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Leveraging the Three Core Competencies: How OFAC Licensing Optimizes Holistic Sanctions

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Leveraging the Three Core Competencies: How OFAC Licensing Optimizes Holistic Sanctions

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Robert S. Ruff III‡‡

I. Introduction ........................................................................................................ 730

II. OFAC and the Evolution of the U.S. Sanctions Regime... 735
   A. Early Sanctions Efforts ................................................................. 736
   B. TWEA and the Office of Foreign Funds Control ...... 739
   C. Establishment of OFAC and Cold War Anti-Communism Sanctions .............................................. 742
   D. IEEPA and the Expanding Scope of Sanctions........... 745

III. Modern U.S. Sanctions Policy................................................................. 750
   A. New Tricks for Old Dogs in Cuba ............................................... 752
   B. Nonproliferation from North Korea to Iran .............. 756
   C. Non-State Terrorism Sanctions ................................................ 763
   D. Regime Change and Human Rights.......................... 765

IV. OFAC and the Administration of U.S. Sanctions Protocols ................................................. 769
   A. Types of Sanctions Programs Administered by OFAC ................................................................. 770
   B. Penalties for Violations .............................................................. 772
   C. OFAC’s Licensing Practices ...................................................... 776
      1. General Licenses ................................................................. 778
      2. Specific Licenses .............................................................. 781
   D. The “Core Competencies” of OFAC Licensing....... 786

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I. Introduction

The ouster of Tunisian President Zine El Abidine Ben Ali in January 2011 triggered a concatenation of protests, demonstrations, and other forms of civil resistance across the Middle East. This revolutionary wave, termed the "Arab Spring" by the media, brought millions together in a grassroots effort to promote democratic reforms, the recognition of human rights and, in some cases, the overthrow of longstanding oppressive regimes. The movement has led to the toppling of governments in Egypt, Yemen, and Libya, in addition to the Ben Ali regime in Tunisia. It has also triggered other conflicts that remain ongoing.

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7. See Liz Sly & Leila Fadel, *Overthrow of Tunisian President Jolts Arab Region*, WASH. POST, Jan. 15, 2011, at A11. Notably, economic sanctions were not a part of the formal U.S. response to the civil unrest in Bahrain, Tunisia and Yemen. Jeff Lord, Kay
most notably President Bashar al-Assad’s crackdown against opposition groups in Syria.8

Like Syria, many of the governments in power responded to the events of the Arab Spring with oppressive violence.9 The resulting conflicts elicited a range of responses from the Western world, from diplomatic missions10 to direct military intervention.11 A central element of the West’s response, however, has been the use of economic sanctions.12 Economic sanctions involve the deliberate withdrawal of normal economic relations between a sanctioning governmental body and a target country, government, entity, or individual in order to coerce the target to modify its behavior in a manner consistent with the sanctioning body’s foreign policy goals.13


8 See infra notes 213-218 and accompanying text.


12 See John Boscariol et al., Export Controls and Economic Sanctions, 46 INT’L LAW. 23, 34-38 (2012) (discussing Arab Spring-related sanctions from the United States and Canada); see also Lord, et al., supra note 7, at 273 (“Throughout 2011, trade lawyers and industry attempted to keep pace with a seemingly constant flow of sanctions, licenses, revised licenses, revoked licenses, statements of licensing policy, and new regulations, all seeking to address and influence the rapidly moving political developments in the Arab world . . . .”).

Sanctions vary greatly in scope and objective. At one end of the continuum, a sanctioning government may attempt to force complete regime change through a comprehensive embargo on trade with the target.\textsuperscript{14} At the other end, a surgical effort to freeze the assets of a single government official or other individual or entity may be employed to influence a change in policy.\textsuperscript{15}

United States commitment to economic sanctions originated in the aftermath of World War I. With the atrocities of that conflict fresh in the minds of the American public, President Woodrow Wilson championed sanctions as a potential alternative to all-out war.\textsuperscript{16} Since that time, the United States has been the predominant force on the international sanctions scene, leveraging its considerable economic power in pursuit of a variety of foreign policy objectives.\textsuperscript{17} The U.S. economic sanctions regime utilizes a variety of techniques, from embargoes to reductions in foreign aid.\textsuperscript{18} Perhaps the most prominent of such techniques are the trade restrictions and asset freezes that compose the twenty-two sanctions programs currently administered by the Office of Foreign Assets Control (OFAC), a component of the Department

\textsuperscript{14} See, e.g., infra notes 74-78 and accompanying text (discussing U.S. sanctions against Cuba); infra Part III.A (discussing the same).

\textsuperscript{15} See, e.g., HUFBAUER ET AL., supra note 13, at 139 (discussing a U.N. Security Council ban on the sale of luxury goods to North Korea in response to that country's October 2006 nuclear test, which was tailored to annoy North Korean leader Kim Jong-II who was known to enjoy "Hennessy cognac, iPods, Harley Davidson motorcycles, and plasma televisions").

\textsuperscript{16} See id. at 1 ("Speaking in Indianapolis in 1919, President Wilson said: 'A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation boycotted but it brings a pressure upon the nation which, in my judgment, no modern nation could resist.'" (citing SAUL K. PADOVER, WILSON'S IDEALS 108 (1942)); see also Radka Druláková et al., Assessing the Effectiveness of EU Sanctions Policy, 4 CENT. EUR. J. INT'L & SEC. STUD. 101, 103 (2010) ("[T]he effectiveness, success and/or utility of economic sanctions and their importance among foreign policy tools have been discussed extensively since the times of the US President Woodrow Wilson . . . .").

\textsuperscript{17} See infra Part III; see also infra note 32 and accompanying text.

\textsuperscript{18} See, e.g., infra notes 74-78 and accompanying text (describing the Cuba embargo); infra note 115 (describing the counternarcotics certification program); see also HUFBAUER ET AL., supra note 13, at 133-34 (describing the President's broad sanctioning authority under various statutes).
of the Treasury. For the past fifty years, OFAC has been the agency through which the U.S. government has implemented its sanctions regime.

OFAC employs a myriad of restrictive measures to effectuate U.S. sanctions strategy. Many of its sanctions programs make use of targeted or "smart" sanctions, which freeze the assets of and restrict trade with designated individuals and entities, such as proliferators of weapons of mass destruction (WMD), narcotics traffickers, and terrorists and their supporters. Other smart sanctions target persons who threaten democratic processes within a particular country or region, such as Liberia, the Western Balkans, and the Congo. OFAC is best known, however, for its "holistic" sanctions that target specific countries or their governments, such as Cuba, Iran, and Syria, and impose broad-

19 See Harry Wolf, Unilateral Economic Sanctions: Necessary Foreign Policy Tool or Ineffective Hindrance on American Businesses?, 6 HOUS. BUS. & TAX L.J. 329, 329-30 (2006) ("During the latter decades of the twentieth century, the United States increasingly dealt with difficult areas of foreign policy through the implementation of economic sanctions programs, many of which have been in place for years and remain operative today."); see also Alan Einisman, Note, Ineffectiveness at Its Best: Fighting Terrorism with Economic Sanctions, 9 MINN. J. GLOBAL TRADE 299, 304-05 (2000) (discussing the United States' frequent use of economic sanctions).

20 See generally infra Part II.C (discussing the establishment of OFAC).

21 See, e.g., Specially Designated Nationals List (SDN), U.S. DEP’T OF TREASURY, http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx (last visited Jan. 12, 2013); see also infra note 232 and accompanying text. Targeted or "smart" sanctions are intended to focus their impact on leaders, political elites, and segments of society believed to be responsible for objectionable behavior, while simultaneously reducing collateral damage to the general population and to third countries.” Gary C. Hufbauer & Barbara Oegg, Targeted Sanctions: A Policy Alternative?, 32 LAW & POL’Y INT’L BUS. 11, 12 (2000) [hereinafter Hufbauer & Oegg, Targeted Sanctions].

22 See infra note 231.

23 The term "holistic" is used to refer to sanctions programs that employ broad restrictions on trade up to and including a comprehensive embargo. Targeted asset freezes may nonetheless be a component of a holistic program, particularly where such measures block a government’s assets or the assets of a significant number of entities operating in a given industry, as the United States has done in Iran. See infra notes 168-184 and accompanying text. Cf. Hufbauer & Oegg, Targeted Sanctions, supra note 21, at 12 ("‘Selective’ sanctions, which are less broad than comprehensive embargoes, involve restrictions on particular products or financial flows. ‘Targeted’ sanctions focus on certain groups or individuals within the targeted country and aim to impact these groups directly. As a result, there is some overlap between these two concepts.” (internal citation omitted)).
based, categorical restrictions on doing business with those countries.\textsuperscript{24}

The U.S. experience, both historically and in connection with the events of the Arab Spring, has revealed significant challenges attendant to the holistic sanctions programs that are fundamental to its strategic approach.\textsuperscript{25} Comprehensive trade restrictions can create conflict-of-law scenarios for businesses operating within the sanctioned country as well as preclude activities that are deemed benign and not inconsistent with U.S. foreign policy.\textsuperscript{26} They can also impose an excessive hardship on innocent citizens and businesses in the targeted countries whose interests the United States is trying to protect by imposing sanctions in the first place.\textsuperscript{27} To control for these excesses, OFAC employs a robust licensing practice.\textsuperscript{28} Licensing involves the exemption of certain categories of transactions or, upon application, specific transactions that would otherwise run afoul of government sanctions.\textsuperscript{29}

This Article examines the role an effective licensing program like OFAC's plays in the success of an economic sanctions strategy. The Article proceeds in three parts. Part II traces the history of the U.S. sanctions regime and the policy considerations that shaped its evolution, from the use of sanctions as an instrument of war through their development into a versatile foreign policy tool. Part III reviews modern U.S. sanctions policy, in which the United States has implemented a diversified, flexible strategy that includes everything from Cold War-carryover measures to new efforts targeting narcotics trafficking,

\textsuperscript{24} See infra notes 226-231 and accompanying text. In order to fully effectuate the foreign policy objectives of its sanctions programs, particularly in a complex global environment where it is impossible to predict all types of activity and evasive actions that may be taken and the necessary responses thereto, the United States often formulates comprehensive sanctions with broad assertions of jurisdiction. R. Richard Newcomb, Targeted Financial Sanctions: The U.S. Model, in \textsc{Smart Sanctions: Targeting Economic Statecraft} 41, 46 (David Cortright & George A. Lopez eds., 2002); see also Telephone Interview with Robert Werner, former Director of OFAC, (Dec. 6, 2011) [hereinafter Werner Interview].

\textsuperscript{25} See generally Lord et al., supra note 7, at 273 (reviewing the successes of the U.S. sanctions program).

\textsuperscript{26} See infra Part IV.D.2.

\textsuperscript{27} See id.

\textsuperscript{28} Parts IV.C.1-2.

\textsuperscript{29} See infra notes 267-269 and accompanying text.
international crime, and terrorism. Part IV discusses how OFAC administers the U.S. sanctions programs. It pays particular attention to OFAC’s licensing practices and demonstrates, by reference to historical conflicts and recent lessons emerging from the Arab Spring, how licensing fosters three “core competencies” that are essential to address the risks inherent in holistic sanctions programs: flexibility, the ability to mitigate collateral damage, and adaptability. The Article concludes by predicting that multinational bodies like the European Union and the Arab League increasingly will join the United States in resorting to holistic sanctions in response to civil unrest around the world. The Article argues that the success of such efforts, and of any economic sanctions regime, will depend upon establishing an infrastructure that promotes the achievement of the three core competencies.

II. OFAC and the Evolution of the U.S. Sanctions Regime

Although the United States is far from the first state to have availed itself of sanctions as a coercive tactic, it has largely driven the evolution of global sanctions for almost a century. While the precise nature and objectives of its sanctions strategy have changed over time, the United States’ reliance upon sanctions has remained constant.

30 See infra Part III.D.


32 A well-known study on the effectiveness of economic sanctions found that the United States, alone or with its allies, was responsible for 109 out of 174 recorded cases of economic sanctions from 1914-2000. See Hufbauer et al., supra note 13, at 17. Other originators of sanctions programs did not come close to that total. See id. (reporting 20 cases of U.N. sanctions, 16 cases by the U.K., and 14 cases by the EU). These tallies do not include cases where the originator participated as a member of an international organization such as the U.N. or EU. Id.

33 Consider Thomas Jefferson’s pronouncement in 1808 that in foreign relations, “three alternatives alone are to be chosen from. 1. Embargo. 2. War. 3. Submission and tribute.” Letter from Thomas Jefferson, U.S. President, to Benjamin Lincoln, Lieutenant
A. Early Sanctions Efforts

The United States's earliest foray into economic sanctions dates back to the run-up to the War of 1812. The United States, then a fledgling nation, found itself stuck between Great Britain and France as those countries vied for global dominance. In an effort to protect U.S. vessels from French and British navies and privateers, and to put economic pressure on Britain, President Thomas Jefferson successfully promoted the passage of the Governor of Mass. (Nov. 13, 1808), in 4 Memoir, Correspondence, and Miscellanies, from the Papers of Thomas Jefferson 116, 116 (Thomas Jefferson Randolph ed., 1829). Nearly two hundred years later, then-Chairman of the Senate Foreign Relations Committee, Senator Jesse Helms, reasserted Jefferson's pithy summation of U.S. foreign policy in defending the U.S. sanctions regime against charges of epidemicity by business lobbyists:

There are, indeed, three tools in foreign policy: diplomacy, sanctions, and war. Take away sanctions and how can the United States deal with terrorists, proliferators, and genocidal dictators? Our options would be empty talk or sending in the marines. Without sanctions, the United States would be virtually powerless to influence events absent war. Sanctions may not be perfect and they are not always the answer, but they are often the only weapon.


See OFAC: Frequently Asked Questions and Answers, at 2, U.S. Dep't of the Treasury, http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx (last updated Dec. 19, 2012 1:02 PM). Depending on how one is willing to define "U.S." economic sanctions, the earliest instance may be the American colonists' boycott of English goods in response to the 1765 Stamp Act and later taxation attempts by the British government. See ALEXANDER, supra note 31, at 12-13 (labeling the boycotts as "the first significant U.S. economic sanctions").


The Embargo Act was a response to the harassment of U.S. vessels by French and British ships. See id. at 1647-55 (discussing the historical context of the passage of the Embargo Act). Since the American Revolution, the British navy had been interfering with American shipping through seizures and the impressment of American sailors. Id. at 1647-48. Franco-British warfare also led to disruptions of American shipping. Id. at 1648. By 1807, actions taken by the governments of both countries "had made virtually any U.S. vessel on the high seas fair game for the British or French navies, or for privateers acting under British or French authority." Id. Although the attacks on American ships were acts of war by any standard, then-President Jefferson saw military conflict with Great Britain or France (or both) as an undesirable last resort due not only to the military might of those countries but also to reductions in the American military by his administration. Id.
The Embargo Act of 1807.\textsuperscript{37} The Embargo Act was monumental in scope.\textsuperscript{38} It prohibited every U.S. vessel from departing for any foreign port without the express approval of the President.\textsuperscript{39} The Act was ultimately a political disaster for the Jefferson administration, however, as its total ban on international trade required increasingly draconian enforcement methods.\textsuperscript{40} Congress ultimately repealed the Embargo Act only three months after enacting its severest enforcement provisions.\textsuperscript{41}

\textsuperscript{37} An Act Laying an Embargo on All Ships and Vessels in the Ports and Harbors of the United States (Emargo Act), ch. 5, 2 Stat. 451 (1807) (repealed 1809).

\textsuperscript{38} Mashaw, supra note 35, at 1647 ("Indeed, the scope of the embargo and the powers that it gave the executive branch over American commerce make the Interstate Commerce Act's attempts at regulating the railroad industry seem almost pathetic by comparison.").

\textsuperscript{39} Embargo Act § 1. Additionally, ships traveling from one U.S. port to another were required to first post a bond equal to twice the value of their cargo, guaranteeing that the ship would reland in another U.S. port. \textit{Id.} § 2. Jefferson's backing of such an enormous piece of legislation is striking given his historical persona as an advocate for a limited federal government. See Colleen J. Shogan, \textit{The Moralist and the Cavalier: The Political Rhetoric of Washington and Jefferson}, 28 N. Ky. L. REV. 573, 587-92 (2001) (discussing the tensions between Jefferson's political writings, personal letters, and presidential actions).

Merchants viewed the "presidential approval" caveat as empowering the President to grant exemptions at will; Jefferson was accordingly inundated with applications. Mashaw, supra note 35, at 1660. Jefferson and Secretary of the Treasury Albert Gallatin responded by construing the statute narrowly to allow for exceptions only when a private voyage was necessary to carry on government business. \textit{Id.} at 1660-61. Gallatin's involvement with the Embargo Act presaged the Treasury's role in implementing and enforcing U.S. sanctions thereafter. \textit{OFAC FAQ, supra note 34, at 2}. For a comprehensive discussion of Jefferson's and Gallatin's "reluctant" administration of the Embargo Act, see Mashaw, \texti{supra note 35, at 1657-85}.

\textsuperscript{40} See Mashaw, supra note 35, at 1650-55 (discussing the Embargo Act's statutory history); see also John Yoo, \textit{Jefferson and Executive Power}, 88 B.U. L. REV. 421, 443-453 (2008) (tracking the increasingly severe and ultimately unsuccessful actions taken by the Jefferson administration to enforce the Embargo Act). Although the original penalty for violating the Embargo Act was the forfeiture of one's bond, supplemental legislation strengthened the Act's penalties to include the forfeiture of one's ship and cargo or, if either was unavailable, a fine equal to double their combined value. Mashaw, supra note 35, at 1651. Additionally, anyone knowingly involved in a prohibited foreign voyage was subject to a fine ranging from $1000 to $20,000. \textit{Id.} Owners of violating ships were effectively barred from foreign trade. \textit{See id. at 1651 n.65}.

\textsuperscript{41} Mashaw, supra note 35, at 1655; see also Yoo, supra note 40, at 451-52. Congress replaced the Embargo Act with substantially milder legislation banning imports from Great Britain and France. Mashaw, supra note 35, at 1655; see also An
Despite this early failure, the U.S. government continued to see economic sanctions as a tool of war. During the American Civil War, for example, the Union enforced a crippling blockade against the Confederate States, which amplified the North’s advantages in sea power, railroads, material wealth, and industrial capacity to produce iron and munitions. Congress also passed a law prohibiting transactions with the Confederacy and calling for the forfeiture of goods involved in such transactions.

Several decades later, in the aftermath of the Spanish-American War, President Theodore Roosevelt, utilizing his authority under a joint congressional resolution, banned the export of arms and ammunition to the Dominican Republic for the purpose of protecting a U.S. receivership over Dominican customs houses. 

Act to Interdict the Commercial Intercourse Between the United States and Great Britain and France, and Their Dependencies; and for Other Purposes, ch. 24, 2 Stat. 528 (1809).

42 See ALEXANDER, supra note 31, at 12-15 (describing the difficulties of the Embargo Act and the continued, more effective use of sanctions during World War I).

43 Id. at 13; see also HUFBAUER ET AL., supra note 13, at 40 tbl.1A.3.

44 OFAC FAQ, supra note 34, at 2. The law also provided for a licensing program, to be implemented through rules and regulations by the Treasury Department, whereby certain otherwise prohibited transactions with the South would be allowed. Id. This was an early recognition of the fact that that a licensing program can provide needed leniency in a comprehensive sanctions program. Today, the existence of OFAC’s broad licensing practice confirms the enduring truth of that recognition.

45 ALLEN W. DULLES & HAMILTON FISH ARMSTRONG, CAN WE BE NEUTRAL? 162 (Books for Libraries Press 1971) (1936); see also ALEXANDER, supra note 31, at 13 (characterizing this act as “the beginning of a policy of applying arms export restrictions and economic sanctions in order to promote political stability and U.S. interests in Latin America and China”). Roosevelt was concerned that political unrest in the Caribbean and Central America would present European nations with the opportunity to “gain a greater foothold in the region.” David Gartner, Foreign Relations, Strategic Doctrine, and Presidential Power, 63 A.L.A. L. Rev. 499, 513 (2012). A strong proponent of the Monroe Doctrine, Roosevelt made it known that the United States was willing to intervene in the affairs of neighboring countries when necessary to preserve “the ties of civilized society.” Id. at 514. With regard to the Dominican Republic, he feared that Europeans would resort to force to resolve outstanding debts, potentially through the occupation of Santo Domingo. Id. at 518. Roosevelt’s solution was to negotiate a U.S. receivership over the Dominican customs houses to relieve the country of pressure from its foreign creditors. DULLES & ARMSTRONG, supra, at 162; see also Gartner, supra, at 518-19. The 1905 arms embargo was aimed at preventing these financial arrangements from being disturbed by revolution. DULLES & ARMSTRONG, supra, at 162.
B. TWEA and the Office of Foreign Funds Control

Though the United States continued to employ sanctions as a wartime measure well into the twentieth century, concurrent developments in the legal framework for sanctions would provide the basis for the later expansion of the use of sanctions as an alternative, rather than a mere complement, to traditional warfare.46 This expansion began during World War I, with the enactment of the Trading with the Enemy Act of 1917 (TWEA).47 Before TWEA, the President lacked the authority to quickly impose restrictions on foreign states and nationals in the event of an emergency.48 Enacted on the day that Congress declared war on Germany, TWEA was a response to this lack of authority.49 Its purpose was to allow the President, in rapid fashion, to prevent the nation’s enemies from accessing assets subject to U.S. jurisdiction and using such assets to harm U.S. interests.50

As originally conceived, TWEA gave the President authority to impede the transactions of enemy states during times of war.51 Although the statute clearly restricted exercise of that power to wartime and exempted purely domestic transactions, in 1933 President Franklin Roosevelt invoked his authority under TWEA

46 See HUFBAUER ET AL., supra note 13, at 10 (“Only after World War I was extensive attention given to the notion that economic sanctions might substitute for armed hostilities as a stand-alone policy.”); see also infra Part II.D (introducing the International Emergency Economic Powers Act).

