INTERNATIONAL TRADE LAW:
A Comprehensive E-Textbook

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VOLUME FOUR:
NATIONAL SECURITY

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There are seven sins in the world: Wealth without work, Pleasure without conscience, Knowledge without character, Commerce without morality, Science without humanity, Worship without sacrifice, and Politics without principle.

*Mahatma Gandhi (1869-1948)*
Dedication

For Shera and Her Generation,
That They Are Not Scourged by Poverty, Extremism, or a Clash of Civilizations,
But Rather Blessed by Peace through Sustainable Trade and Development.

And for the Glory of God.
About the Author

Born in Toronto, Rakesh (Raj) Kumar Bhala is a dual Canadian-U.S. citizen. He is the inaugural Leo. S. Brenneisen Distinguished Professor (2017-present) at the University of Kansas School of Law (KU Law), before which he was the Rice Distinguished Professor (2003-2017). Both are university-level chairs. He served as KU Law’s Associate Dean for International and Comparative Law (2011-2017). Raj teaches International Trade Law, Advanced International Trade Law, Law and Literature, and Islamic Law. Ingram’s Business Magazine designated him as one of “50 Kansans You Should Know” (https://ingrams.com/article/50-kansas-you-should-know-the-class-of-2020/).

Before joining KU Law, Raj was the Patricia Roberts Harris Research Professor at The George Washington University School of Law (1998-2003). He began his teaching career at William & Mary Marshall-Wythe School of Law (1993-1998), where he was voted tenure and full professorship. At both, he headed the International Law programs.

Raj has been a Visiting Professor at Duke, Michigan, La Trobe University (Melbourne), Tel Aviv University, University of Auckland (where he was the 2017 New Zealand Legal Research Foundation Visitor), Washington University in Saint Louis, and World Trade Institute (Berne). He has guest lectured around the world, including across India, and held fellowships at the Bank of Japan and University of Hong Kong. An International Bar Association (IBA) member since 1995, Raj has served in officer positions on the Academic and Professional Development and Customs and International Trade Law Committees.

Raj practiced at the Federal Reserve Bank of New York (1989-1993), where he twice won the President’s Award for Excellence thanks to his service as a delegate to the United Nations Conference on International Trade Law (UNCITRAL), along with a Letter of Commendation from the U.S. Department of State. He was Senior Advisor to Dentons U.S. LLP (2017-2023), the world’s largest law firm, focusing on International Trade Law. He is a member of the State Department’s Speaker Program.

Raj is a Harvard Law School graduate (1989, Cum Laude), where he wrote his first book – Perspectives on Risk-Based Capital (1989) – as a third-year J.D. student. As a Marshall Scholar (1984-1986), Raj earned two Master’s degrees, from the London School of Economics (LSE, 1985) in Economics, and from Oxford (Trinity College, 1986) in Management (Industrial Relations). His undergraduate degree is from Duke (1980-1984, Summa Cum Laude, Phi Beta Kappa), where he was an Angier B. Duke Scholar and double-majored in Economics and Sociology. At Harvard and Duke, he served as a Research Assistant (RA), respectively, in International Financial Law to Nomura Professor

Raj is author of 100 scholarly articles published in law journals world-wide, including three trilogies: on *stare decisis* in International Trade Law; the failed Doha Round of multilateral trade negotiations; and India’s trade law and policy. He has written 13 books. They include *International Trade Law: A Comprehensive Textbook* (5th edition, 2019, 4 volumes), www.dropbox.com/s/78sagrsm4g30k4g/R%20Bhala%20Book%20Launch.mp4?dl=0, which is one of the world’s leading references and has been used at over 100 law schools world-wide, plus the first treatise on GATT in nearly 50 years, *Modern GATT Law* (2nd edition, 2013, 2 volumes). His monographs, *Trade War: Causes, Conduct, and Consequences of Sino-American Confrontation* (2024), and *TPP Objectively: Legal, Economic, and National Security Dimensions of CPTPP* (2nd edition, 2019), were the first interdisciplinary analyses of their subjects by a legal scholar. *Trade, Development, and Social Justice* (2003) was a rare application of Catholic Social Justice Theory to GATT. Raj is the first non-Muslim American scholar to write a textbook on Islamic Law, *Understanding Islamic Law (Sharī’a)* (3rd edition, 2023). That textbook, too, has been widely used, including for 10 years (2010-2019) in his course for U.S. Special Operations Forces at the Command and General Staff College, Fort Leavenworth, Kansas.

Raj’s current project is a new book, *Principles of Law, Literature, and Rhetoric: A Shakespearean Approach*. Covering legal interpretative methodologies as well as legal themes in classic works, in both a theoretical and practical sense, this work aims to help organize the subject for use in teaching and research.


Raj has served on the Executive Board of Directors of the Carriage Club of Kansas City, including as its Treasurer. He also been on the Alumni Association Board of the University School of Milwaukee (USM), his high school *alma mater* (Class of 1980). He is grateful to his USM teachers for a liberal arts education that made all good things possible. Raj loves fitness training, has finished 115 marathons, including the “Big Five” of the “World’s Majors” (Boston twice, New York twice, Chicago twice, Berlin, and London). He enjoys studying Shakespeare and (especially since becoming Catholic at Easter Vigil 2001) Theology – and watching baseball.
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The Part and Chapter titles in this Summary of Contents cover all eight Volumes of the Sixth Edition of *International Trade Law: A Comprehensive E-Textbook*. The Detailed Contents of each individual Volume are set out in the pertinent Volume.

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Preface

Dating to 1993, this *E-Textbook* is based on 32 years of research and teaching around the world. So, it aims to provide students, scholars, and practitioners around the world with a world-class reference – for free. All eight Volumes of the *E-Textbook* are available Open Access.

These Volumes may be used as a set, in sequence, as I do in my *International Trade Law* and *Advanced International Trade Law* courses, covering Volumes 1-4 and 5-8, respectively. Or, one of them may be assigned as a stand-alone Volume for a specialty course or seminar, such as Volume Four for a class on *Trade and National Security*, Volume Seven for a class on *FTAs*, or Volume Eight for a class on *Trade and Development*. Or, any one or more of them may be used for research papers, articles, and books on subjects that implicate multiple Volumes. The only constraint on how the *E-Textbook* is read is the imagination of the reader. As trade negotiators sometimes say, the “geometry is variable.”


The prior Editions, whether print or electronic, became ever-more expensive. Since its 1st Edition, and particularly since its 5th Edition, printing costs increased dramatically. Publishers went out of business or were merged into other publishers. (Sadly, many of my editors, who were my friends, lost their jobs.) Contemporaneously, in a world of curt social media communications, patience for thick books decreased. As the endurance of attention spans diminished, bottom-line answers mattered more than cognitive reasoning processes. Authors were pressured to jam more material into less space, and convey all of it faster.

These trends – adversely affecting both the supply and demand curves for lengthy, conventionally published, law school teaching materials – increasingly impeded access to the previous Editions. That was especially true for students of modest means in America and across the world. The cost of those materials became a non-*de minimis* element in calculating student indebtedness to earn a law degree. Some students could not afford to take my *International Trade Law* and *Advanced International Trade Law* courses. Others cobbled together resources, borrowed or shared the book, or made do with old editions. All the while, good teachers, seeking to be good shepherds, cared about serving their students with instructional materials exceed their teachers.

Thanks to the University of Kansas, School of Law, Wheat Law Library, and its Director, Professor Chris Steadham and Team, the problem of rising supply costs is solved. All eight Volumes of this 6th Edition are published by the Library. Thanks also to Marianne Reed, Digital Publishing and Repository Manager, KU Libraries. Because of her, they may be downloaded from KU ScholarWorks quickly and easily at zero cost. No student, teacher, scholar, or practitioner is left behind for want of eight PDF files.
Likewise, all relevant primary and secondary source documents are freely available on the Library’s International Trade Law Research & Study Guide Web page (https://guides.law.ku.edu/intltrade). Not one dollar or dirham, riyal or rupee need be spent on paying for a Documents Supplement.

As for demand, no background in the subject matter is presumed. What is required is intellectual curiosity about the subject, an open-hearted willingness to fall ever-more in love with it – and, yes, patience. Learning the subject pays off handsomely, both in professional and personal returns. What also is needed is an appreciation for the reality that the boundaries of the subject continue to widen, its theory and practice continue to deepen. There is a canon, a common core that is the language for a common dialogue. Yet, this canon evolves.

Accordingly, the 1996 single-volume 1st Edition of this work was 1,450 pages. The work has grown with the 30 years’ worth of developments in the field, avoiding trade-offs that disrespect its controversies and grandeur. The eight Volumes of this 6th Edition span approximately 6,666 pages. The Volumes are organized thematically into 188 Chapters, thus averaging 36 pages per Chapter. A cursory nutshell (summarizing assorted topics), or a slender work on one aspect of the field (e.g., the WTO), have their place. But they can take a reader only so far. This E-Textbook embraces a different challenge: take all readers further.

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1 Volume One (Interdisciplinary Foundations), 753 pages, 25 Chapters; Volume Two (Fundamental Multilateral Obligations), 885 pages, 28 Chapters; Volume Three (Customs Law), 440 pages, 16 Chapters; Volume Four (National Security), 1,089 pages, 25 Chapters; Volume Five (Remedies), 1,085 pages, 33 Chapters; Volume Six (Special Sectors), 628 pages, 16 Chapters; Volume Seven (Free Trade Agreements, Labor, and Environment), 1,196 pages, 30 Chapters; and Volume Eight (Growth, Development, and Poverty), 590 pages, 15 Chapters. (Please note page counts are approximate.)
Acknowledgments

A publication of this breadth and depth results from many skilled minds. I am blessed by such minds around me that not only contribute to a better product than possibly could be achieved alone, but also make the research and writing process every bit as fun as quiet contemplation (an equally indispensable activity).

Each Volume of this E-Textbook is “Made in the Midwest.” That origination is thanks in part to my Research Assistants (RAs). They came from near and far to the University of Kansas School of Law (KU Law) for their Juris Doctor (J.D.) degree, plus earned a Certificate in International Trade in Finance. I asked these talented, cosmopolitan RAs to treat me not as a Professor, but a colleague, and take a “hard look” at the drafts. They worked diligently on hundreds of draft pages. I am grateful for their contributions and personal sacrifices.

Listed alphabetically, my KU Law School RAs on this and previous editions of this work are:

Jacob C. Barefield, J.D. Class of 2023
Bridget Beran, J.D. Class of 2023
Matthew Walter Cooper, J.D. Class of 2015
Owen Andrew Grieb, J.D. Class of 2007
Katie Charlotte Hahn, J.D. Class of 2023
Madeline Renee Heeren, J.D. Class of 2015
David Roy Jackson, J.D. Class of 2007
Lauren E. Johannes, J.D. Class of 2019
Shannon B. Keating, J.D. Class of 2013
Viet Q. Le, J.D. Class of 2019
Heidi Minnihan, J.D. Class of 2014, M.B.A. Class of 2014
Corrine (Cori) Moffett, J.D. Class of 2021
Quan M. Nguyen, J.D. Class of 2025
Aqmar Rahman, J.D. Class of 2015
Michael Robert Rebein, J.D. Class of 2025
Sarah Schmidt, J.D. Class of 2013, M.A. Economics Class of 2013
Bruno Germain Simões, J.D. Class of 2013
Devin S. Sikes, J.D. Class of 2008
Dan Spencer IV, J.D. Class of 2006
Brien C. Stonebreaker, J.D., M.P.H. Class of 2024
Kaitlyn E. Taylor, J.D. Class of 2025
Chalinee Tinaves, J.D. Class of 2014
Spencer Toubia, J.D. Class of 2015
Eric Witmer, J.D. Class of 2016
Cody N. Wood, J.D. Class of 2017

It is a joy to see each one of them flourish, professionally and personally, in their extraordinary endeavors across the world.

Volume Four  Wheat Law Library
Hearty thanks also go to Professor Chris Steadham, Director, Wheat Law Library, University of Kansas, School of Law. In every respect, at every step, Chris and his Team — which includes W. Blake Wilson, Assistant Director for Instructional and Faculty Services, and Pamela Crawford, Assistant Director for Public & Technical Services (Emerita) — have been efficient, supportive, and responsive. They consistently worked hard to produce, promote, and distribute a product for teaching and research useful around the globe. They are fun professionals with whom to collaborate. Ditto for Marianne Reed, Digital Publishing and Repository Manager, KU Libraries.

This publication is the blessing of a splendid family. The family improves its quality. There is my immediate family: my smart and lovely wife and best friend, Kara; and our poised daughter, Shera, our little gift who has matured beyond our best dreams into a smiling Dartmouth graduate and Fulbright Scholar with a big heart, world class intellect and très chic sense of fashion. And, there is my Research Assistant family (above). Thank you.

I also gratefully acknowledge the law firms of Crowell & Moring LLP, Washington, D.C., and Miller & Company, P.C., Kansas City, Missouri. Their monthly client alerts on International Trade Law are superb. In addition to quoting and citing renowned media sources (especially Bloomberg, Financial Times, Nikkei Asia, Reuters, and The New York Times), I have relied on these alerts for valuable explanations and insights on key developments (especially concerning customs classification, AD-CVD, and safeguard cases, and export controls and trade sanctions).


Still more scrutiny was applied to this 6th Edition to ensure all Eight Volumes of the International Trade Law E-Textbook are as universally user-friendly as possible. Toward this goal, I exercised editorial judgment, though in a light-handed manner that in no way impinged on the meaning of any quoted or excerpted materials. Specifically, I: (1) standardized spelling according to American (not British) English; (2) used international dating (day-month-year); (3) occasionally made minor stylistic (but not substantive) changes (e.g., converting bullet points to numbers, adding an Oxford comma, simplifying ellipses, fonts, and indents, and normalizing “emphasis original” and “emphasis added” notations); and (4) providing full citations (thus avoiding the tyranny of the Blue Book).