47 Trading with the Enemy Act (TWEA), Pub. L. No. 65-91, 40 Stat. 411 (1917) (codified as amended at 12 U.S.C. § 95a). TWEA contained essentially the same economic controls used in the U.K.’s Trading with the Enemy Act of 1915, which imposed a total blockade against Germany in response to German submarine warfare. See ALEXANDER, supra note 31, at 15 & n.11 (“The blockade covered all German trade, ignoring distinctions between types of contraband. Enforcing the blockade was difficult because of the hazards of inspecting ships on the high seas.”).


50 Savage, supra note 48, at 29; Hipp, supra note 48, at 1318-19.

51 Savage, supra note 48, at 29; Hipp, supra note 48, at 1318-19.
to order a bank holiday at the height of the Great Depression.\textsuperscript{52} In response to the President’s declared emergency and public pressure resulting from bank closures, Congress ratified retroactively the President’s actions by passing the Emergency Banking Relief Act (EBA).\textsuperscript{53} Among other things, the EBA authorized the President to restrict trade during peacetime national emergencies, removed the restriction to foreign transactions, and eliminated every reference to “enemy” in TWEA.\textsuperscript{54} Congress’s

\begin{footnotesize}
\textsuperscript{52} ALEXANDER, supra note 31, at 93; Hipp, supra note 48, at 1319-20; see also MALLOY, supra note 31, at 152 (“TWEA was later invoked, with virtually no textual support, as a basis for President Roosevelt’s ‘Banking Holiday’ declaration of a state of emergency in 1933.”). The holiday, which Roosevelt imposed from March 6, 1933, to March 9, 1933, forbade banks from processing gold, silver, or currency transactions, from “ta[k]ing any other action which might facilitate the hoarding thereof,” and from paying out deposits, making loans, or “transact[i]ng any other banking business whatsoever.” Proclamation No. 2039, 48 Stat. 1690 (Mar. 6, 1933), available at http://www.presidency.ucsb.edu/ws/index.php?pid=14661. Attempting to justify the apparent absence of a foreign nexus to action taken under TWEA, President Roosevelt claimed that speculation in foreign exchanges was draining U.S. stocks of gold. Hipp, supra note 48, at 1320. Roosevelt did not attempt to explain the lack of a wartime nexus, though he later defended his decision to invoke TWEA to declare a peacetime national emergency on the grounds that something had to be done, even if he had no specific authorization to take such action. Id. at 1321. Roosevelt’s real objective in purchasing gold was to inflate agricultural commodity prices. Anna Gelpern, Financial Crisis Management, 41 CONN. L. REV. 1051, 1090 (2009); see also Kenneth W. Dam, From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law, 50 U. CHI. L. REV. 504, 509-14 (1983) (chronicling Roosevelt’s efforts to eliminate the gold standard).

\textsuperscript{53} Emergency Banking Relief Act, Pub. L. No. 73-1, ch. 1, 48 Stat. 1, ch. 1 (1933); ALEXANDER, supra note 31, at 93; Hipp, supra note 48, at 1321. Congress did so, moreover, only three days after Roosevelt declared the emergency. Id. The legislative intent behind the Act remains unclear, as the bill was apparently passed unread by many congressmen in a haste born from public pressure commensurate with a four-day, government-ordered bank closure. See Roots, supra note 49, at 266-67 (discussing the expedited passage of the Emergency Banking Relief Act).

\end{footnotesize}
rush to action produced a dramatic expansion of the President’s national emergency powers, giving the President broad discretion to define national emergencies and craft responses thereto, actions over which Congress retained virtually no oversight.\textsuperscript{55}

TWEA was the first modern version of U.S. sanctions legislation.\textsuperscript{56} TWEA also provided the original basis for the establishment of a sanctioning agency within the U.S. Department of the Treasury.\textsuperscript{57} Although the involvement of the Secretary of the Treasury in implementing economic sanctions dates back to the Embargo Act,\textsuperscript{58} a Treasury division specializing in administering sanctions did not arrive until 1940.\textsuperscript{59} At that time, President Roosevelt, invoking his executive power under TWEA, authorized the Secretary of the Treasury to prescribe regulations to carry out the purposes of Executive Order 8389, which the President issued following the invasion of Norway by Nazi Germany.\textsuperscript{60} Pursuant to that order, the Secretary established the Office of Foreign Funds Control (OFFC), OFAC’s earliest predecessor.\textsuperscript{61} The OFFC’s initial purpose was to prevent Nazi use of Norway’s holdings of foreign exchange securities and the forced repatriation of funds belonging to Norwegian nationals.\textsuperscript{62}

\textsuperscript{55} Hipp, supra note 48, at 1324 (citing Preston Brown, The Kuwait/Iraq Sanctions—U.S. Regulations in an International Setting, 562 PRACTISING L. INST. COM. L. & PRAC. COURSE HANDBOOK SERIES 7, 10 (1990)).

\textsuperscript{56} See Malloy, supra note 31, at 150-51 (introducing TWEA with the observation that modern U.S. sanctions are, “both as a matter of policy and as a matter of technique, the direct product of their historical antecedents, at least since the immediate pre-World War II period”); Savage, supra note 48, at 28-29 (explaining that the International Emergency Economic Powers Act, the source of almost all current U.S. economic sanctions, “is the fruit of its predecessor, [TWEA]”).


\textsuperscript{58} See An Act Laying an Embargo on All Ships and Vessels in the Ports and Harbors of the United States (Embargo Act), ch. 5, 2 Stat. 451 (1807) (repealed 1809).


\textsuperscript{61} Records of the Office of Foreign Assets Control, supra note 59.

\textsuperscript{62} OFAC FAQ, supra note 34, at 2.
The OFFC implemented the Foreign Funds Control Regulations (FFCR), which banned transactions involving the property of Norway, Denmark, or their nationals, unless licensed by the Secretary of the Treasury, and froze all Norwegian and Danish assets held by U.S. persons or their subsidiaries. As the war progressed, Roosevelt expanded the Treasury Department’s and the OFFC’s role to protect the assets of other invaded countries, as well as to provide for the blocking of the assets and financial transactions of the Axis powers.

C. Establishment of OFAC and Cold War Anti-Communism Sanctions

In the years following World War II, the United States found itself in a position of military and economic strength. With the subsequent rise of the Soviet Union and the emergence of the Cold

63 ALEXANDER, supra note 31, at 94; R. Richard Newcomb, Foreign Assets Control, 606 PRACTISING L. INST. COM. L. & PRAC. COURSE HANDBOOK SERIES 329, 537 (1992) ("The FFCR were issued by the Secretary of the Treasury on April 10, 1940, to implement sanctions imposed by the President through Executive Order 8389 to protect the property within U.S. jurisdiction of persons in Nazi-occupied territory.").

64 ALEXANDER, supra note 31, at 94; see also Newcomb, supra note 63 ("[T]he FFCR were extended through Executive Order 8785 to block property within U.S. jurisdiction of Germany and its nationals."). The FFCR, which initially froze German, Japanese, and many other European assets, eventually blocked assets in the Soviet sector of Germany and in the Baltic States (Estonia, Latvia, and Lithuania). Lillian V. Blageff, Overview of U.S. Sanctions and Embargoes Programs, Including 2006 Update, 23 No. 3 CORP. COUNS. QUARTERLY ART. 6 at 10 (2007); R. Richard Newcomb, Office of Foreign Assets Control, 844 PRACTISING L. INST. COM. L. & PRAC. COURSE HANDBOOK SERIES 105, 116 (2002). The breakup of the U.S.S.R. negated the policy reasons for these freezes, and the FFCR were repealed completely by the mid-1990s. Blageff, supra, at 10; Newcomb, supra, at 116. The FFC also implemented the FFCR and administered the Proclaimed List of Certain Blocked Nationals, more commonly known as the “Black List.” Records of the Office of Foreign Assets Control, supra note 59; see also ALEXANDER, supra note 31, at 18-19 ("The U.S. Treasury Department . . . recognised that . . . a control which could reach only those who were actually citizens of the Axis countries or of other countries under their domination would be ineffective, and, indeed, naïve in the light of Axis practices." (internal quotation marks removed)). The Black List was a precursor to the Specifically Designated Nationals List. See infra text accompanying notes 233-236.

War, the United States sought to leverage this position to exert economic pressure to curb the spread of Communism.\textsuperscript{66} It did so in part through the use of new economic sanctions programs.\textsuperscript{67}

One such program was the U.S. sanctioning of North Korea and China in 1950,\textsuperscript{68} which necessitated a revitalization of power within the Treasury Department.\textsuperscript{69} The Treasury had abolished the OFFC in 1947 and transferred its duties to the newly established Office of International Finance (OIF).\textsuperscript{70} In conjunction with this

\textsuperscript{66} Wolf, \textit{supra} note 19, at 335-37; see also HUFBAUER ET AL., \textit{supra} note 13, at 13 (noting sanctions aimed at regime change in Cuba (1960), the Dominican Republic (1960), Brazil (1962), and Chile (1970), and characterizing these episodes as “a superpower pitted against a smaller and formerly friendly country gone ’astray’”).

\textsuperscript{67} Id.

\textsuperscript{68} See Blageff, \textit{supra} note 64, at 16.

\textsuperscript{69} \textit{Records of the Office of Foreign Assets Control}, \textit{supra} note 59 (demonstrating the creation of OFAC in 1962).

\textsuperscript{70} Id. For various reasons, principally its sponsoring of terrorism in the 1970s and 1980s and its pursuit through the 1990s and eventual obtainment of nuclear weapons, economic relations between the United States and North Korea have been “virtually nonexistent” since the initial imposition of sanctions in 1953. HUFBAUER ET AL., \textit{supra} note 13, at 143. North Korea-sponsored terrorism has mostly been directed toward South Korea. Paul E. Boehm, \textit{Decennial Déjà Vu: Reassessing a Nuclear North Korea on the 1995 Supply Agreement’s Ten-Year Anniversary}, 14 \textit{TUL. J. INT’L & COMP. L.} 81, 87 (2005). In 1974, a would-be assassin made an attempt on the life of then-South Korean President Park Chung-Hee. \textit{Id.} Park survived the assassination attempt, but his wife was killed by a stray bullet. \textit{Id.} North Korea denied responsibility until Kim Jong II reportedly apologized to Park’s daughter in 2002 for the death of her mother. \textit{Id.} In October 1983, North Korean agents attempted to assassinate then-South Korean President Chun Doo-hwan during his trip to Rangoon, Burma. \textit{Id.} A traffic delay prevented Chun from arriving at his planned destination on time, but the bomb was detonated on schedule, killing South Korea’s deputy prime minister, foreign minister, and commerce minister, along with eighteen others. \textit{Id.} Perhaps North Korea’s most nefarious act of terrorism was the bombing of Korean Air Flight 858, an attack that led to the United States’ designation of North Korea as a state sponsor of terrorism. \textit{Id.} at 87-88. On November 29, 1987, two North Korean agents, who would later disembark in Abu Dhabi, planted a bomb in the passenger cabin of Korean Air Flight 858. \textit{Id.} at 87. The plane exploded over the Indian Ocean, killing the 115 people on board. \textit{Id.} Though the North Korean agents attempted to commit suicide when on the verge of being captured, one survived, confessed to the bombing, and implicated Kim Jong II, who allegedly ordered the attack in hopes of destabilizing South Korea before its upcoming presidential elections and the 1988 Summer Olympics in Seoul. \textit{Id.}

In the years following its designation as a state sponsor of terrorism, North Korea continued to draw the ire of the United States through its quest for, and ultimate obtainment of, nuclear weapons. For a fuller discussion of North Korea’s nuclear ambitions in the 1990s and the U.S. sanctions response, see \textit{supra} Part III.B.
structural move, activities relating to blocked foreign assets were transferred from the OIF to the Office of Alien Property, a division of the Department of Justice.\(^7\) The entry of China into the Korean War in 1950, however, prompted President Truman to declare a national emergency under TWEA and to block all Chinese and North Korean assets under U.S. jurisdiction.\(^7\) To implement controls over these assets, the Treasury Department created OFAC.\(^7\)

For most of its existence, OFAC has been responsible for overseeing the oldest and most controversial U.S. sanctions program, the Cuba embargo, which also began as a Cold War-era effort to stop the spread of Communism and force a regime change.\(^7\) President Eisenhower ordered a partial embargo in 1960 in response to Fidel Castro’s ties to the Soviet Union and the Cuban government’s mass expropriation of U.S. property.\(^7\) In

\(^7\) Records of the Office of Foreign Assets Control, supra note 59.


\(^7\) Records of the Office of Foreign Assets Control, supra note 59. OFAC was originally called the Division of Foreign Assets Control, but was renamed by order of the Treasury Department in 1962. Id.

\(^7\) See HUFBAUER ET AL., supra note 13, at 146-47 (providing a brief history of the Cuba sanctions); John W. Boscariol, An Anatomy of a Cuban Pyjama Crisis: Reconsidering Blocking Legislation in Response to Extraterritorial Trade Measures of the United States, 30 L. & POL’Y INT’L BUS. 439, 445-49 (1999) (discussing some of the more controversial components of the Cuba sanctions). North Korea perhaps has the better claim to the dubious honor of being the “oldest” U.S. sanctions program, although unlike the Cuba sanctions regulations, the current sanctions against North Korea are not the same TWEA regulations that the United States imposed in 1950, but rather new (although in many ways similar) sanctions imposed under IEEPA. See infra note 78.

\(^7\) HUFBAUER ET AL., supra note 13, at 146; Boscariol, supra note 74, at 445. For many decades before the Cuban Revolution in 1959, in keeping with the Monroe Doctrine, the United States maintained an interest in Cuban affairs and European influence therein. PAOLO SPADONI, FAILED SANCTIONS: WHY THE U.S. EMBARGO AGAINST CUBA COULD NEVER WORK 25 (2010). The United States tried several times to purchase Cuba from Spain and controlled development on the island through military intervention, trade and investment, and influencing Cuban internal affairs. Id. The Eisenhower administration recognized Fidel Castro’s government in January 1959 following its successful coup against the brutal regime of General Fulgencio Batista. Id. Though Castro’s revolution had gained support through promises to restore civil liberties and democracy, these promises were never fulfilled and U.S.-Cuba relations quickly deteriorated. Id.; Daniel Fisk & Courtney R. Perez, Managed Engagement: The Case of Castro’s Cuba, 42 U. MIAMI INTER-AM. L. REV. 47, 53 (2010).
1962, following the unsuccessful Bay of Pigs invasion, President Kennedy banned all imports from Cuba, creating a total embargo on trade with Cuba that in most respects remains in place today.\textsuperscript{76} This embargo was and remains implemented through OFAC’s Cuban Assets Control Regulations (CACR).\textsuperscript{77} The CACR were imposed under the President’s “national emergency” authority under TWEA; although an amendment to TWEA restricted its application to wartime emergencies, the CACR were “grandfathered,” and are the only U.S. sanctions presently maintained under a TWEA national emergency.\textsuperscript{78}

\textbf{D. IEEPA and the Expanding Scope of Sanctions}

TWEA remained the statutory basis for U.S. economic sanctions until the passage of the International Emergency Economic Powers Act\textsuperscript{79} (IEEPA) in 1977. IEEPA was the
culmination of Congress's response to the numerous extant-yet-obsolete national emergencies declared under TWEA,\(^80\) such as the gold emergency in 1933,\(^81\) the Korean War,\(^82\) the postal strike of 1970,\(^83\) and the 1971 inflation emergency.\(^84\) Congress terminated these bygone "national emergencies" with the National Emergencies Act (NEA)\(^85\) and IEEPA.\(^86\) Under IEEPA, the President's emergency powers remained as expansive as they were under TWEA before NEA restored the original wartime limitation.\(^87\) IEEPA attempted to improve Congress's oversight over the President's exercise of his emergency powers, however, by imposing certain conditions on those powers, including requirements that "(1) the President declare a peacetime national emergency; (2) make certain findings; and (3) notify the Congress of these findings."\(^88\) Upon the President's declaration of a national

\(^{80}\) See S. REP. No. 93-549, at 4-6 (1973) (describing various declarations of national emergencies that had not been "terminat[ed] . . . when the particular emergency itself ha[d], in fact, ended").


\(^{82}\) See Proclamation No. 2914, 3 C.F.R. 99 (Dec. 16, 1950).

\(^{83}\) See Exec. Order No. 11,519, 3 C.F.R. 111 (1971).

\(^{84}\) See Proclamation No. 4074, 3 C.F.R. 80 (Aug 1, 1971).

\(^{85}\) See National Emergencies Act, 50 U.S.C. §§ 1601-1651 (2006) ("All powers and authorities possessed by the President . . . as a result of the existence of any declaration of national emergency in effect on [the date of enactment of this Act] are terminated . . .").


\(^{88}\) ALEXANDER, supra note 31, at 95; see also Note, Congressional Control, supra note 87, at 1116-19 (describing the procedural limitations of IEEPA). The President must consult with Congress before exercising any of his powers under IEEPA and must regularly report to Congress on the status of the actions taken. 50 U.S.C. § 1703(a)-(c). Additionally, because NEA governs the President's power to declare a national
emergency, IEEPA grants the chief executive broad economic regulatory powers "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." Such powers include the authority to block a wide array of foreign transactions and, in times of war, the authority to confiscate certain foreign-owned property. Although TWEA remains in place and is the statutory basis for U.S. sanctions against Cuba, IEEPA governs every other current OFAC sanctions program. Since 1976, there have been thirty-two declared national emergencies, the last of which came after the terrorist attacks of September 11th and remains in effect today.

During the Cold War era, IEEPA provided the basis for broadening the United States’ application of economic sanctions.

emergency under IEEPA, the President’s declaration is subject to termination review by Congress every six months, and a declared emergency terminates on its anniversary unless renewed by the President. Id. § 1622.

89 50 U.S.C. § 1701(a).

90 See 50 U.S.C. § 1702(a)(1)(B) (granting the President the power to block "any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States").


95 See ALEXANDER, supra note 31, at 95 (explaining that Congress passed IEEPA because it felt that the president did not have the means of “restrict[ing] private international financial transactions as part of an overall economic sanctions policy in
Although stopping the spread of Communism remained an important U.S. foreign policy objective, the United States began to see economic sanctions as a solution to other emerging foreign policy issues as well. One of these issues was the rise of state-sponsored terrorism. Airplane hijackings in the 1960s and 1970s, the killing of Israeli athletes at the 1972 Munich Olympics, and the Lockerbie Bombing in 1988 "focused [the] times of undeclared war".

See generally id. at 90 (explaining that the United States has increasingly employed sanctions to force certain countries to follow international law since the end of the Cold War).

Id. at 89.

Before the late 1960s, U.S. airplane hijackings were rare. See Ric Simmons, Searching for Terrorists: Why Public Safety Is Not a Special Need, 59 DUKE L.J. 843, 851 (2010) ("In the decade preceding 1968, hijackings had averaged only one per year."). Terrorists hijacked eighteen planes in 1968, however, and thirty-three in 1969. Id. The number of hijackings remained high—in the mid-twenties—through 1972. Id. n.11. The U.S. government responded by implementing surveillance programs and passenger screening at airports. Id. at 851-52. The federal courts upheld the constitutionality of these measures, giving rise to the administrative search exception to the Fourth Amendment. See id. at 855-59 (discussing how the federal courts justified curtailing Fourth Amendment protections on account of hijacking and domestic bombing epidemics in the late 1960s and early 1970s). After a few anomalous years in the late 1970s and early 1980s, U.S. hijackings were almost nonexistent in the late 1980s and disappeared entirely through the 1990s. TRANSF. SEC. ADMIN., U.S. DEP’T OF TRANS., CRIMINAL ACTS AGAINST CIVIL AVIATION 67 (2001), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB165/faa8.pdf. The September 11th hijackings were the first U.S. hijackings in nine years. Id.

For the definitive account of the massacre and aftermath, see generally SIMON REEVE, ONE DAY IN SEPTEMBER: THE FULL STORY OF THE 1972 MUNICH OLYMPICS MASSACRE AND THE ISRAELI REVENGE OPERATION "WRATH OF GOD" 1-19 (Arcade Publishing 2000). At the 1972 Summer Olympics in Munich, the Palestinian group Black September took members of the Israeli Olympic team hostage. Id. During the kidnapping and failed rescue attempt, eleven Israeli athletes and coaches, five members of Black September, and one West German police officer were killed. Id. at 124, 132. Israel initially responded by bombing Palestine Liberation Organization bases in Syria and Lebanon. Id. at 152-53. Among the dead were an estimated two hundred innocent people, including many women and children. Id. Later, hijackers of a West German passenger jet demanded and obtained the release of the surviving Black September gunmen. Id. at 155-59. Israel then authorized the Mossad to track down and eliminate those responsible for the massacre in Munich. Id. at 159-74.

On December 22, 1988, a bomb detonated in the cargo hold of Pan Am Flight 103, killing the 259 people on board, including 189 Americans. War Crimes Research Symposium, A Thorn on the Tulip - A Scottish Trial in the Netherlands: The Story Behind the Lockerbie Trial, 36 CASE W. RES. J. INT’L L. 307, 308 (2005). The flight was
world's attention on terrorism.\textsuperscript{101} In 1979, the State Department designated Libya, Syria, Iraq, and South Yemen as state sponsors of terrorism; this subsequently led to the imposition of sanctions against Libya and Iraq for supplying military equipment to terrorists.\textsuperscript{102}

Throughout the 1970s and 1980s, the United States made additional use of sanctions in areas such as the protection of human rights\textsuperscript{103} and nonproliferation.\textsuperscript{104} Most of the human rights initiatives occurred in the late 1970s and were unilateral\textsuperscript{105} U.S. sanctions aimed at affecting regime change in Latin America.\textsuperscript{106} In 1977, for instance, the United States signaled its opposition to the Anastasio Somoza Debayle regime in Nicaragua by withdrawing economic and military assistance.\textsuperscript{107} With respect to

bound from London to New York and exploded over Lockerbie, Scotland. \textit{Id.} Bodies and debris from the plane fell on and around the small town of Lockerbie, killing eleven people on the ground. \textit{Id.} After nearly three years of investigations, including thousands of interviews and the review of tens of thousands of pieces of evidence and photographs, the United Kingdom and the United States concluded that two Libyan security agents who had worked for Libyan Airlines in Malta perpetrated the bombing. \textit{Id.}

\textsuperscript{101} \textsc{Hufbauer et al.}, supra note 13, at 15; see also Matthew Lippman, \textit{The New Terrorism and International Law}, 10 Tulsa J. Comp. & Int'l L. 297, 325-36 (discussing international responses to terrorism in the 1970s and 1980s).

\textsuperscript{102} \textsc{Hufbauer et al.}, supra note 13, at 15-16. Cuba, North Korea, Iran, Sudan, and Afghanistan were later added to this list; Iraq was removed in 2003 after the U.S. invasion, and Libya was removed in 2006 for implicitly admitting its responsibility for the Lockerbie bombing and for compensating the victims' families. \textit{Id.} at 16.

\textsuperscript{103} \textit{Id.} at 13.

\textsuperscript{104} \textit{Id.} at 53.

\textsuperscript{105} This Article adopts the definition of “unilateral” sanctions used by the Trade Sanctions Reform and Export Enhancement Act (the TSRA), 22 U.S.C. § 7201-7211 (2006). The TSRA defines unilateral sanctions as those imposed in the absence of (1) substantially equivalent measures imposed by fellow members of a multi-country initiative or (2) a U.N. Security Council mandate. See id. § 7201(6)-(7) (defining unilateral sanctions within the context of agriculture and medicine).

\textsuperscript{106} \textsc{Hufbauer et al.}, supra note 13, at 13. Of the 17 sanctions initiatives imposed by the United States during the Carter administration, 10 targeted Latin American countries, 8 sought improvements to human rights, and all were unilateral. See \textit{id.} at 23-26 (listing sanctions programs from 1962 to 1986).

\textsuperscript{107} \textit{Id.} at 13. The withdrawal of U.S. support assisted the rise of the Fidel Castro-funded Sandinista National Liberation Front, a leftist group that ousted the Somoza dictatorship from power in 1979. \textit{Id.; see also} Hunter R. Clark & Amanda Velazquez, \textit{Foreign Direct Investment in Latin America: Nicaragua—A Case Study}, 16 Am. U. Int'l L. Rev. 743, 781-94 (2001) (surveying the U.S. relationship with Nicaragua during the Cold War, the Somoza dictatorship, and the reign of the Sandinista regime). In other
nonproliferation, the United States opposed the development of weapons of mass destruction in South Africa, Taiwan, Brazil, and Argentina. Furthermore, it partnered with Canada in 1975 to prevent South Korea from purchasing a nuclear reprocessing plant, and again in the late 1970s to impose sanctions against India and Pakistan. Though varied in success, these early ventures were the first attempts at the broader use of sanctions, a pattern that would define the post-Cold War period.

III. Modern U.S. Sanctions Policy

The years following the collapse of the Soviet Union can be described as the beginning of the era of modern U.S. sanctions policy. Particularly over the last decade, the United States has increasingly used both its position as the global financial hub, and foreign firms’ and financial markets’ reliance on the U.S. dollar as a reserve currency, to impose restrictive measures against state and non-state targets. During this period, the U.S. sanctions regime has developed Cold War-carryover measures, pursued several of the sanctions objectives arising towards the end of the Cold War, and targeted new areas like narcotics trafficking.

Latin American countries, U.S. sanctions experienced less success. See Hufbauer et al., supra note 13, at 13 (“U.S. sanctions against the Alfredo Stroessner regime in Paraguay . . . and the military regimes in Argentina . . . and El Salvador failed to change the behavior of these regimes.”).

See id. at 12 (finding that while nonproliferation sanctions were “highly successful” in South Korea and Taiwan, they “played only a limited role in dissuading South Africa, Brazil, and Argentina from becoming nuclear powers” and failed with respect to India and Pakistan, as evidenced by those countries’ 1998 nuclear tests).

Alexander, supra note 31, at 90.

See id. at 36-40, 50 (discussing how states use their comparative advantages in certain industries to implement more effective sanctions regimes, as exemplified by the United States’ leveraging of its financial industry against its adversaries).

See infra Part III.A (discussing Cuba sanctions); infra notes 140-152 (discussing nonproliferation sanctions against North Korea).

See infra Part III.C (discussing counterterrorism sanctions); infra Part III.D (discussing sanctions aimed at improving human rights and forcing regime change).

U.S. counter narcotics sanctions, the only ones of their kind, began in the 1980s with the initiation of a certification process that triggers economic sanctions against a
international crime, and terrorism. These initiatives, through which the OFAC’s role has expanded tremendously since its creation over fifty years ago, exemplify U.S. sanctions programs

country identified as a major drug producer unless that country demonstrates its cooperation in U.S. antidrug efforts or the U.S. president waives the sanctions for national security reasons. HUFBAUER ET AL., supra note 13, at 15. Nevertheless, most countries were certified through the 1980s, with sanctions typically being leveled against countries with few geographic or economic ties to the United States, such as Iran, Syria, and Afghanistan. Id. The Clinton administration changed this in the 1990s, decertifying Nigeria in 1994 and threatening Mexico and Colombia with the same fate. Id. In 1996, the United States certified Mexico but denied certification to Colombia due to Colombian president Ernesto Samper’s alleged ties to drug cartels. Id. These decisions led to accusations from Latin American leaders of a double standard. Id. The accusations grew louder in 1997, when the Clinton administration again certified Mexico and denied certification to Colombia, despite revelations of drug-related corruption in the Mexican government. HUFBAUER ET AL., supra note 13, at 15. After “years of relative quiet,” the Bush administration decertified Venezuela in 2005 as U.S.-Venezuela relations deteriorated, prompting criticism that the President had used the certification process for political purposes. Id.

Issued by President Obama on July 24, 2011, Executive Order 13,581 found that “the activities of significant transnational criminal organizations [“TCOs”]... have reached such scope and gravity that they threaten the stability of international political and economic systems” and that “[s]uch organizations are becoming increasingly sophisticated and dangerous to the United States... [and] are increasingly entrenched in the operations of foreign governments and the international financial system, thereby weakening democratic institutions, degrading the rule of law, and undermining economic markets.” Exec. Order No. 13,581, 76 Fed. Reg. 44,757, 44,757 (July 24, 2011). Executive Order 13,581 further found that “[t]hese organizations facilitate and aggravate violent civil conflicts and increasingly facilitate the activities of other dangerous persons.” Id. The order designates four organizations as TCOs; authorizes the Treasury Secretary to designate additional TCOs, their supporters, and their affiliates; and imposes an asset freeze and transactions ban on those persons. Id. at 44,757-58. U.S. Attorney General Eric Holder indicated that the ability to designate TCOs allows U.S. regulators to “extend the reach of anti-money-laundering provisions and update racketeering laws to cover new forms of crime.” Palmina M. Fava, Strategies for Staying in Compliance with the FCPA and Other International Anti-Corruption Laws, in INTERNATIONAL WHITE COLLAR ENFORCEMENT: LEADING LAWYERS ON COOPERATING WITH ENFORCEMENT AGENCIES, UNDERSTANDING NEW LAWS, AND CONSTRUCTING COMPLIANCE PROGRAMS 23, 39 (Jo Alice Darden ed., 2012). “Attorney General Holder added that these changes would enhance the DOJ’s ability to prosecute securities fraud and violations of the FCPA.” Id.

See infra Part III.C.

as they exist today: diversified in purpose, varied in scope, and increasingly flexible.  

A. New Tricks for Old Dogs in Cuba

U.S. sanctions policy from the 1990s onward has experienced a gradual move toward multilateralism and cooperation with international sanctioning bodies such as the U.N. and EU.  

See HUFBAUER ET AL., supra note 13, at 133 ("The US president enjoys broad authority under several statutes to impose sanctions in response to national security or foreign policy concerns. [These statutes] enable the president to prohibit some or all trade and financial transactions with foreign countries, groups or individuals.").

See id. at 130 (noting that U.S. sanctions in the 1990s "entailed more cooperation," which led to higher success rates); Kimberly Ann Elliott, Trends in Economic Sanctions Policy, in INTERNATIONAL SANCTIONS: BETWEEN WORDS AND WARS IN THE GLOBAL SYSTEM 3, 4 (Peter Wallensteen & Carina Staibano eds., 2005) ("Nearly 60 new instances of sanctions were recorded in the 1990s and, of these, 42 involved the United States, usually in cooperation with other countries... [T]he United States was less a Lone Ranger in the 1990s than in the 1970s and 1980s."); Gary Clyde Hufbauer & Barbara Oegg, The European Union as an Emerging Sender of Economic Sanctions, 58 AUSSENWIRTSCHAFT 547, 551 (2003) [hereinafter Hufbauer & Oegg, EU As a Sender of Sanctions] ("Less than a third of the [U.S.] cases initiated in the 1990s were purely unilateral ventures. By contrast, in the 1970s, the United States was involved in 32 sanction episodes and three-quarters of them were unilateral initiatives."); see also Samuel Rubenfeld, Clinton Names Iran Sanctions Waiver Recipients, WALL ST. J. (Mar. 20, 2012), http://blogs.wsj.com/corruption-currents/2012/03/20/clinton-names-iran-sanctions-waiver-recipients [hereinafter Rubenfeld, Clinton Names Waiver Recipients] ("Clinton cited the European Union embargo [against Iran]... as 'solidarity' with the United States and their commitment to holding Iran accountable for its failure to comply with international obligations.").

Many commentators attribute the United States' shift toward multilateralism to the United States' decreased hegemony in the world economy. See HUFBAUER ET AL., supra note 13, at 128 (pointing to "the relative decline of the US position in the world economy" as the "most obvious and important explanation" and explaining that "economic progress worldwide has reduced the pool of truly vulnerable target countries"); Developments in the Law—Responding to Extraterritorial Legislation: The European Union and Secondary Sanctions, 124 HARV. L. REV. 1246, 1255 (2011) [hereinafter EU and Secondary Sanctions] (noting that the emergence of the EU common market, "in rivaling that of the United States, has leveled the playing field between U.S. and EU regulators"). Additional explanations include enhanced cooperation between the major world powers following the collapse of the U.S.S.R., see Hufbauer & Oegg, EU As a Sender of Sanctions, supra, at 551 (noting the increased presence of the United Nations in international disputes following the collapse of the Soviet Union as reflected by the United Nations imposition of mandatory sanctions thirteen times in the 1990s as compared to just two instances of sanctions in previous decades), and a shift in geographical focus from Latin America to Africa and the Middle East—regions with historically closer ties to Europe, see id. at 552 (noting the decline in sanctions targeting
Despite this shift, the Cuba sanctions have remained a bastion of unilateralism and extraterritoriality, generating plenty of international controversy and even several "blocking laws." \(^ {121} \)

Following the downfall of the U.S.S.R. in 1991, Fidel Castro’s regime was expected to follow, as it had relied on the U.S.S.R. as a trade partner after the United States imposed its embargo. \(^ {122} \) The Castro regime survived, but the United States would not pass up an opportunity to “squeeze one of the last communist States in the world.” \(^ {123} \) The result was the passage of the Cuban Democracy Act of 1992 (CDA), \(^ {124} \) which tightened the already smothering economic sanctions against the island nation. \(^ {125} \) OFAC implemented these new sanctions with amendments to the CACR. \(^ {126} \) Although the new regulations imposed numerous additional restrictions, the most controversial aspect of the CDA was its imposition of U.S. sanctions against foreign subsidiaries of U.S. corporations doing business with Cuba or Cuban nationals. \(^ {127} \)

Latin American countries during the 1990s as the region “moved towards democratic governance” and the increase in sanctions initiatives in Africa due to the rise of oppressive regimes, and arguing that “[t]his shift in geographical focus—from the U.S. backyard to a region with historically closer ties to Europe—is one factor in the decline in unilateral U.S. sanctions and the rise of European initiatives”). It may also be that the United States has simply found, through its experience with the Iraq, counterterrorism, and weapons of mass destruction (“WMD”) nonproliferation sanctions, that multilateral sanctions are more effective and worth building consensus around through the United Nations and European Union. Werner Interview, \textit{supra} note 24.

\(^ {121} \) See infra notes 131-134 and accompanying text; \textit{infra} notes 317-24 and accompanying text.

\(^ {122} \) \textit{Hufbauer et al.}, \textit{supra} note 13, at 146.

\(^ {123} \) Cedric Ryngaert, \textit{Extraterritorial Export Controls (Secondary Boycotts)}, \textit{7 Chinese J. Int’l L.} 625, 636 (2008); see also \textit{Hufbauer et al.}, \textit{supra} note 13, at 146.

\(^ {124} \) \textit{Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001-10} (2006). The CDA came in the wake of the failure of communism in the former Soviet Union and Eastern Europe. Ryngaert, \textit{supra} note 123, at 636; see also 22 U.S.C. § 6001(6) (“The fall of Communism in the former Soviet Union and Eastern Europe, the now universal recognition in Latin America and the Caribbean that Cuba provides a failed model of government and development, and the evident inability of Cuba’s economy to survive current trends, provide the United States and the international democratic community with an unprecedented opportunity to promote a peaceful transition to democracy in Cuba.”).

\(^ {125} \) \textit{Hufbauer et al.}, \textit{supra} note 13, at 146; Ryngaert, \textit{supra} note 123, at 636.

\(^ {126} \) For a summary of the various amendments in the early 1990s to the CACR, see Blageff, \textit{supra} note 64, at 6-8.

\(^ {127} \) See Cuban Assets Control Regulation, 31 C.F.R. § 515.329(d) (2011) (including
This extraterritorial application of U.S. sanctions provoked international backlash,128 which was only exacerbated by Congress’s enactment of the Helms-Burton Act (Helms-Burton).129 Helms-Burton, among other things, prohibits any person, foreign or domestic, from “trafficking” in American property that the Cuban government confiscated following the Cuban Revolution.130 The CDA and Helms-Burton provoked “blocking laws” or “anti-boycott laws” from several countries.131 These “blocking laws” generally prohibit persons under the jurisdiction of the enacting countries from complying with U.S. sanctions against Cuba.132 Although some of these laws have not given rise to conflicts,133

"[a]ny corporation, partnership, association, or other organization, wherever organized or doing business, that is owned or controlled by [a U.S. national]" in the definition of "person subject to the jurisdiction of the United States"); Blageff, supra note 64, at 6 (explaining that the CACR used to allow the export of bunker fuel, provisions, and supplies under an EAR general license to Cuban vessels or vessels carrying Cuban goods or individuals, and that this was disallowed by the 1992 Act).


130 Helms-Burton provides the U.S. national who possesses the claim to such property with a civil cause of action against the alleged trafficker. 22 U.S.C. § 6082. The creation of this private right of action caused considerable controversy. See Blageff, supra note 64, at 8 ("Several of the U.S. major trading partners considered enacting retaliatory legislation or bringing charges before a World Trade Organization or North American Free Trade Agreement panel."); Ryngaert, supra note 123, at 645-48 (discussing the negative international reaction to Helms-Burton, in particular Europe). In response to this controversy, U.S. presidents have exercised their authority continuously since 1996 to suspend the private right of action for renewable six-month periods. Blageff, supra note 64, at 8; Ryngaert, supra note 123, at 638-39; see also Tim Bearden, Helms-Burton Act: Resurrecting the Iron Curtain, COUNCIL ON HEMISPHERIC AFFAIRS (June 10, 2011) http://www.coha.org/helms-burton-act-resurrecting-the-iron-curtain (discussing the reaction to Helms-Burton and the negotiations that led to repeated waivers of the private right of action).

131 See infra notes 319-23 and accompanying text.

132 Id. The Canadian Parliament even introduced a bill that mocked Helms-Burton by proclaiming the right of Canadian descendants of Loyalists who fled the American Revolution to reclaim land and property confiscated by the American government. See Bill C-339: The American Liberty and Democratic Solidarity (Loyalty) Act 1996 (Can.), available at http://web.textfiles.com/politics/NWO/nwo_0012.txt; Ryngaert, supra note 123, at 647 (discussing the bill).

133 See Blageff, supra note 64, at 8 (explaining that Helms-Burton’s controversial
several companies have been caught in situations where compliance with OFAC’s regulations meant violating Canada’s Foreign Extraterritorial Measures Act (FEMA), and vice versa.\textsuperscript{134}

In addition to expanding the CACR’s jurisdictional reach, Helms-Burton took the unusual step of removing much of the President’s discretion with respect to the Cuba embargo.\textsuperscript{135} Section 102(h) of Helms-Burton codified as federal statutory law “[t]he economic embargo of Cuba, as in effect on March 1, 1996, including all restrictions under [the CACR].”\textsuperscript{136} This provision effectively removed the President’s authority to reduce sanctions against Cuba; the act provides for the removal of the Cuba embargo only upon a determination, based on an array of enumerated factors, that a “transitional” democratic government is in power.\textsuperscript{137} Despite the fact that many politicians and commentators have either called for the end of the Cuba embargo private right of action has been waived to avoid conflicts with U.S. trading partners); Ryngaert, supra note 123, at 646-48 (discussing EU Council Regulation 2271/96 and noting that the regulation “is mainly of symbolic relevance, as no relevant cases have arisen”).

\textsuperscript{134} See infra note 325 (discussing an historical example of such a conflict). The Hotel Sheraton Maria Isabel, located in Mexico City, was the locus of such a conflict in February 2006, when OFAC demanded the eviction of a group of Cuban officials who were meeting there with representatives from American oil companies to discuss investment opportunities. See James C. McKinley, Jr., Mexico and Cuba Protest Hotel’s Expulsion of Havana Delegation, N.Y. TIMES (Feb. 7, 2006), http://www.nytimes.com/2006/02/07/international/americas/07mexico.html. OFAC telephoned the hotel’s U.S. parent company to inform it that it was violating the Cuba embargo by allowing the meeting to take place. Id. The Sheraton told the Cuban officials to leave and sent their room deposits to the Treasury Department. Id. The Mexican government later fined the hotel for violating Mexican commerce laws. See Sheraton Hotel Fined for Expelling Cubans, CHICAGO TRIBUNE (Mar. 24, 2006) http://articles.chicagotribune.com/2006-03-26/news/0603260401_1_starwood-hotels-resorts-sheraton-maria-isabel-hotel-mexican-government.

\textsuperscript{135} See Blageff, supra note 64, at 8 (describing the limitations Helms-Burton places on presidential authority to modify the Cuba embargo); Amy Dean Westbrook, What’s In Your Portfolio? U.S. Investors Are Unknowingly Financing State Sponsors of Terrorism, 59 DePaul L. Rev. 1151, 1178 n.173 (2010).

\textsuperscript{136} Helms-Burton Act, 22 U.S.C. § 6032.

\textsuperscript{137} See id. §§ 204-06 (requiring such a determination and listing factors like the legalization of all political activity, the release of all political prisoners, a showing of basic respect for the civil liberties and human rights of Cuban citizens, and free and fair elections).
or at least significant pullbacks from the embargo, these limitations on the President's authority mean that real change is unlikely—and unlawful—without congressional action.

B. Nonproliferation from North Korea to Iran

The United States' North Korea sanctions program, another relic of the Cold War, still features prominently. As discussed in Part C above, the original sanctions were imposed in connection with the Korean War, and were later imposed in the 1980s in response to North Korea's support of terrorism. Since the 1990s, however, the focus has shifted to North Korea's pursuit of nuclear weapons. North Korean sanctions vaulted to the fore in March 1993, when North Korea announced its intent to "withdraw[] from the Nuclear Non-Proliferation Treaty (NPT) over a dispute about inspections of its nuclear waste sites." After heated negotiations, the United States, South Korea, Japan, and North Korea came to an agreement in 1994. Under the so-called "Agreed Framework," North Korea pledged to abolish its nuclear program in exchange for two light-water reactors and the easing of U.S. sanctions. Though by no means harmonious, the U.S.-North Korea relationship was comparably less hostile through the late 1990s, with the United States easing sanctions and


140 See HUFBAUER ET AL., supra note 13, at 143-44 (explaining the present state of the U.S. sanctions program toward North Korea).

141 See supra text accompanying notes 70-72.

142 See supra note 70 (citing several acts of terrorism that gave rise to the United States' designation of North Korea as a state sponsor of terrorism).

143 See HUFBAUER ET AL., supra note 13, at 21, 31 (showing the United States' sanction goals vis-à-vis North Korea).


145 HUFBAUER ET AL., supra note 13, at 143; Lee, supra note 144, at 256-57.

146 HUFBAUER ET AL., supra note 13, at 143; Lee, supra note 144, at 256-57.
North Korea dismantling its nuclear program.\(^{147}\) In 2000, “Clinton administration officials announced a plan to lift a broad range of North Korea sanctions” and allow imports from, travel to, and investment in North Korea.\(^{148}\)

However, this progress quickly evaporated in the early years of the Bush administration.\(^{149}\) Both the United States and North Korea accused the other of breaching the Agreed Framework; as a result, the United States and its allies halted construction of North Korea’s two light-water reactors and North Korea withdrew from the NPT and resumed its nuclear program.\(^{150}\) Despite several attempts at negotiating an accord, the United States and North Korea maintained icy relations during the mid-2000s, with North Korea’s 2006 nuclear weapons test playing no small part.\(^{151}\) Comprehensive economic sanctions against North Korea remain in place today.\(^{152}\)

Amid all of the developments in the North Korea sanctions program during the 1990s, the Clinton administration issued two executive orders that signaled a shift in the way the U.S. sanctions regime addressed WMD proliferation.\(^{153}\) In November 1994, President Clinton signed Executive Order 12,938 (EO 12,938),\(^{154}\) declaring WMD proliferation a national emergency.\(^{155}\)

\(^{147}\) HUFBAUER ET AL., supra note 13, at 143. But see Lee, supra note 144, at 257-58 (describing North Korea’s frustrations with the United States’ perceived failure to meet its obligations under the Agreed Framework).