For over three decades, dating to my research and teaching in 1993, this work has been a joyful passion shaping my career, and more importantly, serving readers globally. No further Editions are anticipated. Any significant updates may be offered through a Supplement and/or posted materials, to which the same editorial standards would apply.
### Table of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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</thead>
<tbody>
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<td>AANZFTA</td>
<td>ASEAN-Australia-New Zealand Free Trade Agreement</td>
</tr>
<tr>
<td>AB</td>
<td>WTO Appellate Body</td>
</tr>
<tr>
<td>AB InBev</td>
<td>Anheuser-Busch InBev SA/NV</td>
</tr>
<tr>
<td>ABA</td>
<td>American Bar Association</td>
</tr>
<tr>
<td>ABI</td>
<td>Automated Broker Interface</td>
</tr>
<tr>
<td>ACA</td>
<td><em>America Competes Act of 2022</em>, <em>i.e.</em>, <em>America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength Act of 2022</em>, sometimes abbreviated as <em>COMPETES Act</em> (House of Representatives bill)</td>
</tr>
<tr>
<td>ACDB</td>
<td>WTO Accession Commitments Data Base</td>
</tr>
<tr>
<td>ACFTA (AfCFTA)</td>
<td><em>African Continental Free Trade Area</em> (entered into force 30 May 2019, operational 7 July 2019, with staged implementation on 1 January 2021 and concluding with full implementation by 2030)</td>
</tr>
<tr>
<td>ACFTU</td>
<td>All China Federation of Trade Unions</td>
</tr>
<tr>
<td>ACI</td>
<td>Anti-Coercion Instrument (EU)</td>
</tr>
<tr>
<td>ACP</td>
<td>African, Caribbean, and Pacific</td>
</tr>
<tr>
<td>ACS</td>
<td>Automated Commercial System</td>
</tr>
<tr>
<td>ACTRAV</td>
<td>Bureau for Workers’ Activities (ILO)</td>
</tr>
<tr>
<td>ACWL</td>
<td>Advisory Center on WTO Law</td>
</tr>
<tr>
<td>AD</td>
<td>Antidumping</td>
</tr>
<tr>
<td>AD Agreement</td>
<td>WTO Antidumping Agreement (<em>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</em>)</td>
</tr>
<tr>
<td>ADB</td>
<td>Asian Development Bank</td>
</tr>
<tr>
<td>Additional Protocol</td>
<td>Model Additional Protocol (associated with NPT, CSA)</td>
</tr>
<tr>
<td>ADP</td>
<td>Automatic data processing</td>
</tr>
<tr>
<td>ADR</td>
<td>American Depositary Receipt</td>
</tr>
<tr>
<td>ADVANCE Democracy Act</td>
<td>2007 <em>Advance Democratic Values, Address Non-democratic Countries and Enhance Democracy Act</em></td>
</tr>
<tr>
<td>AECA</td>
<td><em>Arms Export Control Act of 1976</em></td>
</tr>
<tr>
<td>AEO</td>
<td>Authorized Economic Operator</td>
</tr>
<tr>
<td>AEOI</td>
<td>Atomic Energy Organization of Iran</td>
</tr>
<tr>
<td>AES</td>
<td>Automated Export System</td>
</tr>
<tr>
<td>AFA</td>
<td>Adverse Facts Available</td>
</tr>
<tr>
<td>AfCFTA</td>
<td><em>African Continental Free Trade Area</em></td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
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</tr>
<tr>
<td>AfDB</td>
<td>African Development Bank</td>
</tr>
<tr>
<td>AFIP</td>
<td>Administración Federal de Ingresos Públicos (Argentina, Federal Public Revenue Administration)</td>
</tr>
<tr>
<td>AFL-CIO</td>
<td>American Federation of Labor-Congress of Industrial Organizations</td>
</tr>
<tr>
<td>AFU</td>
<td>Agence France-Presse</td>
</tr>
<tr>
<td>AFR</td>
<td>Application for Further Review (U.S. CBP)</td>
</tr>
<tr>
<td>AFTA</td>
<td>ASEAN Free Trade Area</td>
</tr>
<tr>
<td>AG (1st meaning)</td>
<td>Aktiengesellschaft (company incorporated in Austria, Germany, or Switzerland, limited by share ownership, the shares of which are tradeable on a stock market)</td>
</tr>
<tr>
<td>Ag (2nd meaning)</td>
<td>Agriculture</td>
</tr>
<tr>
<td>AGOA</td>
<td>2000 African Growth and Opportunity Act</td>
</tr>
<tr>
<td>AGOA II</td>
<td>included in 2002 Trade Act</td>
</tr>
<tr>
<td>AGOA III</td>
<td>2004 African Growth and Opportunity Acceleration Act</td>
</tr>
<tr>
<td>Agriculture Agreement (Ag Agreement)</td>
<td>WTO Agreement on Agriculture</td>
</tr>
<tr>
<td>AI (1st meaning)</td>
<td>Artificial Intelligence</td>
</tr>
<tr>
<td>AI (2nd meaning)</td>
<td>Avian Influenza</td>
</tr>
<tr>
<td>AID</td>
<td>U.S. Agency for International Development</td>
</tr>
<tr>
<td>AIG</td>
<td>American Insurance Group</td>
</tr>
<tr>
<td>AIIS</td>
<td>American Institute for International Steel</td>
</tr>
<tr>
<td>AIKSCC</td>
<td>All India Kisan Sangharsh Coordination Committee</td>
</tr>
<tr>
<td>AIM</td>
<td>Aluminum Import Monitoring system (U.S. DOC)</td>
</tr>
<tr>
<td>AIO</td>
<td>Aerospace Industries Organization (Iran)</td>
</tr>
<tr>
<td>AIOC</td>
<td>Anglo Iranian Oil Company</td>
</tr>
<tr>
<td>AIPAC</td>
<td>American Israel Public Affairs Committee</td>
</tr>
<tr>
<td>AIS</td>
<td>Automatic Identification System (ship location transponder)</td>
</tr>
<tr>
<td>AIT</td>
<td>American Institute in Taiwan</td>
</tr>
<tr>
<td>ALADI</td>
<td>Latin American Integration Association (Spanish acronym)</td>
</tr>
<tr>
<td>ALBA</td>
<td>Bolivarian Alliance for the Peoples of our America</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>--------------</td>
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</tr>
<tr>
<td>ALD</td>
<td>atomic layer deposition (production tools)</td>
</tr>
<tr>
<td>ALJ</td>
<td>Administrative Law Judge</td>
</tr>
<tr>
<td>ALOP</td>
<td>Appropriate Level Of Protection</td>
</tr>
<tr>
<td>ALT</td>
<td>Alternate (alternate proposed text)</td>
</tr>
<tr>
<td>AMA</td>
<td>American Medical Association</td>
</tr>
<tr>
<td>AmCham</td>
<td>American Chamber of Commerce</td>
</tr>
<tr>
<td>AMEC</td>
<td>Advanced Micro-Fabrication Equipment Inc. (China)</td>
</tr>
<tr>
<td>AMI Credit</td>
<td>Advanced Manufacturing Investment Credit (U.S. 2022 CHIPS Act)</td>
</tr>
<tr>
<td>AMIS</td>
<td>Agricultural Market Information System</td>
</tr>
<tr>
<td>AMPS</td>
<td>Acrylamido tertiary butyl sulfonic acid</td>
</tr>
<tr>
<td>AMS (1st meaning)</td>
<td>Aggregate Measure of Support</td>
</tr>
<tr>
<td>AMS (2nd meaning)</td>
<td>Agriculture Marketing Services (USDA)</td>
</tr>
<tr>
<td>ANAD</td>
<td>National Association of Democratic Lawyers (Mexico)</td>
</tr>
<tr>
<td>ANZCERTA</td>
<td>Australia-New Zealand Closer Economic Relations Trade Agreement (CER)</td>
</tr>
<tr>
<td>ANZUS (ANZUS Treaty)</td>
<td>1951 Australia, New Zealand, United States Security Treaty</td>
</tr>
<tr>
<td>AoA</td>
<td>WTO Agreement on Agriculture</td>
</tr>
<tr>
<td>AOG</td>
<td>All Other Goods</td>
</tr>
<tr>
<td>AOR</td>
<td>All Others Rate</td>
</tr>
<tr>
<td>APA</td>
<td>1946 Administrative Procedure Act (U.S.)</td>
</tr>
<tr>
<td>APEC</td>
<td>Asia Pacific Economic Cooperation (forum)</td>
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<tr>
<td>APEP</td>
<td>Assistant to the President for Economic Policy (U.S.)</td>
</tr>
<tr>
<td>API</td>
<td>active pharmaceutical ingredient</td>
</tr>
<tr>
<td>APMC</td>
<td>Agricultural Produce Marketing Committee (India)</td>
</tr>
<tr>
<td>APNSA</td>
<td>Assistant to the President for National Security Affairs (U.S.)</td>
</tr>
<tr>
<td>APOC</td>
<td>Anglo Persian Oil Company</td>
</tr>
<tr>
<td>APTA</td>
<td>Asia-Pacific Trade Agreement</td>
</tr>
<tr>
<td>APV</td>
<td>Annual Purchase Value</td>
</tr>
<tr>
<td>AR</td>
<td>Administrative Review</td>
</tr>
<tr>
<td>ARI</td>
<td>Additional (United States) Rules of Interpretation</td>
</tr>
<tr>
<td><strong>ARP Act of 2000</strong></td>
<td>2000 <em>Agricultural Risk Protection Act</em></td>
</tr>
<tr>
<td><strong>ARRA</strong></td>
<td>2009 <em>American Recovery and Reinvestment Act</em></td>
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<tr>
<td><strong>ARS</strong></td>
<td>Advance Ruling System</td>
</tr>
<tr>
<td><strong>ASA (1st meaning)</strong></td>
<td>American Securities Association</td>
</tr>
<tr>
<td><strong>ASA (2nd meaning)</strong></td>
<td>American Sugar Alliance</td>
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<tr>
<td><strong>ASCM</strong></td>
<td>WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement)</td>
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<tr>
<td><strong>ASEAN</strong></td>
<td>Association of Southeast Asian Nations</td>
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<tr>
<td><strong>ASL (AFSL)</strong></td>
<td>Anti-Foreign Sanctions Law (June 2021 PRC Law blocking compliance with sanctions against China)</td>
</tr>
<tr>
<td><strong>ASM</strong></td>
<td>artisanal small mine</td>
</tr>
<tr>
<td><strong>ASML (ASML Holding N.V.)</strong></td>
<td>Advanced Semiconductor Materials Lithography (Netherlands)</td>
</tr>
<tr>
<td><strong>ASP</strong></td>
<td>American Selling Price</td>
</tr>
<tr>
<td><strong>ASPI</strong></td>
<td>Australian Strategic Policy Institute</td>
</tr>
<tr>
<td><strong>ATAP</strong></td>
<td>1996 <em>Agreement Concerning Certain Aspects of Trade in Agricultural Products</em> (1985 U.S.-Israel FTA)</td>
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<td><strong>ATC</strong></td>
<td>WTO Agreement on Textiles and Clothing</td>
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<tr>
<td><strong>ATISA</strong></td>
<td>ASEAN Trade In Services Agreement</td>
</tr>
<tr>
<td><strong>ATPA</strong></td>
<td>1991 <em>Andean Trade Preferences Act</em></td>
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<tr>
<td><strong>ATPDEA</strong></td>
<td>2002 <em>Andean Trade Promotion and Drug Eradication Act</em></td>
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<tr>
<td><strong>ATT</strong></td>
<td>2014 U.N. <em>Arms Trade Treaty</em></td>
</tr>
<tr>
<td><strong>AUS</strong></td>
<td>Australian Dollar</td>
</tr>
<tr>
<td><strong>AUD</strong></td>
<td>Australian Dollar</td>
</tr>
<tr>
<td><strong>AUKUS</strong></td>
<td>September 2021 <em>Australia – United Kingdom – United States Security Partnership</em> (Trilateral Security Agreement concerning nuclear submarines and their deployment in Indo-Pacific region)</td>
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<tr>
<td><strong>AUMF</strong> (Iraq Resolution)</td>
<td>2001 <em>Authorization for Use of Military Force</em></td>
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<td><strong>AUMF</strong> (Iraq Resolution)</td>
<td>2002 <em>Authorization for Use of Military Force Against Iraq Resolution</em></td>
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<tr>
<td><strong>Automotive Appendix</strong></td>
<td>Appendix, Provisions Related to the Product-Specific Rules of Origin for Automotive Goods, to Annex 4-B of USMCA Chapter 4</td>
</tr>
<tr>
<td><strong>AUV</strong></td>
<td>Average Unit Value</td>
</tr>
<tr>
<td><strong>AV</strong></td>
<td>Audio-Visual</td>
</tr>
<tr>
<td><strong>AVE</strong></td>
<td><em>Ad Valorem Equivalent</em></td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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</tr>
<tr>
<td>AVIC</td>
<td>Aviation Industry Corporation of China</td>
</tr>
<tr>
<td>B&amp;H</td>
<td>Brokerage and handling (costs)</td>
</tr>
<tr>
<td>B&amp;O</td>
<td>Washington State Business and Occupation Tax Rate Reduction</td>
</tr>
<tr>
<td>BA</td>
<td>Bankers Acceptance</td>
</tr>
<tr>
<td>BAE</td>
<td>British Aerospace Systems Plc</td>
</tr>
<tr>
<td>BAMS-D</td>
<td>Broad Area Maritime Surveillance-Drone (U.S. Navy)</td>
</tr>
<tr>
<td>BBC</td>
<td>British Broadcasting Corporation</td>
</tr>
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<td>BBS</td>
<td>Bangladesh Bureau of Statistics</td>
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<td>B.C.</td>
<td>British Columbia</td>
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<td>BCA</td>
<td>Border Carbon Adjustment (Carbon BTA)</td>
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<td>BCI</td>
<td>Business Confidential Information</td>
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<tr>
<td>bcm</td>
<td>billion cubic meters</td>
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<tr>
<td>BCR</td>
<td>Blue Corner Rebate (Thailand)</td>
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<td>BDC</td>
<td>Beneficiary Developing Country</td>
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<td>BDS</td>
<td>Boycott, Divestment, and Sanctions</td>
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<td>BECA</td>
<td>October 2020 Basic Exchange and Cooperation Agreement (U.S.-India)</td>
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<td>beIN</td>
<td>beIN Media Group LLC (Qatar)</td>
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<td>beoutQ</td>
<td>be out Qatar (Saudi Arabia)</td>
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<td>BEPS</td>
<td>tax Base Erosion and Profit Sharing</td>
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<tr>
<td>BFA</td>
<td>Banana Framework Agreement</td>
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<td>Bhd (BHD)</td>
<td>Berhad (publicly limited company, Malaysia)</td>
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<td>BIA</td>
<td>Best Information Available (Pre-Uruguay Round U.S. term for Facts Available)</td>
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<td>BILA (ILAB)</td>
<td>Bureau of International Labor Affairs (U.S. DOL OTLA)</td>
</tr>
<tr>
<td>BIMSTEC</td>
<td>Bangladesh, Bhutan, India, Myanmar, Nepal, Sri Lanka, and Thailand (SAARC minus Afghanistan and Pakistan, plus Myanmar (Burma) and Thailand)</td>
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<tr>
<td>BIS</td>
<td>Bank for International Settlements (1st meaning)</td>
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<td>Abbreviation</td>
<td>Description</td>
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<td>--------------</td>
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<td>BIS</td>
<td>Bureau of Industry and Security (U.S. DOC)</td>
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<tr>
<td>bis</td>
<td>second version (of a text), again, repeat</td>
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<td>B.I.S.D.</td>
<td>Basic Instruments and Selected Documents</td>
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<td>BIT</td>
<td>Bilateral Investment Treaty</td>
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<td>BJP</td>
<td>Bharatiya Janata Party (India)</td>
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<tr>
<td>bn</td>
<td>billion</td>
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<td>BNA</td>
<td>Bureau of National Affairs (International Trade Reporter and International Trade Daily)</td>
</tr>
<tr>
<td>BNO</td>
<td>British National (Overseas) passport (Hong Kong)</td>
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<td>BOJ</td>
<td>Bank of Japan</td>
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<td>BOK</td>
<td>Bank of Korea</td>
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<tr>
<td>Bolero</td>
<td>Bills of Lading for Europe</td>
</tr>
<tr>
<td>BOP</td>
<td>Balance Of Payments</td>
</tr>
<tr>
<td>BOT</td>
<td>Balance Of Trade</td>
</tr>
<tr>
<td>BP</td>
<td>British Petroleum</td>
</tr>
<tr>
<td>bpd</td>
<td>barrels per day</td>
</tr>
<tr>
<td>Brexit</td>
<td>British exit, i.e., withdrawal of the U.K. from EU, effective 31 January 2020, with transition period ended 31 December 2021, following 23 June 2016 U.K.-wide referendum</td>
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<tr>
<td>BRI</td>
<td>Belt and Road Initiative (China)</td>
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<td>BRICS</td>
<td>Brazil, Russia, India, China, and South Africa</td>
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<td>BSE</td>
<td>Bombay Stock Exchange</td>
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<td>BSSAC</td>
<td>Beneficiary Sub-Saharan African Country</td>
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<td>BCE</td>
<td>Bovine Spongiform Encephalopathy (Mad Cow Disease)</td>
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<td>Abbreviation</td>
<td>Description</td>
</tr>
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<tr>
<td>BSSP</td>
<td>Burmese Socialist Program Party</td>
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<tr>
<td>BTA (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Bilateral Trade Agreement</td>
</tr>
<tr>
<td>BTA (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>2002 Bio-Terrorism Act (Public Health Security and Bioterrorism Preparedness and Response Act of 2000)</td>
</tr>
<tr>
<td>BTA (3&lt;sup&gt;rd&lt;/sup&gt; meaning)</td>
<td>Border Tax Adjustment</td>
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<tr>
<td>BTD</td>
<td>May 2007 Bipartisan Trade Deal</td>
</tr>
<tr>
<td>C-4</td>
<td>Cotton Four Countries (Benin, Burkina Faso, Mali, and Chad)</td>
</tr>
<tr>
<td>C&amp;F</td>
<td>cost and freight</td>
</tr>
<tr>
<td>CAA</td>
<td>1979 Clean Air Act</td>
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<tr>
<td>CAS</td>
<td>Canadian Dollar</td>
</tr>
<tr>
<td>CAATSA</td>
<td>2017 Countering America’s Adversaries Through Sanctions Act</td>
</tr>
<tr>
<td>CAC</td>
<td>Cyberspace Administration of China</td>
</tr>
<tr>
<td>CAD</td>
<td>Canadian Dollar</td>
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<tr>
<td>CAFC</td>
<td>United States Court of Appeals for the Federal Circuit</td>
</tr>
<tr>
<td>CAFTA-DR</td>
<td>Central American Free Trade Agreement – Dominican Republic</td>
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<tr>
<td>CAI</td>
<td>January 2021 EU-China Comprehensive Agreement on Investment</td>
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<td>CAIR</td>
<td>Council on American-Islamic Relations</td>
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<tr>
<td>CAN</td>
<td>Community of Andean Nations</td>
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<tr>
<td>CANACAR</td>
<td>Camara Nacional del Autotransporte de Carga</td>
</tr>
<tr>
<td>CAOI</td>
<td>Civil Aviation Organization of Iran</td>
</tr>
<tr>
<td>CAP (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Common Agricultural Policy (EU)</td>
</tr>
<tr>
<td>CAP (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Carolina Academic Press</td>
</tr>
<tr>
<td>CAPES</td>
<td>Centre d’Analyse des Politiques, Economiques et Sociales (Burkina Faso)</td>
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<td>CASA</td>
<td>Construcciones Aeronáuticas SA (Spain)</td>
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<td>CB</td>
<td>citizens band (radio)</td>
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<td>CBA</td>
<td>collective bargaining agreement</td>
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<td>CBAM</td>
<td>Carbon Border Adjustment Mechanism</td>
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<td>CBC</td>
<td>Canadian Broadcasting Corporation</td>
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<tr>
<td>CBD</td>
<td>U.N. Convention on Biological Diversity</td>
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<tr>
<td>CBE</td>
<td>Commander of the Most Excellent Order of the British Empire</td>
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<tr>
<td>Abbreviation</td>
<td>Description</td>
</tr>
<tr>
<td>--------------</td>
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</tr>
<tr>
<td><strong>CBERA</strong></td>
<td>1983 Caribbean Basin Economic Recovery Act</td>
</tr>
<tr>
<td><strong>CBI</strong> (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Caribbean Basin Initiative</td>
</tr>
<tr>
<td><strong>CBI</strong> (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Central Bank of Iran</td>
</tr>
<tr>
<td><strong>CBO</strong></td>
<td>Congressional Budget Office</td>
</tr>
<tr>
<td><strong>CBOT</strong></td>
<td>Chicago Board Of Trade</td>
</tr>
<tr>
<td><strong>CBP</strong></td>
<td>U.S. Customs and Border Protection (“U.S. Customs Service” until 1 March 2003)</td>
</tr>
<tr>
<td><strong>CBSA</strong></td>
<td>Canadian Border Services Agency</td>
</tr>
<tr>
<td><strong>CBTPA</strong></td>
<td>Caribbean Basin Trade Partnership Agreement</td>
</tr>
<tr>
<td><strong>CC</strong></td>
<td>Cooperative Country (Argentina)</td>
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<tr>
<td><strong>CCB</strong></td>
<td>U.S. Conference of Catholic Bishops</td>
</tr>
<tr>
<td><strong>CCC</strong> (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>U.S. Commodity Credit Corporation (USDA)</td>
</tr>
<tr>
<td><strong>CCC</strong> (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Customs Cooperation Council (renamed WCO in 1994)</td>
</tr>
<tr>
<td><strong>CCC</strong> (3&lt;sup&gt;rd&lt;/sup&gt; meaning)</td>
<td>Commerce Country Chart</td>
</tr>
<tr>
<td><strong>CCFRS</strong></td>
<td>Certain cold flat-rolled steel</td>
</tr>
<tr>
<td><strong>CCHT</strong></td>
<td>Center for Countering Human Trafficking (U.S. DHS)</td>
</tr>
<tr>
<td><strong>CCI</strong> (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Competition Commission of India</td>
</tr>
<tr>
<td><strong>CCI</strong> (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Countervailing Currency Intervention</td>
</tr>
<tr>
<td><strong>CCL</strong></td>
<td>Commerce Control List</td>
</tr>
<tr>
<td><strong>CCMC</strong></td>
<td>Communist Chinese Military Company</td>
</tr>
<tr>
<td><strong>CCP</strong></td>
<td>Chinese Communist Party (or CPC, Communist Party of China)</td>
</tr>
<tr>
<td><strong>CCPA</strong></td>
<td>U.S. Court of Customs and Patent Appeals (abolished 1982; transfer to Federal Circuit)</td>
</tr>
<tr>
<td><strong>CCS</strong></td>
<td>Carbon Capture and Storage</td>
</tr>
<tr>
<td><strong>CDC</strong> (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>U.S. Centers for Disease Control and Prevention</td>
</tr>
<tr>
<td><strong>CDC</strong> (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Canadian Dairy Commission</td>
</tr>
<tr>
<td><strong>CDC</strong> (3&lt;sup&gt;rd&lt;/sup&gt; meaning)</td>
<td>Chilean Distortions Commission</td>
</tr>
<tr>
<td><strong>CDM</strong></td>
<td>Clean Development Mechanism</td>
</tr>
<tr>
<td><strong>CDS</strong></td>
<td>credit default swap</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
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<tr>
<td>CDSOA</td>
<td>2000 <em>Continued Dumping and Subsidy Offset Act (Byrd Amendment)</em></td>
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<tr>
<td>CE</td>
<td><em>Conformité Européenne (EU)</em></td>
</tr>
<tr>
<td>CEA</td>
<td>Council of Economic Advisors (U.S.)</td>
</tr>
<tr>
<td>CEC</td>
<td>Commission for Environmental Cooperation (NAFTA)</td>
</tr>
<tr>
<td>CEMAC</td>
<td><em>Communauté Économique et Monétaire de l’Afrique Centrale</em></td>
</tr>
<tr>
<td>CEMS</td>
<td>Continuous Emission Measurement System (EU CBAM)</td>
</tr>
<tr>
<td>CENTCOM</td>
<td>United States Central Command</td>
</tr>
<tr>
<td>CEO</td>
<td>Chief Executive Officer</td>
</tr>
<tr>
<td>CEP</td>
<td>Constructed Export Price</td>
</tr>
<tr>
<td>CEPA (1st meaning)</td>
<td>India-UAE <em>Comprehensive Economic Partnership Agreement</em></td>
</tr>
<tr>
<td>CEPA (2nd meaning)</td>
<td>Japan-U.K. <em>Comprehensive Economic Partnership Agreement</em></td>
</tr>
<tr>
<td>CEPR</td>
<td>Center for Economic and Policy Research</td>
</tr>
<tr>
<td>CER</td>
<td><em>Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)</em></td>
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<tr>
<td>CET</td>
<td>Common External Tariff</td>
</tr>
<tr>
<td>CETA</td>
<td><em>Comprehensive Economic and Trade Agreement</em></td>
</tr>
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<td>CFC</td>
<td>Controlled Foreign Corporation</td>
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<tr>
<td>CFCRL</td>
<td>Federal Conciliation and Labor Registry Center (Spanish acronym, Mexico)</td>
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<tr>
<td>CFE</td>
<td><em>Comisión Federal de Electricidad (Mexico)</em></td>
</tr>
<tr>
<td>CFIUS</td>
<td>Committee on Foreign Investment in the United States</td>
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<td>CFO</td>
<td>Chief Financial Officer</td>
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<tr>
<td>C.F.R. (1st meaning)</td>
<td>Code of Federal Regulations</td>
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<td>CFR (2nd meaning)</td>
<td>Council on Foreign Relations</td>
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<td>CGE</td>
<td>Computable General Equilibrium</td>
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<td>CGLO</td>
<td>Central Government Liaison Office (China)</td>
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<td>CGTN</td>
<td>China Global Television Network</td>
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<tr>
<td>CH</td>
<td>Order of the Companions of Honor</td>
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<tr>
<td>CHF</td>
<td>Swiss Francs</td>
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<tr>
<td>CHIP 4</td>
<td>U.S., Japan, Korea, and Taiwan</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
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<tr>
<td>---------</td>
<td>-------------</td>
</tr>
<tr>
<td>(CHIP 4 Alliance)</td>
<td>(forum concerning semiconductor chips)</td>
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<tr>
<td>CHIPS</td>
<td>Clearing House Interbank Payment System</td>
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<tr>
<td>CHIPS Act (CHIPS for America Act)</td>
<td>2022 Creating Helpful Incentives to Produce Semiconductors Act</td>
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<td>CIA</td>
<td>U.S. Central Intelligence Agency</td>
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<td>CIC</td>
<td>Citizenship and Immigration Service for Canada</td>
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<td>CIDEx</td>
<td>Contribution of Intervention in the Economic Domain (Brazil)</td>
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<tr>
<td>CIF (c.i.f)</td>
<td>Cost, Insurance, and Freight</td>
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<td>CII</td>
<td>Confederation of Indian Industry</td>
</tr>
<tr>
<td>CIP</td>
<td>Chhattisgarh Industrial Program (India)</td>
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<td>CISADA</td>
<td>2010 Comprehensive Iran Sanctions, Accountability, and Divestment Act</td>
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<tr>
<td>CIT</td>
<td>U.S. Court of International Trade (New York, N.Y.)</td>
</tr>
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<td>CITA</td>
<td>U.S. Committee for Implementation of Textile Agreements</td>
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<td>CITT</td>
<td>Canadian International Trade Tribunal</td>
</tr>
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<td>CJ</td>
<td>Commodity Jurisdiction</td>
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<td>CKD</td>
<td>Complete knock down</td>
</tr>
<tr>
<td>cm</td>
<td>centimeter</td>
</tr>
<tr>
<td>CMAA</td>
<td>Customs Mutual Assistance Agreement</td>
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<td>CME</td>
<td>Chicago Mercantile Exchange</td>
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<td>CMI</td>
<td>Comité Maritime International (IMO)</td>
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<td>CMIC</td>
<td>Chinese Military Industrial Complex Company</td>
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<td>CMM</td>
<td>Conservation Management Measures</td>
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<td>CMO</td>
<td>Common Market Organization (EU)</td>
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<td>CNCE</td>
<td>Commission Nacional de Comercio Exterior (Argentina)</td>
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<td>CNL</td>
<td>Competitive Need Limitation</td>
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<td>CNOOC</td>
<td>China National Offshore Oil Corporation</td>
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<td>CNPC</td>
<td>China National Petroleum Corporation</td>
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<tr>
<td>CNY</td>
<td>Chinese Yuan</td>
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<tr>
<td>Abbreviation</td>
<td>Definition</td>
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<tr>
<td>--------------</td>
<td>------------</td>
</tr>
<tr>
<td>CO₂</td>
<td>Carbon Dioxide</td>
</tr>
<tr>
<td>CO₂e</td>
<td>Carbon Dioxide equivalent</td>
</tr>
<tr>
<td>CoA</td>
<td>WTO Committee on Agriculture</td>
</tr>
<tr>
<td>CoA-SS</td>
<td>Special Session of WTO Committee on Agriculture</td>
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<tr>
<td>COBRA</td>
<td>Consolidated Omnibus Budget and Reconciliation Act (multiple years)</td>
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<td>COCOM</td>
<td>Coordinating Committee on Multilateral Export Controls</td>
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<td>COFINS</td>
<td>Civil Service Asset Formation Program Contribution (Brazil)</td>
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<td>COFINS-Importation</td>
<td>Contribution to Social Security Financing Applicable to Imports of Goods or Services (Brazil)</td>
</tr>
<tr>
<td>COGS</td>
<td>Cost of Goods Sold</td>
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<td>COMAC</td>
<td>Commercial Aircraft Corporation of China Ltd.</td>
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<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa</td>
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<td>CONNUM</td>
<td>Control Number</td>
</tr>
<tr>
<td>COO (1st meaning)</td>
<td>Certificate of Origin</td>
</tr>
<tr>
<td>COO (2nd meaning)</td>
<td>Country of Origin</td>
</tr>
<tr>
<td>COO (3rd meaning)</td>
<td>Chief Operating Officer</td>
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<tr>
<td>COOL</td>
<td>Country of Origin Label</td>
</tr>
<tr>
<td>COP (1st meaning)</td>
<td>Conference of the Parties</td>
</tr>
<tr>
<td>COP (2nd meaning)</td>
<td>Cost of Production</td>
</tr>
<tr>
<td>CORE</td>
<td>corrosion-resistant steel</td>
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<td>COS</td>
<td>Circumstances of Sale (dumping margin calculation adjustment)</td>
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<td>COSCO</td>
<td>Chinese Ocean Shipping Company</td>
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<td>COVAX</td>
<td>COVID-19 Vaccines Global Access</td>
</tr>
<tr>
<td>COVID-19</td>
<td>Corona Virus Disease (coronavirus)</td>
</tr>
<tr>
<td>CPA (1st meaning)</td>
<td>Certified Public Accountant</td>
</tr>
<tr>
<td>CPA (2nd meaning)</td>
<td>Coalition Provisional Authority (Iraq-U.S.)</td>
</tr>
<tr>
<td>CPC (1st meaning)</td>
<td>Caspian Pipeline Consortium</td>
</tr>
<tr>
<td>CPC (2nd meaning)</td>
<td>U.N. Central Product Classification list</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
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<tr>
<td>CPC</td>
<td>Communist Party of China (or CCP, Chinese Communist Party)</td>
</tr>
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<td>CPEC</td>
<td>China-Pakistan Economic Corridor</td>
</tr>
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<td>CPSC</td>
<td>U.S. Consumer Product Safety Commission</td>
</tr>
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<td>CPTPP</td>
<td>Comprehensive and Progressive Agreement for Trans Pacific Partnership (entered into force 30 December 2018, informally called TPP 11)</td>
</tr>
<tr>
<td>CPV</td>
<td>Communist Party of Vietnam (or VCP, Vietnamese Communist Party)</td>
</tr>
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<td>CQE</td>
<td>Certificate of Quota Eligibility</td>
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<td>CRO</td>
<td>WTO Committee on Rules of Origin</td>
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<td>CROC</td>
<td>Revolutionary Confederation of Laborers and Farmworkers (Mexico, Spanish acronym)</td>
</tr>
<tr>
<td>Crop Year 2001 Act</td>
<td>Crop Year 2001 Agricultural Economic Assistance Act</td>
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<td>CRPF</td>
<td>Central Reserve Police Force (India)</td>
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<td>CRRC</td>
<td>China Railway Rolling Stock Corporation</td>
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<td>CRS</td>
<td>Congressional Research Service</td>
</tr>
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<td>CRTC</td>
<td>Canadian Radio-Television and Telecommunications Commission</td>
</tr>
<tr>
<td>CSA</td>
<td>Comprehensive Safeguards Agreement (associated with NPT)</td>
</tr>
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<td>CSCL</td>
<td>China Shipping Container Lines</td>
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<td>CSI</td>
<td>Container Security Initiative</td>
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<td>CSIS</td>
<td>Center for Strategic and International Studies (Washington, D.C.)</td>
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<tr>
<td>CSMS</td>
<td>Cargo Systems Messaging Service (CBP)</td>
</tr>
<tr>
<td>CSP</td>
<td>Conferences of States Parties</td>
</tr>
<tr>
<td>CSPV</td>
<td>Crystalline Silicon Photovoltaic cells, modules, laminates, and panels (solar panels)</td>
</tr>
<tr>
<td>CSRC</td>
<td>China Securities Regulatory Commission</td>
</tr>
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<td>CTA</td>
<td>Central Tibetan Administration</td>
</tr>
<tr>
<td>CTC</td>
<td>Change in Tariff Classification</td>
</tr>
<tr>
<td>CTCS</td>
<td>Customs Tariff Commission of the State Council (China)</td>
</tr>
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<td>CTD</td>
<td>WTO Committee on Trade and Development</td>
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<tr>
<td>Acronym</td>
<td>Description</td>
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</tr>
<tr>
<td>CTESS</td>
<td>WTO Committee on Trade and Environment in Special Session</td>
</tr>
<tr>
<td>CTF</td>
<td>Customs and Trade Facilitation</td>
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<tr>
<td>CTH</td>
<td>Change in Tariff Heading</td>
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<tr>
<td>CTHA</td>
<td>WTO Chemical Tariff Harmonization Agreement</td>
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<td>CTIL</td>
<td>Center for Trade and Investment Law (India)</td>
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<tr>
<td>CTPA</td>
<td>United States – Colombia Trade Promotion Agreement</td>
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<tr>
<td>C-TPAT (CTPAT)</td>
<td>Customs – Trade Partnership Against Terrorism</td>
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<td>CTSH</td>
<td>Change in Tariff Sub-Heading</td>
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<tr>
<td>CU</td>
<td>Customs Union</td>
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<td>Customs Valuation Agreement</td>
<td>WTO Agreement on Customs Valuation (Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994)</td>
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<td>CUFTA (CUSFTA)</td>
<td>Canada – United States FTA</td>
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<td>CUSMA</td>
<td>Canada – United States – Mexico Agreement (revised FTA based on August 2017-September 2018 renegotiations, called CUSMA in Canada, USMCA in America, called CUSMA in Canada, USMCA in America, and informally called NAFTA 2.0, signed 30 November 2018, signed again after further renegotiations 10 December 2019, and entered into force 1 July 2020)</td>
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<td>CV</td>
<td>Constructed Value</td>
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<tr>
<td>CVA</td>
<td>Canadian Value Added</td>
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<tr>
<td>CVD (1st meaning)</td>
<td>Countervailing Duty</td>
</tr>
<tr>
<td>CVD (2nd meaning)</td>
<td>Chronic Venous Disorder</td>
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<tr>
<td>CVI</td>
<td>Chronic Venous Insufficiency</td>
</tr>
<tr>
<td>CVID</td>
<td>Complete, Verifiable, Irreversible Disarmament</td>
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<td>CWP (1st meaning)</td>
<td>Circular Welded carbon quality steel Pipe</td>
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<tr>
<td>CWP (2nd meaning)</td>
<td>Cooperative Work Program (IPEF)</td>
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<tr>
<td>CY</td>
<td>Calendar Year</td>
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<td>DAHD</td>
<td>Department of Animal Husbandry, Dairying, and Fisheries (India)</td>
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<td>DARPA</td>
<td>U.S. Defense Advanced Research Projects Agency</td>
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<tr>
<td>DBT</td>
<td>U.K. Department for Business and Trade (established February 2023 via merger of DIT with certain</td>
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<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>DCIV</td>
<td>Double Cab In Van</td>
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<tr>
<td>DCR</td>
<td>Domestic Content Requirement</td>
</tr>
<tr>
<td>DCS</td>
<td>Destination Control Statement</td>
</tr>
<tr>
<td>DDA</td>
<td>Doha Development Agenda</td>
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<tr>
<td>DDTC</td>
<td>U.S. Directorate of Defense Trade Controls (Department of State)</td>
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<tr>
<td>DEA</td>
<td>Digital Economy Agreement</td>
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<tr>
<td>DeitY</td>
<td>Department of Electronics and Information Technology (MCIT, India)</td>
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<tr>
<td>DEPA (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Digital Economic Partnership Agreement (generally)</td>
</tr>
<tr>
<td>DEPA (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>June 2020 Digital Economic Partnership Agreement (Chile, New Zealand, Singapore)</td>
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<tr>
<td>DFFT</td>
<td>Data Free Flow with Trust</td>
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<tr>
<td>DFQF</td>
<td>Duty Free, Quota Free</td>
</tr>
<tr>
<td>DG</td>
<td>Director General (Director-General)</td>
</tr>
<tr>
<td>DGCFMC</td>
<td>WTO Director General’s Consultative Framework Mechanism on the development aspects of Cotton</td>
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<tr>
<td>DGFT</td>
<td>Director General of Foreign Trade (part of Ministry of Commerce, India)</td>
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<td>DHS</td>
<td>U.S. Department of Homeland Security</td>
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<tr>
<td>DIPAM</td>
<td>Department of Investment and Public Asset Management (India)</td>
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<tr>
<td>DJAI</td>
<td>Declaración Jurada Anticipada de Importación (Argentina, Advance Sworn Import Declaration)</td>
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<tr>
<td>DIEM</td>
<td>Derechos de Importación Específicos Mínimos (Argentina, Minimum Specific Import Duties)</td>
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<td>DIFMER</td>
<td>Difference in Merchandise (dumping margin calculation adjustment)</td>
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<td>DIT</td>
<td>Department for International Trade (U.K.)</td>
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<td>DIY</td>
<td>Do It Yourself</td>
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<tr>
<td>DM (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Dumping Margin</td>
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<tr>
<td>DM (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Deutsche Marks</td>
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<td>DMA (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>2022 EU Digital Markets Act</td>
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<td>DMA (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Domestic Marketing Assessment</td>
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<td>Description</td>
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<tr>
<td>DMZ</td>
<td>De-Militarized Zone</td>
</tr>
<tr>
<td>DNA</td>
<td>deoxyribonucleic acid</td>
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<td>DNI</td>
<td>Director of National Intelligence (U.S.)</td>
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<tr>
<td>DNR</td>
<td>Donetsk People’s Republic</td>
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<td>DOC</td>
<td>U.S. Department of Commerce</td>
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<td>DOD</td>
<td>U.S. Department of Defense</td>
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<td>DOE</td>
<td>U.S. Department of Energy</td>
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<td>DOJ</td>
<td>U.S. Department of Justice</td>
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<td>DOL</td>
<td>U.S. Department of Labor</td>
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<td>DOP</td>
<td>13 September 1993 Israeli-PLO Declaration of Principles on Interim Self-Government Arrangements (Oslo I Accord, Oslo I)</td>
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<td>DOS</td>
<td>U.S. Department of State</td>
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<td>DOT</td>
<td>U.S. Department of Transportation</td>
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<td>DP (DPW)</td>
<td>Dubai Ports Dubai Ports World</td>
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<tr>
<td>DPA (1st meaning)</td>
<td>1950 Defense Production Act (U.S.)</td>
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<tr>
<td>DPA (2nd meaning)</td>
<td>Deferred Prosecution Agreement</td>
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<td>DPA (3rd meaning)</td>
<td>Data Protection Authority (India)</td>
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<tr>
<td>DPCIA</td>
<td>1990 Dolphin Protection Consumer Information Act</td>
</tr>
<tr>
<td>DPP</td>
<td>Dialogue on Plastic Pollution and Environmentally Sustainable Plastics Trade (WTO)</td>
</tr>
<tr>
<td>DPRK</td>
<td>Democratic People’s Republic of Korea (North Korea)</td>
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<tr>
<td>DRAM</td>
<td>Dynamic Random-Access Memory</td>
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<tr>
<td>DSM</td>
<td>Dispute Resolution Mechanism (JCPOA)</td>
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<tr>
<td>DRAMS</td>
<td>Dynamic Random-Access Memory Semiconductor</td>
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<tr>
<td>DRC</td>
<td>Democratic Republic of the Congo</td>
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<tr>
<td>DSB</td>
<td>WTO Dispute Settlement Body</td>
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<tr>
<td>DSM</td>
<td>Dispute Settlement Mechanism</td>
</tr>
<tr>
<td>DST</td>
<td>Digital Sales Tax, Digital Services Tax</td>
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<td>DSU</td>
<td>WTO Dispute Settlement Understanding (Understanding on Rules and Procedures Governing the Settlement of Disputes)</td>
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<td>DTA</td>
<td>Digital Trade Agreement</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>DUP</td>
<td>Democratic Unionist Party (Northern Ireland)</td>
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<tr>
<td>DUV</td>
<td>deep ultraviolet lithography (systems)</td>
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<tr>
<td>DVD</td>
<td>Digital Video Recording</td>
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<tr>
<td>E3</td>
<td>Britain, France, and Germany</td>
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<td>EA</td>
<td>Environmental Assessment</td>
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<tr>
<td>EAA</td>
<td>1979 <em>Export Administration Act</em></td>
</tr>
<tr>
<td>EAC (1st meaning)</td>
<td>East African Community</td>
</tr>
<tr>
<td>EAC (2nd meaning)</td>
<td>East Asian Community</td>
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<tr>
<td>EAC (3rd meaning)</td>
<td>Environmental Affairs Council <em>(CAFTA-DR, KORUS)</em></td>
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<tr>
<td>EADS</td>
<td>European Aeronautic Defense and Space Company NV</td>
</tr>
<tr>
<td>EaEU (EAEU)</td>
<td>Eurasian Economic Union</td>
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<tr>
<td>EAF</td>
<td>Electric Arc Furnace</td>
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<tr>
<td><em>EAGLE Act</em></td>
<td>2021 <em>Ensuring American Global Leadership and Engagement Act</em></td>
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<td><em>EAPA</em></td>
<td>2015 <em>Enforce and Protect Act</em> (U.S.)</td>
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<tr>
<td><em>EAR</em></td>
<td><em>Export Administration Regulations</em></td>
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<tr>
<td>EBA</td>
<td><em>Everything But Arms</em></td>
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<tr>
<td>EBOR</td>
<td>Electronic On Board Recorder</td>
</tr>
<tr>
<td>EBRD</td>
<td>European Bank for Reconstruction and Development</td>
</tr>
<tr>
<td>EC (1st meaning)</td>
<td>European Commission</td>
</tr>
<tr>
<td>EC (2nd meaning)</td>
<td>European Communities</td>
</tr>
<tr>
<td><em>ECA</em> (1st meaning)</td>
<td><em>Economic Cooperation Agreement</em></td>
</tr>
<tr>
<td><em>ECA</em> (2nd meaning)</td>
<td>Agreement between the Government of the United States of America and the Government of the Republic of Korea on Environmental Cooperation <em>(KORUS)</em></td>
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<tr>
<td><em>ECA</em> (3rd meaning)</td>
<td><em>Export Controls Act of 2018</em> (part of 2018 NDAA)</td>
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<td>ECAT</td>
<td>Emergency Committee for Foreign Trade</td>
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<td>ECB</td>
<td>European Central Bank</td>
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<tr>
<td>ECC (1st meaning)</td>
<td>Environmental Cooperation Commission <em>(CAFTA-DR)</em></td>
</tr>
<tr>
<td>ECC</td>
<td>Extraordinary Challenge Committee</td>
</tr>
<tr>
<td>(2nd meaning)</td>
<td>(NAFTA)</td>
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<tr>
<td>---------------</td>
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<tr>
<td>ECCAS</td>
<td>Economic Community of Central African States</td>
</tr>
<tr>
<td>ECCN</td>
<td>Export Control Classification Number</td>
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<td>ECE</td>
<td>Evaluation Committee of Experts (NAFTA)</td>
</tr>
<tr>
<td>ECFA</td>
<td>Economic Cooperation Framework Agreement</td>
</tr>
<tr>
<td>ECG</td>
<td>electrocardiogram</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
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<tr>
<td>ECLAC</td>
<td>Economic Commission for Latin America and the Caribbean</td>
</tr>
<tr>
<td>E-Commerce</td>
<td>Electronic Commerce</td>
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<tr>
<td>ECOSOC</td>
<td>U.N. Economic and Social Council</td>
</tr>
<tr>
<td>ECOWAS</td>
<td>Economic Community of West African States</td>
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<tr>
<td>ECRA</td>
<td>Export Control Reform Act of 2018 (part of John S. McCain National Defense Authorization Act for Fiscal Year 2019, i.e., 20199 NDAA)</td>
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<td>ECU</td>
<td>European Currency Unit</td>
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<td>ED</td>
<td>Economic Development Administration (of DOC)</td>
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<td>EDBI</td>
<td>Export Development Bank of Iran</td>
</tr>
<tr>
<td>EDC</td>
<td>Export Development Corporation (Canada)</td>
</tr>
<tr>
<td>EDI</td>
<td>Electronic Data Interchange</td>
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<tr>
<td>EEC</td>
<td>European Economic Community</td>
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<td>EEU</td>
<td>Eurasian Economic Union</td>
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<td>EEZ</td>
<td>Exclusive Economic Zone</td>
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<td>EFSA</td>
<td>European Food Safety Authority</td>
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<td>EFTA</td>
<td>European Free Trade Association</td>
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<td>EGA</td>
<td>WTO Environmental Goods Agreement</td>
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<td>EHC</td>
<td>export health certificate (U.K.)</td>
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<td>EIB</td>
<td>European Investment Bank</td>
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<td>EIF</td>
<td>Enhanced Integrated Framework (formerly “IF,” or “Integrated Framework”)</td>
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<td>EIG</td>
<td>équipement d’intérêt general (France)</td>
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<td>ELLIE</td>
<td>Electronic Licensing Entry System</td>
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<td>ELS</td>
<td>Extra Long Staple (cotton)</td>
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<td>EN</td>
<td>Explanatory Note</td>
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<td>ENAM</td>
<td>Electronic National Agricultural Market system (India)</td>
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<td><strong>ENFORCE Act (TFTEA, TEA)</strong></td>
<td>2015 <em>Trade Facilitation and Trade Enforcement Act</em></td>
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<td><strong>EO</strong> (E.O.)</td>
<td><em>Executive Order</em> (U.S.)</td>
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<td><strong>EOBR</strong></td>
<td>Electronic On Board Recorder</td>
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<td><strong>EP</strong></td>
<td>Export Price</td>
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<td><strong>EPA</strong> (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td><em>Economic Partnership Agreement</em></td>
</tr>
<tr>
<td><strong>EPA</strong> (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>U.S. Environmental Protection Agency</td>
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<td><strong>EPI</strong></td>
<td>Economic Policy Institute</td>
</tr>
<tr>
<td><strong>EPZ</strong></td>
<td>Export Processing Zone</td>
</tr>
</tbody>
</table>
| **ERC** | End-Use Review Committee  
(U.S. DOC BIS, set forth under EAR) |
| **ERP** | Effective Rate of Protection |
| **E-SIGN Act** | 2000 *Electronic Signatures in Global and National Commerce Act* |
| **ESCS** | European Steel and Coal Community |
| **ESG** | Environmental, Social, and Governance |
| **ESL** | English as a Second Language |
| **ESP** | Exporter’s Sales Price  
(Pre-Uruguay Round U.S. term for Constructed Export Price) |
| **ESPO** | Eastern Siberia Pacific Ocean |
| **ET** (EST) | Eastern Time  
(Eastern Standard Time) |
| **ETA** | Employment and Training Administration  
(DOL) |
| **ETF** | exchange traded fund |
| **ETI Act** | 2000 *Extraterritorial Income Exclusion Act* |
| **ETIM** | East Turkistan Islamic Movement |
| **ETP** | Eastern Tropical Pacific (Ocean) |
| **ETS** | Emission(s) Trading Scheme (System) |
| **EU** | European Union |
| **EUR** | euro |
| **EUSFTA** | *European Union-Singapore Free Trade Agreement* |
| **EUC** | End-User Review Committee  
(U.S.) |
<p>| <strong>EUV</strong> | extreme ultraviolet lithography |
| <strong>Eurojust</strong> | EU agency for judicial cooperation in criminal matters |
| <strong>Europol</strong> | European Union Agency for Law Enforcement Cooperation |
| <strong>EV</strong> | Electric Vehicle |</p>
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>Ex-Im Bank</td>
<td>U.S. Export-Import Bank</td>
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<td><em>FACT Act of 1990 (1990 Farm Bill)</em></td>
<td><em>1990 Food, Agriculture, Conservation and Trade Act</em></td>
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<td><em>FAIR Act of 1996 (1996 Farm Bill)</em></td>
<td><em>1996 Federal Agricultural Improvement and Reform Act</em></td>
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<td><em>FAIR Transition and Competition Act</em></td>
<td><em>2021 Fair, Affordable, Innovative, and Resilient Transition and Competition Act</em> (proposed BCA legislation)</td>
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<td>FAQ</td>
<td>Food and Agricultural Organization</td>
</tr>
<tr>
<td>FAQ</td>
<td>Frequently Asked Question</td>
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<td>FAR</td>
<td>Federal Acquisition Regulation (U.S.)</td>
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<td>FAS</td>
<td>Foreign Agricultural Service (of USDA)</td>
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<td>FAST</td>
<td>Free And Secure Trade</td>
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<td>FATA</td>
<td>Federally Administered Tribal Areas (Pakistan)</td>
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<td>FATF</td>
<td>Financial Action Task Force</td>
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<td>FBI</td>
<td>U.S. Federal Bureau of Investigation</td>
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<td>FCC</td>
<td>Federal Communications Commission (U.S.)</td>
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<td>FCF</td>
<td>Fong Chun Formosa Fishery (Taiwan)</td>
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<td>FCIC</td>
<td>U.S. Federal Crop Insurance Corporation (USDA)</td>
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<td>FCLRC</td>
<td>Federal Conciliation and Labor Registration Center (Mexico)</td>
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<td>FCPA</td>
<td>1977 <em>Foreign Corrupt Practices Act</em></td>
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<td>FCSC</td>
<td>Foreign Claims Settlement Commission (U.S.)</td>
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<td>FDA</td>
<td>Food and Drug Administration (U.S.)</td>
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<td>FDI</td>
<td>Foreign Direct Investment</td>
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<td>FDP Rule</td>
<td>Foreign Direct Product Rule (U.S.)</td>
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<td>Federal Circuit</td>
<td>U.S. Court of Appeals for the Federal Circuit (Washington, D.C.)</td>
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<td>FEMA</td>
<td>Federal Emergency Management Agency (U.S. DHS)</td>
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<tr>
<td>FEP</td>
<td>Fuel Enrichment Plant <em>(e.g., for UF₆ at Natanz, Iran)</em></td>
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<tr>
<td>FERC</td>
<td>U.S. Federal Energy Regulatory Commission</td>
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<tr>
<td>FF</td>
<td>French Francs</td>
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<tr>
<td>FFI</td>
<td>foreign financial institution</td>
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<tr>
<td>FFPO</td>
<td>Fines, Penalties and Forfeitures Office(r) (U.S. Ports of Entry)</td>
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<td>FFTJ</td>
<td>Fittings, flanges, and tool joints</td>
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<td>FGUP</td>
<td>State Research Center of the Russian Federation</td>
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<td>FICCI</td>
<td>Federation of Indian Chambers of Commerce and Industry</td>
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<td>FIFA</td>
<td>Fédération Internationale de Football Association</td>
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<td>Fimea</td>
<td>Finnish Medicines Agency</td>
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<td>U.S. Financial Crimes Enforcement Network (Department of the Treasury)</td>
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<td>fintech</td>
<td>financial technology</td>
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<td>FIRRMA</td>
<td>Foreign Investment Risk Review Modernization Act of 2018 (part of 2018 NDAA)</td>
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<td>Feed-in tariff</td>
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<td>FLETF</td>
<td>Forced Labor Enforcement Task Force (DHS)</td>
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<td>FMCSA</td>
<td>Federal Motor Carrier Safety Administration</td>
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<td>FMSA</td>
<td>2011 Food Safety Modernization Act</td>
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<td>FMV (1st meaning)</td>
<td>Foreign Market Value (Pre-Uruguay Round U.S. term for Normal Value)</td>
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<tr>
<td>FMV (2nd meaning)</td>
<td>Fair Market Value</td>
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<td>FMVSS</td>
<td>Federal Motor Vehicle Safety Standards</td>
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<td>FN4 Entity</td>
<td>Footnote 4 Entity (entity to which Footnote 4 is added to its entry on Entity List)</td>
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<td>Facts Otherwise Available</td>
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<td>FOB (f.o.b.)</td>
<td>Free On Board</td>
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<td>FOP</td>
<td>Factors of Production</td>
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<td>FOREX</td>
<td>Foreign Exchange</td>
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<td>FPA</td>
<td>Foreign Partnership Agreement</td>
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<td>FPC</td>
<td>U.S. Federal Power Commission (predecessor of DOE)</td>
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<td>FPGA</td>
<td>field programmable gate array integrated circuit</td>
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<tr>
<td>FRAND</td>
<td>Fair, Reasonable, and Non-Discriminatory (terms)</td>
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<tr>
<td>FRCP</td>
<td>U.S. Federal Rules of Civil Procedure</td>
</tr>
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<td>FRCrmp</td>
<td>U.S. Federal Rules of Criminal Procedure</td>
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<tr>
<td>FRE</td>
<td>U.S. Federal Rules of Evidence</td>
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<tr>
<td>FRS</td>
<td>Fellowship of the Royal Society</td>
</tr>
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</table>
| FRSA | Fellowship of the Royal Society for the Encouragement of
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
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<tbody>
<tr>
<td>FSA (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>U.S. Farm Services Agency</td>
</tr>
<tr>
<td>FSA (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Food Safety Agency (EU)</td>
</tr>
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<td>FSB</td>
<td>Federal Security Service (Russia)</td>
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<td>FSC</td>
<td>Foreign Sales Corporation</td>
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<td>FSIA</td>
<td><em>Foreign Sovereign Immunities Act of 1976</em></td>
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<td>FSRI Act of 2002 (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>2002 <em>Farm Security and Rural Investment Act</em></td>
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<td>FTA</td>
<td>Free Trade Agreement</td>
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<tr>
<td>FTAA</td>
<td><em>Free Trade Area of the Americas</em></td>
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<td>FTAAP</td>
<td><em>Free Trade Agreement of the Asia Pacific Region</em></td>
</tr>
<tr>
<td>FTC (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Free Trade Commission (<em>NAFTA</em>)</td>
</tr>
<tr>
<td>FTC (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Federal Trade Commission (U.S.)</td>
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<td>FTO</td>
<td>Foreign Terrorist Organization</td>
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<td>FTZ (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Foreign Trade Zone</td>
</tr>
<tr>
<td>FTZ (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Free Trade Zone</td>
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<tr>
<td>FY</td>
<td>Fiscal Year</td>
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<td>FX</td>
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<td>G7 (G-7)</td>
<td>Group of Seven Industrialized Nations</td>
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<tr>
<td>G8 (G-8)</td>
<td>Group of Eight Industrialized Nations</td>
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<td>G20 (G-20)</td>
<td>Group of Twenty Developed Nations</td>
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<td>G33 (G-33)</td>
<td>Group of 33 Developing Countries</td>
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<tr>
<td>G&amp;A</td>
<td>General and Administrative expenses</td>
</tr>
<tr>
<td>GAAP</td>
<td>Generally Accepted Accounting Principles</td>
</tr>
<tr>
<td>GAFA</td>
<td>Google, Apple, Facebook, and Amazon</td>
</tr>
<tr>
<td>GAIN</td>
<td>USDA FAS Global Agricultural Information Network</td>
</tr>
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<td>GAO</td>
<td>U.S. Government Accountability Office</td>
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<td>GATB</td>
<td><em>General Agreement on Trade in Bananas</em> (15 December 2009)</td>
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<td>GATS</td>
<td><em>General Agreement on Trade in Services</em></td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade (GATT 1947 and/or GATT 1994)</td>
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<td>GATT 1947</td>
<td>General Agreement on Tariffs and Trade 1947 and all</td>
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<td>Acronym</td>
<td>Description</td>
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<tr>
<td>GAVI</td>
<td>Global for Vaccines and Immunizations</td>
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<td>GB</td>
<td>Great Britain</td>
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<td>GCAM</td>
<td>General Commission for Audiovisual Media (Saudi Arabia)</td>
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<td>GCC (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Global Climate Coalition</td>
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<td>GCC (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Gulf Cooperation Council</td>
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<td>GDP</td>
<td>Gross Domestic Product</td>
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<td>GDPR</td>
<td>General Data Protection Regulation (EU 2016/679)</td>
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<td>GE</td>
<td>General Electric</td>
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<td>GFCI</td>
<td>Global Financial Centers Index</td>
</tr>
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<td>GI</td>
<td>Geographical Indication</td>
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<tr>
<td>GILT</td>
<td>Global Intangible Low-Taxed Income</td>
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<td>GISAI</td>
<td>Global Initiative on Sharing Avian Influenza Data</td>
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<td>GL</td>
<td>General License</td>
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<td>GloMag</td>
<td>2016 Global Magnitsky Human Rights Accountability Act</td>
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<td>GM</td>
<td>Genetically Modified, Genetic Modification</td>
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<td>GMO</td>
<td>Genetically Modified Organism</td>
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<tr>
<td>GMT</td>
<td>Greenwich Mean Time</td>
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<td>GNH</td>
<td>Gross National Happiness</td>
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<tr>
<td>GNI</td>
<td>Gross National Income</td>
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<tr>
<td>GNP</td>
<td>Gross National Product</td>
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<td>GOI</td>
<td>Government of India</td>
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<td>GPA</td>
<td>Government Procurement Agreement (WTO Agreement on Government Procurement)</td>
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<td>GPO (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Government Pharmaceutical Organization (Thailand)</td>
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<td>GPO (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Group Purchasing Organization (U.S.)</td>
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<td>GPS</td>
<td>Global Positioning System</td>
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<td>GPT</td>
<td>General Preferential Tariff</td>
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<td>Description</td>
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<tr>
<td>GRI</td>
<td>General Rules of Interpretation (of the HS)</td>
</tr>
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<td>GRP</td>
<td>Good Regulatory Practice</td>
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<td>GSM</td>
<td>General Sales Manager</td>
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<td>GSP</td>
<td>Generalized System of Preferences (U.S.)</td>
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<td>GSP+</td>
<td>Generalized System of Preferences Plus (EU)</td>
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<td>GTA</td>
<td>Global Trade Atlas</td>
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<td>GVWR</td>
<td>Gross Vehicle Weight Rating</td>
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<td>GW</td>
<td>gigawatt</td>
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<tr>
<td>H5N1</td>
<td>Avian Flu (virus)</td>
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<tr>
<td>H&amp;M</td>
<td>Hennes &amp; Mauritz AB (Swedish MNC)</td>
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<td>HALE</td>
<td>High-Altitude, Long, Endurance unmanned aircraft system (drone) (U.S. Navy)</td>
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<td>HALEU</td>
<td>high-assay, low-enriched Uranium</td>
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<td>HCTC</td>
<td>Health Care Tax Credit</td>
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<td>HDC</td>
<td>Holder in Due Course</td>
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<td>HDI</td>
<td>U.N. Human Development Index</td>
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<td>HDPE</td>
<td>high-density polyethylene</td>
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<td>HFCAA</td>
<td>2020 Holding Foreign Companies Accountable Act</td>
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<td>HFCS</td>
<td>High Fructose Corn Syrup</td>
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<td>HHS</td>
<td>U.S. Department of Health and Human Services</td>
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<tr>
<td>HIPC</td>
<td>Highly Indebted Poor Country</td>
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<td>HKS</td>
<td>Hong Kong dollar</td>
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<td>HKIAC</td>
<td>Hong Kong International Arbitration Center</td>
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<td>HKMA</td>
<td>Hong Kong Monetary Authority</td>
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<tr>
<td>HKSAR</td>
<td>Hong Kong Special Administrative Region</td>
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<td>HKSE</td>
<td>Hong Kong Stock Exchange</td>
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<td>HKU</td>
<td>Hong Kong University (University of Hong Kong)</td>
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<td>HLED</td>
<td>High Level Economic Dialogue (e.g., U.S.-Mexico)</td>
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<tr>
<td>HM</td>
<td>Her (His) Majesty</td>
</tr>
<tr>
<td>HMG</td>
<td>Her (His) Majesty’s Government</td>
</tr>
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<td>HMT</td>
<td>Her (His) Majesty’s Treasury (U.K.)</td>
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<tr>
<td>HNW</td>
<td>High Net Worth</td>
</tr>
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<td>HOEP</td>
<td>Hourly Ontario Energy Price</td>
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<td><strong>Homeland Security Act</strong></td>
<td>2002 <em>Homeland Security Act</em></td>
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<tr>
<td>HPAE</td>
<td>High Performing Asian Economy</td>
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<td>HPAI</td>
<td>High Pathogenic Avian Influenza</td>
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<td>HPC</td>
<td>High Performance Computer</td>
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<td>HPNAI</td>
<td>High Pathogenic Notifiable Avian Influenza</td>
</tr>
<tr>
<td>HQ</td>
<td>Headquarters</td>
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<td>HRL</td>
<td>Headquarters Ruling Letter (U.S. Customs Service, CBP)</td>
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<tr>
<td>HS</td>
<td>Harmonized System</td>
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<tr>
<td>HSBC</td>
<td>Hong Kong Shanghai Banking Corporation</td>
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<td>HSBI</td>
<td>Highly Sensitive Business Information</td>
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<td>HSC</td>
<td>Harmonized System Committee (WCO)</td>
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<td>HSI</td>
<td>Homeland Security Investigation (U.S. DHS)</td>
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<tr>
<td>HTS</td>
<td>Harmonized Tariff Schedule</td>
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<td>HTSUS</td>
<td>Harmonized Tariff Schedule of the U.S.</td>
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<td>HVAC</td>
<td>Heating, Ventilation, and Air Conditioning</td>
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<tr>
<td>IA (1st meaning)</td>
<td>Import Administration (U.S. DOC)</td>
</tr>
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<td>IA (2nd meaning)</td>
<td>Information Available</td>
</tr>
<tr>
<td>IA (3rd meaning)</td>
<td>Internal Advice</td>
</tr>
<tr>
<td>IAC</td>
<td>Iran Alumina Company (IMIDRO subsidiary)</td>
</tr>
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<td>IADB</td>
<td>Inter-American Development Bank</td>
</tr>
<tr>
<td>IAEA</td>
<td>International Atomic Energy Agency</td>
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<tr>
<td>IAR</td>
<td>Internal Advice Response (CBP)</td>
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<td>IBRD</td>
<td>International Bank for Reconstruction and Development (The World Bank)</td>
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<td>IBT (1st meaning)</td>
<td>International Brotherhood of Teamsters</td>
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<td>IBT (2nd meaning)</td>
<td>International Business Transactions</td>
</tr>
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<td>IC (1st meaning)</td>
<td>Indifference Curve</td>
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<td>IC (2nd meaning)</td>
<td>integrated circuit</td>
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<tr>
<td>ICs</td>
<td>Indigenous Communities</td>
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<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>ICAC</td>
<td>International Cotton Advisory Committee</td>
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<td>ICAO</td>
<td>International Civil Aviation Organization (U.N.)</td>
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<td>ICBM</td>
<td>Intercontinental Ballistic Missile</td>
</tr>
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<td>ICC (1st meaning)</td>
<td>International Chamber of Commerce</td>
</tr>
<tr>
<td>ICC (2nd meaning)</td>
<td>International Criminal Court</td>
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<tr>
<td>ICE</td>
<td>U.S. Immigration and Customs Enforcement</td>
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<td>ICFTU</td>
<td>International Confederation of Free Trade Unions</td>
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<td>ICIT</td>
<td>Intergovernmental Commission on International Trade (Ukraine)</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICOR</td>
<td>Incremental Capital Output Ratio</td>
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<td>ICS</td>
<td>Investment Court System</td>
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<td>ICSID</td>
<td>International Center for the Settlement of Investment Disputes</td>
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<td>ICT</td>
<td>Information and Communications Technology</td>
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<td>ICTS</td>
<td>Information and Communications Technology Services</td>
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<td>ICTSD</td>
<td>International Center for Trade and Sustainable Development</td>
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<td>IDB</td>
<td>Integrated Database</td>
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<td>IDF</td>
<td>Israeli Defense Forces</td>
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<td>IDP</td>
<td>WTO Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade</td>
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<td>IEC (1st meaning)</td>
<td>International Electrotechnical Commission</td>
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<td>IEC (2nd meaning)</td>
<td>Importer-Exporter Code (India)</td>
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<td>IFD</td>
<td>WTO Agreement on Investment Facilitation for Development</td>
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<td>IFPMA</td>
<td>International Federation of Pharmaceutical Manufacturers and Associations</td>
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<td>IFPRI</td>
<td>International Food Policy Research Institute</td>
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<tr>
<td>IFSA</td>
<td>2006 Iran Freedom Support Act</td>
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<td>IFTA</td>
<td>1985 United States-Israel Free Trade Implementation Act</td>
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<td>IGBA</td>
<td>1970 Illegal Gambling Business Act</td>
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<td>IGG</td>
<td>itinéraire à grand gabarit (France)</td>
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<td>Acronym</td>
<td>Description</td>
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<td>IHR</td>
<td>International Health Regulations (WHO)</td>
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<td>International Investment Agreement</td>
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<td>IIF</td>
<td>Institute of International Finance</td>
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<td>IIPA</td>
<td>International Intellectual Property Alliance</td>
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<tr>
<td>IIT</td>
<td>Indian Institute of Technology</td>
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<tr>
<td>ILAB (BILA)</td>
<td>Bureau of International Labor Affairs (U.S. DOL OTLA)</td>
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<tr>
<td>ILC</td>
<td>International Law Commission</td>
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<td>ILO</td>
<td>International Labor Organization</td>
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<tr>
<td>ILRF</td>
<td>International Labor Rights Forum</td>
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<td>ILSA</td>
<td>1996 Iran and Libya Sanctions Act (called ISA after IFSA)</td>
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<td>IMC</td>
<td>Industrial Metal and Commodities</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>IMF Articles</td>
<td>Articles of Agreement of the International Monetary Fund</td>
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<td>IMIDRO</td>
<td>Iranian Mines and Mining Industries Development and Renovation Organization</td>
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<td>IMO</td>
<td>International Maritime Organization (CMI)</td>
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<td>IMTDC</td>
<td>iron mechanical transfer drive component</td>
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<td>INARA</td>
<td>2015 Iran Nuclear Agreement Review Act</td>
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<td>INBAR</td>
<td>International Bamboo and Rattan Organization</td>
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<tr>
<td>Inc.</td>
<td>incorporated (U.S.)</td>
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<td>INC</td>
<td>Inter-governmental Negotiation Committee</td>
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<td>Incoterms</td>
<td>International Commercial Terms (ICC)</td>
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<td>INN</td>
<td>International Non-proprietary Names (WHO)</td>
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<td>INOVAR-AUTO</td>
<td>Incentive to the Technological Innovation and Densification of the Automotive Supply Chain (Brazil)</td>
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<tr>
<td>INR (1st meaning)</td>
<td>Initial Negotiating Right</td>
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<td>INR (2nd meaning)</td>
<td>Indian Rupee</td>
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<td>INS</td>
<td>U.S. Immigration and Naturalization Service (reorganized partly into ICE in March 2003)</td>
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<td>IO</td>
<td>International Organization</td>
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<td>IOR</td>
<td>Importer of Record</td>
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<tr>
<td>IP</td>
<td>Intellectual Property</td>
</tr>
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<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>IPBES</td>
<td>Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Studies</td>
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<td>IPCC</td>
<td>U.N. Intergovernmental Panel on Climate Change</td>
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<tr>
<td>IPEF</td>
<td><em>Indo-Pacific Economic Framework</em></td>
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<tr>
<td>IPI Tax</td>
<td>Tax on Industrialized Products (Brazil)</td>
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<tr>
<td>IPIC Treaty</td>
<td>1989 <em>Treaty on Intellectual Property in Respect of Integrated Circuits</em></td>
</tr>
<tr>
<td>IPO</td>
<td>initial public offering</td>
</tr>
<tr>
<td>IPOA</td>
<td>International Plan Of Action</td>
</tr>
<tr>
<td>IPOA-IUU</td>
<td>International Plan Of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing (FAO)</td>
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<tr>
<td>IPPC</td>
<td>1952 <em>International Plant Protection Convention</em></td>
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<td>IPPR</td>
<td>Institute for Public Policy Research</td>
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<td>IPR</td>
<td>Intellectual Property Right</td>
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<td>IPR (1st meaning)</td>
<td>Intellectual Property Right</td>
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<td>IPR (2nd meaning)</td>
<td>International Priority Right</td>
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<td>IPTV</td>
<td>Internet Protocol Television</td>
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<td>IRA (1st meaning)</td>
<td>U.S. <em>Inflation Reduction Act of 2022</em></td>
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<td>IRA (2nd meaning)</td>
<td>Irish Republican Army (Provisional Irish Republican Army)</td>
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<tr>
<td>IRC</td>
<td>U.S. Internal Revenue Code</td>
</tr>
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<td>IRENA</td>
<td>International Renewable Energy Agency</td>
</tr>
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<td>IRGC (IRGC)</td>
<td>Iranian Revolutionary Guard Corps (Islamic Revolutionary Guard Corps)</td>
</tr>
<tr>
<td>IRGCN</td>
<td>Islamic Revolutionary Guards Corps Navy (Iran)</td>
</tr>
<tr>
<td>IRGC-QF</td>
<td>Islamic Revolutionary Guards Corp <em>Quds</em> Forces (Iran)</td>
</tr>
<tr>
<td>IRISL</td>
<td>Islamic Republic of Iran Shipping Lines</td>
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<tr>
<td>IRNA</td>
<td>Islamic Republic News Agency (Iran)</td>
</tr>
<tr>
<td>IRQ</td>
<td>Individual Reference Quantity</td>
</tr>
<tr>
<td>IRS</td>
<td>U.S. Internal Revenue Service</td>
</tr>
<tr>
<td>ISDS</td>
<td>Investor-State Dispute Settlement</td>
</tr>
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<td>ISEAS</td>
<td>Institute of Southeast Asian Studies</td>
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<tr>
<td>Acronym</td>
<td>Definition</td>
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<tr>
<td>ISI</td>
<td>Inter-Services Intelligence (Pakistan)</td>
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<td>ISIL</td>
<td>Islamic State in the Levant (ISIS)</td>
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<td>ISIS</td>
<td>Islamic State in Shams (ISIL)</td>
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<td>ISO</td>
<td>International Organization for Standardization</td>
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<td>ISTC</td>
<td>International Sugar Trade Coalition</td>
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<tr>
<td>IT</td>
<td>Information Technology</td>
</tr>
<tr>
<td>ITA (1st meaning)</td>
<td>1996 WTO <em>Information Technology Agreement</em></td>
</tr>
<tr>
<td>ITA (2nd meaning)</td>
<td>U.S. International Trade Administration (DOC)</td>
</tr>
<tr>
<td>ITA II (ITA – Exp)</td>
<td>2015 <em>Information Technology Agreement</em> (Expansion of the <em>Information Technology Agreement</em>)</td>
</tr>
<tr>
<td>ITAR</td>
<td><em>International Traffic in Arms Regulations</em></td>
</tr>
<tr>
<td>ITC (1st meaning)</td>
<td>International Trade Center (joint WTO-U.N. agency)</td>
</tr>
<tr>
<td>ITC (U.S. ITC) (2nd meaning)</td>
<td>U.S. International Trade Commission</td>
</tr>
<tr>
<td>ITDS</td>
<td>International Trade Data System (electronic single window for import-export data)</td>
</tr>
<tr>
<td>ITO</td>
<td>International Trade Organization</td>
</tr>
<tr>
<td>ITO Charter (Havana Charter)</td>
<td><em>Charter for an International Trade Organization</em></td>
</tr>
<tr>
<td>ITRD</td>
<td>International Trade Reporter Decisions</td>
</tr>
<tr>
<td>ITSR</td>
<td>Iranian Transactions and Sanctions Regulations (31 C.F.R. Part 560)</td>
</tr>
<tr>
<td>ITT</td>
<td>ITT Corporation</td>
</tr>
<tr>
<td>ITT NV</td>
<td>ITT Night Vision</td>
</tr>
<tr>
<td>ITU</td>
<td>International Telecommunications Union</td>
</tr>
<tr>
<td>IUD</td>
<td>intra-uterine device</td>
</tr>
<tr>
<td>IUSCT</td>
<td>Iran – U.S. Claims Tribunal</td>
</tr>
<tr>
<td>IUU</td>
<td>illegal, unreported, and unregulated</td>
</tr>
<tr>
<td>IWC</td>
<td>International Whaling Commission</td>
</tr>
<tr>
<td>JADE Act</td>
<td>2008 <em>Tom Lantos Block Burmese JADE (Junta’s Anti-Democratic Efforts) Act</em></td>
</tr>
<tr>
<td>J&amp;K</td>
<td>Jammu and Kashmir (Indian-Administered Kashmir)</td>
</tr>
<tr>
<td>JCPOA</td>
<td>July 2015 <em>Joint Comprehensive Plan of Action</em></td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Form</td>
</tr>
<tr>
<td>---------</td>
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</tr>
<tr>
<td>JeM</td>
<td>Jaish-e-Mohammed (&quot;The Army of Muhammad,&quot; Pakistan-based terrorist organization)</td>
</tr>
<tr>
<td>JFTC</td>
<td>Japan Fair Trade Commission</td>
</tr>
<tr>
<td>JIA</td>
<td>Japanese Investigative Authority</td>
</tr>
<tr>
<td>JNPT</td>
<td>Jawaharlal Nehru Port Terminals (Mumbai, India)</td>
</tr>
<tr>
<td>JPC</td>
<td>Joint Planning Committee (India)</td>
</tr>
<tr>
<td>JSC</td>
<td>Joint Stock Company (Russia)</td>
</tr>
<tr>
<td>JSI</td>
<td>Joint Statement Initiative</td>
</tr>
<tr>
<td>JV</td>
<td>Joint Venture</td>
</tr>
<tr>
<td>KAF</td>
<td>Khalid Al Falih (former Saudi Minister of Oil)</td>
</tr>
<tr>
<td>KCBT</td>
<td>Kansas City Board of Trade</td>
</tr>
<tr>
<td>KDB</td>
<td>Korea Development Bank</td>
</tr>
<tr>
<td>KEXIM</td>
<td>Export-Import Bank of Korea</td>
</tr>
<tr>
<td>KFC</td>
<td>Kentucky Fried Chicken</td>
</tr>
<tr>
<td>KfW</td>
<td>Kreditanstalt für Wiederaufbau (Germany, Credit Agency for Reconstruction)</td>
</tr>
<tr>
<td>kg</td>
<td>kilogram</td>
</tr>
<tr>
<td>KGB</td>
<td>Komitet Gosudarstvennoy Bezopasnosti (&quot;Committee for State Security,&quot; Soviet Union)</td>
</tr>
<tr>
<td>KH</td>
<td>Kata’ib Hezbollah (Hezbollah Brigades, Iraq)</td>
</tr>
<tr>
<td>km</td>
<td>kilometer</td>
</tr>
<tr>
<td>KMA</td>
<td>Kubota Manufacturing of America</td>
</tr>
<tr>
<td>KMT</td>
<td>Kuomintang</td>
</tr>
<tr>
<td>KORUS</td>
<td>Korea – United States Free Trade Agreement</td>
</tr>
<tr>
<td>KPPI</td>
<td>Komite Pengamanan Perdagangan Indonesia (competent international trade authority)</td>
</tr>
<tr>
<td>KSA</td>
<td>Kingdom of Saudi Arabia</td>
</tr>
<tr>
<td>KU</td>
<td>University of Kansas</td>
</tr>
<tr>
<td>kW</td>
<td>kilowatt</td>
</tr>
<tr>
<td>kWh</td>
<td>kilowatt hour</td>
</tr>
<tr>
<td>L/C</td>
<td>Letter of Credit</td>
</tr>
<tr>
<td>LAC</td>
<td>Line of Actual Control (Ladakh-Aksai Chin)</td>
</tr>
<tr>
<td>Acronym</td>
<td>Definition</td>
</tr>
<tr>
<td>---------</td>
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</tr>
<tr>
<td>LAN</td>
<td>Local Area Network</td>
</tr>
<tr>
<td>LAP</td>
<td>Labor Action Plan (Colombia TPA)</td>
</tr>
<tr>
<td>LCA</td>
<td>Large Civil Aircraft</td>
</tr>
<tr>
<td>LCD</td>
<td>Liquid Crystal Display</td>
</tr>
<tr>
<td>LDBD/DC</td>
<td>Least Developed Beneficiary Developing Country</td>
</tr>
<tr>
<td>LDC (1st meaning)</td>
<td>Least Developed Country</td>
</tr>
<tr>
<td>LDC (2nd meaning)</td>
<td>Less Developed Country (includes developing and least developed countries)</td>
</tr>
<tr>
<td>LDC (3rd meaning)</td>
<td>Local distribution company</td>
</tr>
<tr>
<td>LED</td>
<td>light-emitting diode</td>
</tr>
<tr>
<td>LEEM</td>
<td>Licensing and Enforcement Experts Meeting (MTCR)</td>
</tr>
<tr>
<td>LegCo</td>
<td>Legislative Council of the Hong Kong Special Administrative Region</td>
</tr>
<tr>
<td>LGBTQ+</td>
<td>Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), and others</td>
</tr>
<tr>
<td>LLDC</td>
<td>Landlocked Developing Country</td>
</tr>
<tr>
<td>LNG</td>
<td>Liquefied Natural Gas</td>
</tr>
<tr>
<td>LNPP</td>
<td>Large Newspaper Printing Press</td>
</tr>
<tr>
<td>LNR</td>
<td>Luhansk People’s Republic</td>
</tr>
<tr>
<td>LOC</td>
<td>Line of Control (Kashmir)</td>
</tr>
<tr>
<td>LOT</td>
<td>Level of Trade (dumping margin calculation adjustment)</td>
</tr>
<tr>
<td>LPAI</td>
<td>Low Pathogenic Avian Influenza</td>
</tr>
<tr>
<td>LPF</td>
<td>level playing field</td>
</tr>
<tr>
<td>LPG</td>
<td>Liquefied Petroleum Gas</td>
</tr>
<tr>
<td>LPMO</td>
<td>Livestock Products Marketing Organization (Korea)</td>
</tr>
<tr>
<td>LPNAI</td>
<td>Low Pathogenic Notifiable Avian Influenza</td>
</tr>
<tr>
<td>LPR (1st meaning)</td>
<td>Labor Force Participation Rate</td>
</tr>
<tr>
<td>LPR (2nd meaning)</td>
<td>Loan Prime Rate (PBOC)</td>
</tr>
<tr>
<td>LRW</td>
<td>Large Residential Washer</td>
</tr>
<tr>
<td>LTFV</td>
<td>Less Than Fair Value</td>
</tr>
<tr>
<td>LVC</td>
<td>Labor Value Content</td>
</tr>
<tr>
<td>LVMH</td>
<td>Louis Vuitton Moët Hennessey</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
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</tr>
<tr>
<td>LWR</td>
<td>Light-Walled Rectangular pipe and tube</td>
</tr>
<tr>
<td>LWS</td>
<td>Laminated Woven Sacks</td>
</tr>
<tr>
<td>M&amp;A</td>
<td>mergers and acquisitions</td>
</tr>
<tr>
<td>MAD</td>
<td>Mutually Assured Destruction</td>
</tr>
<tr>
<td>MAFF</td>
<td>Ministry of Agriculture, Forestry, and Fisheries (Korea)</td>
</tr>
<tr>
<td>MAI</td>
<td>Multilateral Agreement on Investment</td>
</tr>
<tr>
<td>MAP</td>
<td>Monitoring and Action Plan</td>
</tr>
<tr>
<td>Marrakesh Protocol</td>
<td>Marrakesh Protocol to GATT 1994</td>
</tr>
<tr>
<td>Maastricht Treaty</td>
<td>1992 Treaty on European Union</td>
</tr>
<tr>
<td>MAS</td>
<td>Monetary Authority of Singapore</td>
</tr>
<tr>
<td>MBB</td>
<td>Messerschmitt-Bölkow-Blohm GmbH (Germany)</td>
</tr>
<tr>
<td>MBS</td>
<td>Mohammed Bin Salman (Crown Prince, Saudi Arabia)</td>
</tr>
<tr>
<td>MC (MCX)</td>
<td>WTO Ministerial Conference (MC11 means 11&lt;sup&gt;th&lt;/sup&gt; Ministerial Conference, MC12 means 12&lt;sup&gt;th&lt;/sup&gt; Ministerial Conference, MC13 means 13&lt;sup&gt;th&lt;/sup&gt; Ministerial Conference, and so on)</td>
</tr>
<tr>
<td>MCF</td>
<td>military-civil fusion (doctrine) (China)</td>
</tr>
<tr>
<td>MCIT</td>
<td>Ministry of Communications and Information Technology (India)</td>
</tr>
<tr>
<td>MCL</td>
<td>Munitions Control List</td>
</tr>
<tr>
<td>MCTL</td>
<td>Military Critical Technologies List</td>
</tr>
<tr>
<td>MDG</td>
<td>Millennium Development Goal</td>
</tr>
<tr>
<td>MDL</td>
<td>Military Demarcation Line (DMZ)</td>
</tr>
<tr>
<td>MEA</td>
<td>Multilateral Environmental Agreement</td>
</tr>
<tr>
<td>MEC</td>
<td>Myanmar Economic Corporation</td>
</tr>
<tr>
<td>MEDT</td>
<td>Ministry of Economic Development and Trade (Ukraine)</td>
</tr>
<tr>
<td>MEFTA</td>
<td>Middle East Free Trade Agreement</td>
</tr>
<tr>
<td>MEHL</td>
<td>Myanmar Economic Holdings Limited</td>
</tr>
<tr>
<td>MEK (PMOI)</td>
<td>Mojahedin-e Khalq (People’s Mojahedin Organization of Iran, PMOI, exiled Iranian opposition group)</td>
</tr>
<tr>
<td>MENA</td>
<td>Middle East North Africa</td>
</tr>
<tr>
<td>MEP</td>
<td>Member of the European Parliament</td>
</tr>
<tr>
<td>METI</td>
<td>Ministry of Economy, Trade, and Industry (Japan, formerly MITI)</td>
</tr>
<tr>
<td>MEU</td>
<td>military end user</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form/Description</td>
</tr>
<tr>
<td>--------------</td>
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</tr>
<tr>
<td><strong>MFA</strong></td>
<td><em>Multi-Fiber Arrangement</em> (1974-2004)</td>
</tr>
<tr>
<td>MFN</td>
<td>Most Favored Nation</td>
</tr>
<tr>
<td>MGE</td>
<td>Myanmar Gems Enterprise</td>
</tr>
<tr>
<td>MHI</td>
<td>Mitsubishi Heavy Industries, Ltd.</td>
</tr>
<tr>
<td><strong>MHT</strong></td>
<td><em>Matra Hautes Technologies</em> (France)</td>
</tr>
<tr>
<td>MI5</td>
<td>Military Intelligence, Section 5 (U.K. domestic counter-intelligence and security agency)</td>
</tr>
<tr>
<td>MI6</td>
<td>Military Intelligence, Section 6 (U.K. foreign intelligence service)</td>
</tr>
<tr>
<td>MIIT</td>
<td>Ministry of Industry and Information Technology (China)</td>
</tr>
<tr>
<td>MITI</td>
<td>Ministry of International Trade and Industry (Japan)</td>
</tr>
<tr>
<td>MLA</td>
<td>Member of the Legislative Assembly (Stormont, Northern Ireland)</td>
</tr>
<tr>
<td>mm</td>
<td>millimeter</td>
</tr>
<tr>
<td>MMA</td>
<td>Minimum Market Access (quota)</td>
</tr>
<tr>
<td>MMBtu</td>
<td>Million British Thermal Unit</td>
</tr>
<tr>
<td><strong>MMPA</strong></td>
<td><em>1972 Marine Mammal Protection Act</em></td>
</tr>
<tr>
<td>MMT</td>
<td>million metric tons</td>
</tr>
<tr>
<td>mn</td>
<td>million</td>
</tr>
<tr>
<td>MNC</td>
<td>Multinational Corporation</td>
</tr>
<tr>
<td>MNE</td>
<td>Multinational Enterprise</td>
</tr>
<tr>
<td>MOCI</td>
<td>Ministry of Commerce and Industry (India, Saudi Arabia)</td>
</tr>
<tr>
<td>MOCIE</td>
<td>Ministry of Commerce, Industry, and Energy (Korea)</td>
</tr>
<tr>
<td>MOFAT</td>
<td>Ministry of Foreign Affairs and Trade (Korea)</td>
</tr>
<tr>
<td>MOFCOM</td>
<td>Ministry of Commerce (China)</td>
</tr>
<tr>
<td>MOGE</td>
<td>Myanma Oil and Gas Enterprise (sometimes referred to as Myanmar Oil and Gas Enterprise)</td>
</tr>
<tr>
<td><strong>MOI</strong></td>
<td>Market Oriented Industry (MOI Test)</td>
</tr>
<tr>
<td><strong>MOTIE</strong></td>
<td>Ministry of Trade, Industry, and Energy (Korea)</td>
</tr>
<tr>
<td><strong>MOU</strong></td>
<td>Memorandum of Understanding</td>
</tr>
<tr>
<td><strong>MP</strong></td>
<td>Member of Parliament</td>
</tr>
<tr>
<td><strong>MPC</strong></td>
<td>Marginal Propensity to Consume</td>
</tr>
<tr>
<td><strong>MPF</strong></td>
<td>Merchandise Processing Fee</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
</tr>
<tr>
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</tr>
<tr>
<td>MPIA</td>
<td>WTO Multi-Party Interim Appeal Arbitration Arrangement</td>
</tr>
<tr>
<td>MPS</td>
<td>Marginal Propensity to Save</td>
</tr>
<tr>
<td>MRA</td>
<td>Mutual Recognition Agreement</td>
</tr>
<tr>
<td>MRE</td>
<td>Meals Ready to Eat</td>
</tr>
<tr>
<td>MRI</td>
<td>magnetic resonance imaging</td>
</tr>
<tr>
<td>MRL</td>
<td>Maximum Residue Level</td>
</tr>
<tr>
<td>MRM</td>
<td>Marine Resource Management</td>
</tr>
<tr>
<td>mRNA</td>
<td>messenger ribonucleic acid</td>
</tr>
<tr>
<td>MRS</td>
<td>Marginal Rate of Substitution</td>
</tr>
<tr>
<td>MRT</td>
<td>Marginal Rate of Transformation</td>
</tr>
<tr>
<td>MSCI</td>
<td>Morgan Stanley Capital International</td>
</tr>
<tr>
<td>MSF</td>
<td>Médecins Sans Frontières</td>
</tr>
<tr>
<td>MSME</td>
<td>Micro, Small, and Medium Sized Enterprise</td>
</tr>
<tr>
<td>MSP</td>
<td>Minimum Support Price</td>
</tr>
<tr>
<td>MSS</td>
<td>Ministry of Social Protection</td>
</tr>
<tr>
<td>MST</td>
<td>Ministry of State Security</td>
</tr>
<tr>
<td>MSY</td>
<td>maximum sustainable yield</td>
</tr>
<tr>
<td>mt</td>
<td>metric ton</td>
</tr>
<tr>
<td>MTA</td>
<td>Managed Trade Agreement</td>
</tr>
<tr>
<td>MTB</td>
<td>Miscellaneous Trade Bill</td>
</tr>
<tr>
<td>MTCR</td>
<td>Missile Technology Control Regime</td>
</tr>
<tr>
<td>MTN</td>
<td>Multilateral Trade Negotiation</td>
</tr>
<tr>
<td>MTO</td>
<td>Multilateral Trade Organization</td>
</tr>
<tr>
<td>MTOP</td>
<td>Millions of Theoretical Operations per Second</td>
</tr>
<tr>
<td>MUFG</td>
<td>Mitsubishi UFJ Financial Group Bank, Ltd.</td>
</tr>
<tr>
<td>MVTO</td>
<td>Motor Vehicles Tariff Order</td>
</tr>
<tr>
<td>MWh</td>
<td>Mega Watt hour</td>
</tr>
<tr>
<td>MY</td>
<td>Marketing Year</td>
</tr>
<tr>
<td>NAD Bank</td>
<td>North American Development Bank</td>
</tr>
<tr>
<td>Term</td>
<td>Description</td>
</tr>
<tr>
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</tr>
<tr>
<td>NAAEC</td>
<td>North American Agreement on Environmental Cooperation (NAFTA Environmental Side Agreement)</td>
</tr>
<tr>
<td>NAALC</td>
<td>North American Agreement on Labor Cooperation (NAFTA Labor Side Agreement)</td>
</tr>
<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement (NAFTA 1.0 and/or NAFTA 2.0)</td>
</tr>
<tr>
<td>NAFTA 1.0</td>
<td>North American Free Trade Agreement (original FTA that entered into force 1 January 1994)</td>
</tr>
<tr>
<td>NAFTA 2.0</td>
<td>North American Free Trade Agreement (revised FTA based on August 2017-September 2018 renegotiations, called CUSMA in Canada, USMCA in America, and informally called NAFTA 2.0, signed again after further renegotiations 10 December 2019, and entered into force 1 July 2020)</td>
</tr>
<tr>
<td>NAI</td>
<td>Notifiable Avian Influenza</td>
</tr>
<tr>
<td>NAM (1st meaning)</td>
<td>U.S. National Association of Manufacturers</td>
</tr>
<tr>
<td>NAM (2nd meaning)</td>
<td>Non-Aligned Movement</td>
</tr>
<tr>
<td>NAMA</td>
<td>Non-Agricultural Market Access</td>
</tr>
<tr>
<td>NAND</td>
<td>Not AND flash memory chip technology</td>
</tr>
<tr>
<td>NAO</td>
<td>National Administrative Office (NAFTA)</td>
</tr>
<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
</tr>
<tr>
<td>NASA</td>
<td>U.S. National Aeronautics and Space Administration</td>
</tr>
<tr>
<td>NASDAQ</td>
<td>National Association of Securities Dealers Automated Quotations exchange (U.S.)</td>
</tr>
<tr>
<td>NBA</td>
<td>National Basketball Association</td>
</tr>
<tr>
<td>NBP</td>
<td>National Bank of Pakistan</td>
</tr>
<tr>
<td>NC</td>
<td>Net Cost</td>
</tr>
<tr>
<td>NCC (1st meaning)</td>
<td>National Chicken Council</td>
</tr>
<tr>
<td>NCC (2nd meaning)</td>
<td>Non-Cooperative Country (Argentina)</td>
</tr>
<tr>
<td>NCCDA</td>
<td>National Critical Capabilities Defense Act (part of ACA)</td>
</tr>
<tr>
<td>NCM</td>
<td>Non-Conforming Measure</td>
</tr>
<tr>
<td>N.C.M.</td>
<td>Nomenclatura Común MERCOSUR (MERCOSUR Common Nomenclature)</td>
</tr>
<tr>
<td>NCSC</td>
<td>National Counterintelligence and Security Center</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
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</tr>
<tr>
<td>NCSC</td>
<td>National Cyber Security Center (U.K.)</td>
</tr>
<tr>
<td>(2nd meaning)</td>
<td></td>
</tr>
<tr>
<td>NCTO</td>
<td>National Council of Textile Organizations</td>
</tr>
<tr>
<td>NDA</td>
<td>National Democratic Alliance (India)</td>
</tr>
<tr>
<td>NDC</td>
<td>North Drilling Company (Iran)</td>
</tr>
<tr>
<td>NdFeB</td>
<td>neodymium-iron-boron permanent magnets (also called neodymium magnets, neo magnets, or rare earth magnets)</td>
</tr>
<tr>
<td>NDRC</td>
<td>National Development and Reform Commission (China)</td>
</tr>
<tr>
<td>NEA</td>
<td>1976 National Emergencies Act</td>
</tr>
<tr>
<td>NEI</td>
<td>National Export Initiative</td>
</tr>
<tr>
<td>NEP</td>
<td>New Economic Policy (Malaysia)</td>
</tr>
<tr>
<td>nes</td>
<td>not elsewhere specified</td>
</tr>
<tr>
<td>NFIDC</td>
<td>Net Food Importing Developing Country</td>
</tr>
<tr>
<td>NFTC</td>
<td>National Foreign Trade Council</td>
</tr>
<tr>
<td>NG</td>
<td>Natural Gas</td>
</tr>
<tr>
<td>NGR</td>
<td>Negotiating Group on Rules (WTO Doha Round)</td>
</tr>
<tr>
<td>NHI</td>
<td>National Health Insurance (Korea)</td>
</tr>
<tr>
<td>NHS</td>
<td>National Health Service (U.K.)</td>
</tr>
<tr>
<td>NHT</td>
<td>National Hand Tools Corporation</td>
</tr>
<tr>
<td>NI</td>
<td>Northern Ireland</td>
</tr>
<tr>
<td>NIC</td>
<td>Newly Industrialized Country</td>
</tr>
<tr>
<td>NICO</td>
<td>Naftiran Intertrade Company</td>
</tr>
<tr>
<td>NIDC</td>
<td>National Iranian Drilling Company (NIOC subsidiary)</td>
</tr>
<tr>
<td>NIEO</td>
<td>New International Economic Order</td>
</tr>
<tr>
<td>NIOC</td>
<td>National Iranian Oil Company</td>
</tr>
<tr>
<td>NIST</td>
<td>U.S. National Institute of Standards and Technology</td>
</tr>
<tr>
<td>NITC</td>
<td>National Iranian Tanker Company</td>
</tr>
<tr>
<td>NJPA</td>
<td>National Juice Products Association</td>
</tr>
<tr>
<td>NLC</td>
<td>National Labor Committee (U.S.)</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>--------------</td>
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</tr>
<tr>
<td>NLCF</td>
<td>National Livestock Cooperatives Federation</td>
</tr>
<tr>
<td>NLD</td>
<td>National League for Democracy (Burma)</td>
</tr>
<tr>
<td>NLR</td>
<td>No Licence Required (U.S. DOC BIS)</td>
</tr>
<tr>
<td>NLRB</td>
<td>National Labor Relations Board (U.S.)</td>
</tr>
<tr>
<td>nm</td>
<td>nanometer</td>
</tr>
<tr>
<td>NMDC</td>
<td>National Minerals Development Corporation (India)</td>
</tr>
<tr>
<td>NME</td>
<td>Non-Market Economy</td>
</tr>
<tr>
<td>NMFS</td>
<td>U.S. National Marine Fisheries Service (DOC)</td>
</tr>
<tr>
<td>NNSA</td>
<td>U.S. National Nuclear Security Administration (DOE)</td>
</tr>
<tr>
<td>NOAA</td>
<td>U.S. National Oceanic and Atmospheric Administration (DOC)</td>
</tr>
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<td>NOx</td>
<td>Nitrogen oxides</td>
</tr>
<tr>
<td>NPA</td>
<td>Non-Prosecution Agreement</td>
</tr>
<tr>
<td>NPC (1st meaning)</td>
<td>National People’s Congress (China’s legislature)</td>
</tr>
<tr>
<td>NPC (2nd meaning)</td>
<td>National Petrochemical Company (Iran)</td>
</tr>
<tr>
<td>NPCSC</td>
<td>National People’s Congress Standing Committee (NPC’s top-decision making body)</td>
</tr>
<tr>
<td>NPF</td>
<td>Non-Privileged Foreign status</td>
</tr>
<tr>
<td>NPL</td>
<td>Non-Performing Loan</td>
</tr>
<tr>
<td>NPT</td>
<td>1968 <em>Nuclear Non-Proliferation Treaty</em></td>
</tr>
<tr>
<td>NRA</td>
<td>National Rifle Association</td>
</tr>
<tr>
<td>NRC</td>
<td>U.S. Nuclear Regulatory Commission</td>
</tr>
<tr>
<td>NRI</td>
<td>Non-Resident Indian</td>
</tr>
<tr>
<td>NRL</td>
<td>Nuclear Referral List</td>
</tr>
<tr>
<td>NSA</td>
<td>U.S. National Security Agency</td>
</tr>
<tr>
<td>NSC</td>
<td>National Securities Commission (Argentina)</td>
</tr>
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<td>NS-CMIC List</td>
<td>Non-SDN Chinese Military Industrial Complex Companies List</td>
</tr>
<tr>
<td>NSF</td>
<td>U.S. National Science Foundation</td>
</tr>
<tr>
<td>NSG</td>
<td>Nuclear Suppliers Group</td>
</tr>
<tr>
<td>NSIBR</td>
<td><em>National Security Industrial Base Regulations</em></td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>NSM</td>
<td>Jawaharlal Nehru National Solar Mission (India)</td>
</tr>
<tr>
<td>NSPK</td>
<td>National Payment Card System Joint Stock Company (Russia)</td>
</tr>
<tr>
<td>NSPD</td>
<td>National Security Presidential Directive</td>
</tr>
<tr>
<td>NSS</td>
<td>WTO SPS National Notification System</td>
</tr>
<tr>
<td>NTA</td>
<td>National Textile Association (U.S.)</td>
</tr>
<tr>
<td>NTB</td>
<td>Non-Tariff Barrier</td>
</tr>
<tr>
<td>NTC</td>
<td>National Trade Council (United States)</td>
</tr>
<tr>
<td>NTE (1st meaning)</td>
<td>National Trade Estimate Report on Foreign Trade Barriers (USTR)</td>
</tr>
<tr>
<td>NTE (NTE sector (2nd meaning)</td>
<td>Non-Traditional Export (sector)</td>
</tr>
<tr>
<td>NTM</td>
<td>Non-Tariff Measure</td>
</tr>
<tr>
<td>NTR</td>
<td>Normal Trade Relations</td>
</tr>
<tr>
<td>NTSB</td>
<td>National Transportation Safety Board (U.S.)</td>
</tr>
<tr>
<td>NV (N.V.) (1st meaning)</td>
<td>Naamloze Vennootschap (Dutch), a publicly limited liability company, with legal personality, which sells capital that is divided into shares to the public to obtain income.</td>
</tr>
<tr>
<td>NV (2nd meaning)</td>
<td>Normal Value</td>
</tr>
<tr>
<td>NVOCC</td>
<td>Non-Vessel Operating Common Carrier</td>
</tr>
<tr>
<td>NWFP</td>
<td>North West Frontier Province (Pakistan) (Khyber Pakhtunkhwa)</td>
</tr>
<tr>
<td>N.Y. Fed (1st meaning)</td>
<td>Federal Reserve Bank of New York</td>
</tr>
<tr>
<td>NYSE</td>
<td>New York Stock Exchange</td>
</tr>
<tr>
<td>NYU</td>
<td>New York University</td>
</tr>
<tr>
<td>NZ$</td>
<td>New Zealand Dollar</td>
</tr>
<tr>
<td>NZD</td>
<td>New Zealand Dollar</td>
</tr>
<tr>
<td>OAS</td>
<td>Organization of American States</td>
</tr>
<tr>
<td>OBE</td>
<td>Officer of the Most Excellent Order of the British Empire</td>
</tr>
<tr>
<td>OBRA</td>
<td>Omnibus Budget and Reconciliation Act (multiple years)</td>
</tr>
<tr>
<td>OCD</td>
<td>Ordinary Customs Duties</td>
</tr>
<tr>
<td>OCR</td>
<td>Out of Cycle Review</td>
</tr>
<tr>
<td>OCTG</td>
<td>Oil Country Tubular Goods</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
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</tr>
<tr>
<td>ODA</td>
<td>Official Development Assistance</td>
</tr>
<tr>
<td>ODC</td>
<td>Other Duties and Charges</td>
</tr>
<tr>
<td>OECD</td>
<td>Organization for Economic Cooperation and Development</td>
</tr>
<tr>
<td>OED</td>
<td><em>Oxford English Dictionary</em></td>
</tr>
<tr>
<td>OEE</td>
<td>U.S. Office of Export Enforcement (BIS)</td>
</tr>
<tr>
<td>OEM</td>
<td>Original Equipment Manufacturer</td>
</tr>
<tr>
<td>OFA</td>
<td>Other Forms of Assistance</td>
</tr>
<tr>
<td>OFAC</td>
<td>U.S. Office of Foreign Assets Control (Department of the Treasury)</td>
</tr>
<tr>
<td>OIC</td>
<td>Organization of Islamic Conference</td>
</tr>
<tr>
<td>OIE</td>
<td>World Organization for Animal Health (<em>Office International des Epizooties</em>)</td>
</tr>
<tr>
<td>OLI</td>
<td>Ownership, Location, and Internalization (Theory)</td>
</tr>
<tr>
<td>OMA</td>
<td>Orderly Marketing Arrangement</td>
</tr>
<tr>
<td>OMB</td>
<td>Office of Management and Budget (U.S.)</td>
</tr>
<tr>
<td>OMO</td>
<td>Open Market Operation</td>
</tr>
<tr>
<td>OOIDA</td>
<td>Owner-Operator Independent Drivers Association</td>
</tr>
<tr>
<td>OPA</td>
<td>Ontario Power Authority (Canada)</td>
</tr>
<tr>
<td>OPEC</td>
<td>Organization of Petroleum Exporting Countries</td>
</tr>
<tr>
<td>OPZ</td>
<td>Outward Processing Zone (<em>KORUS</em>)</td>
</tr>
<tr>
<td>OSINFOR</td>
<td><em>Organismo de Supervisión de los Recursos Forestales y de Fauna Silvestre</em> (Forestry regulator, Peru)</td>
</tr>
<tr>
<td><em>Oslo I Accord (Oslo I)</em></td>
<td>13 September 1993 <em>Israeli-PLO Declaration of Principles on Interim Self-Government Arrangements (DOP)</em></td>
</tr>
<tr>
<td>OTC</td>
<td>Over the Counter</td>
</tr>
<tr>
<td>OTCG</td>
<td>Oil Country Tubular Good</td>
</tr>
<tr>
<td>OTDS</td>
<td>Overall Trade distorting Domestic Support</td>
</tr>
<tr>
<td>OTEXA</td>
<td>Office of Textiles and Apparel (U.S. DOC)</td>
</tr>
<tr>
<td>OTLA</td>
<td>Office of Trade and Labor Affairs (in DOL)</td>
</tr>
<tr>
<td>OTR</td>
<td>Off-The-Road</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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<td>--------------</td>
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</tr>
<tr>
<td>P5+1</td>
<td>China, France, Russia, U.K., and U.S. (five permanent U.N. Security Council members), plus Germany</td>
</tr>
<tr>
<td>P&amp;I</td>
<td>protection and indemnity (maritime insurance)</td>
</tr>
<tr>
<td>PACOM (USINDOPACOM)</td>
<td>United States Indo-Pacific Command</td>
</tr>
<tr>
<td>PADIS</td>
<td>Program of Incentives for the Semiconductors Sector (Brazil)</td>
</tr>
<tr>
<td>PAP</td>
<td>People’s Action Party (Singapore)</td>
</tr>
<tr>
<td>PAPS</td>
<td>Pre-Arrival Processing System</td>
</tr>
<tr>
<td>Paris Agreement</td>
<td>December 2015 <em>Paris Climate Accord</em>, or <em>Paris Climate Agreement</em>, under UNFCCC</td>
</tr>
<tr>
<td>Paris Convention</td>
<td>1883 Paris Convention for the Protection of Industrial Property</td>
</tr>
<tr>
<td>PASA</td>
<td>Pre-Authorization Safety Audit</td>
</tr>
<tr>
<td>PATVD</td>
<td>Program of Support for the Technological Development of the Industry of Digital TV Equipment (Brazil)</td>
</tr>
<tr>
<td>PBC (PBOC)</td>
<td>People’s Bank of China</td>
</tr>
<tr>
<td>PBS</td>
<td>Price Band System</td>
</tr>
<tr>
<td>PBUH</td>
<td>Peace Be Upon Him</td>
</tr>
<tr>
<td>Pub. L. No.</td>
<td>Public Law Number (United States)</td>
</tr>
<tr>
<td>PC</td>
<td>Personal Computer</td>
</tr>
<tr>
<td>PCA (1st meaning)</td>
<td>Post-Clearance Audit</td>
</tr>
<tr>
<td>PCA (2nd meaning)</td>
<td>Permanent Court of Arbitration (The Hague)</td>
</tr>
<tr>
<td>PCAOB</td>
<td>Public Company Accounting Oversight Board (United States)</td>
</tr>
<tr>
<td>PCAST</td>
<td>President’s Council of Advisors on Science and Technology (United States)</td>
</tr>
<tr>
<td>PCB</td>
<td>printed circuit board</td>
</tr>
<tr>
<td>PCBA</td>
<td>printed circuit board assembly</td>
</tr>
<tr>
<td>PCG (PCG fibers)</td>
<td>polyvinyl alcohol (PVA), cellulose, and glass fibers</td>
</tr>
<tr>
<td>PDB</td>
<td>President’s Daily Brief</td>
</tr>
<tr>
<td>PDR</td>
<td>People’s Democratic Republic (Lao PDR)</td>
</tr>
<tr>
<td>PDV</td>
<td>Present Discounted Value</td>
</tr>
<tr>
<td>PDVSA</td>
<td><em>Petróleos de Venezuela, S.A.</em></td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>PEESA</td>
<td>Protecting Europe’s Energy Security Act of 2019, as amended</td>
</tr>
<tr>
<td>Pemex</td>
<td>Petróleos Mexicanos (Mexico)</td>
</tr>
<tr>
<td>PEO</td>
<td>Permanent Exclusion Order</td>
</tr>
<tr>
<td>PETA</td>
<td>People for the Ethical Treatment of Animals</td>
</tr>
<tr>
<td>PF</td>
<td>Privileged Foreign status</td>
</tr>
<tr>
<td>PFC</td>
<td>Priority Foreign Country</td>
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<tr>
<td>Pharma Agreement</td>
<td>WTO Agreement on Pharmaceutical Products (Uruguay Round plurilateral sectoral agreement)</td>
</tr>
<tr>
<td>PhRMA</td>
<td>Pharmaceutical Manufacturers of America</td>
</tr>
<tr>
<td>PI</td>
<td>preliminary injunction</td>
</tr>
<tr>
<td>PIS/PASEP</td>
<td>Social Integration Program/Civil Service Asset Formation Program Contribution (Brazil)</td>
</tr>
<tr>
<td>PIS/PASEP-Importation</td>
<td>Social Integration and Civil Service Asset Formation Programs Contribution Applicable to Imports of Foreign Goods or Services (Brazil)</td>
</tr>
<tr>
<td>PJSC</td>
<td>Public Joint Stock Company (Russia)</td>
</tr>
<tr>
<td>PLA</td>
<td>People’s Liberation Army (China)</td>
</tr>
<tr>
<td>Plc</td>
<td>public limited company (U.K.)</td>
</tr>
<tr>
<td>PLI</td>
<td>Production-Linked Incentive</td>
</tr>
<tr>
<td>PLO</td>
<td>Palestine Liberation Organization</td>
</tr>
<tr>
<td>PM</td>
<td>Prime Minister</td>
</tr>
<tr>
<td>PMC</td>
<td>Popular Mobilization Committee (Iraq)</td>
</tr>
<tr>
<td>PME</td>
<td>Pingtan Marine Enterprise (China)</td>
</tr>
<tr>
<td>PNTR</td>
<td>Permanent Normal Trade Relations</td>
</tr>
<tr>
<td>PNW</td>
<td>Pine wood nematode</td>
</tr>
<tr>
<td>POA</td>
<td>Power of Attorney</td>
</tr>
<tr>
<td>POC</td>
<td>Point of Contact (MTCR)</td>
</tr>
<tr>
<td>POI</td>
<td>Period of Investigation</td>
</tr>
<tr>
<td>POR</td>
<td>Period of Review</td>
</tr>
<tr>
<td>POW-MIA</td>
<td>Prisoner of War – Missing in Action</td>
</tr>
<tr>
<td>PP</td>
<td>Purchase Price (Pre-Uruguay Round U.S. term for Export Price)</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Definition</td>
</tr>
<tr>
<td>--------------</td>
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</tr>
<tr>
<td>PPA</td>
<td>Power Purchase Agreement</td>
</tr>
<tr>
<td>PPB</td>
<td>Basic Productive Process (Brazil)</td>
</tr>
<tr>
<td>PPE</td>
<td>personal protective equipment</td>
</tr>
<tr>
<td>PPF</td>
<td>Production Possibilities Frontier</td>
</tr>
<tr>
<td>PPM (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>parts per million</td>
</tr>
<tr>
<td>PPM (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>process and production method</td>
</tr>
<tr>
<td>PPP</td>
<td>Purchasing Power Parity</td>
</tr>
<tr>
<td>PPS</td>
<td>Probability-Proportional to Size</td>
</tr>
<tr>
<td>PR</td>
<td>public relations</td>
</tr>
<tr>
<td>PRC</td>
<td>People’s Republic of China</td>
</tr>
<tr>
<td>PROEX</td>
<td>Programa de Financiamento às Exportações (Brazil)</td>
</tr>
<tr>
<td>PRO-IP Act</td>
<td>2008 Prioritizing Resources and Organization for Intellectual Property Act</td>
</tr>
<tr>
<td>PRS</td>
<td>Price Range System</td>
</tr>
<tr>
<td>PSA (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Port of Singapore Authority</td>
</tr>
<tr>
<td>PSA (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>production sharing agreement</td>
</tr>
<tr>
<td>PSC</td>
<td>Post-Summary Correction (U.S. CBP)</td>
</tr>
<tr>
<td>PSH</td>
<td>Public Stock Holding</td>
</tr>
<tr>
<td>PSI</td>
<td>Pre-Shipment Inspection</td>
</tr>
<tr>
<td>PSI Agreement</td>
<td>WTO Agreement on Pre-Shipment Inspection</td>
</tr>
<tr>
<td>PSRO</td>
<td>Product Specific Rule of Origin</td>
</tr>
<tr>
<td>PSU</td>
<td>Public Sector Unit (India)</td>
</tr>
<tr>
<td>PTA (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Preferential Trade Agreement, or Preferential Trading Arrangement</td>
</tr>
<tr>
<td>PTA (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Payable through account</td>
</tr>
<tr>
<td>PTO</td>
<td>U.S. Patent and Trademark Office</td>
</tr>
<tr>
<td>PUBG</td>
<td>PlayerUnknown’s Battlegrounds (Chinese app)</td>
</tr>
<tr>
<td>PV</td>
<td>Photovoltaic</td>
</tr>
<tr>
<td>PVA (PVA fibers)</td>
<td>Polyvinyl alcohol fibers</td>
</tr>
<tr>
<td>PVC</td>
<td>Polyvinyl chloride</td>
</tr>
<tr>
<td>PVLT</td>
<td>passenger vehicle and light truck</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
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<tr>
<td>PwC</td>
<td>PricewaterhouseCoopers</td>
</tr>
<tr>
<td>QAI</td>
<td>Quds Aviation Industries (Iran)</td>
</tr>
<tr>
<td>QC</td>
<td>Queen’s Counsel</td>
</tr>
<tr>
<td>QE</td>
<td>Quantitative Easing</td>
</tr>
<tr>
<td>QIZ</td>
<td>Qualified Industrial Zone</td>
</tr>
<tr>
<td>QR</td>
<td>Quantitative Restriction</td>
</tr>
<tr>
<td>Quad</td>
<td>Quadrilateral Security Dialogue (Australia, India, Japan, and U.S.)</td>
</tr>
<tr>
<td>R&amp;D</td>
<td>Research and Development</td>
</tr>
<tr>
<td>R&amp;TD</td>
<td>Research and Technological Development measures</td>
</tr>
<tr>
<td>RAM</td>
<td>Recently Acceded Member (of WTO)</td>
</tr>
<tr>
<td>RAN</td>
<td>Radio Access Network</td>
</tr>
<tr>
<td>RBI</td>
<td>Reserve Bank of India</td>
</tr>
<tr>
<td>RCC</td>
<td>United States – Canada Regulatory Cooperation Council</td>
</tr>
<tr>
<td>RCEP</td>
<td>Regional Comprehensive Economic Partnership</td>
</tr>
<tr>
<td>RCMC</td>
<td>Registration-cum-Membership Certificate (India)</td>
</tr>
<tr>
<td>RDIF</td>
<td>Russian Direct Investment Fund</td>
</tr>
<tr>
<td>rDNA</td>
<td>recombinant deoxyribonucleic acid</td>
</tr>
<tr>
<td>REACH</td>
<td>Registration, Evaluation, and Authorization of Chemicals (EU)</td>
</tr>
<tr>
<td>REC</td>
<td>Regional Economic Community</td>
</tr>
<tr>
<td>REER</td>
<td>Real Effective Exchange Rate</td>
</tr>
<tr>
<td>Rep.</td>
<td>Representative</td>
</tr>
<tr>
<td>RESTRICT Act</td>
<td>U.S. Restricting the Emergence of Security Threats that Risk Information and Communications Technology (RESTRICT) Act</td>
</tr>
<tr>
<td>RFMO</td>
<td>Regional Fisheries Management Organization</td>
</tr>
<tr>
<td>RFMO/A</td>
<td>Regional Fisheries Management Organization or Arrangement</td>
</tr>
<tr>
<td>RMA (1st meaning)</td>
<td>Risk Management Association (U.S.)</td>
</tr>
<tr>
<td>RMA (2nd meaning)</td>
<td>Risk Management Authorization</td>
</tr>
<tr>
<td>RMB</td>
<td>Ren min bi (“people’s money,” the Chinese currency)</td>
</tr>
<tr>
<td>RMG</td>
<td>Ready Made Garment</td>
</tr>
<tr>
<td>RMI (DRM)</td>
<td>Rights Management Information (Digital Rights Management)</td>
</tr>
<tr>
<td>RNG</td>
<td>WTO Negotiating Group on Rules</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>--------------</td>
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</tr>
<tr>
<td>RNRC</td>
<td>Rules Negotiating Group</td>
</tr>
<tr>
<td>ROA</td>
<td>Return on Assets</td>
</tr>
<tr>
<td>ROC (R.O.C.)</td>
<td>Republic of China (Taiwan)</td>
</tr>
<tr>
<td>Rome Convention</td>
<td>1964 Rome Convention for the Protection of Performer, Producers of Phonograms and Broadcasting Organizations</td>
</tr>
<tr>
<td>ROO</td>
<td>Rule Of Origin</td>
</tr>
<tr>
<td>ROW</td>
<td>Rest Of World</td>
</tr>
<tr>
<td>ROZ</td>
<td>Reconstruction Opportunity Zone</td>
</tr>
<tr>
<td>RPC</td>
<td>RCEP Participating Country</td>
</tr>
<tr>
<td>RPG</td>
<td>Rocket-propelled grenade</td>
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<tr>
<td>RPL</td>
<td>Relative Price Line</td>
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<td>RPOC</td>
<td>Reinforced Point Of Contact (MTCR)</td>
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<td>RPT</td>
<td>Reasonable Period of Time</td>
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<tr>
<td>RRM</td>
<td>USMCA Rapid Response Mechanism</td>
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<tr>
<td>Rs.</td>
<td>Rupee</td>
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<td>RSS</td>
<td>Rashtriya Swayamsevak Sangh (India)</td>
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<tr>
<td>RTA</td>
<td>Regional Trade Agreement</td>
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<tr>
<td>RTAA</td>
<td>Re-employment Trade Adjustment Assistance</td>
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<td>Rusi</td>
<td>Royal United Services Institute (U.K.)</td>
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<tr>
<td>RV</td>
<td>Recreational Vehicle</td>
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<td>RVC</td>
<td>Regional Value Content</td>
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<tr>
<td>S&amp;D</td>
<td>Special and Differential</td>
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<td>S&amp;ED</td>
<td>Strategic and Economic Dialogue (U.S.-China)</td>
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<tr>
<td>S.A.</td>
<td>Société Anonyme (French company designation), Sociedad Anónima (Spanish company designation), Sociedade Anónima (Portuguese company designation)</td>
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<tr>
<td>S.A. de C.V.</td>
<td>Sociedad Anónima de Capital Variable (Mexican company designation)</td>
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<td>SAA</td>
<td>Statement of Administrative Action</td>
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<td>SAARC</td>
<td>South Asia Association for Regional Cooperation</td>
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<td>SABIC</td>
<td>Saudi Arabian Basic Industry Corporation (Saudi Arabian Basic Industries Corporation)</td>
</tr>
<tr>
<td>SAC</td>
<td>State Administration Council (Burma)</td>
</tr>
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<td>SACU</td>
<td>Southern African Customs Union</td>
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<td>Abbreviation</td>
<td>Description</td>
</tr>
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<td>--------------</td>
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<tr>
<td>SADC</td>
<td>Southern African Development Community</td>
</tr>
<tr>
<td>SAF</td>
<td>sustainable aviation fuel (IPEF)</td>
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<tr>
<td>SAFE</td>
<td>State Administration of Foreign Exchange (China)</td>
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<td>SAFE Port Act</td>
<td>2006 Security and Accountability for Every Port Act</td>
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<td>SAFTA</td>
<td>South Asia Free Trade Agreement</td>
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<td>SAGIA</td>
<td>Saudi Arabian General Investment Authority</td>
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<td>SAIC</td>
<td>Shanghai Automotive Industry Corporation Motor Corporation Limited (China)</td>
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<td>SAM</td>
<td>surface-to-air (missile)</td>
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<td>SAMA</td>
<td>Saudi Arabian Monetary Authority</td>
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<td>SAP</td>
<td>Structural Adjustment Program</td>
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<td>SAPTA</td>
<td>South Asia Preferential Trading Arrangement</td>
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<tr>
<td>SAR (1st meaning)</td>
<td>Suspicious Activity Report (FinCEN)</td>
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<tr>
<td>SAR (2nd meaning)</td>
<td>Special Administrative Region (China)</td>
</tr>
<tr>
<td>SAR (3rd meaning)</td>
<td>Saudi Arabian Riyal</td>
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<tr>
<td>SARS</td>
<td>Sudden Acute Respiratory Syndrome</td>
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<td>SASAC</td>
<td>State-owned Assets Supervision and Administration Commission of the State Council (China)</td>
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<td>SBV</td>
<td>State Bank of Vietnam</td>
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<td>SCC</td>
<td>standard contractual clause</td>
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<td>Scexit</td>
<td>Exit of Scotland from the U.K.</td>
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<tr>
<td>SCGP</td>
<td>Supplier Credit Guarantee Program</td>
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<td>SCI</td>
<td>Secretaría de Comercio Interior (Argentina, Secretary of Domestic Trade)</td>
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<td>SCM</td>
<td>Subsidies and Countervailing Measures</td>
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<td>SCM Agreement</td>
<td>WTO Agreement on Subsidies and Countervailing Measures (ASCM)</td>
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<td>SCP</td>
<td>Sugar Containing Product</td>
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<td>SDF</td>
<td>Steel Development Fund (India)</td>
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<td>SDG</td>
<td>United Nations Sustainable Development Goal</td>
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<td>SDIC</td>
<td>State Development &amp; Investment Corp. (China)</td>
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<td>SDLP</td>
<td>Social Democratic and Labor Party (Northern Ireland)</td>
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<td>Term</td>
<td>Description</td>
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<tr>
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<tr>
<td>SDN</td>
<td>Specially Designated Nationals and Blocked Persons (List)</td>
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<td>Sdn Bhd</td>
<td>Sendirian Berhad (privately limited company, Malaysia)</td>
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<tr>
<td>SDR</td>
<td>services domestic regulation</td>
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<tr>
<td>SDR (1st meaning)</td>
<td>IMF Special Drawing Right</td>
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<td>SDR (2nd meaning)</td>
<td></td>
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<tr>
<td>SE</td>
<td>Secretaría de Economía (Secretariat of Economy, Mexico, formerly SECOFI)</td>
</tr>
<tr>
<td>SEBI</td>
<td>Securities and Exchange Bureau of India</td>
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<tr>
<td>SEC</td>
<td>U.S. Securities and Exchange Commission</td>
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<tr>
<td>SECOFI</td>
<td>Secretary of Commerce and Industrial Development (Secretario de Comercio y Fomento Industrial), i.e., Ministry of Commerce and Industrial Development (Mexico, renamed SE in December 2000)</td>
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<td>SED</td>
<td>Strategic Economic Dialogue (U.S.-China)</td>
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<td>SEI</td>
<td>Strategic Emerging Industry (SEI Catalogue – China)</td>
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<tr>
<td>SEIU</td>
<td>Service Employees International Union</td>
</tr>
<tr>
<td>Sen.</td>
<td>Senator</td>
</tr>
<tr>
<td>SENTRI</td>
<td>Secure Electronic Network for Travelers Rapid Inspection</td>
</tr>
<tr>
<td>SEP</td>
<td>Standard Essential Patent</td>
</tr>
<tr>
<td>SEZ</td>
<td>Special Economic Zone</td>
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<tr>
<td>SFA</td>
<td>Singapore Food Agency</td>
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<td>SFO</td>
<td>Serious Fraud Office</td>
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<tr>
<td>SG&amp;A</td>
<td>Selling, General, and Administrative expenses</td>
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<tr>
<td>SGD</td>
<td>Singapore Dollar</td>
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<td>SHIG</td>
<td>Shahid Hemmat Industries Group (Iran)</td>
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<td>SIDS</td>
<td>Small Island Developing States</td>
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<td>SJM</td>
<td>Swadeshi Jagaran Manch (India)</td>
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<td>SIE</td>
<td>State Invested Enterprise</td>
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<tr>
<td>SIFI</td>
<td>Systemically Important Financial Institution</td>
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<td>SIFMA</td>
<td>Securities Industry and Financial Markets Association</td>
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<td>SII</td>
<td>Serum Institute of India</td>
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<td>SIL</td>
<td>Special Import License (India)</td>
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<td>SIM</td>
<td>Sistema Informático MARIA</td>
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<td>Description</td>
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<td>SIMA</td>
<td>Special Import Measures Act (Canada)</td>
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<td>SKD</td>
<td>Semi-knock down</td>
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<tr>
<td>SKM</td>
<td>Samyukta Kisan Morcha (India, umbrella group of approximately 40 farmers unions)</td>
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<tr>
<td>SMART</td>
<td>Secondary Materials and Recycled Textiles Association</td>
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<td>SMBC</td>
<td>Sumitomo Mitsui Banking Corporation (Japan)</td>
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<td>SME (1st meaning)</td>
<td>Small and Medium Sized Enterprise</td>
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<td>SME (2nd meaning)</td>
<td>Square Meter Equivalent</td>
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<td>SMIC</td>
<td>Semiconductor Manufacturing International Corp. (China)</td>
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<td>SMS</td>
<td>Supply Management System (Canada)</td>
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<td>SNAP</td>
<td>Supplemental Nutritional Assistance Program</td>
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<tr>
<td>SNAP-R</td>
<td>Simplified Network Application Process - Redesign</td>
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<tr>
<td>SNB</td>
<td>Swiss National Bank</td>
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<td>SNITIS</td>
<td>Sindicato Nacional Independiente de Trabajadores de Industrias y de Servicios Movimiento 20/32 (independent Mexican labor union)</td>
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<tr>
<td>SNP</td>
<td>Scottish National Party</td>
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<td>S.O.</td>
<td>Statutory Order (India)</td>
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<tr>
<td>SOCB</td>
<td>State Owned Commercial Bank (China)</td>
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<td>SocGen</td>
<td>Société Générale (France)</td>
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<td>SOE</td>
<td>State Owned Enterprise</td>
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<tr>
<td>SOF</td>
<td>Special Operations Forces</td>
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<td>SOGI</td>
<td>Sexual Orientation and Gender Identity</td>
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<tr>
<td>SPD</td>
<td>Solar Power Developer</td>
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<tr>
<td>SPI (1st meaning)</td>
<td>Seven Pillars Institute for Global Finance and Ethics</td>
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<td>SPI (2nd meaning)</td>
<td>Special Program Indicator</td>
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<tr>
<td>SPND</td>
<td>Sazman-e Pazhouadeshaye Novin-e Defa‘i (Organization of Defensive Innovation and Research, Iran)</td>
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<td>SPS (1st meaning)</td>
<td>Sanitary and Phyto-sanitary</td>
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<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>SPS</td>
<td>Single Payment Scheme</td>
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<tr>
<td><strong>SPS Agreement</strong></td>
<td>WTO Agreement on Sanitary and Phytosanitary Measures</td>
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<tr>
<td>SPV</td>
<td>Special Purpose Vehicle</td>
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<tr>
<td>SRAM</td>
<td>Static Random Access Memory (chip)</td>
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<td>SRO</td>
<td>Special Remission Order (Canada)</td>
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<td>SS</td>
<td>Special Session(s)</td>
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<td>SSA</td>
<td>Sub-Saharan Africa</td>
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<td>SSAC</td>
<td>Sub-Saharan African Country</td>
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<td>SSF Guidelines</td>
<td>Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (FAO)</td>
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<td>SSG</td>
<td>Special Safeguard</td>
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<td>SSM</td>
<td>Special Safeguard Mechanism</td>
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<td>SSN</td>
<td>Resolutions of the National Insurance Supervisory Authority (Argentina)</td>
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<td>SST</td>
<td>State Sponsor of Terrorism</td>
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<td>Stat.</td>
<td>United States Statutes at Large</td>
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<tr>
<td>Stat. Suf.</td>
<td>Statistical Suffix</td>
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<tr>
<td>STB</td>
<td>set-top box</td>
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<td>STDF</td>
<td>WTO Standards and Trade Development Facility</td>
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<td>STE</td>
<td>State Trading Enterprise</td>
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<td><strong>STIP</strong></td>
<td>U.S.-Kenya Strategic Trade and Investment Partnership</td>
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<tr>
<td>STO</td>
<td>Special Trade Obligation</td>
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<td>SUV</td>
<td>Sport utility vehicle</td>
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<tr>
<td>SVE</td>
<td>Small, Vulnerable Economy</td>
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<tr>
<td>SVP</td>
<td>surge voltage protector</td>
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<tr>
<td>SWAT</td>
<td>Strategic Worker Assistance and Training Initiative</td>
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<td>SWIFT</td>
<td>Society for Worldwide Interbank Financial Telecommunications</td>
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<tr>
<td>T&amp;A</td>
<td>Textiles and Apparel</td>
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<tr>
<td><strong>TAA (1st meaning)</strong></td>
<td>Trade Adjustment Assistance</td>
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<tr>
<td><strong>TAA (2nd meaning)</strong></td>
<td><em>Trade Agreements Act of 1974</em>, as amended</td>
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<tr>
<td><strong>TAAEA</strong></td>
<td>2011 <em>Trade Adjustment Assistance Extension Act</em></td>
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<td><strong>TAARA</strong></td>
<td><em>Trade Adjustment Assistance Reauthorization Act of 2015</em></td>
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<td><strong>TAA Reform Act</strong></td>
<td>2002 <em>Trade Adjustment Assistance Reform Act</em></td>
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<tr>
<td>TABC</td>
<td>Trans-Atlantic Business Council</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<td>--------------</td>
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<tr>
<td>(TBC)</td>
<td>(also abbreviated TBC)</td>
</tr>
<tr>
<td>TABD</td>
<td>Trans-Atlantic Business Dialogue</td>
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<tr>
<td>TAC</td>
<td>Total Allowable Catch</td>
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<td>TACB</td>
<td>technical assistance and capacity building (IPEF)</td>
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<td>TAIPEI Act</td>
<td>2019 Taiwan Allies and International Protection and Enhancement Initiative Act</td>
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<td>TB</td>
<td>tuberculosis</td>
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<td>TBEA</td>
<td>Tebian Electric Apparatus Co., Ltd. (China)</td>
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<td>TBI</td>
<td>traumatic brain injury</td>
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<tr>
<td>TBT</td>
<td>Technical Barriers to Trade</td>
</tr>
<tr>
<td>TBT Agreement</td>
<td>WTO Agreement on Technical Barriers to Trade</td>
</tr>
<tr>
<td>TCA</td>
<td>U.K.-EU Trade and Cooperation Agreement (EU-U.K. Trade and Cooperation Agreement, i.e., Christmas Eve 2020 Brexit Deal, effective 1 January 2020)</td>
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<tr>
<td>TCOM</td>
<td>Total Cost of Manufacturing</td>
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<td>TCP (1st meaning)</td>
<td>Third Country Price</td>
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<tr>
<td>TCP (2nd meaning)</td>
<td>El Tratado de Comercio entre los Pueblos, (“Trade Treaty for the Peoples”)</td>
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<td>TCS</td>
<td>Tata Consulting Services</td>
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<td>TD</td>
<td>Treasury Decision (U.S.)</td>
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<td>TDA</td>
<td>2000 Trade and Development Act</td>
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<tr>
<td>TDDS</td>
<td>trade-distorting domestic support</td>
</tr>
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<td>TDEA</td>
<td>1983 Trade and Development Enhancement Act</td>
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<td>TDI</td>
<td>Trade Defense Instrument</td>
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<td>TDIC</td>
<td>Tourism Development and Investment Company (Abu Dhabi, UAE)</td>
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<td>TEA (1st meaning)</td>
<td>Trade Expansion Act of 1962, as amended</td>
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<td>TEA (2nd meaning)</td>
<td>Trade Enforcement Act of 2015, as amended (same as TFTEA, Trade Facilitation and Trade Enforcement Act)</td>
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<tr>
<td>TECRO</td>
<td>Taipei Economic and Cultural Representative Office</td>
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<td>TED</td>
<td>Turtle Excluder Device</td>
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<td>TEM</td>
<td>Technical Experts Meeting (MTCR)</td>
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<td>TEO</td>
<td>Temporary Exclusion Order</td>
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<tr>
<td>ter</td>
<td>third version (of a text)</td>
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<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>--------------</td>
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<tr>
<td>TESSD</td>
<td>Trade and Environmental Sustainability Structured Discussions (WTO)</td>
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<td>TEU</td>
<td>Twenty Foot Equivalent Unit</td>
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<td>TFA</td>
<td>WTO Agreement on Trade Facilitation (Trade Facilitation Agreement)</td>
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<td>TFAF</td>
<td>Trade Facilitation Agreement Facility</td>
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<tr>
<td>TFP</td>
<td>Total Factor Productivity</td>
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<tr>
<td>TFR</td>
<td>Total Fertility Rate</td>
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<td>TGAAA</td>
<td>2009 Trade and Globalization Adjustment Assistance Act</td>
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<td>TGL</td>
<td>Temporary General License</td>
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<td>THAAD</td>
<td>Terminal High Altitude Area Defense system</td>
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<td>TIEA</td>
<td>Tax Information Exchange Agreement</td>
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<td>TIES</td>
<td>Threat and Imposition of Economic Sanctions database (University of North Carolina)</td>
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<td>TIFA</td>
<td>Trade and Investment Framework Agreement</td>
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<td>TIPA</td>
<td>Taiwan Invasion Prevention Act</td>
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<tr>
<td>TIPi</td>
<td>Trade and Investment Partnership Initiative</td>
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<tr>
<td>TISA (TISA, TSA)</td>
<td>WTO Trade in Services Agreement</td>
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<tr>
<td>TKB</td>
<td>Transkapitalbank (Russia)</td>
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<tr>
<td>TMT</td>
<td>thousand metric tons</td>
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<tr>
<td>TN (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>NAFTA business visa</td>
</tr>
<tr>
<td>tn (second meaning)</td>
<td>trillion</td>
</tr>
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<td>TNC</td>
<td>WTO Trade Negotiations Committee</td>
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<td>TOT</td>
<td>Terms of Trade</td>
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<td>TPA (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Trade Promotion Agreement</td>
</tr>
<tr>
<td>TPA (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Trade Promotion Authority (Fast Track)</td>
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<tr>
<td>TPBI</td>
<td>Thai Plastic Bags Industries</td>
</tr>
<tr>
<td>TPC</td>
<td>Technology Partnerships Canada</td>
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<td>TPEA</td>
<td>2015 Trade Preferences Extension Act</td>
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<td>TPF</td>
<td>United States – India Trade Policy Forum</td>
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<td>TPL</td>
<td>Tariff Preference Level</td>
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<tr>
<td>TPM (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Trigger Price Mechanism</td>
</tr>
<tr>
<td>TPM</td>
<td>Technological Protection Measure</td>
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<td>Term</td>
<td>Description</td>
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</tr>
<tr>
<td>TPP</td>
<td>Trans‐Pacific Partnership</td>
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</table>
| TPP (2nd meaning) | Tobacco Plain Packaging  
For example, Australia’s (1) Tobacco Plain Packaging Act 2011, (2) Tobacco Plain Packaging Regulations 2011, as amended by the Tobacco Plain Packaging Amendment Regulation 2012 (Number 1), and (3) Trade Marks Amendment (Tobacco Plain Packaging) Act 2011. |
| TPP 11 | CPTPP (entered into force 30 December 2018) |
| TPRB | WTO Trade Policy Review Body |
| TPRM | WTO Trade Policy Review Mechanism |
| TPSC | Trade Policy Staff Committee  
(U.S., interagency led by USTR) |
| TRA (1st meaning) | 1979 Taiwan Relations Act |
| TRA (2nd meaning) | Trade Readjustment Allowance |
| TRB | Tapered roller bearing |
| TRIA | Terrorism Risk Insurance Act of 2002 |
| TRIMs | Trade Related Investment Measures |
| TRIMs Agreement | WTO Agreement on Trade Related Investment Measures |
| TRIPs | Trade Related Aspects of Intellectual Property Rights |
| TRIPs Agreement | WTO Agreement on Trade Related Aspects of Intellectual Property Rights |
| TRO | Temporary Restraining Order |
| TRQ | Tariff Rate Quota |
| TSA | U.S. Transportation Security Administration |
| TSMC | Taiwan Semiconductor Manufacturing Co. |
| TSUS | Tariff Schedule of the United States  
(predecessor to HTSUS) |
<p>| TTC | U.S.-EU Trade and Technology Council |
| TTF | Dutch Title Transfer Facility |
| T‐TIP | Trans‐Atlantic Trade and Investment Partnership |
| TV (1st meaning) | Television |
| TV (2nd meaning) | Transaction Value |
| TVE | Town and Village Enterprise |
| TVPA | 2000 Trafficking Victims Protection Act |
| TWEA | 1917 Trading With the Enemy Act |</p>
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>TWN</td>
<td>Third World Network</td>
</tr>
<tr>
<td>UAV</td>
<td>Unmanned Aerial Vehicle (drone)</td>
</tr>
<tr>
<td>UAW</td>
<td>United Auto Workers</td>
</tr>
<tr>
<td>UBC</td>
<td>University of British Columbia</td>
</tr>
<tr>
<td>UBS AG</td>
<td>Swiss bank resulting from 1998 merger of Union Bank of Switzerland and Swiss Bank Corporation (founded in 1872 and 1862, respectively)</td>
</tr>
<tr>
<td>UCC (1st meaning)</td>
<td>Uniform Civil Code (India)</td>
</tr>
<tr>
<td>U.C.C. (2nd meaning)</td>
<td>Uniform Commercial Code (U.S.)</td>
</tr>
<tr>
<td>UCLA</td>
<td>University of California at Los Angeles</td>
</tr>
<tr>
<td>UCP (1st meaning)</td>
<td>Uniform Customs and Practices</td>
</tr>
<tr>
<td>UCP (2nd meaning)</td>
<td>Unified Cargo Processing</td>
</tr>
<tr>
<td>UE</td>
<td>United Electrical, Radio and Machine Workers of America</td>
</tr>
<tr>
<td>UEFA</td>
<td>Union of European Football Associations</td>
</tr>
<tr>
<td>UES</td>
<td>United Engineering Steel (U.K.)</td>
</tr>
<tr>
<td>UETA</td>
<td>1999 Uniform Electronic Transactions Act</td>
</tr>
<tr>
<td>UF</td>
<td>Ultra-filtered (milk)</td>
</tr>
<tr>
<td>UF₆</td>
<td>Uranium Hexafluoride</td>
</tr>
<tr>
<td>UFLPA</td>
<td>2021 Uyghur Forced Labor Prevention Act</td>
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<tr>
<td>UHRP</td>
<td>Uyghur Human Rights Project</td>
</tr>
<tr>
<td>UI</td>
<td>Unemployment Insurance</td>
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<tr>
<td>UIEGA</td>
<td>2006 Unlawful Internet Gambling Enforcement Act</td>
</tr>
<tr>
<td>U.K.</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>U.K.CA (UKCA)</td>
<td>United Kingdom Conformity Assessed</td>
</tr>
<tr>
<td>U.K.CGC</td>
<td>U.K. Carbon &amp; Graphite Company</td>
</tr>
<tr>
<td>U.K.SFTA (UKSFTA)</td>
<td>United Kingdom-Singapore Free Trade Agreement</td>
</tr>
<tr>
<td>UMR</td>
<td>Usual Marketing Requirement (FAO)</td>
</tr>
<tr>
<td>UMTS</td>
<td>Universal Mobile Telecommunications System</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNCAC</td>
<td>United Nations Convention Against Corruption</td>
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<tr>
<td>UNCC</td>
<td>United Nations Compensation Commission</td>
</tr>
<tr>
<td>UNCDP</td>
<td>United Nations Committee for Development Policy</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
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<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Commission on Trade and Development</td>
</tr>
<tr>
<td>UNEP</td>
<td>United Nations Environmental Program</td>
</tr>
<tr>
<td>UNESCO</td>
<td>United Nations Educational, Cultural, and Scientific Organization</td>
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<tr>
<td>UNFCCC</td>
<td>United Nations Framework Convention on Climate Change</td>
</tr>
<tr>
<td>UNICA</td>
<td>Brazilian Sugarcane Industry Association</td>
</tr>
<tr>
<td>UNITA</td>
<td>National Union for the Total Independence of Angola</td>
</tr>
<tr>
<td>UNOCHA</td>
<td>United Nations Office for the Coordination of Humanitarian Affairs</td>
</tr>
<tr>
<td>UNODA</td>
<td>United Nations Office of Disarmament Affairs</td>
</tr>
<tr>
<td>UNOHRCHR (OHCHR)</td>
<td>United Nations Office of the High Commissioner for Human Rights</td>
</tr>
<tr>
<td>UPA</td>
<td>United Progressive Alliance (India)</td>
</tr>
<tr>
<td>UPS (1st meaning)</td>
<td>uninterrupted power supply</td>
</tr>
<tr>
<td>UPS (2nd meaning)</td>
<td>United Parcel Service</td>
</tr>
<tr>
<td>UPU</td>
<td>Universal Postal Union</td>
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<tr>
<td>URAA</td>
<td>1994 Uruguay Round Agreements Act</td>
</tr>
<tr>
<td>U.S.</td>
<td>United States</td>
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<tr>
<td>USAPEEC</td>
<td>USA Poultry and Egg Export Council</td>
</tr>
<tr>
<td>USC</td>
<td>United Shipbuilding Corporation (Russia)</td>
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<tr>
<td>USCBC</td>
<td>U.S.-China Business Council</td>
</tr>
<tr>
<td>USCCAN</td>
<td>United States Code Congressional and Administrative News</td>
</tr>
<tr>
<td>USCCB</td>
<td>United States Conference of Catholic Bishops</td>
</tr>
<tr>
<td>USD (1st meaning)</td>
<td>Union Solidarity and Development Party (Burma)</td>
</tr>
<tr>
<td>USD (2nd meaning)</td>
<td>United States Dollar</td>
</tr>
<tr>
<td>USDS</td>
<td>United States Data Security (division)</td>
</tr>
<tr>
<td>USICA</td>
<td>U.S. Innovation and Competition Act of 2021 (Senate bill)</td>
</tr>
<tr>
<td>USJDTA</td>
<td>United States – Japan Digital Trade Agreement (signed 7 October 2019)</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
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</tr>
</tbody>
</table>
| USJTA        | United States – Japan Trade Agreement  
(signed 7 October 2019, entered into force 1 January 2020) |
| USMCA        | United States-Mexico-Canada Agreement  
(revised FTA based on August 2017-September 2018 renegotiations, called CUSMA in Canada, USMCA in America, and informally called NAFTA 2.0, signed 30 November 2018, signed again after further renegotiations 10 December 2019, and entered into force 1 July 2020) |
| USML         | United States Munitions List |
| USP          | United States Price  
(Pre-Uruguay Round U.S. term encompassing both Purchase Price and Exporter’s Sales Price) |
| U.S.S.       | United States Ship  
(U.S. Navy) |
| U.S.S.R.     | Union of Soviet Socialist Republics |
| USTR         | U.S. Trade Representative |
| USVSST       | United States Victims of State Sponsored Terrorism Fund |
| USW (1st meaning) | United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union |
| USW (2nd meaning) | United Steel Workers of America |
| UVL          | Unverified List |
| VAT          | Value Added Tax |
| VC           | Venture Capital |
| VCP          | Vietnamese Communist Party  
(or CPV, Communist Party of Vietnam) |
<p>| VCR          | Video Cassette Recorder |
| VEO          | Violent Extremist Organization |
| VER          | Voluntary Export Restraint |
| VEU          | Validated End User |
| VLCC         | Very Large Crude Carrier |
| VND          | Vietnamese dong |
| VNM (VNOM)   | Value of Non-Originating Materials |
| VOC          | volatile organic compound |
| VOD          | video on demand |
| VOM          | Value of Originating Materials |
| VPN          | virtual private network |
| VRA          | Voluntary Restraint Agreement |
| VSD          | voluntary self-disclosure |</p>
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>VW</td>
<td>Volkswagen AG</td>
</tr>
<tr>
<td>W120</td>
<td>WTO services classification list (based on CPC)</td>
</tr>
<tr>
<td>WA</td>
<td>1995 Wassenaar Arrangement</td>
</tr>
<tr>
<td>WAML</td>
<td>Wassenaar Arrangement Munitions List</td>
</tr>
<tr>
<td>WCF</td>
<td>World Cocoa Foundation</td>
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<tr>
<td>WCO</td>
<td>World Customs Organization (formerly CCC until 1994)</td>
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<tr>
<td>WFOE</td>
<td>Wholly Foreign-Owned Enterprise (China)</td>
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<tr>
<td>WFP</td>
<td>World Food Program</td>
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<tr>
<td>WHO</td>
<td>World Health Organization</td>
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<tr>
<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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<tr>
<td>WIV</td>
<td>Wuhan Institute of Virology</td>
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<tr>
<td>WMD</td>
<td>Weapon of Mass Destruction</td>
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<tr>
<td>WMO</td>
<td>World Meteorological Association</td>
</tr>
<tr>
<td>WRO</td>
<td>Withhold Release Order</td>
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<tr>
<td>WTO</td>
<td>World Trade Organization</td>
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<tr>
<td>WTO Agreement</td>
<td>Agreement Establishing the World Trade Organization (including all 4 Annexes)</td>
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<tr>
<td>WWF</td>
<td>World Wildlife Fund</td>
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<tr>
<td>XITIC</td>
<td>Xiamen International Trade and Industrial Company</td>
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<tr>
<td>XPCC</td>
<td>Xinjiang Production and Construction Corps. (China)</td>
</tr>
<tr>
<td>XUAR</td>
<td>Xinjiang Uyghur Autonomous Region (China)</td>
</tr>
<tr>
<td>YMTC</td>
<td>Yangtze Memory Technologies Co. (China)</td>
</tr>
<tr>
<td>YoY</td>
<td>Year on Year</td>
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<tr>
<td>ZAC</td>
<td>zone d’aménagement concertée (France)</td>
</tr>
<tr>
<td>ZTE</td>
<td>Zhongxing Telecommunications Corp.</td>
</tr>
<tr>
<td>1916 Act</td>
<td>Antidumping Act of 1916, as amended (repealed)</td>
</tr>
<tr>
<td>1930 Act</td>
<td>Tariff Act of 1930, as amended</td>
</tr>
<tr>
<td>1934 Act</td>
<td>Reciprocal Trade Agreements Act of 1934</td>
</tr>
<tr>
<td>1934 FTZ Act</td>
<td>Foreign Trade Zones Act of 1934, as amended</td>
</tr>
<tr>
<td>1945 UNPA</td>
<td>United Nations Participation Act of 1945</td>
</tr>
<tr>
<td>1974 Act</td>
<td>Trade Act of 1974, as amended</td>
</tr>
<tr>
<td>1978 Act</td>
<td>Customs Procedural Reform and Implementation Act</td>
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<td>1979 Act</td>
<td>Trade Agreements Act of 1979</td>
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<tr>
<td>Act</td>
<td>Description</td>
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<tr>
<td>(1st meaning, OTCA)</td>
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<tr>
<td>1988 Act</td>
<td>United States – Canada Free Trade Implementation Act</td>
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<tr>
<td>(2nd meaning)</td>
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<tr>
<td>1990 Act</td>
<td>Customs and Trade Act of 1990</td>
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<tr>
<td>1993 Mod Act</td>
<td>Customs Modernization Act of 1993</td>
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<tr>
<td>2002 Act</td>
<td>Trade Act of 2002</td>
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<tr>
<td>2010 Act</td>
<td>Omnibus Trade Act of 2010</td>
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<tr>
<td>3D</td>
<td>Three dimensional</td>
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<tr>
<td>3PLs</td>
<td>Third Party Logistics Providers</td>
</tr>
<tr>
<td>3Ts (3T Issues)</td>
<td>Taiwan, Tiananmen, and Tibet</td>
</tr>
<tr>
<td>4Ts (4T Issues)</td>
<td>Taiwan, Tiananmen, Tibet, and The Party (CCP)</td>
</tr>
</tbody>
</table>
Part One

BORDER SECURITY
Chapter 1

POST-9/11 CUSTOMS LAW PARADIGM SHIFT

I. Proud 200 Year Tradition of U.S. Customs

● Three of the First Five Acts

Tariff legislation and what once was called the U.S. “Customs Service” are nearly as old as the American Republic. The introduction to the Second Act of the First Congress – the Tariff Act (Duty Act), dated 4 July 1789 – stated its purpose was:

for laying a Duty on Goods, Wares, and Merchandises imported into the United States.