\(^{149}\) HUFBAUER ET AL., supra note 13, at 143.

\(^{150}\) Id. at 143; Lee, supra note 144, at 258-59.

\(^{151}\) For a more complete summary of this period in U.S.-North Korea relations, see Lee, supra note 144, at 257-62.

\(^{152}\) See Cuban Assets Control Regulation, 31 C.F.R. pt. 510 (2011); see generally OFAC, OVERVIEW OF NORTH KOREA SANCTIONS, supra note 78 (summarizing OFAC’s current North Korea sanctions, including an asset freeze and general ban on imports).


\(^{155}\) See id. (“I . . . find that the proliferation of nuclear, biological, and chemical weapons (‘weapons of mass destruction’) and of the means of delivering such weapons, constitutes an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and hereby declare a national emergency to deal with
tightened export controls by directing the Secretaries of State and Commerce to “control any exports... that either Secretary determine[d] would assist a country in acquiring the capability to develop, produce, stockpile, deliver, or use weapons of mass destruction or their means of delivery.”156 Additionally, EO 12,938 provided for limited sanctions against any person or country that the Secretary of State determined had knowingly contributed to the efforts of any foreign country or entity to “use, develop, produce, stockpile, or otherwise acquire chemical or biological weapons.”157 In 1998, President Clinton strengthened and amended EO 12,938 with Executive Order 13,094,158 which facilitated the State Department’s designation process by removing the “knowing” requirement; adding “attempted contributions” to the listed offenses; and adding nuclear weapons, radiological weapons, and missiles capable of delivering WMD to the ban on chemical and biological weapons.159

U.S. use of targeted sanctions against WMD proliferators amplified in the years after the September 11th attacks.160 Following the invasion of Iraq—which had been targeted with nonproliferation measures—and the United States’ failure to discover WMD there, President Bush issued Executive Order 13,328,161 establishing a commission to assess whether the U.S. intelligence community was capable of effectively identifying and warning the U.S. government of acts of WMD proliferation.162

that threat.”).

156 Id. § 2.

157 Id. §§ 4, 5. With respect to sanctioned “foreign persons,” EO 12,938 imposed an import ban and prohibited U.S. government departments and agencies from contracting with such persons. See id. § 4(b). With respect to sanctioned “foreign countries,” the measures were harsher—including a prohibition on foreign assistance, U.S. opposition to any multilateral development bank assistance, a general prohibition on exports and imports, and the termination of landing rights—although asset freezes and transaction bans were not available to U.S. regulators until Executive Order 13,382. See infra text accompanying notes 161-162.


160 HUFBAUER ET AL., supra note 13, at 142.


162 Id. at 6,901-03.
The commission recommended that the President use the same restrictive measures, namely asset freezes, that were in place to fight terrorism under Executive Order 13,224 and advised the President that the "intersection of terrorism and proliferation posed the greatest threat to the United States." In response to the commission's recommendations, President Bush issued Executive Order 13,382 (EO 13,382). EO 13,382 bolstered U.S. non-proliferation sanctions by providing four categories of designated proliferators: (1) persons designated in EO 13,382 itself; (2) persons the State Department determined to be engaged in proliferation; (3) persons the Treasury Department determined to have provided support for proliferation; and (4) persons the Treasury Department determined to be owned or controlled by, or acting or purporting to act on behalf of, other designated persons. President Bush also ordered an asset freeze and transaction ban on all persons designated under EO 13,382.

Divestment Act of 2010 (CISADA),\textsuperscript{169} which amended the Iran Sanctions Act of 1996 (ISA)\textsuperscript{170} to reflect the United States’ increasing concern with Iran’s developing nuclear program.\textsuperscript{171} CISADA’s most significant amendments affect Iran’s energy and financial services industries.\textsuperscript{172} Although the ISA already imposed sanctions against companies investing over specified limits in Iran’s energy sector, CISADA expanded the list of transactions subject to sanctions, in particular the import of gasoline and other refined petroleum products.\textsuperscript{173} CISADA also broadened the scope of the entities to which those measures apply.\textsuperscript{174} The ISA sanctions applied to both U.S. and non-U.S. companies and allowed for sanctions against a parent, subsidiary, or other affiliate of a sanctioned person only if that affiliate knowingly engaged in sanctioned activities. Whereas, CISADA extended liability to affiliates that own or control sanctioned persons and knew or should have known that “the sanctioned person was engaging in prohibited activities.”\textsuperscript{175} CISADA also added three new penalties to the menu available to the executive branch in the event that a


\textsuperscript{171} EU and Secondary Sanctions, supra note 120, at 1250. For a summary of the EU’s recent Iran sanctions, see Edward L. Rubinoff & Shiva Aminian, Recent U.S. and Multilateral Sanctions Against Iran: A New Framework?, in COPING WITH U.S. EXPORT CONTROLS 231-32 (2010). CISADA expanded on what is known as a “secondary boycott.” Secondary boycotts prohibit third-country exporters from exporting to a country already sanctioned under a “primary” boycott. Ryngaert, supra note 123, at 626. Secondary boycotts are often controversial in that they “universalize a primary boycott” by “interven[ing] in the commercial relations between actors who are not active within the territory of the regulating State.” Id. Notably, due to multilateral opposition to Iran’s ongoing nuclear program, CISADA has not been subject to the level of criticism seen with previous instances of U.S. secondary boycotts. Rubinoff & Aminian at 231-32.

\textsuperscript{172} See EU and Secondary Sanctions, supra note 120, at 1250; Rubinoff & Aminian, supra note 171, at 211.

\textsuperscript{173} See EU and Secondary Sanctions, supra note 120, at 1250-51 (detailing the newly targeted activities); Rubinoff & Aminian, supra note 171, at 215-16 (detailing the same).

\textsuperscript{174} Rubinoff & Aminian, supra note 171, at 216-17.

violation is found: a foreign exchange transactions ban, a ban on the transfer of credit or payments through financial institutions that involve the sanctioned person's interests, and a ban on transactions involving property in which the sanctioned person has an interest.\textsuperscript{176} While the State Department is responsible for identifying persons acting in violation of these sanctions, the OFAC is responsible for implementing CISADA's substantial penalties.\textsuperscript{177}

CISADA's second major addition to the ISA focused on the activities of U.S. and foreign financial institutions.\textsuperscript{178} CISADA requires the Treasury Department to implement regulations restricting U.S. correspondent accounts of foreign financial institutions that commit certain sanctionable activities, including: facilitating the Iranian government's efforts to acquire or develop WMD or to support international terrorism; facilitating the activities of persons subject to financial sanctions under certain U.N. resolutions; carrying out such activities through money laundering or facilitating efforts by the Central Bank of Iran or other Iranian financial institution; and transacting with or providing significant financial services to the Iranian Revolutionary Guard Corps.\textsuperscript{179} Per CISADA's directive, the OFAC has promulgated regulations implementing the statute.\textsuperscript{180}

CISADA's broad measures and tough penalties have been a cause for concern among countries that import significant amounts of oil from Iran yet cannot afford to be shut out of the U.S. financial system, as the new sanctions would effectively mandate.\textsuperscript{181} Under the previous version of the ISA, the President

\begin{itemize}
  \item \textsuperscript{176} See Clark & Ware, \textit{supra} note 175, at 101 (listing the penalties available, including those under the ISA, totaling eight; under CISADA, the President must impose at least three of the penalties where a violation has occurred); Rubinoff & Aminian, \textit{supra} note 171, at 215-17 (listing the same).
  \item \textsuperscript{177} Jasper Helder, \textit{Focus on Iran (June 2011)}, 943 PRACTISING L. INST. COM. L. & PRAC. COURSE HANDBOOK SERIES 399, 402 (2011); see also Exec. Order No. 13,574, 76 Fed. Reg. 30,505, 30,505-07 (May 23, 2011).
  \item \textsuperscript{178} See \textit{EU and Secondary Sanctions}, \textit{supra} note 120, at 1250-51; Rubinoff & Aminian, \textit{supra} note 171, at 220-24.
  \item \textsuperscript{179} See \textit{EU and Secondary Sanctions}, \textit{supra} note 120, at 1251 n.46 (detailing the financial restrictions imposed by CISADA); Rubinoff & Aminian, \textit{supra} note 171, at 222 (detailing the same).
  \item \textsuperscript{180} See 31 C.F.R. pt. 561 (2011).
  \item \textsuperscript{181} See, \textit{e.g.}, Sheila A. Smith, \textit{Japan's Iran Sanctions Dilemma}, COUNCIL ON
had the authority to grant a penalty waiver to an entity deemed to have engaged in prohibited activities if he certified to Congress that the waiver was “important to the national interest.”\(^{182}\) Though CISADA left in place the President’s waiver power, the statute tightened the certification standard to “necessary to the national interest.”\(^{183}\) The President may also grant a six-month waiver of the energy-related sanctions upon certification to Congress that the waiver is “vital to the national security interests of the United States.”\(^{184}\)

\(^{182}\) See Rubinoff & Aminian, supra note 171, at 219-220 (explaining CISADA’s changes to the waiver provision); see also Clark & Ware, supra note 175, at 102-03 (discussing presidential discretion under CISADA).

\(^{183}\) See Clark & Ware, supra note 175, at 102-03; see also Rubinoff & Aminian, supra note 171, at 219-220. While “necessary” denotes a stricter test than “important,” it remains to be seen whether this change will manifest in practice. Waivers granted thus far have dealt with the energy-related sanctions, for which CISADA requires the waiver to be “vital,” rather than “necessary.” See infra note 184 and accompanying text.

\(^{184}\) Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA), 22 U.S.C. § 8501 note (2010); see also Fact Sheet: Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA), U.S. DEP’T OF STATE (May 23, 2011), http://www.state.gov/e/eb/esc/iransanctions/docs/160710.htm. The President may grant a twelve-month waiver if he certifies to Congress that, in addition to being “vital to the national security interests of the United States,” the waiver exempts a person subject to the primary jurisdiction of a “government . . . [that] is closely cooperating with the United States in multilateral efforts to prevent Iran from . . . acquiring or developing chemical, biological, or nuclear weapons or related technologies; or . . . acquiring or developing destabilizing numbers and types of advanced conventional weapons . . . CISADA.” Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA), 50 U.S.C. 1701 note (2010). In March 2012, the United States granted CISADA waivers to eleven countries—Belgium, the Czech Republic, France, Germany, Greece, Italy, Japan, the Netherlands, Poland, Spain, and the United Kingdom—on the basis of their reductions in Iranian oil imports. Rubenfeld, Clinton Names Waiver Recipients, supra note 120. Notable among the waiver recipients is Japan, which, despite its heavy reliance on Iranian oil and its energy and economic difficulties in the wake of the March 2011 tsunami, id., was able to significantly reduce its Iranian oil imports in order to obtain a waiver. Samuel Rubenfeld, Japan Cheers U.S. Sanctions Waiver, WALL ST. J. (Mar. 21, 2012), http://blogs.wsj.com/corruption-currents/2012/03/21/japan-cheers-us-sanctions-waiver.
C. Non-State Terrorism Sanctions

Although the United States has continued to implement its Cold War mainstay programs against Cuba and North Korea, the 1990s and 2000s were more notable as the decades in which the United States expanded its use of sanctions to address a new array of foreign policy objectives.185 The United States’ counterterrorism sanctions program was perhaps the most prominent in this respect.186 As explained in Section D above, antiterrorism sanctions began in 1980s as a response to incidents of state-sponsored bombings and other acts of aggression.187 The 1990s, however, saw the decline of state sponsorship and the rise of non-state terrorist actors, most prominently Osama bin Laden’s al-Qaeda network.188 The emergence of non-state terrorist actors necessitated a change in the U.S. approach to sanctions, as broad, state-targeted measures were ineffectual.189 This change came in 1995 when President Clinton issued Executive Order 12,947190 (EO 12,947), the first targeted or “smart” sanctions issued against terrorist organizations.191 EO 12,947 directed that the U.S.-based assets of entities deemed to be a threat to the Middle East peace process be frozen, and prohibited transactions between the entities and either U.S. nationals or any other persons within the United States.192

185 Werner Interview, supra note 24.
186 Id. Though U.S. counterterrorism sanctions were probably the most well-known, the counternarcotics sanctions were arguably more significant in terms of scope and impact, since they have reached a number of legitimate and well-known businesses in Latin America as well as property and companies within the United States. Id. They have also resulted in leverage for the extradition of certain narcotics traffickers and have had a real impact on the stability of the government in Colombia. Id.
187 See supra notes 96-102 and accompanying text.
188 HUFBAUER ET AL., supra note 13, at 142; see also Lippman, supra note 101, at 302-08 (discussing the emergence and ideology of radical Islamic terrorist groups).
189 HUFBAUER ET AL., supra note 13, at 142; see also Kenneth W. Abbott, Economic Sanctions and International Terrorism, 20 VAND. J. TRANSNAT’L L. 289, 306 (1987) (“Sanctions designed to impose economic costs are largely irrelevant to terrorism carried on without state support; they are too blunt an instrument to be used in pressuring small groups of terrorists.”).
191 See HUFBAUER ET AL., supra note 13, at 142; see also Lord et al., supra note 7, at 278.
The September 11th attacks radically altered U.S. sanctions policy as it pertained to counterterrorism, to put it mildly. In the wake of the attacks, President Bush issued Executive Order 13,224, which declared a national emergency, expanded the application of economic sanctions to persons assisting or otherwise associated with designated terrorists, and authorized the Secretaries of State and Treasury to designate additional terrorists and their supporters as “Specially Designated Global Terrorists” (SDGTs). By expanding the scope of U.S. counterterrorism sanctions to include terrorists outside of the Middle East, the Bush administration established “the international financial equivalent of law enforcement’s ‘most wanted’ list.” Additionally, the USA PATRIOT Act, enacted in October 2001, expanded executive authority under IEEPA in several key ways, including: (1) allowing “the executive branch to submit classified evidence in camera and ex parte in court proceedings against alleged financiers of terrorism”, (2) permitting “OFAC to block assets during the pendency, rather than after the conclusion, of an investigation”, and (3) granting the President the ability “to confiscate any property subject to the jurisdiction of the United States of any foreign person, organization, or country determined to have planned, authorized, aided, or engaged in terrorist hostilities or attacks against the United States.”

These expanded powers strengthened the U.S. sanctions regime and adapted it to serve as a vital counterterrorism tool.

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193 Incidentally, before the attacks of September 11th, the Bush administration sought reductions in the U.S. regulatory regime and an increased dependence on multilateral efforts to prevent illicit money flows. Vanessa Ortblad, Comment, Criminal Prosecution in Sheep’s Clothing: The Punitive Effects of OFAC Freezing Sanctions, 98 J. CRIM. L. & CRIMINOLOGY 1439, 1444 (2007-2008).
195 See id. at 49,079-80.
196 HUFBAUER ET AL., supra note 13, at 16.
198 Ortblad, supra note 193, at 1444; see also PATRIOT Act § 106.
199 Id.
200 Id.
201 George W. Bush, President Signs USA PATRIOT Improvement and Reauthorization Act, WHITE HOUSE OF PRESIDENT GEORGE W. BUSH (March 9, 2006,
One group of commentators points to three broad strategies pursued by the Bush administration under this evolved sanctions regime: (1) to “cast a wide net in sanctioning” non-state terrorist entities; (2) to “buttress multilateral sanctions regimes”; and (3) to induce cooperation by previously targeted countries in the war on terror by offering incentives in the form of lifted sanctions. In pursuit of these strategies, OFAC has overseen a colossal expansion in U.S. sanctions against terrorist entities; the agency now implements terrorism sanctions under four parts of the Code of Federal Regulations, imposing asset and transaction freezes on roughly 3800 designated terrorists and terrorist entities.

D. Regime Change and Human Rights

In addition to maintaining sanctions programs against Cuba, WMD proliferation, and terrorism, the United States employed sanctions through the 1990s to produce regime changes in response to human rights violations. In fact, regime change sanctions accounted for more than half of the sanctions programs initiated in the 1990s, and they frequently involved the coordinated efforts of the United States and other parties, particularly the European Union.

2:46 PM), http://georgewbush-whitehouse.archives.gov/news/releases/2006/03/20060309-4.html (“It is a piece of legislation that’s vital to win the war on terror and to protect the American people.”).

202 HUFBAUER ET AL., supra note 13, at 142.

203 A search of the text version of the SDN List, see OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF TREASURY, ALPHABETICAL LISTING OF SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS (“SDN LIST”), yields 3794 results for “SDGT.” Currently, all FTOs are also designated as SDGTs, and about half of the 39 SDTs are also SDGTs. See Specially Designated Nationals Search, U.S. DEP’T OF TREASURY, http://sdnsearch.ofac.treas.gov/Default.aspx (last visited July 24, 2012) (providing a search-by-program function). Thus, the current number of SDGTs accurately represents the number of terrorist designees on the SDN List.

204 While in the 1960s and 1970s “regime change” sanctions were typically imposed in response to foreign policy disputes between the United States and other nations, in the late 1970s such sanctions evolved into a tool to support broad human rights demands and, in the 1990s, to encourage democratic reforms and good governance. See HUFBAUER ET AL., supra note 13, at 13-14 (chronicling the development of “regime change” sanctions from the early 1960s through the end of the 20th century); see also supra note 111 and accompanying text.

205 See HUFBAUER ET AL., supra note 13, at 14 (“[R]egime change broadly defined has been a recurring theme in the post-Cold War period, accounting for nearly half of the
United States’ use of economic sanctions to force regime change has continued into the twenty-first century, with the most recent example of this approach being the U.S. government’s response to the Arab Spring.\(^{206}\) For example, shortly after Libyan security forces fired on civilian demonstrators in Benghazi,\(^{207}\) the United States imposed comprehensive sanctions restricting trade with and blocking the assets of the Libyan government and related persons.\(^{208}\) The effecting executive order also authorized the Treasury Secretary and the OFAC to identify and designate additional persons for asset freezes and transaction bans.\(^{209}\) In

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\(^{208}\) Several days after news agencies reported that the Libyan military was attacking protestors, the United States imposed sanctions against Gaddafi and his regime. *See* Cooper & Landler, *supra* note 206, at A1 (“The tougher American response came nine days into the Libyan crisis and six days after Colonel Qaddafi’s security forces first opened fire on protesters at a funeral in Benghazi, plunging Libya into something close to civil war and igniting worldwide condemnation.”). The United States imposed the new sanctions “[j]ust minutes after a charter flight left Tripoli carrying the last Americans who wanted to leave Libya,” a cautionary measure taken because the exiting Americans feared that Gaddafi would harm the flight’s passengers. *Id.*

blocking "the Government of Libya, its agencies, instrumentalities, and controlled entities," Executive Order 13,566\textsuperscript{210} departed from the targeted sanctions methods developed over the preceding ten to fifteen years in that it did not specifically designate the entities to be subject to sanctions.\textsuperscript{211} Rather, it left to the public the determination of whether a particular entity fell within the ambit of the restrictions.\textsuperscript{212}

The 2011 sanctions against Syria were similar in purpose to the Libya sanctions, though different in approach.\textsuperscript{213} Unlike with Libya, the United States already had fairly extensive sanctions in place against the Syrian government before the al-Assad regime responded to public demonstrations with military force.\textsuperscript{214} The

\textsuperscript{210} Id.

\textsuperscript{211} Lord et al., supra note 7, at 283-284; see also Exec. Order No. 13,566, 76 Fed. Reg. at 11,318 (listing only members of Gaddafi's family).

\textsuperscript{212} See Lord et al., supra note 7, at 283-284 (noting that the Libya sanctions were the first since the 1997 Sudan sanctions to block the assets of a large category of persons while "leav[ing] the regulated public with the responsibility of identifying for themselves entities whose property must be blocked"). OFAC clarified the scope of these broad measures within the first month of the Libya sanctions program by issuing an array of general licenses. For a discussion of the use of general licenses as adaptive measures in the Libya program, see infra notes 399-403 and accompanying text.

\textsuperscript{213} See Lord et al., supra note 7, at 276 ("The Libya sanctions grew and contracted over the course of the year . . . [while] the Syria sanctions show a gradual tightening of an already relatively robust embargo . . . . As regime change in places across the Arab world begins to seem more likely in other countries or regions, the Libyan and Syrian experiences suggest paths that could be used to advocate regime change through targeted sanctions rather than simply to punish recalcitrant behavior by rogue states using broad brush country-wide sanctions.").