That is, responding to the urgent need for funds, the First Congress passed, and President George Washington (1732-1799, President, 1789-1797) signed, the Tariff Act of July 4, 1789. This Act permitted collection of duties on imported goods. The news media of the day called it “the Second Declaration of Independence.” The Third Act of the First Congress – called the Act Imposing Duties on Tonnage, dated 20 July 1789 – established duties on all ships and vessels. Those duties were a levy on the weight of incoming crafts, whether American or foreign.

Two weeks later, on 31 July 1789, the Fifth Act of the First Congress established port districts in each State and provided for staffing of each port. In effect, the Fifth Act created the Customs Service and authorized ports of entry. The Service – born in July 1789 – is the oldest American government agency. Two months later, in September 1789, Congress created the Department of the Treasury, and housed the Service in that Department. Thus, of the first five pieces of legislation the young American Congress passed, three of them dealt squarely with international trade.

● Tariff Revenue and Nation Building

2 Documents References:
(1) Havana (ITO) Charter Articles 16, 45:1(a)(ii), 99
(2) GATT Articles I, XXI
(3) NAFTA 1.0 Chapters 5, 21, USMCA Chapters 7, 28, 32
(4) Relevant provisions in other FTAs


4 The first five Acts of the First Congress are:
(1) 1 Cong. Ch. 1, June 1, 1789, 1 Stat. 23 (entitled Time and Manner of Certain Oaths).
(2) 1 Cong. Ch. 2, July 4, 1789, 1 Stat. 24.
(3) 1 Cong. Ch. 3, July 20, 1789, 1 Stat. 27.
(4) 1 Cong. Ch. 4, July 27, 1789, 1 Stat. 28 (concerning the establishment of the Department of Foreign Affairs, the precursor to the modern-day Department of State).
(5) 1 Cong., Ch. 5, July 31, 1789, 1 Stat. 29.

Observe, then, that of the first five Acts, four of them concerned international relations.
Money helps explain the immediate attention Congress gave to the customs matters. Shortly after the American revolutionaries declared independence, the nation teetered on the brink of bankruptcy. For the first 125 years of American history, tariffs were the primary source of government revenue. Funding most of the budget, tariffs allowed for:

1. Purchase of the territories of Louisiana (from France in 1803) and Alaska (from Tsarist Russia in 1867 – a transaction dubbed “Seward’s Folly”).
2. Acquisition of Oregon (through the 1818 Treaty of Ghent, with Great Britain, plus a further agreement with Britain in 1846 removing any British claims to the American West) and Florida (through the 1819 Adams-Onis Treaty with Spain).
3. Construction of the National Road between 1811 and 1820 from Cumberland, Maryland, to Wheeling, West Virginia.
4. Construction of the Transcontinental Railroad, from 1853 to 1869, which stretched from sea-to-sea.
5. Building the nation’s lighthouses, starting in 1716, before Independence, and continuing to 1910.
6. Building the army and naval academies at West Point (in 1802) and Annapolis (in 1845), respectively.
7. Building the City of Washington, D.C., following the British burning of it on 24 August 1814, during the War of 1812.

Impressively, by 1835, customs revenue alone had reduced the national debt to zero.

In fact, not until 1916, when the U.S. Supreme Court held an income tax to be Constitutional under the 16th Amendment, did the relative importance of tariffs decrease.\(^5\) This pattern – customs fueling the lion’s share of the budget while an income tax system is non-existent or inchoate – is typical of countries as they develop.

**Duty Collection Today**

Today, duty collection accounts for about 1% of U.S. government revenue (specifically, 1.09% in 2005, and 1.06% in 2014, with duty collections actually rising 2% between 2013 and 2014, based on processing $2.4 trillion in trade, up 4% from 2013.) Still, it is 1% (amounting to $23 billion in 2005, and $34 billion in 2014) of a huge aggregate

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\(^5\) In 1895, the Supreme Court ruled the federal statutory income tax unconstitutional. See *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 158 U.S. 601 (1895). The process for ratifying the 16th Amendment was completed in 1913. Three years later, the Court affirmed the constitutionality of that Amendment. See *Brushaber v. Union P.R. Co.*, 240 U.S. 1 (1916).
federal government revenue figure. Moreover, with larger trade volumes (albeit generally lower tariff rates), customs is a growing source of revenue for the Federal government, and the Customs Service is profitable – returning over $16.00 to the taxpayer for every dollar Congress appropriates.

II. Day in Life of Customs

The specific functions formed by the Customs Service have not remained the same during its proud history. The Customs Service was the parent or forerunner to several other government agencies. For instance, in the early years of American history, the Customs officers administered military pensions, collected import and export statistics, supervised revenue cutters, and established standard weights and measures. Now, officials from the Departments of Veterans Affairs, Bureau of Census, U.S. Coast Guard, and National Bureau of Standards, respectively, perform these functions. In addition, the Customs Service used to collect hospital dues to help sick and disabled seamen, a function Public Health Service officials later performed.

Of course, throughout its history, the core business, as it were, of CBP has been, and remains, the following: ⁶

- **Trade Revenue and Administrative Functions**

  1. Assessing and collecting duties, excise taxes, fees, and penalties due on imported merchandise, and thereby protecting revenue. On a typical day (as of FY 2019), CBP collects $80.7 billion in tariffs, duties, and fees, and approves for entry 35.5 million entries of shipments of goods. It processes annually (as of FY 2019) $2.7 trillion worth of trade and 28.7 million containers – a daily average (as of FY 2014) of $6.3 billion and 66,575 containers. With an average MFN duty of 16% and over $94 billion annually (as of FY 2011) in imports, T&A merchandise accounts for 47% of all tariff revenue the Customs Service collects.

  2. Processing persons, baggage, cargo and mail, and administering certain navigation laws. On a typical day (as of FY 2019), CBP processes 410.3 million travelers at U.S. ports of entry, including (as of FY 2014) 680,000 aliens, 240,737 incoming international air passengers, 71,151 passengers and crew arriving by ship, 327,042 incoming privately-owned vehicles, and 70,900 truck, rail, and sea containers.

  3. Collecting accurate data on imports and exports for compilation in international trade statistics. For this function, the ninth and 10th digits in the HTSUS – the statistical suffix – are useful.

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Trade Remedy Functions

(1) Protecting holders of U.S. IPRs by enforcing remedies, such as Section 337 of the Tariff Act of 1930, as amended, that allow for the exclusion of merchandise infringing on an IPR, or seizure of such merchandise. Annually (as of FY 2011), it seizes roughly 24,792 shipments of infringing goods (and 23,140 shipments with a retail value of $1.2 billion in FY 2014, including over $1 million in counterfeit Gibson, Les Paul, Martin, and Paul Reed Smith guitars), with China being their top source, accounting for 62% of them, and India and Pakistan being prominent origins. The infringing merchandise includes apparel and accessories, computers and accessories, batteries, cigarettes, consumer electronics (particularly cell phones), critical technology components, footwear, exercise equipment, eyewear, footwear, health and personal care products (including pharmaceuticals), handbags (along with backpacks, purses, and wallets), jewelry and watches, labels and tags, optical media, perfume and cologne, pharmaceuticals, toys, and transportation equipment. Notably, Hong Kong (as of 2014) was second in terms of seizures of IPR infringing goods (based on Manufacturers Suggested Retail Prices), with Canada third. So, China (the Hong Kong SAR) was busy seizing goods pirated in China (the Mainland). Also notably, about 90% (as of 2016) of IP infringing goods CBP seizes are e commerce transactions, such as small packages of goods ordered online.

(2) Protecting American labor rights by enforcing remedies, particularly the prohibition on importation of convict-made goods under Section 307 of the Tariff Act of 1930, as amended.

(3) Enforcing other remedies against unfair trade practices, namely, implementing AD and CVD orders on subject merchandise.

Law Enforcement and Border Control Functions

(1) Enforcing import and export laws and regulations at American ports of entry, ensuring all merchandise imported into or exported from the U.S. customs territory conform to U.S. import-export laws. On a typical day, the Customs Service seizes $646,900 worth of fraudulent commercial merchandise at ports of entry, and intercepts 71 fraudulent documents.

(2) Ensuring (along with Immigration and Customs Enforcement, which was created in a March 2003 reorganization of the Immigration and Naturalization Service, that split the INS investigation and enforcement functions from its border functions, giving them to ICE and CBP, respectively) persons attempting to enter the U.S. are doing so lawfully. On a typical day, the Customs Service makes 63 arrests at ports of entry, and 2,984 apprehensions between ports for illegal entry. It refuses entry at ports of entry to 574 non-citizens, and 63 criminal aliens, and intercepts 20 smuggled aliens trying to enter the U.S. The Customs Service also rescues 8 illegal migrants per day on average in distress or dangerous conditions between ports of
entry.

(3) Combating smuggling, including the interdiction and seizure of contraband items, such as child pornography.

(4) Combating fraud aimed at circumventing customs laws, including the interdiction and seizure of T&A merchandise that is illegally trans-shipped (e.g., through Mexico to take advantage of duty free treatment under the NAFTA), bears a false country of origin label, is under-valued or mis-classified, or violates a quota rule or valid IPR. Annually (as of FY 2011), the Customs Service seizes over $14 million worth of T&A merchandise for violating quota rules or IPRs.

(5) Serving as the first line of defense in the war on drugs at ports of entry, and specifically, interdicting and seizing narcotics and other illegal drugs. On a typical day, the Customs Service seizes 1,769 pounds of narcotic in 63 seizures at ports of entry, and a further 3,788 pounds of narcotics in 20 seizures between ports of entry.

(6) Assisting in the investigation, apprehension, and conviction of persons engaged in counterfeiting and money laundering. On a typical day, the Customs Service seizes $157,800 in undeclared or illicit currency.

(7) Enforcement of over 400 provisions of law, other than import-export rules, on behalf of at least 40 other government agencies, including provisions on quality of life, notably, environmental regulations on motor vehicle safety and emissions, water pollution, pesticides, freon smuggling, and endangered species protection, and provisions on agriculture, public health, and consumer safety. On a typical day, the Customs Service seizes 4,462 prohibited plant materials, animal byproducts, and meat, including 147 agricultural pests, at ports of entry. Annually (as of FY 2011), it seizes over 1.6 million shipments of prohibited plant and animal products, and intercepts about 183,000 pests.

● National Security Functions

(1) Controlling the import and export of merchandise, particularly with respect to imports or exports of controlled merchandise, such as military or dual-use technologies, and critical technology that might be used to make WMDs.

(2) Intercepting persons trying to enter the U.S. who pose a national security risk to the country. On a typical day, the Customs Service intercepts 1.5 travelers because of terrorism or other national security concerns.

Obviously, the customs territory of the U.S., around which the Customs Service must perform these protective functions, is vast. There are:

(1) 5,525 miles of border with Canada.
(2) 1,900 miles of border with Mexico.
(3) 95,000 miles of shoreline
(4) 325 ports of entry
(5) 20 sectors with 33 border checkpoints between the ports of entry.

Not surprisingly, therefore, the Customs Service requires a large, well-trained, and dedicated staff. It boasts approximately 42,000 employees, including 18,000 officers, 12,300 Border Patrol agents, 2,000 agriculture specialists, and 650 air and marine officers. On an average day, the Customs Service deploys 8,075 vehicles, 260 aircraft, 215 watercraft, and 202 equestrian patrols, as well as 1,264 canine enforcement teams.

III. Post 9/11 Paradigm Shift

- Good Goods and Good People

Overall, the Customs Service has been, and continues to be, the indispensable authority to facilitate the lawful cross-border movement of goods and people. This pre-9/11 paradigm, in which customs authorities the world over are, first and foremost, international trade players with law enforcement and border patrol functions related directly to trade, is reflected in international customs agreements from before that day. Generally speaking, pre-9/11 customs treaties addressed:

(1) Publication of customs tariffs.
(2) Establishment of an international body headquartered in Brussels, formerly the Customs Cooperation Council (CCC), renamed in 1994 the WCO.
(3) Container conventions.
(4) Importation of samples, and temporary importation of professional equipment, with a view to generating new business.
(5) Harmonization of procedures.
(6) Non-preferential ROOs.

In the pre-9/11 world, facilitating trade was of primary importance, and the key law enforcement challenge was limiting illegal drug imports. After 9/11, this business plan for customs authorities, indeed the whole paradigm in which they operated, changed.

Nowhere better was that shift manifest than in the name change. Following 9/11, the U.S. Customs Service was newly christened “Customs and Border Protection.” The essence of the new paradigm is not trade per se, or facilitating trade, but securing trade. The lodestar for the CBP is to allow entry into the U.S. only for “good” goods and “good” people. Between 2004 and 2011, the Customs Service more than doubled the number of staff dedicated to border patrol, and added high-technology assets such as mobile surveillance units, non-intrusive inspection devices, and thermal imaging systems.
Likewise, from an international perspective, the thrust of customs treaties altered, with their focus on secure movement of goods and people. Thus, the paradigm shifted from a focus on collecting tariffs and stopping drugs to securing the borders. The CBP became a weapon in America’s arsenal for the War on Terror, albeit one that retained its historical trade and trade-related functions. Query what impact CBP has had in the War.

**Homeland Security**

The obvious titular manifestation of the change from customs-as-a-trade-agency to customs-as-a-security agency was the abandonment of the name “Customs Service” in favor of CBP. The obvious organizational manifestation of the paradigm shift was the creation of DHS, a post-9/11 cabinet-level, Executive Branch department. These events were connected. When DHS was born, the new term “CBP” was created, and the CBP (i.e., the old Customs Service) moved from the Department of the Treasury to DHS. The legislative instrument effecting these changes is the *Homeland Security Act of 2002*.\(^7\)

The *Homeland Security Act* has nine titles. Title I of the *Act* creates the “Department of Homeland Security” and gives it a three-pronged mission:

1. Prevent terrorist attacks within the U.S.
2. Reduce vulnerability of the U.S. to terrorism.
3. Minimize damage, and assist in recovery, from terrorist attacks that do occur in the U.S.

To fulfill its mission, the DHS has five primary responsibilities:

1. Information Analysis and Infrastructure Protection (Title II).
2. Chemical, Biological, Radiological, Nuclear, and Related Countermeasures (Title III).
3. Border and Transportation Security (Title IV).
4. Emergency Preparedness and Response (Title V).
5. Management and coordination with other executive agencies, state and local governments, and the private sector (Titles VI and VII).

The final two Titles (VIII and IX) concern transition arrangements and conforming and technical amendments.

**Title IV of Homeland Security Act**

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\(^7\) See Public Law Number 107-296, 25 November 2002, codified in scattered titles and sections of the U.S.C. The paradigm shift is manifest in many other ways not directly connected to international trade, and effected through other statutes, namely, the *Patriot Act 2001* (Public Law Number 107-56, 115 Stat. 272), *Patriot Act Renewal 2005* (Public Law Number 109-177, 120 Stat. 192), and *Secure Fence Act 2006* (Public Law Number 109-367, 120 Stat. 2638).
Naturally, CBP is charged with the third responsibility. Hence, Title IV of the *Homeland Security Act* is crucially important for International Trade Law practitioners and scholars. The salient features of this Title were:

1st: Title IV assigned to CBP the responsibilities of:

1. Preventing the entry of terrorists and instruments of terrorism from entry into the U.S.
2. Securing U.S. borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems, including the managing and coordinating of government activities at points of entry.
3. Administering U.S. immigration and naturalization laws of the U.S.
5. Ensuring the speedy, orderly, and efficient flow of lawful traffic and commerce.

2nd: To implement these responsibilities, Title IV established a new body – Immigration and Customs Enforcement. Born in March 2003, ICE is the largest investigative branch in the DHS. In essence, ICE is a combination of the law enforcement arms of the pre-9/11 INS and Customs Service. As such, ICE focuses on enforcement of immigration and customs laws, and protection from terrorist attacks. ICE executes this mission by targeting illegal immigrants, namely, the people, money, and materials that support terrorism and other criminal activities. Lest it be thought the ICE overlaps with other law enforcement agencies, the sharing of responsibilities is a deliberate post-9/11 strategy. That strategy, called “layered defense,” is designed to create a thick barrier against bad people and bad goods from entering the U.S., and bad acts from occurring within the country.

3rd: Also to implement these responsibilities, Title IV of the *Act* transferred various agencies into the DHS, namely:

1. **Customs Service (CBP)**
   The Customs Service no longer is part of the Department of the Treasury. So, Congress shifted the delegation of general authority over traditional, indeed historic, customs revenue functions from their obvious home – the Treasury Department – to DHS.

   In doing so, Congress allowed for a few exceptions. In particular, the Secretary of the Treasury retains sole authority to approve any new regulations concerning:

   -- Import quotas or trade bans
   -- User fees
   -- Marking

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-- Labeling
-- Copyright and trademark enforcement
-- Completion of entry or substance of entry summary, including duty assessment and collection
-- Classification
-- Valuation
-- Application of the HTSUS
-- Eligibility or requirements for preferential trade programs
-- Establishment of recordkeeping requirements

Exactly where authority to review, modify, or revoke any determination or ruling that falls within these areas is not clear, but is under consideration. To facilitate coordination between DHS and the Treasury Department, particularly with respect to these areas, Title IV of the Act creates an Advisory Committee on Commercial Operations of the Customs Service. Its members are jointly appointed, and meetings presided over by the Secretaries of the Treasury and Homeland Security.

Notably, there is an “exception to the exception.” In the event of an overriding, immediate, and extraordinary security threat to public health and safety, the Secretary of Homeland Security may take action in one of the areas otherwise reserved to the Secretary of the Treasury, without prior approval of the Secretary of the Treasury. However, immediately after taking such action, the Secretary of Homeland Security shall certify in writing the specific reasons for the action, and deliver the report to the Secretary of the Treasury, as well as Congress (specifically, the Chairman and Ranking Member of the Senate Committee on Finance). Unilateral action by the DHS Secretary must terminate within 14 days, unless the Secretary of the Treasury approves its continuation and provides notice thereof to the DHS Secretary.

(2) Immigration and Naturalization Service (INS)
The INS was transferred from DOJ, and (as explained above) its functions split between ICE and CBP.

(3) Animal and Plant Health Inspection Service
This Service was transferred from the USDA.

(4) Coast Guard
The Coast Guard was transferred from DOT.

Title IV also transferred the TSA from the DOT to DHS, and moved the Federal Protective Service of the GSA to DHS.

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9 See 19 U.S.C. §§ 1516 and 1625(c).
Chapter 2

POST-9/11 BORDER SECURITY INITIATIVES

I. Post-9/11 Statutory Overview

For most International Trade lawyers, and their clients, involved in importation into the U.S., the greatest post-9/11 Customs Law shift affecting their daily transactions concerns port and container security.\(^{11}\) In part, the shift shows how seriously authorities take the Tom Clancy novel, *The Sum of All Fears* (1991), which became a 2002 movie thriller. The nightmarish plot involves smuggling, amidst lawful merchandise imported into the U.S., a nuclear device, and detonating it at the Super Bowl. Nuclear weapons are not the only WMDs worrying authorities. Biological weapons pose a risk, which the U.S. Congress addressed through the 2002 *Bioterrorism Act*. The five Titles of the *BTA* aim to secure U.S. food and drug supplies, and drinking water, against the threat of a bioterrorist attack, and enhance preparedness in the event of such an attack.

Accordingly, increased port and container security to guard against entry of WMDs, as well as other contraband items, is a key component of an overall national security strategy to manage risks and target threats. There are several elements to post-9/11 port and container security. They include (as explained below) the *Container Security Initiative* and *Customs-Trade Partnership Against Terrorism* (explained below), as well as schemes such as “Screening” (*i.e.*, evaluating the import risk of all incoming vessels, and assigning the appropriate level of scrutiny based on the risk level), the “24 Hour Rule” (*i.e.*, mandating a minimum of 24 hours prior notice for importation of articles into the U.S. by water-based vessel, or four hours for air-based vessels, so CBP has the chance for screening), “Canines” (*i.e.*, using dog bomb and drug detection teams), and “High Tech” (*i.e.*, deploying advanced technology).

Initially, some of these elements were laid out directly, or countenanced by, the *Homeland Security Act of 2002*.\(^{12}\) Many, however, were administrative fiat, that is, initiatives of the CBP. Thus, in October 2006, Congress enacted the *CSI* and *C-TPAT* programs into law.\(^{13}\) Congress did so through the *Security and Accountability for Every Port Act of 2006*, which has the clever acronym the “SAFE Port Act.”\(^{14}\) Until their

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10 Documents References:

(1) *Havana (ITO) Charter* Articles 16, 45:1(a)(ii), 99
(2) GATT Articles I, XXI
(3) NAFTA 1.0 Chapters 5, 21, USMCA Chapters 7, 28, 32
(4) Relevant provisions in other FTAs


12 The 24 Hour Rule was set out in the *Trade Act of 2002*, Public Law Number 107-120, and is found at 19 C.F.R. Parts 4 (water-borne vessels), 24 (administrative procedures and fees), and 122 (aircraft).


14 See H.R. 4954, 109th Cong., 2d Sess., Public Law 109-347. There are eight parts to the *Act*:

(1) Security of United States Seaports
(2) Security of International Supply Chain

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codification, the CSI and C-TPAT had been administrative programs without a clear statutory basis. The SAFE Port Act also contained new security mandates, including that the 22 busiest ports in the U.S. implement radiation detection technology.

II. Fighting Bioterrorism with BTA

Surely a bioterrorist attack is among the “worst nightmare” scenarios of security officials around the world. One response of the U.S. to this threat is the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. Known as the BTA, it is a complement to the Homeland Security Act of 2002.

While it consists of a large number of provisions affecting many parts of the U.S. government, the BTA is neatly organized into five Titles. The names of the first four Titles intimate strongly the policy objectives of the legislation. (Title V concerns additional provisions unrelated to bioterrorism.)

Title I: National Preparedness for Bioterrorism and Other Public Health Emergencies
Title II: Enhancing Controls on Dangerous Biological Agents and Toxins
Title III: Protecting Safety and Security of Food and Drug Supply
Title IV: Drinking Water Security and Safety

In studying the BTA, consider whether its specific measures achieve the policy objectives.

III. Securing Ports and Containers with CSI

The CSI, which the U.S. government announced in January 2002, has four core features to create and enforce a security regime for global shipping into the U.S.:16

1. Identify high risk containers.
2. Prescreen and evaluate containers before they are shipped.
3. Use technology to prescreen.
4. Use smarter, more secure, containers.

“Containers,” of course, refers to the twenty-foot equivalent unit (TEU) hollow rectangles, or similar large box-like receptacles, for holding merchandise being shipped from an exporter to an importer.

Under the CSI, a team of CBP officers is deployed to foreign ports – ports of shipment for goods destined for the U.S. At those ports, the officers work jointly with foreign officials to screen – in effect, pre-screen – containers departing for the U.S. Roughly 58 foreign ports in 32 foreign countries participate in pre-screening (as of July 2013). They are considered “operational” for CSI purposes, and designated as “CSI ports.” These ports account for 80% of all containers shipped to America. The key advantage of pre-screening at a CSI port is expedited processing. That is, if a container is pre-screened, then, upon arrival at the U.S. border, the cargo in it is processed in an expedited manner.

A key aspect of CSI is a “24 Hour Rule.” Exporters must file manifest declarations 24 hours before loading a container on a vessel bound for the U.S. Consider the impact on developing and least developed country exporters. Does compliance increase administrative expenditures, or simply shift back in time by one day the actual expenditure? Might enhanced logistical efficiency (e.g., alacritous processing) be a positive externality of compliance? What is the cost of failure to comply when the cargo is a perishable commodity, which many poor countries export?

IV. Securing Global Supply Chains with C-TPAT

As its rubric suggests, C-TPAT is a government instigated JV with the private sector to enhance international trade security. The program focuses on fighting terrorism by making the cross-border commercial supply chain through which merchandise is imported into the U.S. as safe, secure, and efficient as possible. Notably, in August 2022, CBP announced six new requirements related to forced labor with which C-TPAT existing and potential future program members were required to comply: risk-mapping, codes of conduct, evidence of implementation, due diligence and training, remediation plans, and shared best practices. These new obligations were to fight forced labor, i.e., root it out of supply chains. (Forced labor is discussed in a separate Chapter.)

To be sure, for certain products, countries prefer to keep the supply chain to itself, that is, to achieve vertical integration in a product. However, thanks to post-Second World

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War tariff reductions via GATT rounds, FTAs, and CUs, the reality is supply chains that straddles international boundaries:

Beginning in the 1980s, trade began behaving strangely, growing twice as fast as GDP. This burst originated in a revolution in supply chains that had been decades in the making. For most of industrial history, countries traded raw materials or finished goods, with the process of turning the one into the other located entirely within a single country, and often within a single factory. From the 1980s, however, a large and rapidly growing share of trade consisted of “intermediate goods.” Rather than produce a computer from scratch in one country, for example, a tech firm would source components from several different countries, bring them together in yet another country for assembly, and then ship the completed good to consumers around the world. As a result, rising GDP led to even greater jumps in trade.

The great supply chain revolution was slow in coming…. Tariff rates fell precipitously from the 1940s to the 1980s, by which time the duties imposed on most goods traded between rich economies had fallen to negligible levels. The shift to container shipping, which made transit by sea much faster and more reliable, was largely over by the early 1980s. From 1950 to 1985, the cost of a long-distance phone call dropped dramatically. Yet it was not until the 1990s that the supply chain boom really got going, abetted in part by China’s economic opening.\(^{19}\)

Every step in a multi-jurisdictional supply chain is an opportunity for evil action, such as the insertion of a WMD into an intermediate or finished good, or container, or malware or a virus into an IT product. The essence of the \textit{C-TPAT} bargain is that if a private sector entity agrees to heightened security measures for its global supply chains, then CBP grants its merchandise expedited clearance into the American market.\(^{20}\)

\textit{C-TPAT} has five goals, which it seeks to achieve through a close partnership between the CBP and businesses committed through their practices to trade security and trade law compliance:

(1) \textit{Enhancing the Security of Supply Chains}

Ensure \textit{C-TPAT} partners improve the security of their international supply chains pursuant to specified security criteria, working with stakeholders in that chain, and thereby enhance U.S. border security. In particular:

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\textit{Certify security profiles and information provided by C-TPAT partners.}

\(^{19}\) \textit{Free Exchange – A Serviceable Deal}, THE ECONOMIST, 14 November 2015, 76.

\(^{20}\) The U.S. is not the only WTO Member to have such a public-private venture. The EU has the Authorized Economic Operator program. Effective 31 January 2013, the U.S. and EU agreed to mutual recognition of AEO and \textit{C-TPAT}, respectively.
Enhance validation selection procedures by relying on risk factors, and expand the scope and volume of validations. “Validation” itself refers to the process by which CBP meets with company representatives, and visits domestic and foreign sites to verify company statements about security. A company is selected for validation based on the risk in its import supply chain. In turn, risk is assessed based on factors such as security-related anomalies, strategic threats posed in particular geographic regions, and import volumes.

Formalize requirements for C-TPAT to be a self-policing tool, and implement periodic self-assessment checks.

Require the partners to engage on security matters with all business entities in a supply chain.

(2) Increasing the Efficiency of Supply Chains

Provide incentives and benefits to include expedited processing of C-TPAT shipments to C-TPAT partners, thus increasing the efficiency, as well as security, of international supply chains. In particular –

- Develop a C-TPAT secure communication platform.
- Conduct supply chain security training seminars and targeted outreach programs for certified partners and the trade community.
- Share information, including on “security best practices,” among the partners.
- Develop minimum security practices, especially applicable to the point of origin, point of stuffing (i.e., the time and place at which cargo is put into a container and then sealed), and smarter, more secure cargo containers.
- Provide expedited processing benefits to the partners.

(3) Internationalizing Security Standards

Internationalize the core principles of C-TPAT through cooperation and coordination with the international community. In particular –

- Work with the international trade community to secure global supply chains.
- Partner with domestic customs administrations (e.g., Mexican customs officials in Kansas City) to coordinate anti-terrorism efforts.
- Support the WCO to develop a WCO framework to secure and facilitate global trade through customs-private sector partnerships.
- Coordinate with other international organizations to improve the security and integrity requirements of their membership.

(4) Supporting CBP

Support other CBP security and facilitation initiatives. In particular –

- Help implement and expand the Free and Secure Trade (FAST) program.
-- Assist in developing and implementing a smarter and more secure container.
-- Complement the CSI.
-- Reinforce other CBP and DHS anti-terrorism efforts.

(5) **Bettering Administration**

Improve administration of the *C-TPAT*. In particular –
-- Implement a human capital plan.
-- Expand the structured training program for supply chain specialists.
-- Coordinate with the CBP Modernization Office to enhance *C-TPAT* data collection and information management capabilities.

Underlying *C-TPAT* is an integrated approach to global commodity chains. Each step in the process of bringing merchandise into the U.S. is viewed not in isolation, but as part of an overall transaction, any link of which could be vulnerable to terrorist infiltration.

Note also the third goal. The rhetoric surrounding the program is distinctly multilateral. It emphasizes “partnership,” “support,” “cooperation,” and “coordination.” But, consider the extent to which initiatives of the WCO are catalyzed or channeled by U.S. security policy.

The public-private partnership is an essential foundation of *C-TPAT*. About 11,400 companies participate (as of January 2017). Consider the alternative to the government obtaining the assistance of private industry to ensure increased vigilance throughout international supply chain. The government – CBP – takes full charge of security by rigorous inspections of virtually every container crossing into the U.S. That regime would cost an astronomical sum in government resources, impose high – even prohibitive – expenses on importers and suppliers, cause trade to grind to a halt, and have deleterious knock-on effects throughout the economies of the U.S. and its trading partners.

In other words, there is no viable alternative. Yet, as a partnership between the public and private sectors, *C-TPAT* is voluntary. The program admits CBP can provide the highest level of cargo security only through close cooperation with the ultimate owners of international supply chain. Those owners are businesses – importers, carriers, consolidators, licensed customs brokers, exporters, and manufacturers. Essentially, then, *C-TPAT* is a means by which CBP asks them to ensure the integrity of their security practices, and communicate and verify the security guidelines of their business partners in the supply chain.

Observe that both CSI and *C-TPAT* endeavor to extend the zone of security around the U.S. Where possible, they push that zone to the point of origin of a shipment and merchandise. What are the *C-TPAT* security criteria on which CBP makes designation decisions?
Necessarily, the security guidelines adjust to threat types and levels. They address a range of topics, including:

1. Personnel
2. Physical and procedural security access controls
3. Education, training and awareness
4. Cargo manifest procedures
5. Conveyance security threat awareness
6. Documentation processing

Any company that applies for C-TPAT designation must sign an agreement with CBP committing itself to these guidelines. In addition, a C-TPAT partner must agree to leverage its business and service providers to increase their security practices. In that way, C-TPAT influences positively the security practices of thousands of companies located around the globe not enrolled in the program. Interestingly, many companies demand of the entities with which they do business that these entities enroll in CTPAT, or at least adhere to its security guidelines. They do so, for example, by conditioning their business relationships on compliance.

What types of businesses may apply to be a C-TPAT partner? The answer is somewhat predictable. There is open enrollment (as of January 2017) for the following business types related to cargo handling and movement in the U.S. import supply chain:

1. U.S. importers of record
2. U.S./Canada highway carriers
3. U.S./Mexico highway carriers
4. Air, rail, or sea carriers
5. U.S. Marine Port Authority or Terminal Operators
6. U.S. Air Freight Consolidators, Ocean Transportation Intermediaries and Non-Vessel Operating Common Carriers (NVOCC)
7. Mexican and Canadian manufacturers
8. Certain invited foreign manufacturers
9. Licensed U.S. customs brokers
10. Third Party Logistics Providers (3PLs)

CBP established these “enrollment categories,” which is logical given its responsibility for screening all import cargo transactions.

Utilizing risk management principles, CBP determined C-TPAT should seek to enroll compliant, low-risk companies that are directly responsible for importing, transporting, and coordinating commercial import cargo into the U.S. A decision to enroll a particular company depends on that company being a trusted import trader with good supply chain security procedures and controls, which will allow for reduced screening of its imported cargo. In turn, CBP resources are liberated to focus screening efforts on import cargo transactions involving unknown or high-risk import traders.
Assuming a company is eligible to participate in *C-TPAT*, to become a partner it must apply. The application is online (at [www.cbp.gov](http://www.cbp.gov)), and requires submission of

1. corporate information,
2. a supply chain security profile, and
3. acknowledgement that participation is voluntary.

In essence, the application allows CBP to designate qualified companies as low risk. Shipments from or to such companies are less likely to be examined than non-designated companies – a benefit discussed below. The designation is based on the customs compliance history and security profile of a company, and on validation of a sample international supply chain involving that company. CBP conducts domestic and foreign site visits to examine whether companies adhere to security “best practices,” and evaluates weaknesses along their international supply chains.

Obviously, the second item in the application is critical. To complete a security profile, an applicant must conduct a comprehensive self-assessment of its supply chain security procedures using the *C-TPAT* security criteria (or guidelines jointly developed by CBP and the trade community for the specific enrollment category to which the applicant belongs). The criteria cover:

1. Business Partner Requirements
2. Procedural Security
3. Physical Security
4. Personnel Security
5. Education and Training
6. Access Controls
7. Manifest Procedures
8. Information Security
9. Conveyance Security

Not all companies are in a position to meet *C-TPAT* minimum security criteria. These criteria are not intended to impose additional costs on companies, but they are unlikely to do so only if a company already satisfies them.

All information on supply chain security submitted by *C-TPAT* applicants is kept confidential. Moreover, CBP does not disclose whether a company participates in *C-TPAT*. Query whether, and the extent to which, CBP may share confidential information with other parts of the U.S. government, and with foreign governments? Might the prospect of intra- or inter-governmental data sharing be a concern even to law-abiding companies? Might it be a concern among rejected applicants?

Of course, a threshold question for an eligible company and its international trade counsel is why bother applying to join the first world-wide supply chain security initiative, a program that might change considerably with experience? That is, what benefits accrue from *C-TPAT* participation? After all, from a legal perspective, whether a company
participates in C-TPAT or not makes no liability difference, i.e., C-TPAT is not intended to add to, or detract from extant obligations under U.S. trade laws and regulations. And yet, joining C-TPAT obviously commits a company to follow through on actions specified in an agreement signed with CBP. These actions include self-assessing security systems, submitting security questionnaires, developing security enhancement plans, and communicating C-TPAT guidelines to other entities in the supply chain. If a company, after joining C-TPAT, fails to meet the minimum security criteria, then its status as a certified partner is suspended, or even removed – as are the aforementioned benefits.

That happened to Volkswagen AG in 2016, when CBP booted it from C-TPAT because of the emissions test cheating scandal (and related false declarations to import autos into the U.S.), resulting in a $4.3 billion fine and guilty plea to criminal charges. Because only 13% of VW cars sold in the U.S. are made in America (2nd last except for Mazda), the expulsion damaged the company: 87% of its cars for the U.S. market would be subject to import delays. C-TPAT status, and the benefits, may be reinstated when the company implements corrects its security deficiencies.

One answer to “why join?” is C-TPAT offers a trade-related business an opportunity to play an active role in the war against terrorism. That answer, in itself, hardly appeals to economic self-interest. Rather, it is a call to patriotism. Another, more commercially meaningful, response is that by participating, a company ensures its employees, suppliers, and customers are part of a transactional chain with enhanced security and efficiency. Tangibly, that means benefits for certain certified C-TPAT member categories, including:

1. A reduced number of CBP inspections, and thus reduced border delays.
2. Priority processing for CBP inspections, i.e., front-of-the-line processing for examinations when possible.
3. Assignment (upon satisfactory completion of the online application) of a C-TPAT Supply Chain Security Specialist (SCSS), who works with a company to validate and enhance security throughout its international supply chain.
4. Potential eligibility for the CBP Importer Self-Assessment (ISA) program, which emphasizes self-policing instead of CBP audits (but which in July 2022 evolved to what CBP called the “C-TPAT Trade Compliance Program”21).
5. Eligibility to attend C-TPAT supply chain security training seminars.

To be sure, weighing these benefits against costs is especially important for SMEs. C-TPAT is not designed to be a “big company program,” nor could it be to achieve widespread success. SMEs account for a large volume of import transactions every day. What special considerations might affect SMEs in deciding whether to participate in C-TPAT? What advantages, if any, might be gained from complying with C-TPAT level security criteria, but not being a formal partner?

After seven years of operation (i.e., by June 2014), there were over 10,000 C-TPAT companies, including most Fortune 500 corporations involved in importing or retailing.

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CBP said it would expand the program to include exporters.

V. Securing NAFTA Trade with FAST and SENTRI

Free and Secure Trade is an initiative of the NAFTA 1.0 and USMCA Parties – the U.S., Canada, and Mexico – in the form of an accord among the respective governments. This accord is neither part, nor an outgrowth, of that FTA. Rather, it is a response to the post-9/11 environment, whereby the Parties seek to build on the economic successes of their FTA, while also addressing security concerns they did not foresee when NAFTA entered into force on 1 January 1994.

Through the FAST accord, the NAFTA Parties commit themselves to coordinate border processes using a common set of risk management principles, supply chain security systems, advanced technology, and partnerships with industry. In effect, FAST is an effort to harmonize border security procedures. Different sets of security procedures in the U.S., Canada, and Mexico can create inefficiencies that hamper importers and carriers, and vulnerabilities that terrorists and narcotics traffickers exploit. The logic is that harmonization helps avoid these insalubrious outcomes. However, as with CSI and C-TPAT, query whether “harmonization” winds up being “Americanization.”

After all, FAST essentially leverages on C-TPAT. Specifically, FAST is a clearance process at the NAFTA borders. Under the FAST program, a C-TPAT importer may be designated as a FAST entity, if it uses C-TPAT approved carriers. A separate application and approval process are necessary for a C-TPAT approved carrier to be designated a “FAST Highway Carrier.” Once this designation is obtained, known low risk cargo importers may select a FAST Highway Carrier to ship its merchandise. The practical result is merchandise of that importer can cross the border through a separate FAST-designated lane in a swifter manner than others. Across the U.S.-Canada and U.S.-Mexico border, several FAST crossing points exist (e.g., Sweetgrass, Montana, Coutts Alberta, El Paso, Texas, and Ciudad Juarez, Chihuahua), with additional ones planned.

Incongruous with the harmonization principle is the fact that somewhat different requirements and procedures exist at the northern and southern NAFTA borders. That is true not only for obtaining certification as a FAST Highway Carrier, but also for an individual driver qualifying for a “FAST Pass,” i.e., a valid FAST Commercial Driver Card adducing eligibility to use FAST clearance.

● Northern Border

To qualify for FAST Highway Carrier status between the U.S. and Canada, two separate applications, one for the U.S. FAST Processing Center, and the other for the Canadian FAST Processing Center. Each Center independently performs a risk assessment, and issues approvals. The U.S. requires a FAST approved carrier to satisfy all C-TPAT standards by or through the FAST registration process.

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As regards the *FAST* Commercial Driver Card, an individual must complete a *FAST* Commercial Driver Application for the U.S. and Canada. The application first is subjected to a risk assessment by a Canadian consortium of the Canada Border Service Agency (CBSA), Citizenship and Immigration Service for Canada (CIC), and Canada Revenue Agency. Upon approval from Canada, CBP conducts a full risk examination at its risk assessment center in St. Albans, Vermont. Note, then, U.S. authorities do not grant automatic recognition to the Canadian risk assessment. An applicant CBP identifies as “low risk” reports to an enrollment center, where that driver is interviewed, has her original identification and citizenship documents reviewed, is fingerprinted, and digitally photographed. Successful applicants are issued a *FAST* Pass.

- **Southern Border**

  To qualify for *FAST* Highway Carrier status between the U.S. and Mexico, an applicant must prove it has a history of complying with all relevant legislative and regulatory requirements set forth by CBP. The applying carrier must commit itself to C-TPAT security-enhancing business practices. Further, it must use drivers who are in possession of a valid *FAST* commercial driver card when using *FAST* clearance.

  The procedure for a *FAST* Commercial Driver Card for the southern border is similar to that for the northern border. However, the *FAST* driver application is submitted to the Mellon Financial Corporation in Pittsburgh, Pennsylvania. Thereafter, it is forwarded to the CBP risk assessment center in St Albans, Vermont. Consider these differences when studying the *NAFTA* Mexican Trucking dispute (in a separate Chapter).

- **Cargo Release Methods**

  As indicated, *FAST* eligible shipments benefit from expedited border crossing procedures. How exactly is incoming cargo released under the *FAST* program to save time and enhance efficiency? There are two cargo release methods: paperless processing and the Pre-Arrival Processing System (PAPS).

  With paperless processing, shipping documents are transmitted through Electronic Data Interchange (EDI) and transponder technology. Just as e-mail is a faster velocity communication method than paper mail, this transmission speeds up customs clearance. In contrast, PAPS utilizes barcodes located on commercial invoices and manifests. A customs broker references the barcodes in the Automated Commercial System (ACS), which is an electronic database for filing customs entry documentation electronically. Thus, when a *FAST* truck comes to the border, a customs officer can scan the barcode, and thereby retrieve automatically entry documentation and allows for faster port processing of incoming cargo.

- **SETRI**

  Not all *NAFTA* border crossings involve commercial-grade shipments of merchandise. Everyday, millions of motorists cross at points such as Windsor–Detroit on
the U.S.–Canadian border, and Juraez-El Paso on the U.S.-Mexican border. They may do so for work or pleasure. These motorists are not interested in, and indeed may be ineligible for, a FAST Commercial Driver Card, and do not necessarily work for carriage companies with or seeking FAST Highway Carrier status. Yet, two facts about them are clear. First, they are important, if not indispensable, to the operation of the NAFTA economies. Second, there is a security risk a terrorist might lurk among the honest motorists. The Secure Electronic Network for Travelers Rapid Inspection program is another effort emblematic of the dual nature of the mission of CBP, namely, to facilitate expeditious border crossings by legitimate travelers while screening out evildoers from crossing the frontiers.23 As with CSI, C-TPAT, and FAST, the SENTRI program leverages off high technology.

The SENTRI program actually pre-dates 9/11. It was first implemented at the Otay Mesa passenger port of entry in California in 1995. The program was extended periodically, typically for two-year intervals, but in October 2006, for a five-year period (i.e., through 2011), and subsequently renewed. The program was popular, for reasons anyone who has stood in a long immigration queue at an airport understands. Individual motorists who are SENTRI members have access to a dedicated commuter lane, the SENTRI lane, which allows faster processing at ports of entry: an average of about 10 seconds per inspection. They are trusted travelers – trusted, that is, by the U.S. government. To qualify, an applicant must undergo voluntarily a background check, in-person interview, and fingerprinting – and pay a fee (e.g., U.S. $129 in February 2007) to cover administrative expenses. (The fee is non-refundable, even if the applicant is rejected.)

VI. 2007 Implementation of 9/11 Commission Recommendations

● Domestic Rules with Global Effects

“Six years after the terrorist attacks of 9/11 and three years after the bipartisan and independent 9/11 commission delivered to the American people a road map for security that the Republican Congress has failed to pass into law, the Democratic Congress is about to deliver to the President a bill for his signature to make the American people safer.”24 This remark, from Speaker of the House Nancy Pelosi (Democrat-California), indicates the political controversy surrounding the topic of trade and security. Passage of the new bill, entitled Implementing Recommendations of the 9/11 Commission Act of 2007 (also called the 9/11 Commission Act, or 2007 Act), was at the top of the priority list of the new, Democratic-controlled, 110th Congress.25 The bill was House Resolution 1, and Senate

Resolution 4. It became law on 3 August 2007, after both chambers passed it by wide margins and President George W. Bush (1946-, President, 2001-2009) signed it.

Immediately, the practical impact of the 2007 Act was felt around the world. That is because its provisions ratcheted up American security requirements for essentially all imports into the U.S. The bill is voluminous. It boasted 24 titles and 284 pages of text covering the following topics:

1. Financial grants for Homeland Security (Sections 101-104), and for Emergency Management Performance projects (Sections 201-202).
2. Communications improvement for First Responders (i.e., the first officials to respond to an emergency, such as medical staff, firefighters, and police) and interoperability (among different communications systems at the federal, state, tribal, and local levels, in the event one fails) in emergency situations. (Interestingly, the 2006 SAFE Port Act did not mention funding for interoperability in respect of tribal areas.) (Sections 301-302, 401-410.)
3. Intelligence sharing among government agencies (Sections 501-541) and Congressional oversight (Sections 601-605).
4. Prevention of terrorist travel, including international collaboration on border security, enhanced identification document security, modernization of visa waiver schemes, model ports of entry programs (Sections 701-725), plus privacy and civil liberties protection (Sections 801-804).
5. Prevention of terrorist attacks including critical infrastructure reinforcement (Sections 1001-1003), upgrading defenses against nuclear and radiological WMDs (Section 1101-1104), bio-surveillance against a “biological event of national concern” (Section 1102), transportation security (Sections 1201-1310), including public transport (Section 1401-1415), railroads (Section 1511-1528), aviation (e.g., construction of blast-proof airplane cargo holds) (Section 1601-1618), trucking (Section 1531-1542), and hazardous material transport (e.g., to ensure “hazmats” are moved around, not through, urban areas) (Section 1551-1558).
6. 100% container screening (Section 1701).
7. Fighting terrorism through (inter alia) education in “predominantly Muslim countries” (Sections 2011-2014), democracy advancement in the “Broader Middle East” region (Section 2021), and “Reaffirming United States Moral Leadership” (Sections 2031-2034)
8. Specific efforts in Afghanistan (Section 2041), Pakistan (Section 2042), and the Kingdom of Saudi Arabia (Section 2043).

Time will tell whether the Act actually has enhanced America’s national security, or impeded trade and added transaction costs.

- **Triple Play**

Essential to understanding the 2007 Act is its clear thrust to continue the post-9/11 paradigmatic shift in customs law from traditional functions like tariff collection (through
classification, valuation, and origin determination) and statistics gathering (e.g., on HTS and BOP matters), to securing America’s supply chain globally amidst the War on Terror. Only “good goods” and “good people” should move across America’s borders.

Also essential to understanding the Act is it broadens the thrust. “Good countries” are a criterion for distinguishing among sources of imports. Not only must a good be “good,” and a person be “good,” if entry is to be permitted, but also the source of the good or person had better be a “good” country. In brief, the 2007 Act is about “good goods, good people, and good countries.”

How, exactly, does the 2007 Act seek to make this triple play? A number of features of the triple play are worth highlighting.

- **Elaborating on Good Goods and Good People**

  Several topics in the 2007 Act elaborate on the “good goods, good people” paradigm shift wrought by earlier, post-9/11 reforms. Project grants, emergency communications efforts, and intelligence gathering are found in the 2002 Homeland Security Act. The anti-terrorist attack provisions continue efforts by the CBP and 2006 SAFE Port Act to address vulnerabilities in America’s large transportation network.

  The 2007 Act essentially funds the pre-existing programs, albeit with some broadening of them. Notably, the funding allows individual Congressmen to demonstrate the relevance of their state to their constituents in the War on Terror. Less euphemistically, critics might charge the funding is old-fashioned, pork barrel politics.

- **Good Countries, Too**

  The 2007 Act extends the immediate post-9/11 trade security paradigm beyond goods and people to countries. That is most evident in three topical areas: the container security requirement; efforts to re-assert America’s moral leadership in the world; and programs aimed at key countries.

1<sup>st</sup>: **Screening**

  The container security, or screening, requirement is that all containers must be scanned in a foreign country port of discharge before they are shipped to the U.S. Section 1701(b)(1) of the 2007 Act states:

  A container that was loaded on a vessel in a foreign port shall not enter the United States (either directly or via a foreign port) unless the container was scanned by nonintrusive imaging equipment and radiation detection equipment at a foreign port before it was loaded on a vessel.
Essentially, scanning must occur at the point of stuffing, after which a container is sealed. Conceptually, the key point is that “good” goods had better come from “good” countries, with a “good” country being one whose ports provide 100% container screening.

While adroit ports like Hong Kong raised little or no objection to the screening requirement, the general foreign reaction was outcry. Some Asian countries indicate they suffer the brunt of the 100% screening rule. That is because they account for most of America’s imports. While only 1.8 million containers travel from Europe to the U.S. (in 2006), 13.7 million come from Asia.26

European countries complain the “unilateral action by the U.S. would force Europe’s taxpayers to foot the bill for America’s security,” and explain they rather would have continued the “risk based” assessment scheme. Under it, only a sample of containers (not every single container) was screened, based on origin.27 Surely the U.S. had not given risk assessment – which it created under the CSI – enough time to prove its merit. Surely, too, the Congressional Democrats were too eager to score political points. The previous Republican-controlled Congress passed the SAFE Port Act in October 2006, hardly a month before the watershed election. A few months later, the 2007 Act appeared.

Nevertheless, with fear a WMD might be smuggled into a container gripping the American psyche, the only rational response is to check every container. That said, there are circumstances under which the 100% screening requirement is relaxed. First, the obligation is not immediate. The Act establishes an implementation date of three-to-five years, finishing on 1 July 2012, or possibly earlier if the Secretary of Homeland Security deems it possible based on pilot programs. That date can be pushed out further, in two-year increments, on a port-specific basis, if the Secretary presents Congress with written justification. The Act sets out six possible justifications, two or more of which must exist in a port for a postponement of implementation of 100% screening in that port:28

1. Scanners are not available for purchase and installation, i.e., the necessary equipment is unavailable.
2. Scanners yield too many false positives (i.e., false alarms) to be effective.
3. The port does not have the physical characteristics to install a scanner.
4. Scanners cannot be integrated with existing facilities at a port, i.e., the necessary equipment exists but cannot be made to work with extant systems.
5. Scanners will significantly impact trade capacity and flow of cargo.
6. Scanners do not give automated alerts of questionable or high-risk cargo.

26 Andrew Bounds, Brussels Attacks American Plan to Scan Shipping Containers, FINANCIAL TIMES, 3 August 2007, 6. [Hereinafter, Brussels Attacks.]
27 Brussels Attacks.
28 The 2007 Act uses the term “systems to scan containers,” which effectively means scanners.
Any extension would take effect 60 days from the date the Secretary presented a report, and the Secretary must inform Congress the following year if this granted extension is to be renewed again after the 2-year period expires.
Practically, an extension was needed to achieve 100% scanning of maritime containers by 12 July 2012. The deadline proved impossible for the DHS to meet.

This failure was not surprising. Annually (as of 2012), over 11 million cargo containers arrived at over 700 American ports, through 21,000 shipping lanes, with only 4%-5% scanned. And, the number of CSI officers from CBP at foreign ports dropped from 167 in 2009 to 79 in 2012. CBP tried pilot Secure Freight Initiative (SFI) projects at in Honduras (Port Cortes), Pakistan (Port Qasim), and the U.K. (Southampton), but even these SFI ports could not achieve 100% scanning because of technical and logistical problems. In May 2012 DHS extended the target implementation date to 1 July 2014.

That, too, was impossible to meet. In June 2013, the DHS Secretary told Congress full implementation would have to wait at least another two years. CBP was beset with problems ranging from diplomatic rows with foreign governments to reconfiguring port facilities. With this extension came calls by American farmers, manufacturers, retailers, distributors, and transportation and logistics providers to repeal the 100% screening mandate. Trying to scan every container was slowing up the movement of containers through ports. Surely it would be more efficient, and wiser, to focus taxpayer resources on identifying and inspecting 100% of the high risk (as opposed to all) containers, and disabling the threat they posed at the earliest possible step in the commercial chain. While (as of June 2014) 100% of high-risk containers were examined before they entered the American stream of commerce, only 85% of them were checked before loaded on a U.S.-bound vessel. The remaining 15% might reach American shores with a WMD.

What about cargo shipments on international passenger aircraft? Section 1602 of the 9/11 Commission Act mandated 100% screening for cargo shipments bound for the U.S. by August 2010. The TSA failed to meet that deadline. In May 2012, TSA announced it would meet it by 3 December of that year. TSA did meet the earlier deadline for 100% screening of outbound cargo, that is, cargo on a domestic or international flight departing from an airport in the U.S.

Second, two categories of imports are exempt from the screening requirement: Department of Defense military shipments into the U.S., and military cargo of foreign countries, are exempt. Third, Congress mandated that the Secretary implement the 100% container screening obligation in a manner that does not violate international trade rules, especially ones of the WCO.

2nd: Moral Leadership

Animating through parts of the 2007 Act is the presumption a “good” country is one that respects, and to some degree follows, American moral principles. One sub-title in

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29 See Rossella Brevetti, *Nadler Criticizes DHS’ Inability to Meet 100 Percent Sea Cargo Scanning Mandate*, 29 International Trade Reporter (BNA) 237 (16 February 2012).
the 2007 Act, “Reaffirming United States Moral Leadership,” is telling. Some provisions in this sub-title are thinly veiled efforts at converting “bad” to “good” countries. Other provisions work to ensure certain countries stay on a “good” behavioral trajectory. Accordingly, the sub-title encourages increased pro-American media broadcasts abroad, especially in times of a foreign crisis. The Broadcasting Board of Governors is tasked with the responsibility of providing Arabic and Persian translations of news broadcasts to Congress, and the public, via its website. The Department of State is to develop strategies for scholarship and scholarly exchanges with, and library collection building in, Muslim countries.

Even more thinly veiled are the attempts to convert countries to democracy. Under the Advance Democratic Values, Address Non-democratic Countries and Enhance Democracy Act of 2007 (ADVANCE Democracy Act), which is embedded in the 2007 Act, the State Department is to evangelize democracy around the world. Its mission instruments are (1) a new “Democracy Liaison Officer” corps, (2) a special office for democracy development, (3) upgraded training of Foreign Service Officers, (4) handing out awards for pro-democracy movements, and (5) an enhanced website that touts success stories on promoting democracy. The irony that these attempts – were the U.S. not a democracy – would be dubbed “propaganda” is difficult to miss. In the long run, American deeds impress even the least sophisticated foreigners more than American words. Fortunately, the ADVANCE Democracy Act calls on the President to investigate human rights violations, and pursue country-specific strategies to promote democracy.

3rd: Key Country Initiatives

The third manifestation of the paradigmatic shift in post-9/11 U.S. customs law toward “good countries” is in provisions targeting certain categories of, or specific, nations. For instance, the U.S. continues its visa waiver program for friends in the War on Terror. They are “good” countries. Hence, their people need not undergo strict scrutiny before entering the U.S. Never mind the obvious vulnerability here – a threat posed by “home grown” terrorists in Europe, perhaps individual British Muslims of Pakistani origin, or German converts to Islam. To look beyond an EU passport and scrutinize religion or national origin would be politically, and probably legally, unacceptable.

Education to help countries be “good” is another example. The Act distinguishes two regions – “Predominantly Muslim Countries” and the “Broader Middle East.” Labels aside, the first category is the broader one, as it presumably includes any country in any region with an Islamic population of 50% or more. The “Broader Middle East” covers

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31 In one sense, the incongruity between American values and American human rights practice during the Iraq War, particularly following the Abu Ghraib prisoner abuse scandal, the rubric is misleading. “Reclaiming” might be more accurate than “reaffirming.” The 9/11 Commission Report states the U.S. should work with “friends to develop mutually agreed upon principles for the detention and humane treatment of captured international terrorists.” The 2007 Act follows up, seeking a modicum of reclamation. The Act says the “sense of Congress” is the Secretary of Homeland Security should develop a common coalition approach to comply with Common Article 3 of the Geneva Conventions. The Secretaries of Defense and State, and the Attorney General had to present a progress report on this approach within six months of enactment of the Act.
Afghanistan, Algeria, Bahrain, Egypt, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Syria, Tunisia, UAE, West Bank and Gaza, and Yemen. Notably, this second category excludes Turkey and Israel, and does not extend northward into Central Asia.

Predominantly Muslim Countries are the beneficiary of funding for “modern basic public education,” including English language training, and creation of an International Muslim Youth Opportunity Fund. These two schemes aim to discourage financing of madrassas (Islamic religious schools) that simultaneously neglect fundamental cognitive and skills training necessary for success in the global economy and emphasize memorization of the Holy Qur’ān and extreme Islamic doctrines.

For the Broader Middle East, the 2007 Act authorizes a Middle East Fund, to offer grants, technical assistance, and training to support civil society, education reform, and human rights (including women’s rights), foster an independent media and political participation, create economic opportunities for citizens, and enforce the rule of law.

Front-line allies in the War on Terror – Afghanistan, Pakistan, and Saudi Arabia – get special attention. Afghanistan is funded to train its civilian police force. The program for Pakistan is wide-ranging. The President is to develop a strategy to help it:

1. Curb nuclear proliferation.
2. Fight corruption.
3. Reduce poverty.
4. Improve governance and governmental authority, especially in North West Frontier Province (NWFP, i.e., Khyber Pakhtunkhwa), Federally Administered Tribal Areas (FATA), Waziristan, and parts of Baluchistan.
5. Secure its borders, especially with Afghanistan and Iran to block Taliban and other terrorist group movements.
6. Resolve its long-standing Kashmir dispute with India.
7. Generally advance the rule of law.

Held out to Pakistan is the promise of funds if it demonstrates a “clear commitment to building a moderate democratic state.” The Act highlights Saudi Arabia – not Afghanistan or Pakistan – as having an “uneven record in the fight against terror.” It does recognize Royal family efforts to fight terrorists, including private financing for them (e.g., the 9/11 hijackers).

- Power Game

The 2007 Act is as much about power between Congress and the Executive Branch over foreign economic policy, and specifically the trade – national security nexus, as it is about shifting the customs law paradigm to make Americans more secure. The Act bolsters Congressional oversight, relative to the Executive Branch, on a topic the White House championed itself as the pre-eminent authority. Until the Act, the Republican-dominated Congress left the nexus to the President, who in turn delegated authority to the CBP. There
was little challenge to Executive Branch initiatives such as the 2002 Act, the BTA, 2006 Safe Port Act, and programs such as CSI and C-TPAT.

Many Democrats, however, specifically asked why recommendations in the 9/11 Commission Report went un-enacted, and upon taking control of Congress, put them into legislation. In so doing, Congress also inserted throughout the 2007 Act metrics to measure progress toward goals it establishes, and obligations on the President or State Department to report to it on those metrics. In that respect, a sub-title about reaffirming America’s moral leadership veils an intra-governmental power play. Congress can reaffirm its power relative to the Presidency by working to reaffirm American values.

For example, by setting out specific goals, and tying funding to their realization, on democracy and human rights, Congress demonstrates to the White House its determination to set priorities and evaluative metrics. As another example, for the country-specific programs, in respect of all three front-line countries, the President (or the State Department) must report on their social, economic, legal, and political development – or lack thereof. The State Department is supposed to list each predominantly Muslim country as to the seriousness of its efforts to support the U.S. schemes. For Afghanistan, progress reports are expected to gauge the success of that training. For every 6 months through 2009, it must receive reports from the Executive on Pakistani progress. The Act requires the President to provide Congress with a written analysis of Saudi progress in the fight against terrorism, as well as on economic, political, and social reform, and improved religious freedom, and assess Saudi membership in the International Convention for the Suppression of the Financing of Terrorism, and evaluate the work of the Saudi Nongovernmental National Commission for Relief and Charity Work Abroad.

VII. Multilateral Impact of American Security Programs:
Exporting Policy to WCO

The post-9/11 American security initiatives, such as CSI and C-TPAT, predate an international regime for securing global trade against terrorist threats. To what extent does the U.S. – by design or effect – export its customs rules on security, unilaterally drawn up and implemented, to other countries? Does America essentially take its security regime as its negotiating position in the WCO?

One approach to this question is to consider the timing and nature of work undertaken by the WCO. In June 2005, the WCO published a Framework of Standards to Secure and Facilitate Global Trade. Query whether this Framework (inter alia) legitimizes CSI and C-TPAT. The Framework states that enhanced security must rest on two pillars – “Customs to Customs” and “Customs to Business.” In reviewing the synopsis of these pillars below, consider the extent to which they resemble, respectively, CSI and C-TPAT.

● Standards for Customs to Customs Security Enhancements

The Framework calls on WCO member countries to evaluate global supply chains in an integrated manner. They should upgrade cargo inspections, partly by using modern
technology, better risk management systems, identifying high risk cargo or containers, obtaining advanced electronic information, targeting, and communicating with different governmental authorities. They also should articulate performance measures, conduct periodic security assessments, and emphasize the importance of integrity among customs officials. The Framework highlights the importance of outbound security inspections, a provision obviously in the interest of major importing countries like the U.S.

- Standards for Customs to Business Security Enhancements

The Framework manifests the need for public-private partnerships to address security risks, facilitate trade, and build open communication channels between the two sectors. These partnerships can be forged with low-risk importers and carriers, designating as AEOs on the basis of sound security criteria. The partnerships can take advantage of advanced technology, not only in security procedures (e.g., infrared detection equipment), but also in applying and maintaining AEO designations (e.g., on line applications).

Building on these pillars, the Framework contains several specific provisions, many of which resemble American rules. For example, Note 1.3.6 in the Framework is redolent of the CBP “Prior Notice Rule.” This Note states:

The exact time at which the Goods and Cargo declarations have to be lodged with the Customs administration at either export or import should be defined by national law after careful analysis of the geographical situation and the business processes applicable for the different modes of transport, and after consultation with the business sector, and other Customs administrations concerned.32

The Framework sets minimum prior notice deadlines based on the transport mode: 24 hours before port arrival for maritime, four hours for air, two hours for rail, and 1 hour for road.

To be sure, the Framework does not establish a mandatory set of rules. Rather, it amounts to a set of suggestions, i.e., recommendations as to best standards and practices that signatories ought to implement into their respective laws, as well as a commitment to “endeavor to secure the full cooperation of business” and report back to WCO on their progress.33 Bluntly put, the WCO does not have the enforcement capabilities of the WTO DSU, and the U.S. cannot force its will on other WCO countries. Yet, as the pre-eminent multilateral customs law body – the one, for instance, responsible for the HS – its power of suggestion is considerable. As a practical matter, probably the biggest constraint on that power is capacity in developing and least developed countries. Without assistance, they cannot acquire the requisite sophisticated, automated security systems needed to implement the Framework standards – even if they have the political will to do so.

VIII. MRAs and C-TPAT

32 World Customs Organization, Framework of Standards to Secure and Facilitate Global Trade 22 (June 2005). [Hereinafter, World Customs Organization.]
33 World Customs Organization 41-42.

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In January 2013, the U.S. and EU implemented a Mutual Recognition Agreement whereby Europe accepted American C-TPAT standards as equivalent to its own AEO scheme, and the U.S. recognized the European AEO scheme as equivalent to C-TPAT. Consequently, American C-TPAT exporters get reciprocal benefits when shipping to the EU, meaning they are subject to fewer examinations, and have lower risk scores. The converse is true for European exporters to America. Like the American AEO program, the European scheme is a trusted trader program the EU uses to assess the risk associated with exporters and their shipments, facilitate trade by reducing redundant security checks, and increase customs transparency.

America also has MRAs for C-TPAT with Canada, Japan, Jordan, Korea, New Zealand, and Taiwan. The reality that MRAs creates a unified security posture for cargo trade is an incentive to join C-TPAT. Through C-TPAT participation, an American firm enjoys simplified access, at reduced transactions costs, for its merchandise access in multiple foreign jurisdictions. Thus, it is of considerable practical benefit.

Are MRAs also a vehicle for the U.S. to encourage harmonization of, if not outright export its, security standards overseas?
Part Two

DEFINING “NATIONAL SECURITY”
Chapter 3

MULTILATERAL TRADE-NATIONAL SECURITY FRAMEWORKS

I. Trade Policy Is National Security Policy

Thomas Schelling (1921-), winner of the 2005 Nobel Prize in Economics, contended “trade is what most of international relations are about. For that reason, trade policy is national security policy.” In other words, trade and national security are inextricably linked. Indeed, recall the perspectives of Plutarch versus Horace (discussed in a separate Chapter). The Greek Platonist philosopher Plutarch (circa 46-116 A.D.) urges that interdependence through trade enhances national security. The Roman lyric poet Horace (65-27 B.C.) says it undermines national security.

Their debate resonates today, and has so throughout history, in the corridors of power in any conscientious government. Often, those corridors are occupied by an admixture of commercially-oriented business and legal officials, and security-oriented military and intelligence officers. Together, sometimes collaboratively and sometimes raucously, they work out trade policies that advance their collective goals of economic growth and development, conflict management, and peace.

At the “front lines” of the policies they make are the personnel who interpret and implement them, not the least of whom are Customs Law officials in the public and private sectors. The same officials engaged in Customs Classification and Valuation in routine import transactions also are occupied with questions about HTSUS product classifications for purposes of adhering to trade sanctions or export controls. Thus, Customs Law and National Security are connected in practice as well as in theory. Included in these linkages is environmental law. That was made clear on 27 January 2021, when President Joseph R. Biden (1942-, President, 2021-) issued an Executive Order (discussed in a separate Chapter) declaring climate change a “national security threat.”

Documents References:

(1) Havana (ITO) Charter Preamble, Article 99
(2) GATT Article XXI
(3) Relevant provisions in FTAs

Quoted in The Trans Pacific Partnership and America’s Strategic Role in Asia, Statement by Claude Barfield, Ph.D., Resident Scholar, American Enterprise Institute, before House Committee on Foreign Affairs, Subcommittee on Asia and the Pacific, 4 March 2015, www.aei.org/publication/trans-pacific-partnership-america-strategic-role/.

II. Origins of, and Need for, GATT Article XXI National Security Exception

Article XXI is the exception in GATT for national security. Its origins date to the drafting of the ITO Charter:

The U.S. delegation initially introduced the text of what became Article XXI as part of a broader set of exceptions in Article 37 of the draft ITO Charter. Article 37 encompassed what would eventually become GATT Article XX on General Exceptions, including for public health, preservation of natural resources, and law enforcement, and also included a narrower version of what became GATT Article XXI’s exception for a Member’s essential security interests. The key discussion about the ITO Charter’s security provisions took place in Geneva at the 33rd meeting of Commission A of the Preparatory Committee of the United Nations Conference on Trade and Employment on July 24, 1947. At that point, a decision was made to move the security exception into Article 94 so it encompassed all provisions of the ITO Charter and was not limited to the provisions of Chapter IV on Commercial Policy. The drafters who created the multilateral trading system understood the importance of the exception.

After discussing the wording of various Article XX exceptions (e.g., the chapeau, conservation of exhaustible natural resources, state-trading monopolies, measures to ensure compliance with laws and regulations, customs enforcement, patents and copyrights, plant variety rights, etc.), the delegates [at the July 1947 Geneva negotiating sessions] turned to the Article XXI(b)(iii) exception for security measures in times of war or other international relations emergencies. Concerns were raised by the delegate from the Netherlands that the exception was “possibly a very big loophole in the whole Charter.” Presumably because the United States was the principal drafter of the security exception, Mr. John Leddy, the U.S. delegate, responded as follows:

We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide of an exception and we could not put it into the Charter simply by saying: “by any Member of measures relating to a Member’s security interests,” because that would permit anything under the sun. Therefore, we thought it well to draft exceptions that would take care of really essential security interests and, at the same time, so far as we could to limit the exceptions and to adopt that protection for maintaining industries under every conceivable circumstance. … I think there must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight,
because we cannot prohibit measures which are needed purely for security purposes. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.

As the Committee chairman noted, it is not possible to seriously constrain the exercise of measures to defend a Member’s security interests; and “when the ITO is in operation, I think the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind to which the Netherlands delegate has drawn our attention.” However, he also asked whether by moving the Article out of the Commercial Policy chapter’s consultation and dispute settlement provisions in Article 35 and into the general provisions of the entire Charter, the Committee was removing “any possibility of redress.” The Australian delegate urged that “a Member’s rights under Article 35(2) are not in any way impinged upon.” This was a reference to what was then Article 35 of the draft Charter, which, coming out of the New York negotiating session, set out its consultation and dispute settlement provisions as follows:

Article 35 – Consultation, Nullification or Impairment

2. If any Member should consider that any other Member is applying any measure, whether or not it conflicts with the terms of this Charter, or that any situation exists, which has the effect of nullifying or impairing any object of this Charter, the Member or Members concerned shall give sympathetic consideration to such written representations or proposals as may be made with a view to effecting a satisfactory adjustment of the matter. If no such adjustment can be affected, the matter may be referred to the Organization, which shall, after investigation, and, if necessary, after consultation with the Economic and Social Council of the United Nations and any appropriate intergovernmental organizations, make appropriate recommendations; to the Members concerned. The Organization, if it considers the case serious enough to justify such action, may authorize a Member or Members to suspend the application to any other Member or members of such specified obligations or concessions under this Chapter as may be appropriate in the circumstances. If such obligations or concessions are in fact suspended. any affected Member shall then be free, not later than sixty days
after such action is taken, to withdraw from the Organization upon the expiration of sixty days from the day on which written notice of such withdrawal is received by the Organization. (Emphasis added.)

Leddy responded:

I think that the place of an Article in the Charter has nothing to do with whether or not it comes under Article 35. Article 35 is very broad in its terms, and I think probably covers any action by any Member under any provision of the Charter. It is true that an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that the Member was violating the Charter; but if that action, even though not in conflict with the terms of Article 94, should affect another Member, I should think that that Member would have the right to see redress of some kind under Article 35 as it now stands. In other words, there is no exception from the application of Article 35 to this or any other article. (Emphasis added.)

Leddy was clearly referring to the non-violation nullification and impairment provisions of Article 35, which later became Article XXIII of GATT 1947. In his formulation, a national security measure could not be challenged as a violation of the Charter, but nevertheless could be pursued as a non-violation nullification or impairment of benefits accruing under the agreement or as an “other situation.” After some back and forth, the Australian delegate acquiesced to this approach. The Chairman then closed the session by saying: “Then I am in agreement with the Sub-Committee on Chapter VIII, that we have considered and approved this draft of Article 94.”

In January 1948, a GATT Working Party, as part of a review of the ITO Charter’s dispute settlement procedures, stated:

Such action, for example, in the interest of national security in time of war or other international emergency would be entirely consistent with the Charter but might nevertheless result in the nullification or impairment of benefits accruing to other Members. Such other Members should, under those circumstances, have the right to bring the matter before the Organization, not on the ground that the measure taken was inconsistent with the Charter, but on the ground that the measure so taken effectively nullified benefits accruing to
As the above drafting history suggests, a key unresolved issue with respect to GATT Article XXI is whether its invocation can be challenged, and if so, how (e.g., as a non-violation nullification or impairment claim?) – in a word, justiciability.

To be sure, the national security exception is rarely invoked. But, this exception is significant, all the more so after the terrorist attacks of 11 September 2001. Following 9/11, the U.S. added several dramatic devices to its arsenal of border protections. But for Article XXI, inevitable clashes would occur between, on the one hand, unilateral measures adopted under these statutes, and on the other hand, pillar GATT obligations, and various duties under other WTO agreements.

Could these clashes be managed by Article XXXV:1(b), which allows for non-application of the GATT, and thereby the imposition of economic measures such as bans or boycotts? No. Non-application under Article XXXV:1 must be invoked by a WTO applicant against a WTO Member at the time the applicant joins the WTO. Conversely, a Member must invoke it against an applicant at the time the applicant joins the WTO.

Could Article XXV:5 manage the clashes? Again, certainly not. This provision explains how to obtain a waiver of obligations in “exceptional circumstances not elsewhere provided for in” GATT. To obtain a waiver, this Article requires a two-thirds majority vote involving more than half of the WTO Members. There is no exception to this requirement for unilaterally-imposed national security measures. Thus, it is Article XXI that provides the indispensable textual basis in GATT for such measures.

It is not the only such basis in the GATT-WTO regime. Article 73 of the TRIPs Agreement, and Article XIV:1 bis of GATS, contain national security exceptions the wording of which track that of GATT Article XXI. There is no jurisprudence on the TRIPs and GATS provisions, and precious little on that of GATT. Thus, for example, in June 2014, Russia asserted it might challenge American and European sanctions (e.g., blocking assets of individual Russian officials and businesspersons, and barring transactions with Bank

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Leddy, while a young State Department officer at the time, was a key member of the U.S. delegation and would go on to a distinguished career in the Departments of State and Treasury. That he was given responsibility for addressing draft essential security language was an indication of his high standing in the delegation because this was a major point of difference within the U.S. delegation and the subject of Congressional concerns. Whereas the Department of Defense wanted broad scope for security measures and thus totally exempt them from scrutiny, the Department of State officials (e.g., Clair Wilcox) raised concerns that an overly broad security exception represented a potential loophole and was open to abuse for protectionist purposes.

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Id., fn 46 at 16.

Rossiya) imposed against it in response to the crisis in Ukraine.\textsuperscript{38} The Russian argument was that while relations with the U.S. and EU deteriorated, they had not descended into a war.\textsuperscript{39}

Recall the inherent tension between abusive protectionism under the guise of SPS or TBT measures, on the one hand, and legitimate invocation of such measures to protect human, animal, or plant life or health, or consumer safety, respectively, on the other hand. The balancing mechanisms are “science” for SPS measures, and “international standards” for TBT measures, in the \textit{SPS} and \textit{TBT Agreements}, respectively. For national security measures, the U.S. recognized in 1947, when GATT Article XXI was drafted, the risk that trade policies that “really have a commercial purpose” might be put under the “guise of national security.”\textsuperscript{40} So, a similar tension as with SPS and TBT contexts exists between illegitimate protectionism and legitimate security concerns. But, there is no balancing mechanism in Article XXI, nor in \textit{GATS} Article XIV.

Not surprisingly, then, the WTO is anything but eager to serve as the forum to handle clashes over trade measures invoked for national security purposes. As Director General Roberto Azevêdo said in summer 2017, well before the crisis set off by America’s March 2018 Section 232 action against steel and aluminum imports (discussed below):

\begin{quote}
National security is something that is not technical. … It is not something that will be solved by a dispute in the WTO. That requires conversation at the highest political level.\textsuperscript{41}
\end{quote}

Put differently, while post-Uruguay Round \textit{DSU} adjudication illustrates the proposition of lawyers triumphing over diplomats, diplomats rather than lawyers should be in the best position to preserve sovereignty on national security matters, and avert a trade war.\textsuperscript{42}

\section*{III. 1949 \textit{Czech Decision}, Scope, and Self-Judgment}

The all-embracing scope of Article XXI, as an exception to GATT obligations, is manifest from the first word of the Article, “[n]othing.” Once a WTO Member relies on
\textsuperscript{38} Notably, in a WTO action between Russia and Ukraine over Russian restrictions on Ukrainian goods in transit, the U.S. participated as a third party and in March 2018 oral arguments at the WTO, urged that the WTO “has no authority to adjudicate matters of national security.” Bryce Baschuk, \textit{China Hits U.S. Goods with $611.5 Million in Retaliatory Duties}, 35 International Trade Reporter (BNA) (5 April 2018). [Hereinafter, \textit{China Hits}.]
\textsuperscript{39} For an excellent synopsis of the strategic importance of Ukraine across the centuries, including during the First and Second World Wars, and to post-Cold War Russia seeking to be an empire on the world stage, see, e.g., Hal Brands, \textit{In Every Modern War, Ukraine Has Been the Big Prize}, BLOOMBERG, 2 January 2022, \url{www.bloomberg.com/opinion/articles/2023-01-01/russia-invasion-ukraine-has-been-the-prize-in-every-modern-war?srfe=7sxw9Sx}.\textsuperscript{40} Quoted in Tom Miles, \textit{Trump’s Tariffs Headed For Legal Minefield}, REUTERS, 16 March 2018, \url{www.reuters.com/article/us-usa-trade-wo/trumps-tariffs-head-for-a-legal-minefield-idUSKCN1GS1KL}.
Article XXI to implement a measure against another Member, there is no GATT obligation to which the sanctioning Member must adhere with respect to the target Member. This point is further reinforced by a 1949 Decision of the CONTRACTING PARTIES in a case brought under Article XXIII of GATT by the former Czechoslovakia against the U.S.43

Czechoslovakia argued the U.S. breached its obligations under Articles I and XIII by reason of its administration of export licensing and short-supply controls. The controls, instituted in 1948, discriminated among destination countries. The U.S. defended the controls under Article XXI(b)(ii), arguing they were necessary for security purposes, and they applied only to a narrow group of exports of goods that could be used for military purposes. The CONTRACTING PARTIES rejected the Czech claim, voting 17 to 1, with 3 abstentions. In so doing, “the Chairman indicated that Article XXI ‘embodied exceptions to the general rule contained in Article I.’”44 Most of the other fundamental GATT obligations were not at issue in the case. But, it is reasonable to infer from this statement that if the Article I MFN rule is excepted, so too would be the other duties.