\textsuperscript{214} See id. at 276, 291 (contrasting the growing Libya sanctions with what started as "an already relatively robust export embargo against Syria" and attributing previous U.S. sanctions against Syria as due its role as a state sponsor of terrorism). Protests in Syria began in early 2011 but were slow to take hold, with many suspecting that, despite the presence of authoritarian rule, corruption, and economic hardship—factors that led to uprisings in Egypt and Tunisia—revolution would never catch on in the country. See e.g., Rania Abouzeid, \textit{The Youth of Syria: The Rebels Are on Pause}, TIME (Mar. 6, 2011), http://www.time.com/time/world/article/0,8599,2057454,00.html (contrasting the varying sentiments held by young Syrians toward the Syrian government); \textit{Syria: 'A Kingdom of Silence,'} AL JAZEERA (Feb. 9, 2011), http://www.aljazeera.com/indepth/features/2011/02/201129103121562395.html (citing "a popular president, dreaded security forces and religious diversity" as factors weighing against a full-fledged uprising). Nevertheless, protests intensified in mid-March 2011, and despite early hints of reform, Syrian president Bashar al-Assad soon responded with military force. See Mariam Karouny & Yara Bayoumy, \textit{Assad Blames Unrest on Saboteurs, Pledges...
United States has had restrictive measures in place against Syria since it designated the country as a state sponsor of terrorism in 1979. In April 2011, as the Syrian military resorted to increasingly violent measures to quell protests, the United States began to expand its Syria sanctions by designating additional individuals for targeted sanctions. In August 2011, President Obama issued Executive Order 13,582 (EO 13,582), which imposed sanctions against the entire Syrian government.

As the preceding discussion illustrates, the modern U.S. sanctions regime is comprised of a variety of restrictive measures supporting diverse foreign policy goals, including counterterrorism, WMD nonproliferation, and the protection of basic human rights and democratic principles. This evolution and America’s continuing economic hegemony have entrenched

Reforms, REUTERS (Jun 20, 2011), http://www.reuters.com/article/2011/06/20/us-syria-idUSTRE75J0AV20110620. The conflict is ongoing, and the United Nations, the Arab League, and countries around the world, including Syria’s neighboring countries Jordan and Turkey, have condemned the al-Assad regime’s use of violence against protesters. Id. Presently, however, the United States has ruled out military intervention, resorting instead to diplomatic pressure and sanctions. See Michael R. Gordon & Elisabeth Bumiller, U.S. Military Sent to Jordan On Syria Crisis, N.Y. TIMES, Oct. 10, 2012, at A1 (reporting that “[t]he Obama administration has declined to intervene in the Syrian conflict beyond providing communications equipment and other nonlethal assistance to the rebels opposing the government of President Bashar al-Assad.”).

Lord et al., supra note 7, at 291; see also supra note 102 and accompanying text. Representing a thirty-year history of sanctions, the measures in place at the beginning of 2011 included a prohibition on virtually all exports and re-exports regulated by the Commerce Department’s Bureau of Industry and Security as well as a transaction ban against numerous Syrian persons designated on the SDN List. Lord et al., supra note 7, at 291.

Jasper Helder, United States, European Union, Switzerland, and Canada Expand Sanctions on Trade with Syria (September 7, 2011), in COPING WITH U.S. EXPORT CONTROLS 409, 411 (2011); see also Lord et al., supra note 7, at 292.


Id. As will be discussed in Parts IV.D.2-3, while the Syria sanctions involved a “gradual tightening” of sanctions, beginning with targeted measures against certain individuals and organizations and expanding by late summer 2011 to a freeze on Syrian government assets and a comprehensive embargo on Syrian imports and exports, the Libya sanctions were initially extremely stringent and gradually loosened over the course of a year as the provisional government assumed control. Lord et al., supra note 7, at 276, 292. By contrast, the August 2011 expansion of the Syria sanctions program came with a set of general licenses covering anticipated areas of ambiguity or concern. For a discussion of these licenses, see infra notes 418-423 and accompanying text.

See supra Parts III.C-D and accompanying text.
the OFAC as the dominant force in global sanctions.\textsuperscript{220}

**IV. OFAC and the Administration of U.S. Sanctions Protocols**

Since 1950, OFAC has been the agency responsible for implementing U.S. economic sanctions.\textsuperscript{221} According to its mission statement, OFAC "administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals."\textsuperscript{222} Although the U.S. Constitution vests the power to regulate trade with Congress, when it comes to sanctions, Congress has traditionally delegated that authority to the President, most prominently via TWEA, IEEPA, and the Export Administration Act (EAA).\textsuperscript{223} "Together, these statutes provide the main legal basis for the most comprehensive economic sanctions regime in modern history."\textsuperscript{224}

\textsuperscript{220} Id.

\textsuperscript{221} See supra notes 73-78 and accompanying text.

\textsuperscript{222} Mission of OFAC, U.S. DEP'T OF TREASURY, http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx (follow "Mission" hyperlink) (last visited Jan. 12, 2013) (listing OFAC’s targets as "[certain] foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States").


Though typically delegating sanctioning authority to the President, Congress has in some cases codified existing sanctions regulations as federal statutory law, thus removing the President’s authority to reduce those sanctions below their statutory levels. See id. at 106 ("The [Iran/Libya Sanctions Act] ... reflected Congress’s intent to codify certain U.S. sanctions practices against Iran and Libya and to restrict the president’s discretion to manage sanctions policy against Iran and Libya ... "); see also id. at 111 ("Another statute where Congress intervened to limit executive discretion in the management of U.S. sanctions policy was [the Helms-Burton Act, an objective of which] ... was to codify the then-thirty four year-old U.S. economic embargo against Cuba.").

\textsuperscript{224} ALEXANDER, supra note 31, at 92.
A. Types of Sanctions Programs Administered by OFAC

OFAC currently administers twenty-two different sanctions programs. These programs vary in scope and severity. The Cuba sanctions, for instance, impose a near total embargo on all goods and services. In addition, programs targeting Iran, Syria, and Sudan, though somewhat less severe than the Cuba sanctions, significantly restrict trade with the targeted country, its government, or its nationals, while allowing for limited categories of transactions. OFAC also administers a number of programs


226 See supra notes 74-78 and accompanying text; see also supra Section III.A.

227 The Iran sanctions approach the level of comprehensiveness seen with the Cuba sanctions, particularly in light of CISADA. See supra notes 168-184 and accompanying text (discussing CISADA); see also An Overview of O.F.A.C. Regulations Involving Sanctions Against Iran, U.S. DEP’T OF THE TREASURY OFFICE OF FOREIGN ASSETS CONTROL (2011) (describing import, export, transaction, and financial services bans), http://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran.pdf [hereinafter Overview of OFAC Iran Sanctions Regulations].

228 See supra notes 213-218 and accompanying text (introducing the Syria sanctions).

229 The Sudan program imposes comprehensive sanctions against that nation, including asset freezes against the Sudanese government and other designees, a transaction ban, and a ban on financial dealings, among other restrictions. See An Overview of the Sudanese Sanctions Regulations, U.S. DEP’T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL (2008), http://www.treasury.gov/resource-center/sanctions/Programs/Documents/sudan.pdf. This program contains an important carve-out, however, for certain marginalized areas of Sudan, such as Southern Sudan and Darfur. Id. The carve-out generally exempts the specified areas from the Sudan sanctions, with the notable exception of the ban on transactions related to the petroleum or petrochemical industries of Sudan. Id.

230 Burma, or Myanmar, was also subject to comprehensive U.S. sanctions, mainly for political repression and anti-democratic actions, though the exportation of goods and non-financial services to Myanmar was generally allowed. See U.S. DEP’T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, BURMA: AN OVERVIEW OF THE BURMESE SANCTIONS REGULATIONS 1-3 (2008) (describing, among other restrictions, asset freezes, an import ban, a financial services export ban, and a ban on new investment). Recent political reforms in Myanmar led the United States to ease its longtime sanctions against that country. See Annie Lowrey, Myanmar: U.S. Eases Sanctions, N.Y. TIMES, July 12, 2012, at A8. The United States also levied comprehensive sanctions against Libya at the onset of the Libyan civil war, but these initially broad measures have largely been drawn down with general licenses. See infra notes 410-417 and accompanying text.
that, although tied to a particular geographic region or country, in actuality target designated bad actors within that region determined to be responsible for the repression of democracy, human rights abuses, political destabilization, or other wrongdoing.\textsuperscript{231} The five remaining OFAC programs are not tied to a geographic region, but instead target persons deemed to be engaged in illicit activities such as terrorism, WMD proliferation, and narcotics trafficking.\textsuperscript{232}

Individuals and entities designated by the President or his designee under one of the aforementioned programs are added to the SDN List.\textsuperscript{233} The SDN List is an administrative tool managed by OFAC for the purpose of providing a single reference listing all persons designated under a U.S. sanctions program.\textsuperscript{234} The assets under U.S. jurisdiction of persons identified on the SDN List are blocked, and U.S. persons are generally prohibited from transacting with such persons.\textsuperscript{235} OFAC publishes and frequently

\textsuperscript{231} These programs target persons undermining democratic processes and institutions in Belarus; persons threatening international stabilization efforts in the Western Balkans; former members of the previous government of Iraq (although several general licenses have nullified many of the sanctions); persons who were involved with the former regime of Charles Taylor, or who unlawfully depleted Liberian resources; persons contributing to the conflict in Côte d’Ivoire; persons contributing to the conflict in the Democratic Republic of the Congo; persons contributing to the conflict in Somalia; and persons undermining democratic processes in Zimbabwe. See generally Sanctions Programs and Country Information, supra note 225 (listing all sanctions programs that OFAC currently enforces). The North Korea sanctions may be considered among these programs, as the sanctions principally target individuals and entities designated as facilitating North Korean arms trafficking, procurement of luxury goods, or engaging in other illicit activities that involve or support the North Korean government. See OFAC, Overview of North Korea Sanctions, supra note 78, at 2. The North Korea sanctions are notably more severe, however, in that they include a ban on all imports from North Korea, whereas the other programs listed above are strictly list-based. See id. at 3 (summarizing the import ban).

\textsuperscript{232} These targeted classes of bad actors include WMD proliferators and their supporters; persons engaging in international narcotics trafficking; persons who commit, threaten to commit, or support terrorism; traffickers of rough diamonds not controlled through the Kimberley Process Certification Scheme; and transnational criminal organizations. See generally Sanctions Programs and Country Information, supra note 225 (listing all sanctions programs that OFAC currently enforces).

\textsuperscript{233} Specially Designated Nationals List (SDN), supra note 21.

\textsuperscript{234} Werner Interview, supra note 24; see also Specially Designated Nationals List (SDN), supra note 21.

\textsuperscript{235} Specially Designated Nationals List (SDN), supra note 21 ("U.S. persons are
updates the SDN List, which it makes available on its website.\textsuperscript{236}

\textbf{B. Penalties for Violations}

United States persons who fail to comply with OFAC's sanctions face stiff civil and criminal penalties.\textsuperscript{237} For a person found to be in violation of U.S. sanctions, IEEPA permits OFAC to impose a maximum civil penalty of $250,000 or twice the amount of the transaction underlying the sanctions violation, whichever is greater.\textsuperscript{238} In determining the amount of a civil penalty, OFAC considers whether the violation was voluntarily disclosed and whether, based on an array of factors, the violation was "egregious."\textsuperscript{239} IEEPA also allows for criminal penalties. Criminal penalties are reserved for "willful" violators of U.S. sanctions, and IEEPA caps such penalties at $1,000,000, or, if the violator is a natural person, up to twenty years in prison.\textsuperscript{240}

generally prohibited from dealing with [individuals, groups, and entities listed on the SDN List].")

\textsuperscript{236} Id.

\textsuperscript{237} See, e.g., 50 U.S.C. § 1705(b) (2011) (providing criminal penalties); id. § 1705(c) (providing civil penalties).


\textsuperscript{239} See generally 31 C.F.R. § 501 app. A (providing "a general framework for the enforcement of all economic sanctions programs administered by [OFAC]"). In determining whether a violation is "egregious," OFAC considers, among other factors, whether the violation was willful or reckless, whether the violator was aware of the conduct at issue, and the harm to the sanctions program's objectives. Id. pt. V.B.1.

\textsuperscript{240} 50 U.S.C. § 1705(c); see also 31 C.F.R. § 501 app. A, pt. II.F. ("In appropriate circumstances, OFAC may refer the matter to appropriate law enforcement agencies for criminal investigation and/or prosecution. Apparent sanctions violations that OFAC has referred for criminal investigation and/or prosecution also may be subject to OFAC civil penalty or other administrative action."). Criminal penalties under TWEA for organizations are capped at $1,000,000, as they are under IEEPA. Id. § 501.701(b). TWEA penalty caps for individuals are slightly below their IEEPA counterparts. Individuals who violate TWEA sanctions may be imprisoned for a maximum of 10 years and fined the greater of $250,000 or twice the transaction value.
OFAC follows certain procedures when imposing penalties.\textsuperscript{241} Penalty imposition begins with OFAC sending the alleged violator a pre-penalty notice indicating the suspected violation and a proposed penalty amount.\textsuperscript{242} The pre-penalty notice initiates a period, typically lasting thirty days, during which the respondent may make a written presentation in its defense.\textsuperscript{243} Barring a settlement or a finding that in fact no violation occurred, OFAC then issues a penalty notice, which informs the respondent of the amount of the penalty and sets a payment deadline, typically thirty days from the issuance of the penalty notice.\textsuperscript{244} The penalty notice constitutes final agency action, which the respondent may appeal to federal court.\textsuperscript{245}

In recent years, OFAC assessed increasingly significant penalties.\textsuperscript{246} From 2006 to 2008, OFAC brought 192 enforcement

\begin{itemize}
\item \textit{Id.} §§ 501.701(a), (b).
\item \textsuperscript{241} \textit{See generally} 31 C.F.R. §§ 501.703-.747 (detailing the procedural rules for TWEA penalty purposes).
\item \textsuperscript{242} \textit{Id.} § 501 app. A, pt. V.A.1.
\item \textsuperscript{243} \textit{Id.} pt. V.A.1-2. \textit{See, e.g., id.} § 537.702(b) ("The pre-penalty notice also shall inform the respondent’s right to make a written presentation within the applicable 30-day period . . . as to why a monetary penalty should not be imposed or why, if imposed, the monetary penalty should be in a lesser amount than proposed.").
\item \textsuperscript{244} \textit{Id.} § 501 app. A, pt. V.A.3 (2011). \textit{See, e.g., id.} § 537.704(b)(2) ("The penalty notice shall inform the respondent that payment or arrangement for installment payment of the assessed penalty must be made within 30 days of the date of mailing of the penalty notice by the Office of Foreign Assets Control.").
\item \textsuperscript{245} \textit{Id.} at pt. V.A.5. \textit{See, e.g., id.} § 537.704(b)(4) ("The issuance of the penalty notice finding a violation and imposing a monetary penalty shall constitute final agency action. The respondent has the right to seek judicial review of that final agency action in federal district court."). Penalty procedures under the TWEA differ slightly in that they require an administrative review process before an appeal in federal court is available. Upon receiving a penalty notice, the respondent may request a hearing before an administrative law judge (ALJ) instead of paying the penalty within the thirty-day period. \textit{Id.} § 501.703(a)(3). If the respondent requests a hearing, OFAC, assuming it decides against discontinuing the penalty action based on the information submitted by the respondent, issues an “Order Instituting Proceedings” and refers the matter to an ALJ for a decision. \textit{Id.} § 501.703(a)(4). The designee of the Treasury Secretary may then review the ALJ’s decision. \textit{Id.} §§ 501.703(a)(5)-(6). The ALJ’s decision, or, if reviewed, the determination of the Secretary’s designee, then becomes a final decision of the Treasury Department, which the respondent may appeal to federal court. \textit{Id.} §§ 501.703(a)(5)-(7).
\item \textsuperscript{246} The figures were taken from OFAC’s website. \textit{See Civil Penalties and Enforcement Information}, U.S. Dep’t of Treasury, http://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx (last visited Jan. 13, 2013) (listing
actions that resulted in penalties or settlements totaling around $48.56 million. By contrast, from 2009 to 2011, though OFAC assessed penalties or reached settlements in only 75 enforcement actions, amounts recovered totaled over $1.064 billion. OFAC reached settlements during this period with major U.S. and international financial services firms such as J.P. Morgan Chase, Barclays, Lloyds TSB, and Credit Suisse, with some settlements reaching into the hundreds of millions of dollars. In June 2012, OFAC announced a $619 million settlement with ING Bank N.V. (ING), then the largest OFAC penalty in history. In December 2009, Credit Suisse agreed to pay a $536,000,000 fine, the largest ever at the time. Marilyn Muench & Robert Shapiro, Swiss Bank Pays Record $536 Million Fine for OFAC Violations: U.S. Banks May Want to Review Relevant Procedures, THOMPSON COBURN LLP (Jan. 2010), http://documents.jdsupra.com/65f898b7-4490-48e0-a7db-dad353df104b.pdf. The severity of the fine resulted from Credit Suisse’s continual and willful violations of the Iran, Burma, Sudan, Cuba, Libya, and Charles Taylor regime sanctions. Id. Attorney General Eric Holder described the violations as a “simply astounding” level of “criminal misconduct.” Id.

The historic fine against ING was eclipsed later that year, in December 2012, when HSBC reached a $1.92 billion settlement with OFAC and several other criminal and regulatory authorities for alleged sanctions and money-laundering violations. Also in December, Standard Chartered reached an agreement with federal and local authorities to pay $667 million in connection with violations of U.S. sanctions.

United States between 2002 and 2007, primarily in apparent violation” of the Cuba, Iran, Sudan, and Libya sanctions programs. For example, “[b]eginning in the 1990s, at the instruction of senior bank management, ING employees in Curacao began omitting references to Cuba in payment messages sent to the United States in order to prevent U.S. financial institutions from identifying and interdicting prohibited transactions.”

The practice of removing and omitting such information was also used by other branches of ING’s Wholesale Banking Division, including in France, Belgium, and the Netherlands, in processing U.S. dollar payments and trade finance transactions through the United States. In addition, ING’s senior management in France authorized, advised in the creation of, and ultimately provided fraudulent endorsement stamps for use by Cuban financial institutions in processing traveler’s check transactions, which disguised the involvement of Cuban banks in these transactions when they were processed through the United States. Moreover, ING’s Trade and Commodity Finance business at its Wholesale Banking branch in the Netherlands routed payments made on behalf of U.S.-sanctioned Cuban clients through other corporate clients to obscure the sanctioned clients’ identities, and ING’s Romanian branch omitted details from a letter of credit involving a U.S. financial institution in order to finance the exportation of U.S.-origin goods to Iran. ING reached simultaneous settlements with OFAC as well as the U.S. Department of Justice, “the U.S. Attorney’s Office for the District of Columbia, the Department of Justice’s National Security Division, the Department of Justice’s Asset Forfeiture and Money Laundering Section, and the New York County District Attorney’s Office.”

Howard Mustoe, *HSBC to Pay $1.92 Billion in U.S. Money-Laundering Probe*, BLOOMBERG (Dec. 11, 2012), http://www.bloomberg.com/news/2012-12-11/hsbc-agrees-to-pay-1-92-billion-in-money-laundering-settlement.html. This included an $875 million settlement with the Treasury Department, “the largest collective settlement in the department’s history.” Press Release, U.S. Dep’t of the Treasury, Office of Foreign Assets Control, Treasury Department Reaches Landmark Settlement with HSBC (Dec. 12, 2012), available at http://www.treasury.gov/press-center/press-releases/Pages/tg1799.aspx. HSBC was alleged to have altered its transaction records to obscure information about its clients in so-called “U-turn” transactions, which involved the transfer of funds from Iranian to non-U.S. banks through U.S. financial institutions. Mustoe, supra. HSBC reportedly executed similar transactions with other sanctioned countries including North Korea, Cuba, Sudan, and Burma. On top of these allegations, the bank was accused of giving terrorists and narcotics traffickers access to the U.S. financial system, in violation of U.S. sanctions and anti-money laundering regulations.

C. OFAC’s Licensing Practices

The holistic sanctions programs OFAC favors carry a significant risk of excess.\textsuperscript{257} The broad-based, categorical restrictions against U.S. persons doing business with certain countries can create conflict of law scenarios as well as frustrate activities that are deemed benign and not inconsistent with U.S. foreign policy.\textsuperscript{258} They can also disproportionately impact innocent citizens and businesses in the targeted countries whose interests the United States is trying to protect by imposing sanctions in the first place.\textsuperscript{259} To control for the potential excesses of such a system, the agency employs a robust licensing practice.\textsuperscript{260}

OFAC processes tens of thousands of license and interpretative guidance requests annually.\textsuperscript{261} While the bulk of these are Cuban travel license requests under the Trade Sanctions Reform and Export Enhancement Act\textsuperscript{262} (TSRA),\textsuperscript{263} some implement specific

\(^{257}\text{See infra Part IV.D.2.}\)

\(^{258}\text{See id.}\)

\(^{259}\text{See id.}\)

\(^{260}\text{See infra Parts IV.C.1-2.}\)

\(^{261}\text{See Examining Treasury’s Role in Combating Terrorist Fin. Five Years After 9/11: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs, 109th Cong. 37 (2006) (statement of Adam J. Szubin, Dir., Office of Foreign Assets Control) (“We review and process tens of thousands of license and interpretive guidance requests a year, filed by individuals, firms, and multinational corporations, each of which requires careful consideration, and some of which entail sophisticated transactional analysis.”); Oversight of the Dep’t of Treasury: Hearing Before the H. Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs., 108th Cong. 91 (2004) (statement of R. Richard Newcomb, Dir., Office of Foreign Assets Control) (“[OFAC’s] Licensing Division reviews, analyzes and responds to more than 25,000 requests per year for specific licenses covering a broad range of trade, financial and travel-related transactions . . . .”).}\)


U.S. foreign policy decisions. Others respond to the inevitable conflicts and unanticipated situations that arise under any comprehensive sanctions regime. OFAC’s pervasive use of licensing reflects the agency’s proclivity to assert its jurisdiction broadly, making any needed curtailments by granting exemptions, rather than running the risk of under-regulating.

OFAC licenses typically entitle the licensee or a larger class of persons to engage in a transaction or transactions that would
otherwise be prohibited by one of the U.S. sanctions programs.267 OfAC issues two types of licenses: (1) general licenses,268 which are made public and provide universal exemptions to a given set of sanctions, and (2) specific licenses, which are granted only upon application and authorize only the applicant to engage in a specific transaction or category of transaction, often with significant limitations and reporting requirements.269

1. General Licenses

General licenses are set forth in OFAC's published regulations and authorize particular types of transactions for a class of persons.270 If a general license covers a transaction, the class of persons specified in the general license can engage in that activity without having to apply individually to OFAC for permission.271 The class of persons is often U.S. persons generally,272 but in some

267 OFAC FAQ, supra note 34, at 74.

268 Around half of OFAC's 22 current sanctions programs have general licenses in place. See Sanctions Programs and Country Information, supra note 225 (listing OFAC's sanctions programs; the webpages for the individual programs typically indicate whether there are general licenses in effect).

269 Werner Interview, supra note 24.

270 OFAC FAQ, supra note 34, at 74.

271 Persons engaging in generally licensed transactions, however, must take care to strictly observe any restrictions in the general license. Id.; see, e.g., OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF TREASURY, EXECUTIVE ORDER 13582 OF AUGUST 17, 2011, BLOCKING PROPERTY OF THE GOVERNMENT OF SYRIA AND PROHIBITING CERTAIN TRANSACTIONS WITH RESPECT TO SYRIA, GENERAL LICENSE NO. 8: OFFICIAL ACTIVITIES OF INTERNATIONAL ORGANIZATIONS (2011) ("Any U.S. person engaging in or facilitating transactions authorized pursuant to this general license shall keep a full and accurate record of each such transaction, including any supporting documentation, and such record shall be available for examination for at least five (5) years after the date of the transaction.").

272 See, e.g., OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, EXECUTIVE ORDER 13582 OF AUGUST 17, 2011, BLOCKING PROPERTY OF THE GOVERNMENT OF SYRIA AND PROHIBITING CERTAIN TRANSACTIONS WITH RESPECT TO SYRIA, SYRIA GENERAL LICENSE NO. 5: EXPORTATION OF CERTAIN SERVICES INCIDENT TO INTERNET-BASED COMMUNICATIONS AUTHORIZED (2011) ("[T]he exportation from the United States or by U.S. persons, wherever located, to persons in Syria of services incident to the exchange of personal communications over the Internet, such as instant messaging, chat and email, social networking, sharing of photos and movies, web browsing, and blogging, is authorized, provided that such services are publicly available at no cost to the user.").
cases OFAC will specify a narrower class.\footnote{273 See, e.g., id. ("U.S. depository institutions, U.S. registered brokers or dealers in securities, and U.S. registered money transmitters are authorized to process funds transfers for the operating expenses or other official business of third-country diplomatic or consular missions in Syria . . . ").}

General licenses serve a variety of purposes. OFAC often issues general licenses to resolve ambiguities or uncertainties in a given sanctions program, which arise most commonly in programs imposing broad measures.\footnote{274 Werner Interview, supra note 24.} In cases where ambiguity or uncertainty is unanticipated, OFAC may issue general licenses in response to a deluge of specific license applications voicing similar concerns.\footnote{275 See, e.g., infra note 330 (discussing the swamping of OFAC’s licensing division in the early days of the recent Libya sanctions); see infra notes 388-92, 404-07 and accompanying text (discussing how the United States used general licenses in its Libya sanctions program to respond to compliance difficulties).} Where possible, however, OFAC prefers to anticipate these problems and pair new regulations with appropriate general licenses.\footnote{276 Werner Interview, supra note 24.}

This was the case with the sanctions imposed against the Palestinian Authority in 2006.\footnote{277 Another more recent example of OFAC bundling new sanctions with anticipatory general licenses was the recent ratcheting up of the Syria sanctions following the Syrian government’s military response to civilian protests. See infra notes 414-420 and accompanying text (contrasting the United States’ recent approaches to sanctions in Libya and Syria); see also supra notes 213-218 (discussing generally the conflict in Syria and recent U.S. sanctions there).} In the 2006 Palestinian parliamentary elections, Hamas, a designated terrorist entity under several U.S. sanctions programs, won a majority of seats from the Fatah party.\footnote{278 Steven Erlanger, Hamas Routs Ruling Faction, Casting Pall on Peace Process, N.Y. TIMES (Jan. 27, 2006), http://www.nytimes.com/2006/01/27/international/middleeast/27mideast.html?pagewanted=all.} Hamas’ victory and newfound position of power within the Palestinian Authority led OFAC to prohibit transactions between U.S. citizens and the Authority, on the ground that Hamas had a property interest in those transactions.\footnote{279 See Global Terrorism Sanctions Regulations, 71 Fed. Reg. 27,199 (May 10, 2006) ("OFAC has determined that, as a result of the recent elections, HAMAS has a property interest in the transactions of the Palestinian Authority. Accordingly . . . U.S. persons are prohibited from engaging in transactions with the Palestinian Authority unless authorized.").} Five general
licenses accompanied this prohibition, however.\textsuperscript{280} Several of these licenses were designed to ensure that the sanctions did not unduly disrupt activity deemed legitimate and necessary, including authorizations of transactions by U.N. officials and transactions incident to the daily lives of U.S. citizens living in the region.\textsuperscript{281} Two of the general licenses focused on targeting the wrongdoers while minimizing collateral damage.\textsuperscript{282} General License No. 4 focused the pressure on Hamas by permitting transactions with Fatah party leader President Mahmoud Abbas and his affiliates, the Palestinian judiciary, and non-Hamas members of the Palestinian Legislative Council.\textsuperscript{283} General License No. 6 authorized in-kind donations of medicine, medical devices, and medical services to the Ministry of Health.\textsuperscript{284}

There is an advantage in bundling new sanctions with general licenses in this way. General licenses authorize the types of transactions that the U.S. government has no interest in frustrating.\textsuperscript{285} The President can, of course, cancel a sanctions program by executive order.\textsuperscript{286} When the United States promulgates such exemptions as licenses rather than full-fledged executive or legislative measures, however, OFAC retains the ability to revoke or amend the exemptions in the case of abuse or changed circumstances.\textsuperscript{287} Even when OFAC revokes a general license, specific licensing remains available to ensure that legitimate and desirable transactions get through.\textsuperscript{288}


\textsuperscript{281} See 31 C.F.R. § 594.510 (2012) (authorizing “[o]fficial activities of certain international organizations; U.S. person employees of certain governments”); § 594.511 (authorizing certain “[t]ravel, employment, residence and maintenance transactions with the Palestinian Authority”); § 594.12 (authorizing “[p]ayment of taxes and incidental fees to the Palestinian Authority”); § 594.514 (authorizing the conclusion of preexisting contractual and programmatic obligations with the Palestinian Authority).

\textsuperscript{282} See §§ 594.503–.504.

\textsuperscript{283} See § 594.513 (authorizing “[t]ransactions with entities under the control of the Palestinian President and certain other entities”).

\textsuperscript{284} See § 594.515.

\textsuperscript{285} Werner Interview, \textit{supra} note 24.

\textsuperscript{286} Id.

\textsuperscript{287} Id.

\textsuperscript{288} Id.
In other cases, OFAC may issue a general license to effectuate or facilitate the actions or policies of a higher executive authority, such as the Secretary of the Treasury, the Secretary of State, or the President.\textsuperscript{289} For example, as discussed in Part III.B above, in the mid-1990s, in response to representations from North Korea that it would suspend its nuclear program, the United States agreed to reduce its trade and economic sanctions against North Korea, which, until that point, constituted a virtual embargo on all trade.\textsuperscript{290} In addition to amending the regulations it had in place, OFAC issued general licenses allowing exports to North Korea, investment in a number of North Korean industries, and brokered transactions.\textsuperscript{291} OFAC also licensed the importation of most North Korean-origin goods and raw materials, although these imports required prior approval from OFAC and affirmations from the importer that the importation of the goods was not otherwise prohibited by various arms control measures that remained in place.\textsuperscript{292}

2. Specific Licenses

In addition to general licenses, OFAC issues specific licenses, which authorize a particular transaction upon the written application of the prospective licensee.\textsuperscript{293} OFAC’s use of specific licenses reflects the reality that in a comprehensive sanctions regime, it is impossible to anticipate or generally authorize everything.\textsuperscript{294} Unlike general licenses, specific licenses only authorize the applicant to engage in the specified activity and are typically not made public.\textsuperscript{295}

\textsuperscript{289} \textit{Id.}

\textsuperscript{290} See Blageff, \textit{supra} note 64, at 3-4; \textit{supra} text accompanying notes 140-148. Of course, North Korea became notorious for misleading the international community with respect to its nuclear weapons technology research and development. \textit{See generally} Boehm, \textit{supra} note 70, at 92-106 (summarizing North Korea’s history of flouting its non-proliferation obligations).

\textsuperscript{291} Blageff, \textit{supra} note 64, at 4; \textit{see} Foreign Assets Control Regulations, 65 Fed. Reg. 38,165-66 (June 19, 2000).

\textsuperscript{292} Blageff, \textit{supra} note 64, at 4; \textit{see} Foreign Assets Control Regulations, 65 Fed. Reg. 38,165-66.

\textsuperscript{293} OFAC FAQ, \textit{supra} note 34, at 74.

\textsuperscript{294} Werner Interview, \textit{supra} note 24.

\textsuperscript{295} \textit{Id.; see} OFAC FAQ, \textit{supra} note 34, at 74. Occasionally, OFAC will publish a redacted version of its response to a specific license request as guidance. \textit{See, e.g.,} Letter
The requirements for an application for a specific license are detailed in the Code of Federal Regulations. In general, requests for specific licenses need not follow a specific format. OFAC provides an application form only for a few categories of requests, including applications for the release of funds blocked at a U.S. financial institution and applications for licenses to export agricultural commodities, medicine, and medical devices to Iran or Sudan under the TSRA. As a baseline, however, every specific license application must be in writing and provide a detailed description of the proposed transaction and the names and addresses of each of the individuals or companies involved. Additionally, the sanctions program under which the applicant seeks a specific license may require additional information from the applicant.

OFAC’s decision-making process with respect to specific license applications is less than transparent. OFAC generally

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297 OFAC FAQ, supra note 34, at 75.


299 OFAC FAQ, supra note 34, at 75.

300 See, e.g., OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF TREASURY, GUIDANCE ON THE RELEASE OF LIMITED AMOUNTS OF BLOCKED FUNDS FOR PAYMENT OF LEGAL FEES AND COSTS INCURRED IN CHALLENGING THE BLOCKING OF U.S. PERSONS IN ADMINISTRATIVE OR CIVIL PROCEEDINGS (2010); OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF TREASURY, LICENSING DIVISION, LICENSE APPLICATION GUIDELINES FOR EXPORTS TO IRAN AND SUDAN OF AGRICULTURAL COMMODITIES, MEDICINE, AND MEDICAL DEVICES (providing guidelines for persons applying for licenses to export goods allowed under the TSRA); OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF TREASURY, STATEMENT OF LICENSING POLICY REGARDING TRANSACTIONS WITH THREE COLOMBIAN ENTITIES DESIGNATED PURSUANT TO E.O. 12978.

301 Some commentators have raised First Amendment concerns based on this lack of transparency and what they view as an insufficient appeals process for license denials. See Tracy J. Chin, Note, An Unfree Trade in Ideas: How OFAC’s Regulations Restrain
does not publish the factors it takes into consideration when making a determination on a specific license application.\textsuperscript{302} Additionally, although OFAC issues opinion letters, regulatory interpretations, and other statements, the organization can change its opinion without public notice.\textsuperscript{303} This lack of transparency is due in part to OFAC's desire to maintain its discretion and not bind itself to any formula.\textsuperscript{304} Moreover, OFAC does not want to create a specific licensing process that is so transparent as to facilitate the fabrication by applicants of factual circumstances that skirt U.S. sanctions.\textsuperscript{305}

The length of time for a decision on a specific license varies based on a number of factors, one of which is the extent to which OFAC must coordinate with other government agencies.\textsuperscript{306} Sometimes an executive order mandates consultation with other agencies.\textsuperscript{307} On other occasions, such consultation occurs simply


\textsuperscript{302} \textit{But see generally Office of Foreign Assets Control, U.S. Dep't of Treasury, Comprehensive Guidelines for License Applications to Engage in Travel-Related Transactions Involving Cuba} (2011), [hereinafter \textit{OFAC, Cuba Travel License Guidelines}] (summarizing travel-related general licenses and providing the criteria for specific licenses, including examples of licensable activity for each category of specific license).

\textsuperscript{303} \textit{OFAC FAQ, supra} note 34, at 14-15. OFAC therefore recommends exercising caution when relying on such guidance. \textit{Id.}

\textsuperscript{304} Werner Interview, \textit{supra} note 24.

\textsuperscript{305} \textit{Id.} The lack of transparency also reflects the reality that because OFAC's sanctions programs deal with matters of national security and implement the foreign policy of the United States, the actual basis for the licensing decision and the considerations that are brought to bear cannot always be made public and subject to debate and comment. \textit{Id.} These concerns are also evident in the fact that OFAC generally promulgates regulations without the traditional notice and comment period. \textit{Id.}

\textsuperscript{306} \textit{See OFAC FAQ, supra} note 34, at 77 (listing such factors as "the complexity of the transactions under consideration, the scope and detail of interagency coordination, and the volume of similar applications awaiting consideration" and encouraging applicants to wait "at least two weeks before telephonically contacting the Licensing Division" with regard to an outstanding application).

\textsuperscript{307} \textit{See e.g., Exec. Order No. 13,441, 72 Fed. Reg. 43,499} (Aug. 3, 2007) (blocking the assets of "any person determined by the Secretary of the Treasury, in consultation with the Secretary of State" to have engaged in certain enumerated activities).
out of respect for the functions and interests of other regulatory bodies.\textsuperscript{308} For instance, if a specific license application raises issues of foreign policy, such as a travel license under the Iran or Cuba sanctions programs, OFAC often defers to the Department of State.\textsuperscript{309} In addition, with respect to sanctioned countries, OFAC handles some of the licensing of: (1) U.S. exports and (2) exports and re-exports from other countries involving U.S.-origin goods or technology and foreign products incorporating U.S. parts or based on U.S. technology. In the licensing decisions that OFAC does handle, OFAC coordinates with the Department of Commerce’s Office of Export Enforcement in making its decisions.\textsuperscript{310} For license applications from an indicted person, OFAC will not make a determination without consulting with the Department of Justice.\textsuperscript{311}

Licensing decisions are “final agency action[s],” and OFAC’s regulations do not provide for a formal appeals process.\textsuperscript{312} It is

\textsuperscript{308} Werner Interview, supra note 24.

\textsuperscript{309} See Corruption in the U.N. Oil-for-Food Program: Reaching a Consensus on U.N. Reform: Hearing Before the Permanent Subcomm. on Investigations Comm. on Homeland Sec. & Governmental Affairs, 109th Cong. 3 (2005) (statement of Robert Werner, Director, Office of Foreign Assets Control), available at http://www.hsgac.senate.gov/download/?id=c6d612e2-c256-4ff0-8012-27a71346625d ("OFAC referred travel applications to the Department of State for foreign policy guidance in appropriate cases, such as when an applicant claimed a compelling humanitarian consideration (e.g., a critical illness of an immediate family member in Iraq), or where circumstances indicated that a national interest was at stake."); OFAC FAQ, supra note 34, at 78 ("Many of OFAC’s licensing determinations are guided by U.S. foreign policy and national security concerns. Numerous issues often must be coordinated with the U.S. Department of State . . . .").

\textsuperscript{310} Blageff, supra note 64, at 2; Werner Interview, supra note 24.

\textsuperscript{311} Werner Interview, supra note 24. Conversely, with regard to applications for licenses to export agricultural commodities, medicine, and medical devices under the TSRA, OFAC routinely grants licenses without consulting other agencies. Id. The Department of State is generally kept apprised of such decisions, however. Id. In addition to the agencies already named, OFAC also works directly with the Federal Bureau of Investigation, the Department of Homeland Security’s U.S. Customs and Border Protection, and U.S. Immigration and Customs Enforcement. Oil for Influence: How Saddam Used Oil to Reward Politicians Under the U.N. Oil-for-Food Program: Hearing Before the Permanent Subcomm. on Investigations Comm. on Homeland Sec. & Governmental Affairs, 109th Cong. 2 (2005) (statement of Robert Werner, Director, Office of Foreign Assets Control), available at http://www.hsgac.senate.gov/download/ws-psi-werner-ofac.

\textsuperscript{312} See 31 C.F.R. § 501.802 (2012) ("The Office of Foreign Assets Control will
OFAC LICENSING AND ECONOMIC SANCTIONS

doubtful, moreover, that a formal appeals process would provide much recourse for denied applicants. The U.S. District Court for the District of Columbia has held that because OFAC has complete discretion over specific licensing decisions, "no justiciable standard" exists for evaluating such decisions. Nonetheless, OFAC will reconsider an application for "good cause," such as where the applicant can demonstrate "changed circumstances" or "submit additional relevant evidence that was not previously made available to OFAC." Additionally, the applicant may request that OFAC explain why it denied a specific license application. OFAC's responses to such requests are often no more than a generic indication that the applicant's described activity does not comport with U.S. foreign policy.

advise each applicant of the decision respecting filed applications. The decision of the Office of Foreign Assets Control acting on behalf of the Secretary of the Treasury with respect to an application shall constitute final agency action.

313 See Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury, 606 F. Supp. 2d 59, 76 n.22 (D.D.C. 2009) ("[B]ecause the specific license decisions [are] left to the complete discretion of OFAC, and OFAC ma[kes] the decisions based on foreign policy objectives in conjunction with the State department, there [is] no justiciable standard for evaluating the specific licensing decisions and they [cannot] be disturbed as a matter of law."); Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury, 516 F. Supp. 2d 43, 59 (D.D.C. 2007) ("[B]ecause no justiciable standard for evaluating OFAC's specific licensing decisions exists, the Court concludes 'agency action is committed to agency discretion by law.'")

314 OFAC FAQ, supra note 34, at 76. Reversals of previous denials of license applications are extremely rare, however. Werner Interview, supra note 24.


316 Werner Interview, supra note 24. Companies engaged in more global, repeatable activity sometimes receive more detailed explanations to aid their navigation of issues presented by a particular sanctions program, but those explanations are usually given orally. Id. These oral explanations are consistent with OFAC's hesitancy to publish any formal guidelines by which it makes specific licensing decisions. See supra text accompanying note 313.
D. The "Core Competencies" of OFAC Licensing

While OFAC's licensing practices may be opaque, they provide OFAC with the ability to maximize the efficacy of U.S. sanctions programs. There are three general attributes or "core competencies" associated with OFAC licensing that optimize U.S. sanctions: (1) the ability to operate flexibly, (2) the ability to mitigate collateral damage, and (3) the ability to adapt to changed circumstances in the target of a sanctions program.

1. Flexibility

Perhaps the most important aspect of OFAC's licensing practices is the ability to operate flexibly. This flexibility is apparent in many areas. For instance, OFAC has leveraged licensing to manage conflict-of-law situations. The extraterritorial application of certain U.S. sanctions programs, such as the Cuba sanctions, can adversely affect the interests of subsidiaries of U.S. businesses operating in countries that allow trade with Cuba and its people. As mentioned in Part III.A above, several countries have gone so far as to enact "blocking laws" that prohibit entities under their jurisdictions from complying with U.S. sanctions programs. Canada, the EU,

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317 Werner Interview, supra note 24.
318 See generally SPADONI, supra note 75, at 97-127 (analyzing how Helms-Burton has affected foreign investors and foreign companies with major business activities in Cuba); see also Boscariol, supra note 74, at 448 ("U.S. Congressman Robert Torricelli, one of the leading supporters of the 1992 CDA, estimated that U.S. trade with Cuba through foreign subsidiaries fell from U.S. $718 million in 1991 to only U.S. $1.6 million in 1992 as a direct result of the implementation of [the CDA].").
319 See supra Part III.A.
320 An Act to Amend the Foreign Extraterritorial Measures Act (FEMA), S.C. 1996, c. 28 (Can.).
321 Council Regulation 2271/96, Protecting Against the Effects of the Extraterritorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 1996 O.J. (L 309) 1 (EC). The EU’s negative response to the United States’ extraterritorial Cuba sanctions stands in contrast to its adoption of most of CISADA’s provisions, thus precluding conflicts over extraterritorial U.S. enforcement, at least with respect to EU businesses in the majority of cases. See EU and Secondary Sanctions, supra note 120, at 1251-54 (comparing the U.S. and EU measures and explaining the contrast with the EU’s reaction to the Cuba sanctions as a factor of economic, security, and political circumstances).
and Mexico\textsuperscript{322} each have blocking or anti-boycott laws in place to counteract U.S. sanctions against Cuba, for example.\textsuperscript{323} As a result, situations can arise where a foreign subsidiary of a U.S. company is faced with a Morton’s Fork: Comply with OFAC regulations and face prosecution by the business’s country of operation, or comply with local obligations and risk the imposition of penalties by OFAC.\textsuperscript{324}

On some occasions, these dilemmas are resolved by enforcement action.\textsuperscript{325} More typically, however, they are resolved by licensing.\textsuperscript{326} A U.S. company might indicate to its subsidiary

\textsuperscript{322} Ley de Protección al Comercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional [Act for the Protection of Commerce and Investments from Foreign Policies that Contravene International Law], Diario Oficial de la Federación [DO], 22 de Octubre de 1996. The act prohibits persons within the borders of Mexico from taking any action that “affects commerce or investment if those acts correspond to the application of laws of foreign countries.” Ryngaert, \textit{supra} note 123, at 646.

\textsuperscript{323} Ryngaert, \textit{supra} note 123, at 645-47, 662; see also Harry C. Clark, \textit{Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures}, 20 U. PA. J. INT’L ECON. L. 61, 81-87 (providing an overview of anti-boycott legislation in the EU, Canada, and other countries).