Indubitably, the most important and controversial portion of Article XXI is Article XXI(b). The word “it” means sole discretion to determine whether an action conforms to the requirements set forth in Article XXI(b) rests with the WTO Member invoking sanction measures. The plain meaning of this word indicates no other Member or group of Members, and no WTO Panel or other adjudicatory body, has any right to determine for a sanctioning Member whether a measure satisfies the requirements. This interpretation is evident, for example, in the confident statement of the representative from Ghana concerning Ghana’s boycott of Portuguese goods when Portugal acceded to GATT in 1961: “each contracting party was the sole judge of what was necessary in its essential security interest [and] [t]here could therefore be no objection to Ghana regarding the boycott of goods as justified by security interests.”45

That statement is borne out in cases in which a GATT contracting party or WTO Member took trade action relying on Article XXI, as against Cuba in 1962 and Argentina in 1982, plus against Yugoslavia in 1991 by the EU and 10 other countries. Surely a WTO Panel or the Appellate Body is not eager to decide what national security interests are “essential,” and what corresponding measures are “necessary.” The judges of Geneva lack the expertise to do so. The complainant and respondent would not adduce classified intelligence to make or defend their case. Anything those judges said would be perceived by one side or the other as a gross and illegitimate infringement on sovereignty.

44 Quoted in GATT ANALYTICAL INDEX, vol. 1 at 606.
45 Quoted in GATT ANALYTICAL INDEX, vol. 1 at 600.

IV. Four Controversial Corollaries

If it is correct that GATT Article XXI(b) allows each WTO Member to decide for itself what its “essential security interests” are, then what legal implications follow? Arguably, four corollary propositions may be advanced.

• 1st: No Prior Notice

A sanctioning Member need not give prior notice of impending national security sanctions, nor need it give notice upon or after the imposition of sanctions. For example, Cuba, not the U.S., informed GATT contracting parties of the trade embargo imposed on Cuba in February 1962 by the Kennedy Administration, and thereafter the Administration invoked Article XXI as its justification. In contrast, the Reagan Administration informed the contracting parties of its May 1985 prohibition on imports of all Nicaraguan goods and services, and its ban on exports to Nicaragua of all American goods and services other than those destined for the organized democratic resistance.

• 2nd: No Justification

A sanctioning Member need not justify its determination to the WTO or its Members.

• 3rd: No Approval or Ratification

A sanctioning Member need not obtain the prior approval or subsequent ratification of the WTO or its Members.

The first three propositions are manifest in a GATT Council discussion about trade restrictions on imports from Argentina imposed between April and June 1982 as a result of the Falklands Islands War by EEC states, Canada, and Australia.

The EEC representative stated the exercise of Article XXI rights “required neither notification, justification nor approval [sic], a procedure confirmed by 35 years of implementation of the General Agreement.”46 The American representative made the point in even bolder terms: “The General Agreement left to each contracting party the judgment as to what it considered to be necessary to protect its security interests. The CONTRACTING PARTIES had no power to question that judgment.”47

Notably, the sanctioning GATT contracting parties – other than the U.K. – did not argue Argentina threatened directly each of their own national security interests. Rather, they said maintaining international peace and supporting the international rule of law were in their interests. That was enough, thus reinforcing the point that how “essential security interests” are defined is self-judging.

46 Quoted in GATT ANALYTICAL INDEX, vol. 1 at 600.
47 Quoted in GATT ANALYTICAL INDEX, vol. 1 at 600.
4th: Threat versus Actual Danger

The fourth corollary principle concerns threatened versus actual dangers. A sanctioning Member may determine its essential security interests are, in the words of the Ghanaian representative in the 1961 debate about Ghana’s boycott of Portuguese goods, “threatened by a potential as well as an actual danger.”48 Nothing in Article XXI(b) requires a sanctioning Member to face a danger that is manifest in a concrete sense, such as a physical invasion or armed attack, before imposing a national security measure.

V. Two Possible Restraints

Notwithstanding the 2019 Russia Transit Traffic Panel Report (discussed in a separate Chapter), what checks exist against unrestrained, cowboy-like behavior under Article XXI? Arguably, there is (1) giving prior notice in the hope of engendering support, or at least minimizing opposition, to national security sanctions, and (2) using critical terms in the introductory chapeau to Article XXI(b) as a gauge of the reasonableness of such sanctions. Neither is a fail-safe device against abusive invocations of Article XXI(b), and the corrosive effect on multilateralism from them.

First, in most cases it is politically prudent for a sanctioning Member at least to give prior notice to other WTO Members, and possibly also attempt to garner a critical mass of multilateral acquiescence, if not de facto support, before using Article XXI. Thus, on 30 November 1982, after discussing the Falklands Islands crisis, the CONTRACTING PARTIES adopted a Decision Concerning Article XXI of the General Agreement setting forth two points about the invocation of Article XXI:

3. Subject to the exception in Article XXI:a [concerning the right to withhold sensitive information], contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI.

4. When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement.49

Paragraph 3 is nothing more than a procedural recommendation. It is not an obligation to give notice to the WTO or its Members because of the phrase “to the fullest extent possible,” and the sanctioning Member decides whether notice is “possible.” Moreover, there is no preference expressed as between a priori or post hoc notice.

But, Paragraph 3 of the Decision reflects a consensus view that giving prior notice is not just a matter of courtesy and respect for trading partners, but also a way of reducing friction. Presenting the international community fait accompli with national security sanctions inevitably leads to quarrels among political allies, with countries opposing the

48 Quoted in GATT ANALYTICAL INDEX, vol. 1 at 600. (Emphasis added.)
49 Quoted in GATT ANALYTICAL INDEX, vol. 1 at 606. (Emphasis added.)
sanctions typically arguing they share the same end as the sanctioning country, but disagree with sanctions as a means to achieve that end. These quarrels have exploded into major trade rows because the U.S. has taken to the use of secondary boycotts of a target country, thus penalizing entities from third (including allied) countries that trade with or invest in the target. As explained in the context of Russia (discussed later):

The U.S. sanctioned hundreds of Russian officials, lawmakers, family members and businesses … [on 30 September 2022] in what Treasury Secretary Janet Yellen called a “sweeping action,” but in reality, the measures will have little practical effect on President Vladimir Putin’s ability to sustain his country’s economy with oil and gas revenue.

That raises fundamental questions about the effectiveness of sanctions, despite how big it looks on paper for the Biden administration to go after Russia’s central banker, Elvira Nabiullina, and Alexander Novak, the deputy prime minister and a key figure in Russia’s energy sector. A raft of sanctions so far haven’t materially affected the war on the ground in Ukraine or dented Putin’s determination to pursue it despite repeated setbacks.

“To further isolate Russia, there needs to be a serious look at deploying secondary sanctions, rather than just threatening,” said Daniel Tannebaum, a former Treasury Department official…. “Secondary sanctions force countries to choose between doing business with the target of sanctions or those imposing sanctions. In this instance, you could carve out energy, agricultural, food, and medicine-related transactions but more broadly ban additional sectoral trade.”

Compulsion is the root of the controversies: third countries may be allied with, or neutral toward, the target country, and even if they are like-minded with the America that the target should be sanctioned, they may be too dependent economically on imports from, or exports to, the target to comply with a secondary boycott (at least in the short run).

The other restraint on cowboy behavior is contained in the introductory chapeau to Article XXI(b). A sanctioning Member is supposed to make sure that its measure is “necessary” for the “protection” of that Member’s “essential security interests.” For the most part, GATT contracting parties exercised restraint in interpreting these terms, and most WTO Members similarly have been cautious. Overall, the number of express or implicit invocations of Article XXI remains relatively small. Nevertheless, the potential for abuse exists, and the considerable criticism of recent American sanctions laws would lead some observers to doubt the power of these terms to continue to act as a restraint on cowboy behavior. After all, these terms are broad enough to encompass a variety of circumstances, and their application to a particular set of facts is subjective. At the same
time, these terms are a gauge by which the world trading community can opine on a sanctioning Member’s use of Article XXI(b). They can help shape world opinion as to whether a sanctioning Member is “crying wolf.”

Consider Sweden’s global import quota system for certain footwear (army boots), in effect from November 1975 to July 1977. Sweden argued the:

decrease in domestic production has become a critical threat to the emergency planning of Sweden’s economic defense as an integral part of the country’s security policy. This policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such a capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations.\(^{51}\)

In fairness to the Swedish argument, it is true that, as one contracting party said during the discussion of the 1949 action brought by Czechoslovakia against the U.S., Article XXI covers “goods which were of a nature that could contribute to war potential.”\(^{52}\) But, on reflection, the gauge suggested reveals why Sweden’s argument is outrageous: it is a slippery slope. Would buttons for military uniforms be “necessary” for the “protection” of Sweden’s “essential security interests” on the grounds that troops are disadvantaged if they lack appropriate attire?

More generally, is Article XXI(b) really designed for potential non-military (i.e., economic) threats? If so, then America’s Big Three automakers (General Motors, Ford, and Chrysler) could argue that Japanese auto imports should be banned or severely restricted because of the threat they pose to market share in the vital passenger car industry. Likewise, India could argue (as it has) it must enact extraordinary measures against imported food to ensure it maintains self-sufficiency in food, especially given its long-standing border conflicts.

These arguments, however, would stretch beyond recognition Article XXI(b), making it a commercial as well as national security exception. In terms of these arguments, the central thrust behind Article XXI(b) is the requirement of showing a link between the American passenger car industry and a national security threat, or between India’s food needs and its traditional nemeses, Pakistan and China. But, these arguments pre-suppose such a link and thus become self-fulfilling. To be sure, there are cases in which commercial and national security interests are so intertwined that a bright line between these interests cannot be drawn. Nonetheless, trade remedies condoned under other Articles of GATT, most notably the Escape Clause allowed by Article XIX, exist to deal with non-military threats posed by fair foreign competition.

As another illustration of how the gauge can be helpful in delimiting Article XXI(b), consider an argument made by Nicaragua in an action it brought against the U.S.

\(^{51}\) Quoted in GATT ANALYTICAL INDEX, vol. 1 at 603.
\(^{52}\) Quoted in GATT ANALYTICAL INDEX, vol. 1 at 602.
relating to a trade embargo imposed by the Reagan Administration in May 1985 against Nicaragua. Nicaragua urged that the key terms in the Article XXI(b) chapeau amount to a self-defense requirement, i.e., they mean a Member can invoke Article XXI(b) only after it has been subjected to aggression. In the unadopted 1986 Report, the GATT Panel felt its strict terms of reference prevented it from ruling on this argument. However, Nicaragua’s argument cannot be right. If the drafters of GATT meant to include only self-defense cases, then it is likely they would have said so expressly and, perhaps even referenced the language in Article 51 of the United Nations Charter. Instead, they used terms that would balance competing interests, as is evident from the statement of one of the drafters of the Havana Charter about the meaning of “essential security interests:”

We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: “by any Member of measures relating to a Member’s security interests,” because that would permit anything under the sun. Therefore, we thought it well to draft provisions which would take care of real security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance. ... [T]here must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.54

Moreover, clauses (i), (ii), and (iii) that follow the chapeau to Article XXI(b) indicates actual aggression is not a prerequisite – the point the Ghanaian Representative made.

These clauses envision the invocation of Article XXI(b) to deal with nuclear weapons material, arms trafficking, or an international relations emergency. If a sanctioning Member had to wait until a hostile power acquires nuclear weapons, a destabilizing number or type of non-nuclear arms, or a physical invasion, then it would be too late for trade sanctions to have any protective effect. In addition, the threat may be orchestrated by a “military establishment,” a term broad enough to include not just sovereign governments, but also major terrorist organizations or drug cartels.

At the same time, however, implicit in clauses (i), (ii), and (iii), and in the words “necessary,” “protection,” and “essential security interests,” must be the concept of a credible threat from these dangers. Simply “crying wolf” will not do, because Article XXI

53 Article 51 provides that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” 59 Stat. 1031, done at San Francisco, 26 June 1945, entered into force on 24 October 1945.
54 Quoted in GATT ANALYTICAL INDEX, vol. 1 at 600.
could not have been designed to protect a hyper-sensitive government anymore than many standards of care in tort law do not protect the hyper-sensitive plaintiff. Rather, the test should be an objective one, namely, whether a “reasonable” government faced with the same circumstances would invoke Article XXI. In sum, it is the implicit concept of a credible threat judged from the objective standpoint of a reasonable, similarly-situated government, coupled with the articulation of specific types of dangers that track one or more of the three clauses, and not Nicaragua’s unduly restrictive self-defense argument, that can be a restraint on cowboy behavior.

Is there, perhaps, a third possible restraint on cowboy-like behavior. Consider this proposal:

[As discussed in a separate Chapter,] … a distinguishing feature of the WTO, ceased to exist on December 11, 2019, because the United States blocked appointments to the Appellate Body of the WTO dispute settlement mechanism. A major obstacle to the United States accepting any resolution of this impasse – thus permitting dispute settlement to once again be binding on all WTO members – is settling the issue of whether claims of national security to legitimize trade measures are reviewable. This is a red line for the United States, which argues this claim is nonreviewable. In the emerging area of great power competition, the United States is unlikely to accept a return to fully effective WTO dispute settlement absent a compromise that finds determinations of national security nonjusticiable. This paper offers a compromise: There would be no adjudication of whether a trade measure was justified under the WTO’s national security exception, but those WTO Members adversely affected would have an immediate right to rebalance trade concessions themselves by imposing retaliatory trade measures against the WTO Member invoking the exception.\textsuperscript{55}

But would this proposal for non-justiciability (of invocation of the national security exception) coupled with automatic rebalancing (of trade concessions) of create more problems than it solves?

First, as a practical matter, automatic right of retaliation against the U.S. or any Member invoking a GATT-WTO national security exception could make that exception useless for all but the most powerful Members. Members vulnerable to retaliation effectively would be denied the ability to invoke it. That is because the adversely-affected Member would unilaterally decide what levels of concessions to suspend against the invoking Member. That could mean a disproportionate response, which would be utterly unfair – even if there was involvement by the WTO Director General and/or an \textit{ad hoc} Panel to decide not the legitimacy of the invocation, but only the level of trade concessions that could be suspended, and even if that matter could be resolved on a fast-track time-frame. Second, as a theoretical matter, the proposal is unsound. Trade policy is national security policy, and \textit{vice versa}: that link, whether recognized or not, has existed since ancient times, as the Plutarch-Horace debate (discussed in a separate Chapter) shows. The

\textsuperscript{55} Maruyama & Wolff, 1. \textit{See also id.}, 18-21.
WTO does not need “saving” from the national security exception; rather, the road to salvation is a healthy integration of trade and national security.
Chapter 4

GATT-WTO NATIONAL SECURITY JURISPRUDENCE:
2019 RUSSIA TRANSIT TRAFFIC AND 2020 SAUDI-QATARI CASES

I. GATT Article XXI and April 2019 Russia Transit Traffic Case

● Facts

If the four corollary propositions (discussed earlier) are correct, then they surely place Article XXI(b) among the GATT provisions coming closest to allowing a Member to act unilaterally. And yet, a WTO Panel issued a Report in April 2019 clearly taking the opposite view: This provision is not self-judging, said the Panel in its Russia Transit Traffic Report, which was not appealed. The Panel reasoned it had subject matter jurisdiction to decide whether Russia’s invocation of this provision to justify measures Russia took against traffic in transit involving the Ukraine was legitimate.

The facts concern Russian restrictions on traffic (that is, exports of merchandise) from the Ukraine through Russian territory eastward to Kazakhstan and the Kyrgyz Republic. Russia adopted three controversial measures:

a. 2016 Belarus Transit Requirements [also called the “2016 General Transit Ban and Other Transit Restrictions”]: Requirements that all international cargo transit by road and rail from Ukraine destined for the Republic of Kazakhstan or the Kyrgyz Republic, through Russia, be carried out exclusively from Belarus, and comply with a number of additional conditions related to identification seals and registration cards at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border.

b. 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods [also called the “2016 Product-Specific Transit Ban and Other Transit Restrictions”]: Bans on all road and rail transit from Ukraine of: (i) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU; and (ii)
goods that fall within the scope of the import bans imposed by Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic. Transit of such goods may only occur pursuant to a derogation requested by the Governments of Kazakhstan or the Kyrgyz Republic which is authorized by the Russian Government, in which case, the transit is subject to the 2016 Belarus Transit Requirements (above).

c. 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods [also called the “2014 Transit Bans and Other Transit Restrictions”]: Prohibitions on transit from Ukraine across Russia, through checkpoints in Belarus, of goods subject to veterinary and phytosanitary surveillance and which are subject to the import bans implemented by Resolution No. 778, along with related requirements that, as of 30 November 2014, such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints on the Russian side of the external customs border of the EaEU and only pursuant to permits issued by the relevant veterinary surveillance authorities of the Government of Kazakhstan and the Rosselkhoznadzor, and that, as of 24 November 2014, transit to third countries (including Kazakhstan) of such plant goods take place exclusively through the checkpoints across the Russian state border.

Russia had blocked Ukrainian traffic in transit for Mongolia, Tajikistan, Turkmenistan, and Uzbekistan. Ukraine said these three controversial restrictions on its traffic to Kazakhstan and the Kyrgyz Republic essentially extended the existing Russian bans on its merchandise shipments to the other countries – as Ukraine put it, the “De Facto Application of the 2016 General and Product-Specific Transit Bans in Decree Number 1, as amended, to Traffic in Transit Destined for Mongolia, Tajikistan, Turkmenistan, and Uzbekistan.”

● GATT Article V:2 Claim and Article XXI(b)(iii) Defense

All such restrictions were illegal, alleged Ukraine, under GATT Article V, which provides for freedom of transit, and also under Russia’s commitments in its 2012 WTO Protocol of Accession.59 Russia defended its measures under Article XXI(b)(iii), saying

59 In September 2023 a curious dispute arose between Ukraine and Poland. Though both were allies against Russia in Russia’s war on Ukraine, Poland threatened to, and actually did, introduce a unilateral ban on importation – including traffic in transit – of Ukrainian grains (including barley, maize, sunflower oil, and wheat – all of which Ukraine is one of world’s largest suppliers). See Ukraine Sues EU Neighbors Over Food Imports Ban, BBC NEWS, 18 September 2023, www.bbc.com/news/world-europe-66849185 [hereinafter, Ukraine Sues EU Neighbors]; Kateryna Choursina & Daryna Krasnolutska, Ukraine Will Complain to WTO if Poland Enacts New Grain Ban, BLOOMBERG, 9 September 2023, www.bloomberg.com/news/articles/2023-09-09/ukraine-will-complain-to-wto-if-poland-enacts-new-grain-ban?ref=7sxw9SkI [hereinafter, Ukraine Will Complain to WTO.] Because of the war and Russia’s domination of the Black Sea and Ukraine’s ports on that Sea, Ukraine was ever-more reliant on channeling its exports through its EU neighbors. See Ukraine Will Complain to WTO. Yet, along with Poland, in April International Trade Law E-Textbook (Raj Bhala, 6th Edition, 2025) University of Kansas (KU) Volume Four Wheat Law Library
Agriculture Agreement’s safeguard action under Article XIX of GATT and (if available) an SSG under Articles XX or XXI. Arguably what Poland, Hungary, and Ukraine should have done is resort to a violation of (appeared to have the better of the arguments: the measures against which it complained looked to be undercutting them and distorting local markets.” [L]arge quantities of grain ended up in Central Europe,” hence “[f]armers in those countries … held protest rallies, saying that Ukrainian grain shipments were harm farmers. 

As Ukraine, one of the world’s largest grain exporters, has struggled to ship its grain because of Russia’s invasion, the European Union has opened up to tariff-free food imports from the country, a move that had the unintended consequence of undercutting prices and hurting farmers in several countries in the east of the European Union. As part of a deal meant to protect those countries, the bloc allowed some grain to transit through them, but prohibited domestic sales.

Brussels’ decision to let that deal expire at midnight on … [15 September 2023] revived an issue that has threatened European Union unity on support for Ukraine. The Hungarian Agriculture Minister, Istvan Nagy, announced an extended ban that would include more products …, saying that “we will protect the interests of the farmers.”

… Poland’s President ordered that the ban be kept in place, and Slovakia’s Ministry of Agriculture also announced a continuation of the ban, underlining that it didn’t apply to transit through the country, “thus expressing solidarity with Ukraine.”

[Originally,] [t]he ban [allowed by the EU between May-September] was a response to concerns from those nations [as well as Bulgaria and Romania] that a flood of cheap, tariff-free food imports from Ukraine was hurting their own farmers.


The EU let its temporary ban on importation of Ukrainian grains expire because it said market distortions in the affected Central and Eastern European countries had disappeared, plus “Ukraine … agreed to introduce legal steps, such as an export licensing system, within 30 days to avoid grain surges….” Jorge Valero, Megan Durisin & Zoltan Simon, *EU Ends Ukraine Crop Import Ban, Heightening Trade Tensions*, BLOOMBERG, 15 September 2023, www.bloomberg.com/news/articles/2023-09-15/eu-ends-ukraine-crop-import-ban-heightening-national-tensions?srref=7sxw9Sxl. [Hereinafter, *EU Ends Ukraine Crop Import Ban.*] Nevertheless, Poland, along with Hungary and Slovakia, affirmed they would defy the EU, which sets trade policy for the 27-member customs union, i.e., they rejected instructions from Brussels to lift their embargo on Ukrainian grain imports (although they did permit Ukrainian grain to transit through their countries for markets in other countries). Hungary went so far as to expand the import ban to cover beef and wine (though it, too, permitted traffic in transit if such traffic left Hungary within 15 days of entry). See id.

Predictably, Ukraine filed a WTO case against them. See World Trade Organization, *Ukraine Initiates WTO Dispute Complaints Against Hungary, Poland and Slovak Republic* (21 September 2023), www.wto.org/english/news_e/news23_e/ds618_620_621rfc_21sep23_e.htm. At first glance, Ukraine appeared to have the better of the arguments: the measures against which it complained looked to be violations of (inter alia) the GATT MFN and QR rules in GATT Articles I:1 and XI:1, with no justification under Articles XX or XXI. Arguably what Poland, Hungary, and Ukraine should have done is resort to a safeguard action under Article XIX of GATT and (if available) an SSG under Article 5 of the WTO Agriculture Agreement. Interestingly, Ukraine did not raise an MFN claim, but it did allege a violation of Article XI, as well as Article X (concerning transparency), alleged breaches of three provisions in the Agriculture Agreement. Thus, in its complaint against Poland, Ukraine stated:

(i) Article XI:1 of the GATT 1994, as they prohibit or restrict the importation of agricultural goods from Ukraine to the territories of the Republic of Poland;
they were “necessary for the protection of its [Russia’s] essential security,” as per the *chapeau* of Article XXI(b), and specifically under Sub-Paragraph (iii), as they were “taken in time of war or other emergency in international relations.” Russia argued the Panel had no jurisdiction to adjudicate its Article XXI defense. So, too, did the U.S., as a third party; that is, the Russians and Americans Article XXI is self-judging and thus non-justiciable. After all, the *chapeau* in Article XXI(b) says “which it considers,” and “it” is the individual WTO Member invoking the exception. So, that Member is the one – and the only one – to ascertain whether a measure is “necessary” to protect “its” “essential security interests.”

Ukraine and the other third parties – Australia, Brazil, China, EU, Japan, Moldova, Singapore, and Turkey – all argued Panels have subject matter jurisdiction over this national security defense, though they tread carefully in exercising it, so as to balance the sovereign right of every Member to protect its essential security interests against abusive invocations of this defense for protectionist purposes. Applying reasoning akin to that under the general exceptions of GATT Article XX, the EU called (unsuccessfully) for an

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(ii) Article V:2 of the GATT 1994 to the extent that the measure of the Republic of Poland either *de jure* or *de facto* restricts freedom of transit of Ukrainian agricultural goods through the territory of Poland to other EU Member States;

(iii) Article X:1 of the GATT 1994, as the Republic of Poland failed to publish its regulations at issue promptly in such a manner as to enable the Government of Ukraine and traders to become acquainted with them;

(iv) Article 4:2 of the *Agreement on Agriculture*, as the Republic of Poland have maintained, resorted to, or reverted to measures of the kind which have been required to be converted into ordinary customs duties, such as import prohibitions and restriction on Ukrainian agricultural goods; and

(v) Article 5 of the *Agreement on Agriculture* to the extent that it is applicable, because, *inter alia*, neither the EU, nor the Republic of Poland does not appear to have reserved their right to apply measures that fall under the scope of this provision to most of the products at issue in their Schedule of Concessions under the GATT 1994; these measures take the form of a ban instead of a duty; and these measures are discriminatory as they apply only to Ukrainian imports and not also to other WTO Members’ imports.


assertive review whereby Panels should determine whether the link between the controversial measure and the purported security interest was sufficient. That is, the EU urged that Panels “should … review this determination [by a Member about whether a controversial measure is essential to the security interests of that Member], albeit with due deference, to assess whether the invoking Member can plausibly consider the measure necessary and whether the measure is ‘applied’ in good faith.”61

**Jurisdictional Assertion**

The Panel rejected the Russian-American view of GATT Article XXI(b), but did not go quite as far as the EU would have liked. The Panel looked first at the *chapeau* to Article XXI(b) – that nothing in GATT shall be interpreted “to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests – and agreed this language empowers a WTO Member to do what it says, namely, derogate from a GATT obligation to protect the essential security interests of that Member. But, the Panel said the three Sub-Paragraphs of Article XXI(b) are “limitative qualifying clauses,” *i.e.*, they are restrictions on the discretion of a Member that the *chapeau* confers. That much was rather obvious textual interpretation: to invoke Article XXI(b) in defense of a trade-restrictive measure, a Member needs to fits that measure within one of the Sub-Paragraphs. The controversial move the Panel made was to decide that it (and, by inference, the Appellate Body) has the jurisdiction to review the invocation of the defense, *i.e.*, that the defense is not strictly self-judging, and is justiciable.

The Panel offered two reasons for its jurisdictional assertion. First, as a matter of textual interpretation, it said the adjectival clause in the GATT Article XXI(b) *chapeau*, namely, “which it considers” does “not extend to the determination of the circumstances in each Sub-Paragraph.” In other words, the word “it” in the adjectival clause does not preclude the ability of a Panel to review the national security defense, because “it” does not cover an evaluation of whether the terms of the Sub-Paragraphs are met. On this vital point, the Panel seems simply wrong.

Second, the Panel said the negotiating history of GATT Article XXI (which it discussed in Paragraphs 7:83-7:104) supports its assertion of jurisdiction. The Panel said that history confirms its view that: “requiring that the evaluation of whether the invoking Member has satisfied the enumerated Sub-Paragraphs of Article XXI(b) be made objectively rather than by the invoking Member itself.” Here, the Panel seems simply naïve: the party in the best position to apply the terms of Sub-Paragraph (iii) to the facts of its security position is the party itself. That party – the respondent WTO Member – will have access to far more intelligence, which will be classified as “top secret,” and thus which cannot be shared with the judges of Geneva without compromising intelligence gathering operations, and even human lives engaged in those operations.

**Step One: Sub-Paragraph (iii) of Article XXI(b)**

So, the Panel proceeded. Without formally saying so, it engaged in a kind of Two-
Step analysis redolent of GATT Article XX cases, asking whether Russia satisfied the itemized limitation in Sub-Paragraph (iii) of GATT Article XXI(b), and whether Russia met the terms of the *chapeau* in Article XXI(b). The Panel concluded (at Paragraph 8:1):

a. With respect to the Panel’s jurisdiction to review Russia’s invocation of Article XXI(b)(iii) of the GATT 1994, the Panel finds that:

i. it has jurisdiction to determine whether the requirements of Article XXI(b)(iii) ….

...

d. With respect to whether Russia has met the requirements for invoking Article XXI(b)(iii) …, the Panel finds that:

i. as of 2014, there has existed a situation in Russia’s relations with Ukraine that constitutes an emergency in international relations within the meaning of Sub-Paragraph (iii) of Article XXI(b) …;

ii. each of the measures at issue was taken in time of this emergency in international relations within the meaning of Sub-Paragraph (iii) of Article XXI(b) …;

iii. Russia has satisfied the conditions of the *chapeau* of Article XXI(b) …; and

iv. accordingly, Russia has met the requirements for invoking Article XXI(b)(iii) in relation to the measures at issue, and therefore the measures at issue are covered [*i.e.*, excepted from violating Article V:2] by Article XXI(b)(iii) ….

Russia prevailed. That is because Russia met what the Panel regarded (in Paragraph 7:76) as the definition of an “emergency in international relations,” namely:

An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.\(^{152}\) Such situations give rise to particular types of interests for the Member in question, *i.e.*, defense or military interests, or maintenance of law and public order interests.\(^{153}\)

\(^{152}\) This interpretation of an emergency in international relations is consistent with the preparatory work [*i.e.*, negotiating history], … which indicates that the United States, when proposing the provision...
of the Geneva Draft of the *ITO Charter* that was carried over into Article XXI of the GATT 1947, and in referring to an “emergency in international relations,” had in mind particularly the situation that existed between 1939 and 1941. During this time, the United States had not yet participated in the Second World War, yet owing to that situation, had still found it necessary to take certain measures for the protection of its essential security interests.

This understanding is well-entrenched historically in diplomatic practice. *See, e.g.*, Article 11 of the *Covenant of the League of Nations*: “Any war or threat of war, whether immediately affecting any of the members of the League or not, is hereby declared a matter of concern to the whole League … [i]n case any such emergency should arise ….” (*Covenant of the League of Nations*, done at Paris, 28 June 1919, League of Nations Treaty Series, Vol. 108, p. 188.)

The Panel (adhering to Article 31(1)-(2) of the 1969 *Vienna Convention*) arrived at this definition based on the ordinary meaning of Article XXI(b)(iii) and *chapeau* of Article XXI, read in light of their context.

Plainly, the conjunctive “or” plus the adjective “other” in Sub-Paragraph (iii) show that “war” is only one type of “emergency” in international relations. The U.S., for example, has fought just five wars in its history declared by Congress under Article I, Section 8 of the Constitution, most recently in the Second World War (1939-1945), and before that the First World War (1914-1918), War of 1812, Mexican-American War (1846), and Spanish-American War (1898). But, the U.S. has been engaged in many “emergencies,” including the Korean and Vietnam Wars (1950-1953 and 1965-1973, respectively), and the post-9/11 War on Terror (2001-). Yet, the Panel said not every problem rises to the level of an “emergency”: “political or economic differences between Members are not, sufficient, of themselves, to constitute an emergency in international relations for purposes of Sub-Paragraph (iii).”

Here again, the Panel seems to have been naïve and over-stepped its bounds. A WTO Member might well consider a difference over water rights (*e.g.*, Syria and Lebanon versus Israel, or Pakistan versus India) to be an “emergency.” A Member might also consider an actual or potential large influx of refugees (*e.g.*, to Jordan and Turkey from Syria) to be an “emergency.”

Nonetheless, the Panel also looked beyond the text of the phrase “emergency in international relations” to the context of this phrase. The matters in Sub-Paragraphs (i) and (ii) are that context, *i.e.*, measures relating to fissionable materials and trafficking in weapons, respectively. Such measures suggested that “emergency in international relations” in Sub-Paragraph (iii) must be of a similar, convergent nature. So, again, mere political or economic tiffs are insufficient to be “emergencies.” Of course, the Panel can be faulted for unimaginatively limiting the context to that which might have been imagined by the GATT drafters in 1945-1947, and thus not appreciating that Sub-Paragraphs (i) and (ii) need, indeed should, not be read to constrain the flexible language of Sub-Paragraph

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62 *Emphasis added.*

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Pressing on to interpret “emergency in international relations,” the Panel looked at the object and purpose of GATT, and at GATT negotiating history. Notably (following Article 31(3)(b) of the *Vienna Convention*), the Panel did not ascribe much interpretative value to subsequent practice of the contracting parties. The Panel reviewed this practice (in the Annex to its Report), but found it inconsistent, and thus revealed no common understanding of the term. The Panel did say, though (in Paragraph 7: 81) that even the variegated practice suggested armed conflict or heightened tensions that could lead to armed conflict is when GATT Article XXI(b)(iii) typically is invoked. Thus, the Panel arrived at its above-quoted definition: “emergency in international relations” means armed conflict, latent armed conflict, heightened tension or crisis, or general instability afflicting a country. Russia’s conflict with Ukraine met the Panel’s definition.

### Step Two: *Chapeau* to Article XXI(b)

What of the *chapeau* to Article XXI(b), the sort-of Step Two in the Panel’s Article XXI analysis? How much discretion does a WTO Member have to invoke the national security exception under the *chapeau* language? The Panel viewed this language as referring to protection from external threats of the people and territory of a WTO Member, and also of the maintenance of law and public order. Each case is unique, varying with the specific facts and the perception of the Member. But, said the Panel, a Member is not “free to elevate any concern to that of an ‘essential security interests.’” A Member must interpret the *chapeau* language, and a Panels could and would review its interpretation, according to two criteria:

1. “Whether there was any evidence to suggest that the Member’s designation of its essential security interest was not made in good faith,” and

2. “Whether the challenged measures were ‘not implausible’ as measures to protect those essential security interests.”

The Panel found Russia met both *chapeau* criteria, and thus upheld its invocation of Article XXI(b)(iii).

### Summary

To sum up, the Panel established that invocation of GATT Article XXI(b) is justiciable under the *DSU*. Further, based on text, context, and negotiating history, the Panel Reasoned that the criteria in a Sub-Paragraph to this provision must be satisfied, and so, too, must be the criteria of the *chapeau* to this provision – a kind of Two Step Test. The criteria in Sub-Paragraph (iii), “emergency in international relations,” pertain to actual or impending cross-border violence. The criteria in the *chapeau* involve good faith and plausibility.

The Panel also concluded (in Paragraph 8:2) that in normal times, Ukraine would
have won the case:

a. With respect to Ukraine’s claims under the first sentence of Article V:2 of the GATT 1994, the Panel considers that, had the measures been taken in normal times, i.e., had they not been taken in time of an “emergency in international relations” (and met the other conditions of Article XXI(b)), Ukraine would have made a prima facie case that:

i. the 2016 Belarus Transit Requirements [imposed by Russia] were inconsistent with the first sentence of Article V:2, because these measures prohibit traffic in transit from entering Russia from Ukraine;

ii. the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods were inconsistent with the first sentence of Article V:2, because these measures prohibit traffic in transit from entering Russia from Ukraine; and

iii. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods were inconsistent with the first sentence of Article V:2, because these measures prohibit traffic in transit from Ukraine from entering Russia from any Member other than those countries from which entry is exclusively permitted, as listed in the measure.

b. With respect to Ukraine’s claims under the second sentence of Article V:2 . . . , the Panel considers that, had the measures been taken in normal times, i.e., had they not been taken in time of an “emergency in international relations” (and met the other conditions of Article XXI(b)), Ukraine would have made a prima facie case that:

i. the 2016 Belarus Transit Requirements were inconsistent with the second sentence of Article V:2, because these measures make distinctions based on the place of departure (Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic), and the place of entry (Belarus, where entry is exclusively permitted) of the traffic in transit;

ii. the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods were inconsistent with the second sentence of Article V:2, because these measures make distinctions based on the place of departure (Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic), the place of origin (countries listed in Resolution No. 778, as amended to
include Ukraine) and the place of entry (Belarus, where entry is exclusively permitted) of the traffic in transit; and

iii. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods were inconsistent with the second sentence of Article V:2, because these measures make distinctions based on the place of entry (certain countries where entry is exclusively permitted, as listed in that measure) and the place of origin (countries listed in Resolution No. 778, as amended to include Ukraine) of the traffic in transit.

So, Russia won, but was its victory Pyrrhic? The Panel took jurisdiction over GATT Article XXI. Moreover, it set a high threshold for an “emergency” in international relations – essentially, a war (as occurred between Russia and Ukraine) or heightened tensions that could lead to war.

II. TRIPs Agreement Article 73 and June 2020 Saudi-Qatari Case

● Fraught Saudi-Qatari Relations

WTO PANEL REPORT, SAUDI ARABIA – MEASURES CONCERNING THE PROTECTION OF INTELLECTUAL PROPERTY, WT/DS567/R (ISSUED 16 JUNE 2020, ADOPTED 29 JUNE 2020, APPEALED)63

1. INTRODUCTION

1.3.2 Procedural issues arising from Saudi Arabia’s refusal to interact with Qatar

1.10 … Saudi Arabia took the position that, consistent with its severance of all relations with Qatar (including diplomatic and consular relations), and the essential security interests that motivated it to take that action, it would not interact, or have any direct or indirect engagement, with Qatar in any way in this dispute. ….

1.11 Saudi Arabia’s refusal to engage with Qatar … raised the question of how the Panel ought to conduct the proceeding. … [T]he Panel did not consider it necessary to develop any special or additional working procedures in the circumstances of this case. However, the Panel did adjust certain aspects of the normal Panel process …. The Panel has been guided … by the prohibition against any ex parte communications between the Panel and either party.

2. FACTUAL ASPECTS

2.2.2 The June 2017 Severance of Relations and Events Leading Up To It

63 www.wto.org/english/tratop_e/dispu_e/567r_e.pdf. (Footnotes omitted.)
2.16. The issues … must be understood in the context of the serious deterioration of relations between Saudi Arabia, Qatar and certain other countries from the MENA [Middle East North Africa] region. On 5 June 2017, Saudi Arabia, the UAE, and other nations [namely, Bahrain and Egypt] severed all relations with Qatar. In their respective submissions to the Panel, the disputing parties (and the UAE as a third party) each referred to the 5 June 2017 severance and/or the events leading up to the severance and, as noted below, the disputing parties characterized the severance of relations as constituting relevant “background” to the measures at issue in this dispute.

[The severance of relations put the U.S. in a difficult spot, because all parties were long-standing American allies. On the one hand, the Kingdom and UAE host U.S. military personnel, Bahrain is home to the U.S. Navy’s Fifth Fleet, and Egypt cooperates with the U.S. on many security matters, including with respect to Israel. On the other hand, Qatar is home to the largest U.S. military base in MENA, Al Udeid Air Base. In January 2021, Saudi Arabia decided to lift the total trade embargo it had engineered against Qatar. It did so, reportedly, because MBS sought to develop good relations with President Joseph R. Biden (1942, President, 2021-), who made no secret of his desire to reset relations with the Kingdom in the aftermath of the October 2018 Jamal Khashoggi killing, and the Kingdom’s endless war in Yemen.64]

64 See David Gardner, Joe Biden’s Silent Treatment of the Middle East Prompts an Outbreak of Reason, FINANCIAL TIMES, 17 February 2021, www.ft.com/content/6cc43a18-ea1f-4742-a805-2272201847a?shareType=nongift (reporting: “After [President Donald J.] Trump’s conversations with their leaders at a summit in Riyadh in May 2017, Saudi Arabia, the United Arab Emirates and Egypt blockaded Qatar, a move Trump initially backed, even though the maverick Gulf emirate hosts the biggest U.S. air base in the region. … Last month, the blockade of Qatar was finally lifted, in what looked to be a carefully prepared offering to team Biden. … This outbreak of reasonableness could be little more than precautionary atmospherics. The Biden team has said there will no more blank cheques for autocrats…. Biden has promised a review of relations with Saudi Arabia, given a free pass by Trump even after the CIA implicated Prince Mohammed in the murder of journalist Jamal Khashoggi at the Kingdom’s consulate in Istanbul in 2018. The shield Trump often provided for Erdogan in Washington is likely to be removed.”). As to the terms of the January 2021 deal among the Gulf rivals:

The embrace last week between Tamim bin Hamad al-Thani, the Emir of Qatar, and Mohammed bin Salman, Crown Prince and de facto ruler of Saudi Arabia, ended the three-year blockade of the tiny gas-rich Emirate by its powerful neighbours, led by the Saudis and the United Arab Emirates. The terms of the deal will only become fully known as they are implemented. But already the agreement – a tactical rapprochement rather than a reconciliation between embittered rivals – looks like a score-draw for Qatar against heavy odds. The deal restores the air, land and sea links to the emirate that were severed in June 2017, and lifts the trade embargo.

…

… [T]he anti-Qatar crusaders came up with a laundry list of unrealistic demands. These included: the closure of Al Jazeera, the Qatari broadcaster; ending support for Islamist movements; abjuring the emirate’s links with Iran and alliance with Turkey, which has a military base in the Emirate; and submitting to its neighbors’ monitoring for 12 years.

…

Nothing was heard of this last week. Qatar seems to have agreed only to drop legal cases against its adversaries at the International Civil Aviation Organization and the World Trade Organization. Both sides say they will de-escalate hostilities in the media. Qatar had already scaled back its commitment to Islamist insurgents from Libya to Syria. Along with
2.17. Saudi Arabia characterized the events leading up to its severance of relations with Qatar as “relevant background information.” However, Saudi Arabia went further, submitting also that the “severance of relations between the two countries and the publicly-stated reasons for the measures of Saudi Arabia constitute the only relevant facts in this dispute.”

2.18. ... Qatar explained in its first written submission that the “rampant piracy at issue in this dispute has occurred against the background of Saudi Arabia having imposed, since 5 June 2017, a scheme of coercive economic measures against Qatar.” In its Panel request, Qatar stated also that:

In June 2017, Saudi Arabia imposed a scheme of diplomatic, political, and economic measures against Qatar. Such measures impacted, *inter alia*, the ability of Qatari nationals to protect intellectual property rights in Saudi Arabia. ... The multiple Qatari companies severely impacted by these measures include beIN Media Group LLC and affiliates (“beIN”).

2.19. According to Saudi Arabia, especially since 2011, “the security situation in many countries in the [MENA] region has been unstable, with wars, terrorism, and instability prevailing in many places for many different reasons, causing a devastating effect on human life and on the stability of national governments and multiple crises in international relations.” Saudi Arabia provided the following summary of and perspective on the events leading up to the 5 June 2017 severance. The Panel expresses or implies no position concerning any of these allegations. The Panel further recalls that Qatar, while maintaining that many of Saudi Arabia's assertions about the events leading up to the severance of relations are irrelevant to the specific measures at issue, strongly denied certain accusations

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Turkey, however, it has maintained support for the pan-Islamist Muslim Brotherhood, abhorred by the UAE and the Saudis.

Almost all parties to this angry spat acknowledge it pushed Qatar further into the arms of Iran and Turkey – and that the emirate will not dismantle the alternative supply lines it was forced to build. Qatar cannot, in any event, dissolve its links with Iran – the two countries share the world’s largest natural gas field. Its adversaries know this. After all, Abu Dhabi, the lead emirate of the UAE, renewed an oilfield concession with Qatar in 2018 despite the embargo. Dubai, the Emirati showcase, still operates as an extra lung for an Iran under economic siege.

More remarkable still, Gulf sources say Qatar is being asked to mediate between Saudi Arabia and Turkey as part of the deal. This is galling to the Saudis and the Emiratis, who regard the regional adventurism of Recep Tayyip Erdogan, Turkey’s President, as a threat. The Saudi reset with a U.S. under Joe Biden is hard, too. Prince Mohammed had put nearly all the kingdom’s eggs in the Trump basket, and drew the anger of the US Congress for the assassination of journalist Jamal Khashoggi, the war in Yemen and flooding the market with cheap oil. Mr. Biden has spoken of reviewing the 75-year-old alliance with the kingdom.

David Gardner, *Qatar’s Rapprochement Restores Balance in the Middle East*, FINANCIAL TIMES, 13 January 2021, [www.ft.com/content/eeb4f0ec-0f97-4b55-9667-26201adfc48b](http://www.ft.com/content/eeb4f0ec-0f97-4b55-9667-26201adfc48b).
made by Saudi Arabia. ...Qatar maintains that the period leading up to that date was characterized by cordial and cooperative relations between Qatar and Saudi Arabia.

2.20. ... Saudi Arabia submitted that “years of active diplomacy at the highest national levels” took place within the Gulf Cooperation Council (GCC), a regional council established by Saudi Arabia, Bahrain, Kuwait, Oman, Qatar, and the UAE. According to Saudi Arabia, it and other GCC Countries “have acted, individually where necessary and collectively wherever possible, to uproot the sources of instability in our region.” Saudi Arabia stated that “[c]onsistent with this commitment,” in November 2013, Bahrain, Kuwait, Qatar, and the UAE signed the “First Riyadh Agreement,” which established a collective understanding of the causes for, and solutions to, instability and violence in the region.

2.21. The First Riyadh Agreement included a collective commitment by signatories to refrain from taking certain actions that were identified as the cause of instability, and which are set out in the three paragraphs of the First Riyadh Agreement. The First Riyadh Agreement set forth the following obligations:

1. No interference in the internal affairs of the Council’s states, whether directly or indirectly. Not to give harbor or naturalize any citizen of the Council states that has an activity which opposes his country’s regime, except with the approval of his country; no support to deviant groups that oppose their states; and no support for antagonistic media.

2. No support to the Muslim Brotherhood or any of the organizations, groups or individuals that threaten the security and stability of the Council States through direct security work or through political influence.

3. Not to present any support to any faction in Yemen that could pose a threat to countries neighboring Yemen.

2.22. On 5 March 2014, Saudi Arabia, the UAE, and Bahrain issued a statement withdrawing their ambassadors from Qatar. In the statement, Saudi Arabia, the UAE, and Bahrain took the position that Qatar had not taken necessary actions to put into effect the commitments contained in the First Riyadh Agreement of 23 and 24 November 2013. The Statement referred, among other things, to the principle “not to support all of the actions that threaten the security and stability of the GCC Countries by organizations or individuals, either through direct security work or by attempting political influence as well as not supporting hostile media.”

2.23. The Mechanism Implementing the Riyadh Agreement was signed by all GCC Countries on 17 April 2014 and set forth implementation procedures regarding the obligations contained in the Riyadh Agreement. It identified certain agreed threats to the security and stability of GCC Countries, reaffirmed the obligations undertaken in the First Riyadh Agreement, and established specific procedures to ensure compliance with commitments undertaken. It also reiterated and expanded upon the obligations listed in the
First Agreement relating to the “Internal Security” of GCC Countries, their “Foreign Policy” and their “Internal Affairs.” The Implementing Mechanism further clarified that “[i]f any country of the GCC Countries failed to comply with this mechanism, the other GCC Countries shall have the right to take an[y] appropriate action to protect their security and stability.”

2.24. On 16 November 2014, the GCC Countries found it necessary to enter into the “Supplementary Riyadh Agreement.” Under the Supplementary Riyadh Agreement, GCC Countries undertook, among other things, “not to give refuge, employ, or support whether directly or indirectly, whether domestically or abroad, to any person or media apparatus that harbors inclinations harmful to any [GCC] state.” It further stated that all signatories were committed to “ceasing all media activity directed against the Arab Republic of Egypt in all media platforms, whether directly or indirectly, including all the offenses broadcasted on Al Jazeera, Al-Jazeera Mubashir Masr, and to work to stop all offenses in Egyptian media.”

2.25. In connection with the Supplementary Riyadh Agreement, Saudi Arabia, Bahrain, and the UAE returned their ambassadors to Qatar in November 2014. However, Saudi Arabia asserted that, between November 2014 and June 2017, Qatar continued to violate the explicitly agreed terms of the Riyadh Agreements by supporting and harboring extremist individuals and organizations, many of whom had been designated as terrorists by the United Nations and by individual countries; supporting and allowing terrorist and extremist groups to use Qatar-based and Qatar-sponsored media platforms to spread their messages; and “[e]ngaging in activities that threatened the security and stability of GCC Countries as detailed in reports by intelligence chiefs, including as mandated under the Riyadh Agreements…”

2.26. On 19 February 2017, Qatar’s Foreign Minister sent a letter to the Secretary General of the GCC calling upon the GCC Countries to “agree to terminate the Riyadh Agreement which has been overtaken by events at the international and regional levels.” Saudi Arabia said that it considered this letter to amount to “a repudiation by Qatar of its obligations under the Riyadh Agreements” (to which Qatar responded that the letter could not reasonably be read in that manner).

2.27. Saudi Arabia asserted that, between 19 February 2017 and 5 June 2017, Qatar continued to act against Saudi Arabia’s essential security interests, in violation of the terms of the Riyadh Agreements. Saudi Arabia asserted that, in addition to continuing to harbor and support extremists and terrorists, Qatar had purportedly made ransom payments to secure the release of kidnapped members of the Qatari royal family. (Qatar responded that these assertions should be rejected as having no basis in fact.)

2.28. According to Saudi Arabia, it was in the light of the above developments, and following Saudi Arabia’s further consideration of remaining viable options to protect its essential security interests in view of Qatar’s failure to abide by its commitments under the Riyadh Agreement, that Saudi Arabia determined that severing all diplomatic and consular relations would be the only way to protect effectively its sovereign interests.
2.29. On 5 June 2017, Saudi Arabia severed relations with Qatar, including diplomatic and consular relations, the closure of all ports, the prevention of Qatari nationals from crossing into Saudi territory, and the expulsion within 14 days of Qatari residents and visitors in Saudi territories. On the same day, Saudi Arabia publicly articulated the rationale behind the measures in the following terms:

[T]he Government of … Saudi Arabia emanating from exercising its sovereign rights guaranteed by [] international law and protecting its national security from the dangers of terrorism and extremism has decided to sever diplomatic and consular relations with the State of Qatar, close all land, sea and air ports, prevent crossing into Saudi territories, airspace and territorial waters.

2.2.3 The Broadcasting Operations of the Qatari-based beIN Media Group

2.30. beIN Media Group LLC (beIN) is a global sports and entertainment company headquartered in Qatar.

2.31. To build its business, beIN has made substantial investments in acquiring licences to broadcast content produced by major international right holders. To this end, it has obtained the exclusive rights to broadcast, and to authorize others to broadcast, prime sporting competitions in the MENA region, including in Saudi Arabia. beIN’s content includes, but is not limited to, broadcasts of: the major European football leagues, Major League Baseball, the National Basketball Association, the National Football League, the US Open Tennis Championships, the Fédération Internationale de Football Association (FIFA) World Cup, the Union of European Football Associations (UEFA) Champions League and many others.

2.32. The rights to broadcast this content have been licensed on a territorial basis, and beIN holds exclusive rights to broadcast in the territory of Saudi Arabia. As a licensor and commercial broadcaster of sports and entertainment content, beIN’s revenues are largely generated from subscriptions to beIN’s television packages. Saudi Arabia is the largest and most important market in the MENA region, and is strategically important to beIN and its right holders.

2.33. beIN generally owns the copyright in: (a) any match/event commentary produced by beIN (for example, Arabic match commentary) on particular matches/events; (b) any studio programming produced in and around the relevant live matches/events (excluding any match/event footage included within such studio programming but including any beIN filmed player/manager interviews, and other beIN produced non-match footage); (c) beIN logos (including on-screen channel bugs) included within the relevant transmission; and (d) any beIN commissioned/owned musical works included within the relevant transmissions.
2.34. In addition, beIN owns the related rights conferred on broadcasting organizations, including the right to prohibit unauthorized fixations, reproductions of fixations and rebroadcasting by wireless means of broadcasts, as well as communications to the public of television broadcasts of the same.

2.35. In some instances, beIN had the right to take action under the Saudi Copyright Law in respect of an infringed copyright work or related right where beIN is not the owner of that right. For example, pursuant to beIN’s media rights agreement with UEFA National Team Football, beIN commenced legal proceedings for infringement of the underlying copyright work belonging to UEFA, with UEFA’s prior written consent. In general, given that beIN typically owns the copyright for multiple aspects of the works that it broadcasts, it would be expected that beIN and the relevant sports league (e.g., UEFA) would ordinarily bring a copyright infringement action together, as co-plaintiffs.

2.36. Following Saudi Arabia’s severance of relations with Qatar on 5 June 2017, the Saudi Ministry of Culture and Information blocked access to beIN’s website in Saudi Arabia since early June 2017. Since that time, customers connecting from a Saudi internet protocol address have been redirected to a page stating that beIN websites violate Saudi law.

2.37. On 19 June 2017, the Saudi Ministry of Culture and Information and GCAM issued a Circular, which stated that beIN was not licensed to distribute media content, and did not have the right to operate, in Saudi Arabia. The Circular also provided that any distribution of media content either via satellites or through other means and platforms, and the charging and collection of related fees in Saudi Arabia without obtaining the necessary licences from the appropriate authorities:

shall subject the distributors of such media content and content licensors, hardware suppliers, and their owners in their individual capacity to criminal prosecution and personal litigation and shall result in the imposition of penalties and fines and the loss of the legal right to protect any related intellectual property rights.

2.38. On 11 July 2017, the Saudi Arabian Monetary Authority issued a Decision suspending and prohibiting “all monetary operations in all methods of payment either through credit cards, payment cards, transfers or any other method to the said company either for new subscriptions or any renewals in its channels or services.” The Decision referred directly to the Saudi Ministry of Culture and Information and GCAM’s Circular of 19 June 2017, which Qatar says was to prohibit beIN sports channels in Saudi Arabia and to severely limit beIN’s ability to operate in Saudi Arabia.

2.39. The parties held different views as to the time periods during which beIN had a licence to operate in Saudi Arabia. According to Saudi Arabia, beIN was not licensed and did not have the right to operate in Saudi Arabia between December 2016 and June 2017 (or thereafter). According to Qatar, beIN understood at all times until early June 2017 that
it was operating with the approval of GCAM under a valid licence, pending the formal renewal of its pre-existing Pay TV Licence.

2.2.4 The emergence of beoutQ

2.40. Qatar provided the following summary of and perspective on the emergence of the broadcasting entity known as beoutQ, and the following facts do not appear to be contested. In August 2017, beoutQ began the unauthorized distribution and streaming of media content that is created by or licensed to beIN, and beIN continues to broadcast in the MENA region. The name “beoutQ,” i.e., “be out Qatar,” is a play on the name beIN Sports. beoutQ illegally streams and broadcasts the contents of beIN’s sports channels, replacing beIN’s logo with that of beoutQ. It provides access to 10 beIN sports channels (both live and pre-recorded by beoutQ). In addition to pirated versions of live broadcasts147, beoutQ also creates unauthorized reproductions of those broadcasts for later replay as reruns.

2.41. While beoutQ initially limited its activities to streaming pirated content online, it expanded to the retail sale of beoutQ-branded set-top boxes (STBs) throughout Saudi Arabia and other countries. These STBs receive satellite broadcasts of pirated content and, as discussed further below, they also provide access to Internet Protocol Television (IPTV) applications offering thousands of pirated movies, TV shows and TV channels around the globe. Web streaming appears to have been terminated in favor of beoutQ’s satellite-based broadcasting to STBs.

2.42. There are reports that beoutQ STBs and subscriptions have been widely available in Saudi retail outlets since the autumn of 2017. The beoutQ STBs available in the above-referenced stores in November 2017 allegedly ranged in price from between Saudi Arabian Riyals (SAR) 360-SAR 400 (approximately U.S.D 95-110). In September 2018, investigators reportedly found beoutQ STBs for sale in 16 electronics shops visited in Riyadh, Jeddah, and Dammam. These beoutQ STBs allegedly ranged in price from between SAR 330-SAR 370 (approximately U.S.D 89-99).

2.43. In addition to generating revenue through sales of STBs and subscriptions, beoutQ allegedly sells advertising slots on its 10 pirated channels, and publishes its advertising rates in Saudi Riyals on its website (e.g., Premier League “gold packages” for advertising priced at SAR 2,500,000 or approximately U.S.D 666,638). Moreover, many of the advertisements shown on beoutQ channels are reportedly for Saudi products.

2.44. beoutQ has promoted its pirated streams on a variety of social media platforms, including Facebook, Instagram and Twitter. Additionally, beoutQ has circulated an anti-beIN cartoon encouraging Saudi citizens and beIN’s licensors to replace beIN with beoutQ. beoutQ packaging and promotional material in Saudi retail outlets explicitly advertises the availability of sports content exclusively licensed to beIN.

2.45. While the focus of beoutQ’s broadcasting activities was initially on sports content, it has expanded to cover the most popular movies and television programming in the world. In addition to illegally providing access to beIN channels 1-10, the beoutQ STBs come pre-
loaded with IPTV applications and portals that lead to other pirated content. Allegedly, the beoutQ custom app store, which comes pre-loaded on the device, contains 25 applications (apps), including 12 IPTV apps, which are used to watch live television and video-on-demand (VOD) content over the Internet. Some of these apps allegedly offer between 2,300 and 4,000 live or recorded television channels from all over the world with thousands of movies available in different languages, and up to 35,000 TV show episodes. The Show Box application, which has come to be known as the “Netflix of piracy,” provides free access to more than 4,700 movies, 700 TV shows and 35,000 TV show episodes via streaming or direct download to the STB. The other five IPTV applications tested by beIN offer thousands of live television channels in addition to VOD content and require activation codes (subscriptions) that can be purchased online. These applications offer all major U.S. and European television channels, live U.S. sports events and movies and TV shows in English and other languages. Some of these IPTV applications also broadcast the pirate beoutQ sports channels.

- **Six Controversial Saudi Measures and National Security Defense**

**WTO PANEL REPORT, SAUDI ARABIA – MEASURES CONCERNING THE PROTECTION OF INTELLECTUAL PROPERTY, WT/DS567/R (ISSUED 16 JUNE 2020, ADOPTED 29 JUNE 2020, APPEALED)**

2.3 **The Measures at Issue**

2.46. According to Qatar, the measures at issue “include the following specific acts and/or omissions:

- (i) Saudi Arabia’s acts and omissions that result in Qatari nationals being unable to protect their intellectual property rights, including copyrights, broadcasting rights, trademarks and other forms of intellectual property;

- (ii) Saudi Arabia’s acts and omissions that result in failure to accord Qatari nationals treatment no less favorable than that accorded to Saudi Arabia’s own nationals or nationals of other countries, with regard to the protection of intellectual property rights, including copyrights, broadcasting rights, trademarks and other forms of intellectual property;

- (iii) Saudi Arabia’s acts and omissions that make it unduly difficult, for Qatari nationals to access civil judicial remedies, or to seek remedies, in respect of enforcement of intellectual property rights, including copyrights, broadcasting rights, trademarks and other forms of intellectual property rights; and,

- (iv) Saudi Arabia’s omission to prosecute, as a criminal violation, piracy on a commercial scale, of material in which copyright is owned by, or licensed to, Qatari nationals.”

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65 [www.wto.org/english/tratop_e/dispu_e/567r_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/567r_e.pdf) (Footnotes omitted.)
2.47. Qatar submitted that the above “acts and omissions” are “reflected” in the following “evidence,” which may also be analysed as specific “measures” at issue in this proceeding:

(1) the 19 June 2017 Circular allegedly issued by the Ministry of Culture and Information and GCAM which, according to Qatar, served effectively to strip beIN of the legal right to protect any intellectual property rights related to the beIN channels;

(2) so-called “anti-sympathy measures” allegedly imposed shortly after the severance of relations on 5 June 2017, and which allegedly subject lawyers based in Saudi Arabia to legal jeopardy if they express support for and/or provide assistance to Qatar and Qatari nationals, and thereby prevent beIN from securing legal representation needed to access civil enforcement procedures against the infringement of its intellectual property rights;

(3) the travel restrictions, imposed on or shortly after 5 June 2017, to the extent that they, in combination with the anti-sympathy measures and other measures, allegedly prevent beIN from being able to access civil enforcement procedures against the infringement of its intellectual property rights by initiating procedures or testifying in person;

(4) the Ministerial approval requirement of Copyright Committee decisions which, as applied to beIN, allegedly prevents beIN from being able to access civil and criminal enforcement procedures against the infringement of its intellectual property rights;

(5) Saudi Arabia’s alleged failure to apply criminal procedures and penalties against beoutQ, despite the evidence that beoutQ’s activities constitute copyright piracy on a commercial scale and the evidence that it is directed and controlled by persons and entities subject to the criminal jurisdiction of Saudi Arabia; and

(6) Saudi Arabia’s alleged promotion of public gatherings with screenings of beoutQ’s unauthorized broadcasts.

2.48. Qatar asserted that certain of these measures “work together” to prevent beIN from accessing Saudi courts and tribunals to protect its intellectual property rights, and stresses that it challenges their “combined operation.”

3. Parties Requests for Findings and Recommendations

3.1. Qatar claims that these measures, in different combinations, violate multiple obligations in Parts I, II and III of the TRIPs Agreement, as follows:

[Qatar’s claims concerning Parts I and II are omitted.]
c. Part III of the TRIPs Agreement:

i. Article 41:1 of the TRIPs Agreement, because they fail to make available to Qatari nationals enforcement procedures, as specified in Part III of the TRIPs Agreement;

ii. Article 42 of the TRIPs Agreement, because they fail to make available to Qatari nationals civil judicial procedures concerning the enforcement of intellectual property rights, including inter alia the right to be represented by independent legal counsel; and

iii. Article 61 of the TRIPs Agreement, because they fail to provide for the application of criminal procedures and penalties to the wilful commercial scale piracy of beIN’s copyrighted material.

3.3. Saudi Arabia requests that the Panel reject Qatar’s claims in this dispute in their entirety, and stated that “the Panel has multiple avenues to end its work without addressing the substantive claims that have been raised in this case, including by:

(1) recognizing that Security Exceptions have been invoked;

(2) confirming that Saudi Arabia’s actions are justified under Article 73 of the TRIPs Agreement;

(3) referencing Article 3:4 of the DSU and the impossibility of issuing a recommendation or ruling “aimed at achieving a satisfactory settlement of the matter” or Article 3:7 of the DSU and the impossibility of securing a positive solution to the dispute; and/or

(4) barring the claim because it has not been brought in good faith with the attention of addressing substantive WTO rules.”

Holdings and Rationale

WTO PANEL REPORT, SAUDI ARABIA – MEASURES CONCERNING THE PROTECTION OF INTELLECTUAL PROPERTY, WT/DS567/R (ISSUED 16 JUNE 2020, ADOPTED 29 JUNE 2020, APPEALED)66

7. Findings

66 www.wto.org/english/tratop_e/dispu_e/567r_e.pdf. (Footnotes omitted.)

Note the mention of “abuse” in Paragraph 7:182 of this Report, albeit in a limited, IP-related context. Consider the problem of abusive invocation of the GATT Article XXI national security exception in a wide context. For a discussion of this problem, see, e.g., Simon Lester, Major Threats to the WTO and the World Trading System, and Proposed Solutions, in The Future of Trade: A North American Perspective, Chapter 10, 229-251, at 243-247 (Cheltenham, United Kingdom: Edward Elgar, David A. Gantz & Tony Payan eds., 2023).
7.1.1 Overview and Order of Analysis

7.1. In this dispute, Qatar challenged six different measures relating to beoutQ’s piracy of beIN’s proprietary content. Qatar claims that these measures, in different combinations, violate multiple distinct obligations of the TRIPs Agreement relating to non-discrimination, the availability of IP rights in Saudi Arabia, and the availability of civil and criminal IP enforcement procedures. … In response to Saudi Arabia’s invocation of Article 73(b)(iii) of the TRIPs Agreement, Qatar submitted that the Panel should first make findings on whether the measures at issue violate the obligations of the TRIPs Agreement, and only then consider whether the affirmative defence under Article 73(b)(iii) applies and justifies any such violations. Qatar also argued that the Panel should reject Saudi Arabia's invocation of Article 73(b)(iii) and its request that the Panel decline to make any findings or a recommendation.

7.2. … Saudi Arabia focused on its severance of all relations with Qatar on 5 June 2017, which it refers to as its “comprehensive measures.” Saudi Arabia submitted that its comprehensive measures of 5 June 2017, constitute action justified by the security exception in Article 73 of the TRIPs Agreement. Saudi Arabia also presented the separate and additional argument that the Panel should exercise its discretion to decline to make any findings or a recommendation in this dispute. … Saudi Arabia addressed the six measures challenged by Qatar more specifically (and some of the other facts underlying Qatar’s claims), for the purposes of demonstrating its “good faith conduct in connection with the invocation” of the exception in Article 73. Saudi Arabia, at the same time, stated that it would “not engage with facts or arguments presented by Qatar.”

7.1.2 Saudi Arabia’s request that the Panel decline to make any findings or recommendation based on Articles 3:4, 3:7, and 11 of the DSU

7.23. … [T]he Panel concludes that it cannot decline to exercise its jurisdiction over the claims of WTO-inconsistency that fall within its terms of reference and that the matter is justiciable.

7.1.3 The measures challenged by Qatar

7.36. … [S]ince Qatar’s claim in relation to the Circular is an “as applied” claim, Qatar bears the burden of substantiating its assertion that the 19 June 2017 Circular “served to effectively strip beIN of the legal right to protect any intellectual property rights related to the beIN channels.” To do so, Qatar would have to adduce evidence to show that beIN had actually taken action to protect its IP rights and that such action was barred or in some way hampered by the Saudi authorities.

7.2. Acts and omissions claimed by Qatar to be attributable to Saudi Arabia
7.2.1 Introduction

7.37. The following factual circumstances underlying Qatar’s claims are undisputed. First, beIN has not initiated civil enforcement procedures against beoutQ before Saudi tribunals, and neither has any other foreign right holder. Second, Saudi authorities have not applied criminal procedures or penalties against what Qatar has characterized as beoutQ’s commercial-scale piracy. Third, beoutQ’s illegal broadcasts of some 2018 World Cup matches were publicly screened in Saudi Arabia. However, the parties disagree about the extent to which any of these circumstances is the result of acts and omissions attributable to Saudi Arabia.

7.38. While Qatar asserted that Saudi Arabia had taken a number of measures (i.e., the 19 June 2017 Circular, anti-sympathy measures, travel restrictions and Ministerial approval requirement) whose “combined operation … deprive[s] Qatari nationals of access to civil judicial procedures and remedies in respect of intellectual property rights,” Saudi Arabia submitted that these alleged measures either do not exist or do not have the effects alleged by Qatar. Similarly, Saudi Arabia stated that the reason for the absence of criminal procedures and penalties being applied against beoutQ is that beIN and other foreign right holders have not provided Saudi authorities with sufficient supporting evidence and cooperation. Furthermore, Saudi Arabia suggested that any public screenings of beoutQ’s illegal broadcasts were not endorsed by, and are not a measure attributable to, the Government of Saudi Arabia.

7.39. It is for the complainant to make a prima facie case, which involves establishing the existence of the challenged measures and the other factual premises underlying its claims, as well as the breach of the legal provisions invoked by the complainant. While WTO-inconsistent conduct may not be lightly presumed, and must always be supported by sufficient evidence, the applicable evidentiary standard of proof in WTO dispute settlement proceedings is closer to that of the balance of probabilities, and is not a standard of certainty or proof beyond a reasonable doubt. As a consequence of the applicable evidentiary standard being closer to that of a balance of probabilities, Panels may make findings of fact based on inferences and circumstantial evidence.

7.40. In the light of Saudi Arabia's stated position that it would “not engage with the facts or arguments presented by Qatar,” the Panel considers it important to confirm that, before considering any exceptions or lines of defence invoked by Saudi Arabia, it must first satisfy itself that Qatar has established a prima facie case in relation to each of the measures and claims at issue. In those WTO cases where a responding party did not contest one or more claims raised by the complainant, Panels have consistently proceeded on the basis that they were nonetheless required to satisfy themselves that the complainant had established a prima facie case of violation in order to rule in the complainant's favour. In this case, the Panel has sought to satisfy itself that Qatar’s claims are well-founded in fact and in law through various means, including written and oral questions and undertaking a careful review of the evidentiary basis underlying Qatar’s various factual assertions. The Panel has not made any material factual findings merely on the basis that some of Qatar’s assertions are uncontested by Saudi Arabia. If the Panel determines that a prima facie case has been
established by Qatar in relation to any of the measures, it will then turn to consider the defenses and arguments made by Saudi Arabia.

7.2.3 Assessment by the Panel

7.2.3.1 Applicable Legal Standard

7.48. Article 3:3 of the DSU refers to “measures taken by another Member,” without limitation as to the government agencies involved, and “[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.” …

7.49. For the purposes of the DSU, the notion of “measures” is not restricted by requirements as to form. Although measures challenged in the WTO are often reflected in legal instruments such as enacted legislation, measures enacted or applied through other instruments that are legally binding in a Member’s domestic legal framework (decrees, directives, regulations, notifications, judicial decisions, etc.) have also been subject to challenge. A determination of whether an instrument is a “measure” “must be based on [its] content and substance … and not merely on its form or nomenclature.” The legal status of an instrument within the domestic legal system of the Member concerned is not dispositive of whether that instrument is a measure for purposes of WTO dispute settlement.

7.2.3.2.1.5 Conclusion

7.72. The Panel considers that the evidence before it sustains the conclusions that: (a) Saudi Arabia imposed general anti-sympathy measures banning expressions of support toward Qatar, at least on social media, on 6 June 2017; (b) all Saudi law firms that have been approached by beIN, and by seven major football right holders, have declined to act in relation to the beoutQ matter, and it is difficult to conceive of any plausible explanation of why beIN and foreign right holders would be unable to obtain any legal representation in Saudi Arabia in relation to beoutQ – an entity engaged in high-profile piracy that has been the subject of global condemnation – if not for some form of government instruction, direction or guidance; and (c) Qatar provided two other examples of Saudi authorities actively seeking to influence right holders or a law firm in their arrangements with beIN.

7.73. … [T]he Panel considers that Qatar has demonstrated that Saudi Arabia has taken “anti-sympathy measures” that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals.

7.94. … [T]he Panel finds that Saudi Arabia has imposed certain restrictions that could impact beIN’s ability to access civil enforcement procedures. These include the 19 June
2017 Circular, the travel restrictions and the Ministerial approval requirement. However, there is no evidence that any of these measures has yet been applied to beIN to prevent it from accessing civil enforcement procedures. The Panel considers that it would be an exercise in speculation to predict how those requirements might be applied to restrict beIN's access to civil enforcement procedures.

7.95. The Panel concludes that Qatar has not discharged its burden of proving that the 19 June 2017 Circular, the travel restrictions and the Ministerial approval requirement, taken individually or collectively, have prevented, or would prevent, beIN from accessing civil enforcement procedures before Saudi courts and tribunals. However, the Panel concludes that Qatar has established that Saudi Arabia has taken “anti-sympathy measures” that, directly or indirectly, have had the result of preventing beIN from securing legal representation to enforce its IP rights.

7.2.3.3 Non-application of criminal procedures and penalties

7.2.3.3.1 Introduction

7.96. The Panel now turns to the question of whether sufficient evidence has been provided to establish that beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia. This issue is central to Qatar’s claim under Article 61 of the TRIPS Agreement, and it is disputed between the parties. Saudi Arabia maintained that Members cannot be expected to act on criminal allegations without evidence and without the cooperation of concerned right holders. Saudi Arabia reiterated that criminal procedures and penalties were not applied against beoutQ, because beIN and other foreign right holders have not provided sufficient supporting evidence and cooperation. Qatar asserted that “it could not be for lack of sufficient evidence that Saudi Arabia has failed to initiate procedures and penalties against the beoutQ piracy.”

7.2.3.3.7 Overall assessment

7.155. The Panel considers that the evidence which was provided to Saudi authorities by beIN and other third-party right holders, and which has now been corroborated and supplemented by further evidence submitted to the Panel, supports Qatar’s assertions that: (a) beoutQ’s piracy was promoted by prominent Saudi nationals; (b) beoutQ targets the Saudi market; (c) beoutQ’s pirate broadcasts are transmitted via Arabsat satellite frequencies; and (d) beoutQ has received assistance from a Saudi content distributor in delivering its pirated broadcasts to Saudi consumers. … [T]he Panel considers that Qatar has established a prima facie case that beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia.

7.2.3.4 Public screenings of beoutQ’s broadcasts

7.157. The Panel now turns to Saudi Arabia’s alleged promotion of public gatherings with screenings of beoutQ’s unauthorized broadcasts of some 2018 World Cup matches. …
7.163. … [T]he Panel concludes that Saudi Arabia promoted public gatherings with screenings of beoutQ’s unauthorized [i.e., pirated] broadcasts of 2018 World Cup matches.

7.2.4 Conclusion

7.164. The Panel concludes that although Qatar did not demonstrate the existence of formal legal restrictions being applied to prevent beIN from accessing civil enforcement procedures, Qatar otherwise established that the non-initiation of civil enforcement procedures against beoutQ before Saudi tribunals by beIN, the non-application of criminal procedures or penalties against beoutQ by the Government of Saudi Arabia and the public screening of beoutQ’s illegal broadcasts of 2018 World Cup matches in Saudi Arabia are all the result of acts and omissions attributable to Saudi Arabia.

7.3 Claims under Parts I, II and III of the TRIPs Agreement

... 7.3.3 Assessment by the Panel

7.3.3.1 Order of Analysis

7.180. The parties do not dispute that the text of the Saudi Copyright Law and Implementing Regulations provide for all of the exclusive rights set forth in Part II of the TRIPs Agreement that are relevant to the dispute. The Panel therefore considers Qatar’s claims fall more squarely under the enforcement obligations in Part III of the TRIPs Agreement.

7.3.3.2 Claims under Article 42 of the TRIPs Agreement regarding civil and administrative procedures and remedies, and Article 41:1 on general obligations

7.3.3.2.1 Applicable legal standard

7.182. Article 41 constitutes Section 1, entitled “General Obligations,” of Part III of the TRIPs Agreement. Article 41:1 reads as follows:

Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

... 7.184. Article 42, entitled “Fair and Equitable Procedures,” is part of Section 2, entitled “Civil and Administrative Procedures and Remedies,” of Part III of the TRIPs Agreement. Article 42 reads as follows:
Members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

7.185. Article 42 is part of Section 2, which deals with civil and administrative procedures and remedies. Article 42 details specific requirements in respect of “civil judicial procedures” concerning the enforcement of any IP rights to ensure that such procedures are “fair and equitable.” The Appellate Body has noted that, “[l]ike Section 1 of Part III, Section 2 introduces an international minimum standard which Members are bound to implement in their domestic legislation.” [Here the Panel cited WTO Appellate Body Report, United States – Section 211 Omnibus Appropriations Act of 1998, WT/DS176/AB/R ¶ 207 (adopted 1 February 2002) (hereinafter, 2002 Section 211 Appellate Body Report).]

7.186. Footnote 11 to Article 42 clarifies that, for the purpose of Part III, the term “right holder” includes federations and associations having legal standing to assert such rights. The Appellate Body has noted that the term “right holders” within the meaning of Article 42 “includes persons who claim to have legal standing to assert rights.” [Here the Panel cited the 2002 Section 211 Appellate Body Report, ¶ 217.]

7.187. The basic obligation in the first sentence of Article 42 is that Members shall “make available” to “right holders” “civil judicial procedures” concerning the enforcement of any IP right covered by the TRIPs Agreement. The Appellate Body has elaborated that “[m]aking something available means making it ‘obtainable,’ putting it ‘within one’s reach’ and ‘at one’s disposal’ in a way that has sufficient force or efficacy” [here the Panel cited the 2002 Section 211 Appellate Body Report, ¶ 215, which referred to The New Shorter Oxford English Dictionary, L. Brown (ed.), (Clarendon Press, 1993), Vol. I, p. 154]; therefore, “the ordinary meaning of the term ‘make available’ suggests that ‘right holders’ are entitled under Article 42 to have access to civil judicial procedures that are effective in bringing about the enforcement of their rights covered by the Agreement.” [Here the Panel cited id., ¶ 215 (Emphasis added.)]
sporting competitions in the MENA region, including in Saudi Arabia. The rights to broadcast this content have been licensed on a territorial basis, and beIN holds exclusive rights to broadcast in the territory of Saudi Arabia.

7.191. The Panel considers that it is also clear that sports broadcasts of the type that beIN has been licensed to distribute constitute protected “works” under the provisions of the Berne Convention (1971) as incorporated into the TRIPs Agreement, and are covered by the definition of “Audio-Visual Work” under Article 1 of Saudi Arabia’s Copyright Law, or otherwise protected under the Copyright Law. …[T]here is no disagreement between the parties on this issue.

7.192. In addition, beIN generally owns the copyright in any match/event commentary produced by beIN, as well as studio programming such as interviews, beIN logos and musical works. beIN also owns the related rights conferred on broadcasting organizations, including the right to prohibit unauthorized fixations, reproductions of fixations and rebroadcasting by wireless means of broadcasts, as well as communications to the public of television broadcasts of the same. In some instances, beIN had the right to take action under the Saudi Copyright Law in respect of an infringed copyright work or related right where beIN is not the owner of that right.

7.194. The Panel has found that Saudi Arabia has taken measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals. Given that beIN is a right holder for purposes of Article 42 of the TRIPs Agreement, it follows that Saudi Arabia has acted inconsistently with the specific requirement, in the third sentence of Article 42, that parties “shall be allowed to be represented by independent legal counsel.”

7.3.3.2.3 Conclusion

7.199. The Panel concludes that Saudi Arabia has acted in a manner inconsistent with Article 42 and Article 41:1 of the TRIPs Agreement by taking measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals.

7.3.3 Claim under Article 61 of the TRIPs Agreement regarding criminal procedures

7.3.3.1 Applicable legal standard

7.200. Article 61, which constitutes Section 5, entitled Criminal Procedures,” of Part III of the TRIPs Agreement, reads as follows:

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a
commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.

7.201. Qatar’s claim is directed at the obligation in the first sentence of Article 61 that Members “shall provide for criminal procedures and penalties to be applied at least in cases of wilful … copyright piracy on a commercial scale.”


7.3.3.3.2 Application to the facts

7.214 In the Panel’s view, the conduct of beoutQ amounts to “wilful … copyright piracy on a commercial scale.”

7.215. … beoutQ has engaged in “copyright piracy on a commercial scale.” It initially streamed pirated content online, and then expanded to the retail sale of beoutQ-branded STBs throughout Saudi Arabia and other countries. These STBs receive satellite broadcasts of pirated content and, as discussed further below, they also provide access to IPTV applications offering thousands of pirated movies, TV shows and TV channels around the globe. There are reports that beoutQ STBs and subscriptions have been widely available in Saudi retail outlets since the autumn of 2017. In addition to generating revenue through sales of STBs and subscriptions, beoutQ allegedly sells advertising slots on its 10 pirated channels, and publishes its advertising rates in Saudi riyals on its website (e.g., Premier League “gold packages” for advertising priced at SAR 2,500,000 or approximately U.S.D 666,638). beoutQ has promoted its pirated streams on a variety of social media platforms, including Facebook, Instagram and Twitter. While the focus of beoutQ’s broadcasting activities was initially on sports content, it has expanded to cover the most popular movies and television programming in the world.

7.217. The Panel considers that beoutQ’s conduct is properly characterized as “wilful,” taking into account “the infringer’s intent.” An entity such as beoutQ, whose sole operation consists of providing illegally pirated content and does so on a commercial scale, is not infringing on third-party copyright in a manner that could be characterized as unintentional, accidental, or inadvertent.

7.218. Turning next to the question of whether Saudi Arabia has “provide[d] for criminal procedures and penalties to be applied” to beoutQ’s commercial-scale piracy, Saudi Arabia
has not identified any such action. Rather, Saudi Arabia argued that its authorities have taken no such action because they have received “no credible evidence.”

7.219. The Panel has found that Qatar has established a *prima facie* case that beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia. The Panel has also found that beIN and other foreign right holders repeatedly sent detailed information to the Saudi authorities to inform them of beoutQ’s alleged piracy, and the extensive evidentiary basis for concluding that beoutQ is operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia. Additionally, the Panel has found that, while taking no action to apply criminal procedures and penalties to beoutQ, Saudi authorities engaged in the promotion of public gatherings with screenings of beoutQ’s unauthorized broadcasts of 2018 World Cup matches.

7.3.3.3 Conclusion

7.221. … [T]he Panel concludes that Qatar has discharged its burden of establishing that, notwithstanding that Saudi Arabia's written law may provide for criminal penalties and procedures to be applied to cases of wilful copyright piracy on a commercial scale, its authorities have acted inconsistently with the obligation in the first sentence of Article 61 to “provide for criminal procedures and penalties to be applied” to the operations of beoutQ. The Panel therefore concludes that Saudi Arabia has acted inconsistently with Article 61 of the *TRIPs Agreement*.

7.4 Saudi Arabia’s invocation of Article 73(b)(iii) of the *TRIPs Agreement*

7.4.1 Introduction

7.229. Saudi Arabia has invoked the security exception in Article 73(b)(iii) of the *TRIPs Agreement*. …[T]he Panel will determine whether the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals (i.e., the anti-sympathy measures), and/or Saudi Arabia's refusal to provide for criminal procedures and penalties to be applied to beoutQ, constitute “action which it considers necessary for the protection of its essential security interests … taken in time of war or other national emergency international relations.”

7.230. Article XXI(b)(iii) of the GATT 1994, which is identical to Article 73(b)(iii) of the *TRIPs Agreement*, was recently addressed by the Panel in *Russia – Measures Concerning Traffic in Transit*. [See WTO Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS/512/R (issued 5 April 2019, adopted 26 April 2019, not appealed), www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm. This Report is discussed in a separate Chapter.] It held that a Panel must determine for itself whether the invoking Member’s actions were “taken in time of war or other emergency in international relations” in Sub-Paragraph (iii) of Article XXI(b) of the GATT 1994. It further found that a Panel’s review of whether the invoking Member’s actions are ones “which it considers necessary
for the protection of its essential security interests” under the *chapeau* of Article XXI(b) … requires an assessment of whether the invoking Member has articulated the “essential security interests” that it considers the measures at issue are necessary to protect, along with a further assessment of whether the measures are so remote from, or unrelated to, the “emergency in international relations” as to make it implausible that the invoking Member implemented the measures for the protection of its “essential security interests” arising out of the emergency. According to the Panel in *Russia – Traffic in Transit*, the obligation of a Member to interpret and apply Article XXI(b)(iii) … in “good faith” requires “that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, *i.e.*, that they are not implausible as measures protective of these interests.”

7.231. In this dispute, both parties interpreted Article 73(b)(iii) of the *TRIPS Agreement* by reference to, and consistently with, the interpretation of Article XXI(b)(iii) of the GATT 1994 developed by the Panel in *Russia – Traffic in Transit*. However, the parties’ arguments reveal divergent views on three fundamental issues pertaining to the applicability of the security exception in Article 73(b)(iii) to the facts and measures at issue: (a) whether there is an “emergency in international relations” in the sense of Sub-Paragraph (iii) of Article 73(b); (b) whether Saudi Arabia has articulated its “essential security interests” with sufficient clarity and precision; and (c) whether – and, if so, how – the measures that Saudi Arabia characterizes as the “action which it considers necessary for the protection of its essential security interests” under the *chapeau* of Article 73(b) relate to any of the specific measures challenged by Qatar in this dispute.

7.4.2 Arguments

7.4.2.1 Saudi Arabia

7.232. Saudi Arabia submitted that the Panel should find that an “emergency in international relations” exists in the sense of Article 73(b)(iii) on the basis that it has “severed all diplomatic and economic ties with the complaining Member, which is the ultimate State expression of the existence of an emergency in international relations.” Saudi Arabia also submitted that “[t]he existence of an emergency in international relations has been recognized by other countries which have applied similar measures against the complaining Party.” It referenced Qatar’s alleged repudiation of the *Riyadh Agreements* concluded between the GCC members and alleged interference in other countries in the region. Saudi Arabia asserted that its action was taken “in time of” the emergency because it severed all diplomatic and consular relations with Qatar on 5 June 2017, following Qatar’s repudiation of the *Riyadh Agreements* and Qatar’s continued actions that those agreements identified as threats to the security and stability of GCC members. According to Saudi Arabia, the emergency in international relations “has persisted since June 2017.”

7.233. … Saudi Arabia articulated its “essential security interests” generally in terms of protecting itself “from the dangers of terrorism and extremism.” Thus, it stated that “one of its principal essential security interests” is “the elimination of the extremism and terrorism that have led to instability and conflict in [their] region” and that the “essential
security interest” in question is “the protection of Saudi citizens, territory, and government from terrorism and extremism.” … Saudi Arabia reiterated that it “has always defined its ‘essential security interest’ as carrying out its central sovereign duty of protecting Saudi citizens and population, government institutions, and territory from the threats of terrorism and extremism, which have led to war, instability, and general unrest in our region.”

7.234. In the context of its invocation of Article 73(b)(iii) Saudi Arabia focused on its “comprehensive measures” taken on 5 June 2017, and on its consequent refusal to engage directly or indirectly with Qatar in this dispute.

7.4.2.2 Qatar

7.235. Qatar disagreed with the arguments raised by Saudi Arabia concerning the existence of an “emergency in international relations” in this case, submitting that: Saudi Arabia’s allegations regarding the events leading up to the severance of relations in June 2017 are unsupported, and also pointed to a “mere political or economic” dispute, which is not sufficient to constitute an emergency; to the extent that Saudi Arabia argued that the severance of all diplomatic and economic ties in June 2017 itself precipitated an “emergency” that justifies the same severance of all diplomatic and economic ties, the argument is illogical and would render the condition set forth in Article 73(b)(iii) redundant. In Qatar’s view no "emergency" in international relations prevails today, and the two countries cooperate in various fora.

7.236. Qatar submitted that Saudi Arabia has not identified its “essential security interests” with sufficient clarity or precision, and that its articulation of its essential security interests “lacks veracity.” In its view, Saudi Arabia’s apparent interests “are communicated in the most abstract of terms.” That is problematic, Qatar asserts, because the present dispute is distant from the “hard core” of war, and therefore the Member invoking Article 73(b) “must articulate its interest with an appropriate degree of clarity and precision to demonstrate their veracity, so as to demonstrate that they are true and not a disguise for pursuit of other objectives.” Qatar doubted the veracity of any security interests in connection with the measures at issue, because in its view those measures bear no relation to such interests. Qatar asserted that Saudi Arabia’s actions are in fact motivated by the objective of promoting the growth of its own media industry, and submitted that a Member is not permitted to invoke the security defence merely by labelling commercial interests as security interests.

7.237. Qatar further submitted that the measures at issue are not plausibly connected to Saudi Arabia’s essential security interests. In response to Saudi Arabia’s submissions about what constitutes the “action” that it considers “necessary to protect its essential security interests” in the sense of the chaapeau of Article 73(b) of the TRIPs Agreement, Qatar set out its understanding that Saudi Arabia has not actually invoked Article 73(b) with respect to the measures at issue. In the light of Saudi Arabia’s statements that it is not invoking Article 73 in respect of any of the six measures challenged by Qatar other than the travel restrictions, Qatar submitted that the Panel “cannot uphold the defense in respect of the measures that the respondent affirmatively asserts were not considered necessary for
7.4.3.1 Applicable legal standard

7.241. … [T]he wording of Article 73(b)(iii) of the TRIPS Agreement is identical to that of Article XXI(b)(iii) of the GATT 1994, which was first interpreted by the Panel in *Russia – Traffic in Transit*. The Panel’s interpretation of Article XXI(b)(iii) in that dispute gave rise to an analytical framework that can guide the assessment of whether a respondent has properly invoked Article XXI(b)(iii) of the GATT 1994, or, for the purposes of this dispute, Article 73(b)(iii) of the TRIPS Agreement.

7.242. Specifically, a Panel may proceed by assessing:

a. whether the existence of a “war or other emergency in international relations” has been established in the sense of Sub-Paragraph (iii) to Article 73(b);

b. whether the relevant actions were “taken in time of” that war or other emergency in international relations;

c. whether the invoking Member has articulated its relevant “essential security interests” sufficiently to enable an assessment of whether there is any link between those actions and the protection of its essential security interests; and

d. whether the relevant actions are so remote from, or unrelated to, the “emergency in international relations” as to make it implausible that the invoking Member considers those actions to be necessary for the protection of its essential security interests arising out of the emergency.

7.243. The parties in this dispute and multiple third parties each express agreement with the general interpretation and analytical framework enunciated by the Panel in *Russia – Traffic in Transit*. [There were 19 third parties in the Saudi-Qatari case were Australia, Bahrain, Brazil, Canada, China, EU, India, Japan, Korea, Mexico, Norway, Russia, Singapore, Taiwan (Chinese Taipei), Turkey, Ukraine, UAE, U.S., and Yemen.] These parties and third parties therefore considered that both can be transposed to Article 73(b)(iii) of the TRIPS Agreement.

…
7.245. … For the Panel, while “political” and “economic” conflicts could sometimes be considered “urgent” and “serious” in a political sense, such conflicts will not be “emergenc[ies] in international relations” within the meaning of Sub-Paragraph (iii) “unless they give rise to defence and military interests, or maintenance of law and public order interests.”

7.246. Saudi Arabia and Qatar each appeared to generally agree with the interpretation of Sub-Paragraph (iii) provided above, as both referred to the interpretations of the Panel in Russia – Traffic in Transit. Neither party stated any disagreement with any aspect of that Panel’s reasoning. Notably, Saudi Arabia agreed that the phrase “emergency in international relations” should be understood to mean “a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.” The Panel notes that the opinion of the majority of the third parties that expressed a view on this issue is consistent with that Panel’s interpretation.

7.247. Turning to the second step of the analytical framework, the Panel in Russia – Traffic in Transit examined the introductory phrase “taken in time of” in Sub-Paragraph (iii). This phrase connects the “action” referred to in the chapeau of Paragraph (b) to the phrase “emergency in international relations” in Sub-Paragraph (iii). In the Panel’s view, this introductory phrase “require[s] that the action be taken during the war or other emergency in international relations.” The connection between these two elements constitutes a “chronological concurrence [that] is also an objective fact, amenable to objective determination.”

7.248. Saudi Arabia and Qatar both appeared to generally agree, implicitly or expressly, with the Panel’s interpretation of the phrase “taken in time of.” Notably, Saudi Arabia also referred to the “temporal relation” that should exist between qualifying emergencies and related “actions.” None of the third parties expressed any disagreement with this aspect of the Panel’s interpretation.

7.249. Proceeding to the third step in the analytical framework, the Panel in Russia – Traffic in Transit concluded that a Panel would be required to assess whether a respondent has sufficiently articulated its “essential security interests” in the sense of the chapeau of Paragraph (b). The Panel noted that “essential security interests” is evidently a narrower concept than “security interests,” with the former generally concerning “those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.” For the Panel, “[t]he specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances.” For these reasons, the Panel considered that “it is left, in general, to every Member to define what it considers to be its essential security interests.”

7.250. The Panel noted, however, that a Member is not “free to elevate any concern to that of an ‘essential security interest;’” rather, “the discretion of a Member to designate particular concerns as ‘essential security interests’ is limited by its obligation to interpret
and apply Article XXI(b)(iii) of the GATT 1994 in good faith.” For the Panel, this “obligation of good faith” requires that Members not use the security exception as a means to circumvent their WTO obligations. The Panel concluded that “[i]t is therefore incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity.”

7.251. Qatar and Saudi Arabia each advanced arguments consistent with the Russia – Traffic in Transit panel's interpretation of the phrase “essential security interests.” Notably, Saudi Arabia maintained that it “has clearly articulated its determination that the application of comprehensive measures is necessary [to] protect ‘its national security from the dangers of terrorism and extremism,’ and … are [not] applied to circumvent its WTO obligations.” Most if not all of the third parties that addressed this element of the security exception expressed their agreement with one or more elements of the Panel’s interpretation reviewed above.

7.252. Moving to the fourth and final step of the analytical framework set out above, the Panel in Russia – Traffic in Transit considered the “obligation of good faith” to apply not only to the respondent’s articulation of “its essential security interests,” but also to the connection between the measures at issue and those interests. This obligation, for the Panel, is “crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests.” Specifically, a Panel must determine “whether the measures are so remote from, or unrelated to, the … emergency that it is implausible [the respondent] implemented the measures for the protection of its essential security interests arising out of the emergency.”

7.253. Saudi Arabia and Qatar each expressed basic agreement with the interpretation of the chapeau of Paragraph (b) as expressed above.

7.4.3.2 “taken in time of war or other emergency in international relations”

7.257. … [T]he reasons that follow, the Panel considers that “a situation of heightened tension or crisis” exists in the circumstances in this dispute, and is related to Saudi Arabia’s “defence or military interests, or maintenance of law and public order interests” (i.e., essential security interests), sufficient to establish the existence of an “emergency in international relations” that has persisted since at least 5 June 2017. …[I]t is the combination of the considerations that follow which sustains this conclusion, rather than any one of them being necessarily decisive in its own right.

7.261. … Article 41 of the U.N. Charter – located in Chapter VII thereof, entitled “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression” – provides that the U.N. Security Council may decide what measures, short of the use of armed force, are to be employed to give effect to its decisions. Article 41 states that these measures “may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”
7.262. Saudi Arabia’s severance of all diplomatic, consular and economic ties with Qatar, viewed in the context of similar actions taken by several other nations and the relevant history recounted … [above], falls into the category of cases in which such action can be characterized in terms of an exceptional and serious crisis in the relations between two or more States.

7.263. Second, the Panel recalls the context in which Saudi Arabia’s severance of relations with Qatar occurred. Saudi Arabia repeatedly alleged that Qatar had, inter alia, repudiated the *Riyadh Agreements* designed to address regional concerns of security and stability, supported terrorism and extremism, and interfered in the internal affairs of other countries. The Panel expresses or implies no position concerning any of these allegations, and recalls that Qatar strongly denied the various accusations made by Saudi Arabia. It suffices to observe that the nature of the allegations constitutes further evidence of the grave and serious nature of the deterioration and rupture in relations between these Members, and is also explicitly related to Saudi Arabia’s security interests. In the Panel’s view, when a group of States repeatedly accuses another of supporting terrorism and extremism, … that in and of itself reflects and contributes to a “situation … of heightened tension or crisis between them that relates to their security interests. Thus, in the light of the reasons advanced by Saudi Arabia for its actions, the Panel does not accept Qatar’s view that the events culminating in the severance of relations can be characterized as a “mere political or economic” dispute.

7.265. The Panel recalls that the “action[s]” that it must examine under the *chapeau* are the specific acts and omissions attributable to Saudi Arabia that it has found to be inconsistent with the *TRIPs Agreement*. In this case, these are: (a) the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals; and (b) Saudi Arabia’s non-application of criminal procedures and penalties to be applied to beoutQ. Qatar itself stressed that the severance of relations is distinct from the measures it is challenging.

7.268. …[T]he WTO dispute settlement system is not meant “to encourage either Panels or the Appellate Body to ‘make law’ by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute.” …[T]he Panel does not consider it necessary to rule on certain issues discussed by the parties or third parties about how a Panel should proceed in a case where it is not persuaded that an “emergency in international relations” exists, or is presented with an insufficient basis upon which to make any determination of that issue. The Panel has found, on the basis of the facts in this dispute, that an “emergency in international relations” exists in this case.

7.269. As to the second element of Sub-Paragraph (iii) of Article 73(b) of the *TRIPs Agreement*, it follows from the foregoing assessment, and in particular the Panel’s conclusion that an “emergency in international relations” has persisted since at least 5 June 2017, that the two actions that the Panel must examine under the *chapeau* of Article 73(b) were “taken in time of” the “emergency in international relations.” The measures at issue
are of a continuing nature, as opposed to acts or omissions that occurred or were completed on a particular date, and neither party has suggested that the Panel must assign any dates to them for the purposes of examining the claims and defences before the Panel. In the Panel’s view, it suffices to note that beoutQ did not commence operations until August 2017, and hence the actions to be examined under the *chapeau* were “taken in time of” the “emergency in international relations” that has persisted since at least 5 June 2017.

7.270. The Panel thus concludes that the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals (*i.e.*, anti-sympathy measures), and Saudi Arabia’s non-application of criminal procedures and penalties to be applied to beoutQ, were “taken in time of war or other emergency in international relations.”

7.4.3.3 “action which it considers necessary for the protection of its essential security interests”

7.4.3.3.1 Introduction

7.271. The Panel will now proceed with the second prong of the test under Article 73(b)(iii) of the *TRIPs Agreement*, which entails the consideration of two further issues: (a) whether Saudi Arabia has sufficiently articulated the “essential security interests” that it considers the measures at issue are necessary to protect; and (b) whether the anti-sympathy measures and/or the non-application of criminal procedures or penalties are so remote from, or unrelated to, the “emergency in international relations” as to make it implausible that the invoking Member implemented the measures for the protection of its “essential security interests” arising out of the emergency.

7.4.3.3.2 The “actions” covered by Saudi Arabia’s invocation of Article 73(b)(iii)

7.273. … Saudi Arabia’s arguments under Article 73(b)(iii) of the *TRIPs Agreement* focus on its “comprehensive measures” taken on 5 June 2017. This led Qatar to repeatedly state that these “actions” are not the measures that it is challenging, and to argue that Saudi Arabia has therefore not actually invoked any defence under Article 73(b) with respect to the specific measures at issue in this dispute.

7.274. … Saudi Arabia stated that it has “properly invoked the Security Exception in Article 73(b)(iii) of the *TRIPs Agreement*” and the consequence of that, according to Saudi Arabia, is that the Panel “should decline to proceed further in this dispute because a WTO dispute settlement panel is not capable of resolving the national security matter at issue.” … Saudi Arabia stated that it “has established that its invocation of the Security Exceptions under Article 73 of the *TRIPs Agreement* is justified and that no additional findings be made in this dispute.” In short, according to Saudi Arabia, the effect of its invocation of Article 73 was that no further findings can be made in this dispute and thus Article 73 operated to end the case. On that basis, the invocation of Article 73 was an invocation of
the Security Exception in respect of, and which applied to, the entire matter before the Panel.

7.276. … Saudi Arabia invoked Article 73 in respect of, and as applied to, the entire matter before the Panel, and was not directing its invocation at the specific measures identified by Qatar. The Panel notes that, given that Saudi Arabia denied that some of the measures identified by Qatar existed in fact, it would have been contradictory for Saudi Arabia to say that it had invoked Article 73 specifically in respect of measures whose existence it denied.

7.278. … [T]he Panel concludes that the “actions” covered by Saudi Arabia's invocation of Article 73(b)(iii) of the TRIPs Agreement include the anti-sympathy measures and the non-application of criminal procedures and penalties to beoutQ.

7.4.3.3.3 Saudi Arabia’s articulation of its “essential security interests”

7.280. First, Saudi Arabia has expressly articulated its “essential security interests,” in terms of protecting itself “from the dangers of terrorism and extremism.” Thus, the situation in this case contrasts to the situation that arose in Russia – Traffic in Transit, in which the respondent appeared not to expressly articulate its essential security interests at all. Second, the interests identified by Saudi Arabia are ones that clearly “relat[e] to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.”

7.281. Although Qatar argued that Saudi Arabia's formulations of its essential security interests are “vague” or “imprecise,” the Panel sees no basis in the text of Article 73(b)(iii), or otherwise, for demanding greater precision than that which has been presented by Saudi Arabia. The Panel recalls that, in Russia – Traffic in Transit, the standard applied to the invoking Member was whether its articulation of its essential security interests was “minimally satisfactory” in the circumstances. The requirement that an invoking Member articulate its “essential security interests” sufficiently to enable an assessment of whether the challenged measures are related to those interests is not a particularly onerous one, and is appropriately subject to limited review by a Panel. The reason is that this analytical step serves primarily to provide a benchmark against which to examine the “action” under the chapeau of Article 73(b). That is, this analytical step enables an assessment by the Panel of whether either of the challenged measures found to be inconsistent with the TRIPs Agreement is plausibly connected to the protection of those essential security interests.

7.282. … [T]he Panel concludes that Saudi Arabia’s articulation of its relevant “essential security interests” is sufficient to enable an assessment of whether there is any link between the relevant actions and the protection of its essential security interests.

7.4.3.3.4 The connection between the measures and the essential security interests

…
7.284. ...Saudi Arabia’s position in this dispute is that it seeks to protect Saudi citizens and the Saudi population, Saudi government institutions, and the territory of Saudi Arabia from the threats of terrorism and extremism. One of the means through which Saudi Arabia seeks to protect these essential security interests is by ending any direct or indirect interaction between Saudi Arabia and Qatar, extending to their respective populations and institutions. An action that Saudi Arabia has taken for this purpose is to refuse to interact with Qatar in the context of WTO dispute settlement proceedings. Another is to end or prevent any direct or indirect interaction or contact between Saudi Arabian and Qatari nationals.

...  

7.288. For these reasons, the Panel considers that the anti-sympathy measures “meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e., that they are not implausible as measures protective of these interests.”

7.289. In the Panel’s view, however, the same conclusion cannot be reached regarding the connection between Saudi Arabia’s stated essential security interests and its authorities’ non-application of criminal procedures and penalties to beoutQ. In contrast to the anti-sympathy measures, which might be viewed as an aspect of Saudi Arabia’s umbrella policy of ending or preventing any form of interaction with Qatari nationals, the Panel is unable to discern any basis for concluding that the application of criminal procedures or penalties to beoutQ would require any entity in Saudi Arabia to engage in any form of interaction with beIN or any other Qatari national.

...  

7.293. The Panel concludes that the non-application of criminal procedures and penalties to beoutQ does not have any relationship to Saudi Arabia’s policy of ending or preventing any form of interaction with Qatari nationals. Therefore, the Saudi authorities’ non-application of criminal procedures and penalties to beoutQ is so remote from, or unrelated to, the “emergency in international relations” as to make it implausible that Saudi Arabia implemented these measures for the protection of its “essential security interests.” As a consequence, the Panel concludes that the non-application of criminal procedures and penalties to beoutQ does not “meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e., that they are not implausible as measures protective of these interests.”

7.4.4 Conclusion

7.294. ...[T]he Panel finds that the requirements for invoking Article 73(b)(iii) are met in relation to the inconsistency with Article 42 and Article 41:1 of the TRIPs Agreement arising from the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals. The Panel also finds that the requirements for invoking Article 73(b)(iii) are not met in relation to the inconsistency with Article 61 of the TRIPs Agreement arising from Saudi Arabia's non-application of criminal procedures and penalties to beoutQ.

8. Conclusions and Recommendations
8.1. … [T]he Panel concludes as follows:

a. The Panel has no discretion to decline to make any findings or recommendation in the case that has been brought before it.

b. With respect to Qatar's claims under Parts I, II and III of the TRIPs Agreement:

i. Qatar has established that Saudi Arabia has taken measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals, and thus Saudi Arabia has acted in a manner inconsistent with Article 42 and Article 41:1 of the TRIPs Agreement;

ii. Qatar has established that Saudi Arabia has not provided for criminal procedures and penalties to be applied to beoutQ despite the evidence establishing prima facie that beoutQ is operated by individuals or entities under the jurisdiction of Saudi Arabia, and thus Saudi Arabia has acted inconsistently with Article 61 of the TRIPs Agreement;

…

c. With respect to Saudi Arabia’s invocation of the security exception in Article 73(b)(iii) of the TRIPs Agreement:

i. the requirements for invoking Article 73(b)(iii) are met in relation to the inconsistency with Article 42 and Article 41:1 of the TRIPs Agreement arising from the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals; and

ii. the requirements for invoking Article 73(b)(iii) are not met in relation to the inconsistency with Article 61 of the TRIPs Agreement arising from Saudi Arabia’s non-application of criminal procedures and penalties to beoutQ.

8.3. … [T]he Panel recommends that Saudi Arabia bring its measures into conformity with its obligations under the TRIPs Agreement.

III. Who Won the June 2020 Saudi-Qatari Case?

Who won the June 2020 Saudi-Qatari IP case? On the one hand, Qatar did. As per Paragraph 8:1(b) of the 125-paged Panel Report, Qatar prevailed on its substantive claims, proving the Kingdom violated the IPRs it was obliged to provide to beIN under Articles 42
and 41:1 of the TRIPs Agreement. Qatar also defeated one of the instances in which the Kingdom invoked the Article 73(b)(iii) national security provision: that defense worked with respect to beIN, as per Paragraph 8.1(c)(i), but not beoutQ, as per Paragraph 8.1(c)(ii). That was because Saudi Arabia would have to deal with Qatari interests as to beIN, as it was a Qatari media group), which could imperil Saudi security. But, Saudi Arabia would not have to deal with Qatar if it prosecuted beoutQ for infringing on beIN’s IPRs, because beoutQ was subject to the Kingdom’s jurisdiction.

Qatar defeating the Saudi invocation of Article 73 with respect to beoutQ was the first time in the history of GATT-WTO jurisprudence an adjudicatory body ruled against a respondent invoking a national security provision as a defense against its violation of a multilateral trade rule. With that defeat, Saudi Arabia was under an international legal obligation to prosecute criminally beoutQ. The Kingdom was supposed to allow Qatar to have legal representation before Saudi courts (as per Articles 42 and 41:1) and stop any unauthorized broadcasting from Saudi soil (as per the partial failure of the Article 73(b)(iii) defense). Moreover, the length to which Saudi Arabia went to strike at Qatar, namely, intentionally violating the TRIPs Agreement, sullied the Kingdom’s efforts to develop a reputation for business-friendliness and adherence to the rule of law. It continued to be what it had been since King Abdulaziz bin Abdul-Rahman bin Faisal (i.e., Ibn Saud, 1876-1953, reigned 1902-1953) – an absolute monarchy.

On the other hand, Saudi Arabia won. Without ever dealing directly with Qatar, it brought to the attention of the WTO its allegations of Qatar’s nefarious foreign policy that threatened regional peace. Qatar, in the Kingdom’s view, was no longer interested in adhering to the November 2013 First Riyadh Agreement, April 2017 Mechanism Implementing the Riyadh Agreement, or November 2014 Supplementary Riyadh Agreement. And, by appealing to the Appellate Body, the Kingdom effectively “deep sixed” its defeat concerning beoutQ, because that Body ceased to function in December 2019 (as discussed in a separate Chapter). In the meantime, there was no effective way Qatar could retaliate. The two WTO Members had no ties whatsoever since 5 June 2017.

In December 2020, a tentative deal – an agreement in principle that had yet to be memorialized in writing – between the Kingdom and Qatar apparently was reached, brokered by the U.S. and Kuwait. See Ghaida Ghantous & Crispian Balmer, Saudi Arabia Says Resolution of Gulf Dispute Within Reach, REUTERS, 4 December 2020, www.reuters.com/article/us-gulf-qatar/kuwait-qatar-flag-movement-on-resolving-gulf-row-idUSKBN28E12M (reporting “Doha had been set 13 demands, ranging from closing Al Jazeera television and shuttering a Turkish base to cutting links to the Muslim Brotherhood and downgrading ties with Iran, which shares a significant gas field with Qatar.”); Andrew England, Derek Brower, Simeon Kerr & Katrina Manson, Saudi Arabia Seeks to Resolve Qatar Crisis as “Gift” to Joe Biden, FINANCIAL TIMES, 27 November 2020, www.ft.com/content/ae7e041f-f4b-4df7-8b2b-06488e17a91e?shareType=nongift (hypothesizing that “[t]he move to end the Gulf states’ blockade of their gas-rich neighbor [Qatar] is being perceived as an attempt by Crown Prince Mohammed bin Salman to curry favor with the incoming Biden Administration and deliver a parting present to Mr Trump,” and observing that “[a]fter imposing the embargo, Riyadh and Abu Dhabi presented Doha with an extraordinary list of 13 demands that included closing Al Jazeera, curbing Doha’s relations with Iran and closing a Turkish military base,” “[b]ut … Kuwaiti mediators had secured a new deal to replace the 13 terms to ‘pave way for a kiss and make up,’ according to U.S. National Security Advisor Richard O’Brien”).
Perhaps both sides, and all WTO Members, lost, if the criterion for success is that national security provisions in GATT Article XXI, GATS Article Article XIV:1 *bis*, and TRIPs Agreement Article 73 should be self-judging. Perhaps, too, the trading system lost if what actually underlay the Saudi-Qatari dispute was regional rivalry between the Kingdom and Iran, which in turn reflected an historic *Sunni-Shī‘ite* schism that dated as far back as 632 A.D. when the Prophet Muhammad (PBUH) died, or 680 A.D., when the Battle of Karbala occurred.\(^{68}\)

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GATT-WTO NATIONAL SECURITY JURISPRUDENCE (CONTINUED):
2022 CHINA SECTION 232 AND CHINA-HONG KONG LABELLING CASES

I. GATT Article XXI and 2022 WTO Section 232 Cases (China):
Overview

In its 84-page Report (excerpted below), a WTO Panel held the U.S. Section 232 25% and 10% duties on steel, aluminum, and derivative products violated America’s tariff binding under GATT Article II:1(a)-(b), and the country exemptions America granted to Australia, Argentina, Brazil, Korea, and to Canada and Mexico, without extending them immediately and unconditionally to all other WTO Members, violated America’s MFN obligation under GATT Article I:1. It exercised judicial economy concerning Article X. And, it said the Safeguards Agreement was irrelevant to the case.

Documents References:
(1) Havana (ITO) Charter Preamble, Article 99
(2) GATT Article XXI
(3) Relevant provisions in FTAs

Specifically, in Paragraph 8:1 of its Report, the Panel stated:

a. Regarding China’s claims under Article II of the GATT 1994:
   i. the additional duties of 25% on steel products and 10% on aluminium products do not accord the treatment provided for in the United States’ Schedule, contrary to Article II:1(b) and Article II:1(a) …;
   ii. the additional duty of 50% on steel products from Türkiye does not accord the treatment provided for in the United States’ Schedule, contrary to Article II:1(b) and Article II:1(a) …; and
   iii. the additional duties of 25% on derivative steel products and 10% on derivative aluminium products do not accord the treatment provided for in the United States’ Schedule, contrary to Article II:1(b) and Article II:1(a) ….

b. Regarding China’s claims under Article I of the GATT 1994:
   i. the country exemptions for steel and aluminium products confer an advantage to products from Australia, Argentina, Brazil, and the Republic of Korea that has not been accorded immediately and unconditionally to like products from all other Members, in a manner inconsistent with Article I:1 …; and
   ii. the country exemptions for derivative steel and aluminium products confer an advantage to products from Australia, Argentina, Brazil, the Republic of Korea, Canada, and Mexico that has not been accorded immediately and unconditionally to like products from all other Members, in a manner inconsistent with Article I:1 ….

c. Regarding China’s claims under Article X of the GATT 1994, the Panel does not consider it necessary to make findings on China’s claims relating to the administration of the process for excluding products from duties that have already been found inconsistent with other obligations under the GATT 1994. The Panel therefore declines to make findings regarding the claims under Article X:3(a) ….

d. Regarding China’s claims under Article XIX of the GATT 1994 and the Agreement on Safeguards, the Panel finds that the relevant measures at issue were
The Panel further held the U.S. took the Section 232 action under GATT Article XXI (national security), not under Article XIX (safeguards), hence the latter provision was irrelevant to the case. The Panel rejected America’s Article XXI(b) argument, i.e., its invocation of its “essential security interests” to justify the Section 232 measures; the Panel held these measures were not (in the language of Article XXI(b)(iii)) “taken in time of war or other emergency in international relations,” and thus the Article I:1 and II:1 violations could not be justified.

Similarly, also in December 2022, the Panel issued three parallel Reports in cases launched by Norway, Switzerland, and Turkey:


These Reports were 79, 94, and 89 pages in length, respectively. The U.S. lost these cases, too. In all three of them, the Panel findings were essentially the same as those in its Report in the case brought by China, with the additional conclusion that America’s Section 232 action violated GATT Article XI:1 (because it entailed quotas on Argentinian, Brazilian, and Korean steel and aluminum). See id., Sections 7-8 of the Norwegian, Swiss, and Turkish Reports.

Thus, along with the WTO China-Hong Kong-U.S. Labelling Panel Report, within the span of 12 days, between 9-21 December 2022, WTO Panels had asserted subject jurisdiction over GATT Article XXI matters, rejecting the American argument this defense to GATT violations was self-judging.

Immediately and unsurprisingly, the USTR was scathing in its criticism of all the Panel Reports in United States – Certain Measures on Steel and Aluminum Products (DS544, 552, 556, and 564), and intoned they would have no impact on America’s Section 232 actions:
The United States strongly rejects the flawed interpretation and conclusions in the … WTO Panel Reports … released today regarding challenges to the United States’ Section 232 measures on steel and aluminum brought by China and others. *The United States has held the clear and unequivocal position, for over 70 years, that issues of national security cannot be reviewed in WTO dispute settlement and the WTO has no authority to second-guess the ability of a WTO Member to respond to a wide-range of threats to its security.*

These WTO Panel Reports only reinforce the need to fundamentally reform the WTO dispute settlement system. The WTO has proven ineffective at stopping severe and persistent non-market excess capacity from the PRC and others that is an existential threat to market-oriented steel and aluminum sectors and a threat to U.S. national security. The WTO now suggests that the United States too must stand idly by. *The United States will not cede decision-making over its essential security to WTO Panels.*

The Biden Administration is committed to preserving U.S. national security by ensuring the long-term viability of our steel and aluminum industries, and *we do not intend to remove the Section 232 duties as a result of these disputes.*

The final sentence meant the U.S. was willing to suffer retaliation from (as it surely was unwilling to pay compensation to) China and the other winning complainants.

But, were the winners really winners? Consider the observations of the *Financial Times:*

It was a horrible decision to force a dispute Panel to make. The dispute settlement system has asserted its right to judge the use of the rationale before, in a case involving Russia and Ukraine in 2019 [excerpted above], but didn’t actually rule against the measures under question on that occasion. [That is, Russia’s GATT Article XXI defense was successful, but Russia had to acquiesce to the subject matter jurisdiction of a WTO Panel over this Article to win.]

There’s been a kind of mutual non-aggression pact among governments for decades to use the loophole very sparingly, in case it becomes a catch-all for ignoring whatever rules you want to. The U.S. forced the dispute settlement panel to choose between issuing a *carte blanche* for governments to use the exemption at will or take the politically explosive step of second-guessing Washington’s assessment of its national security needs.

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To choose the former would have looked silly – Norwegian steel is a threat to U.S. national security? – but it’s a decision it would rather not have made. You can see why the former WTO Director General, the exceedingly cautious Brazilian Roberto Azevêdo, was against national security being litigated in the WTO at all.

…

… Using Article XXI on such a flimsy pretext and calling WTO dispute settlement illegitimate for judging it is another step towards turning the world trading system back into an arrangement of security-based power relations where the big guys crush the small.72

Was the pretext “flimsy”? What old-fashioned industries are more directly related to national security than steel and aluminum?

Recall the forerunner institution of the EU was the European Steel and Coal Community, which was founded by Belgium, France, Italy, the Netherlands, and West Germany via the 1951 Treaty of Paris, and which ultimately led to the formation of the EU. The premise of the ECSC was supra-nationalism, specifically, preventing another World War by diversifying across Europe steel and coal assets, which are essential to the conduct of war. With a single common market for coal and steel, no one nation could dominate these sectors and develop a menacing military, as Nazi Germany had. If Chinese over-capacity in the steel and/or aluminum industries was spilling into international markets and provoking other countries – including Norway – to take defensive measures, then why would the U.S. not act, too?

So, was the U.S., while submitting to WTO dispute settlement on all issues not involving national security, correct to draw one red line that no international dispute settlement body ever should cross – a line Mr. Azevêdo accepted? In other words, was the victory by China and the other complainants pyrrhic? Had they won the battle testing Section 232 steel and aluminum tariffs against GATT Articles I, II, and XI, but lost the war, because they had cornered the U.S. into defiant non-compliance and thus wrought systemic damage upon the WTO and the international rule of law?

II. GATT Article XXI and 2022 WTO Section 232 Cases (China): Facts, Holdings, and Rationales

WORLD TRADE ORGANIZATION, PANEL REPORT, UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS (COMPLAINT BY CHINA), WT/DS544/R (9 DECEMBER 2022, APPEALED)73

72 Alan Beattie, WTO Judgment No One Wanted to Happen, FINANCIAL TIMES, 12 December 2022, www.ft.com/content/04b2cf59-7781-40f1-8987-f22b2284b5cd
7.8 Article XXI(b) of the GATT 1994 Introduction

7.102 The United States invokes Article XXI(b) of the GATT 1994 in relation to the measures at issue as “action[s] which [the United States] considers necessary for the protection of its essential security interests.” The Panel will address the United States’ invocation of Article XXI(b) … in relation to whether the measures found to be inconsistent with Articles I:1 and II:1 of the GATT 1994 are “actions” falling within the scope of Article XXI(b)…. 

7.103 The Panel will first address the parties’ interpretive disagreement on the extent to which the terms of Article XXI(b) of the GATT 1994 permit review of a Member’s invocation of that provision in proceedings under the DSU. In doing so, the Panel will address specific issues of interpretation contested by the parties, including the United States’ arguments as to the “self-judging” nature and “non-justiciability” of Article XXI(b) …. The Panel will then assess the evidence and arguments submitted by the parties in relation to the measures found to be inconsistent with provisions of the GATT 1994 in light of the conclusions reached regarding the interpretation of Article XXI(b)…. 

7.8.2 Interpretation of Article XXI(b) of the GATT 1994 in accordance with Article 3:2 of the DSU

7.104 Article XXI of the GATT 1994 is entitled “Security Exceptions” and provides:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
   (i) relating to fissionable materials or the materials from which they are derived;
   (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
   (iii) taken in time of war or other emergency in international relations; or
   (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

7.105 The United States submits that the Panel should limit its findings in this dispute to recognizing the invocation of Article XXI(b) because “[t]he text of [the provision], in its context and in the light of the Agreement’s object and purpose, establishes that the
exception is self-judging.” According to the United States, “[t]he self-judging nature of …
Article XXI(b) is demonstrated by that provision’s reference to actions that the Member ‘considers necessary’ for the protection of its essential security interests.” Consequently, “the only requirement for the Member invoking Article XXI is for the Member to consider that a particular action is necessary to protect its essential security interests in any of the circumstances identified in Article XXI(b).” The United States maintains that this requirement is met “once the Member indicates, in the context of dispute settlement, that it has made such a determination” that it “consider[s] one or more of the circumstances set forth in Article XXI(b) to be present.”

7.106 A premise of the United States’ characterization of Article XXI(b) as “self-judging” is that, based on “the text and grammatical structure” of the provision, “the phrase ‘which it considers’ qualifies all of the terms in the single relative clause that follows the word ‘action.’” According to the United States, this “single relative clause” in Article XXI(b) “begins with ‘which it considers necessary’ and ends at the end of each Sub-Paragraph” and “describes the situation which the Member ‘considers’ to be present when it takes such ‘action.’” The United States argues from this premise that, “[b]ecause the relative clause describing the action begins with ‘which it considers,’ the other elements of this clause are committed to the judgment of the Member taking the action.” The United States thus posits an “overall grammatical structure” of Article XXI(b) according to which a Panel may not “determine, for itself, whether a security interest is ‘essential’ to the Member in question, or whether the circumstances described in one of the Sub-Paragraphs exists.”

[A “relative clause,” also known as an “adjective clause,” is a dependent clause (i.e., it contains a subject and verb but is not a complete sentence) that modifies a noun or a noun phrase and thereby gives more information about that noun or noun phrase, thus connecting an idea to a previously mentioned point and allowing for two independent clauses to be combined into one sentence.74 Typically, a relative clause begins with a relative pronoun, such as who, whom, whose, which, or that, or a relative adverb, such as when, where, or why. A relative clause may be “restrictive” or “essential” (i.e., it defines the meaning of a noun or noun phrase and is not separated from the rest of a sentence by a comma), or “non-restrictive” or “non-essential” (i.e., it also adds information to a sentence, but uses a comma.).]

7.107 China contests the interpretive and grammatical basis of the United States’ argument and emphasizes the objective review in dispute settlement proceedings of terms in Article XXI(b) that are not qualified by the phrase “which it considers.” China thus disputes the characterization of Article XXI(b) as “self-judging” and contends that the measures are not justified under this provision based on the arguments and evidence before the Panel. … China argues that the United States’ interpretation fails to give effective meaning to the Sub-Paragraphs of Article XXI(b) and is incompatible with the

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requirements of the DSU concerning the independent review of matters raised under the covered agreements.

7.108 The Panel recalls that it is required to address the United States’ invocation of Article XXI(b) of the GATT 1994 in accordance with Article 3:2 of the DSU and the customary rules of interpretation of Public International Law. A threshold point of interpretive disagreement between the parties is the extent to which the terms of Article XXI(b) … permit review of a Member’s invocation of that provision by a Panel established under the DSU. While the parties refer to numerous aspects of treaty interpretation in relation to this question, both parties base their positions primarily on the terms of Article XXI(b) … and the rule of interpretation set out in Article 31(1) of the Vienna Convention that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms in their context and in the light of its object and purpose.” … [T]his rule of interpretation forms part of the “customary rules of interpretation of Public International Law” referred to in Article 3:2 of the DSU. Accordingly, the Panel will examine the ordinary meaning of the terms of Article XXI(b) … in their context and in light of the treaty’s object and purpose, focusing on the parties’ disagreement as to whether the terms of the provision permit review of its invocation in proceedings under the DSU.

7.109 Pursuant to the security exceptions under Article XXI of the GATT 1994, “[n]othing in this Agreement shall be construed to require” a Member “to furnish any information” described under Paragraph (a) or “to prevent” a Member “from taking any action” described under Paragraphs (b) or (c) of that provision. The three Paragraphs (a) to (c) are separated by semicolons followed by the word “or” and Article XXI concludes in a full stop at the end of Paragraph (c). Paragraph (b) of Article XXI provides that the “action” that a Member is not prevented from taking is “any action which [the Member] considers necessary for the protection of its essential security interests,” followed by three Sub-Paragraphs that are enumerated (i) to (iii). These Sub-Paragraphs are separated by semicolons and the word “or” appears after the semicolons at the end of Paragraph (a) and Sub-Paragraph (iii) of Article XXI(b).

7.110 In providing for “any action” that “[n]othing in this Agreement shall be construed … to prevent,” Article XXI(b) establishes an exception to obligations under other provisions of the GATT 1994. The “action” covered by this provision is one that a Member “considers necessary for the protection of its essential security interests.” Dictionary definitions of the term “consider” include to “regard in a certain light or aspect, look upon as” or “think or take to be.” [Covering the three WTO languages, English, French, and Spanish, the Panel cited, respectively, the Shorter OED and New Shorter OED, and Le Petit Robert Dictionnaire de la Langue Française, and Diccionario de la Lengua Española.] Under Article XXI(b), a Member must consider that its action is “necessary for” a defined purpose, namely “the protection of its essential security interests.” Dictionary definitions of “interest” include “the relation of being involved or concerned as regards potential detriment or (esp.) advantage.” The relevant interests under Article XXI(b) pertain to “security,” which may be defined as “the condition of being protected from or not exposed to danger.” The description of these security interests as “essential” indicates the heightened significance of the security interests that Members are not
prevented from taking action to protect under Article XXI(b). As indicated by the possessive pronoun “its,” the relevant “security interests” are those of the Member taking action under Article XXI(b).

[The Panel continued to cite the aforementioned lexicographic sources in this and subsequent Paragraphs of its Report. However, thus far, query why a foray into French and Spanish is necessary, given that the Panel, at Footnote 442 to Paragraph 7:112 of its Report, concludes:

To the extent that the comparison of authentic [i.e., English, French, and Spanish] texts discloses any difference in meaning under Article 33(4) of the VCLT, the Panel considers that the application of Articles 31 and 32 of the VCLT removes any such difference so as to resolve the contested issues of interpretation in this dispute. Accordingly, the Panel does not consider it necessary for the purposes of this dispute to address in further detail the parties’ arguments on the reconciliation of authentic texts in relation to the contested issues of interpretation under Article XXI(b) and its application to the measures at issue in this dispute.

Likewise, at Footnote 449 to Paragraph 7:115, the Panel states: “The Panel notes that the parties’ arguments concerning the grammar of Article XXI(b) focus on the English text of the provision, and the Panel accordingly focuses its assessment on the English text and the specific reference materials on English grammar submitted by the parties.” Overall, then, is the Panel’s discussion thus far unnecessarily tedious?]

7.111 Interpreting the terms of Article XXI(b) within the structure and context of the provision as a whole, the Panel notes the textual separation and indentation under Article XXI of the three paragraphs and a similar separation and indentation of the three Sub-Paragraphs under Paragraph (b) of Article XXI. The introductory terms of Article XXI (“Nothing in this Agreement shall be construed”) form the beginning of a sentence with three alternative endings to this sentence in each of the Paragraphs (a) to (c). Under Paragraph (b) of Article XXI, the enumerated Sub-Paragraphs (i) to (iii) are alternative endings to the sentence following the terms “any action which it considers necessary for the protection of its essential security interests.” The punctuation and conjunctions linking these various parts of Article XXI serve the function of listing the alternative endings to the provision. These considerations indicate that Article XXI(b) forms part of, and provides in its own Sub-Paragraphs, a list of alternative endings to form a sentence. Therefore, Article XXI(b) is to be given meaning as a complete sentence with the enumerated Sub-Paragraphs (i) to (iii) representing alternative endings to the sentence that begins “Nothing in this Agreement shall be construed.”

[Again, are not the points in here, and in Paragraph 7:112, obvious?]

7.112 In continuation of the sentence formed under Article XXI(b), Sub-Paragraphs (i) and (ii) begin with the terms “relating to” and Sub-Paragraph (iii) begins with the terms “taken in time of.” The terms “relating to” indicate a connection to the “materials” and
“traffic” in Sub-Paragraphs (i) and (ii), respectively, while the terms “taken in time of” indicate a temporal relationship to the circumstances in Sub-Paragraph (iii). The Panel understands these opening terms in each Sub-Paragraph to qualify and describe the “action” referred to in Article XXI(b). This is confirmed in the French and Spanish versions of Article XXI(b) in which the corresponding terms (“se rapportant” and “appliquées” in French and “relativas” and “aplicadas” in Spanish) qualify nouns that are feminine and plural translations of “any action” (“toutes mesures” in French and “todas las medidas” in Spanish). The relation of the opening terms of each Sub-Paragraph to the “action” in Article XXI(b) is further supported by their parallel positioning in the text and their common function of linking the remaining terms of each Sub-Paragraph to those in Paragraph (b).

7.113 As a result, Article XXI(b) applies to actions “relating to” the “materials” and “traffic” described in Sub-Paragraphs (i) and (ii), respectively, and to actions “taken in time of” the circumstances referred to in Sub-Paragraph (iii). These Sub-Paragraphs provide alternative endings that are an integral part of complete sentences formed under Article XXI(b). Moreover, there is no textual indication that the sentence endings in the Sub-Paragraphs of Article XXI(b) are merely illustrative or that Article XXI(b) may apply to actions other than those described in the Sub-Paragraphs. These considerations indicate that the Sub-Paragraphs are exhaustive in establishing the circumstances in which a Member may take the “action which it considers necessary for the protection of its essential security interests” within the meaning of Article XXI(b).

[The last two sentences of Paragraph 7.113 seem to be the first important observations, namely, that the list in Article XXI(b) is exclusive.]

7.114 Regarding the discretion of Members taking “action” under Article XXI(b), the parties acknowledge the deference accorded to a Member’s judgment for “any action which it considers necessary for the protection of its essential security interests.” The terms “which it considers” denote the consideration or judgment of the Member taking action under Article XXI(b), which is further reinforced by providing that the Member shall not be prevented from taking “any” action within the terms of the provision. Regarding the extent of discretion accorded by the terms “which it considers,” the parties disagree as to what precisely in Article XXI(b) is qualified by these terms and the implications of such qualification for the review of a Member’s invocation of Article XXI(b) in dispute settlement proceedings. In particular, the parties dispute whether the three enumerated Sub-Paragraphs (i) to (iii) of Article XXI(b) are qualified by the terms “which it considers” and, relatedly, how to interpret those Sub-Paragraphs in accordance with the requirements of the DSU. A specific question in this regard is whether, as argued by the United States and contested by China, the clause beginning with the relative pronoun “which” constitutes a “single relative clause” that includes the terms in Sub-Paragraphs (i) to (iii) of Article XXI(b).

[In urging there is no “single relative clause,” and thus “which it considers” does not apply to Sub-Paragraph (iii), is China arguing against its long-term interests? The CCP vigorously defends its sovereignty and abhors what it considers meddling in its internal affairs, for example, over the 3T issues and its treatment of Uyghurs. Imagine if the
litigation positions were reversed: would the Party want to be constrained the way it hopes to see America constrained?]

7.115 The Panel notes that the United States submits certain reference materials on English grammar in support of its contention that the Sub-Paragraphs of Article XXI(b) form part of a “single relative clause” that is entirely reserved to the judgment of the Member taking action under the provision. Due to the grammatical dimension of the United States’ arguments concerning the “single relative clause” in Article XXI(b), the Panel examines the grammatical construction of the provision in relation to the contested issue of whether the Sub-Paragraphs of Article XXI(b) are qualified by the terms “which it considers.” The grammatical considerations raised by the parties reinforce the Panel’s preceding textual analysis of Article XXI(b) and are addressed insofar as they may inform the assessment of the ordinary meaning of the terms in their context.

7.116 The grammatical analysis of Article XXI(b) for the purposes of this dispute particularly concerns the relationship between various phrases and clauses within the overall sentence structure of the provision.

[In Footnote 450 here, citing a U.S. Exhibit, the Panel observed:

A “clause” in this context has been defined as “a group of words containing both a subject and a predicate” that “functions as an element of a compound or complex sentence.” A “phrase,” by contrast, is “a brief expression that consists of two or more grammatically related words but that does not constitute a clause” (i.e., does not contain a noun and a verb). (Merriam-Webster’s Guide to Punctuation and Style (Merriam-Webster, Incorporated, 1995)…"

A “predicate” is the part of either a sentence of clause that has a verb, and that makes a statement about the subject.]

… Article XXI begins a sentence that is completed by the terms of Paragraph (b) and the alternative endings in the Sub-Paragraphs thereunder. The opening terms of Article XXI form a clause beginning with the terms “Nothing in this Agreement” and ending with the terms “any action” in Paragraph (b). This clause can be characterized as an independent clause in that it contains a subject (“Nothing”) and predicate (“shall be construed to prevent any Member from taking any action”) that can stand alone as a complete sentence.

[At Footnote 451 here, the Panel cited from a U.S. Exhibit:

… W. Strunk Jr. and E.B. White, The Elements of Style, 4th ed. (Allyn and Bacon, 1999) … [pages] 91 and 93 (an “independent clause” is “[a] group of words with a subject and verb that can stand alone as a sentence.” A “predicate” refers to “[t]he verb and its related words in a clause or sentence” and “expresses what the subject does, experiences, or is”). According to the United States, through the language in this independent
clause, “Article XXI(b) creates an exception to the obligations in the [GATT 1994].”

7.117 Following this independent clause, the relative pronoun “which” in Article XXI(b) begins a relative clause that can be grammatically characterized as a dependent clause in the sense that it is a group of words with a subject and verb that, unlike an independent clause, cannot stand on its own as a complete sentence.

[Here, in Footnote 452, the Panel cited from a U.S. Exhibit:

… S. Greenbaum, English Grammar (Oxford University Press, 1996), … p. 631 (a “relative clause” is used to “postmodify nouns” and is “introduced by a relative item” such as the relative pronoun “which”); R. Flesch and A.H. Lass, The Classic Guide to Better Writing (HarperPerennial, 1996), … p. 69 (“[w]ho and which are called relative pronouns and introduce relative clauses.”) Using these relative pronouns “[makes] an independent clause into a relative or dependent clause – a group of words that can’t stand by itself”) (Emphasis omitted.); and W. Strunk Jr. and E.B. White, The Elements of Style, p. 91 (a “dependent clause” is “subordinate to an independent clause in a sentence” and begins with either a subordinating conjunction or a relative pronoun such as “which.”) (Emphasis omitted.)]

This relative clause is grammatically subordinate to the independent clause at the beginning of Article XXI that ends with the word “action” in Paragraph (b), qualifying the noun “action” to describe the action that a Member may take notwithstanding the obligations under the GATT 1994.

[Here at Footnote 453, the Panel cited a U.S. Exhibit:

S. Greenbaum, English Grammar …, p. 631 (a “relative clause” is used to “postmodify nouns”); Merriam-Webster’s Guide to Punctuation and Style …, p. 233 (a subordinate clause “cannot stand alone, and must be either preceded or followed by a main clause”); and W. Strunk Jr. and E.B. White, The Elements of Style, 4th ed. …, p. 95 (a “subordinate clause” is a “clause dependant on the main clause in a sentence”).]

The pronoun “it” refers to the Member taking action under Article XXI(b) and is the subject of this relative clause. The verb “considers” is followed by an immediate object (“necessary”) that is further modified by a prepositional phrase (“for the protection of”) and noun phrase (“its essential security interests”).

[Here at Footnote 454, the Panel cited to a U.S. Exhibit:

… Merriam-Webster’s Guide to Punctuation and Style …, p. 232 (a “noun phrase” consists of “a noun and its modifiers” whereas a “prepositional
phrase” consist of “a preposition and its object”); W. Strunk Jr. and E.B. White, *The Elements of Style*, 4th ed …, p. 93 (a prepositional phrase is “[a] group of words consisting of a preposition, its object, and any of the object’s modifiers”).

7.118 Each of the Sub-Paragraphs of Article XXI(b) begins with a participle that forms the beginning of a participle phrase.

[Here at Footnote 455, the Panel cited to an U.S. Exhibit:

... *Merriam-Webster’s Guide to Punctuation and Style* …, p. 232 (a participial phrase includes a participle and functions as an adjective”); W. Strunk Jr. and E.B. White, *The Elements of Style*, 4th ed …, p. 93 (a “participial phrase” is “[a] present or past participle with accompanying modifiers, objects, or complements”).]

Specifically, Sub-Paragraphs (i) and (ii) begin with the present participle “relating” and Sub-Paragraph (iii) begins with the past participle “taken.” As these participles qualify the noun “action,” the terms following each participle function as adjectives describing the “action” under Article XXI(b) and thus can be characterized as participle or adjectival phrases qualifying that noun.

[Here at Footnote 457, the Panel cited to a U.S. Exhibit:

... *Merriam-Webster’s Guide to Punctuation and Style* …, … [pages] 232-233 (“[a] participle phrase includes a participle and functions as an adjective.” An “adjective clause modifies a noun or pronoun and normally follows the word it modifies”).]

7.119 The Panel does not consider that the grammatical construction of Article XXI(b) definitively resolves whether the Sub-Paragraphs are qualified by the phrase “which it considers” as part of a “single relative clause” in the manner contended by the United States. The adjectival phrases in the Sub-Paragraphs of Article XXI(b) could be regarded as continuations of the relative clause that begins with the relative pronoun “which” in the sense that they provide alternative endings to the sentence formed under the provision. However, this does not necessarily compel the conclusion that the Sub-Paragraphs form part of a “single relative clause” in the sense argued by the United States that, “[b]ecause the relative clause describing the action begins ‘which it considers,’ the other elements of this clause are committed to the judgment of the Member taking the action.” In support of its view that, under the ordinary meaning of the English text of Article XXI(b), Sub-Paragraphs (i) and (ii) modify the phrase “essential security interests,” the United States refers to rules of English grammar according to which “an adjectival phrase normally follows the word it modifies or is otherwise placed as closely to the word it modifies.”

[Here in Footnote 460, the Panel wrote:]
United States’ Response to Panel Question No. 90 (referring to Merriam-Webster’s Guide to Punctuation and Style ..., ... [pages] 232-233 (“[t]he adjective clause modifies a noun or pronoun and normally follows the word it modifies” and “[u]sage problems with phrases occur most often when a modifying phrase is not placed close enough to the word or words that it modifies”) and S. Benedict (ed.), Harper’s English Grammar (Harper & Row, 1966), ... [another U.S. Exhibit], p. 186 (“adjectives and adverbial phrases, like adjectives and adverbs themselves should be placed as closely as possible to the words they modify”)).]

According to this argument, the adjectival phrases in the Sub-Paragraphs of Article XXI(b) would thus be part of the relative clause that begins with the word “which” and would modify the terms in that relative clause that appear closest to the Sub-Paragraphs.

7.120 The grammatical references cited by the United States do not indicate a categorical rule according to which the relative clause in Article XXI(b) that begins “which it considers” must contain and qualify any following adjectival phrase (i.e., those contained in the Sub-Paragraphs). Indeed, the United States acknowledges a deviation in Article XXI(b) from the general rule it cites as “the drafters departed from typical English usage” in Sub-Paragraph (iii) by placing the adjectival phrase in that Sub-Paragraph next to “essential security interests,” rather than next to the term modified by that adjectival phrase (“action”). With respect to the interpretation of Article XXI(b), the qualification of the noun “action” in Paragraph (b) by the participle phrases in the Sub-Paragraphs is not solely determined by rigid application of grammar but follows from the ordinary meaning of these terms, notwithstanding the existence of a relative clause in Paragraph (b) between the noun “action” and textually discrete adjectival phrases qualifying that “action.”

[Query what, exactly, the Panel is saying in the Paragraph 7:120? The adjectival phrase in Article XXI(b)(iii) (“taken in time of war or other emergency in international relations”) immediately follows the relative clause (“which it considers necessary for the protection of its essential security interests”). This adjectival phrase is not immediately next to the noun it modifies (“action”). So what? How does that placement alter a normal understanding of Article XXI(b)? The GATT drafters wrote:

Nothing in this Agreement shall be construed

...  
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
(iii) taken in time of war or other emergency in international relations; …

Suppose, as the Panel seems to want, the GATT drafters instead had written:

Nothing in this Agreement shall be construed

(b) to prevent any contracting party from taking any action

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations;

which it considers necessary for the protection of its essential security interests….

How would the meaning change? The drafters had a choice to place the relative clause either before the three participle phrases in the three Sub-Paragraphs, or after these phrases. They chose to put the relative clause first, at the top, in the chapeau of Article XXI(b). That choice makes the entire Paragraph (b) easier to read, i.e., it flows better, and underscores the importance of the relative clause, i.e., it highlights it to the reader up front. IN other words, placing the relative clause at the start seems to reinforce the American argument that the entire provision is self-judging.

7.121 The foregoing considerations reflect the potential limitations of a purely grammatical analysis of the terms of Article XXI(b) and the significance of additional interpretive considerations in ascertaining the ordinary meaning of the terms in their context. In addressing the parties’ dispute as to the interpretation of Article XXI(b) of the GATT 1994, the Panel is mindful of the principle of effective treaty interpretation according to which all terms of a treaty are to be given meaning and effect. Relatedly, the terms used in a treaty must not be reduced to redundancy or inutility. The meaning and effect of the Sub-Paragraphs derives not only from considerations of grammatical qualification but also the specific terms used within the overall structure of the provision. Characterizing the Sub-Paragraphs as part of a “single relative clause,” even if grammatically permissible, does not account for the ordinary meaning of actions “relating to” specified “materials” and “traffic” and to actions “taken in time of” specified circumstances. Nor does it account for the structure of Article XXI(b) and the textual separation of the Sub-Paragraphs into an enumerated list, which corresponds to the role of the Sub-Paragraphs as alternative sentence endings that collectively delimit the scope of Article XXI(b).

[Query what point the Panel is making in Paragraph 7:121? Has it muddied up what should be a clear grammatical analysis, per the American argument, so as to move to other
rationales that allow it to behave in an activistic manner? Query also whether the penultimate sentence is wrong, as a grammatical matter, and the ultimate sentence is the exact opposite of the truth, i.e., the GATT drafters “got it right” the first time in the way they structured Article XXI(b).

7.122 The Panel notes the United States’ argument that Article XXI(b) “should be read as a single clause and not as introducing separate conditions.” Further, the United States cautions against an approach that would “atomize this single relative clause” because “[a]rtificially separating the words ‘which it considers necessary’ from the language that immediately follows and continues the clause – for the protection of – would erroneously interpret certain terms of Article XXI(b) in isolation.” In the Panel’s view, giving meaning and effect to the terms of the Sub-Paragraphs does not entail reading them in isolation from the other terms of Article XXI(b) or “introducing separate conditions” beyond what is reflected in the terms themselves. The terms of Article XXI(b) grant discretion to Members for actions that they “consider necessary for the protection of their essential security interests” while also enumerating circumstances and conditions under which that discretion may be exercised. The right to take action under Article XXI(b) thus consists of an express provision of deference to a Member’s consideration that is complemented by Sub-Paragraphs that must be given meaning and effect according to the ordinary meaning of their terms.

[Here the U.S. again seems to be on point, and the Panel seems to destroy the natural meaning of GATT Article XXI by atomizing its different components under the guise of giving each component its full meaning.]

7.123 The Panel finds relevant context for the interpretive issues raised in this dispute in the provisions of the GATT 1994 concerning consultation and potential recourse in cases of nullification or impairment, as well as the rules and procedures of the DSU, noting that these agreements are both “integral parts of [the WTO] Agreement, binding on all Members.” Article XXII of the GATT 1994 provides for consultation “with respect to any matter affecting the operation of this Agreement” and Article XXIII of the GATT 1994 addresses nullification or impairment of “any benefit accruing to [a Member] under this Agreement.” The DSU elaborates upon these provisions and establishes the rules and procedures applicable to disputes concerning the covered agreements in Appendix I of the DSU. Neither the relevant provisions of the GATT 1994 nor the DSU make any explicit reference to Article XXI of the GATT 1994 or the potential review of its invocation in dispute settlement proceedings. In the absence of any special or additional rule of dispute settlement concerning Article XXI(b) of the GATT 1994, any review of its invocation must be carried out in accordance with the DSU as a function of the terms of the provision interpreted in accordance with customary rules of interpretation of public international law.

7.124 The Panel finds further guidance in the object and purpose as expressed in the Preamble of the WTO Agreement “to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations.” In addition, the Preambles of both the WTO Agreement
and the GATT 1994 refer to the desire to contribute to the objectives of these agreements “by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.” In furtherance of these objectives, the WTO Agreement establishes a legal framework of rights and obligations that includes the rules and procedures applicable to disputes concerning the covered agreements in the DSU. The DSU “serves to preserve the rights and obligations of Members under the covered agreements” and “[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under [the DSU] and the covered agreements.” The rules and procedures of the DSU are thus intended to maintain the balance between the rights and obligations of the Members as embodied in the covered agreements and the relevant provisions thereof raised by the parties to proceedings under the DSU.

[Why does the Panel recite well-known, general information in Paragraphs 7:123-7:124? What relevance does it have to the case?]

7.125 The provision of relevance to this dispute, Article XXI(b) of the GATT 1994, establishes a right to take action for the protection of a Member’s essential security interests and explicitly enumerates conditions in the Sub-Paragraphs that are an integral part of that right. [Here the Panel seems to be going in circles.] The absence of explicit provision or elaboration in Article XXI(b) … as to whether and how its invocation may be reviewed does not, in itself, preclude or otherwise determine the review of that provision in dispute settlement proceedings. Rather, the scope and nature of such review derives from the terms of Article XXI(b) … and requirements of the DSU established under the WTO Agreement, which acknowledges inter alia the role of the WTO dispute settlement system in “providing security and predictability to the multilateral trading system.” If Article XXI(b) … is raised in dispute settlement proceedings, the DSU requires that it be addressed in accordance with the terms of the provision itself and within an objective assessment of the relevant measures and claims to make findings that will assist the DSB to make recommendations provided for in the covered agreements.

7.126 In addition to the relevant text, context, and object and purpose of the covered agreements, the parties have referred to various other materials regarding the interpretation of Article XXI(b)…. These materials include: (a) negotiating history of Article XXI of the GATT 1947 and preparatory works of the Havana Charter for the International Trade Organization (ITO); (b) internal documents of the U.S. delegation to the negotiation of the ITO Draft Charter and GATT 1947; (c) GATT Council Decisions under the GATT 1947; (d) views expressed by GATT contracting parties prior to the creation of the WTO; and (e) negotiating history of the Uruguay Round. Both parties contend that these materials provide support for their primary arguments on the terms of Article XXI(b) … and the rule of interpretation in Article 31(1) of the Vienna Convention. In Appendix B to this Report [omitted], the Panel addresses the parties’ arguments on the relevance of these materials to the interpretation of Article XXI(b) of the GATT 1994.
7.127 As detailed in Appendix B, these materials do not provide clear guidance regarding the contested issues in this dispute, particularly concerning the scope and nature of the review of a Member’s invocation of Article XXI(b) of the GATT 1994 in proceedings under the *DSU*. In addition to questions on the precise legal status of these materials for the purpose of treaty interpretation, the Panel does not find any clear indication in these materials of the “self-judging nature” or “non-justiciability” of Article XXI(b) … as contended by the United States. Rather, the Panel finds these materials to support the general conclusion that the terms of Article XXI(b) … establish a right to take action for the protection of essential security interests in the conditions and circumstances described in the three Sub-Paragraphs.

7.128 In conclusion, the entirety of Article XXI(b) of the GATT 1994 is to be given meaning and effect in a manner that preserves the right and discretion of a Member to take action it considers necessary for the protection of its essential security interests under the conditions and circumstances described in Sub-Paragraphs (i) to (iii). The Panel does not consider that Article XXI(b) … is “self-judging” or “non-justiciable” in the sense argued by the United States, nor that the provision contains a “single relative clause” that wholly reserves the conditions and circumstances of the Sub-Paragraphs to the judgment of the invoking Member. In light of this conclusion …, the Panel turns to assess the United States’ invocation of Article XXI(b) … in relation to the measures at issue.

7.8.3 Assessment of the measures at issue

7.129 The Panel will assess whether the measures found to be inconsistent with Articles I:1 and II:1 of the GATT 1994 were taken under the conditions and circumstances described in the Sub-Paragraphs of Article XXI(b) of the GATT 1994.

…

7.131 The United States has presented its specific arguments on the challenged measures subject to its interpretive argument that Article XXI(b) is entirely “self-judging” and imposes no requirement to explain or identify a relevant circumstance in Sub-Paragraphs (i) to (iii). Although the United States has focused its arguments on the interpretation of Article XXI(b) and the discretion accorded by its terms to Members, it has also submitted an extensive record of material relating to the measures at issue. Of particular note in this context are the *Steel and Aluminium Reports* of the U.S. DOC and Presidential *Proclamations* setting out the legal basis under Section 232 for taking action on steel and aluminium products. … [T]he United States has also elaborated its position throughout the course of the proceedings concerning the measures at issue and, in particular, the existence of an “emergency in international relations” within the meaning of Article XXI(b)(iii) “in time of” which the measures were taken.

7.132 The United States’ first written submission focused on the argument that Article XXI of the GATT 1994 is “self-judging” as a defense against WTO-inconsistencies and that its invocation by a Member is “non-justiciable” in WTO dispute settlement proceedings. Following the first substantive meeting, the United States argued that “publicly available information” concerning its measures “could be understood to relate most naturally to the circumstance described in Article XXI(b)(iii).” At the same time, the
United States maintained its interpretive view that it is not necessary under Article XXI for any Member to provide details relating to its invocation of the exception, nor “to identify the relevant Sub-Paragraph ending to that provision that an invoking Member may consider most relevant.”

7.133 The United States subsequently elaborated its arguments regarding the measures at issue based on its interpretation of an “other emergency in international relations” as meaning “a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention.” In particular, the United States argued that “the extensive findings in the Steel and Aluminum Reports are consistent with the United States considering the measures at issue to be taken ‘in time of war or other emergency in international relations.’” The United States cited various findings in the Steel and Aluminium Reports and argued that “the findings cited above relating to the threatened impairment of national security by steel and aluminum imports, and the global crisis circumstances under which such importations were occurring, are consistent with the United States considering that an ‘other emergency in international relations’ exists – that is, a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention.”

7.134 In its closing statement at the second substantive meeting, the United States argued that, “even on the complainant’s understanding of Article XXI(b) as not self-judging, … [t]he record before the Panel demonstrates that the United States considers the measures at issue to be necessary for the protection of its essential security interests and taken ‘in time of war or other emergency in international relations.’” The United States referred to findings in the Steel Report on “whether an emergency related to steel excess capacity exists” to comment that, “in 2017, it emerged that global efforts to address these crises would be insufficient. While the DOC steel report noted that the excess capacity crisis is a global problem that steel-producing nations have committed to ‘work together on possible solutions,’ the Report observed the limits of the global efforts, including the work of the Global Forum on Steel Excess Capacity.” The United States argued that “what the DOC Steel Report conveys is that the United States was at a crucial point [and] that without immediate action, the steel industry could suffer damages that may be difficult to reverse and reach a point where it cannot maintain or increase production to address national emergencies.” The United States additionally argued that “[a]n industry facing ‘fundamental changes’ brought on by a ‘production revolution’ can certainly lead to unexpected developments, particularly when that industry is facing an ‘acute’ situation of global excess capacity that is the highest in the industry’s history.”

7.135 The Panel notes that the United States has referred to appendices in the Steel and Aluminium Reports concerning global excess capacity in connection with the existence of an "emergency in international relations" under Article XXI(b)(iii). In addition, the United States has referred to the G-20 Global Steel Forum Report of 2017 that describes the situation of excess steelmaking capacity as “particularly acute since 2015” and addresses the outlook of global steelmaking capacity. Further, the United States refers to remarks of the EU Commissioner for Trade at the OECD High-Level Symposium on Steel expressing
concerns on steel overcapacity. The United States has also referred to a statement of the chairperson of the OECD Ministerial Council Meeting in 2018 that OECD members “share the view that severe excess capacity in key sectors such as steel and aluminium are serious concerns for the proper functioning of international trade, the creation of innovative technologies and the sustainable growth of the global economy” and “stress the urgent need to avoid excess capacity in ... sectors such as aluminium and high technology.” The United States additionally refers to the Charlevoix G7 Summit Communiqué which “stressed the urgent need to avoid excess capacity” in the aluminium sector.

7.137 Under Sub-Paragraph (iii) of Article XXI(b), a Member may take action which it considers necessary for the protection of its essential security interests “in time of war or other emergency in international relations.” Dictionary definitions of the term “emergency” include “[a] situation, esp. of danger or conflict, that arises unexpectedly and requires urgent attention,” “a condition requiring immediate treatment,” or a “pressing need.” [Here and subsequently, the Panel cited to the Shorter OED and The New Shorter OED.] The relevant emergency within the meaning of Sub-Paragraph (iii) must be “in international relations.” The term “relations” may be defined as “[t]he various ways by which a country, State, etc., maintains political or economic contact with another,” while the term “international” may be defined as “[e]xisting, occurring, or carried on between nations; pertaining to relations, communications, travel, etc., between nations.” The phrase “international relations” may thus be understood to mean interactions between nations or national governments. [Here the Panel also referred to the OED Online and Black’s Law Dictionary.] The terms of Article XXI(b)(iii) appear to distinguish the relevant emergency under that Sub-Paragraph from an emergency in purely domestic or national affairs and indicate the “international” character of the emergency in time of which Members are not prevented from taking action under Article XXI(b).

7.138 The term “war” precedes the phrase “or other emergency in international relations” in Sub-Paragraph (iii) of Article XXI(b) and provides immediate context for its interpretation. Dictionary definitions of “war” include “[h]ostile contention by means of armed forces, carried on between nations, states, or rulers, or between parties in the same nation or state; the employment of armed forces against a foreign power, or against an opposing party in the state.” [The Panel again cited the OED Online.] Based on its ordinary meaning, “war” involves a state of conflict characterized by the use of force. This is further confirmed by the French and Spanish language versions of Article XXI(b)(iii), where the terms “guerre” and “guerra” similarly signify armed struggles or outbreak of hostilities.

[The Panel cited Le Petit Robert Dictionnaire de la Langue Française and Diccionario de la Lengua Española, but as asked about the earlier part of its Report, why is reference to French or Spanish terms necessary?]

7.139 The Panel finds that the reference to “war” informs the meaning of “emergency in international relations” as part of the circumstances “in time of” which a Member may act under Article XXI(b) for the protection of its essential security interests. In particular, the Panel considers that an “emergency in international relations” within the meaning of Article XXI(b)(iii) must be, if not equally grave or severe, at least comparable in its gravity
or severity to a “war” in terms of its impact on international relations. This understanding is supported by the French and Spanish language versions of Article XXI(b)(iii) …, where the terms corresponding to “emergency in international relations” are “grave tension internationale” and “grave tensión internacional” respectively. The term “grave” in these languages may be understood as referring to international tensions that are of a critical or serious nature in terms of their impact on the conduct of international relations.

7.140 Further, under Sub-Paragraph (iii) of Article XXI(b), action for the protection of essential security interests must be “taken in time of” an emergency in international relations. … [T]he Panel understands these opening terms of Sub-Paragraph (iii) to qualify and describe the “action” referred to in Article XXI(b). The phrase “taken in time of” in Sub-Paragraph (iii) describes the temporal link between the action taken by a Member under Article XXI(b) and the “war or other emergency in international relations” in Sub-Paragraph (iii) of that Article.

7.141 The Panel also considers relevant the context provided by the Sub-Paragraphs of Article XXI(b) in conjunction with the terms used in Paragraph (b) of Article XXI, which concerns actions taken by a Member for the protection of its “essential security interests.” … [T]he description of these security interests as “essential” indicates the heightened significance of the security interests that Members are not prevented from taking action to protect pursuant to Article XXI(b). Actions taken by a Member for the protection of its essential security interests may concern “fissionable materials” under Sub-Paragraph (i), “traffic” involving certain military interests under Sub-Paragraph (ii), and “war or other emergency in international relations” under Sub-Paragraph (iii). The Panel is guided by the delimiting function of the Sub-Paragraphs in construing Sub-Paragraph (iii) to refer to circumstances of a certain gravity or severity in terms of their impact on the conduct of international relations, as part of the balance of rights and obligations reflected in the ordinary meaning of the terms of Article XXI(b), interpreted in their context and in light of the object and purpose of the GATT 1994 and WTO Agreement.

[Query whether Paragraphs 7:140-7:141 add any value to the Panel’s Report. Are they obvious and redundant?]

7.142 With respect to the measures at issue, the Panel notes that the United States has referred in its arguments regarding Article XXI(b)(iii) to factors considered by the U.S. DOC in the Steel and Aluminium Reports. These Reports reflect the domestic legislative basis and statutory terms of Section 232, particularly the factors to be considered in investigations by the U.S. DOC and the reference to importation “in such quantities or under such circumstances” that the imports "threaten to impair the nation security.” The Panel notes that various factors relied upon by U.S. authorities are treated cumulatively in support of the determination to act under Section 232. Specifically, the Steel and Aluminium Reports identify “three factors” as the basis for finding with respect to steel and aluminium that “weakening of our internal economy may impair the national security,” namely: (a) displacement of domestic steel/aluminium by excessive imports; (b) the consequent adverse impact on the economic welfare of the domestic steel/aluminium industry; and (c) the global excess capacity in steel and aluminium. The Panel notes that
the first two factors focus predominantly on developments relating to the domestic situation of steel and aluminium industries in the United States, while the third focuses on a global aspect of the situation.

7.143 The analysis and conclusions of the U.S. DOC in the *Steel and Aluminium Reports* do not purport to identify or address the existence of an “emergency in international relations” within the meaning of Article XXI(b)(iii) of the GATT 1994. The determinations of U.S. domestic authorities under Section 232 relate to a different legal standard and basis under U.S. municipal law than the provisions of the covered agreements within the Panel’s mandate under the *DSU*. Accordingly, the factors relied upon by the U.S. DOC and conclusions in the *Steel and Aluminium Reports* are distinct from, and cannot be directly transposed to, the terms of Article XXI(b)(iii) … and the objective assessment required under Article 11 of the *DSU*. Therefore, the factors treated cumulatively by U.S. domestic authorities under Section 232 may not be regarded as having commensurate relevance or weight in the Panel’s objective assessment as to whether the measures were taken “in time of war or other emergency in international relations” under Article XXI(b)(iii)…. The assessment of the Panel in this dispute concerns the United States’ specific arguments in connection with the existence of an “emergency in international relations” under Article XXI(b)(iii) and, in particular, its references to an international situation of global excess capacity in steel and aluminium.

[Does Paragraph 7:143 signal the Panel’s bias against the U.S.? It overrides American sovereignty by refusing to examine whether an “emergency in international relations” exists as “it” – the pertinent WTO Member, the U.S. – considers under “its” Section 232 statute. Even if the Panel is correct in ignoring U.S. law, is any WTO Panel competent to decide whether an “emergency in international relations,” especially in comparison with national-level intelligence experts?]

7.144 The Panel observes that, in its arguments under Article XXI(b), the United States refers to this international situation – i.e., global excess capacity in steel and aluminium – in connection with the impact of imports on domestic producers of steel and aluminium, as reflected in the conclusions of the U.S. DOC in the *Steel and Aluminium Reports*. The United States refers to factors addressed by the U.S. DOC in the *Steel and Aluminium Reports* as evidence that it “considers” the measures at issue to have been “taken in time” of an “emergency in international relations” within the meaning of Article XXI(b)(iii). In this regard, the Panel notes the United States’ argument that “the extensive findings in the *Steel and Aluminum Reports* are consistent with the United States considering the measures at issue to be taken 'in time of war or other emergency in international relations.’” The United States additionally argues that “the Panel should find [that] the United States has provided information that it considers the measure necessary for the protection of its essential security interests … [and] that the United States has provided information that it considers the measure ‘taken in time of war or other emergency in international relations,’ the circumstance in Sub-Paragraph ending (iii).”

7.145 The Panel recalls its conclusion that the terms “which it considers” in Article XXI(b) do not qualify the Sub-Paragraphs to render them “self-judging” as argued by the
United States. While the United States contends that it has “provided information that it considers” the measures at issue to fall under Article XXI(b)(iii), the review of such information in accordance with the DSU requires an objective ascertainment of factors relating to the relevant “emergency in international relations” under Sub-Paragraph (iii), as distinguished from factors pertaining to what is reserved to a Member’s consideration under Paragraph (b) of Article XXI. The United States refers to factors that were cumulatively considered by domestic authorities in support of the determination to act under Section 232. … [T]hese factors concern both the domestic situation of steel and aluminium industries as well as global excess capacity.

7.146 In the Panel’s view, the factors raised by the United States on the impact of imports on domestic producers of steel and aluminium, including the consideration of U.S. domestic authorities of “national security” under Section 232, pertain more to the “action which [the United States] considers necessary for the protection of its essential security interests” under Paragraph (b) of Article XXI. However, in accordance with the ordinary meaning of its terms, Sub-Paragraph (iii) requires a distinct inquiry as to whether the actions were taken in time of an “emergency in international relations” based on an objective assessment of relevant evidence and arguments.

7.147 In this connection, the Panel notes the evidence submitted by the United States of international concerns regarding global excess capacity in steel and aluminium, including the discussion of such concerns in the Steel and Aluminium Reports. The statements at the international level referred to by the United States indicate that the issue of global excess capacity in steel and aluminium has been a topic of high-level discussion and expressions of concern in various international fora. … [T]he discussion of global excess capacity focuses on specific sectors and is evidence of the fact that the issue has been raised as a matter of international attention within the conduct of international relations of various countries. Notwithstanding such evidence of international engagement, the Panel recalls that an “emergency in international relations” under Article XXI(b)(iii) refers to situations of a certain gravity or severity and international tensions that are of a critical or serious nature in terms of their impact on the conduct of international relations.