\textsuperscript{325} One of the more public examples of the FEMA/OFAC conflict involved a Wal-Mart in Winnipeg, Canada and Cuban pajamas. In February 1997, a shopper at the Winnipeg Wal-Mart notified the store that it had on its shelves pajamas marked “Made in Cuba.” Boscariol, \textit{supra} note 74, at 462. Wal-Mart, upon instruction from its U.S. parent company, pulled the Cuban pajamas from its shelves, and this action caught the attention of Canada’s Department of Foreign Affairs and International Trade, which referred the matter to the Canadian Justice Department for possible prosecution under FEMA. \textit{Id.} A few weeks later, after consulting with its lawyers and Canadian officials, Wal-Mart returned the pajamas to its shelves. \textit{Id.} at 463. What seems comical now was undoubtedly a harrowing experience for the Winnipeg Wal-Mart. Mere hours after the store restocked its shelves with the pajamas, Wal-Mart Stores, Inc., stated publicly that its Canadian subsidiary had deliberately defied instructions from headquarters to obey the U.S. sanctions. \textit{Id.} Despite the parent company’s attempt to divorce itself from the situation, OFAC announced that it was reviewing the situation and subsequently entered into a settlement with the parent company for a $50,000 fine and no finding of liability. \textit{Id.}; Fairley, \textit{supra} note 324, at 892. Situations like the Wal-Mart pajama crisis, where a company faces a direct conflict between its obligations under U.S. and Canadian law, and the enforcement agencies of both countries refuse to budge, are uncommon. \textit{Id.}

\textsuperscript{326} Werner Interview, \textit{supra} note 24; see also Fairley, \textit{supra} note 324, at 892 (noting that these conflict of law scenarios are more frequently resolved non-
operating in a jurisdiction that is subject to blocking legislation that it is company policy not to do business with Cuba.\textsuperscript{327} The subsidiary usually informs its home-state authority that it has received such a directive and informs its parent that local law precludes it from complying with OFAC sanctions.\textsuperscript{328} The parent company then alerts OFAC to the impasse, thus establishing the "foreign sovereign compulsion defense," which allows both parent and subsidiary to represent that they have complied as diligently as possible with their home country’s laws.\textsuperscript{329}

In most cases, “papering this Mexican standoff” works.\textsuperscript{330} While the subsidiary may still face repercussions for violating U.S. sanctions, OFAC will often grant a specific license in these situations, provided that U.S. foreign policy does not militate in favor of enforcing the sanction.\textsuperscript{331} Granting a specific license also allows OFAC to closely monitor the subsidiary’s trade with the sanctioned jurisdiction per the reporting requirements of the

\begin{footnotesize}
\begin{enumerate}
  \item Fairley, \textit{supra} note 324, at 892.
  \item \textit{Id.} This is required under Canada’s FEMA, for example. \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.} In some cases, however, specific licensing cannot resolve the conflict effectively. This was the case in the early months of the United States’ Libya sanctions during the Arab Spring, where the volume of specific license applications filed in response to the broad initial sanctions swamped OFAC’s licensing division. \textit{See Lord et al., \textit{supra} note 7, at 280 (noting that the specific license requests ‘create[d] more demand on an already over-burdened licensing department within OFAC’).} In the spring of 2011, numerous sanctioning bodies targeted Libya, and these actors’ regimes were often inconsistent. \textit{See id.} at 279-80 (‘[The lack of] grandfathering or wind-down clauses allowing the completion or payment of existing contracts . . . raised multiple practical questions regarding transactions such as payment of customs fees to Libyan customs authorities, letters of credit issued by Libyan banks, airline fares, crude oil aboard vessels, ships in Libyan ports, payment due for goods and services already delivered or received, and the like.’). The U.S. sanctions were among the broadest, as they targeted the Libyan government, yet the lack of an exemption for the completion of pre-existing contracts placed many businesses in a position where they faced a breach of their contractual obligations under non-U.S. law because their payment in U.S. dollars could not clear American banks. \textit{Id.} at 280. The only recourse for these businesses was to request a specific license from OFAC, which placed serious burdens on OFAC’s licensing division. \textit{Id.} Perhaps hoping to avoid this in Syria, OFAC’s Syria sanctions were bundled with a number of general licenses, one of which authorized the fulfillment of pre-existing contractual obligations. \textit{See infra} text accompanying notes 418-420 (discussing the 2011 Syria general licenses).
  \item Werner Interview, \textit{supra} note 24.
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\end{footnotesize}
license, and OFAC retains the ability to revoke the license if it is being abused (for example, if the U.S. parent company uses the subsidiary merely as a means of circumventing OFAC sanctions).  

OFAC also aspires to remain flexible with its sanctions by granting specific licenses to inadvertent violators and persons attempting in good faith to meet their obligations under the regulations. Although it appears from OFAC’s guidance that even “inadvertent” violations of U.S. economic sanctions are subject to penalties, OFAC’s regulations make clear that it will consider the willfulness or recklessness of the violation when assessing penalties. In addition to its consideration of a violator’s state of mind as a mitigating factor, OFAC occasionally issues specific licenses to allow inadvertent violators to reverse a prohibited transaction. For example, OFAC’s Iran sanctions prohibit, among other activities, the purchase, sale, or transportation of goods of Iranian origin. If, however, a person purchased goods without knowing or having reason to know that the goods were of Iranian origin, OFAC may grant that person a specific license to allow him to dispose of the goods. 

Further illustrating its flexibility, OFAC may use licensing to allay the compliance concerns of persons doing business in politically volatile situations where the distinction between a sanctioned party and a non-sanctioned government or country

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332 For a discussion of regulations put in place by the Canadian government to prevent U.S. companies from using their Canadian subsidiaries as conduits for trading with Cuba, see Fairley, supra note 324, at 893-94.

333 Werner Interview, supra note 24.

334 OFAC FAQ, supra note 34, at 13 (“OFAC does not have an ‘amnesty’ program [for inadvertent failures to comply]. The ramifications of non-compliance, inadvertent or otherwise, can jeopardize critical foreign policy and national security goals. OFAC does, however, review the totality of the circumstances surrounding any violation, including the quality of a company’s OFAC compliance program.”).


336 Werner Interview, supra note 24.


338 Werner Interview, supra note 24. Such specific licenses are not guaranteed, and OFAC may still assess penalties or require the person to forfeit the goods. Id.
becomes blurred. Such was the case in Lebanon following Hezbollah’s transition from a militia group to an influential political party. Following the assassination of former Lebanese Prime Minister Rafik Hariri and the subsequent withdrawal of the Syrian military from Lebanon, Hezbollah parlayed its military power into a position of prominence in the Lebanese government, culminating with the group’s securing fourteen seats in the 2005 Lebanese parliamentary election. This action put companies doing business in Lebanon in a precarious position. Although OFAC does not administer a sanctions program against the government of Lebanon, Hezbollah was, and remains, a

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Hariri was a reformer and opposed the longstanding Syrian occupation of Lebanon. Macdonald, supra. His assassination triggered the “Cedar Revolution,” a Lebanese political movement that sought to end Syrian influence in Lebanon. Id. Syria’s perceived responsibility for Hariri’s assassination fostered an anti-Syrian sentiment among the Lebanese people and led to the exit of Syrian forces from the country. Bloom, supra note 340, at 65; Macdonald, supra. Coincidentally, this created a military power vacuum that was filled by Hezbollah, the group now viewed as the most likely perpetrator of Hariri’s assassination. Bloom, supra note 340, at 65. Hezbollah soon developed a presence in the Lebanese government, eventually winning fourteen seats in the Lebanese parliament in 2005. Id. at 65-66.

designated terrorist entity on OFAC’s SDN List.\textsuperscript{343} Thus, companies operating in Lebanon, such as those doing business with Lebanon’s central bank or state-owned enterprises, expressed concern that OFAC may view such dealings as running afoul of U.S. sanctions against Hezbollah.\textsuperscript{344} As a measure of assurance to such companies and so as to avoid suffocating legitimate business in Lebanon and risk destabilizing the country, OFAC issued specific licenses for transactions that did not run the risk of furthering Hezbollah’s extremist objectives.\textsuperscript{345} In doing so, OFAC demonstrated a willingness to work with companies that make good-faith efforts to comply with U.S. sanctions.\textsuperscript{346}

2. Ability to Mitigate Collateral Damage

Because OFAC prefers to formulate its sanctions program broadly, its economic sanctions can affect the lives of unintended targets, such as ordinary citizens of foreign countries that have no influence in their sanctioned government.\textsuperscript{347} The broad reach of U.S. sanctions can also unnecessarily put U.S. citizens and companies at a competitive disadvantage, undermine international support for the sanctions programs, and even undermine the policy objectives of the programs.\textsuperscript{348} One way in which OFAC mitigates


\textsuperscript{344} Werner Interview, supra note 24.

\textsuperscript{345} Id.

\textsuperscript{346} This willingness was demonstrated again with Libya in 2011. Recognizing the potential for confusion raised by the United States’ sanctioning of the Libyan government and its affiliates, OFAC attempted to provide clarity through numerous general licenses, while at the same time urging businesses not operating under a general license to submit applications for specific licenses. Lord et al., supra note 7, at 279.

\textsuperscript{347} Werner Interview, supra note 24.

\textsuperscript{348} Id. Then-Secretary of State Madeline Albright acknowledged this reality in her March 17, 2000 remarks before the American-Iranian Council regarding U.S. sanctions in Iran, in which she announced that the Clinton administration was easing certain sanctions affecting Iranian businesspeople. See Madeline K. Albright, Secretary, U.S. Dep’t of State, Remarks Before the American-Iranian Council: American-Iranian Relations (Mar. 17, 2000), available at http://www.fas.org/news/iran/2000/000317.htm. She noted, “The purpose of our sanctions . . . is to spur changes in policy. They are not an end in themselves, nor do they seek to target innocent civilians.” Id.; see also
the collateral damage of its holistic sanctions is by issuing licenses that permit U.S. citizens to export food and medical supplies\textsuperscript{349} and provide humanitarian aid\textsuperscript{350} to people in sanctioned countries. In an effort to avoid placing private enterprises at an unnecessary competitive disadvantage, which can damage U.S. influence internationally and U.S. interests as a whole, OFAC may also allow certain activities from an otherwise sanctioned country.\textsuperscript{351} Additionally, OFAC issues licenses to avoid interfering with the legitimate activities of international and charitable organizations and to permit U.S. persons to participate in such organizations.\textsuperscript{352} By licensing these types of activities and transactions, OFAC focuses its sanctions and the punitive consequences thereof, to the extent possible, on those in a position to produce the desired change, rather than on innocent civilians and businesses.\textsuperscript{353}

The TSRA generally prohibits the President from unilaterally banning or controlling the export of agricultural commodities, medicine, or medical devices to sanctioned countries.\textsuperscript{354} In

\textsuperscript{349} See infra notes 354-363 and accompanying text (discussing the Trade Sanctions Reform and Export Enhancement Act).

\textsuperscript{350} See, e.g., OFAC, CUBA TRAVEL LICENSE GUIDELINES, supra note 302, at 36-38 (providing guidance on applying for a license to travel to Cuba for purposes of “certain humanitarian projects in or related to Cuba designed to directly benefit the Cuban people, including but not limited to medical and health-related projects; construction projects intended to benefit legitimately independent civil society groups; environmental projects; projects involving formal or non-formal educational training, within Cuba or off-island, on topics including civil education, journalism, advocacy and organizing, adult literacy, and vocational skills; community-based grass roots projects; projects suitable to the development of small-scale private enterprise; projects that are related to agricultural and rural development that promote independent activity; and projects to meet basic human needs”); OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF TREASURY, IRANIAN TRANSACTIONS REGULATIONS: FUNDS TRANSFERS TO IRAN FOR HUMANITARIAN RELIEF AFTER MARCH 25, 2004 (2004) (authorizing for a “ninety-day period... donations of funds directly to US-based non-governmental organizations (“NGOs”) specifically licensed by [OFAC] to be used in direct support of humanitarian relief and reconstruction activities being undertaken in Iran in response to the earthquake in Bam”).

\textsuperscript{351} Werner Interview, supra note 24; see infra text accompanying notes 368-72.

\textsuperscript{352} See infra notes 364-367, 374-377 and accompanying text.

\textsuperscript{353} See Albright, supra note 348.

\textsuperscript{354} The TSRA defines unilateral sanctions as those imposed by the United States.
OFAC LICENSING AND ECONOMIC SANCTIONS 793

contrast with the broad discretion afforded to the President under TWEA and IEEPA, the TSRA is an example of Congress limiting the President's foreign policy discretion by prescribing a specific framework within which the President may impose export controls.\textsuperscript{355} If the President wishes to impose such unilateral sanctions, he must submit a report to Congress describing the proposed restrictive measures and the actions by the targeted country that justify the restrictions, and Congress must approve the report by joint resolution.\textsuperscript{356}

The TSRA contains important exceptions to its general prohibition on unilateral agricultural and medical supplies sanctions.\textsuperscript{357} The first of these exceptions exempts from the rule countries in which the United States has military involvement, whether through a declaration of war, a statutory authorization of the use of military force, or other general hostilities.\textsuperscript{358} The TSRA also generally exempts arms control and nonproliferation sanctions.\textsuperscript{359} Another important exemption requires exporters of agricultural or medical commodities to designated state sponsors of terrorism to obtain a license before exporting such goods.\textsuperscript{360} State sponsors of terrorism are designated by the State Department

outside of a multilateral regime in which other countries have agreed to impose substantially equivalent measures or those imposed without a mandatory decision from the U.N. Security Council. Trade Sanctions Reform and Export Enhancement Act (TRSA), 22 U.S.C. §§ 7201-2702 (2006).


\textsuperscript{356} TRSA § 7202.

\textsuperscript{357} See id. § 7203.

\textsuperscript{358} Id. § 7203(1).

\textsuperscript{359} See id. § 7203(2).

\textsuperscript{360} Id. § 7205(a)(1).
and currently include Cuba, Iran, Sudan, and Syria.\textsuperscript{361} TSRA exports to such countries, or entities within such countries, can only be made pursuant to one-year licenses.\textsuperscript{362} OFAC administers this licensing process with respect to Iran and Sudan.\textsuperscript{363}

Commonly, sanctioning entities exclude humanitarian exports like agricultural and medical commodities, from their controls, though this exclusion often occurs through blanket authorizations.\textsuperscript{364} The TSRA licensing system appears to hold an advantage over boilerplate statutory or regulatory exemptions in that it allows the United States to closely monitor humanitarian exports to countries that threaten U.S. foreign policy interests.\textsuperscript{365} For instance, OFAC can deny license applications where it finds that a TSRA application requests a license to export goods to an entity that OFAC determines is actually a front for a designated terrorist group.\textsuperscript{366} At the other end of the spectrum, OFAC may determine that the individual review of TSRA license applications is no longer necessary, as it did with Sudan in 2009, and issue a general license authorizing such exports.\textsuperscript{367}


\textsuperscript{362} Id. § 7205(a)(1).


\textsuperscript{365} Werner Interview, supra note 24.

\textsuperscript{366} Id.

\textsuperscript{367} Id. In September 2009, to resolve a statutory conflict, OFAC amended the Sudanese Sanctions Regulations to authorize all TSRA exports to Southern Sudan and other specified areas of Sudan. See Sudanese Sanctions Regulations, 74 Fed. Reg. 46,361 (Sept. 9, 2009) (to be codified at 31 C.F.R. pt. 538). The lifting of trade sanctions on those areas of Sudan through the Darfur Peace and Accountability Act of 2006 and the implementing executive order conflicted with the TSRA’s licensing provisions, which at the time required OFAC to license agricultural and medical supply}
To avoid economic harm to individuals and businesses that have no influence in a targeted government’s activities, OFAC will exempt certain types of transactions from an otherwise comprehensive ban. For instance, in 2000, OFAC issued a general license authorizing the importation of Iranian-origin foodstuffs, carpets, and related transactions. This licensure was part of the United States’ overtures toward Iran during the end of the Clinton administration, through which the United States attempted to foster goodwill between Iranians and Americans while still maintaining restrictive measures targeting the Iranian government as reprisal for its nuclear program and sponsorship of terrorism. Though pistachio, caviar, and carpet exports may compose a relatively small portion of Iran’s overall trade, the authorization of these imports surely gave a boost to the private Iranian businesses that produce these goods. It also may have restored some cultural ties between the United States and Iran.

exports to the specified areas of Sudan even though, under the new statutory regime, “no OFAC authorization was required to export most other items to those areas.” Id. at 46, 361-62.


See id. (“The Treasury Department is amending the Iranian Transactions Regulations to add general licenses authorizing the importation into the United States of, and dealings in, certain Iranian-origin foodstuffs and carpets and related transactions.”).

See Albright, supra note 348 (remarking on these objectives); David Stout, U.S. to Drop Longtime Ban on Luxuries from Iran, N.Y. TIMES (Mar. 15, 2000), http://www.nytimes.com/2000/03/15/world/us-to-drop-longtime-ban-on-luxuries-from-iran.html (“[T]he Clinton administration, eager to encourage moderation in the land where the United States has been reviled as the Great Satan, is about to ease some import bans on Iranian consumer goods: pistachios, caviar and carpets.”).

See Stout, supra note 370 (“The value of the pistachios, caviar and carpets may be relatively small in terms of Iran’s overall trade but it is significant for the boost it can give to private Iranian entrepreneurs by pumping much-needed hard currency into their country, administration officials said.”).

See id. (“The move may also affect another kind of currency, less definite but no less real, in the United States: the social cachet that comes from being able to buy things that have been largely forbidden since the shah of Iran was driven from the Peacock Throne in 1979.”). As then-Secretary of State Albright put it, the authorization of these imports was “designed to show the millions of Iranian craftsmen, farmers and fisherman who work in these industries, and the Iranian people as a whole, that the United States bears them no ill will. . . . [and that] the United States will explore ways to remove unnecessary impediments to increase contact between American and Iranian scholars, professional artists, athletes, and non-governmental organizations[, which] . . . will serve
OFAC’s licensing practices additionally reflect a desire to prevent U.S. economic sanctions from interfering with the legitimate humanitarian and diplomatic activities of charitable non-governmental organizations (NGOs) and international organizations like the U.N. or from unduly restricting the ability of U.S. persons to transact with foreign diplomats. The activities of these organizations and diplomats may be aimed at brokering peace, developing international trade, providing humanitarian aid, and other endeavors consistent with U.S. foreign policy. Yet without licenses from OFAC, U.S. citizens would often be prohibited from working for international organizations dealing with sanctioned countries.

On a case-by-case basis similar to specific licensing, OFAC issues registration numbers to NGOs that allow registered organizations to conduct humanitarian or religious activities in countries or areas subject to economic sanctions. The permitted transactions for registered NGOs are sometimes specified by a registration number to deepen bonds of mutual understanding and trust.” Albright, supra note 348.

Of course, just as OFAC may dial down a sanctions program with improving international relations, it may tighten them again when relations turn sour. With the enactment of CISADA, the importation of Iranian pistachios, carpets, and caviar is again prohibited. See Iranian Transactions Regulations, 75 Fed. Reg. 59,611 (Sept. 28, 2010) (“OFAC is amending the Iranian Transactions Regulations . . . to remove general licenses authorizing the importation into the United States of, and dealings in, certain foodstuffs and carpets of Iranian origin and related services, and to implement the import and export prohibitions in section 103 of [CISADA].”); see also Joe Palazzolo, Iran Sanctions Means Return to ‘Persian-Style’ Rugs, WALL ST. J. (Sept. 27, 2010), http://blogs.wsj.com/corruption-currents/2010/09/27/iran-sanctions-means-return-to-persian-style-rugs (“American living rooms will lament Sept. 29, 2010: the day Persian carpets ceased flying into the U.S. legally. That’s when a ban on ‘carpets and other textile floor coverings and carpets used as wall hangings’ of Iranian origin takes effect, as part of a package of sanctions issued by the U.S. against Iran over its nuclear program.”).

373 See infra notes 378-379 and accompanying text.
374 See infra text accompanying notes 380-382.
375 See infra notes 384-387 and accompanying text.
376 For example, as discussed below, a general license under the U.S. Iranian sanctions allows U.S. persons to conduct the official business of the International Monetary Fund (“IMF”) and the World Health Organization (“WHO”), among other institutions. See infra text accompanying notes 381-382.
377 See infra text accompanying notes 381-382.
published statement of licensing policy under the sanctions program for which the registration number is issued; in other cases, OFAC will specify the permitted activities directly in its letter issuing the registration number.\textsuperscript{379} In addition, in connection with many of its sanctions programs, OFAC has issued general licenses permitting U.S. persons to conduct transactions with sanctioned countries on behalf of international organizations.\textsuperscript{380} For instance, OFAC's Iran sanctions program has a general license in place that authorizes U.S. citizens employed by the U.N., the World Bank, the International Monetary Fund, the International Atomic Energy Agency, International Labor Organization, or the World Health Organization to perform "transactions for the conduct of the official business of" those organizations.\textsuperscript{381} OFAC issued this general license "[i]n light of the U.S. interest in promoting the hiring and retention of Americans by international organizations."\textsuperscript{382}

Aside from using general licenses to permit the involvement of U.S. persons with certain international organizations, OFAC also issues general licenses to facilitate third-country diplomatic missions to sanctioned countries as well as the diplomatic missions of some sanctioned countries to the United States.\textsuperscript{383} General licenses issued under the Syria sanctions program typify

\textsuperscript{379} Id. § 501.801(c)(1). OFAC requires extensive information from NGO registrants, including the identification of any field offices, subcontracting organizations, sources of income, financial institutions holding deposits on behalf of the NGO, as well as a detailed description of the NGO's humanitarian or religious activities in the sanctioned countries or geographic areas. Id. § 501.801(c)(2). NGOs that receive a registration number must reference that number in all documentation and transactions related to the authorization provided by its registration. Id. § 501.801(c)(3).