7.148 Having carefully reviewed the relevant evidence and arguments submitted in this dispute, and particularly those submitted by the United States in relation to global excess capacity, the Panel is not persuaded that the situation to which the United States refers rises to the gravity or severity of tensions on the international plane so as to constitute an “emergency in international relations” during which a Member may act under Article XXI(b)(iii). For example, the G-20 Global Steel Forum Report “focuses on the steel sector and provides concrete policy solutions to reduce steel excess capacity.” In referring to excess steelmaking capacity as “a global challenge that has become particularly acute since 2015,” the Report highlights various efforts within the Global Steel Forum in light of trends in the sector as part of “[g]lobal cooperation to find solutions to tackle excess capacity in the steel market.” Such evidence submitted by the United States in this dispute reflects international concern expressed in the context of cooperative efforts to address excess capacity in a specific sector. In the Panel’s view, however, the gravity or severity of an “emergency in international relations” within the meaning of Article XXI(b)(iii),
particularly regarding the impact on international relations of situations falling under that provision, has not been established based on the evidence and arguments submitted in this dispute. …

7.8.4 Conclusion

In conclusion, the Panel does not find, based on the evidence and arguments submitted in this dispute, that the measures at issue were “taken in time of war or other emergency in international relations” within the meaning of Article XXI(b)(iii) of the GATT 1994. Therefore, the Panel finds that the inconsistencies of the measures at issue with Articles I:1 and II:1 … are not justified under Article XXI(b)(iii)….

8. Conclusions and Recommendations

8.1 For the reasons set forth in this Report, the Panel concludes as follows:

…

e. Regarding Article XXI of the GATT 1994, the Panel does not find that the measures at issue were “taken in time of war or other emergency in international relations” within the meaning of Article XXI(b)(iii)…. The Panel therefore finds that the inconsistencies of the measures at issue with Articles I:1 and II:1 … are not justified under Article XXI(b)(iii)….

8.2 Under Article 3:8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the measures at issue are inconsistent with certain provisions of the GATT 1994, they have nullified or impaired benefits accruing to China under that Agreement.

8.3 Pursuant to Article 19:1 of the DSU, the Panel recommends that the United States bring its WTO-inconsistent measures into conformity with its obligations under the GATT 1994.

III. GATT Article XXI and 2022 WTO China-Hong Kong Labelling Case

WTO PANEL REPORT, *UNITED STATES – ORIGIN MARKING REQUIREMENT, WT/DS597/R* (21 DECEMBER 2022, APPEALED)\(^75\)

7.5 Whether the origin marking requirement is justified under Article XXI(b)(iii) of the GATT 1994

7.5.1 Introduction

7.253. Having concluded that the origin marking requirement is inconsistent with Article IX:1, we now turn to assessing the United States’ invocation of Article XXI(b). [The Panel Report concerning GATT Article IX:1, Paragraphs 7:194-7:209 and 7:229-7:252, is excerpted in a separate Chapter.]

7.254. The United States refers to actions by the Government of China and Hong Kong, China’s authorities since November 2019, including the adoption of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law) in June 2020. For the United States, these actions have eroded democracy and human rights in Hong Kong, China, which, it considers, represents a threat to its own national security. … [T]he United States made a finding in U.S. law, that Hong Kong, China lacks “sufficient autonomy” vis-à-vis China, which has led, inter alia, to the origin marking requirement at issue. Consistent with its position that Article XXI(b) is entirely self-judging, the United States takes the view that a Panel is not to review the merits of this defence and submits arguments only in response to questions by the Panel.

[Query whether the Panel understates matters in the second sentence of Paragraph 7:254 (above), thus signalling its ultimate decision against the U.S. By no means was America alone in assessing the National Security Law as eroding democracy in Hong Kong, China, and as imperilling its own national security – all the more so given China’s avowed extraterritorial application without regard to citizenship.]

7.255. For Hong Kong, China, the United States has not demonstrated the objective applicability of any of the Sub-Paragraphs of Article XXI(b). Hong Kong, China also submits that the United States has not demonstrated that its alleged concerns about freedom and democracy in Hong Kong, China meet the conditions of Article XXI(b). Hong Kong, China defines those conditions in line with the legal standard developed by the Panel in Russia – Traffic in Transit. [This Report is excerpted in a separate Chapter.] First, a Panel should determine whether the action was taken in time of an emergency in international relations, such that the events at issue directly implicate defense or military interests, or maintenance of law and public order interests, within the territory of the invoking Member. Second, a Panel should examine whether the invoking Member took its action in good faith. To that effect, the invoking Member must articulate its essential security interests “sufficiently enough to demonstrate their veracity” and demonstrate that the action for which justification is sought meets a “minimum requirement of plausibility” in relation to those proffered essential security interests.

7.256. We recall our previous finding that Article XXI(b), contrary to the United States’ view, is only partly self-judging in that the Sub-Paragraphs are not subject to the phrase “which it considers” in the chapeau. [This finding is excerpted herein.] The circumstances set out in the Sub-Paragraphs, therefore, are not subject to the invoking Member’s own determination, and can be reviewed by a Panel. … [O]ur interpretive analysis of Article XXI(b) was limited to that specific question in order to ascertain whether there was any scope of review by a Panel. Our analysis, therefore, left open what the exact scope of that
review is and how such a review is to be carried out. These questions, which arise now that such review is due, raise further interpretive issues regarding Article XXI(b). … [O]ur duty is to assist the DSB in resolving a dispute, rather than to clarify every issue of systemic importance. Our approach, therefore, is to proceed step by step in the review of the United States’ defense and address interpretive issues as and when they arise at each step.

7.257. Before undertaking these steps, however, we need to first ascertain that the United States has identified the specific Sub-Paragraph on which it bases its security defence under Article XXI(b). Otherwise, it would not be clear what it is we are to review. Once this question is resolved, we turn to assessing the order in which to review that defence, i.e., to identifying the first step in that review.

7.5.2 Which Sub-Paragraph to review in Article XXI(b)

7.258. Consistent with its position that Article XXI(b) is entirely self-judging, the United States does not identify in its first written submission which Sub-Paragraph of Article XXI(b) it is relying on for its defense. Hong Kong, China and some third parties challenge this as a failure to make a prima facie case that a Sub-Paragraph of Article XXI(b) applies. In their view, this falls short of the United States’ burden of proof as the Member invoking this defence. In its second written submission, the United States argues that the information it provided to the Panel could be understood to relate most naturally to the circumstances described in Article XXI(b)(iii). In response to questions after the second meeting of the Panel, the United States further argues that such information supports the existence of an emergency in international relations in this case.

7.259. In our view, Hong Kong, China and the third parties are correct in signalling that a Member invoking a defense under Article XXI(b) must identify the Sub-Paragraph under which it is raising its defense. Without the Member invoking Article XXI(b) identifying the relevant Sub-Paragraph, a Panel would not be in a position to review whether the relevant conditions for the defence are satisfied.

7.260. Here, the United States’ indication about the information on record most naturally relating to Article XXI(b)(iii), together with its indication that such information supports the existence of an emergency in international relations, makes it clear that its invocation of Article XXI(b) pertains to Sub-Paragraph (iii). In our view, this identification of the Sub-Paragraph at issue in this dispute is sufficient for us to conduct our review of the United States’ defence. We agree with Hong Kong, China that the United States, as the Member invoking Article XXI(b), bears the burden of demonstrating that the elements of the relevant Sub-Paragraph are satisfied. Whether the United States has met that burden, is a separate question that we address in Section 7.5.4.2 below.

7.5.3 Order of analysis under Article XXI(b)

7.261. Having identified Sub-Paragraph (iii) as the relevant Sub-Paragraph under which to review the defense under Article XXI(b), we turn to the question of the order in which to review this defence.
7.262. Hong Kong, China and certain third parties [Brazil, Canada, Norway, and Switzerland] submit that the most logical approach would be to first examine whether the circumstances in one of the Sub-Paragraphs are present before turning to an examination of the conditions in the *chapeau* of Article XXI(b). [This approach follows the Two Step Test under GATT Article XX, as discussed in separate Chapters.] The United States disagrees, as in its view, unlike Article XX, the requirement for the applicability of Article XXI(b) is that the Member taking the action must consider such action necessary for the protection of its essential security interests.

7.263. We agree with Hong Kong, China and the third parties that the most logical way to structure our analysis would be to first examine whether the conditions of the relevant Sub-Paragraph are met before reviewing the *chapeau*. It follows from our analysis of Article XXI(b) above that the Sub-Paragraphs limit the circumstances in which a Member can take unilateral action under this provision. Accordingly, only if a Panel is satisfied that the conditions for applying one or more of the Sub-Paragraphs are fulfilled would it make sense for that Panel to move on to the *chapeau*. We note that the previous two Panels that have made findings with respect to the invocation of the security exception followed this same order of analysis.

[Those Panels were: WTO Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R and Add.1, (adopted 26 April 2019) (hereinafter, *Russia – Traffic in Transit*) and *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R and Add.1 (circulated to WTO Members on 16 June 2020, dispute terminated while appeal pending) (hereinafter, *Saudi Arabia – IPRs*). *In Russia – Traffic in Transit*, the Panel applied the same Two Step Test under GATT Article XXI that the present Panel is using. At Paragraphs 7:120-7:125 of *Russia – Traffic in Transit*, the Panel first examined whether, under Article XX(b)(iii), an emergency in international relations existed under, and whether the Russian measures at issue were taken in time of that emergency, and at Paragraphs 7:127-7:148 the Panel next considered whether Russia satisfied the conditions in the *chapeau* of Article XXI(b). The Panel concluded both issues in the affirmative, thus allowing Russia’s Article XXI(b) defense. As for *Saudi Arabia – IPRs*, at Paragraphs 7:241-7:243, the Panel referred to the order of analysis under the *TRIPs Agreement* national security exception, Article 73(b), which is identical to GATT Article XX(b). Both Panel Reports are excerpted herein.]

7.264. … [T]his order of first examining the Sub-Paragraphs also resembles the order in which defences raised under Article XX have been examined in the past. We would underline, however, that by following the same order as in Article XX, we are not finding or implying that the analysis under Article XXI is like that under Article XX. In particular, we are not suggesting that Article XXI requires the same review in the *chapeau* as the review conducted under the *chapeau* in Article XX. What review may be required under the *chapeau* of Article XXI(b) is a question of its interpretation, which we will undertake as and when we get to it.
[How persuasive is the Panel rationale in calling its order of analysis more logical than that of the U.S., which reads the *chapeau* and itemized exceptions thereunder *in seriatim*, not in reverse order, and also disavowing any connection to the GATT Article XX Two Step Test? In citing *Saudi Arabia – IPR* and the *TRIPs Agreement* Article 73 national security exception, does the Panel seem to be saying “let’s use the same Two Step Test across all GATT-WTO agreements, *i.e.*, first prove the terms of an itemized exception are satisfied, and then – reading backwards – turn to the chapeau and prove its terms are met?] 

7.265. Accordingly, we will first address the interpretive and evidentiary aspects of Sub-Paragraph (iii) arising from the United States’ invocation of Article XXI(b).

7.5.4 **Review of Sub-Paragraph (iii)**

7.266. We recall that Article XXI(b)(iii) provides, in relevant part:

> Nothing in this Agreement shall be construed …

> (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests …

> (iii) taken in time of war or other emergency in international relations;

7.267. We see two elements that must be satisfied for an action to be justified under this provision: (a) there must be a “war or other emergency in international relations;” and (b) the action must be “taken in time of” that “war or other emergency in international relations.”

7.268. Neither the United States nor Hong Kong, China have argued that the situation in this case is one of war. Thus, at issue here is whether there is an “other emergency in international relations”. This is the issue we begin with in our step-by-step analysis. We therefore first clarify the meaning of these terms and then assess whether the situation in this dispute is one that constitutes an “emergency in international relations.” If it does, we would then turn to the terms “taken in time of,” clarify their meaning and assess whether the action was taken in time of such an emergency.

[Consider the *IEEPA* use of the phrase “emergency” (discussed in a separate Chapter), and query whether the Panel is infringing on the sovereignty of the U.S. to determine whether an “emergency” exists under GATT Article XX(b) when the President already has done so under that *Act.*]

7.5.4.1 **Interpretation of the phrase “emergency in international relations”**

7.269. As with … [all GATT-WTO] interpretive issues …, pursuant to Article 3:2 of the *DSU*, we interpret the phrase “emergency in international relations” in accordance with the
customary rules of interpretation of Public International Law codified in Articles 31, 32, and 33 of the Vienna Convention.

... 7.4.1.2 Panel’s assessment

7.277. We will develop our interpretation of the phrase “emergency in international relations” on the basis of the ordinary meaning of its terms, in their context and in light of the object and purpose of the GATT 1994, and the WTO Agreement more generally.

7.5.4.1.2.1 Ordinary meaning

7.278. We begin our interpretation of Article XXI(b)(iii) by examining the ordinary meaning of the phrase “emergency in international relations.”

7.279. The word “emergency” is defined as “[a] juncture that arises or ‘turns up,’ esp. a state of things unexpectedly arising, and urgently demanding immediate action.” [The Panel cited the online OED.] We note that the United States referred to a slightly different definition from an earlier edition of the New Shorter Oxford English dictionary, which defines “emergency” as “[a] situation, esp. of danger or conflict, that arises unexpectedly and requires urgent action.” [In so doing, the U.S. was consistent with long-standing Appellate Body lexicography.] While they differ to some extent, both definitions, in our view, refer to a juncture or situation, involving danger or conflict, that can be understood to be one outside the ordinary course of events. Moreover, these definitions suggest a degree or magnitude of seriousness, as reflected by the need for urgent or immediate action. We, therefore, understand these elements as describing a serious state of affairs requiring urgent action.

7.280. In Sub-Paragraph (iii), the noun “emergency” is presented with the compound noun “international relations,” which is defined as “relations between nations, national governments, international organizations, etc., esp. involving political, economic, social, and cultural exchanges.” [The Panel again cited the online OED.] This definition suggests that the relations relevant for this inquiry are those between states and other participants in international relations, including Members of the WTO, and may involve diverse matters, such as political, economic, social, or cultural exchanges. Furthermore, we note the open reference to “international relations” rather than a narrower formulation that might have sought to limit it to some specific types of international relations, for example the exclusively bilateral relations between the invoking Member and the Member affected by the action. [The Panel, though mentioning “other participants,” does not specifically reference non-state actors, which often are the cause of an “emergency” in “international relations.”]

7.281. The term “emergency” is linked to “international relations” through the preposition “in.” [At the risk of cynicism, this sentence suggests a point so obvious that one could wonder whether the Panel understood the English language at the level demanded by the gravity of the matter.] Accordingly, not any emergency would qualify under Article
XXI(b)(iii), but only those occurring in international relations. Thus, the emergency must directly concern those relations.

7.282. The ordinary meaning of the terms in the phrase “emergency in international relations” therefore suggests a reference to a serious state of affairs, which occurs in relations between states or other participants in international relations and which requires urgent action.

7.283. … [P]ursuant to Article 33 of the Vienna Convention, the terms in treaties that are authentic in more than one language, are presumed to have the same meaning in each authentic language. Consistent with this interpretive principle, we turn to examining the meaning of the phrase “emergency in international relation” as it may be derived from the authentic French and Spanish versions of Sub-Paragraph (iii). The French and Spanish versions of Sub-Paragraph (iii) read as follows:

French: appliquées en temps de guerre ou en cas de grave tension internationale;
Spanish: a las aplicadas en tiempos de guerra o en caso de grave tensión internacional; [Emphasis added.]

7.284. In French, the word “grave” is defined as “[s]usceptible de suites fâcheuses, dangereuses.” [.] The word “tension” is defined as “[é]tat de ce qui menace de romper.” The word “internationale” is defined as “[q]ui a lieu de nation à nation, entre plusieurs nations; qui concerne les rapports entre nations.” [In all instances, the Panel cited to Le Robert dico en ligne.]

[The Panel also assessed the Spanish versions of Sub-Paragraph (iii).]

7.286. We note that the three authentic versions of Article XXI(b)(iii) have in common that the emergency or “grave tension” or “grave tension” occurs in international relations. We see no difference in meaning in the reference to the words “internationale” (in French) or “internacional” (in Spanish), when compared to “international relations” (in English), which as noted above, refers to relations between states and other participants in international relations.

[Query whether this discussion is a waste of time. Interpreters and translators at multilateral IOs, such as the U.N. and WTO, are the best and brightest linguists. Before a GATT-WTO agreement is agreed, these professionals must be satisfied all words in one of the three WTO languages, say English, is understood in the same way in other Members.]

7.287. … [T]he French and Spanish authentic versions of Article XXI(b)(iii) depart from the notion of “emergency” in the English authentic version and use the notion of “grave tension” or “grave tension.” These differences suggest to us that, pursuant to Article 33 of the Vienna Convention, to the extent possible, we need to read these meanings harmoniously to clarify the meaning of the phrase “emergency in international relations” in Sub-Paragraph (iii) as set out in its three authentic versions.
[Query why the Panel uses the English verb “depart.” How is “grave tension” different from an “emergency”? Query also whether a three-person WTO Panel the proper forum to render holdings on such issues.]

7.288. The United States suggests that the ordinary meaning of the terms in French and Spanish (i.e., grave tension and grave tensión) refers to “serious tension” in English. The United States further submits that based on the ordinary meaning of these terms in French and Spanish, the definition of “emergency in international relations” could be consistently read with the English as referring to a situation of danger or conflict concerning political or economic contact occurring between nations that arises unexpectedly and requires urgent attention. Furthermore, the United States contends that nothing in the French or Spanish text would suggest that Article XXI(b) is available only in certain types of tensions in international relations.

7.289. We note, first of all, that the drafters chose the word “emergency” rather than the word “tension” in English. [Is the Panel here being culturally incompetent? Different words could have the same emotive meaning in their respective cultures.] It is this word, “emergency,” that [sic] the French and Spanish versions translate into “tension grave” (French) and “grave tension” (Spanish). We recall that the elements of the ordinary meaning of the word “emergency” in English suggest that it refers to a serious state of affairs requiring urgent action. In our view, the above meaning of the relevant words in French and Spanish, suggests that the seriousness of the state of affairs requiring urgent action can be best understood as referring to situations of the utmost gravity. Indeed the above definitions of the relevant terms in French and Spanish refer to a state that threatens to break (“[é]tat de ce qui menace de rompre”) and state of opposition or latent hostility (“[e]stado de oposición u hostilidad latent”). Therefore, tensions and differences in international relations cannot be characterized as resulting in an emergency in international relations unless the situation they give rise to is of a truly grave character for the relevant international relations that the situation implicates, in effect, a situation representing a breakdown or near-breakdown in those relations.

7.290. Having examined the ordinary meaning of the relevant terms in the three authentic languages, we consider that a harmonious interpretation of such ordinary meaning suggests that an emergency in international relations refers to a state of affairs that occurs in relations between states or participants in international relations that is of the utmost gravity, in effect, a situation representing a breakdown or near-breakdown in those relations. We next turn to examining this reading in the treaty’s context and in light of its object and purpose.

[If the Panel is sincere about its “utmost gravity” proposition, then how is CCP behavior with respect to the people of Hong Kong not of the “utmost gravity,” all the more so given the first-hand account of Chris Patten (1944-), the last British Governor of Hong Kong (1992-1997), in The Hong Kong Diaries (2024)?]
7.291. We ... are called upon to consider whether the reading that we have discerned from the ordinary meaning of the phrase “emergency in international relations,” “makes sense” in the context of the other relevant provisions in the GATT 1994 and elsewhere in the covered agreements, and in light of its object and purpose.

[Recall that this determination is one made by the President of the United States after receiving full briefing from America’s intelligence community, none of which any WTO Panel has, or should have, access.]

7.292. We first turn to the immediate context in Sub-Paragraph (iii) itself. ... [T] he wording of the Sub-Paragraph which is “taken in time of war or other emergency in international relations” in English, “appliquées en temps de guerre ou en cas de grave tension internationale” in French, and “a las aplicadas en tiempos de guerra o en caso de grave tensión internacional” in Spanish. In the three authentic texts, the terms “war” and “other emergency” (or its equivalent in French and Spanish) are connected by the conjunction “or,” which in the three languages is used to connect two or more clauses in a sentence.

7.293. We disagree with the United States to the extent that it suggests that the absence of the word similar, indicating “war or other similar emergency,” means that these terms cannot impart meaning to each other. [Query the hypocrisy of the Panel here. It energetically compares English, French, and Spanish meanings, but then says “no” to any U.S. effort to be lexicographically ecumenical.] In our view, the inclusion of the words “or other” before “emergency in international relations” in the English text, makes clear that war is directly connected to such other emergency in international relations, even in the absence of the word “similar.” [Query whether this “view” is without basis: it denies the conjunctive (“or”) the Panel just highlighted, plus makes no sense on any common sense reading of the language.] Indeed, we agree with the Panel in Russia – Traffic in Transit, that war is one example of the larger category of “emergency in international relations.” [Query here the value-added jurisprudence – is there any?] We therefore consider that the words “war” and “other emergency in international relations” are included in Article XXI(b)(iii) in a manner that supports a reading under which those words impart meaning to each other.

7.294. War is defined as “[h]ostile contention by means of armed forces, carried on between nations, states, or rulers, or between parties in the same nation or state; the employment of armed forces against a foreign power, or against an opposing party in the state.” Based on its ordinary meaning, and irrespective of a broader debate on the definition of this term in public international law, we understand the term “war” to generally refer to armed conflict.

7.295. We recall that, consistent with our assessment of the ordinary meaning of its terms, an emergency under Sub-Paragraph (iii) must be in international relations – which, as noted above, are those relations between states or other participants in international relations. The contextual role of war must therefore be framed within the remit of the impact of such type of situation on those international relations. In this regard, a state of war illustrates the exact
opposite of peaceful and friendly interaction between states. Indeed, a state of war between two or more countries represents the ultimate breakdown of their relations.

7.296. As noted above, the reference to war in Sub-Paragraph (iii) suggests that the emergency in international relations is a broader category than war, and in our view also serves to support conceptually the notion of war as an example of an ultimate emergency in international relations. The context provided by the word “war,” suggests that an emergency in international relations must represent a situation of breakdown or near-breakdown in the relations between states or other participants in international relations.

[Query the value added of this Paragraph? Is there any, or is it largely redundant?]

7.297. The above does not suggest that for a situation to constitute an emergency in international relations it must amount to war. Rather, it should reflect a near-comparable gravity or magnitude as concerns its adverse impact on the relations between states or other participants in international relations. In this regard, we note that war will affect conflicting parties directly, but may also affect international relations more broadly. We recall that, the open reference to “international relations” suggests that the emergency does not necessarily have to originate in the invoking Member’s own territory and bilateral relations. Thus, a war taking place between two or more countries, could also give rise to an emergency in international relations affecting other countries.

7.298. The context offered by the rest of Sub-Paragraph (iii) thus confirms our reading, based on the ordinary meaning of the three authentic texts, that an emergency in international relations generally refers to a state of affairs that occurs in relations between states or participants in international relations that is of the utmost gravity, in effect, a situation that represents a breakdown in those relations. Such a state of affairs, just as in a war, could lead to a situation where a Member or Members may well find themselves in a context where they may not, in relation to another Member or Members, be expected to act in accordance with the relevant GATT obligations that would normally apply outside of such war or “other emergency in international relations.”

7.299. We next turn to the broader context of Article XXI(b), namely, Sub-Paragraphs (i) and (ii).

[Query why the Panel makes this turn. The U.S. did not speak of atomic weaponry, but the Panel brings the topic into the case. Conversely, the authentic national security threat to America and Americans – China’s 2020 National Security Law, and the CCP extraterritorial explanation of it – is the truly important context.] The first subparagraph refers to “fissionable materials or the materials from which they are derived.” The second Sub-Paragraph refers to “traffic in arms, ammunition and implements of war” and to “such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment.”

7.300. In our view, unlike Sub-Paragraph (iii) that refers to a specific situation, Sub-Paragraphs (i) and (ii) refer to areas of action where particular aspects of essential security
interests may be implicated. To that extent, these subparagraphs do not speak to the magnitude or gravity of the situation, as the terms “war or other emergency in international relations” do in the context of Sub-Paragraph (iii).

[Again, why is the Panel discussing a textual provision the U.S. has not put in issue?]

7.301. We further note that the subject matters covered in Sub-Paragraphs (i) and (ii) are clearly related to the defense and military sector. They are thus closely connected to the situation of war set out in Sub-Paragraph (iii). [Query whether the Panel’s use of “thus” is a non sequitur, or at least a logical leap without explanation. What principle of treaty or statutory interpretation does the Panel seem implicitly to rely on? Is it not true that separately listed provisions need not be “clearly related,” precisely because they are listed separately?] In our view, given the gravity of the situation that we believe the concept of “emergency in international relations” entails, we would expect defense and military matters to normally be implicated. At the same time, recognizing that each situation will need to be considered on its individual merits, we would refrain from suggesting that an emergency must necessarily involve defense and military interests, as the Panel in Russia – Traffic in Transit seems to suggest and as Hong Kong, China argues.

7.302. Finally, we turn to Article XXI(c), which offers additional context that may be helpful in informing the meaning of the phrase “emergency in international relations.” Article XXI(c) provides that “[n]othing in this Agreement shall be construed to … prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter (U.N. Charter) for the maintenance of international peace and security.” Chapter VII of the U.N. Charter, entitled “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression,” sets out the framework for action by the Security Council with respect to the maintenance of international peace and security. Article 39 of the U.N. Charter describes the types of situations that fall within the Security Council’s competence in this regard. Those situations are “any threat to the peace, breach of the peace, or act of aggression.”

7.303. … Article XXI(c) acknowledges that Members may be required to take action against another Member or Members pursuant to their obligations under the U.N. Charter for the maintenance of international peace and security. Where such actions flowing from such obligations would otherwise be contrary to a Member’s GATT obligations, Article XXI(c) provides for a defense to a claim of GATT inconsistency. Action under Article XXI(b) is, in contrast, unilaterally determined by the invoking Member, rather than resulting from the Member’s U.N. Charter obligations. [Note the Panel’s use of the adverb “unilaterally.”] Does the Panel thereby contradict its earlier holding that Article XXI is not self-judging? Note also any resolution concerning Hong Kong for which the U.S. might have tried to seek Security Council support would have been doomed by a Chinese veto. At the same time, Article XXI(c), forms part of the context of Article XXI(b). Accordingly, for the purposes of identifying the meaning of the phrase “emergency in international relations,” Article XXI(c) can be seen as illustrating the seriousness and gravity of the type of situations that are covered by Article XXI more generally.
7.304. In light of the contextual analysis, we consider that the phrase “emergency in international relations” refers to a state of affairs, of the utmost gravity, that represents a breakdown or near-breakdown in the relations between states or other participants in international relations.

[Consider whether the U.S. should win even on this definition. The CCP’s numerous, sustained repressive acts in Hong Kong were so serious—and involved possible use of the PLA—that relations between America and China, and America and Hong Kong, were fundamentally altered, that is, they essentially broke down and America, by virtue of its own statutory obligations, had no choice to change its country of origin marking requirements.]

7.305. We see nothing in the object and purpose of the GATT 1994 or the WTO Agreement, … which would contradict the meaning that we have discerned.

7.5.4.1.2.3 Conclusion on the interpretation of the phrase “emergency in international relations”

7.306. Where we, thus, have come to in our analysis under Article 31 of the Vienna Convention is that the phrase “emergency in international relations” refers to a state of affairs, of the utmost gravity, in effect a situation representing a breakdown or near-breakdown in the relations between states or other participants in international relations.

7.307. In light of this meaning, a Panel’s inquiry will concern the relations between states and other participants in international relations, and the extent to which underlying circumstances have led to a state of affairs that is of the utmost gravity representing a breakdown or near-breakdown in those relations. … [T]he emergency does not necessarily have to originate in the invoking Member’s own territory and bilateral relations but could happen more broadly in relations among a wider group of WTO Members.

7.308. … [T]he focus under Sub-Paragraph (iii) is therefore not about the underlying circumstances from which such a state of affairs appears to result, but rather about the gravity of the impact that such state of affairs has on the relations between two or more countries, or Members. In other words, the wording of the Sub-Paragraph enjoins a Panel to examine the extent of the deterioration in relations between states or other participants in international relations, irrespective of what caused that deterioration. Although the underlying circumstances may inform a Panel’s assessment of whether a given situation constitutes an emergency in international relations, a Panel would not review the merits or the veracity of such underlying circumstances or alleged circumstances that may have given rise to the situation examined.

[Query whether any WTO Panel, or the Appellate Body, is competent to make the assessment referenced in the second clause of the first sentence in the above Paragraph. Insofar as such an evaluation requires classified intelligence, which the U.S. neither could nor should with Panelists (who, in any event, almost certainly do not have the requisite security clearance), how can a Panel make this assessment?]
7.309. As regards the assessment of the gravity of the situation, the United States submits that “the question of whether a situation is ‘serious, unexpected, and often dangerous’ and ‘requires action’ is inherently subjective.” We acknowledge that the invoking Member’s view, as well as that of other countries or Members implicated in the emergency in international relations, are relevant for a Panel’s examination under Article XXI(b)(iii). However, this does not mean that a Panel must solely rely on the invoking Member’s appreciation of the situation, or that a Panel cannot refer to objective parameters to conclude on the existence or not of such an emergency. To that extent, and consistent with our view that Article XXI(b) is only partly self-judging, we do not consider that it would be solely up to the invoking Member to determine the existence of an emergency in international relations.

7.310. Just as with respect to other inherently subjective human experiences, for example, how we experience whether it is warm or cold, there are parameters to establish when a situation constitutes an emergency in international relations. In our view, such parameters could be conceptualized in a spectrum covering friendly and peaceful interaction between Members, at one end, and the breakdown of relations between two or more countries, or Members, at the other end. This spectrum would serve a similar role for an emergency in international relations, in the same way that a thermometer does for measuring temperature. They both provide a framework to assess how a particular phenomenon has been manifested.

[Does the Panel bespeak its own lack of competence by analogizing an emergency in international relations to warm and cold temperatures? In other words, is this analogy ludicrous, and does it, moreover, denigrate the objectivity of seasoned professionals across America’s intelligence community?]

7.311. Based on the meaning we have discerned above, an emergency in international relations on that spectrum lies closer to the extreme of a breakdown in relations between two or more countries, or Members. In contrast, most political tensions and differences among countries, even those that may appear to be of a quite serious nature, would, in our view, normally not be situated close enough to that end of the spectrum and would therefore not necessarily constitute an emergency. As we know from daily media reports, we live in a world driven by a range of political, economic, social, and environmental tensions and divergences. At the same time, in the midst of these tensions and divergences Members will in most cases continue to manage their relationships within a range of international legal frameworks aimed at ensuring predictability and stability within the international system. Article XXI(b)(iii) stands for the principle that situations of war or other emergency in international relations represent an exception to this. If the existence of tensions or policy divergences of any magnitude, however, were to constitute an emergency in international relations, the character of Article XXI as an exception to apply in the gravest of circumstances would fundamentally change.
[Here the Panel clearly forgets the *dictum* of Clausewitz, that war is politics by other means. That is, the Panel – despite its reference to a “spectrum” – fails to appreciate how close war and politics sometimes are in international relations.]

7.312. However, we consider that it would neither be possible nor helpful to attempt to provide a list of events that fall under this definition in the abstract. A determination of whether a given situation constitutes an emergency in international relations is to be examined on a case-by-case basis, considering the circumstances and context in which Article XXI(b)(iii) is invoked. In this context, we consider that the further removed that a situation is from war or comparable threat to international peace and security, the more explanation a respondent would usually need to provide as to why a given situation is close to the breakdown in relations between two or more countries, or Members, in the sense of Article XXI(b)(iii).

7.313. We further note that two previous Panels have concluded that the circumstances in those cases constituted an emergency in international relations. The first instance was the situation between Ukraine and Russia in 2014, examined by the panel in *Russia – Traffic in Transit*. That Panel considered that there was evidence on record that, between March 2014 and the end of 2016, “relations between Ukraine and Russia had deteriorated to such degree that they were a matter of concern to the international community,” such that by December 2016, the “situation between Ukraine and Russia was recognized by the U.N. General Assembly as involving armed conflict.” That Panel further noted that additional evidence of the gravity of the situation was the fact that, since 2014, several countries had imposed sanctions against Russia in connection with that situation.

7.314. The second instance concerned the relations between Qatar, on the one hand, and Saudi Arabia and other countries in the Middle East and North Africa region, on the other hand, examined by the Panel in *Saudi Arabia – IPRs*. That Panel concluded “that ‘a situation … of heightened tension or crisis’ exists in the circumstances in this dispute, and is related to Saudi Arabia’s ‘defense or military interests, or maintenance of law and public order interests’ (i.e., essential security interests), sufficient to establish the existence of an ‘emergency in international relations’ that has persisted since at least 5 June 2017.” The Panel’s conclusion took into account, *inter alia*, Saudi Arabia’s severance of diplomatic, consular and economic ties with Qatar, which the Panel qualified as action that “can be characterized in terms of an exceptional and serious crisis in the relations between two or more States.” [Query why the Panel does not appreciate that America’s decision to treat Hong Kong no differently from the Mainland is not equivalent to Saudi Arabia’s action.]

The Panel also considered that the nature of the allegations made by Saudi Arabia, on which the Panel expressed or implied no position and that were strongly denied by Qatar, “constitutes further evidence of the grave and serious nature of the deterioration and rupture in relations between these Members, and is also explicitly related to Saudi Arabia’s security.” In this regard the Panel disagreed with Qatar that those events could be characterized as a “mere political or economic” dispute. [Here again, the Panel misses a key fact: by the time of the present case, the Sino-American relationship had plunged to its lowest level since the 4 June 1989 Tiananmen Square massacre, and the U.S.-Taiwan relationship got ever closer, including through American arms exports to Taiwan. That
neither side broke off diplomatic relations with the other was, perhaps, because the two largest powers on earth did not want to go to outright war.]

7.315. Although both Panels relied on a slightly different definition of emergency in international relations than the one elaborated here, the elements identified by both Panels clearly reflect a similar understanding to ours of the type of situation that constitutes an emergency in international relations. That is, a state of affairs, of the utmost gravity, which represents a breakdown or near-breakdown in the relations between states or other participants in international relations.

7.316. We next turn to examining the facts of this case to determine whether the situation at issue satisfies the parameters of an emergency in international relations under Article XXI(b)(iii).

7.5.4.2 Whether the situation at issue is one that constitutes an emergency in international relations

7.5.4.2.1 Arguments of the parties and the third parties

7.317. The United States submits that to the extent that the Panel chooses to assess the merits of the United States’ invocation of Article XXI(b)(iii), it has submitted extensive evidence on the record that supports such invocation, as well as evidence on the existence of an emergency in international relations. According to the United States, the views of other countries regarding the situation with respect to Hong Kong, China could support a finding that there is such an emergency. The United States submits that it would expect the Panel to consider the evidence on record regarding the basis for the measures at issue and the circumstances and context in which they were taken.

7.318. Hong Kong, China contends that the United States has failed to demonstrate that its alleged concerns about freedom and democracy in Hong Kong, China constitute an emergency in international relations. According to Hong Kong, China, the United States failed to demonstrate that these alleged concerns implicate any defence or military interest, or maintenance of law and public order interest, of the United States. [When the promotion of freedom, democracy, and human rights are a central pillar of American foreign policy since the founding of the country, how reasonable is the argument of Hong Kong, China?] Moreover, Hong Kong, China submits that the relations between the United States and Hong Kong, China continue as before, including on trade matters with the exception of the specific origin-marking requirement that is the subject of the current dispute (as well as the other actions taken pursuant to Executive Order 13936 not at issue in this dispute). In this regard, Hong Kong, China notes that most pertinently, the United States continues to treat goods manufactured or produced in Hong Kong, China as goods of Hong Kong, China origin for the purpose of duty assessment.

7.319. Canada comments that the concerns of the United States, which Canada shares, regarding the degree of autonomy of Hong Kong, China and the respect for rights and
7.320. China states that the National Security Law (which came into effect on 30 June 2020) and relevant measures taken to safeguard the security and stability of Hong Kong, China are fully in line with the Basic Law and “one country, two systems” policy. China further notes that these measures have not changed the status of Hong Kong, China as a separate customs territory, nor do they affect its qualifications and status as a WTO Member. According to China, these measures have nothing to do with the so-called national security of other WTO Members. [Given that China applies this Law extraterritorially to any citizen of any country, including in the U.S. to Americans, is the Chinese argument disingenuous?]

7.321. The European Union argues that there are significant elements to indicate that the situation to which the United States sought to respond by its measures is one of an emergency in international relations within the meaning of Article XXI(b)(iii) of the GATT 1994. [Note, then, both Canada and the EU support the American argument. Does that fact suggest the Panel is hubristic in rejecting this argument?]

7.5.4.2.2 Panel’s assessment

7.322. Our task is to examine whether in the specific circumstances of this dispute the situation at issue is one that constitutes an emergency in international relations. To that effect, in this section we examine the evidence and arguments submitted by the United States, as well as Hong Kong, China’s arguments and those arguments and evidence submitted by certain third parties. In undertaking this task, we focus on whether international relations reached a state of breakdown or near-breakdown consistent with the meaning of “emergency in international relations” clarified above. … [O]ur inquiry will not be focused on the underlying events in Hong Kong, China referred to by the United States, but rather on how we see their effect reflected in international relations and whether the standard of an “other emergency in international relations” is met.

[The final sentence of the above Paragraph again dooms the U.S. argument, because events in Hong Kong are inextricably linked to the existence of an emergency. In other words, the Panel evades the connection that is crucial to the American position. Moreover, the situation in Hong Kong involved an international treaty – that between the U.K. and China concerning the 1 July 1997 handover of Hong Kong – plus the 1984 Sino-British Joint Declaration. (These agreements are discussed in a separate Chapter, and in Raj Bhala, Trade War: Causes, Conduct, and Consequences of Sino-American Confrontation (2024). Therein lies another clear nexus of events in Hong Kong to international relations.)

7.5.4.2.2.1 Evidence submitted by the United States
7.323. The United States generally asserts that the evidence that it submitted to the Panel supports the existence of an emergency in international relations. The United States emphasizes that it considered that the situation in Hong Kong, China, resulting from China’s actions (including the adoption of the National Security Law) and from actions of Hong Kong, China’s authorities, poses a threat to its essential security interests. In this way, the United States argument appears to be focused principally on the *chapeau* to Article XXI and the reference to action it considered necessary in relation to its essential security interests. At the same time, we understand that according to the United States, “an erosion of freedoms and rights of the people in Hong Kong, China, as well as the institutional degradation of democracy in Hong Kong, China” in and of itself constitutes an emergency in international relations under Article XXI(b)(iii). We therefore turn to examining whether the evidence on the record demonstrates this to be the case.

7.324. ... [T]he relevant international relations may include those between the parties to this dispute or between other Members. Based on the United States’ arguments, we consider that our inquiry in the context of the current dispute concerns the United States’ relations with China and Hong Kong, China, as well as those between other Members, on the one hand, and China and Hong Kong, China, on the other hand.

7.325. The evidence before us can be grouped in four categories: U.S. domestic instruments; reports and statement by United States’ officials on the situation in Hong Kong, China; statements by other countries and Members on the situation in Hong Kong, China; and press articles. We turn to examining each of those categories.

**U.S. domestic instruments**


7.327. Through the 1992 *Hong Kong Policy Act*, the United States Congress set out the policy of the United States with respect to Hong Kong, China following the resumption of the exercise of the People’s Republic of China’s sovereignty over Hong Kong, China on 1 July 1997. [Your *E-Textbook* author was present for this momentous occasion, before which he received with his colleagues a briefing from the Right Honorable Chris Patton (1944-), the last British Governor of Hong Kong.] Among its findings and declarations, the U.S. Congress recognized the 1984 *Sino-British Joint Declaration* and the parties’ commitments set out therein. The U.S. Congress also noted that “[s]upport for democratization is a fundamental principle of United States foreign policy. As such, it naturally applies to United States policy towards Hong Kong. This will remain equally true after June 30, 1997. Moreover, the U.S. Congress observed that the “human rights of the people of Hong Kong are of great importance to the United States and are directly relevant
to the United States interests in Hong Kong.” This Act also sets out the conditions under which the U.S. President may determine that Hong Kong, China no longer warrants differential treatment from China as a result of a finding that Hong Kong, China is no longer sufficiently autonomous.

7.328. The 2019 *Hong Kong Human Rights and Democracy Act*, reaffirms some of the principles of the 1992 *Hong Kong Policy Act*, including the protection of democracy and human rights. It also expresses that it is the United States’ policy to “urge the Government of [China] to uphold its commitments to Hong Kong,” including democratic elections. As well as to “draw international attention to any violations by the Government of [China] of the fundamental rights of the people of Hong Kong” and to “coordinate with allies, including the United Kingdom, Australia, Canada, Japan, and the Republic of Korea, to promote democracy and human rights in Hong Kong.” [Sic. Note the Panel’s poor editing: the sentence is incomplete, lacking a subject. Therein lies an irony: the Panel, earlier in its decision (excerpted above) arrogates the power of interpretation of GATT Article XXI.] Notably, the 2019 *Hong Kong Human Rights and Democracy Act* sets out the conditions under which the [U.S.] Secretary of State would report to Congress the situation regarding the autonomy of Hong Kong.

7.329. On 28 May 2020, the State Department issued the 2020 *Hong Kong Policy Act Report*, covering developments in Hong Kong from March 2019 through May 2020. The Report observes that “[a]fter careful consideration, as required by Section 301 of the *Hong Kong Policy Act*, I [U.S. Secretary of State Mike Pompeo] can no longer certify that Hong Kong continues to warrant” differential treatment under U.S. law. This Report further notes that since the last Report was issued, where it was found that Hong Kong, China maintained sufficient – although diminished – degree of autonomy, “China has shed any pretence that the people of Hong Kong enjoy the high degree of autonomy, democratic institutions, and civil liberties guaranteed to them by the *Sino-British Joint Declaration* and the *Basic Law*.”

7.330. The Report supports the foregoing statements with reference to three elements. First, a statement issued by the Legislative Affairs Commission of the National People’s Congress Standing Committee (NPCSC) on November 2019 “asserting that only the NPCSC has the power to decide government’s Central Government Liaison Office (CGLO) on 17 April 2020, “claiming that CGLO and the central government’s Hong Kong and Macau Affairs Office in Beijing are not bound by a provision of the *Basic Law* which states that ‘no department of the Central People’s Government … may interfere with the affairs’ of Hong Kong.” Third, that on 22 May 2020, the National People’s Congress proposed to “unilaterally and arbitrarily impose national security legislation on Hong Kong,” which the Report describes as “a procedural step which contradicts the spirit and practice of the *Sino-British Joint Declaration* and the One Country, Two Systems Framework.” The Report also refers to the protests that ensued, as well as reactions from Hong Kong, China and Chinese authorities.

7.331. On 14 July 2020 *Executive Order* 13936 was issued. The U.S. President determined that Hong Kong, China was “no longer sufficiently autonomous to justify differential treatment in relation to [China (PRC)] under the particular United States laws and
provisions thereof set out in this Order.” Executive Order 13936 refers to the events described in the 2020 Hong Kong Policy Act Report, and supplements them indicating that “China has since followed through on its threat to impose national security legislation on Hong Kong.” On that basis, the U.S. President determined that “the situation with respect to Hong Kong, including recent actions taken by the PRC to fundamentally undermine Hong Kong’s autonomy, constitutes an unusual and extraordinary threat, which has its source in substantial part outside the United States, to the national security, foreign policy, and economy of the United States,” and declared “a national emergency with respect to that threat.”

[Per the above comments, query whether the Panel is simply “going through the motions” in reviewing the U.S. legal instruments. Has the Panel not already cast the die against the U.S. with the interpretations is rendered? Indeed, why go through this recitation when the Panel is destined for a conclusion that the human rights deprivations in Hong Kong are neither grave nor an emergency in international relations?]

7.332. Through Executive Order 13936 several measures were put in place in response to the situation in Hong Kong, China. Notably, … it mandated the suspension of differential treatment regarding country of origin marking at issue in this dispute. Other measures included: suspending certain U.S. laws; amending implementing regulations on immigration, and arms and exports control; and suspending or terminating extradition treaties, provision of training to members of the Hong Kong Police Force or other Hong Kong security services, cooperation on scientific and educational matters, and tax exemptions. [Note that under U.S. law, these “other measures” were highly significant, the violation of some of which were criminal.] Action was mandated regarding Hong Kong citizens seeking refugee status in the United States for humanitarian reasons. Measures concerning individuals or entities linked to certain types of events in Hong Kong, China including asset blocks, were also introduced.

7.333. The 2020 Hong Kong Autonomy Act was enacted, “to impose sanctions with respect to foreign persons involved in the erosion of certain obligations of China with respect to Hong Kong.” The U.S. Congress referred to instances where “the Government of China has undertaken actions that have contravened the letter or intent” of some of the obligations in the 1984 Sino-British Joint Declaration and the Basic Law. In particular, the findings refer to judicial independence, maintaining the social and economic system in Hong Kong, China, human rights, and the democratic system in Hong Kong, China. The U.S. Congress further indicates that its findings are “deeply concerning to the people of Hong Kong, the United States, and members of the international community who support the autonomy of Hong Kong.”

7.334. The 2020 Hong Kong Autonomy Act refines the framework to establish penalties with respect to foreign individuals and to entities found to be involved in the contravention of the obligations of China under the 1984 Sino-British Joint Declaration and the Basic Law and the financial institutions transacting with those foreign individuals or entities. At the same time, the imposition of sanctions on the importation of goods from Hong Kong, China is expressly excluded from the authority provided in this Act. Moreover, it is stated
that “[n]othing in this Act shall be construed as an authorization of military force against China.”

[It is almost certain the Panel does not realize why this sentence is included in the Act. A reminder of the AUMF used after 9/11 to justify U.S. military action in Afghanistan and Iraq, and the controversies surrounding this justification, would have been worthwhile.]

7.335. On 31 March 2021, the State Department issued the 2021 Hong Kong Policy Act Report, on the conditions in Hong Kong from June 2020 to February 2021. This Report, like the one for 2020, considers that new actions taken by China led to Hong Kong, China not warranting “treatment under U.S. law in the same manner as U.S. laws were applied to Hong Kong before July 1, 1997.” The Report bases its conclusion on three main elements. First, by unilaterally imposing the National Security Law, China “dramatically undermined rights and freedoms in Hong Kong.” Second, following the imposition of the National Security Law, Hong Kong police arrested at least 99 opposition politicians, activists, and protestors on charges of secession, subversion, terrorism, and collusion with a foreign country or external elements. Third, the Hong Kong Government used COVID-19-related restrictions to deny authorizations for public demonstrations and postponed Hong Kong's Legislative Council elections for at least one year.

[At this point, is it worth asking why the Panel bothers to recount the serious U.S. concerns, only to toss them aside within a few pages? Is the Panel feeling guilty, knowing the international implications of the suffering of the people of Hong Kong under the CCP, yet trying to exonerate itself by regurgitating, but uncourageously not embracing, what the world knew to be true?]

7.336. The Report provides additional details on the State Department’s assessment of the situation in Hong Kong, China in several areas. Detailed views expressed in the Report on two topics are of particular relevance to our analysis of whether an emergency in international relations exists in the current context. The first concerns areas of remaining autonomy. Salient among those are: Hong Kong, China’s continued exercise of its “authority in the implementation of commercial agreements;” the continuation of the Hong Kong, China’s legal system being based on common law, despite concerns about the judicial system’s continued independence; the protection of property rights in law and practice; the maintenance of Hong Kong, China’s own currency pegged to the U.S. dollar; Hong Kong’s autonomous monetary policy; and Hong Kong, China’s participation, separately from China, in 24 international organizations and multilateral entities, including the Financial Action Task Force, the Asia-Pacific Economic Cooperation Forum, the International Olympic Committee, and the WTO.

[Is the Panel naïve to the erosion, if not outright loss, of all sources of autonomy? Consider this question in light of the Sino-American Trade War, chronicled in a separate Chapter.]

7.337. The second topic concerns U.S. – Hong Kong, China Cooperation and Agreements. The Report notes that the United States and Hong Kong, China continue to maintain several bilateral agreements regarding issues such as taxation, parcel delivery, and air services.
The Report refers to the United States’ notification of the suspension or termination of extradition agreements and tax exemptions in August 2020, pursuant to Executive Order 13936. The Report further notes that Hong Kong, China’s Government notified the United States of its purported suspension of the agreement concerning mutual legal assistance in criminal affairs. The lack of engagement or cooperation on law enforcement and related areas is also noted.

7.338. The U.S. instruments reviewed above show the following key aspects for our analysis of the existence of an emergency in international relations under Article XXI(b)(iii). First, the United States, as a matter of foreign policy, attaches great importance to the protection of human rights and democracy generally, and in Hong Kong, China particularly. [The word “particularly” is dubious: though inconsistent, the U.S. has stood for this protection across many Presidential Administrations, and many areas – albeit not all.] Second, the United States considered that certain actions by the Government of China with respect to Hong Kong, China and by Hong Kong, China’s authorities, undermined human rights and democracy in Hong Kong, China and raised serious concerns. Third, in response to such action, the United States took certain measures that include the origin marking requirement at issue in this dispute, amending U.S laws and regulations as they apply to Hong Kong, China in areas such as immigration and arms and exports control, as well as imposing sanctions on individuals or entities linked to certain events in Hong Kong, China. Fourth, the 2020 Hong Kong Autonomy Act expressly excluded restrictions on importations of Hong Kong, China products from the sanctions to be applied and underscored that its terms should not be construed as an authorization to use military force against China. Fifth, the United States and Hong Kong, China continue to maintain several bilateral agreements regarding issues such as taxation, parcel delivery, and air services. Sixth, Hong Kong, China continues to participate, separately from China, in 24 international organizations and multilateral entities, including the WTO.

Reports and statements of United States’ officials on the situation in Hong Kong, China

7.339. We next turn to the second category of evidence that the United States submitted. Such evidence includes some government reports and statements of government officials, referring to the situation in Hong Kong, China between July 2020 and December 2021.

7.340. The United States exhibited the U.S. Department of State Hong Kong 2020 Human Rights Report, which refers to events regarding the protection of human rights and the democratic system in Hong Kong, China. In our view, this Report, while providing an assessment by the United States of the human rights situation in Hong Kong, China, does not offer meaningful information on the specific issue of how the human rights situation in Hong Kong, China has affected international relations between the United States, Hong Kong, China and China.

[Is the Panel’s second sentence in the above Paragraph ridiculous? That annual Report is one of the world’s most well-researched and relied-upon documents concerning human
rights and their actual and potential linkages to international relations that is produced by any government, NGO, or IO.]

7.341. Also on record is a Press Statement of the U.S. Secretary of State [Anthony Blinken] on the amendment to the electoral system in Hong Kong, China of March 2021. According to the Secretary of State “[t]he United States condemns the PRC’s continuing assault on democratic institutions in Hong Kong,” and called on “the PRC to uphold its international obligations and commitments and to act consistently with Hong Kong’s Basic Law.” The Statement further remarked that the “United States stands united with our allies and partners in speaking out for the rights and freedoms of people in Hong Kong.”

7.342. The last Statement submitted by the United States is from the U.S. President [Joseph R. Biden]. The statement referring to the events of June 2021 regarding a media outlet in Hong Kong, China, remarked that “[p]eople in Hong Kong, have the right to freedom of the press. Instead, Beijing is denying basic liberties and assaulting Hong Kong’s autonomy and democratic institutions and processes, inconsistent with its international obligations. The United States will not waver in our support of people in Hong Kong and all those who stand up for the basic freedoms all people deserve.”

7.343. The Reports and Statements referred to above, clearly underscore the importance that the United States attaches to the protection of human rights and democracy in Hong Kong, China. Although some of these documents post-date the adoption of the origin marking requirement, they are informative of the concern that the United States expressed with respect to the events in Hong Kong, China.

[That the Panel is on the verge of ruling against the U.S. is intimated by the verb “informative,” as distinct from “compelling” or “persuasive.”]

Statements of other countries on the situation in Hong Kong, China

7.344. Regarding the third category of evidence, the United States submitted a statement from the Media Freedom Coalition, and the views expressed by Canada and the European Union in their submissions in these proceedings.

7.345. The Media Freedom Coalition Statement is dated 8 February 2022, over a year after the adoption of the origin marking requirement. This Statement signed by the governments of 21 countries, expresses “deep concern at the Hong Kong and Mainland Chinese authorities’ attacks on freedom of the press and their suppression of independent local media in Hong Kong.” This sentiment relates to events following the adoption of the National Security Law. The Statement further notes that these “ongoing actions further undermine confidence in Hong Kong’s international reputation through the suppression of human rights, freedom of speech and free flow and exchange of opinions and information.”

7.346. Canada’s statement referred to by the United States is that “Canada wishes to take this opportunity to join the United States and the European Union in expressing serious concern regarding recent developments in Hong Kong that have affected its degree of
autonomy from mainland China and the respect for rights and freedoms in Hong Kong.” Canada did not submit any evidence in support of this view. However, evidence on record suggests that Canada, similar to the United States, suspended extradition treaties with Hong Kong, China.

7.347. In turn, the European Union's view referred to by the United States is that “the EU shares the concerns of the United States regarding the degree of autonomy of Hong Kong and regarding the respect for protected rights and freedoms in Hong Kong.”

7.348. We further note in this context that the European Union, itself, in this proceeding, submitted statements of officials in support of its view referred to above. One of those statements announced that the European Union, similar to the United States, adopted a response package that included measures regarding: exports of specific sensitive equipment and technologies; extradition; asylum, migration, visa, and residency policy; scholarships and academic exchanges involving Hong Kong, China students and universities; and support to civil society.

7.349. The statement referred to by the United States and the evidence on record confirm that some countries and entities expressed high levels of concern about the events in Hong Kong, China, especially on how such events affect the human rights of its residents and its democratic system, and adopted certain measures in response vis-à-vis Hong Kong, China.

[Here again, the Panel’s failure to be swayed by such evidence, and to trust the CCP, suggests knavishness, foolishness, or both.]

**Press articles**

7.350. The last category of evidence submitted by the United States is press articles. Most of those press articles concern reports on the human rights situation in Hong Kong, China, including on limitations on freedom of the press, freedom of speech, democratic elections, and independence of the judiciary. These articles highlight events in Hong Kong, China during the period indicated above, however, except those mentioned below, they do not indicate how such events impacted international relations, including those between the United States, on the one hand, and China and Hong Kong, China, on the other.

[“Of course, they do,” might be a response: they are all about some of the most important relationships in the world international political economy.]

7.351. Some press articles do, however, refer to reports of reactions of certain governments with respect to the events in Hong Kong, China. Some governments were reported to have announced immigration measures to ease emigration from Hong Kong, China; to be reviewing or suspending extradition treaties with Hong Kong, China and “offering more visas to its citizens;” cautioning citizens over an “increased risk of arbitrary detention in Hong Kong;” expressing concern with respect to the situation in Hong Kong, China; and condemning the National Security Law and ensuing actions in Hong Kong, China.
7.352. The press articles on record report that certain countries share a high level of concern with respect to the human rights situation in Hong Kong, China and its democratic system, and that some countries adopted certain measures in response vis-à-vis Hong Kong, China. More generally, these press articles indicate that the human rights situation in Hong Kong, China has featured as a concern in public opinion within a number of WTO Members.

[Note the Panel’s failure to point out these reports are from a free press, not a press censored by an authoritarian government.]

7.5.4.2.2  Overall assessment

7.353. … [W]e must examine the specific circumstances of this dispute in light of the evidence and arguments on record. In the specific context before us, we consider that it is clear that events in Hong Kong, China, as pointed to by the United States, are, and remain, the subject of tensions and expressions of concern at the international level. It is also evident that the United States has taken certain actions in response to this situation, and specifically the measure at issue in this dispute; other countries have also adopted measures in response to the events in Hong Kong, China vis-à-vis Hong Kong, China. Accordingly, looked at broadly, these events have impacted on international relations between China, Hong Kong, China and a range of other WTO Members, some of whom have adjusted policy settings. At the same time, based on our review of all the evidence on record, we do not consider that the situation the United States points to meets the requisite level of gravity to constitute an emergency in international relations under Article XXI(b)(iii).

[Query whether the penultimate and ultimate sentences are inherently incongruous, and the Panel – without logical explanation – simply sides with the CCP in its crackdown on Hong Kong.]

7.354. In particular we are of the view that the following considerations tend to run counter to a conclusion that the situation has escalated to a point of breakdown or near-breakdown in the relations between states or other participants in international relations. We recall that the evidence before us shows that the United States and other Members took measures vis-à-vis Hong Kong, China (there is no evidence before us that there were measures taken vis-à-vis China). Those measures adopted vis-à-vis Hong Kong, China targeted only certain areas of their relations and not others. [Query, again, the reason for that continuance is to avoid nuclear war.] Indeed, the evidence on record shows that the United States and Hong Kong, China’s international relations continue to involve cooperation in a number of policy areas. We further note that trade has carried on between the United States and Hong Kong, China, largely as before, with the exception of the origin marking requirement and some export controls. [Query whether that is not the key exception”] In our view, all of this mitigates against a conclusion of a breakdown or near-breakdown in international relations that we have found to be consonant with an emergency in such relations.

7.355. We also find it helpful to further compare the situation before us with the previous cases where situations were found to constitute an emergency in international relations, …
to the extent that these may assist in determining whether the United States has demonstrated that the situation at issue is one that falls under Article XXI(b)(iii).

7.356. The situation between Ukraine and Russia in 2014 as considered by the Panel in *Russia – Traffic in Transit* involved a significant breakdown in relations between the two disputing Members, which had been the subject of a resolution in the U.N. General Assembly that considered the situation as involving armed conflict. In contrast, the 2021 *Hong Kong Policy Act Report*, refers to the areas of ongoing cooperation between the United States and Hong Kong, China. [Does it not also refer to the significant areas of divergence? After all, the point of the *Report* is to be honest.] Moreover, contrary to sanctions imposed on Russia following the crisis in 2014, there is no evidence on record of the United States or other countries imposing sanctions on the importation of goods from Hong Kong, China. [This statement ignores the fact that after Secretaries of State from the Trump and Biden Administrations, gentleman who could not be more different in substance and style, agreed Hong Kong, China = China, the U.S. took steps to treat them as one for purpose of sanctions and/or export controls. Witness, for example, the OFAC SDN listings and DOC BIS Entity List (both discussed in separate Chapters.) Goods from Hong Kong, China, although required to be marked as “China” origin, continue to be subject to the same tariff treatment as prior to the imposition of the origin marking requirement. We therefore do not see a parallel between the two situations as we understand the United States to suggest.

7.357. Turning to a comparison with the second case, there is no evidence or argument on the record that the United States or any other Member has severed its diplomatic, consular, or economic relations with China or Hong Kong, China. Such a step was among the considerations that, in the view of the Panel in *Saudi Arabia – IPRs*, demonstrated that the situation between Qatar and Saudi Arabia constituted an emergency in international relations. While Saudi Arabia's allegations against Qatar resulted in a total collapse of their relations, including economic relations, the events in Hong Kong, China condemned by the United States and other Members have not had an equivalent effect on the relations between the United States and other Members, on the one hand, and China and Hong Kong, China, on the other hand.

[Why does, and why should, severance of diplomatic relations matter? That tends to occur when war has broken out, or is about to break out. If so, then the Panel’s reliance on this point is an inflammatory tautology, to the effect: “We, the Panel, will not agree there is a GATT Article XXI(b) emergency in international relations’ unless and until formal diplomatic relations are severed.” If that is the test, then what might a Panel say about the South-North Korean relationship, which remain technically in a state of war, but on the other hand, the refusal of the Holy See (which has diplomatic relations with more country, even the U.S., than any other in the world) to recognize the PRC. Likewise, what might at Panel say about diplomatic relations that have been severed formally, but are handled informally, as between the U.S. and Iran via third parties? Do these questions underscore the inability of any WTO Panel to deal with the matter?]
7.358. In summary, we consider that although there is evidence of the United States and other Members being highly concerned about the human rights situation in Hong Kong, China, the situation has not escalated to a threshold of requisite gravity to constitute an emergency in international relations that would provide justification for taking actions that are inconsistent with obligations under the GATT 1994.

[If that is the case, then what type of human rights situation would surpass the threshold? Would it need to be outright genocide and/or crimes against humanity? Would, then, the repression of Uyghurs qualify? And, if the threshold were so high, what well-informed conscience would or should place any stock in a WTO Panel or Appellate Body opinion?]

7.359. Finally, we underscore that in arriving at this conclusion, we are in no way questioning the importance placed by the United States and other WTO Members, on the protection of human rights and democratic principles, or other values or interests they consider important, which may find reflection in their articulation of their essential security interests. [Here the only reasonable comment is a sceptical, Millenia generation, “Really?” coupled with a giant eye roll.] At the same time, measures adopted by Members to advance such interests, if defended on the basis of Article XXI, will need to meet the conditions for its application, which WTO Panels will continue to have the responsibility to assess in any dispute brought by WTO Members to the DSB in relation thereto. [In truth, perhaps not?: the Panel’s judicial activism has undermined the DSU and DSB.]

7.5.5 Conclusion on Article XXI(b)(iii) of the GATT 1994

7.360. Based on the foregoing, we conclude that the United States has not demonstrated that the situation at issue constitutes an emergency in international relations, and therefore the origin marking requirement is not justified under Article XXI(b)(iii).

7.361. … [O]ur duty is to assist the DSB in securing a positive solution to this dispute, rather than clarifying every issue of systemic importance arising from this dispute. Having reached the conclusion that the situation at issue does not constitute an emergency in international relations, we do not need to assess the measure under the remaining elements of Article XXI(b).

…

[At Paragraphs 7.362-7.368, the Panel exercised judicial economy on Hong Kong, China’s claims that the U.S. origin marking requirement was inconsistent with Article I:1 of the GATT 1994, Articles 2(c) and 2(d) of the ARO, and Article 2:1 of the TBT Agreement.”]

8 Conclusions and Recommendations

8.1. … [T]he Panel concludes as follows:

a. Article XXI(b) is not entirely self-judging insofar as the unilateral determination granted to the invoking Member through the phrase “which it considers” in the chapeau of that provision does not extend to the Sub-Paragraphs. Instead, the Sub-Paragraphs are subject to review by a Panel.
b. The origin marking requirement is inconsistent with Article IX:1 of the GATT 1994 because it accords to products of Hong Kong, China treatment with regard to marking requirements that is less favorable than the treatment accorded to like products of any third country.

c. The United States has not demonstrated that the situation at issue constitutes an emergency in international relations, and therefore the origin marking requirement is not justified under Article XXI(b)(iii).

8.2. The Panel exercises judicial economy on Hong Kong, China’s claims that the origin marking requirement is inconsistent with Article I:1 of the GATT 1994, Articles 2(c) and 2(d) of the ARO, and Article 2:1 of the TBT Agreement.

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measure at issue is inconsistent with Article IX:1 of the GATT 1994, it has nullified or impaired benefits accruing to Hong Kong, China under that agreement.

8.4. Pursuant to Article 19:1 of the DSU, we recommend that the United States bring its measure into conformity with its obligations under the GATT 1994.
Chapter 6

U.S. TRADE-NATIONAL SECURITY FRAMEWORKS

I. Statutory and Presidential Authorizations

HOUSE COMMITTEE ON WAYS AND MEANS, 111TH CONGRESS, 2ND SESSION, OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES, PART I OF II, 251-254, 264-265 (COMMITTEE PRINT, DECEMBER 2010)

INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT

In 1977, Congress passed the International Emergency Economic Powers Act (IEEPA) [50 U.S.C. §§ 1701-1706]. The Act grants the President authority to regulate a comprehensive range of financial and commercial transactions in which foreign parties are involved, but allows the President to exercise this authority only in order “to deal with an unusual and extraordinary threat, which has its source in whole or in part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency … with respect to such threat.”

Background

Public Law 95-223 [approved 28 December 1977], of which [the] IEEPA constitutes title II, redefined the President’s authorities to regulate international economic transactions in times of national emergency, until then provided by Section 5(b) of the Trading with the Enemy Act (TWEA) (50 App. U.S.C. § 5(b)), by eliminating TWEA’s applicability to national emergencies and instead providing such authorities in a separate statute of somewhat narrower scope and subject to congressional review.

The authorities granted to the President under IEEPA broadly parallel those contained in Section 5(b) of the TWEA, but are somewhat fewer and more circumscribed. While under the TWEA the existence of any declared national emergency, whether or not connected with the circumstances requiring emergency action, was used as the basis for such action, the IEEPA allows emergency measures against an external threat only if a national emergency under the National Emergencies Act [Public Law 94-412, 50 U.S.C. §§ 1601 et seq.] has been declared with respect to the same threat. Nevertheless, the President’s authorities under the IEEPA still remain extensive and … were further enhanced in 2001 by the USA Patriot Act [Public Law 109-56, approved 26 October 2001]… Under [the] IEEPA, the President may “by means of instructions, licenses, or otherwise … investigate, regulate, prevent, or prohibit” virtually any foreign economic transaction, from import or export of goods and currency, to transfer of exchange or credit.

Documents References:
(1) Havana (ITO) Charter Preamble, Article 99
(2) GATT Article XXI
(3) Relevant provisions in FTAs

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The only international transactions exempted from this authority are personal communications not involving a transfer of anything of value; charitable donations of necessities of life to relieve human suffering (except in certain circumstances); the importation to or expatriation from any country of information and informational materials, such as publications, not otherwise controlled by export control law or prohibited by espionage law; or personal transactions ordinarily incident to travel.

[The] IEEPA was amended by Section 106 of the USA Patriot Act to enhance its authorities. First, the Patriot Act clarified that the broad authorities granted to the President in the IEEPA include the power to block property during the pendency of an investigation. It also allows the President to confiscate and vest property of any foreign country or foreign national that has planned, authorized, aided, or engaged in armed hostilities with or attacks against the United States. In addition, the USA Patriot Act provides that in any judicial review of a determination made under the authorities Section of [the] IEEPA, if that determination was based on classified information, such information may be submitted to the reviewing court ex parte and in camera.

IEEPA penalties were raised by the International Emergency Economic Powers Enhancement Act [Public Law Number 110-96, enacted 16 October 2007], which increased criminal penalties for IEEPA violations to $1 million – up from $50,000 previously – or up to 20 years’ imprisonment for natural persons, or both. The act also raised civil penalties to the greater of $250,000 or twice the amount of the transaction for which the penalty is imposed, up from $50,000 previously.

[The] IEEPA requires the President to consult with Congress, whenever possible before declaring a national emergency, and while it remains in force. Once a national emergency goes into effect, the President must submit to Congress a detailed report explaining and justifying his actions and listing the countries against which such actions are to be taken, and why. The President is also required to provide Congress periodic follow up reports every six months with respect to the actions taken since the last report, and report any change in information previously reported. IEEPA programs are established pursuant to a Declaration of National Emergency under the National Emergencies Act [Public Law Number 94-412, 50 U.S.C. § 1701]. They can be terminated by the President and expire annually on the anniversary of their promulgation, unless the President continues them for another year.

Application

Since its enactment, the authority conferred by [the] IEEPA has been exercised on various occasions and for different purposes. For example, [the] IEEPA has been used to impose a variety of economic sanctions on foreign countries, as well as to block property and prohibit transactions with specially designated persons, such as persons who commit, threaten to commit, or support terrorism; persons indicted as war criminals by the International Criminal Tribunal for the former Yugoslavia [ICTFY]; persons who threaten international stabilization efforts in the Western Balkans; and persons undermining democratic processes or institutions in Zimbabwe. In addition, [the] IEEPA has been used
to continue in force the authority of the *Export Administration Act* during several periods when statutory authority has lapsed. …

**Iran**

In response to the seizure of the American Embassy and hostages in Teheran, President Carter, using **IEEPA** authority, on November 14, 1979, declared a national emergency and ordered the blocking of all property of the government of Iran and of the Central Bank of Iran within the jurisdiction of the United States. [See Executive Order 12170, 44 Federal Register 65729.] The measure and its later amendments were implemented through Iranian Assets Control Regulations (31 C.F.R. [Part] 535). Sanctions against Iran were broadened on April 7, 1980 [via Executive Order 12205, 45 Federal Register 24099], and April 17, 1980 [via Executive Order 12211, 45 Federal Register 26685], to constitute eventually an embargo on all commercial, financial, and transportation transactions with Iran, with minimal exceptions. The trade embargo was revoked by President Carter on January 19, 1981 [following signature of the *Algiers Accords*, which (<i>inter alia</i>) created the Iran-U.S. Claims Tribunal in The Hague, Netherlands], after the release of the Teheran hostages, but the national emergency has remained in effect and has been extended.

[On 29 October 1987, President Ronald Reagan re-imposed an embargo on imports of goods and services from Iran. His action followed Iranian attacks on American flag ships during the Iran-Iraq War, and was under the authority of the <i>International Security and Development Cooperation Act of 1985</i>, 22 U.S.C. § 2349aa-9, and implemented via Iranian Transactions Regulations set out at 31 CFR Part 560. The embargo remains in force, though it was eased in 2000 to allow some agricultural trade (e.g., caviar, dried fruit, foodstuffs, and nuts, as well as carpets)]. See 31 C.F.R. § 560.535. In 2004, certain publishing activities between the U.S. and Iran were allowed to resume. See 31 C.F.R. §§ 515.577, 538.529, and 560.538.]

President Clinton invoked his authority under [the] **IEEPA** and other statutes on March 15, 1995 to prohibit the entry of any U.S. person or any entity controlled by a U.S. person into a contract involving the financing or overall supervision and management of the development of the petroleum resources located in Iran. [See Executive Order 12957, 60 Federal Register 14615.] The President imposed additional sanctions on May 8, 1995. [Specifically, in Executive Order Number 12959, 60 Federal Register 24757, President Clinton prohibited trade in goods and services of Iranian origin, the export of goods, technology or services to Iran, and providing financing for those transactions, including the provision or use of other financial services with respect to such transactions. The re-exportation to Iran from third countries of goods or technology, which before had been controlled for export to Iran, also was prohibited. Transactions such as brokering and other dealing by U.S. persons in Iranian goods and services was barred, as well as new investments by U.S. persons in Iran or in property owned or controlled by the government of Iran. Finally, American companies were precluded from approving or facilitating their subsidiaries’ performance of transactions that they themselves could not perform.] The sanctions were then amended in 1997 [by Executive Order 13059, 62 Federal Register]
44,531; 31 C.F.R. Part 560]. … [Additional sanctions were imposed on Iran through the *Iran and Libya Sanctions Act of 1996 (ILSA)*, Public Law 99-83, 22 U.S.C. § 2349, which Congress renewed with respect to Iran in 2006, and subsequently amended and broadened. OFAC administers the sanctions.]

*Extensions of Export Control Regulations*

Just as with the *TWEA*, the *IEEPA* authority also has been used [by Presidents via Executive Orders] on several occasions to continue in force the administration of export controls when extensions of the *Export Administration Act of 1979 (EAA)* have not been enacted in time to continue the export control authority in force by statutory extension. …

…

[Presidents frequently invoke *IEEPA* authority. Additional examples of their application of this authority include:

By President Reagan in –
- May 1985 against Nicaragua (specifically, the Sandinista government);
- October 1985 against the apartheid regime of South Africa in January 1986;
- 1992, against the government of Colonel Muammar Qaddafi of Libya (for support of terrorism), and
- April 1988 against Panama (namely, the regime of Manuel Antonio Noriega of Panama).

By President George H.W. Bush in –
- August 1990 against Iraq (because of the invasion of Kuwait by Saddam Hussein’s regime);
- October 1991 against Haiti (in response to the overthrow of a democratically elected government), and;
- 1992 against Serbia and Montenegro (owing to actions in Croatia and Bosnia-Herzegovina).

By President Bill Clinton in –
- June 1998 against Serbia and Montenegro (because of actions in Kosovo);
- 1993 against Angola (in response to actions by the National Union for the Total Independence of Angola – UNITA);
- 1995 against terrorists disrupting the Middle East peace process;
- May 1997 against Burma (because of oppression of democratic opposition);
- November 1997 against Sudan (because of its backing of terrorism and efforts to destabilize neighboring governments, and human rights abuses);
- July 1999 against the Taliban regime in Afghanistan; and
- 2001 against Sierra Leone and Liberia (because of illicit trade in diamonds).

Notably, Presidents also have invoked the *IEEPA* to block the property or interests of specially designated persons, or block their transactions, who have acted contrary to the foreign policy or national security interest of the U.S.
In October 2000, Congress passed legislation— the *Trafficking Victims Protection Act of 2000*— allowing the President to invoke the *IEEPA* against trafficking in persons. It reauthorized that *Act* via the *Trafficking Victims Protection Reauthorization Act.*

... 

**TRADING WITH THE ENEMY ACT**

The ... *TWEA* [Public Law 65-91, Chapter 106, 50 U.S.C. App. §§ 1-44] prohibits trade with any enemy or ally of an enemy during time of war. From enactment in 1917 until 1977, the scope of the authority granted to the President under this *Act* was expanded to provide the statutory basis for control of domestic as well as international financial transactions and was not restricted to trading with “the enemy.” In response to the use of the *Act’s* authority under Section 5(b) during peacetime for domestic purposes that were often unrelated to a pre-existing declared state of emergency, Congress amended the *Act* in 1977. In 1977 Congress removed from the *TWEA* the authority of the President to control economic transactions during peacetime emergencies. [See Public Law Number 95-223, Title I.] Similar authorities, though more limited in scope and subject to the accountability and reporting requirements of the *National Emergencies Act* [Public Law Number 94-412, 50 U.S.C. §§ 1601 et seq.], were conferred upon the President by the *International Emergency Economic Powers Act* [in Title II].... Presidential authority during wartime to regulate and control foreign transactions and property interests were retained under the *Trading With the Enemy Act*. In addition, the 1977 legislation authorized the continuation of various foreign policy controls implemented under the *Trading With the Enemy Act*, such as trade embargoes and foreign assets controls. The retention of such existing controls, however, was made subject to one-year extensions conditioned upon a presidential determination that the extension is in the national interest.

**Background**

The *Trading With the Enemy Act* was passed in 1917 “to define, regulate, and punish trading with the enemy.” The *Act* was designed to provide a set of authorities for use by the President in time of war declared by Congress. In its original 19 Sections, the *TWEA* provided general prohibitions against trading with the enemy; authorized the President to regulate and prohibit international economic transactions by means of license or otherwise; established an office to administer U.S.-held foreign property; and set up procedures for claims to such property by non-enemy persons, among other provisions. The original 1917 *Act* appeared not to authorize the control of domestic transactions and limited its use to wartime exigencies.

Over the years, through use and amendment of Section 5(b), the basic authorizing provision, the scope of Presidential actions under the *TWEA* was greatly expanded. First, the *Act* was expanded to control domestic as well as international transactions. Second, the authorities of the *Act* were used to apply to Presidentially declared periods of “national emergency” as well as war declared by Congress. From 1933, when Congress retroactively approved President [Franklin D.] Roosevelt’s [1882-1945, President, 1933-1945] declaration of a national banking emergency by expanding the use of Section 5(b) to include national emergencies, until 1977, when Congress amended Section 5(b), ... the
President was authorized in time of war or national emergency to:

(1) regulate or prohibit any transaction in foreign exchange, any banking transfer, and the importing or exporting of money or securities;
(2) prohibit the withdrawal from the United States of any property in which any foreign country or national has an interest;
(3) vest, or take title to, any such property; and
(4) use such property in the interest and for the benefit of the United States.

The Trading With the Enemy Act did not provide a statement of findings and standards to guide the administration of Section 5(b). There was no provision in the Act for Congressional participation or review, or for presidential reporting at specified periods for actions undertaken under Section 5(b). There was no fixed time period for terminating a state of emergency. Nor was there any practical constraint on limiting actions taken under emergency authority to measures related to the emergency.

**Application**

By 1977 a state of national emergency had been declared by the President on four occasions and left unrescinded. In 1933 President Roosevelt declared a national emergency to close the banks temporarily and to issue emergency banking regulations. In 1950 President [Harry S.] Truman [1884-1972, President, 1945-1953] declared a national emergency in connection with the Korean conflict. President [Richard M.] Nixon [1913-1994, President, 1969-1974] declared a national emergency in 1970 to deal with the Post Office strike and another in 1971 based on the balance-of-payment crisis. As one measure to remedy this crisis, President Nixon at the same time imposed an import surcharge without specifically referring to Section 5(b), but later did take recourse to it as an additional authority when the action was challenged in court.

[The case is United States v. Yoshida International, Inc., 526 F.2d 560 (C.C.P.A. 1975) (discussed in a separate Chapter). President Nixon’s action was held to be constitutional, and in any event, he terminated the surcharge after a little over four months. Further illustrations of invocation of the TWEA include ones by President Roosevelt against the Axis Powers in the Second World War, and President Lyndon B. Johnson (1908-1973, President, 1963-1969) with respect to China, North Korea, Cambodia, and North and South Vietnam.

The ban on virtually all transactions with Cuba also was based on Section 5(b) of the TWEA. In the wake of the October 1962 Cuban Missile Crisis, in 1963 President John F. Kennedy (1917-1963, President, 1961-1963)) initiated the trade embargo on Cuba, and his Administration promulgated the Cuban Assets Control Regulations, 31 C.F.R. Part 515. Prohibited transactions are in Sub-Part B. Every President since him renewed the sanctions pursuant to the TWEA, typically by an annual “Presidential Determination” under the TWEA, until the dramatic December 2014 announcement by President Barack H. Obama.
(1961-, President, 2009-2017) that he was normalizing diplomatic relations and liberalizing economic ties with Cuba, following a deal brokered by the Holy Father, Pope Francis (1936-, 266th Pope, 2013-).

However, President Donald J. Trump (1946-, President, 2017-2021) reversed President Obama’s decisions, re-activating – effective 2 May 2019 – Title III of the Helms Burton Act (22 U.S.C. Sections 6021-6091) that had been suspended on six-month intervals ever since the Act took effect in 1996. Title III creates a private right of action for U.S. citizens to file lawsuits against any entity (including a foreign government or its agency or instrumentality, or an individual), anywhere in the world, that “traffics” in an asset confiscated by the Castro regime in Cuba on or after 1 January 1959. The Act defines “traffics” broadly to include any knowing and intentional use of confiscated property, without the authorization of the U.S. national that holds claim to that property, such as selling, transferring, distributing, managing, acquiring, or possessing the property, engaging in a commercial activity or otherwise benefiting from the property, causing another person to traffic in the property, or profiting from another person doing so. The damages a successful plaintiff may collect are based on the largest of three formulaic calculations: (1) the current fair market value of the property, or its fair market value when confiscated, plus interest; (2) an amount decided by a judge; or (3) for claims made and ruled upon in the early 1970s, an amount the Foreign Claims Settlement Commission (FCSC) certified, plus interest, and possibly treble damages. The President also reversed Obama-era travel relaxations, for example, cancelling OFAC’s general license for “People-to-People” educational travel.

President Trump’s reversal was itself reversed, in part, by his successor, Joseph R. Biden (1942-, President, 2021-):

The United States on … [16 May 2022] announced a series of steps to revise its policy toward Cuba, including easing some Trump-era restrictions on family remittances and travel to the island and sharply increasing the processing of U.S. visas for Cubans.

The measures, which were rolled out after a lengthy U.S. government review, mark the most significant changes in the U.S. approach to Havana since President Joe Biden took office in January 2021.

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78 See Matt Spetalnick & Sarah Marsh, In Major Shift, Trump to Allow Lawsuits Against Foreign Firms in Cuba, REUTERS, 16 April 2019, www.reuters.com/article/us-usa-cuba/in-major-shift-trump-to-allow-lawsuits-against-foreign-firms-in-cuba-idUSKCN1RS1Y (discussing Title III of the 1996 Helms-Burton Act, which permits “Cuban-Americans and other U.S. citizens to sue foreign companies doing business in Cuba over property seized in decades past by the Cuban government,” the implementation of which every President until Mr. Trump had waived).


But the announcement stopped short of returning U.S.-Cuba relations to the historic rapprochement engineered by former President Barack Obama, under whom Biden served as Vice President. That included less crimped flow of remittances, fewer travel curbs and faster visa services.

U.S. State Department spokesperson Ned Price in a statement said the measures announced Monday were to “further support the Cuban people, providing them additional tools to pursue a life free from Cuban government oppression and to seek greater economic opportunities.”

The State Department said the United States would lift the cap on family remittances, previously set to $1,000 per quarter, and authorize donative remittances to non-family members.

But it made clear that the United States would not remove entities from the Cuba Restricted List, a State Department list of Cuban government- and military-aligned companies with whom U.S. firms and citizens are barred from doing business.

“We are going to ensure that remittances flow more freely to the Cuban people, while not enriching those who perpetrate human rights abuses,” an Administration official said.

The United States will use “electronic payment processors” for remittances to avoid funds going directly to the Cuban government, an official said, adding that the United States had already engaged with the Cuban government “about establishing a civilian processor for this.”

…

Trump slashed visa processing, restricted remittances, scaled back flights, and increased hurdles for U.S. citizens seeking to travel to Cuba for anything other than family visits.

…

Cuban Foreign Minister Bruno Rodriguez … called the U.S. announcement “a limited step in the right direction.”

“The decision does not change the embargo, the fraudulent inclusion (of Cuba) on a list of state sponsors of terrorism nor most of the coercive maximum pressure measures by Trump that still affect the Cuban people,” he said.

…

Among the changes is a plan to reinstate the Cuban Family Reunification Parole Program, which had provided a legal way for Cuban families to be reunited in the United States, and increase capacity for consular services.

Washington will aim to issue 20,000 immigrant visas a year…, in line with
a migration accord. …

…

The Biden Administration will also expand authorized travel to Cuba, allowing scheduled and charter flights to use airports other than Havana….

Washington will also reinstate some categories of group educational travel, as well as certain travel related to professional meetings and research.

Individual “people-to-people” travel, however, will not be reinstated. The category was eliminated by Trump officials who said it was being abused by Americans taking beach vacations.

The United States will also increase support for independent Cuban entrepreneurs, aiming to ease access to the internet and expanding access to microfinance and training, among other measures.81

Arguably, the shift was related to migration pressures at America’s southern border, and thus self-interested: Cuba was “experiencing perhaps its most acute exodus since the Cold War, with many travelling to Nicaragua and then up via Central America to the U.S. border with Mexico.”82

Manifestly, the U.S. approach to Cuba was anything but consistent: it expanded and contracted, depending on the White House occupant and dominant Congressional political party, on a continuum of hard-line, Cold War-era closure to cautious, post-Fidel Castro regime openness. This inconsistency contrasted with America’s closest allies, including Canada and the EU, which had long since made their separate peace with Cuba and allowed both business and personal transactions to go forward.

II. SCOPE AND USE OF 1977 IEEPA PRESIDENTIAL AUTHORITY


[Summary]

The International Emergency Economic Powers Act (IEEPA) [Public Law 95-223, 91 Stat. 1625, 28 December 1977] provides the President broad authority to regulate a variety of economic transactions following a declaration of national emergency. IEEPA, like the

82 U.S. Agrees to Ease (analysis by Will Grant).
Trading with the Enemy Act (TWEA) from which it branched, sits at the center of the modern U.S. sanctions regime. Changes in the use of IEEPA powers since the Act’s enactment in 1977 have caused some to question whether the statute’s oversight provisions are robust enough given the sweeping economic powers it confers upon the President upon declaration of a state of emergency.

Over the course of the twentieth century, Congress delegated increasing amounts of emergency power to the President by statute. The Trading with the Enemy Act was one such statute. Congress passed TWEA in 1917 to regulate international transactions with enemy powers following the U.S. entry into the First World War. Congress expanded the act during the 1930s to allow the President to declare a national emergency in times of peace and assume sweeping powers over both domestic and international transactions. Between 1945 and the early 1970s, TWEA became a critically important means to impose sanctions as part of U.S. Cold War strategy. Presidents used TWEA to block international financial transactions, seize U.S.-based assets held by foreign nationals, restrict exports, modify regulations to deter the hoarding of gold, limit foreign direct investment in U.S. companies, and impose tariffs on all imports into the United States.

Following committee investigations that discovered that the United States had been in a state of emergency for more than 40 years, Congress passed the National Emergencies Act (NEA) in 1976 and IEEPA in 1977. The pair of statutes placed new limits on presidential emergency powers. Both included reporting requirements to increase transparency and track costs, and the NEA required the President to annually assess and extend, if appropriate, the emergency. However, some experts argue that the renewal process has become pro forma. The NEA also afforded Congress the means to terminate a national emergency by adopting a concurrent resolution in each chamber. A decision by the Supreme Court, in a landmark immigration case [INS v. Chadha, 462 U.S. 919 (1983)], however, found the use of concurrent resolutions to terminate an executive action unconstitutional. Congress amended the statute to require a joint resolution, significantly increasing the difficulty of terminating an emergency.

Like TWEA, IEEPA has become an important means to impose economic-based sanctions since its enactment; like TWEA, Presidents have frequently used IEEPA to restrict a variety of international transactions; and like TWEA, the subjects of the restrictions, the frequency of use, and the duration of emergencies have expanded over time. Initially, Presidents targeted foreign states or their governments. Over the years, however, presidential administrations have increasingly used IEEPA to target individuals, groups, and non-state actors such as terrorists and persons who engage in malicious cyber-enabled activities.

As of March 1, 2019, Presidents had declared 54 national emergencies invoking IEEPA, 29 of which are still ongoing. Typically, national emergencies invoking IEEPA last nearly a decade, although some have lasted significantly longer – the first state of emergency declared under the NEA and IEEPA, which was declared in response to the taking of U.S. embassy staff as hostages by Iran in 1979, may soon enter its fifth decade [as of March 2019].
IEEPA grants sweeping powers to the President to control economic transactions. Despite these broad powers, Congress has never attempted to terminate a national emergency invoking IEEPA. Instead, Congress has directed the President on numerous occasions to use IEEPA authorities to impose sanctions. Congress may want to consider whether IEEPA appropriately balances the need for swift action in a time of crisis with Congress’ duty to oversee executive action. Congress may also want to consider IEEPA’s role in implementing its influence in U.S. foreign policy and national security decision-making.

Introduction

The issue of executive discretion has been at the center of Constitutional debates in liberal democracies throughout the twentieth century. How to balance a commitment to the rule of law with the exigencies of modern political and economic crises has engaged legislators and scholars in the United States and around the world. [For example, as the CRS cited in its Footnote 1, see: CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (Princeton, N.J.: Princeton University Press, 1948); EDWARD CORWIN, TOTAL WAR AND THE CONSTITUTION (NEW YORK: KNOPP, 1963). GIORGIO AGAMBEN, STATE OF EXCEPTION (Chicago: University of Chicago Press, 2005); CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (Chicago: University of Chicago Press, 1985).]

The United States Constitution is silent on questions of emergency power. As such, over the past two centuries, Congress and the President have answered those questions in varied and often ad hoc ways. In the eighteenth and nineteenth centuries, the answer was often for the President to act without congressional approval in a time of crisis, knowingly risking impeachment and personal civil liability. [As the CRS observed in its Footnote 2: “Such an answer can be traced to, among others, John Locke, whose political theory was central to the development of American political institutions. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, ed. Thomas Hollis (London: A. Millar et al., 1764), pages 340-341 (“This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative….”).] Congress claimed primacy over emergency action and would decide subsequently to either ratify the President’s actions or indemnify the President for any civil liability.

Constitution, and his station makes it his duty to incur that risk.” *Quoted in PRAKASH, IMPERIAL FROM THE BEGINNING 214.*

By the twentieth century, a new pattern had begun to emerge. Instead of retroactively judging an executive’s extraordinary actions in a time of emergency, Congress created statutory bases permitting the President to declare a state of emergency and make use of extraordinary delegated powers. The expanding delegation of emergency powers to the executive and the increase of governing via emergency power by the executive has been a common trajectory among twentieth-century liberal democracies. [For example, see the sources the CRS cited in its Footnote 5: WILLIAM E. SCHEUERMAN, LIBERAL DEMOCRACY AND THE SOCIAL ACCELERATION OF TIME (Baltimore: Johns Hopkins University Press, 2004); JOHN M. CAREY & MATTHEW SOBERG HUGART, EDS, EXECUTIVE DECREES AUTHORITY (Cambridge: Cambridge University Press, 1998); Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 YALE LAW JOURNAL number 7 (May 2004); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE LAW JOURNAL number 7, 1392-1398 (May 1989); MARY L. DUDZIAK, *WAR-TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* (Oxford: Oxford University Press, 2012); EDWARD CORWIN, *TOTAL WAR AND THE CONSTITUTION* (New York: Knopf, 1963); CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (Princeton, N.J.: Princeton University Press, 1948).] As innovation has quickened the pace of social change and global crises, some legislatures have felt compelled to delegate to the executive, who traditional political theorists assumed could operate with greater “dispatch” than deliberately, future-oriented legislatures. Whether such actions subvert the rule of law or are a standard feature of healthy modern Constitutional orders has been a subject of extensive debate.

The *International Emergency Economic Powers Act (IEEPA)* is one such example of a twentieth-century delegation of emergency authority. One of 123 emergency statutes under the umbrella of the *National Emergencies Act (NEA)*, *IEEPA* grants the President extensive power to regulate a variety of economic transactions during a state of emergency. [To be clear, the *NEA* is the umbrella statute for the *IEEPA*.] Congress enacted *IEEPA* in 1977 to rein in the expansive emergency economic powers that it had been delegated to the President under the *Trading with the Enemy Act (TWEA)*. Nevertheless, some scholars argue that judicial and legislative actions subsequent to *IEEPA’s* enactment have made it, like *TWEA*, a source of expansive and unchecked executive authority in the economic realm. [In its Footnote 10, the CRS cited Patrick Thronson, *Toward Comprehensive Reform of America’s Emergency Law Regime,*” 46 MICHIGAN JOURNAL OF LAW REFORM number 2, 757-759 (2013).] Others, however, argue that Presidents often use *IEEPA* to implement the will of Congress either as directed by law or as encouraged by congressional activity. [The CRS cited in its Footnote 11, Kim Lane Scheppele, *Small Emergencies*, 40 GEORGIA LAW REVIEW number 3, 836, 845-847 (Spring 2006).]

... **Origins**

... **Pushing Back Against Executive Discretion**
By the mid-1970s, in the wake of U.S. military involvement in Vietnam, revelations of domestic spying, assassinations of foreign political leaders, the Watergate break-in, and other related abuses of power, Congress increasingly focused on checking the executive branch. The Senate formed a bipartisan special committee chaired by Senators Frank Church and Charles Mathias to reevaluate the expansive delegations of emergency authority to the President. The special committee issued a report surveying the President’s emergency powers in which it asserted that the United States had technically “been in a state of national emergency since March 9, 1933” and that there were four distinct declarations of national emergency in effect. The report also noted that the United States had “on the books at least 470 significant emergency statutes without time limitations delegating to the Executive extensive discretionary powers, ordinarily exercised by the Legislature, which affect the lives of American citizens in a host of all-encompassing ways.”

In the course of its investigations, Senator Mathias, committee co-chair, noted, “A majority of the people of the United States have lived all of their lives under emergency government.” Senator Church, the other co-chair, said the central question before the committee was “whether it [was] possible for a democratic government such as ours to exist under its present Constitution and system of three separate branches equal in power under a continued state of emergency.”

Among the more controversial statutes highlighted by the committee was TWEA. In 1977, during the House markup of a bill revising TWEA, Representative Jonathan Bingham, Chairperson of the House International Relations Committee’s Subcommittee on Economic Policy, described TWEA as conferring “on the President what could have been dictatorial powers that he could have used without any restraint by Congress.” According to the Department of Justice, TWEA granted the President four major groups of powers in a time of war or other national emergency:

(a) Regulatory powers with respect to foreign exchange, banking transfers, coin, bullion, currency, and securities;
(b) Regulatory powers with respect to “any property in which any foreign country or a national thereof has any interest;”
(c) The power to vest “any property or interest of any foreign country or national thereof;” and
(d) The powers to hold, use, administer, liquidate, sell, or otherwise deal with “such interest or property” in the interest of and for the benefit of the United States.

The House report on the reform legislation called TWEA “essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international economic arena, without congressional review.” The criticisms of TWEA centered on the following:

(a) It required no consultation or reports to Congress with regard to the use of powers or the declaration of a national emergency.
(b) It set no time limits on a state of emergency, no mechanism for congressional review, and no way for Congress to terminate it.

(c) It stated no limits on the scope of TWEA’s economic powers and the circumstances under which such authority could be used.

(d) The actions taken under the authority of TWEA were rarely related to the circumstances in which the national emergency was declared.

In testimony before the House Committee on International Relations, Professor Harold G. Maier summed up the development and the main criticisms of TWEA:

Section 5(b)’s effect is no longer confined to “emergency situations” in the sense of existing imminent danger. The continuing retroactive approval, either explicit or implicit, by Congress of broad executive interpretations of the scope of powers which it confers has converted the section into a general grant of legislative authority to the President.…” [U.S. Congress, House, Committee on International Relations, Revision of the Trading with the Enemy Act: Markup before the Committee on International Relations (“House Markup”), 95th Cong., 1st sess., June 1977.

Enactment of the National Emergencies Act and the International Emergency Economic Powers Act

Congress’s reforms to emergency powers under TWEA came in two acts. First, Congress enacted the National Emergencies Act (NEA) in 1976. The NEA provided for the termination of all existing emergencies in 1978, except those making use of Section 5(b) of TWEA, and placed new restrictions on the manner of declaring and the duration of new states of emergency, including:

- Requiring the President to immediately transmit to Congress of the declaration of national emergency.
- Requiring a biannual review whereby “each House of Congress shall meet to consider a vote on a concurrent [now joint, see below] resolution to determine whether that emergency shall be terminated.”
- Authorizing Congress to terminate the national emergency through a privileged concurrent [now joint] resolution.

Second, Congress tackled the thornier question of TWEA. Because the authorities granted by TWEA were heavily entwined with postwar international monetary policy and the use of sanctions in U.S. foreign policy, unwinding it was a difficult undertaking. The exclusion of Section 5(b) reflected congressional interest in preserving existing regulations regarding foreign assets, foreign funds, and exports of strategic goods. Similarly, establishing a means to continue existing uses of TWEA reflected congressional interest in “improving future use rather than remedying past abuses.”

The Sub-Committee charged with reforming TWEA spent more than a year preparing reports, including the first complete legislative history of TWEA, a tome that ran nearly 700
pages. In the resulting legislation, Congress did three things. First, Congress amended TWEA so that it was, as originally intended, only applicable “during a time of war.” Second, Congress expanded the Export Administration Act to include powers that previously were authorized by reference to Section 5(b) of TWEA. Finally, Congress wrote the International Emergency Economic Powers Act (IEEPA) to confer “upon the President a new set of authorities for use in time of national emergency which are both more limited in scope than those of Section 5(b) and subject to procedural limitations, including those of the [NEA].”

The Report of the House Committee on International Relations summed up the nature of an “emergency” in their “new approach” to international emergency economic powers:

> [G]iven the breadth of the authorities, and their availability at the President’s discretion upon a declaration of a national emergency, their exercise should be subject to various substantive restrictions. The main one stems from a recognition that emergencies are by their nature rare and brief, and are not to be equated with normal ongoing problems. A national emergency should be declared and emergency authorities employed only with respect to a specific set of circumstances which constitute a real emergency, and for no other purpose. The emergency should be terminated in a timely manner when the factual state of emergency is over and not continued in effect for use in other circumstances. A state of national emergency should not be a normal state of affairs.

**IEEPA’s Statute, its Use, and Judicial Interpretation**

**IEEPA’s Statute**

IEEPA [at 50 U.S.C. § 1702] … empowers the president to:

(A) investigate, regulate, or prohibit:

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or national thereof,

(iii) the importing or exporting of currencies or securities; and

(B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, 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.
when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.

These powers may be exercised “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, if the President declares a national emergency with respect to such threat.” [50 U.S.C. § 1701] Presidents may invoke IEEPA under the procedures set forth in the NEA. When declaring a national emergency, the NEA requires that the President “immediately” transmit the proclamation declaring the emergency to Congress and publish it in the Federal Register. [50 U.S.C. § 1621] The President must also specify the provisions of law that he or she intends to use. [50 U.S.C. § 1631]

In addition to the requirements of the NEA, IEEPA provides several further restrictions. Preliminarily, IEEPA requires that the President consult with Congress “in every possible instance” before exercising any of the authorities granted under IEEPA. [50 U.S.C. § 1703(a)] Once the President declares a national emergency invoking IEEPA, he or she must immediately transmit a report to Congress specifying [as per 50 U.S.C. § 1703(b)]:

1. the circumstances which necessitate such exercise of authority;
2. why the President believes those circumstances constitute an 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;
3. the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;
4. why the President believes such actions are necessary to deal with those circumstances; and
5. any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.
The President subsequently is to report on the actions taken under the IEEPA at least once in every succeeding six-month interval that the authorities are exercised [50 U.S.C. § 1703(c)] As per the NEA, the emergency may be terminated by the President, by a privileged joint resolution of Congress, or automatically if the President does not publish in the Federal Register and transmit to the Congress a notice stating that such emergency is to continue in effect after such anniversary. [50 U.S.C. § 1622]

Amendments to IEEPA

Congress has amended IEEPA eight times (Table 1). Five of the eight amendments have altered civil and criminal penalties for violations of orders issued under the statute. Other amendments excluded certain informational materials and expanded IEEPA’s scope following the terrorist attacks of September 11, 2001. Congress also amended the NEA in response to a ruling by the Supreme Court to require a joint rather than a concurrent resolution to terminate a national emergency.

... IEEPA Trends

Like TWEA prior to its amendment in 1977, the President and Congress together have often turned to IEEPA to impose economic sanctions in furtherance of U.S. foreign policy and national security objectives. While initially enacted to rein in presidential emergency authority, presidential emergency use of IEEPA has expanded in scale, scope, and frequency since the statute’s enactment. The House report on IEEPA stated, “emergencies are by their nature rare and brief, and are not to be equated with normal, ongoing problems.” National emergencies invoking IEEPA, however, have increased in frequency and length since its enactment.

Since 1977, Presidents have invoked IEEPA in 54 declarations of national emergency. On average, these emergencies last nearly a decade. Most emergencies have been geographically specific, targeting a specific country or government. However, since 1990, Presidents have declared non-geographically specific emergencies in response to issues like weapons proliferation, global terrorism, and malicious cyber-enabled activities. The erosion of geographic limitations has been accompanied by an expansion in the nature of the targets of sanctions issued under IEEPA authority. Originally, IEEPA was used to target foreign governments; however, Presidents have increasingly targeted groups and individuals. While Presidents usually make use of IEEPA as an emergency power, Congress has also directed the use of IEEPA or expressed its approval of presidential emergency use in several statutes.
<table>
<thead>
<tr>
<th>Date</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>December 28, 1977</td>
<td><em>IEEPA Enacted (P.L. 95-223; 91 Stat. 1625)</em></td>
</tr>
<tr>
<td>August 16, 1985*</td>
<td>Following the Supreme Court’s holding in INS v. Chadha, 462 U.S. 919 (1983) finding so-called legislative vetoes unconstitutional, Congress amends the NEA to change “concurrent” resolution to “joint” resolution. (P.L. 99-93; 99 Stat. 407, 448 (1985)). *While not technically an amendment to IEEPA, IEEPA is tied to the NEA’s provisions relating to the declaration and termination of national emergencies.</td>
</tr>
<tr>
<td>August 23, 1988</td>
<td><em>IEEPA amended to exclude informational materials (Berman Amendment...). (Omnibus Trade and Competitiveness Act of 1988; P.L. 100-418; 102 Stat. 1107, 1371)</em></td>
</tr>
<tr>
<td>October 6, 1992</td>
<td>Section 206 of IEEPA amended to increase civil and criminal penalties under the Act. (Treasury, Postal Service, and General Government Appropriations Act, 1993; P.L. 102-393; 106 Stat. 1729)</td>
</tr>
<tr>
<td>October 6, 1992</td>
<td>Section 206 of IEEPA amended to decrease civil and criminal penalties under the Act. (Department of Defense Appropriations Act, 1993; P.L. 102-396; 106 Stat. 1876)</td>
</tr>
<tr>
<td>September 23, 1996</td>
<td><em>IEEPA amended to penalize attempted violations of licenses, orders, regulations or prohibitions issued under the authority of IEEPA. (National Defense Authorization Act for Fiscal Year 1997; P.L. 104-201; 110 Stat. 2725; October 26, 2001 USA PATRIOT Act Amendments….)</em></td>
</tr>
<tr>
<td>October 26, 2001</td>
<td><em>USA PATRIOT Act … (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001; P.L. 107-56; 115 Stat. 272)</em></td>
</tr>
<tr>
<td>March 9, 2006</td>
<td>Section 206 of IEEPA amended to increase civil and criminal penalties under the Act. (USA PATRIOT Improvement and Reauthorization Act of 2005; P.L. 109-177; 120 Stat. 192)</td>
</tr>
<tr>
<td>October 16, 2007</td>
<td><em>The International Emergency Economic Powers Enhancement Act amended Section 206 of IEEPA to increase civil and criminal penalties and added conspiracy to violate licenses, orders, regulations or prohibitions issued under the authority of IEEPA. Civil penalties are capped at $250,000 or twice the amount of the transaction found to have violated the law. Criminal penalties now include a fine of up to $1,000,000 and imprisonment of up to 20 years. (International Emergency Economic Powers Enhancement Act; P.L. 110-96; 121 Stat. 1011)</em></td>
</tr>
</tbody>
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Presidential Emergency Use

IEEPA is the most frequently cited emergency authority when the President invokes NEA authorities to declare a national emergency. … Rather than referencing the same set of emergencies, as had been the case with TWEA, IEEPA has required the President to declare a national emergency for each independent use. As a result, the number of national emergencies declared under the terms of the NEA has proliferated over the past four decades. Presidents declared only four national emergencies under the auspices of TWEA in the four decades prior to IEEPA’s enactment. In contrast, Presidents have invoked IEEPA in 54 of the 61 declarations of national emergency issued under the National Emergencies Act. As of March 1, 2019, there were 32 ongoing national emergencies; all but three involved IEEPA.

…

Each year since 1990, Presidents have issued roughly 4.5 executive orders citing IEEPA and declared 1.5 new national emergencies citing IEEPA. …

On average, emergencies invoking IEEPA last nearly a decade. The longest emergency was also the first. President Jimmy Carter, in response to the Iranian hostage crisis of 1979, declared the first national emergency under the provisions of the National Emergencies Act and invoked IEEPA. Six successive Presidents have renewed that emergency annually for nearly forty years.

As of March 1, 2019, that emergency is still in effect, largely to provide a legal basis for resolving matters of ownership of the Shah’s disputed assets. That initial emergency aside, the length of emergencies invoking IEEPA has increased each decade. The average length of an emergency invoking IEEPA declared in the 1980s was four years. That average extended to 10 years for emergencies declared in the 1990s and 11 years for emergencies declared in the 2000s.…

As such, the number of ongoing national emergencies has grown nearly continuously since the enactment of IEEPA and the NEA…. Between January 1, 1979, and January 1, 2019, there were on average 14 ongoing national emergencies each year, 13 of which invoked IEEPA.

In most cases, the declared emergencies citing IEEPA have been geographically specific…. For example, in the first use of IEEPA, President Jimmy Carter issued an executive order that both declared a national emergency with respect to the “situation in Iran” and “blocked all property and interests in property of the Government of Iran [...].” Five months later, President Carter issued a second order dramatically expanding the scope of the first EO and effectively blocked the transfer of all goods, money, or credit destined for Iran by anyone subject to the jurisdiction of the United States. A further order expanded the coverage to block imports to the United States from Iran. Together, these orders touched upon virtually all economic contacts between any place or legal person subject to the jurisdiction of the United States and the territory and government of Iran.
Many of the executive orders invoking IEEPA have followed this pattern of limiting the scope to a specific territory, government, or its nationals. Executive Order 12513, for example, prohibited “imports into the United States of goods and services of Nicaraguan origin” and “exports from the United States of goods to or destined for Nicaragua.” The order likewise prohibited Nicaraguan air carriers and vessels of Nicaraguan registry from entering U.S. ports. Executive Order 12532 prohibited various transactions with the “Government of South Africa or to entities owned or controlled by that Government.”

While the majority (38) of national emergencies invoking IEEPA have been geographically specific, ten have lacked explicit geographic limitations. President George H.W. Bush declared the first geographically nonspecific emergency in response to the threat posed by the proliferation of chemical and biological weapons. Similarly, President George W. Bush declared a national emergency in response to the threat posed by “persons who commit, threaten to commit, or support terrorism.” President Barack Obama declared emergencies to respond to the threats of “transnational criminal organizations” and “persons engaging in malicious cyber-enabled activities.” Without explicit geographic limitations, these orders have included provisions that are global in scope. These geographically nonspecific emergencies have increased in frequency over the past 40 years – three of the ten have been declared since 2015.

In addition to the erosion of geographic limitations, the stated motivations for declaring national emergencies have expanded in scope as well. Initially, stated rationales for declarations of national emergency citing IEEPA were short and often referenced either a specific geography or the specific actions of a government. Presidents found that circumstances like “the situation in Iran,” or the “policies and actions of the Government of Nicaragua,” constituted “unusual and extraordinary threat[s] to the national security and foreign policy of the United States” and would therefore declare a national emergency.

The stated rationales have, however, expanded over time in both the length and subject matter. Presidents have increasingly declared national emergencies, in part, to respond to human and civil rights abuses, slavery, denial of religious freedom, political repression, public corruption, and the undermining of democratic processes. While the first reference to human rights violations as a rationale for a declaration of national emergency came in 1985,118most of such references have come in the past twenty years. …

Presidents have also expanded the nature of the targets of IEEPA sanctions. Originally, the targets of sanctions issued under IEEPA were foreign governments. The first use of IEEPA targeted “Iranian Government Property.” Use of IEEPA quickly expanded to target geographically defined regions. Nevertheless, Presidents have also increasingly targeted groups, such as political parties or terrorist organizations, and individuals, such as supporters of terrorism or suspected narcotics traffickers.

…

Congressional Nonemergency Use and Retroactive Approval
While *IEEPA* is often categorized as an emergency statute, Congress has used *IEEPA* outside of the context of national emergencies. When Congress legislates sanctions, it often authorizes or directs the President to use *IEEPA* authorities to impose those sanctions.

In the *Nicaragua Human Rights and Anticorruption Act of 2018*, … Congress directed the President to exercise “all powers granted to the President [by *IEEPA*] to the extent necessary to block and prohibit [certain transactions].” Penalties for violations by a person of a measure imposed by the President under the *Act* would be, likewise, determined by reference to *IEEPA*. The trend has been long-term. Congress first directed the President to make use of *IEEPA* authorities in 1986 as part of an effort to assist Haiti in the recovery of assets illegally diverted by its former government. That statute [Public Law Number 99-529, 100 Stat. 3010, 24 October 1986] provided:

> The President shall exercise the authorities granted by section 203 of the *International Emergency Economic Powers Act* [50 USC 1702] to assist the Government of Haiti in its efforts to recover, through legal proceedings, assets which the Government of Haiti alleges were stolen by former president-for-life Jean Claude Duvalier and other individuals associated with the Duvalier regime. This subsection shall be deemed to satisfy the requirements of Section 202 of that *Act*. [50 USC 1701]

In directing the President to use *IEEPA*, Congress waived the requirement that he declare a national emergency (and none was declared).

…

Congress has also expressed, retroactively, its approval of unilateral presidential invocations of *IEEPA* in the context of a national emergency. In the *Countering Iran’s Destabilizing Activities Act of 2017*, for example, Congress declared, “It is the sense of Congress that the Secretary of the Treasury and the Secretary of State should continue to implement Executive Order No. 13382.”

Presidents, however, have also used *IEEPA* to preempt or modify parallel congressional activity. On September 9, 1985, President Reagan, finding “that the policies and actions of the Government of South Africa constitute an unusual and extraordinary threat to the foreign policy and economy of the United States,” declared a national emergency and limited transactions with South Africa. The President declared the emergency despite the fact that legislation limiting transactions with South Africa was quickly making its way through Congress. In remarks about the Declaration, President Reagan stated that he had been opposed to the bill contemplated by Congress because unspecified provisions “would have harmed the very people [the U.S. was] trying to help.” Nevertheless, members of the press at the time (and at least one scholar since [BARRY E. CARTER, *INTERNATIONAL ECONOMIC SANCTIONS* 201 (1988)]) noted that the limitations imposed by the Executive Order and the provisions in legislation then winding its way through Congress were “substantially similar.”

**Current Uses of *IEEPA***
In general, *IEEPA* has served as an integral part of the postwar international sanctions regime. The President, either through a declaration of emergency or via statutory direction, has used *IEEPA* to limit economic transactions in support of administrative and congressional national security and foreign policy goals. Much of the action taken pursuant to *IEEPA* has involved blocking transactions and freezing assets.

Once the President declares that a national emergency exists, he may use the authority in Section 203 of *IEEPA* (Grants of Authorities; 50 U.S.C. § 1702) to investigate, regulate, or prohibit foreign exchange transactions, transfers of credit, transfers of securities, payments, and may take specified actions relating to property in which a foreign country or person has interest – freezing assets, blocking property and interests in property, prohibiting U.S. persons from entering into transactions related to frozen assets and blocked property, and in some instances denying entry into the United States.

Pursuant to Section 203, Presidents have:

- prohibited transactions with and blocked property of those designated as engaging in malicious cyber-enabled activities, including “interfering with or undermining election processes or institutions” …;
- prohibited transactions with and blocked property of those designated as illicit narcotics traffickers including foreign drug kingpins;
- prohibited transactions with and blocked property of those designated as engaging in human rights abuses or significant corruption;
- prohibited transactions related to illicit trade in rough diamonds;
- prohibited transactions with and blocked property of those designated as Transnational Criminal Organizations;
- prohibited transactions with “those who disrupt the Middle East peace process;”
- prohibited transactions related to overflights with certain nations;
- instituted and maintained maritime restrictions;
- prohibited transactions related to weapons of mass destruction, in coordination with export controls authorized by the *Arms Export Control Act and the Export Administration Act of 1979*, and in furtherance of efforts to deter the weapons programs of specific countries (*i.e.*, Iran, North Korea);
- prohibited transactions those designated as “persons who commit, threaten to commit, or support terrorism;”
- maintained the dual-use export control system at times when its then-underlying authority, the *Export Administration Act* authority had lapsed;
- blocked property of and transactions with those designated as engaged in cyber activities that compromise critical infrastructures including election processes or the private sector’s trade secrets;
- blocked property of and prohibited transactions with those designated as responsible for serious human rights abuse or engaged in corruption;
- blocked certain property of and transactions with foreign nationals of specific countries those designated as engaged in activities that constitute an extraordinary threat.
No President has used IEEPA to place tariffs on imported products from a specific country or on products imported to the United States in general. However, IEEPA’s similarity to TWEA, coupled with its relatively frequent use to ban imports and exports, suggests that such an action could happen. In addition, no President has used IEEPA to enact a policy that was primarily domestic in effect. Some scholars argue, however, that the interconnectedness of the global economy means it would probably be permissible to use IEEPA to take an action that was primarily domestic in effect. [See, as per Footnote 142, *The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, 96 Harvard Law Review number 5, 1111 (March 1983); Patrick A. Thronson, *Toward Comprehensive Reform of America’s Emergency Law Regime,*” 46 University of Michigan Journal of Law Reform number 2, 757-758 (2013).]

**Use of Assets Frozen under IEEPA**

The ultimate disposition of assets frozen under IEEPA may serve as an important part of the leverage economic sanctions provide to influence the behavior of foreign actors. The President and Congress have each at times determined the fate of blocked assets to further foreign policy goals.

**[Box Inset]**

**IEEPA vs Section 232 for Imposing Tariffs in Response to a National Security Threat**

While a President could use IEEPA to impose additional tariffs on imported goods as President Nixon did under TWEA, no President has done so. Instead, Presidents have turned to Section 232 of the *Trade Expansion Act of 1962* [19 U.S.C. § 1862(b)-(c)] in cases of purported emergency. Section 232 provides that if the Secretary of Commerce “finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security,” then the President may take action to adjust the imports such that they will no longer impair national security.

While the use of Section 232 requires findings by the Secretary of Commerce, the restrictions and reporting requirements of the NEA do not apply. For that reason, Section 232 may be a more attractive source of presidential authority for imposing additional tariffs for national security purposes. Using this authority, President Donald J. Trump applied additional duties on steel and aluminum in March 2018.

**Presidential Use of Foreign Assets Frozen under IEEPA**

Presidents have used frozen assets as a bargaining tool during foreign policy crises and to bring a resolution to such crises, at times by unfreezing the assets, returning them to the sanctioned entity or channeling them to a follow-on government. …
President Carter invoked authority under *IEEPA* to impose trade sanctions against Iran, freezing Iranian assets in the United States, in response to the hostage crisis in 1979. On January 19, 1981, the United States and Iran entered into a series of executive agreements brokered by Algeria under which the hostages were freed, a portion of the blocked assets ($5.1 billion) was used to repay outstanding U.S. bank loans to Iran, another part ($2.8 billion) was returned directly to Iran, another $1 billion was transferred into a security account in The Hague to pay other U.S. claims against Iran as arbitrated by the Iran-U.S. Claims Tribunal (IUSCT), and an additional $2 billion remained blocked pending further agreement with Iran or decision of the Tribunal.


The United States also undertook to freeze the assets of the former Shah’s estate along with those of the Shah’s close relatives pending litigation in U.S. courts to ascertain Iran’s right to their return. Iran’s litigation was unsuccessful, and none of the contested assets were returned to Iran.

... There is also precedent for using frozen foreign assets for purposes authorized by the U.N. Security Council. After the first war with Iraq, President George H.W. Bush ordered the transfer of frozen Iraqi assets derived from the sale of Iraqi petroleum held by U.S. banks to be transferred to a holding account in the Federal Reserve Bank of New York to fulfill “the rights and obligations of the United States under U.N. Security Council Resolution No. 778.” The President cited a section of the *United Nations Participation Act (UNPA)* [of 1945, Public Law Number 79-264, 59 Stat. 619, 20 December 1945]), as well as *IEEPA*, as authority to take the action. The transferred funds were used to provide humanitarian relief and to finance the United Nations Compensation Commission, which was established to adjudicate claims against Iraq arising from the invasion. Other Iraqi assets remained frozen and accumulated interest until they were vested in 2003....
Judicial Interpretation of IEEPA

A number of lawsuits seeking to overturn actions taken pursuant to IEEPA have made their way through the judicial system, including challenges to the breadth of congressionally delegated authority and assertions of violations of constitutional rights. … [M]ost of these challenges have failed. The few challenges that succeeded did not seriously undermine the overarching statutory scheme for sanctions.

Dames & Moore v. Regan

The breadth of presidential power under IEEPA is illustrated by the Supreme Court’s 1981 opinion in Dames & Moore v. Regan. [453 U.S. 654 (1981)] In Dames & Moore, petitioners had challenged President Carter’s executive order establishing regulations to further compliance with the terms of the Algiers Accords, which the President had entered into to end the hostage crisis with Iran. Under these agreements, the United States was obligated (1) to terminate all legal proceedings in U.S. courts involving claims of U.S. nationals against Iran, (2) to nullify all attachments and judgments, and (3) to resolve outstanding claims exclusively through binding arbitration in the Iran-U.S. Claims Tribunal (IUSCT). The President, through executive orders, revoked all licenses that permitted the exercise of “any right, power, or privilege” with regard to Iranian funds, nullified all non-Iranian interests in assets acquired after a previous blocking order, and required banks holding Iranian assets to transfer them to the Federal Reserve Bank of New York to be held or transferred as directed by the Secretary of the Treasury.

Dames and Moore had sued Iran for breach of contract to recover compensation for work performed. The district court had entered summary judgment in favor of Dames and Moore and issued an order attaching certain Iranian assets for satisfaction of any judgment that might result, but stayed the case pending appeal. The executive orders and regulations implementing the Algiers Accords resulted in the nullification of this prejudgment attachment and the dismissal of the case against Iran, directing that it be filed at the IUSCT.

In response, Dames and Moore sued the government. The plaintiffs claimed that the President and the Secretary of the Treasury exceeded their statutory and constitutional powers to the extent they adversely affected Dames and Moore’s judgment against Iran, the execution of that judgment, the prejudgment attachments, and the plaintiff’s ability to continue to litigate against the Iranian banks.

The government defended its actions, relying largely on IEEPA, which provided explicit support for most of the measures taken – nullification of the prejudgment attachment and transfer of the property to Iran – but could not be read to authorize actions affecting the suspension of claims in U.S. courts. Justice Rehnquist wrote for the majority:

Although we have declined to conclude that the IEEPA … directly authorizes the President’s suspension of claims for the reasons noted, we cannot ignore the general tenor of Congress’ legislation in this area in trying to determine whether the President is acting alone or at least with the
acceptance of Congress. As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, “especially … in the areas of foreign policy and national security,” imply “congressional disapproval” of action taken by the Executive. On the contrary, the enactment of legislation closely related to the question of the President’s authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to “invite” “measures on independent presidential responsibility.” At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President. [*Dames & Moore*, 453 U.S. at 678-79 (citations omitted)].

The Court remarked that Congress’s implicit approval of the longstanding presidential practice of settling international claims by executive agreement was critical to its holding that the challenged actions were not in conflict with acts of Congress. For support, the Court cited to Justice Frankfurter’s concurrence in *Youngstown Sheet and Tube Co. v. Sawyer* [343 U.S. 579, 610-11 (1952)] stating that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned … may be treated as a gloss on ‘Executive Power’ vested in the President by § 1 of Art. II.” [*Dames & Moore*, 453 U.S. at 686 (citing *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring)).] Consequently, it may be argued that Congress’s exclusion of certain express powers in *IEEPA* do not necessarily preclude the President from exercising them, at least where a court finds sufficient precedent exists.

Lower courts have examined *IEEPA* under a number of other constitutional doctrines.

**Separation of Powers – Non-Delegation Doctrine**

Courts have reviewed whether Congress violated the non-delegation principle of separation of powers by delegating too much power to the President to legislate, in particular by creating new crimes. These challenges have generally failed. As the U.S. Court of Appeals for the Second Circuit explained while evaluating *IEEPA* [in *United States v. Dhafir*, 461 F.3d 211, 212-13 (2d Cir. 2006), at issue in which was whether *IEEPA* constitutes an appropriate delegation of congressional authority to the executive)], delegations of congressional authority are constitutional so long as Congress provides through a legislative act an “intelligible principle” governing the exercise of the delegated authority. Even if the standards are higher for delegations of authority to define criminal offenses, the court held, *IEEPA* provides sufficient guidance. The [*Dhafir*] court stated:

> The *IEEPA* “meaningfully constrains the [President’s] discretion,” by requiring that “[t]he authorities granted to the President ... may only be exercised to deal with an unusual and extraordinary threat with respect to...
which a national emergency has been declared.” And the authorities
delegated are defined and limited.

The Second Circuit found it significant that “IEEPA relates to foreign affairs – an area in
which the President has greater discretion,” bolstering its view that IEEPA does not violate
the non-delegation doctrine.

Separation of Powers – Legislative Veto

The U.S. Court of Appeals for the Eleventh Circuit considered whether Section 207(b) of
IEEPA is an unconstitutional legislative veto. That provision [50 U.S.C. § 1706(b)] states:

The authorities described in subsection (a)(1) may not continue to be
exercised under this section if the national emergency is terminated by the
Congress by concurrent resolution pursuant to section 202 of the National
Emergencies Act [50 U.S.C. § 1622] and if the Congress specifies in such
concurrent resolution that such authorities may not continue to be exercised
under this section.

In U.S. v. Romero-Fernandez, two defendants convicted of violating the terms of an
executive order issued under IEEPA argued on appeal that IEEPA was unconstitutional, in
part, because of the above provision. The Eleventh Circuit accepted that the provision was
an unconstitutional legislative veto (as conceded by the government) based on INS v.
Chadha [983 F.2d 195, 196 (11th Cir. 1993) (citing Chadha, 462 U.S. 919 (1983))], in
which the Supreme Court held that Congress cannot void the exercise of power by the
executive branch through concurrent resolution, but can act only through bicameral
passage followed by presentment of the law to the President. The Eleventh Circuit
nevertheless upheld the defendants’ convictions for violations of IEEPA regulations,
holding that the legislative veto provision was severable from the rest of the statute.

[Courts also have considered three other Constitutional challenges to the IEEPA, namely,
whether asset blocking or penalties imposed pursuant to regulations promulgated under
IEEPA have violated the subjects’ rights under the (1) Fifth Amendment Takings Clause
(as an uncompensated taking of property rights), (2) Fifth Amendment Due Process Clause
(as a denial of due process rights), or (3) First Amendment rights (to free association, free
speech, or religion). Essentially, all such challenges have failed.]

... Use of IEEPA to Continue Enforcing the Export Administration Act (EAA)

Until the recent enactment of the Export Control Reform Act of 2018 [Public Law Number
115-232, Title XVIII(B).], export of dual use goods and services was regulated pursuant to
the authority of the Export Administration Act (EAA), which was subject to periodic expiry
and reauthorization. President Reagan was the first President to use IEEPA as a vehicle for
continuing the enforcement of the EAA’s export controls.
After Congress did not extend the expired EAA, President Reagan issued Executive Order 12444 in 1983, finding that “unrestricted access of foreign parties to United States commercial goods, technology, and technical data and the existence of certain boycott practices of foreign nations constitute, in light of the expiration of the Export Administration Act of 1979, an unusual and extraordinary threat to the national security.” Although the EAA had been reauthorized for short periods since its initial expiration in 1983, every subsequent President utilized the authorities granted under IEEPA to maintain the existing system of export controls during periods of lapse.

... Courts have generally treated this arrangement as authorized by Congress [as in Owens v. Republic of Sudan, 374 F. Supp. 2d 1, 22 (D.D.C. 2005)], although certain provisions of the EAA in effect under IEEPA have led to challenges. The determining factor appears to be whether IEEPA itself provides the President the authority to carry out the challenged action.

... Issues and Options for Congress

Congress may wish to address a number of issues with respect to IEEPA.... [One issue] pertains to how Congress has delegated its authority under IEEPA and its umbrella statute, the NEA. ...

Delegation of Authority under IEEPA

Although the stated aim of the drafters of the NEA and IEEPA was to restrain the use of emergency powers, the use of such powers has expanded by several measures. Presidents declare national emergencies and renew them for years or even decades. The limitation of IEEPA to transactions involving some foreign interest was intended to limit IEEPA’s domestic application. However, globalization has eroded that limit, as few transactions today do not involve some foreign interest. Many of the other criticisms of TWEA that IEEPA was supposed to address – consultation, time limits, congressional review, scope of power, and logical relationship to the emergency declared – are criticisms that scholars levy against IEEPA today. [For example, as per Footnote 267 of the CRS Report, see Jason Luong, Forcing Constraint: The Case for Amending the International Emergency Economic Powers Act, 78 Texas Law Review 1190 (2000); Jules Lobel, Emergency Power and the Decline of Liberalism, 98 Yale Law Journal number 7, 1392-1398 (May 1989).]

In general, three common criticisms are levied by scholars with respect to the structure of the NEA and IEEPA that may be of interest to Congress. First, the NEA and IEEPA do not define the phrases “national emergency” and “unusual and extraordinary threat” and Presidents have interpreted these terms broadly. Second, the scope of presidential authority under IEEPA has become less constrained in a highly globalized era. Third, owing to rulings by the Supreme Court and amendments to the NEA, Congress would likely have to have a two-thirds majority rather than a simple majority to terminate a national emergency. Despite these criticisms, Congress has not acted to terminate or otherwise express displeasure with an emergency declaration invoking IEEPA. This absence of any explicit
statement of disapproval, coupled with explicit statements of approval in some instances, may indicate congressional approval of presidential use of IEEPA thus far. Arguably, then, IEEPA could be seen as an effective tool for carrying out the will of Congress.

**Definition of “National Emergency” and “Unusual and Extraordinary Threat”**

Neither the NEA nor IEEPA define what constitutes a “national emergency.” IEEPA conditions its invocation in a declaration on its necessity for dealing with an “unusual and extraordinary threat … to the national security, foreign policy, or economy of the United States.” In the markup of IEEPA in the House, Fred Bergsten, then-Assistant Secretary for International Affairs in the Department of the Treasury, praised the requirement that a national emergency for the purposes of IEEPA be “based on an unusual and extraordinary threat” because such language “emphasizes that such powers should be available only in true emergencies.” Because “unusual” and “extraordinary” are also undefined, the usual and ordinary invocation of the statute seems to conflict with those statutory conditions.

If Congress wanted to refine the meaning of “national emergency” or “unusual and extraordinary threat,” it could do so through statute. Additionally, Congress could consider requiring some sort of factual finding by a court prior to, or shortly after, the exercise of any authority, such as under the First Militia Act of 1792 or the Foreign Intelligence Surveillance Act. However, Congress may consider that the ambiguity in the existing statute provides the executive with the flexibility necessary to address national emergencies with the requisite dispatch.

**Scope of the Authority**

While IEEPA nominally applies only to foreign transactions, the breadth of the phrase, “any interest of any foreign country or a national thereof” has left a great deal of room for executive discretion. The interconnectedness of the modern global economy has left few major transactions in which a foreign interest is not involved. As a result, at least one scholar has concluded, “the exemption of purely domestic transactions from the President’s transaction controls seems to be a limitation without substance.” (As per Footnote 272, The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power, 96 Harvard Law Review footnote 49 at 111 (March 1983).]

Presidents have used IEEPA since the 1980s to control exports by maintaining the dual-use export control system, enshrined in the Export Administration Regulations (EAR) in times when its underlying authorization, the Export Administration Act (EAA), periodically expired. [The EAR, which are located at 15 C.F.R. Parts 730-774, and DOC’s CCL list, are discussed in a separate Chapter.] During those times when Congress did not reauthorize the EAA, Presidents have declared emergencies to maintain the dual-use export control system. The current emergency has been ongoing since 2001.
While Presidents have used IEEPA to implement trade restrictions against adversaries, it has not been used as a general way to impose tariffs. However, as noted above, President Nixon used TWEA to impose a 10% ad valorem tariff on goods entering the United States to avoid a balance of payments crisis after he ended the convertibility of the U.S. dollar to gold. Although the use of TWEA in this instance was criticized at the time, it does not appear that the subsequent reforms resulting in the enactment of IEEPA would prevent the President from imposing tariffs or other restrictions on trade. However, the availability of diverse other authorities for addressing trade, including for national security purposes, makes the use of IEEPA for this purpose unlikely.

The scope of powers over individual targets is also extensive. Under IEEPA, the President has the power to prohibit all financial transactions with individuals designated by Executive Order. Such power allows the President to block all the assets of a U.S. citizen or permanent resident.

Such uses of IEEPA may reflect the will of Congress or they may represent a grant of authority that may have gone beyond what Congress originally intended.

**Terminating National Emergencies or IEEPA Authorities**

The heart of the curtailment of presidential power by the NEA and IEEPA was the provision that Congress could terminate a state of emergency declared pursuant to the NEA with a concurrent resolution. When the “legislative veto” was struck down by the Supreme Court (see above), it left Congress with a steeper climb – presumably requiring passage of a veto-proof joint resolution – to terminate a national emergency declared under the NEA. Two such resolutions have ever been introduced and neither declarations of emergency involved IEEPA. The lack of congressional action here could be the result of the necessity of obtaining a veto-proof majority or it could be that the use of IEEPA has so far reflected the will of Congress.

If Congress wanted to assert more authority over the use of IEEPA, it could amend the NEA or IEEPA to include a “sunset provision,” terminating any national emergency after a certain number of days. … Alternatively, Congress could amend IEEPA to provide for a review mechanism that would give Congress an active role. In the Senate during the 115th Congress [1st Session], for example, Senator Mike Lee introduced the Global Trade Accountability Act of 2017 [S. 177, 20 January 2017, which would have] required the President to report to Congress on any proposed trade action (including the use of IEEPA), including a description of the proposal together with a list of items to be affected, an economic impact study of the proposal including potential retaliation. Congress, using expedited procedures, would need to approve the President’s action through a joint resolution within a 60-day period. The legislation would have provided for a temporary one-time unilateral trade action for a 90-day period. Similarly, in the 116th Congress, Senator Lee introduced S. 764, a bill to provide for congressional approval of national emergency declarations, and for other purposes, which would amend the NEA to require an act of Congress within 30 days to allow a national emergency to continue.
Another approach would establish a means for Congress to pass a resolution of disapproval if IEEPA authorities are invoked. An example of this approach is the Trade Authority Protection Act (H.R. 5760). After the submission of similar reporting requirements to S. 177 (above), Congress could, under Congressional Review Act (CRA)-style procedures, pass a joint resolution of disapproval. Congress does have the authority to pass a joint resolution under IEEPA, as noted above, but the use of CRA procedures would allow for certain expedited consideration.

Alternatively, Congress could use any of these mechanisms to amend the current disapproval resolution process in IEEPA or the NEA itself.

The Status Quo

Like TWEA before it, IEEPA sits at the center of the modern U.S. sanction regime. Like TWEA before it, Congress has often approved explicitly of the President’s use of IEEPA. In several circumstances, Congress has directed the President to impose a variety of sanctions under IEEPA and waived the requirement of an emergency declaration. Even when Congress has not given explicit approval, no Member of Congress has ever introduced a resolution to terminate a national emergency citing IEEPA. The NEA requires that both houses of Congress meet every six months to consider a vote on a joint resolution on terminating an emergency. Neither house has ever met to do so. In response to concerns over the scale and scope of the emergency economic powers granted by IEEPA, supporters of the status quo would argue that Congress has implicitly and explicitly expressed approval of the statute and its use.

III. 2019 CASE STUDY OF MEXICO BORDER CRISIS AND IEEPA TARIFF THREAT

• May 2019 Justification for Invocation of IEEPA

THE WHITE HOUSE, STATEMENT FROM THE PRESIDENT REGARDING EMERGENCY MEASURES TO ADDRESS THE BORDER CRISIS (30 MAY 2019)\(^{83}\)

As everyone knows, the United States of America has been invaded by hundreds of thousands of people coming through Mexico and entering our country illegally. This sustained influx of illegal aliens has profound consequences on every aspect of our national life – overwhelming our schools, overcrowding our hospitals, draining our welfare system, and causing untold amounts of crime. Gang members, smugglers, human traffickers, and illegal drugs and narcotics of all kinds are pouring across the Southern Border and directly into our communities. Thousands of innocent lives are taken every year as a result of this lawless chaos. It must end NOW!

Mexico’s passive cooperation in allowing this mass incursion constitutes an emergency and extraordinary threat to the national security and economy of the United States. Mexico

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\(^{83}\) www.whitehouse.gov/briefings-statements/statement-president-regarding-emergency-measures-address-border-crisis/. (Emphasis in capitals original, emphasis in italics added.)
has very strong immigration laws and could easily halt the illegal flow of migrants, including by returning them to their home countries. Additionally, Mexico could quickly and easily stop illegal aliens from coming through its southern border with Guatemala.

For decades, the United States has suffered the severe and dangerous consequences of illegal immigration. Sadly, Mexico has allowed this situation to go on for many years, growing only worse with the passage of time. From a safety, national security, military, economic, and humanitarian standpoint, we cannot allow this grave disaster to continue. The current state of affairs is profoundly unfair to the American taxpayer, who bears the extraordinary financial cost imposed by large-scale illegal migration. Even worse is the terrible and preventable loss of human life. Some of the most deadly and vicious gangs on the planet operate just across our border and terrorize innocent communities.

Mexico must step up and help solve this problem. We welcome people who come to the United States legally, but we cannot allow our laws to be broken and our borders to be violated. For years, Mexico has not treated us fairly – but we are now asserting our rights as a sovereign Nation.

To address the emergency at the Southern Border, I [Donald J. Trump] am invoking the authorities granted to me by the International Emergency Economic Powers Act. Accordingly, starting on June 10, 2019, the United States will impose a 5 percent Tariff on all goods imported from Mexico. If the illegal migration crisis is alleviated through effective actions taken by Mexico, to be determined in our sole discretion and judgment, the Tariffs will be removed. If the crisis persists, however, the Tariffs will be raised to 10 percent on July 1, 2019. Similarly, if Mexico still has not taken action to dramatically reduce or eliminate the number of illegal aliens crossing its territory into the United States, Tariffs will be increased to 15 percent on August 1, 2019, to 20 percent on September 1, 2019, and to 25 percent on October 1, 2019. Tariffs will permanently remain at the 25 percent level unless and until Mexico substantially stops the illegal inflow of aliens coming through its territory. Workers who come to our country through the legal admissions process, including those working on farms, ranches, and in other businesses, will be allowed easy passage.

If Mexico fails to act, Tariffs will remain at the high level, and companies located in Mexico may start moving back to the United States to make their products and goods. Companies that relocate to the United States will not pay the Tariffs or be affected in any way.

Over the years, Mexico has made massive amounts of money in its dealings with the United States, and this includes the tremendous number of jobs leaving our country.

Should Mexico choose not to cooperate on reducing unlawful migration, the sustained imposition of Tariffs will produce a massive return of jobs back to American cities and towns. Remember, our great country has been the “piggy bank” from which everybody wants only to TAKE. The difference is that now we are firmly and forcefully standing up for America’s interests.
We have confidence that Mexico can and will act swiftly to help the United States stop this long-term, dangerous, and deeply unfair problem. The United States has been very good to Mexico for many years. We are now asking that Mexico immediately do its fair share to stop the use of its territory as a conduit for illegal immigration into our country.

The cartels and coyotes are having a greater and greater impact on the Mexican side of our Southern Border. This is a dire threat that must be decisively eliminated. Billions of dollars are made, and countless lives are ruined, by these ruthless and merciless criminal organizations. Mexico must bring law and order to its side of the border.

Democrats in Congress are fully aware of this horrible situation and yet refuse to help in any way, shape, or form. This is a total dereliction of duty. The migrant crisis is a calamity that must now be solved – and can easily be solved – in Congress. Our broken asylum laws, court system, catch-and-release, visa lottery, chain migration, and many other loopholes can all be promptly corrected. When that happens, the measures being announced today can be more readily reduced or removed.

The United States is a great country that can no longer be exploited due to its foolish and irresponsible immigration laws. For the sake of our people, and for the sake of our future, these horrendous laws must be changed now.

At the same time, Mexico cannot allow hundreds of thousands of people to pour over its land and into our country – violating the sovereign territory of the United States. If Mexico does not take decisive measures, it will come at a significant price.

We therefore look forward to, and appreciate, the swift and effective actions that we hope Mexico will immediately install.

As President of the United States, my highest duty is the defense of the country and its citizens. A nation without borders is not a nation at all. I will not stand by and allow our sovereignty to be eroded, our laws to be trampled, or our borders to be disrespected anymore.

**Disruption**

Via the above Statement, which shocked the world, President Trump – having obtained nearly all of America’s negotiating objectives in the 2017-2018 NAFTA 2.0 negotiations, signed this USMCA on 30 November 2018, and seeking Congressional passage of this deal – invoked the IEEPA in an unprecedented manner. Ironically, or clumsily, the Statement was published on the same day the Administration transmitted to Congress a draft SAA, by which it hopped to trigger TPA (fast-track) procedures, and advance passage of the USMCA.

Never before had this sanctions legislation been used to impose tariffs to deal with immigration, refugee, and asylum problems on a U.S. border. And, never before had
America taken such dramatic action against its largest trading partner (and the Number 1 or 2 trading partner, with Canada, of the vast majority of U.S. States), which is what Mexico had become in the decades following the 1 January 1994 implementation of NAFTA 1.0.\textsuperscript{84} Table 6-1 summarizes the tariffs he threatened.

Table 6-1

<table>
<thead>
<tr>
<th>Tariff Rate</th>
<th>Date of Imposition</th>
<th>Status / Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>5%</td>
<td>10 June 2019</td>
<td>Not imposed</td>
</tr>
<tr>
<td>10%</td>
<td>1 July 2019</td>
<td>Not imposed</td>
</tr>
<tr>
<td>15%</td>
<td>1 August 2019</td>
<td>Not imposed</td>
</tr>
<tr>
<td>20%</td>
<td>1 September 2019</td>
<td>Not imposed</td>
</tr>
<tr>
<td>25%</td>
<td>1 October 2019</td>
<td>Not imposed</td>
</tr>
</tbody>
</table>

The President’s Statement left a number of questions unanswered, such as:

(1) Scope?

The merchandise covered by the American tariff threat included autos (both passenger vehicles and trucks) and auto parts, beer, fruit, tequila, and vegetables.\textsuperscript{85} But was it literally every article of merchandise, and everything inside that article, from Mexico?

Would the tariffs apply only to materials originating in Mexico (that are included in finished merchandise), or would it apply to all materials (including American, EU, and Japanese-origin inputs)? That is, would the value of non-Mexican origin items be subtracted from the valuations of finished merchandise for purposes of assessing the tariffs? For example, as envisaged by HTSUS Chapter 98, would the value of inputs originating in the U.S., shipped to Mexico, processed there, and then returned to the U.S. as incorporated into a finished good, be exempt from the tariff?

(2) Exclusions?

Would industries and/or products be excluded from the tariffs? Would the Administration establish a process to ensure, applying defined criteria, certain merchandise would be free from the tariffs?


(3) Administrative Burden?

How would CBP officers cope with administering the tariffs, given the other contemporaneous challenges they faced? Those challenges included imposing the Section 232 steel and aluminum tariffs, Section Sino-American Trade War tariffs, and imposing tariffs on merchandise made in India because of the withdrawal (effective June 2019) of GSP benefits for India. CBP officers also had to cope with taking proper care of immigration, refugee, and asylum seekers on America’s southern border, many of whom were single parents with small children, and unaccompanied minors fleeing violent conflict and crime in Mexico and Central America.86

(4) Justification?

Did the IEEPA give the President authority to take action against Mexico, where violent conflict, terrorism, or economic embargo were not at issue?87 Immigration problems never before had been the basis for IEEPA action.88 Likewise, no

86 See Trump Vows High Tariffs on All Mexican Goods, REUTERS, 31 May 2019, https://graphics.reuters.com/USA-IMMIGRATION-TRUMP/010092KD3B7/index.html. The propositions of a “surge” in illegal immigration causing a “crisis” on America’s Southern border was contestable. In May 2019, CBP officers apprehended the highest number of people (almost 133,000) than at any time in the prior decade, but the overall figures were lower than in the 1970s, and the challenge CBP said it faced was not as much in the number of persons attempting to cross the border, but rather the shift from largely single males to unaccompanied minors and women with children, who need (and deserve, as matter of human dignity) extra care. See id. For one among many harrowing accounts of unprosecuted violence, including rape and incest, faced by women that leaves them with little choice but to flee their home countries, see Jill Filipovic, “I Can No Longer Continue to Live Here” – What’s Driving So Many Honduran Women to the U.S. Border? The Reality is Worse than You’ve Heard, POLITICO, 7 June 2019, www.politico.com/magazine/story/2019/06/07/domestic-violence-immigration-asylum-caravan-honduras-central-america-227086?cid=apn.

87 For a Constitutional commentary on the IEEPA, arguing “The Constitution is supposed to limit the president to acting as the executive of the political will expressed by the people’s representatives in Congress,” “[b]ut the IEEPA, like other emergency power provisions created by Congress in the past, is being used by Trump to reverse the Constitutional order designed by the framers, and “[i]n the long run, the only way to fix this problem is for Congress to roll back the emergency authorities it has granted the Executive – powers that are inherently liable to Presidential manipulation and overreach,” see Noah Feldman, Congress’s Weakness on Tariffs Is Its Own Fault, BLOOMBERG, 5 June 2019, www.bloomberg.com/opinion/articles/2019-06-05/congress-s-inability-to-stop-trump-s-mexican-tariffs-is-its-fault [hereinafter, Congress’s Weakness]. Professor Feldman urges the IEEPA is “exactly backward for Congress to need two-thirds majorities in both houses to block Presidential action,” because “[t]he veto override provision of the Constitution isn’t designed to block the President from taking action,” rather, it is “designed to force a bill into law even when the President vetoes it,” “[i]n other words, the basic structure of the Constitution is supposed to make Congress the legal policy maker,” and “[t]he President is called the “Executive” because he is charged with executing the laws passed by Congress.” Id. Is this distinction – between a veto override to force the President to take action (such as execute a law he vetoed) versus refrain from taking action (such as imposing tariffs via Executive Order) – one without a difference?

88 Notably, the President did not invoke the IEEPA when, in February 2019, he declared an emergency at the Southern border. Rather, he cited 10 U.S.C. Section 2808(a), a statute empowering the President to reallocate DOD construction funds the Pentagon has not yet committed in the event of a national emergency. See The White House, Subject: Presidential Proclamation on Declaring a National Emergency Concerning International Trade Law E-Textbook (Raj Bhala, 6th Edition, 2025) University of Kansas (KU) Volume Four Wheat Law Library
provision of any GATT-WTO agreement, nor any Chapter of NAFTA 1.0 or NAFTA 2.0, justified the imposition of tariffs based on immigration problems. Additionally, was there a genuine emergency at the U.S.-Mexican border? On the one hand, the number of persons seeking to enter the U.S. detained by CBP surged in 2019. On the other hand, there had been a general trend downwards since the 1970s.

Moreover, the Statement itself referenced onshoring of American manufacturing facilities. So, too, did a 6 June 2019 tweet in which Mr. Trump said: “The higher the Tariffs go, the higher the number of companies that will move back to the USA!” These remarks were ill-considered, insofar as they undermined the purported justification of invoking the IEEPA to secure the borders against illegal immigrants, and intimated a different (or, at least, dual) motivation – to bring factories and jobs back from Mexico that had been lost following the 1 January 1994 implementation of NAFTA 1.0.

(5) Remedy?

Did the IEEPA authorize the President to boost customs duties, as distinct from restricting imports? Even if it did, would that be an efficacious remedy? It would impose costs on producer-exporters, importers, and consumers of Mexican merchandise. Would there be benefits, such as stricter enforcement by Mexico of its borders with America and Guatemala, increasing interdiction of migrants smuggled through Mexican territory (e.g., on buses), and accepting asylum seekers in Mexico (and allowing them to apply for asylum in Mexico, thus making Mexico a “safe third country,” rather than letting them proceed north to the U.S. border)?


These three behavioral changes reportedly were what the U.S. sought to compel with its threatened remedy, though even before the threat Mexico “ruled out the third request.” Erica Werner, Seung Min Kim, Damian Paletta & Mary Beth Sheridan, GOP Lawmakers Warn White House They’ll Try to Block Trump’s Mexico Tariffs, THE WASHINGTON POST, 4 June 2019, www.washingtonpost.com/world/the_americas/mexico-sees-80-percent-chance-of-a-deal-to-head-off-trump-tariffs/2019/06/04/53bdce08-86c4-11e9-98c1-e945ae5d8fb_story.html?noredirect=on&utm_term=d58a6f10d7a3.

Under a “safe third country accord” between, for example, the U.S. and Mexico, the third country (Mexico) is obliged to allow migrants transiting through its territory (e.g., from Guatemala) to apply for asylum status in that third country. Mexico successfully resisted U.S. pressure to agree to such an accord. But, Mexico agreed to host those migrants on Mexican soil as they applied for asylum in the U.S., essentially expanding the “Remain in Mexico” scheme (formally called the “Migrant Protection Protocol Program”). In other words, the U.S. and Mexico agreed Central American migrants could apply for asylum in the U.S. from the first foreign country they reach after they left their home country. That first foreign country would be Mexico for Guatemalans, and Guatemala for Hondurans and Salvadorans. This “first foreign country” arrangement created the possibility the U.S. would send Guatemalan asylum-seekers back to Mexico, and send Honduran and Salvadoran asylum-seekers back to Guatemala. See Nick Miroff, Kevin Sieff & John Wagner, How Mexico Talked Trump Out of Tariff Threat with Immigration Crackdown Pact, THE WASHINGTON POST, 10 June 2019, www.washingtonpost.com/immigration/trump-mexico-immigration-deal-has-additional-measures-not-yet-made-public/2019/06/10/967e4e56-8b8e-11e9-b08e-e945ae5d8fb_story.html?noredirect=on&utm_term=d58a6f10d7a3.
The U.S. said it. What effect would those benefits have on the treatment of migrants, refugees, and asylum seekers? What racial and ethnic tensions might be stoked in the U.S.?

**Friday Night Deal**

Late on Friday, 7 June – about 48 hours before the 5% duty was scheduled to be imposed – the U.S. and Mexico announced a deal.\(^91\) America agreed to suspend the levy, a turnaround as dramatic as its initial announcement seven days earlier threatening tariffs, citing progress by progress to take additional steps to stop illegal migration.

**U.S. – MEXICO JOINT DECLARATION, 7 JUNE 2019\(^92\)**

The United States and Mexico met … to address the shared challenges of irregular migration, to include the entry of migrants into the United States in violation of U.S. law. Given the dramatic increase in migrants moving from Central America through Mexico to the United States, both countries recognize the vital importance of rapidly resolving the humanitarian emergency and security situation. The Governments of the United States and Mexico will work together to immediately implement a durable solution.

As a result of these discussions, the United States and Mexico commit to:

**Mexican Enforcement Surge**

Mexico will take unprecedented steps to increase enforcement to curb irregular migration, to include the deployment of its National Guard throughout Mexico, giving priority to its southern border. Mexico is also taking decisive action to dismantle human smuggling and trafficking organizations as well as their illicit financial and transportation networks. Additionally, the United States and Mexico commit to strengthen bilateral cooperation, including information sharing and coordinated actions to better protect and secure our common border.

**Migrant Protection Protocols**

The United States will immediately expand the implementation of the existing Migrant Protection Protocols across its entire Southern Border. This means that those crossing the U.S. Southern Border to seek asylum will be rapidly returned to Mexico where they may...
await the adjudication of their asylum claims.

In response, Mexico will authorize the entrance of all of those individuals for humanitarian reasons, in compliance with its international obligations, while they await the adjudication of their asylum claims. Mexico will also offer jobs, healthcare, and education according to its principles.

The United States commits to work to accelerate the adjudication of asylum claims and to conclude removal proceedings as expeditiously as possible.

**Further Actions**

Both parties also agree that, in the event the measures adopted do not have the expected results, they will take further actions. Therefore, the United States and Mexico will continue their discussions on the terms of additional understandings to address irregular migrant flows and asylum issues, to be completed and announced within 90 days, if necessary.

**Ongoing Regional Strategy**

The United States and Mexico reiterate their previous statement of December 18, 2018, that both countries recognize the strong links between promoting development and economic growth in southern Mexico and the success of promoting prosperity, good governance and security in Central America. The United States and Mexico welcome the Comprehensive Development Plan launched by the Government of Mexico in concert with the Governments of El Salvador, Guatemala, and Honduras to promote these goals. The United States and Mexico will lead in working with regional and international partners to build a more prosperous and secure Central America to address the underlying causes of migration, so that citizens of the region can build better lives for themselves and their families at home.

- **Critique and Aftermath**

  The *Joint Statement* was short on details. For example, it did not commit the U.S. to cancel its tariffs. Rather, that pledge came in a contemporaneous Presidential tweet:

  “I am pleased to inform you that The United States of America has reached a signed agreement with Mexico. The Tariffs scheduled to be implemented by the U.S. on Monday, against Mexico, are hereby indefinitely suspended.”

As another example, the *Statement* said nothing about how the two countries will work together toward economic development in Central America. Neither NAFTA nor CAFTA-DR, which were intended in part to boost development, were referenced, *i.e.*, there was no linkage of trade to development. Not surprisingly, then, was the observation of Mexico’s

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93 *Quoted in* Trump Says.
President, Andrés Manuel López Obrador (1953-, President, 2018-):

They [the Americans] are not even analyzing the causes, only the effects. They are not taking into account the profound crisis in Central America [where many people] have no options, no alternatives. We have been insisting that the causes must be dealt with, that Central America be supported with productive activities, employment, welfare, so that migration is optional, not forced.94

Still another example was how Mexico would house, employ, and care for Central American migrants on its soil claiming refugee or asylum status in America while they await what the U.S. said would be an accelerated process – without detailing how it would speed up that process.

Given these uncertainties, possibly the result of a hastily drafted document, the deal immediately provoked controversy.95 Mexico was criticized for surrendering sovereignty by letting a foreign power determine how it would allocate its military, namely, sending 6,000 National Guard troops to the Mexican-Guatemalan border to block Central Americans from migrating northward, and boosting arrests of those who make it past them.96 Mexico also had to fend off U.S. allegations that it had promised to buy more American farm products.97 Conversely, America sought to rebut charges that Mexico already had agreed months before the deal to most of the measures supposedly embodied in the deal, i.e., that the U.S. did not achieve much of substance with its tariff threat.98

Nonetheless, by September 2019, Mexico had taken steps to reduce migration that mollified the U.S.99 Consider, then, was all the drama of a trade war with Mexico worth the Joint Statement? Was it necessary? Consider, also, whether the U.S. was forced to back down: it could not afford to fight a two-front trade war, one with major countries, China, and Mexico, and on the same day the Statement was issued, growth figures published in

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95 See How Mexico Talked.

96 See David Alire Garcia, Mexico Holds off Trump’s Fire But Seen Vulnerable to New Pressure, Reuters, 8 June 2019, www.reuters.com/article/us-usa-trade-mexico-reaction/mexico-holds-off-trumps-fire-but-seen-vulnerable-to-new-pressure-idUSKCN1TA00L.


98 See No Secret Immigration Deal.

the U.S. suggested sluggish employment growth.\textsuperscript{100}

IV. Ordering Companies Out of China?

In August 2019, President Donald J. Trump tweeted the following:

Our great American companies are hereby ordered to immediately start looking for an alternative to China, including bringing your companies HOME and making your products in the USA.\textsuperscript{101}

The prospect of the President actually ordering U.S. companies to decamp from China sent alarm bells across America, China, and the world. The obvious key question was whether he had the legal authority to issue command American firms to disengage from another country?

Arguably, the answer is yes – the IEEPA. The President himself said “try looking at the \textit{Emergency Economic Powers Act of 1977}. Case closed!” The fact was that he had been laying the case against China starting in March 2018 through the USTR’s Section 301 investigation and the attendant key reports his Administration (discussed in a separate Chapter). Those documents were akin to carefully footnoted legal briefs that chronicled \textit{(inter alia)} how China “forced transfer[s] of technology from American firms to China, and g[ave] state-owned businesses an unbeatable edge over potential American competitors who want to sell inside China.”\textsuperscript{102}

The terms of the IEEPA speak of an “unusual and extraordinary” external (or substantially partially external) threat to “the national security, foreign policy, or economy of the United States.”\textsuperscript{103} Did not China’s behavior constitute such a threat? Consider these points:

“In theory, the President could block all financial and business transactions between those subject to U.S. jurisdiction – U.S. citizens, U.S. residents, and any company operating in the United States – and China,” said Hofstra University Law Professor Julian Ku. “This would not ‘order’ U.S. companies to leave China, but it would render those investments in China much less valuable economically or completely value-less, which would force U.S. companies to leave China.”

... “If he forced a sale of a factory in China at a fire sale price, there’s a

\textsuperscript{100} See Roberta Rampton & Diego Oré, \textit{Trump Calls Off Tariffs on Mexico After Deal on Migration}, \textsc{Reuters}, 7 June 2019, \url{www.reuters.com/article/us-usa-trade-mexico-talks/trump-calls-off-tariffs-on-mexico-after-deal-on-migration-idUSKCN1T8196}.


\textsuperscript{102} \textit{Could Donald Trump}.

\textsuperscript{103} 50 U.S.C. §1701(a).
colorable taking case under the 5th Amendment,” [University of Arizona College of Law Professor David] Gantz said. “It’s never been successfully done, but there could be challenges there.”

Gantz cautioned that Courts tend to defer to presidential authority on this, and appeals could take years.104

In other words, even if the IEEPA were interpreted in a way that did not authorize a President to order U.S. entities to disengage from a target country, it does arm the President with blocking authority.105 Thus, the President can effectively order American businesses to disengage from the target by blocking their ability to engage in import, export, investment, and banking transactions in and with that target, as well as travel to that target. Such an Executive Order could cover all of their related entities – subsidiaries, sister companies, branches, agencies, and representative offices.

To be sure, such a broad blocking Order might invite legal challenges. But, in all likelihood, Courts would adjudicate those cases in favor of the President. They would be hesitant to infringe on the national security powers of the Executive Branch, or to opine on political questions.

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Part Three

SECTION 232
Chapter 7

SECTION 232: OVERVIEW

I. Adjusting Imports under Section 232 of 1962 Act

The power delegated by Congress to the Executive Branch to adjust imports for national security purposes originated in during the Administration of President John F. Kennedy (1917-1963, President, 1961-1963). The Trade Expansion Act of 1962 contained Section 232. In pertinent part, it authorizes the Secretary of Defense to investigate whether:

1. Documents References:
   (1) Havana (ITO) Charter Preamble, Article 99
   (2) GATT Article XXI
   (3) Relevant provisions in FTAs


Following invocation of Section 232 by the Trump Administration (discussed below), a Constitutional challenge was raised in September 2018 against the statute. See American Institute for International Steel, Inc., v. United States, CIT, Number 18-00152 (Slip Opinion 19-37, 25 March 2019), www.cit.uscourts.gov/sites/cit/files/19-37.pdf. The claim made by the American Institute for International Steel was Congress delegated too much of its authority to regulate foreign trade, which is based on Article I, Section 8, Clause 3 of the Constitution, and thus violated the doctrine of separation of powers and checks-and-balances system. Richard Chriss, President of the AIIS, argued:

Section 232 of the Trade Expansion Act allows the President nearly unfettered discretion to impose tariffs and create other trade barriers if he simply decides that imports threaten to impair U.S. national security. … At the same time, the law allows tremendous latitude to the President in determining what constitutes a threat. The United States Constitution provides important checks on the President’s power, and the Section 232 trade provision stands in clear violation of that balance.


The Administration defended the statute under the broad authority of the President in the areas of foreign affairs and national security. Applying U.S. Supreme Court precedent, particularly J.W. Hampton, Jr. Co. v. United States, 276 U.S. 394, 409 (1928) and Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 558-60 (1976), the Administration urged that Section 232 is a lawful delegation of power over foreign trade, because Congress sets out in this Section an “intelligible principle” for the President to follow in exercising this power. That “intelligible principle” is a limitation of the power to cases in which imports impair national security and a trade remedy can cure the impairment, along with procedural restrictions. See Defendants Reply Brief (filed 9 November 2018); Brian Flood, Trump Administration Defends Steel Tariffs as Constitutional, 35 International Trade Reporter (BNA) 1225 (20 September 2018). AIIS persuaded the CIT to hear the case with a three-judge panel (invoking a CIT rule that allows for such a panel in cases with Constitutional issues, or that have “broad and significant implications”), the ramifications of which was that a decision of the Panel could be appealed directly to the Supreme Court, thus bypassing the Court of Appeals.
In March 2019, the CIT held for the Administration, reasoning the *Algonquin* case already ruled Section 232 satisfies the “intelligible principle” standard. See Slip Opinion 19-37 (25 March 2019); *American Inst. for Int’l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1339-45 (2019). That is, in the words of the Federal Circuit, the CIT “rejected the challenge [to the Constitutionality of Section 232], concluding that the issue is controlled by the portion of the Supreme Court’s *Algonquin* decision that declares Section 232 not to violate the nondelegation doctrine.” In a February 2020 non-precedential opinion, the Federal Circuit upheld the CIT decision. See *American Institute for International Steel v. U.S.*, Slip Opinion 2019-1727 (28 February 2020), www.cafc.uscourts.gov/sites/default/files/opinions-orders/19-1727.Opinion.2-28-2020.1542185.pdf. Relying on the *Algonquin* decision, and refusing to distinguish this precedent from the case at bar, the Federal Circuit thus upheld the CIT decision that the Section 232 steel tariffs were a Constitutional delegation of Congressional authority.

However, in its March 2019 opinion, the CIT expressed concern about separation of powers and Section 232: “the broad guideposts of Sub-sections (c) and (d) of Section 232 bestow flexibility on the President and seem to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach.” Still, the CIT said judicial review does not extend to an inquiry into the motives of the President, nor his fact-finding, given the *Algonquin* precedent (and the reality that Presidential decision-making is exempt from the *Administrative Procedure Act*). Judge Katazman issued a dubitante opinion in which he concurred with the holding but adopted an alternative perspective. He expressed “grave doubts” that Section 232 “passes Constitutional muster,” and called for Section 232 to be re-examined, because it “provides virtually unbridled discretion to the president with respect to the power over trade that is reserved by the Constitution to Congress.”

In January 2019, another Constitutional challenge against Section 232 was launched in the CIT, this time by Medtrade Inc., A.G. Royce Metal Marketing LLC, and Transpacific Steel LLC, importers of steel from Turkey. See *MedTrade Inc. v. United States*, Number 19-00009 (filed 17 January 2019). The plaintiff-importers argued President Trump exceeded his national security authority, and violated their equal protection rights (“by impermissibly discriminating between similarly situated domestic importers and selectively imposing an additional burden only on certain of those importers who import steel products from Turkey”), when in March 2018 he invoked Section 232 and imposed 25% tariffs on Turkish steel. Brian Flood, *Trump Tariffs on Turkish Steel Draw Constitutional Challenge*, Bloomberg Law International Trade News (18 January 2019), https://news.bloomberglaw.com/international-trade/trump-tariffs-on-turkish-steel-draw-constitutional-challenge. They pointed out Turkish steel shipments into the U.S. had been declining rapidly before the Section 232 action. They also argued that an August 2018 tweet from Mr. Trump proved the action was not based on national security. That tweet said: “I have just authorized a doubling of Tariffs on Steel and Aluminum with respect to Turkey as their currency, the Turkish Lira, slides rapidly downward against our very strong Dollar! Aluminum will now be 20% and Steel 50%. Our relations with Turkey are not good at this time!” *Quoted in id.*

The November 2019 CIT decision in *Transpacific Steel v. United States*, concerning Turkish steel imports, is excerpted above, as is the July 2021 Federal Circuit ruling that reversed the CIT decision.