\textsuperscript{380} See, e.g., id. §§ 537.509, 560.539 (authorizing "transactions and activities otherwise prohibited by this part that are for the conduct of the official business of the United States Government, the United Nations, the World Bank, or the International Monetary Fund"). The IMF's stated objectives include promoting international monetary cooperation, international trade, and exchange stability. See INT'L MONETARY FUND, ARTICLES OF AGREEMENT art. I, at 2 (2011). In its latest budget, the WHO indicated such objectives as reducing the health, social, and economic burdens of communicable diseases and combating HIV/AIDS, tuberculosis, and malaria. See WORLD HEALTH ORG., PROGRAMME BUDGET 2012-2013, at 20-32 (2011).

\textsuperscript{381} Id.


\textsuperscript{383} Werner Interview, supra note 24.
these facilitative measures.\textsuperscript{384} General License No. 1 under the Syria sanctions, for example, authorizes, with limited restrictions, "[t]he provision of goods or services in the United States to the diplomatic missions of the Government of Syria to the United States and the United Nations and payment for such goods or services."\textsuperscript{385} Additionally, General License No. 8 authorizes employees, contractors, and grantees of the U.N. and its "Specialized Agencies, Programmes, and Funds" to perform transactions for the conduct of the official business of those U.N.-related entities.\textsuperscript{386} Finally, General License No. 12 authorizes "U.S. depository institutions, U.S. registered brokers or dealers in securities, and U.S. registered money transmitters . . . to process funds transfers for the operating expenses or other official business of third-country diplomatic or consular missions in Syria," so long as the transfer does not in any way involve the Syrian government or a person designated on the SDN List.\textsuperscript{387}

These general licenses demonstrate OFAC's desire to avoid interference with U.S. foreign relations. A frequent goal among U.S. sanctions programs is to incentivize political or social change in a targeted country. By issuing general licenses that facilitate the dealings of international organizations, sanctioned countries' diplomats in the United States, and American and third-country diplomats in sanctioned countries, OFAC avoids frustrating the efforts of individuals and entities that share that same goal.

\textsuperscript{384} Id.

\textsuperscript{385} Syr. Gen. Lic. No. 1: Syrian Diplomatic Missions to the United States (2011), http://www.treasury.gov/resource-center/sanctions/Programs/Documents/syria_gll.pdf. The license is conditioned on the goods or services not being for resale and being for "the conduct of the official business of the missions, or for the personal use of the employees on the missions." Id. The transaction must also not involve real property and cannot otherwise be prohibited by law. Id.


3. Adaptability

The third core competency of OFAC's licensing practices is the ability to adapt a particular sanctions program quickly in response to political or circumstantial changes. In situations where sanctions goals can change with the tides of revolution, the slow march of legislative and rulemaking processes may be incapable of producing a timely response. Sanctions targeting government-owned or government-operated entities may need to be lifted in response to a positive regime change or re-imposed in the event that the new government fails. OFAC often utilizes general licenses to manage these fast-paced scenarios, either by easing sanctions through license adoption or strengthening sanctions through license revocation. By issuing or revoking general licenses, OFAC can react to the changing political circumstances of a targeted country without requiring a regulatory overhaul or the signing or withdrawal of an executive order.

The sanctions imposed against the Palestinian Authority in the wake of the 2006 Palestinian parliamentary elections illustrate OFAC's use of licensing to adapt to changed circumstances. As

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388 Werner Interview, supra note 24.
389 Id.
390 Id.
391 Id. OFAC's ability to adapt its sanctions regulations was apparent in the wake of the 2009-2010 Iranian presidential election protests. The protests, which were in reaction to what many Iranians saw to be a fixed presidential election, demonstrated the important role social media can play in providing support to pro-democratic movements. See Brad Stone & Noam Cohen, Social Networks Spread Defiance Online, N.Y. TIMES (June 16, 2009), at A11, available at http://www.nytimes.com/2009/06/16/world/middleeast/16media.html. OFAC's Iran sanctions at the time generally prohibited the sale or supply to Iran of the software necessary for the "exchange of personal communications... over the Internet." See Cuban Assets Control Regulations; Sudanese Sanctions Regulations; Iranian Transactions Regulations, 75 Fed. Reg. 10,997, 10,998 (Mar. 10, 2010) (to be codified at 31 C.F.R. pt. 515, 538 & 560). To ensure that the Iran sanctions would not chill the free exchange of information over the Internet in that country, OFAC issued a general license "authoriz[ing] the exportation... of certain services and software incident to the exchange of personal communications over the Internet, such as instant messaging, chat and e-mail, social networking, sharing of photos and movies, web browsing, and blogging." See id. OFAC found that similar considerations applied with respect to its Sudan and Cuba sanctions, and the agency similarly licensed Internet communications-related software under those programs. See id. at 10,998-99.
392 See Global Terrorism Sanctions Regulations; Terrorism Sanctions Regulations;
discussed in Part IV, in the 2006 West Bank and Gaza elections, Hamas, an OFAC designated terrorist organization, won the majority of the Palestinian parliamentary seats from the U.S.-supported Fatah party, led by Palestinian Authority President Mahmoud Abbas. With Hamas and its nominated Prime Minister Ismail Haniya gaining control of the Palestinian Authority, OFAC determined that Hamas had a property interest in Palestinian Authority transactions. This determination resulted in the blocking of Palestinian Authority assets and transactions. After numerous incidents of violence in early 2007, Hamas took control of the Gaza Strip. In response, President Abbas dissolved the unity government, dismissed Ismail Haniya, and appointed Salam Fayyad as Prime Minister. With the effective

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393 Erlanger, supra note 278.

394 See Global Terrorism Sanctions Regulations; Terrorism Sanctions Regulations; Foreign Terrorist Organizations Sanctions Regulations, 71 Fed. Reg. 27,199 (May 10, 2006) (to be codified at 31 C.F.R. pt. 594-95, 597) (“OFAC has determined that, as a result of the recent elections, HAMAS has a property interest in the transactions of the Palestinian Authority. Accordingly . . . U.S. persons are prohibited from engaging in transactions with the Palestinian Authority unless authorized.”).

395 See id. As discussed above, this initial freeze was accompanied by a group of general licenses permitting certain transactions with the Palestinian Authority. See supra text accompanying notes 279-284.


397 Isabel Kershner & Steven Erlanger, Gaza Turmoil Prompts Abbas to Dissolve Government, N.Y. TIMES (June 14, 2007), http://www.nytimes.com/2007/06/14/world/middleeast/14end-mideast.html; see also Abbas Sacks Hamas-Led Government, BBC NEWS (June 15, 2007), http://news.bbc.co.uk/2/hi/middle_east/6754499.stm (“Mr[.] Abbas will now rule by presidential decree until the conditions are right for elections.”). Hamas scoffed at Abbas’s assertions of control and continued to control Gaza, while the Palestinian Authority controlled the West Bank. Al Fatah, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/organizations/f/fatah_al/index.html (last visited Jan. 13, 2013). In May 2011, Hamas and Fatah signed a reconciliation accord and planned to hold elections for another unity government within a year. Ethan Bronner, Palestinian Factions Sign Accord to End Rift, N.Y. TIMES (May 5, 2011), http://www.nytimes.com/2011/05/05/world/middleeast/05palestinians.html. Though the elections were planned for May 2012, internal Hamas divisions have stalled the process indefinitely. See Ethan Bronner, Mideast Din Drowns Out Palestinians, N.Y. TIMES (Mar. 8, 2012), http://www.nytimes.com/2012/03/08/world/middleeast/arab-spring-and-iran-tensions-leave-palestinians-sidelined.html (observing that the Arab Spring and Iran’s nuclear program have diverted the United States and Israel from assisting political
separation of Hamas from the Palestinian Authority, OFAC issued a general license authorizing U.S. citizens to engage in all transactions with the Authority.398

The United States’ use of economic sanctions in response to the 2011 Libyan civil war provides a more recent example of the use of general licenses to adapt to a rapidly evolving situation.399 On February 25, 2011, President Obama signed Executive Order 13,566 (EO 13,566), which prohibited all dealings by U.S. persons in the assets of certain named members of the Muammar Gaddafi regime, any person that the Treasury Secretary designated, and generally all persons involved in the political oppression of the Libyan people.400 Additionally, EO 13,566 froze the assets of and prohibited U.S. persons from transacting with the Government of Libya, its agencies and controlled entities, and the Central Bank of Libya.401 In imposing these sanctions, however, the Obama administration understood that such broad measures could eventually become unnecessary and even harmful to a new Libyan government.402 Thus, as is commonplace with U.S. sanctions, EO 13,566 authorized the Treasury Department to issue licenses as well as delist designated persons.403

The broad Libya sanctions triggered a torrent of specific

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398 See Global Terrorism Sanctions Regulations; Terrorism Sanctions Regulations; Foreign Terrorist Organizations Sanctions Regulations, 72 Fed. Reg. 61,517, 61,517 (Oct. 31, 2007) (to be codified at 31 C.F.R. pt. 594-95, 597) (“Based on foreign policy considerations resulting from recent events in the West Bank and Gaza, including the appointment of Salam Fayyad . . . and of other ministers not affiliated with HAMAS, OFAC is revising [its counterterrorism sanctions] to add a new general license . . . authorizin[g] U.S. persons to engage in all transactions with the Palestinian Authority.”). Nevertheless, OFAC’s original determination that Hamas has a property interest in the Palestinian Authority remains in place; thus, should the political situation in the Palestinian territories change, OFAC can simply revoke the general license. See id. (“Following the 2006 parliamentary elections in the West Bank and Gaza, . . . OFAC determined that HAMAS had a property interest in the transactions of the Palestinian Authority. That determination remains in place.”).


400 See id. § 1.

401 See id. § 2.

402 See id. (explaining in its preamble that the sanctions are intended as a response to the violence perpetrated against the Libyan people by the Gaddafi regime and to prevent the misappropriation by Gaddafi loyalists of Libyan state assets).

403 See id. at §§ 6, 11.
license applications, many of which concerned the same acceptable practices.\(^404\) Thus, OFAC initially used its licensing power to issue general licenses responding to the common issues addressed in the specific license applications it received.\(^405\) These general licenses included authorizations of transactions with financial institutions controlled by the Libyan government but were organized under the laws of another country,\(^406\) transactions involving the provision of goods and services to the Libyan government’s diplomatic missions,\(^407\) transactions for certain legal services,\(^408\) and transactions incident to the normal operations of investment funds that had sanctioned persons as non-controlling minority investors.\(^409\)

As the Libya conflict abated and the Gaddafi regime became less of a threat to the Libyan people, OFAC issued numerous general licenses that restored normal economic relations between the United States and Libya.\(^410\) Indeed, approximately one month after the commencement of NATO operations,\(^411\) OFAC issued a general license permitting transactions related to certain oil, gas, and petroleum exports from Libya occurring under the auspices of the Transitional National Council of Libya (TNC),\(^412\) a then-

\(^{404}\) See Lord et al., supra note 7, at 279-91 (providing a detailed account of the general licenses issued through the progression of the Libyan civil war).

\(^{405}\) Id. at 279-80.

\(^{406}\) Identification of Nine Entities Pursuant to Executive Order 13,566 and Amendment of General License No. 1A, 76 Fed. Reg. 37,404 (proposed June 21, 2011).


\(^{408}\) Id. at 38,566.

\(^{409}\) See Office of Foreign Assets Control, U.S. Dep’t of Treasury, Executive Order 13566 of February 25, 2011 Blocking Property and Prohibiting Certain Transactions Related to Libya, General License No. 4: Guidance and General License with Respect to Investment Funds in Which There Is a Blocked Non-Controlling, Minority Interest of the Government of Libya (2011) [hereinafter OFAC, Libya Sanctions]; Lord et al., supra note 7, at 280-82, 284-85 (summarizing the provisions of these licenses).

\(^{410}\) See Lord et al., supra note 7, at 286-91 (summarizing the general licenses under the Libya program issued during the rise of the new Libyan government).

\(^{411}\) See Holmes, supra note 11.

\(^{412}\) See Office of Foreign Assets Control, U.S. Dep’t of Treasury, Executive Order 13566 of February 25, 2011 Blocking Property and Prohibiting Certain Transactions Related to Libya, General License No. 5: Authorizing Transactions Related to Certain Oil, Gas, or Petroleum Products Exported
emerging anti-Gaddafi group which France had recognized as the sole representative of the Libyan people. In August 2011, to reconcile the United States’ recognition of the TNC as the legitimate governing authority in Libya with the contemporary sanctions targeting the Libyan government, OFAC issued a license generally authorizing all transactions with the TNC. Following the fall of Tripoli, moreover, OFAC licensed transactions with the Libyan government and central bank. Finally, in December 2011, OFAC issued a general license freeing the remainder of those entities’ assets. While these general licenses reduced the force of the U.S. sanctions against Libya, EO 13,566 remains in place, and thus OFAC retains the flexibility to ratchet up its sanctions should a change in Libyan politics militate such action.

Though the Syrian uprising in many ways resembled the concurrent Libyan civil conflict, OFAC took a markedly different

FROM LIBYA (2011).


417 See Libya Sanctions, U.S. DEP’T OF THE TREASURY, http://www.treasury.gov/resource-center/sanctions/Programs/pages/libya.aspx (last visited Jan. 13, 2013) (listing EO 13,566 and the general licenses currently in place). The current status of the Libya sanctions reflects the fact that it is easier for OFAC to issue or revoke a license than it is to reinstate a terminated sanctions program. Werner Interview, supra note 24.
approach with the al-Assad regime.\textsuperscript{418} In Syria, six general licenses accompanied the release of EO 13,582.\textsuperscript{419} Several of these licenses, such as those authorizing transactions with Syrian diplomats and the provision of certain legal services, mirrored the licenses issued under the Libya program; others anticipated activities that, in the absence of a general license, would have been the subject of burdensome specific license requests.\textsuperscript{420} Recognizing the role social media played in the 2009 Iranian election protests, one general license allows the export of certain services incident to Internet-based personal communications.\textsuperscript{421} This strategy suggests that OFAC learned from its experience with Libya, where the agency had scrambled to address a wave of specific license applications with responsive general licenses.\textsuperscript{422} As some commentators have argued, the United States’ approaches in the Libya and Syria programs suggest that OFAC may couple the imposition of future sanctions initiatives with appropriate general license carve-outs, the revocation or limitation of which could easily adjust the scope and severity of the restrictions, as exigencies warrant.\textsuperscript{423}

\begin{footnotesize}
\begin{enumerate}
\item Werner Interview, supra note 24.
\item Id.
\item See Lord et al., supra note 7, at 296; OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF TREASURY, \textit{GENERAL LICENSE NO. 5: EXPORTATION OF CERTAIN SERVICES INCIDENT TO INTERNET-BASED COMMUNICATIONS AUTHORIZED} (2011).
\item Lord et al., supra note 7, at 279-80.
\item See id. at 276, 298-99. Based on their analysis of the Libya and Syria sanctions, Jeff Lord and his colleagues conclude that the U.S. government has shown a willingness to use sanctions to foster regime change, “crafting and eventual[ly] lifting . . . sanctions to provide meaningful support to rebel groups.” Id. at 276. In Libya, the United States’ response, which began with severe sanctions targeting the Gaddafi-controlled Libyan government that were eventually reduced once the TNC assumed control, demonstrated the United States’ ability to distinguish between political movements within a single country and to react with appropriate sanctions. Id. at 298-99. In Syria, the United States took a more measured approach, first targeting individuals to signal its opposition to the human rights violations that were occurring, and only imposing broad, government-targeted measures when the narrowly targeted sanctions failed. Id. at 299. The expanded sanctions were nonetheless accompanied by a series of general licenses that anticipated the compliance problems experienced in Libya. Id.
\end{enumerate}
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V. Conclusion

The United States’ response to the Arab Spring has affirmed its affinity for economic sanctions as a powerful, versatile answer to intolerable state behavior. In particular, the U.S. approach to the civil unrest in Libya and Syria illustrates that it is increasingly willing to use economic sanctions to separate governments from their people and to provide meaningful support to rebel groups. In contrast to past situations in which it has acted unilaterally, moreover, the United States has not been alone in its resort to sanctions to influence political change in the Middle East. The Arab League and the EU also imposed holistic sanctions in response to the crises in the region. In imposing holistic

The United States utilized similarly adaptive sanctions in the Palestinian territories in 2006 and 2007, where it blocked the Palestinian Authority’s assets when Hamas assumed control, crafted licenses to minimize collateral damage to friendly individuals still in power, and broadly authorized transactions with the Palestinian Authority following its split from Hamas, while at the same time leaving the infrastructure in place to reinstate sanctions should a reversion to a hostile Palestinian government occur. See supra notes 392-398 and accompanying text. Labeling these types of restrictive measures “smarter sanctions,” Lord and colleagues posit that the United States’ sanctions activity in connection with the Arab Spring suggests “a more flexible, nearly nimble, and quickly changing approach to [U.S.] sanctions policy,” where comprehensive sanctions can be quickly scaled back, and targeted sanctions can quickly tighten into comprehensive embargos. See Lord et al., supra note 7, at 298-99. Though potentially effective in striking a balance between draconian and inflexible sanctions regimes like the Cuba embargo and the pointed yet often toothless “smart” sanctions that have been in vogue for the last decade and a half, such rapidly changing sanctions programs pose significant challenges for compliance practitioners. See id. at 299 (pointing out such challenges and noting that effective compliance will require “careful attention to the rapidly changing aspects of these regimes” and “maintaining good relationships” with sanctioning agencies “in order to acquire informal guidance or suggestions in ambiguous situations”). The available empirical evidence is at this time insufficient to support any firm conclusions as to whether the Arab Spring sanctioning strategies are simply a product of circumstance or indicative of a fundamental change in the way OFAC approaches sanctions.

See supra Part I.

Lord et al., supra note 7, at 276.

See infra notes 427-428 and accompanying text.


The United Nations has had more difficulty than its supranational counterparts
measures in Libya\textsuperscript{429} and Syria,\textsuperscript{430} the EU deviated from its stated preference for "smart" sanctions.\textsuperscript{431} In addition, the EU aimed broad and severe sanctions at Iran for its nuclear program, restrictions which nearly equaled those imposed under CISADA.\textsuperscript{432}


\textsuperscript{430} \textit{See} Laurence Norman, \textit{EU Hits Syria with Fresh Sanctions}, \textit{WALL ST. J.} (July 23, 2012), http://online.wsj.com/article/SB10000872396390443437504577544420535408762.html ("The EU has already launched 16 rounds of sanctions on Syria as the death toll has surged in the violence there, including a ban on Syrian oil exports and an asset freeze and travel ban on many top officials . . . ."); Bruno Waterfield, \textit{EU Agrees Further Syria Sanctions}, \textit{THE TELEGRAPH} (Feb. 27, 2012), http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9108153/EU-agrees-further-Syria-sanctions.html (reporting the freezing of the assets of Syria’s central bank).

\textsuperscript{431} The EU sanctions policy guidelines updated in 2009 trumpet the cause of “smart” sanctions, directing that “[t]he measures taken should target those identified as responsible for the policies or actions that have prompted the EU decision to impose restrictive measures.” \textit{Council Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy No. 17464/09 of Dec. 15, 2009, ¶ 14.} According to these guidelines, targeted sanctions “are more effective than indiscriminate measures and minimise adverse consequences for those not responsible for such policies and actions.” \textit{Id.} at 6.

\textsuperscript{432} In 2010, less than a month after the United States enacted CISADA, the EU issued Council Decision 2010/413, 2010 O.J. (L 195) 39, which largely mirrors CISADA’s severe Iran sanctions. \textit{EU and Secondary Sanctions, supra} note 120, at 1251. Council Decision 2010/413 prohibits an array of transactions and related financing and financial assistance to Iran’s energy sector, mandates government oversight of funds transfers to Iran not falling under a limited humanitarian exemption, and includes, among other restrictions, a catch-all provision requiring EU banks to “exercise vigilance” in ensuring that transactions in which they are involved are not contributing to Iran’s nuclear program. \textit{Id.} at 1251-52; Helder, \textit{supra} note 177, at 404-05; Rubinoff & Aminian, \textit{supra} note 171, at 231-32.
Should the civil unrest in the Middle East spread to other countries or regions in the future, the experience of the Arab Spring suggests that multinational bodies like the EU and the Arab League will increasingly join the United States in availing themselves of holistic sanctions to address such situations. To ensure the efficacy of their sanctions regimes, these and other sanctioning actors must implement an infrastructure that fosters the three core competencies that are endemic to the U.S. approach: flexibility, the ability to mitigate collateral damage, and adaptability.

A sanctions strategy that promotes these core competencies will be able to navigate the conflict of law issues that arise. It will be prepared to mitigate the damaging effects of sanctions on innocent civilians and businesses. Additionally, it will be more able to respond quickly and cohesively to rapidly changing political circumstances. In short, a strategy that cultivates the three core competencies will be positioned to optimize the impact of sanctions as an instrument of foreign policy.

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433 See MacFarquhar, supra note 427 (describing the Arab League measures as "a battery of economic sanctions meant to sever most trade and investment from the Arab world, an unprecedented step against a member state"); see Rubenfeld, Clinton Names Waiver Recipients, supra note 120 ("Clinton cited the European Union embargo [against Iran]... as 'solidarity' with the U.S. and 'their commitment to holding Iran accountable for its failure to comply with international obligations.'").

434 See supra Part IV.D. In a forthcoming article, the authors argue for the implementation of a centralized licensing program in the emerging EU sanctions regime that accounts for the three core competencies. See Court E. Golumbic & Robert S. Ruff III, Who Do I Call for an EU Sanctions Exemption?: Why the EU Sanctions Regime Should Centralize Licensing, 44 GEO. J. INT’L L. (forthcoming 2013).