The *American Institute* challenge to Section 232 was a full-scale attack on the statute, that it represents an unconstitutional delegation of power by the Legislative to the Executive branch. Such challenges tend to fail, as did that one. In contrast the more limited (i.e., narrower) challenges – such as in the *Transpacific Steel* case (discussed above) tend to be more likely to be at least partly successful. See also *Thyssenkrupp Materials v. U.S.*, CIT Number 20-00093, Slip Opinion 21-29 (10 March 2021), www.cit.uscourts.gov/sites/cit/files/21-29.pdf (dismissing a challenge by an importer to the Section 232 steel and aluminum exclusion process, specifically rejecting the claim of the importer that the exclusion process contravened the Uniformity Clause in Article I, Section 8 of the U.S. Constitution because exclusions were granted to specific importing companies that applied for an exclusion, rather than to a class of merchandise).

In June 2022, the U.S. Court of Appeals for the Federal Circuit dismissed a challenge to President Trump’s imposition of Section 232 steel and aluminum tariffs. In a 20-page decision, the Court held the President has broad discretion to set the nature and duration (including with respect to determining a national security threat, and setting an indefinite duration) of Section 232 tariffs. See *USP Holdings, Inc., et. al. v. International Trade Law E-Textbook* (Raj Bhala, 6th Edition, 2025)
an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security….²⁰⁸

(Up to 1980, the Secretary of the Treasury played a lead investigatory role, and in 1980 the Commerce Secretary took over. Investigations generally take several months, and allow for public hearings and comments.) Note immediately that unlike AD-CVD law and the Section 201 Escape Clause, there is no need to prove injury or threat to a particular industry, nor is there any causation requirement. And, unlike Section 201, there is no need to prove that an unforeseeable increase in imported merchandise occurred. Arguably, then, Section 232 is an easier trade remedy action to win than the conventional options.

That said, Section 232 has ambiguities, the resolution of which creates uncertainty. The statute does not define “impairment.” The statute also does not define “national security.” Following an affirmative finding, the President must decide whether he agrees with the Secretary, and if so, must then:

take action to “adjust the imports of … [an] article and its derivatives so that such imports will not threaten to impair the national security [of the U.S.].”

“Adjustment” is not tied to any geographical origin, or even to a narrow class of merchandise, as are the AD-CVD and safeguard remedies. So, Section 232 gives the President considerable freedom to fashion a broadly-targeted remedy. And, there is no mandatory or suggested statutory time limit on the adjustment. For example, in the 1963 Euro-American “Chicken War,” President Lyndon B. Johnson (1908-1973, President, 1963-1969) used Section 232 to justify a 25% tariff as a temporary adjustment on pickup trucks. That tariff remains in effect. (Thus, the May 2018 Section 232 action on autos and auto parts, discussed in a separate Chapter, is sometimes called “Chicken Wars II.”)

¹⁰⁸ Section 232(c)(1)(A), codified at 19 U.S.C. § 1862(c)(1)(A). (Emphasis added.)
Manifestly, Section 232 is another example that the nexus between international trade and national security is not a new, post-9/11 phenomenon. Yet, despite 26 Section 232 investigations (between the first, launched in 1963, through February 2001, with none thereafter until April 2017, covering a diverse array of merchandise, from circuit ceramic packaging to machine tools), a threat to national security has been found, and a trade remedy deployed, only twice, both times in the 1970s. In 1975, President Gerald R. Ford issued a Proclamation to restrict imports of petroleum and petroleum products (e.g., from Iran and Libya), which he argued imperiled national security. The Section 232 remedies President Ford ordered to discourage oil imports were the imposition of elevated license fees, a fee of $1 per barrel of imported oil during March 1975, and a fee of $3/barrel after 1 April 1975. In 1979, President Carter used Section 232 to embargo oil from Iran, dependence on which was said to impair national security.

In two other cases, in 1999 and 2001, respectively, the DOC launched investigations of crude oil, and iron and steel, respectively. In both instances, it recommended no relief against foreign imports, but the 2001 outcome yielded useful guidance on what constitutes a threat to, or impairment of, “national security” under Section 232. The DOC looked at statutory language and legislative history, and opined that situation exists if imports of subject merchandise (1) “foster[ed] U.S. dependence on unreliable or unsafe imports,” or (2) “fundamentally threatened the ability of U.S. domestic industries to satisfy national security needs.”

However, the history of the sparing use by Presidents of Section 232 changed with Donald J. Trump (1946, President, 2017-). From his inauguration in January 2017 through September 2020, President Trump launched eight total investigations. Of the five cases that reached a conclusion, all five reached an affirmative outcome (i.e., found a threat of impairment to national security from the subject merchandise). Simply put, 25% of all Section 232 cases were brought during the Trump Administration. Does that suggest previous Presidents failed to appreciate the link between trade and national security and, therefore, under-utilized Section 232? Or, did they understand the link, but eschewed Section 232 as too heavy-handed in favor of diplomatic approaches with exporting countries? Conversely, do these facts indicate that Trump Administration over-utilized Section 232, failing to realize that if everything is about national security, then nothing is?

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111 President Richard M. Nixon invoked a different statute, the Trading with the Enemy Act of 1917, to justify an across-the-board 10% import surcharge (which became the subject of the Yoshida case, discussed in a separate Chapter) to deal with a BOP crisis that he said threatened national security.

Section 232 of the *Trade Expansion Act of 1962*, as amended, authorizes the President to impose restrictions on imports that threaten to impair the national security. This authority has been used by the President to impose quotas and fees on imports of petroleum and petroleum products from time to time and to embargo imports of refined petroleum products from Libya. Public Law 96-223 (imposing a windfall profit tax on domestic crude oil) amended Section 232 to authorize the Congress to disapprove by joint resolution an action of the President to adjust oil imports.

Section 232 as amended requires the Secretary of Commerce to conduct immediately an investigation to determine the effects on national security of imports of an article, upon the request of any U.S. government department or agency, application of an interested party, or upon his own motion. The Secretary must report the findings of his investigation and his recommendations for action or inaction to the President within 270 days after beginning the investigation. If the Secretary finds the article “is being imported * * * in such quantities or under such circumstances as to threaten to impair the national security,” he must so advise the President. The President must decide within 90 days after receiving the Secretary’s report whether to take action. If the President decides to take action, he must implement such action within 15 days, and take such action for such time as he deems necessary to “adjust” the imports of the article and its derivatives so imports will not threaten to impair the national security. The President must submit a written statement to the Congress within 30 days explaining action taken and the reasons therefor.

Upon initiation of an investigation, the Secretary of Commerce must immediately notify the Secretary of Defense, and consult with him on methodological and policy questions. Upon request of the Secretary of Commerce, the Secretary of Defense must provide an assessment of the defense requirements of any article subject to investigation. The Secretary of Commerce must hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to the investigation if it is appropriate and after reasonable notice. The Secretary must also seek information and advice from, and consult with, other appropriate agencies. Among the factors which the Secretary and the President must consider are: domestic production needs for projected national defense requirements; domestic industry capacity to meet these requirements; existing and anticipated availability of resources, supplies, and services essential to the national defense; the growth requirements of such industries, supplies, services; imports in terms of their quantities, availability, character, and use as they affect such industries and U.S. capacity to meet national security requirements; the impact of foreign competition on the economic welfare of domestic industries; and any substantial unemployment, revenue declines, loss of skills or investment, or other serious effects resulting from displacement of any domestic products by excessive imports.

II. NSIBR Criteria for Determining “National Security”
§ 705.2 Purpose.

These regulations set forth the procedures by which the Department [of Commerce] shall commence and conduct an investigation to determine the effect on the national security of the imports of any article. Based on this investigation, the Secretary [of Commerce] shall make a report and recommendation to the President for action or inaction regarding an adjustment of the imports of the article.

§ 705.4 Criteria for determining effect of imports on the national security.

(a) To determine the effect on the national security of the imports of the article under investigation, the Department shall consider the quantity of the article in question or other circumstances related to its import. With regard for the requirements of national security, the Department shall also consider the following:

(1) Domestic production needed for projected national defense requirements;

(2) The capacity of domestic industries to meet projected national defense


The thrust of the Commission’s Report was that minerals, more so than other raw materials, were in such demand and were thus rising so rapidly in price that there existed a threat to “undermine our rising standard of living, impair the dynamic quality of American capitalism, and weaken the economic foundations of national security.” In order to remove this threat, the Report recommended that the United States acquire its minerals and other raw materials on the basis of “least cost,” regardless of whether the supplying source was domestic or foreign. This would require, according to the report, the stimulation of foreign trade and the repeal of the “Buy American” Act, which the Commission characterized as “a relic of depression psychology.”


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requirements;

(3) The existing and anticipated availabilities of human resources, products, raw materials, production equipment and facilities, and other supplies and services essential to the national defense;

(4) The growth requirements of domestic industries to meet national defense requirements and the supplies and services including the investment, exploration and development necessary to assure such growth; and

(5) Any other relevant factors.

(b) In recognition of the close relation between the strength of our national economy and the capacity of the United States to meet national security requirements, the Department shall also, with regard for the quantity, availability, character and uses of the imported article under investigation, consider the following:

(1) The impact of foreign competition on the economic welfare of any domestic industry essential to our national security;

(2) The displacement of any domestic products causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects; and

(3) Any other relevant factors that are causing or will cause a weakening of our national economy.

III. Critical Supply Chains and Dependence on Foreign Sources:

2020 COVID-19 Pandemic and Pharmaceutical Supply Chains

The fundamental issue underlying restriction on imports or exports is that the good (or, potentially, service) truly implicates “national security.” Recall the discussion (in separate Chapter) of the scope of application GATT Article XXI: does and/or should it cover army boots, as Sweden argued in 1975-77?). Similarly, recall the discussion (also in a separate Chapter) of India’s export restrictions in 2019 on onions and 2020 on drugs: are they “essential”? During the 2020 coronavirus pandemic, those pharmaceutical restrictions raised the question of whether medicines might be considered national security items, and thereby within the scope of Article XXI, and/or essential merchandise, and hence within the scope of Article XI. In either or both instances, trade in them might be legitimately restricted.

Consider this argument against reliance on overseas supply chains for medicines:

China’s Hubei province is the epicenter of the global coronavirus outbreak. It’s also home to at least 12 drug plants supplying the U.S. with everything from painkillers to antibiotics. And beyond Hubei, an estimated 80% of
pharmaceutical ingredients are sourced from China and India (which, in turn, sources nearly 80% of its drug ingredients from China).

Our ability to make and distribute medicine here in the United States is falling apart, and it’s a direct result of the consolidation of the supply chains and factories that make it.

…

Since at least 2005, hospital administrators and patients have experienced the fragility of the drug supply chain. Policymakers have failed to address the root cause. Why did we consolidate and thin out supply chains so aggressively?

The answer is found in the behavior of “power buyers,” corporations in the drug supply chain that buy a lot of product and subsequently have the power to set prices. Power buyers like CVS or the group purchasing organizations (GPOs), which hospitals use to buy everything from surgical gowns to generic drugs, have consolidated the drug supply chain, squeezing manufacturers to get rid of all their redundant sources of supply – or, even riskier, ship off their production to China.

Indeed, it’s consolidation all the way down: Many of these GPOs outsource even further, purchasing their generic drugs through separate power buyer entities. For example, Cardinal Health, the fifth-largest GPO in the country, runs a joint venture called Red Oak Sourcing with CVS Health, the largest pharmacy chain, to handle purchasing for Cardinal, CVS, Target, Omnicare (which sources for approximately 50% of all nursing homes), and OptumRx (the drug division of UnitedHealth Group). Other power buyers cover purchasing for Walmart, Walgreens, and Express Scripts. The market is so consolidated that just four of these power buyers control over 90% of generic drug purchasing for the entire country.

This consolidation might not seem like a bad thing. After all, generic drugs are cheap; a course of generic antibiotics may cost no more than $5 to the consumer. But power buyers have driven prices below a sustainable level for the producer. Their consolidated buying power – also called monopsony power – has lowered margins on generic drugs such that many manufacturers have consolidated to match their bargaining power or offshored their production lines to eke out whatever margin they can.

Drug shortages aren’t the only consequence of this. Power buyers act similarly to the way Walmart handles purchasing for its more than 5,000 stores, demanding extremely low prices from suppliers and forcing them to either fold or move production to cheaper labor markets overseas. US factories close, production moves offshore, and the result is a loss of diversity and resiliency for the entire supply chain in return for slightly lower prices. Common goods, including garden hoses, TVs, air conditioner
parts, and car parts are now all in shortage.

Rather than solely focusing on the country of origin of the supply chains, lawmakers and regulators should be focused on the market power issues that caused the problem. Regulatory solutions like breaking apart the power buyers of drugs and legislative solutions like banning contracts that guarantee massive purchasers the lowest possible price would allow the supply chain to re-diversify. And diverse supply chains are better able to respond to a catastrophe.  

In evaluating this argument against foreign sourcing of medicines, note, first, the causes of dependence. There are two, monopsony (i.e., imperfect competition on the demand side of a market) in a Capitalist culture of relentless pressure to drive down prices. Neither FDI nor trade per se are the causes of supply chain insecurity in the U.S. for drugs.

Note, second, whether the exact drug matters. For example, should dependence on foreign sources for be thought of as equally threatening to national security as reliance on an anti-viral medicine? Recall the principles of Catholic Social Justice Theory (discussed in a separate Chapter). Is there a counter-argument, that inter-dependence through global supply chains for all medicines bolsters our sense of our common humanity, and especially our respect for the human dignity of each person?

Finally, consider the scope of “national security,” and “essential,” products in relation to product exclusions from Section 232 tariffs granted by the DOC, or from Section 301 tariffs (discussed in a separate Chapter).  

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115 There are significant problems with the administration of the Section 232 product exclusion process. See GOVERNMENT ACCOUNTABILITY OFFICE, STEEL AND ALUMINUM TARIFFS – COMMERCE SHOULD IMPROVE ITS EXCLUSION REQUEST PROCESS AND ECONOMIC IMPACT REVIEWS, GAO-20-517 (September 2020), www.gao.gov/assets/710/709387.pdf. Summarized, the GAO found:

Between March 2018 and November 2019, Commerce received over 106,000 requests; it rejected over 19,000 of them prior to decision due to incorrect or incomplete information. Although rejections may delay relief for requesters and can increase work for Commerce, the agency [i.e., DOC] has not identified, analyzed, or taken steps to fully address the causes of these submission errors.

In deciding exclusion requests, Commerce examines objections from steel and aluminum producers to find whether the requested products are reasonably available domestically in a sufficient amount. Commerce may also decide exclusion requests based on national security issues, but has not done so. While Commerce approved two-thirds of exclusion requests, it most often denied requests that had technical errors or where a domestic producer had objected.

Commerce did not decide about three quarters of requests within its established timeliness guidelines, as shown in the figure, taking more than a year to decide 841 requests. Commerce took steps to improve timeliness, such as streamlining the review process for some requests and creating a new submission website, but continues not to meet guidelines.
merchandise needed to combat a public health emergency, such as the COVID-19 pandemic, are they *ipso facto* within the scope of these terms?

### IV. February 2021 Executive Order on Supply Chains Review

In February 2021, President Joseph R. Biden (1942-, President, 2021-) issued an *Executive Order* instructing the Federal government to evaluate the extent to which the U.S. relied on foreign countries for goods and services, with respect to both government procurement and commercial supply chains, in sectors he considered essential. These sectors included critical minerals (*e.g.*, rare earths used in autos and weapons), EV

and had a backlog of 28,000 requests as of November 2019. Until Commerce takes additional steps, companies will continue to encounter delays in obtaining relief.

Commerce has not documented the results from any reviews of the tariffs’ impacts or assigned responsibility for conducting regular reviews. GAO found evidence of changes in U.S. steel and aluminum imports and markets. For example, imports covered by the tariffs declined after an initial surge and prices dropped after significant increases in earlier years. Evaluating whether the tariffs have achieved the intended goals and how they affect downstream sectors requires more in-depth economic analysis. Without assigning responsibility for conducting regular reviews and documenting the results, Commerce may be unable to consistently assess if adjustments to the tariffs are needed.

*Id.*


117 Rare earths are discussed in a separate Chapter. Notably, U.S. and Canadian companies developed a new production method to lessen dependence on China for them:

Three North American companies are setting up a rare earths supply chain to reduce dependence on China for the vital metals used in weapons, electric vehicles and other advanced technology.

Neo Performance Materials of Canada and Energy Fuels of the US have found an efficient way to safely produce rare earths from radioactive monazite sands. The sands, a mining by-product, will be supplied by U.S.-based chemicals group Chemours.

China controls about 80 per cent of rare earths supply and has been considering an export ban, leading to fears it will gain a military and commercial advantage over the U.S. and Europe. Most western rare earth companies have avoided monazite, produced from mining for zircon, titanium and other minerals, because of its high radioactive content.

But Energy Fuels, which already processes uranium, has developed a method of extracting the radioactive element from the monazite to use in nuclear fuel, turning a waste product into a revenue earner.

Constantine Karayannopoulos, Neo’s Chief Executive, said the U.S.’s large stocks of monazite were the answer to soaring demand for rare earths.

Monazite contains about 50 per cent rare earths, far higher than other ores, as well as 0.2-0.3 per cent natural uranium. It also contains 15 of the 17 rare earths.
batteries, pharmaceuticals (including APIs), and semiconductors. The Order also called for separate, annual reviews for six further sectors: biological preparedness, defense, energy, food production, IT, public health, and transportation. Thus, in signing the Order, Mr. Biden explained:

The Order … does two things. First, it orders a 100-day review of four vital products: semiconductors – one; key minerals and materials, like rare earths, that are used to make everything from harder steel to airplanes; three, pharmaceuticals and their ingredients; four, advanced batteries, like the ones used in electric vehicles.

There’s strong bipartisan support for fast reviews of these four areas because they’re essential to protecting and strengthening American competitiveness.

Second, this Order initiates a long-term review of the industry basis of six sectors of our overall economy over the next year. These reviews will identify policy recommendations to 40 of [fortify] our supply chains, to – it should be to fortify our supply chains at every step, and critically, to start implementing those recommendations right away. …

In studying the Order, consider the line between industrial policy, which the U.S. generally regards as anathema, and appropriate guidance of the market, which the U.S. prefers as

Neo will produce separated rare earth materials used in the permanent magnets needed in electric cars and other advanced materials.

Fighter jets such as the F-35 rely heavily on rare earths. A Congressional Research Service report found that Lockheed Martin aircraft contained 417 kg of rare-earth materials and a nuclear submarine more than 4 tons. [See Valerie Bailey, Rare Earth Elements in National Defense: Background, Oversight Issues, and Options for Congress, Congressional Research Service, R41744 (23 December 2013), https://fas.org/sgp/crs/natsec/R41744.pdf.]

The U.S. government has prioritized a strategy to diversify away from China, including more mining and processing domestically and in partner countries. President Joe Biden last month ordered a review of the vulnerability of critical supply chains including rare earths and the government has subsidised some miners and processing companies.

Chemours will supply Energy Fuels with at least 2,500 tons a year of monazite ore and will send 840 tonnes of rare earths to Estonia.

Energy Fuels eventually aims to process 15,000 tons of monazite a year, which would meet half the rare earth needs of the U.S.

Andy Bounds, North American Groups Seek to Break China’s Grip on Rare Earths Supply, FINANCIAL TIMES, 1 March 2021, www.ft.com/content/bd6aaf87-0c64-4922-b1d0-6149e?d4b7ce?shareType=nongift

relatively less interventionist. What is that line, and does the Order cross it? Also consider what trade remedies might the U.S. apply to protect its supply chains? Would they be “sticks,” such as Section 232, or might they also be “carrots,” such as tax breaks, subsidies, and government procurement preferences?

The purpose of the Order was to position the U.S. to avoid the supply chain shocks it suffered during the COVID-19 pandemic (discussed earlier), as well as the Trump Administration’s Steel and Aluminium Section 232 cases (discussed below) and Sino-American Trade War (discussed in a separate Chapter). In this respect, consider the difference between a “robust” supply chain (one that is not disrupted by shocks) and a “resilient” supply chain (one that bounces back quickly from shocks). In signing the order, President Biden spoke of “resilience,” but implied his long-term goal was robustness:

…[T]he bottom line is simple: The American people should never face shortages in the goods and services they rely on, whether that’s their car or their prescription medicines or the food at the local grocery store.

And remember, the shortages in PPE during this pandemic — that meant we didn’t have the masks; we didn’t have gowns or gloves to protect our frontline health workers.

…

… We shouldn’t have to rely on a foreign country — especially one that doesn’t share our interests or our values — in order to protect and provide our people during a national emergency.

…

Resilient, diverse, and secure supply chains are going to help revitalize our domestic manufacturing capacity and create good-paying jobs….

…

Remember that old proverb: “For want of a nail, the shoe was lost. For want of a shoe, the horse was lost.” And it goes on and on until the kingdom was lost, all for the want of a horseshoe nail. Even small failures at one point in the supply chain can cause outside impacts further up the chain.

Recently, we’ve seen how a shortage of computer chips…; it’s called a “semiconductor” — has caused delays in production of automobiles that has resulted in reduced hours for American workers. A 21st century horseshoe nail.

This semiconductor is smaller than a postage stamp, but it has more than 8 billion transistors — 8 billion transistors, 10,000 times thinner than a single human hair in this one chip. These chips are a wonder of innovation

and design that powers so much of our country, enables so much of our modern lives to go on – not just our cars, but our smartphones, televisions, radios, medical diagnostic equipment, and so much more.

We need to make sure these supply chains are secure and reliable. I’m directing senior officials in my administration to work with industrial leaders to identify solutions to this semiconductor shortfall and work very hard with the House and Senate. …

In the meantime, we’re reaching out to our allies, semiconductor companies, and others in the supply chain to ramp up production to help us resolve the bottlenecks we face now. We need help to stop – we need to stop playing catch up after the supply-chain crisis hit. We need to prevent the supply chain crisis from hitting in the first place.

And in some cases, building resilience will mean increasing our production of certain types of elements here at home. In others, it’ll mean working more closely with our trusted friends and partners, nations that share our values, so that our supply chains can’t be used against us as leverage.

It will mean identifying and building surge capacity that can quickly be turned into and ramped up production in times of emergency. And it will mean investing in research and development, like we did in the ’60s, to ensure long-term competitiveness in our manufacturing base in the decades ahead.\footnote{February 2021 Biden Supply Chain Executive Order Remarks.}

Thus, succinctly put, the \textit{Order} asked, how vulnerable are American supply chains to foreign competitor nations? What and where are the choke points, and how can they be dealt with? Note that the President did not invoke any particular statute, such as the \textit{IEEPA} or Section 232, in issuing the \textit{Order}. What would be the most pertinent bases for his authority with respect to this \textit{Order}?  


By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

\textit{Section 1. Policy.}
The United States needs resilient, diverse, and secure supply chains to ensure our economic prosperity and national security. Pandemics and other biological threats, cyber-attacks, climate shocks and extreme weather events, terrorist attacks, geopolitical and economic competition, and other conditions can reduce critical manufacturing capacity and the availability and integrity of critical goods, products, and services. Resilient American supply chains will revitalize and rebuild domestic manufacturing capacity, maintain America’s competitive edge in research and development, and create well-paying jobs. They will also support small businesses, promote prosperity, advance the fight against climate change, and encourage economic growth in communities of color and economically distressed areas.

More resilient supply chains are secure and diverse – facilitating greater domestic production, a range of supply, built-in redundancies, adequate stockpiles, safe and secure digital networks, and a world-class American manufacturing base and workforce. Moreover, close cooperation on resilient supply chains with allies and partners who share our values will foster collective economic and national security and strengthen the capacity to respond to international disasters and emergencies.

Therefore, it is the policy of my Administration to strengthen the resilience of America’s supply chains.

Section 2. Coordination.

The Assistant to the President for National Security Affairs (APNSA) and the Assistant to the President for Economic Policy (APEP) shall coordinate the executive branch actions necessary to implement this order through the interagency process identified in National Security Memorandum 2 of February 4, 2021 (Renewing the National Security Council System). In implementing this Order, the heads of agencies should, as appropriate, consult outside stakeholders – such as those in industry, academia, non-governmental organizations, communities, labor unions, and State, local, and Tribal governments – in order to fulfill the policy identified in Section 1 of this Order.

Section 3. 100-Day Supply Chain Review.

(a) To advance the policy described in section 1 of this Order, the APNSA and the APEP, in coordination with the heads of appropriate agencies, as defined in Section 6(a) of this Order, shall complete a review of supply chain risks, as outlined in subsection (b) of this section, within 100 days of the date of this Order.

(b) Within 100 days of the date of this order, the specified heads of agencies shall submit the following reports to the President, through the APNSA and the APEP:

(i) The Secretary of Commerce, in consultation with the heads of appropriate agencies, shall submit a report identifying risks in the semiconductor manufacturing and advanced packaging supply chains and policy recommendations to address these risks. …
(ii) The Secretary of Energy, in consultation with the heads of appropriate agencies, shall submit a report identifying risks in the supply chain for high-capacity batteries, including electric-vehicle batteries, and policy recommendations to address these risks. …

(iii) The Secretary of Defense (as the National Defense Stockpile Manager), in consultation with the heads of appropriate agencies, shall submit a report identifying risks in the supply chain for critical minerals and other identified strategic materials, including rare earth elements (as determined by the Secretary of Defense), and policy recommendations to address these risks. The report shall also describe and update work done pursuant to Executive Order 13953 of September 30, 2020 (Addressing the Threat to the Domestic Supply Chain From Reliance on Critical Minerals From Foreign Adversaries and Supporting the Domestic Mining and Processing Industries). …

[President Trump’s Executive Order 13953, defined “critical minerals” as: “35 minerals that (1) are ‘essential to the economic and national security of the United States,’ (2) have supply chains that are ‘vulnerable to disruption,’ and (3) serve ‘an essential function in the manufacturing of a product, the absence of which would have significant consequences for our economy or our national security’.” 122 (quoting from December 2017 Executive Order 13817, A Federal Strategy To Ensure Secure and Reliable Supplies of Critical Minerals (20 December 2017).]

(iv) The Secretary of Health and Human Services, in consultation with the heads of appropriate agencies, shall submit a report identifying risks in the supply chain for pharmaceuticals and active pharmaceutical ingredients and policy recommendations to address these risks. The report shall complement the ongoing work to secure the supply chains of critical items needed to combat the COVID-19 pandemic, including personal protective equipment, conducted pursuant to Executive Order 14001 of January 21, 2021 (A Sustainable Public Health Supply Chain). …

(c) The APNSA and the APEP shall review the reports required under Subsection (b) of this Section and shall submit the reports to the President in an unclassified form, but may include a classified Annex.

(d) The APNSA and the APEP shall include a cover memorandum to the set of reports submitted pursuant to this section, summarizing the reports’ findings and making any additional overall recommendations for addressing the risks to America’s supply chains, including the supply chains for the products identified in Subsection (b) of this Section.

Section 4. Sectoral Supply Chain Assessments.


(a) Within 1 year of the date of this order, the specified heads of agencies shall submit the following reports to the President, through the APNSA and the APEP:

(i) The Secretary of Defense, in consultation with the heads of appropriate agencies, shall submit a report on supply chains for the defense industrial base that updates the report provided pursuant to Executive Order 13806 of July 21, 2017 (Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States), and builds on the Annual Industrial Capabilities Report mandated by the Congress pursuant to section 2504 of title 10, United States Code. The report shall identify areas where civilian supply chains are dependent upon competitor nations….

(ii) The Secretary of Health and Human Services, in consultation with the heads of appropriate agencies, shall submit a report on supply chains for the public health and biological preparedness industrial base….

(iii) The Secretary of Commerce and the Secretary of Homeland Security, in consultation with the heads of appropriate agencies, shall submit a report on supply chains for critical sectors and subsectors of the information and communications technology (ICT) industrial base (as determined by the Secretary of Commerce and the Secretary of Homeland Security), including the industrial base for the development of ICT software, data, and associated services.

(iv) The Secretary of Energy, in consultation with the heads of appropriate agencies, shall submit a report on supply chains for the energy sector industrial base….

(v) The Secretary of Transportation, in consultation with the heads of appropriate agencies, shall submit a report on supply chains for the transportation industrial base….

(vi) The Secretary of Agriculture, in consultation with the heads of appropriate agencies, shall submit a report on supply chains for the production of agricultural commodities and food products.

(b) The APNSA and the APEP shall, as appropriate and in consultation with the heads of appropriate agencies, recommend adjustments to the scope for each industrial base assessment, including digital networks, services, assets, and data (“digital products”), goods, services, and materials that are relevant within more than one defined industrial base, and add new assessments, as appropriate, for goods and materials not included in the above industrial base assessments.

(c) Each report submitted under Subsection (a) of this Section shall include a review of:

(i) the critical goods and materials, as defined in section 6(b) of this Order, underlying the supply chain in question;

(ii) other essential goods and materials, as defined in section 6(d) of this Order, underlying the supply chain in question, including digital products;
(iii) the manufacturing or other capabilities necessary to produce the materials identified in subsections (c)(i) and (c)(ii) of this section, including emerging capabilities;

(iv) the defense, intelligence, cyber, homeland security, health, climate, environmental, natural, market, economic, geopolitical, human-rights or forced-labor risks or other contingencies that may disrupt, strain, compromise, or eliminate the supply chain – including risks posed by supply chains’ reliance on digital products that may be vulnerable to failures or exploitation, and risks resulting from the elimination of, or failure to develop domestically, the capabilities identified in Subsection (c)(iii) of this Section – and that are sufficiently likely to arise so as to require reasonable preparation for their occurrence;

(v) the resilience and capacity of American manufacturing supply chains and the industrial and agricultural base – whether civilian or defense – of the United States to support national and economic security, emergency preparedness, and the policy identified in section 1 of this Order, in the event any of the contingencies identified in subsection (c)(iv) of this section occurs, including an assessment of:

(A) the manufacturing or other needed capacities of the United States, including the ability to modernize to meet future needs;

(B) gaps in domestic manufacturing capabilities, including non-existent, extinct, threatened, or single-point-of-failure capabilities;

(C) supply chains with a single point of failure, single or dual suppliers, or limited resilience, especially for subcontractors…;

(D) the location of key manufacturing and production assets, with any significant risks … Section posed by the assets’ physical location;

(E) exclusive or dominant supply of critical goods and materials and other essential goods and materials … by or through nations that are, or are likely to become, unfriendly or unstable;

(F) the availability of substitutes or alternative sources for critical goods and materials and other essential goods and materials…;

(G) current domestic education and manufacturing workforce skills for the relevant sector and identified gaps, opportunities, and potential best practices in meeting the future workforce needs for the relevant sector;

(H) the need for research and development capacity to sustain leadership in the development of critical goods and materials and other essential goods and materials…;

(I) the role of transportation systems in supporting existing supply chains and risks associated with those transportation systems; and

(J) the risks posed by climate change to the availability, production, or transportation of critical goods and materials and other essential goods and materials …;

(vi) allied and partner actions, including whether United States allies and partners have also identified and prioritized the critical goods and materials and other essential goods and materials …, and possible avenues for
international engagement. In assessing these allied and partner actions, the heads of agencies shall consult with the Secretary of State;

(vii) the primary causes of risks for any aspect of the relevant industrial base and supply chains assessed as vulnerable …’

(viii) a prioritization of the critical goods and materials and other essential goods and materials, including digital products…. The prioritization shall be based on statutory or regulatory requirements; importance to national security, emergency preparedness, and the policy set forth in section 1 of this order …;

(ix) specific policy recommendations for ensuring a resilient supply chain for the sector. Such recommendations may include sustainably reshoring supply chains and developing domestic supplies, cooperating with allies and partners to identify alternative supply chains, building redundancy into domestic supply chains, ensuring and enlarging stockpiles, developing workforce capabilities, enhancing access to financing, expanding research and development to broaden supply chains, addressing risks due to vulnerabilities in digital products relied on by supply chains, addressing risks posed by climate change, and any other recommendations;

(x) any executive, legislative, regulatory, and policy changes and any other actions to strengthen the capabilities identified in subsection (c)(iii) of this section, and to prevent, avoid, or prepare for any of the contingencies identified in subsection (c)(iv) of this section; and

(xi) proposals for improving the Government-wide effort to strengthen supply chains, including proposals for coordinating actions required under this order with ongoing efforts that could be considered duplicative of the work of this order or with existing Government mechanisms that could be used to implement this order in a more effective manner.

(d) The APNSA and the APEP shall review the reports required under subsection (a) of this section and shall submit the reports to the President in an unclassified form, but may include a classified Annex.

Section 5. General Review and Recommendations.

… [T]he APNSA and the APEP, in coordination with the heads of appropriate agencies, shall provide to the President one or more reports reviewing the actions taken over the previous year and making recommendations concerning:

(a) steps to strengthen the resilience of America’s supply chains;

(b) reforms needed to make supply chain analyses and actions more effective, including statutory, regulatory, procedural, and institutional design changes. The report shall include recommendations on whether additional offices, personnel, resources, statistical data, or authorities are needed;

(c) establishment of a quadrennial supply chain review, including processes and
timelines regarding ongoing data gathering and supply chain monitoring;

(d) diplomatic, economic, security, trade policy, informational, and other actions that can successfully engage allies and partners to strengthen supply chains jointly or in coordination;

(e) insulating supply chain analyses and actions from conflicts of interest, corruption, or the appearance of impropriety, to ensure integrity and public confidence in supply chain analyses;

(f) reforms to domestic and international trade rules and agreements needed to support supply chain resilience, security, diversity, and strength;

(g) education and workforce reforms needed to strengthen the domestic industrial base;

(h) steps to ensure that the Government’s supply chain policy supports small businesses, prevents monopolization, considers climate and other environmental impacts, encourages economic growth in communities of color and economically distressed areas, and ensures geographic dispersal of economic activity across all regions of the United States; and

(i) Federal incentives and any amendments to Federal procurement regulations that may be necessary to attract and retain investments in critical goods and materials and other essential goods and materials, as defined in sections 6(b) and 6(d) of this order, including any new programs that could encourage both domestic and foreign investment in critical goods and materials.

Section 6. Definitions.

For purposes of this Order:

(b) “Critical goods and materials” means goods and raw materials currently defined under statute or regulation as “critical” materials, technologies, or infrastructure.

(c) “Critical minerals” has the meaning given to that term in Executive Order 13953 of September 30, 2020 (Addressing the Threat to the Domestic Supply Chain From Reliance on Critical Minerals From Foreign Adversaries and Supporting the Domestic Mining and Processing Industries).

(d) “Other essential goods and materials” means goods and materials that are essential to national and economic security, emergency preparedness, or to advance the policy set forth in section 1 of this order, but not included within the definition of “critical goods and materials.”

(e) “Supply chain,” when used with reference to minerals, includes the exploration, mining, concentration, separation, alloying, recycling, and reprocessing of
minerals.

...
I. March 2018 Section 232 Steel and Aluminum Investigations

- Campaign Promise and Subsequent Investigations

In a June 2016 speech in Pittsburgh, Presidential candidate Donald J. Trump (1946-, President, 2017-2021) declared his intention to use Section 232, as well as AD-CVD laws, to combat China’s mercantilist policies, theft of IP, and currency manipulation. He elaborated on his trade policy in the September 2016 document “Scoring the Trump Economic Plan: Trade, Regulatory, & Energy Policy Impacts.” The steel industry was a favored constituency for the policy. Between 2000 and 2016, 51,400 American steel workers lost their jobs (a drop from 135,000 to 83,600, with 19,000 layoffs in 2015 alone), and American steel production capacity shrunk by 25.5 million tons (from 112 to 86.5 million tons).

As President, in April 2017 Mr. Trump made good on his promise. The DOC launched Section 232 investigations of the effects on American national security of foreign steel (particularly five categories of steel products: flat; long; pipe and tube; semi-finished; and stainless products) and aluminum, with a view to imposing tariffs or otherwise limiting access of foreign, that is, adjusting imports, perhaps especially those of Chinese origin, to the American market on the grounds this subject merchandise was being imported in such quantities as to threaten to impair America’s security. The investigation focused on the following variables:

(a) Quantity of steel [in the U.S.] or other circumstances related to the importation of steel; (b) Domestic production and productive capacity needed for steel to meet projected national defense requirements; (c) Existing and anticipated availability of human resources, products, raw materials, production equipment, and facilities to produce steel [in the U.S.]; (d) Growth requirements of the steel industry to meet national defense requirements and/or requirements to assure such growth; (e) The impact of foreign competition on the economic welfare of the steel industry;

123 Documents References:
(1) Havana (ITO) Charter Preamble, Article 99
(2) GATT Article XXI
(3) Relevant provisions in FTAs

124 See Len Bracken, Trump Sees Revenue Gains From Trade Changes, 33 International Trade Reporter (BNA) 1387 (29 September 2016).


(f) The displacement of any domestic steel causing *substantial unemployment*, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects; … [The Administration apparently was so eager to launch the case it repeated variable (f) as variable (g)]; (h) Relevant factors that are causing or will cause a *weakening of our national economy*; and (i) Any other relevant factors [*i.e.*, a catch-all variable].

Both steel and aluminum are used across the defense industry. For example, “‘high-purity’ aluminum [is] used in various military aircraft, such as the F-35 joint strike fighter, the F-18 and the C-17, as well as armored vehicles, combat vessels and missiles,” yet there is just one American smelter that made aluminum at the time of the Section 232 investigation initiation, and it alleged it was suffering from foreign dumping.

● **Question of National Security Impairment**

Query whether foreign steel poses a threat to American “national security.” U.S. Secretary of Commerce Wilbur Ross said they do, under his broad interpretation of this term:

> Without a strong economy, you can’t have strong national security. … The President’s [Trump’s] overwhelming objective is to reduce our trade deficit.

Is there a *bona fide* link between national security and a trade deficit, and if so, what is it?

Consider a few facts that there is no solid link, and that a nuanced analysis is necessary. For example, although steel is used in over 10,000 military products, the U.S. defense industry purchases less than 5% of domestic steel output, and about 1% of domestic aluminum output. Indeed, only 3% of steel made in America is used for defense or homeland security purposes. These figures suggest American producers can fill Pentagon needs, even if those needs increase, except for certain alloy steels (used, for instance, in armor plating), where domestic mills lack capacity.

As for foreign suppliers, the U.S. sources steel from 110 countries and territories, but most of it comes from close allies like Canada, which provides 6% of steel (the single...
biggest supplier, and 42% of aluminum) consumed in America, as well as Brazil, Japan, Korea, and Mexico.\textsuperscript{132} China, which is the world’s largest steel exporter, is only the 11\textsuperscript{th} largest exporter to the U.S., and accounts for just 4% of U.S. steel imports.\textsuperscript{133} On the list of China’s top steel export customers, America ranks a lowly 26\textsuperscript{th} (well behind the top export destinations, Korea, Vietnam, and the Philippines). For India, which is the world’s 14\textsuperscript{th} biggest steel exporter, the U.S. is its sixth largest destination (behind Nepal, Vietnam, Italy, Belgium, and the UAE).\textsuperscript{134}

\textsuperscript{132} See U.S. Threat.
\textsuperscript{133} See United States Department of Commerce, Global Steel Trade Monitor, Steel Exports Report: China (December 2017), www.trade.gov/steel/countries/pdfs/exports-China.pdf. [Hereinafter, China Steel Trade Monitor.] The data are YTD 2016 (as of September, i.e., September 2016-September 2017). See also U.S. Threat, U.S. Steel and Aluminum (both providing additional data).
\textsuperscript{134} See United States Department of Commerce, Global Steel Trade Monitor, Steel Exports Report: India (December 2017), www.trade.gov/steel/countries/pdfs/exports-India.pdf. The data are YTD 2016 (as of September, i.e., September 2016-September 2017). [Hereinafter, India Steel Trade Monitor.]

The data can and should be disaggregated based on type of steel product in relation to national security. For example, the U.S. is the number 1 destination for Indian pipe and tube steel, number 4 for stainless steel, and number 5 for flat, long, and semi-finished steel. See id. A vital issue, in terms of Section 232 “impairment,” is the extent to which each product implicates national security.

In the waning days of this Administration, President Trump issued Proclamation 10139 removing Section 232 duties on steel imports from the UAE, asserting:

2. In Proclamation 9704 of March 8, 2018 (Adjusting Imports of Aluminum Into the United States), I concurred in the [Commerce] Secretary’s finding that aluminum articles were being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States, and decided to adjust the imports of aluminum articles, as defined in clause 1 of Proclamation 9704, by imposing a 10 percent \textit{ad valorem} tariff on such articles imported from most countries. I further stated that any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country. I also noted that, should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on aluminum article imports from that country and, if necessary, make corresponding adjustments to the tariff as it applies to other countries as the national security interests of the United States require.

3. The United States has an important security relationship with the United Arab Emirates, including our shared commitment to supporting each other in addressing national security concerns in the Middle East, particularly in countering Iran’s malign influence there; combatting violent extremism around the world; and maintaining the strong economic ties between our countries.

4. … [T]he United States has engaged in discussions with the United Arab Emirates on alternative means to address the threatened impairment to our national security posed by aluminum article imports from the United Arab Emirates. On the basis of these discussions, the United States and the United Arab Emirates have now agreed on satisfactory alternative means to address this threat.

5. The United States has successfully concluded discussions with the United Arab Emirates on satisfactory alternative means to address the threatened impairment
of the national security posed by aluminum imports from the United Arab Emirates, specifically a quota restricting the quantity of aluminum articles imported into the United States from the United Arab Emirates. This measure is expected to allow imports of aluminum from the United Arab Emirates to remain close to historical levels without meaningful increases, thus making it more likely that domestic capacity utilization will Start Printed Page 6826 reasonably commensurate with the target level recommended in the Secretary’s report. In my judgment, this measure will provide effective, long-term alternative means to address the contribution of the United Arab Emirates to the threatened impairment to our national security by restraining aluminum article exports from the United Arab Emirates to the United States, limiting export surges by the United Arab Emirates, and discouraging excess aluminum capacity and excess aluminum production. In light of this agreement, I have determined that aluminum article imports from the United Arab Emirates will no longer threaten to impair the national security and have decided to exclude the United Arab Emirates from the tariff proclaimed in Proclamation 9704. The United States will monitor the implementation and effectiveness of the measure agreed with the United Arab Emirates in addressing our national security needs, and this determination may be revisited, as appropriate.

Adjusting Imports of Aluminum Into the United States, 86 Federal Register 6825-6831 (25 January 2021), www.federalregister.gov/documents/2021/01/25/2021-01711/adjusting-imports-of-aluminum-into-the-united-states. However, shortly after his inauguration, President Joseph R. Biden issued a Proclamation revoking Proclamation 10139, explaining:

3. In my view, the available evidence indicates that imports from the UAE may still displace domestic production, and thereby threaten to impair our national security. Proclamation 9704 authorized the Secretary of Commerce to grant exclusions from the aluminum tariffs based on specific national security considerations or if specific imported aluminum articles were determined not to be produced sufficiently in the United States, such that the imports would not diminish domestic production. Tellingly, there have been 33 such exclusion requests for aluminum imported from the UAE, covering 587,007 metric tons of articles, and the Secretary of Commerce has denied 32 of those requests, covering 582,007 metric tons. This indicates the large degree of overlap between imports from the UAE and what our domestic industry is capable of producing.

4. Since the tariff on aluminum imports was imposed, such imports substantially decreased, including a 25 percent reduction from the UAE, and domestic aluminum production increased by 22 percent through 2019, before the coronavirus pandemic began. In light of that history, I believe that maintaining the tariff is likely to be more effective in protecting our national security than the untested quota described in Proclamation 10139.


Note the distinction in the reasoning of the two Presidents: President Biden saw UAE steel imports as a threat to American national security, regardless of (1) Emirati cooperation on regional security matters in the Middle East, and (2) the October 2020 Emirati-Israeli “Abraham Accords” Peace Agreement, whereas President Trump cast the steel import threat in a geopolitical context. Arguably, Mr. Biden was focused more narrowly on supporting American jobs and incomes than his predecessor – an irony given Mr. Trump’s “America First” approach to trade. In any event, the original 10% Section 232 remained in place, and President Trump’s quota scheme to replace it never took effect.
Likewise, the trends were not altogether ominous, and the picture as between China and India was nuanced.\textsuperscript{135} Chinese steel exports rose globally by 378\% (since 2009, 2\textsuperscript{nd} quarter), but fell in volume and value terms (by 31\% and 2\%, respectively, in 2017 and 2016). Chinese steel exports to America fell by 5\% (2017). China also was exporting less, and consuming more, of what it made: Chinese exports as a share of product dropped from 13.8\% (2016) to 9.1\% (2017). For India, globally, steel exports rose by 115\% (since 2005, 1\textsuperscript{st} quarter), and by 68\% and 75\% in volume and value terms (2017), respectively. Indian steel exports to America jumped 162\%. India was exporting more of the steel it manufactured: exports as a share of production increased from 9.9\% (2016) to 15.6\% (2017).

Moreover, restrictions on imports could harm American industries that rely on them. Those industries were diverse: “the auto sector accounted for 26 percent of demand for steel in the United States in 2017, behind the construction industry, at 40 percent of demand in 2017, ... [and] the energy sector was the third biggest user, at 10 percent.”\textsuperscript{136} Indeed, “6.5 million Americans work for manufacturers who make things using steel.”\textsuperscript{137} Small wonder why Hyundai said the Section 232 action "could negatively impact" its production and expansion in Alabama (where it makes Sonata and Elantra sedans and Santa Fe Sport crossovers), and in Georgia (at its KIA affiliate, which assembles Optima sedans and Sorento SUVs).\textsuperscript{138} Moreover, American steel producers cannot meet the demand of the tire industry for tire cord wire rod (an input into tires), nor can they supply enough tin plate for U.S. tin can makers.\textsuperscript{139} Restrictions also could trigger retaliation. America exports steel, with Canada and Mexico being its first and second largest customers, respectively.\textsuperscript{140}

Likewise, not all aluminum products have national security implications. For example, primary and ingot aluminum, and rolled can sheet, are used for food and beverage containers, lids, and closures, not defense articles. In terms of relative employment, the numbers are not close. On the one hand, the American aluminum industry employs 161,000 Americans directly, and supports indirectly a further 700,000 jobs.

\textsuperscript{135} China Steel Trade Monitor and India Steel Trade Monitor.
\textsuperscript{139} See Andrew Mayeda & Rossella Brevetti, Steel Report Could Advise Tariffs, Quotas, Commerce Says, 34 International Trade Reporter (BNA) (15 June 2017); Joe Deaux & Matthew Philips, Does Foreign Steel Threaten U.S. National Security?, 34 International Trade Reporter (BNA) 824 (1 June 2017); Brian Flood, Foreign Officials Argue Against Extraordinary U.S. Steel Protections, International Trade Daily (BNA) (25 May 2017).
\textsuperscript{140} See U.S. Threat.
Consider, on the other hand, non-national security-related users of aluminum cans. Over 11,000 Americans work in the aluminum can industry. American breweries – which themselves support over 2.2 million American jobs – use aluminum for their beer cans, so a Section 232 adjustment to aluminum would – said Molson Coors Brewing Company – cause them to pass on higher prices to beer drinkers. (In May 2019, after the effect of the Section 232 tariffs had flowed through to the U.S. economy, as discussed below, the American brewers claimed a loss of 40,000 jobs thanks in part to the Section 232 tariffs on aluminum cans, but also to the substitution by consumers away from beer and to wine and spirits.) Non-alcoholic beverage companies (such as Coca-Cola) that use aluminum cans employ 240,000 Americans directly, and another 788,000 jobs depend on sales by these firms.

As for national security-related users of aluminum, at a June 2017 public hearing on the investigation, “Alcoa Corp., Rio Tinto Group and Arconic Inc. stopped short of backing Trump’s import crackdown. Arconic, one of the biggest American producers of aluminum automotive and jet parts, warned that action on imports of raw metal may disrupt the supply chain.” The real issue, the producers said, was over-capacity in China, and consequent over-production and shipment (if not dumping) onto world markets, which the U.S. should address directly in a comprehensive fashion, not through an individual Section 232 case. Worse yet, a Section 232 remedy might distort trade patterns in a way that hurts U.S. allies, like Canada, which supplies 42% of America’s aluminum, and distort NAFTA supply chains of MNCs like Rio Tinto Aluminum, which ships 75% of its Canadian-produced aluminum to the U.S.

Finally, the China Iron and Steel Association countered the specific allegation that Chinese producer-exporters hurt American competitors: “[Chinese] shipments to the U.S. are low-end steel products that local producers aren’t willing to make and … [China is] a small player. The volume of Chinese shipments of the metal to the U.S. have fallen more than 67 percent since 2015, and account for only about 4 percent of total American imports.”

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141 See Rossella Brevetti, Coca-Cola, Others Caution About Aluminum Tariff Decision, 35 International Trade Reporter (BNA) 196 (8 February 2018).
142 See Joe Deaux, Congressmen Ask Trump to Rein in Scope of Aluminum Import Probe, 34 International Trade Reporter (BNA) (29 June 2017) (hereinafter, Congressmen Ask Trump); Joe Deaux & Andrew Mayeda, White House Said Divided on How to Deal with Cheap Steel Imports, 34 International Trade Reporter (BNA) (22 June 2017).
144 Congressmen Ask Trump, supra.
145 See Joe Deaux, Aluminum Giants Stop Short of Backing Crackdown, 34 International Trade Reporter (BNA) 944 (29 June 2017). [Hereinafter, Aluminum Giants.]
146 See Aluminum Giants, supra.
147 Andrew Mayeda & Shannon Pettypiece, Trump Says U.S. to Crack Down Soon on Foreign Steel Dumping, 34 International Trade Reporter (BNA) 893 (15 June 2017).
Predictably, then, the American steel industry itself was divided over the merits of the Section 232 investigation. The DOC received 1,600 pages of “across-the-board” comments about the investigation:

Some manufacturers of downstream products asked that the administration exempt certain types of steel that they rely on. For example, the Air Distribution Institute, a trade group of companies that make air duct pipe and fittings for the heating, ventilation and air conditioning industry, argued that its imports of light gauge metals were not in any way used in the defense industry.

The American Automotive Policy Council, which represents FCA US LLC, Ford Motor Co. and General Motors Co., warned that if the president were to increase tariffs on foreign steel or impose other import restrictions, the harm to the U.S. auto industry would outweigh the benefits to U.S. steelmakers.

Allied Machine & Engineering Corp. of Dover, Ohio, said no U.S. steel producer makes the quality of powdered metallurgy steel products that it needs to make its tools, and warned that if new restrictions mean it couldn’t get source these products from Europe, “we would have to consider moving a significant amount of production offshore, thus reducing our US workforce.”

Other manufacturers, however, asked the Commerce Department to take a broad view of its investigation, by imposing restrictions not only on foreign steel, but on downstream products as well. The Coalition of American Flange Producers, for example, argued that flanges are used in navy ships, aviation jet refueling systems, chemical manufacturing plants, and nuclear power reactors, and that domestic producers are facing a crisis in the form of foreign imports from India, China, and other countries.

Similarly, the Diamond Sawblades Manufacturers Coalition argued that diamond-tipped sawblades are “essential in the construction of bridges, highways, airports, hospital, military bases and much more,” but that domestic manufacturers are being threatened by a “surge” of cheap imports. As such, the administration should act to protect these manufacturers too, the coalition urged.

The American Association of Exporters and Importers, however, argued against the inclusion of downstream products in this investigation, saying it would be outside Commerce’s authority and that “it will be an enormously complex enterprise to determine where to draw the line.”

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Simply put, the nature of the comment depended on the position in the commercial chain of the commentator.

- **Problem of Over-Capacity**

Does the diverse array of comments imply that Section 232 is an inappropriate trade remedy to rectify a complex problem in a global industry beset by overcapacity? Notably, “U.S. trade officials claim that Beijing increased its steel production capacity by more than 160 percent since 2009 [through July 2017] and current Chinese steel production exceeds the total capacity of the U.S., Japan, India, and Brazil combined.”¹⁴⁹ China produces more than half of the world’s steel output, and the U.S. pointed out that no GATT-WTO disciplines are sufficient to restrain the “egregious” CCP subsidies that contribute global overproduction.¹⁵⁰ Indeed, the WTO’s June 2018 *Trade Policy Review* for China agreed that “excess capacity in some energy and manufacturing sectors and implicit assistance to SOEs have increased over a number of years” in China.¹⁵¹ The CCP retains a majority stake in all but one of China’s 100 largest publicly listed companies.

The European Commission added that China’s consideration of itself as a developing country, and thus its claim to S&D treatment, for example, more lenient restrictions on agricultural subsidies, “no longer reflects the reality of the rapid economic growth in some developing countries.”¹⁵² The EC called for more nuanced distinctions among developed versus developing countries, and said that China and other ostensibly developing countries should have to justify their claim to that status. China, however, retorted that it would be “unacceptable for China to undertake the same responsibilities as developed countries.”¹⁵³

Accordingly, the U.S. made clear it no longer would constrain itself to the *DSU* to deal with matters it felt the WTO could not handle. As U.S. Ambassador to the WTO, Deputy USTR Dennis C. Shea said, the WTO was effectively useless:

> ... the United States does not object to the Chinese government’s desire to guide and support domestic industries through the issuance of five-year plans and other similar efforts. Other WTO Members also seek to help their industries develop. However, China’s overall approach is materially different, as China’s industrial policies typically go well beyond traditional approaches to guiding and supporting domestic industries. China provides massive, market-distorting subsidies and other forms of state support to its domestic industries, which too often leads to severe excess capacity, and at

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¹⁵² *Quoted in EU, China Pledge.*

¹⁵³ *EU, China Pledge (quoting Chinese Vice Minister Wang Shouwen).*
the same time it actively seeks to impede, disadvantage and harm the foreign competition. China helps its domestic industries by skewing the playing field against imported goods and services and foreign manufacturers and services suppliers in myriad ways, such as market access limitations, investment restrictions and massive financial support. It also employs preferential treatment for state-owned enterprises and other favored Chinese companies, discriminatory regulatory requirements, unique national standards, [and, turning to matters addressed by the Section 301 action, addressed in a separate Chapter] technology transfer requirements, inadequate protection and enforcement of intellectual property rights, cyber theft, overly broad and discriminatory cybersecurity measures, cross-border data restrictions and data localization requirements, and the use of competition law for industrial policy purposes, among many other ways. Exacerbating this situation is the abuse of administrative licensing and approval processes by Chinese government officials, China’s incomplete adoption of the rule of law, a lack of an independent judiciary and inadequate transparency.

It is clear, moreover, that the WTO currently does not offer all of the tools necessary to remedy this situation.

The WTO’s dispute settlement mechanism is not designed to address a situation in which a WTO member has opted for state-led trade and investment policies that prevail over market forces and that pursues policies guided by mercantilism rather than global economic cooperation. Rather, it is narrowly targeted at disputes where one Member believes that another Member has adopted a measure or taken an action that violates a WTO obligation. While some Chinese measures have been found by WTO Panels or the Appellate Body to run afoul of China’s WTO obligations, fundamental problems remain unaddressed as many of the most significant Chinese policies and practices are not directly disciplined by WTO rules or the additional commitments that China made in its [December 2001] Protocol of Accession.154

Subsequently, he added:

This [the claim that America risks undermining the GATT-WTO system by invoking national security to justify import restrictions] is erroneous, and completely backwards.... What threatens the international trading system is that China is attempting to use the WTO dispute settlement system to prevent any action by any member to address its unfair, trade-distorting policies.

...
... [I]ssues of national security are political in nature and are not matters appropriate for adjudication in the WTO dispute settlement system.

[China is to blame for causing] massive excess capacity [in the world steel and aluminum markets, which] undermine[s] the basic fairness of international trade....

We will not allow China's party-state to fatally undermine the U.S. steel and aluminum industries, on which the U.S. military, and by extension global security, rely....

[If China is permitted to use the DSU to defend its] “non-market” [economic policies], then the WTO and the international trading system will lose all credibility and support among our citizens.\footnote{Quoted in Bryce Baschuk, \textit{WTO Dispute Over Metal Tariffs Delayed as Countries Block Action (1)}, 35 International Trade Reporter (BNA) 1400 (1 November 2018).}

These points were effective rebuttals to the observation of the WTO Director General, Roberto Azevêdo, who noted that “[w]henever other WTO Members have complaints against China, they are welcome to take these complaints to the WTO,” and “[f]or every ruling made by the WTO, China has observed those rulings.”\footnote{Quoted in Bryce Baschuk, \textit{WTO Can Address Chinese Trade “Problems,” Vice Minister Says}, 35 International Trade Reporter (BNA) 943 (19 July 2018).} Mr. Shea was saying, essentially, “so what? – the DSU cannot address Chinese behavior that really matters, because that behavior is not within the subject matter jurisdiction of Panels and the Appellate Body, in turn because it is not addressed by any of the covered agreements.”

What alternatives existed, at least to deal with Chinese production? One was plurilateral, outside the WTO auspices. At the G20 Summit in September 2016 in Hangzhou, China, the OECD established a “Global Forum on Steel Excess Capacity.”

We recognize that the structural problems, including excess capacity in some industries, exacerbated by a weak global economic recovery and depressed market demand, have caused a negative impact on trade and workers. We recognize that excess capacity in steel and other industries is a global issue which requires collective responses. We also recognize that subsidies and other types of support from government or government-sponsored institutions can cause market distortions and contribute to global excess capacity and therefore require attention. We commit to enhance communication and cooperation, and take effective steps to address the challenges so as to enhance market function and encourage adjustment. To this end, we call for increased information sharing and cooperation through the formation of a Global Forum on steel excess capacity, to be facilitated by the OECD with the active participation of G20 members and interested

\footnote{Quoted in Bryce Baschuk, \textit{WTO Dispute Over Metal Tariffs Delayed as Countries Block Action (1)}, 35 International Trade Reporter (BNA) 1400 (1 November 2018).}
\footnote{Quoted in Bryce Baschuk, \textit{WTO Can Address Chinese Trade “Problems,” Vice Minister Says}, 35 International Trade Reporter (BNA) 943 (19 July 2018).}
OECD members. We look forward to a progress report on the efforts of the Global Forum to the relevant G20 ministers in 2017.157

The Forum was established in December. In July 2017, following the Hamburg Summit, the G20 leaders said in their Communiqué:

Recognizing the sustained negative impacts on domestic production, trade and workers due to excess capacity in industrial sectors, we commit to further strengthening our cooperation to find collective solutions to tackle this global challenge. We urgently call for the removal of market-distorting subsidies and other types of support by governments and related entities. Each of us commits to take the necessary actions to deliver the collective solutions that foster a truly level playing field. Therefore, we call on the members of the Global Forum on Steel Excess Capacity, facilitated by the OECD, as mandated by the Hangzhou Summit, to fulfill their commitments on enhancing information sharing and cooperation by August 2017, and to rapidly develop concrete policy solutions that reduce steel excess capacity. We look forward to a substantive report with concrete policy solutions by November 2017, as a basis for tangible and swift policy action, and follow-up progress reporting in 2018.158

Nothing emerged from the reporting process.

Is that a surprise? The process itself is non-binding, and the outcomes that follow any truthful reports is unclear. Moreover, the views within the G20 about eliminating “excess capacity,” and even defining what it is and how to measure it, differ considerably. For most developed countries, including the U.S., the issue is one of trade: how can domestic steel industries regain a global competitive footing? For most emerging countries, including India, the issue is one of economic development: how can their domestic steel industries be an engine of per capita GDP growth narrowly, and improved middle class living standards broadly?

For China, the issue is an existential political threat to the CCP: how can its domestic steel industry be reduced in size, in favor of higher-tech manufacturing and services characteristic of a developed economy, without causing widespread and even violent social unrest that will challenge the authority of the Party? To be sure, the CCP pledged to cut 150 million tons of annual capacity by the end of 2020, but could it do so, along with rooting out steel subsidies? The CCP faces the same problem with respect to


158 For a summary of the link between government funding and excess steel supply, and the views of China, G20, and the 33 countries comprising the Global Forum, see Xiaoyi Tang & Laurens Engelen, Subsidies and Overcapacity: Recent Developments at the G20 and the WTO, 24 INTERNATIONAL TRADE LAW & REGULATION issue 1, 1-6 (2018).

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aluminum. A July 2017 ITC Report concluded China, both the world’s largest producer and consumer of aluminum, accounted for most of the 25% increase in global aluminum production between 2011 and 2015, which in turn led to oversupply and “severe” price decreases.\(^{159}\)

Could a similar existential threat be said for the U.S.? Politically, yes, but legally, no. Significant job losses in the traditional industrial belt, which had delivered vital Electoral College votes for Candidate Trump, would jeopardize that political base in the 2018 Congressional and 2020 Presidential elections. Yet, getting re-elected is not a variable under the Section 232 national security impairment test.

Given these differences, what can a Section 232 “adjustment” accomplish? One possibility is a comprehensive set of increased duties, and perhaps TRQs, on all steel and aluminum merchandise from all sources. Another possibility is a set of such remedies that excludes certain types of steel and/or aluminum merchandise (e.g., ones in short supply in the U.S.) from all sources. Still another possibility is a set of remedies that exempts countries with which the U.S. has an FTA. Any allowance for merchandise exclusions or country exemptions is an invitation for intense political lobbying by affected parties of the White House, with possible follow up analyses and adjustments to the adjustments.\(^{160}\) That


\(^{160}\) Notably, JSW Steel USA Inc., a domestic steel processor (owned by JSW Group, an energy, infrastructure, and steel entity based in India) with facilities in Texas and Ohio that initially supported the March 2018 Section 232 action (discussed below), turned against it. That was because it did not receive exemptions from the 25% tariffs for raw steel (slab) that it could not procure within the U.S., and yet needed to expand its U.S.-based processing operations. Much of the steel it processed for industrial uses (e.g., pipe) was imported (e.g., from India). See Bryan Gruley & Joe Deaux, *The Biggest Fan of Trump’s Steel Tariffs is Suing Over Them*, BLOOMBERG, www.bloomberg.com/features/2020-steel-tariffs-jsw/?sref=7sxw95xl.

Another example of adverse unintended consequences, also implicating the Section 232 action, involved a JV, announced in late 2017, between Allegheny Technologies Inc., headquartered in Pittsburgh and “a major supplier of specialty metals to Boeing Co. and other aviation and defense companies,” and China’s Tsingshan Holding Group Co. Shawn Donnan, Joe Deaux & Mark Ritchie, *U.S. Steel Mill Finds a Savior in China But Rivals See a Trojan Horse*, BLOOMBERG, 4 March 2020, www.bloomberg.com/news/features/2020-03-04/trade-war-latest-a-u-s-steel-mill-looks-to-china-for-survival?sref=7sxw95xl. Tsingshan is the world’s largest stainless-steel producer, and operates a facility in Indonesia that produces nickel, which is a key ingredient into stainless steel. Tsingshan incorporated that nickel into stainless steel slabs, which it exported from Sulawesi to Allegheny’s Midland, Pennsylvania facility. Allegheny sought to expand U.S.-based output and employment involved in making stainless steel and advanced steel products, and relied on its JV with Tsingshan to do so. The JV would allow Allegheny to obtain low-cost Chinese raw stainless steel, plus nickel eligible for duty-free treatment under the U.S. GSP program (because Indonesia is a BDC). (The GSP program is discussed in a separate Chapter.)

Alas, the 25% Section 232 tariffs were imposed on raw stainless steel, which Allegheny’s competitors (Outokumpu Oyj and North American Stainless, which operated facilities in Alabama and Kentucky) supported. They opposed continued GSP treatment for Indonesian nickel. Allegheny thus had to fight against its domestic rivals with respect to its request to the (1) DOC for an exclusion from the tariffs on stainless steel, and (2) ITC for continued GSP treatment for Indonesian nickel. Manifestly, companies with global supply chains hurt by the Section 232 tariffs and helped by GSP treatment were pitted against ones helped by those tariffs and hurt by that treatment. Further implicated in this instance were the possibility that Tsingshan benefitted from CCP-funded industrial subsidies, against which the Section 301 action (discussed in a separate Chapter) was directed. See id.
is because Section 232 does not lay out a clear, transparent process for “what happens next” after the President orders initial “adjustments” to imports.

How would any Section remedy solve the problem of world-wide over-capacity in, and over-production of, steel? Think of the Marxist critique of international trade. What underlies the Steel and Aluminum cases? Is it a structural defect in Capitalism, ironically caused in no small part by a country, China, run by a nominally Communist Party?

- **Systemic Effects**

What effect does invocation of Section 232-type remedies have on the multilateral trading system? If WTO Members invoke such remedies too easily, then do they undermine that system, because they cloak violations with the GATT Article XXI rubric of “national security,” when imports pose no *bona fide* national security threat? Note Bahrain, Egypt, Saudi Arabia, and the UAE argued on a 30 June 2017 that their boycott of Qatar, which they launched earlier that month, and under which they closed all air, land, and sea links to Qatar, was justified under GATT on “national security” grounds – the 1st time ever in a WTO meeting a Member openly cited Article XXI to justify a measure. Likewise, China made a GATS Article XIV national security argument to justify its Cyber Security Law, which took effect on 1 June 2017, and which prevent the free flow of data across borders. Hypocrisy aside, MOFCOM observed in the context of the Section 232 cases “the term national security is ‘very broad,’ lacks a ‘clear definition,’ and may ‘easily lead to abuse, limiting the normal flow of international trade.’”

Indeed, replied the DOC: the term “national security” under Section 232 is not limited to the narrow context of defense, but also includes infrastructure and related needs. And, GATT Article XXI allows each WTO Member to define the term as it sees fit. So, the ambiguity of the term, coupled with the sovereign judgment that Article respects, work in favor of the American position.

- **Findings and Choices**

Notwithstanding MOFCOM’s point, on 11 and 20 January 2018, the DOC delivered its Section 232 Steel and Aluminum Reports, respectively, to President Trump. Neither was released publicly, until 16 February. Both found imports “threatened to impair the national security” as per Section 232.

In its 262-page Steel Report, the DOC found:

- The United States is the world’s largest importer of steel. Our imports are nearly four times our exports.

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161 *Quoted in China Urges Caution.*
Six basic oxygen furnaces and four electric furnaces have closed since 2000 and employment has dropped by 35% since 1998.

World steelmaking capacity is 2.4 billion metric tons, up 127% from 2000, while steel demand grew at a slower rate.

The recent global excess capacity is 700 million tons, almost 7 times the annual total of U.S. steel consumption. China is by far the largest producer and exporter of steel, and the largest source of excess steel capacity. Their excess capacity alone exceeds the total U.S. steel-making capacity.

On an average month, China produces nearly as much steel as the U.S. does in a year. For certain types of steel, such as for electrical transformers, only one U.S. producer remains.

As of February 15, 2018, the U.S. had 169 antidumping and countervailing duty orders in place on steel, of which 29 are against China, and there are 25 ongoing investigations.\textsuperscript{163}

And, in its 239-page \textit{Aluminum Report}, the DOC found:

- Aluminum imports have risen to 90\% of total demand for primary aluminum, up from 66\% in 2012.
- From 2013 to 2016 aluminum industry employment fell by 58\%, 6 smelters shut down, and only two of the remaining 5 smelters are operating at capacity, even though demand has grown considerably.
- At today’s reduced military spending, military consumption of aluminum is a small percentage of total consumption and therefore is insufficient by itself to preserve the viability of the smelters. For example, there is only one remaining U.S. producer of the high-quality aluminum alloy needed for military aerospace. Infrastructure, which is necessary for our economic security, is a major use of aluminum.
- The Commerce Department has recently brought trade cases to try to address the dumping of aluminum. As of February 15, 2018, the U.S. had two antidumping and countervailing duty orders in place.

on aluminum, both against China, and there are four ongoing investigations against China.\textsuperscript{164}

So, the DOC offered the President a menu of choices:\textsuperscript{165}

(1) **Global Tariff Option**

- A tariff of at least 24% on all steel products from all countries.
- A tariff of least 7.7% on all aluminum products from all countries.

(2) **Hybrid Option**

- A tariff of at least 53% on all steel merchandise from 12 countries: Brazil; China; Costa Rica; Egypt; India; Korea; Malaysia; Russia; South Africa; Thailand; Turkey; and Vietnam. Steel exports from all other countries would be subject to a quota. For each such other country, steel exports would be capped at 100% of that country’s 2017 steel exports to America, on a product-by-product basis. So, for instance, if Canada shipped 100 metric tons of stainless steel in 2017, and 200 metric tons of steel coil, then its exports of those products would be limited to 100 and 200 metric tons, respectively.
- A tariff of 23.6% on all aluminum merchandise from five sources: China; Hong Kong; Russia; Venezuela; and Vietnam. Aluminum exports from each other countries would be capped at 100% of its 2017 exports, on a product-specific basis, to America.

(3) **Global Quota Option**

- A global quota, with country-specific shares in that quota, on all steel goods. Each country’s share would equal 63% of its 2017 steel exports, \textit{i.e.}, its exports to America would be slashed by one-third.

• A global quota, with country-specific shares in that quota, on all aluminum goods. Each country’s share would equal 86.7% of its 2017 aluminum exports, i.e., its shipments to America would be cut by 13%.

One option the DOC did not identify, but which the President could fashion, was a TRQ.

The options contained no a priori exemptions for NAFTA Parties. For all three options, any American company could request an exclusion for a specific product, if the United States lacked sufficient domestic production capacity in that product and the company needed it, or (somewhat ironically) on national security grounds.

None of the menu options was “light” fare, i.e., they all called for heavy trade barriers. They suffered from obvious defects. First, a global remedy – whacking all steel or all aluminum product categories, instead of targeting certain product categories – might have unintended consequences. It might deprive the American market of one class of merchandise (that is not produced in high volumes in America), but have little effect on another class (where America has production capacity). Second, quotas create administrative costs, quota rents, and races among suppliers to get their merchandise under the quota threshold. Thus, they suffer from the familiar flaws laid bare by Neo-Classical Economic analysis. Third, none of the options dealt directly with the core problem of global overcapacity in the steel and aluminum markets. That required a plurilateral negotiated outcome. Fourth, penalizing foreign countries that trade fairly, and steel and aluminum consumers in America (e.g., the downstream steel-consuming industry, which employs 6.5 million Americans), when significant excess capacity in just a few countries, such as China, existed, seemed ineffective.

Indeed, downstream users were swift to caution Mr. Trump against any remedy:

[P]arts producers of everything from automobiles to aircraft to wiring in homes and office buildings would pay a higher price for metal if they can’t procure material from foreign sources that could cost less. By putting tariffs on imports, it effectively raises the price of imports so that domestic steel and aluminum producers aren’t being undercut.

“The problem with putting quotas or tariff-rate quotas on the upstream products is that the damage is done to the downstream makers,” [said] Kimberly Korbel, Executive Director of American Wire Producers Association.... Korbel wrote a letter on behalf of 15 steel-buying associations to Trump on Feb. 12 that said they represent about 1 million U.S. jobs. The American Iron and Steel Institute estimates that the steel industry directly employs about 140,000 people.¹⁶⁶
Arguably, some such claims were overstated, because they failed to analyze precisely the importance of steel and/or aluminum input costs in a finished product.

For example, regarding the flow through effects of 25% and 10% tariffs hikes on steel and aluminum, respectively, on LCA:

… Boeing provides a window into how double-digit tariffs on raw materials would translate into just a fractional uptick in the cost of finished goods. Boeing makes its planes exclusively in the United States, but nearly 70 percent of the 763 jetliners delivered last year went to customers outside the United States and 22 percent went to China.

Aluminum makes up 80 percent of the weight of older model planes such as the 737 and 777 but only about 12 percent of the cost…. The rest is labor, overhead and other expenses.

A 10 percent aluminum tariff would increase the cost of a plane by about 1.2 percent if all of the aluminum is imported. But most of the aluminum Boeing uses is domestically produced [because it is too expensive to transport large sections of aluminum from overseas].

… [O]nly 25 percent to 30 percent is imported, leaving a net impact of about 0.3 percent of a plane’s cost.

…

… [E]ight major ethane refinery projects are under construction [in the U.S. as of June 2018], a figure that would have been unthinkable a decade ago.

Martha Moore, senior director for policy analysis and economics at the American Chemistry Council, said the 25 percent levy on imported steel and 10 percent for aluminum means costs for new refinery projects could now go way up.

“We’ve had more than $194 billion dollars of investment on new chemical industry projects in this country since 2010, with another $87 billion in the planning stages,” Moore said.

It takes roughly 18,500 tons of steel to build a new ethane cracker….

“Imagine taking an $87 billion project and just adding an extra 25 percent to the cost – that’s the risk behind these steel tariffs,” Moore said.

Ethane crackers are typically very large industrial plants that take ethane, a component of natural gas, and heat it so hot it “cracks” into ethylene. Ethylene is the chemical building block used in everything from plastic bottles to textiles and construction materials and cars.

Quoted in Adam Allington, Chemicals Makers Worry About Damage From Steel Tariffs (1), 35 International Trade Reporter (BNA) 801 (14 June 2018).
On a mid-sized 737, with a list price of $117.1 million, the cost increase could be less than $200,000, because airlines often receive discounts of 40 percent off list price, and Boeing’s profit margin is about 10 percent.

…

The net effect for steel is similar, even though it makes up less of a typical Boeing plane.…

… Trump’s 25 percent tariff on relatively pricey steel would cost U.S. aerospace companies less than $100 million, roughly on par with the overall impact on aluminum. That means the two tariffs would add $150 million to $200 million in cost, or at most about 0.2 percent of $100 billion worth of business jets, jetliners and military aircraft U.S. companies make each year.

For Boeing’s newer 787, which uses carbon-fiber composite for wings and fuselage, the impact is even less. Aluminum makes up 10 percent of the cost…. The result: Trump’s aluminum tariff would increase 787 costs about 0.09 percent.167

Nevertheless, downstream user concerns had political backing:

“[Section] 232 is a little like old-fashioned chemotherapy,” House Ways and Means Committee Chairman Kevin Brady (R-Texas) told Trump. “It isn’t used as much because it can often do as much damage as good.”

Sen. Ron Johnson (R-Wis.) told the President that the manufacturing economy has shifted in the last 25 years, making his concerns less compelling. “It makes no sense for me to try and bring back high labor-content manufacturing to America,” he said. “We need to do the value-added things.”168

They also pointed out Section 232 remedies would risk retaliation against American exports, and inevitably invite a WTO challenge, forcing America to invoke GATT Article XXI. Of course, domestic producers of like downstream products sought coverage under Section 232 of more than raw foreign steel and aluminum; they wanted foreign-made downstream goods that incorporated that steel and aluminum to be subject to any remedy. (As discussed below, not until 24 January 2020 did they get their wish.)

The DOC defended the options as necessary to give the American steel and aluminum industries long-term viability. By that, the DOC meant boosting U.S. capacity utilization to roughly 80% in each industry, up from the 2017 level of 73% in steel and 48% in aluminum, by slashing steel imports by 13.3 million metric tons and aluminum

168 Quoted in Trump’s Passion.
imports by 669,000 tons.\textsuperscript{169} Query whether 80% was a realistic target. In steel, world capacity utilization rates averaged from 71.7% (April 2016) to 73.5% (September 2017).\textsuperscript{170} Surely other steel producers would not trade off a drop of several percentage points in their use rates for an increase in America’s rate.

II. March 2018 Presidential Steel and Aluminum Proclamations

With the discretion to accept, modify or reject the DOC recommendations, the President had 90 days (from the delivery dates) to make his decision. Beleaguered steel and aluminum workers, long-promised relief, were not left wondering for long whether DOC found a national security threat from foreign imports to justify the President unilaterally adjusting imports through a tariff or quota, or entering into negotiations with foreign shippers. In March 2018, Mr. Trump chose a more extreme version of Option 1: global tariffs of 25% and 10% on steel and aluminum, respectively.\textsuperscript{171} The scope of products was staggering: aluminum rolls, steel coil, plates, and slabs, tubes, and raw materials, all of which are “used extensively across US manufacturing, construction, and the oil industry.”\textsuperscript{172}

However, the President exempted imports from Canada and Mexico. He held open the possibility of further country-specific exemptions for countries with which America enjoys a “security relationship,” but left that term undefined. The State Department said 54 other countries participated in collective defense arrangements with America, including

\begin{itemize}
\item \textsuperscript{169} See Natalie Wong & Danielle Bochove, \textit{As Trump Targets Foreign Metal, Canada Argues for Exemption}, 35 International Trade Reporter (BNA) 269 (22 February 2018).
\item \textsuperscript{171} On steel, see \textit{Presidential Proclamation on Adjusting Imports of Steel into the United States, 8 March 2018}, www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states/, Proclamation 9705 of 8 March 2018, 83 Federal Register number 51, 11625-11630 (15 March 2018). “Steel articles” covered by the 25% tariff, as per Paragraph 11(1) of this \textit{Proclamation}, were HTSUS 6-digit CTSH categories “7206.10 through 7216.50, 7216.99 through 7301.10, 7302.10, 7302.40 through 7302.90, and 7304.10 through 7306.90.” Paragraph 11(3) authorized the Commerce Secretary to grant product-specific exclusions “for any steel article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality,” and for “specific national security considerations.”
\item On aluminum, see \textit{Presidential Proclamation on Adjusting Imports of Aluminum into the United States, 8 March 2018}, www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states/, Proclamation 9704 of 8 March 2018, 83 Federal Register number 51, 11619-11624 (15 March 2018). “Aluminum articles” covered by the 10% tariff, as per Paragraph 10(1) of this \textit{Proclamation}, were the following four-digit CTH, plus two 10-digit categories: “(a) unwrought aluminum (HTS 7601); (b) aluminum bars, rods, and profiles (HTS 7604); (c) aluminum wire (HTS 7605); (d) aluminum plate, sheet, strip, and foil (flat rolled products) (HTS 7606 and 7607); (e) aluminum tubes and pipes and tube and pipe fitting (HTS 7608 and 7609); and (f) aluminum castings and forgings (HTS 7616.99.51.60 and 7616.99.51.70).” Here, too, the \textit{Proclamation} (in Paragraph 10(3)) authorized the Commerce Secretary to exclude “any aluminum article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality,” and for “specific national security considerations.”
\end{itemize}

Both \textit{Proclamations} took effect after 15 days of signing, \textit{i.e.}, 23 March 2018.

most of the EU (via the April 1949 NATO accord), Australia and New Zealand (on account of a September 1951 treaty, and the September 1954 South East Asia Treaty), Korea and Japan (through October 1953 and January 1960 bilateral defense treaties, respectively), plus Costa Rica, Thailand, Turkey, and Venezuela. Brazil said it, too, qualified, thanks to the September 1947 Rio Treaty. Presumably, all arrangements counted, and there was no need for a new deal – a position Australia asserted.

The obvious country not in a deal, and thus ineligible for a security arrangement waiver, was China. But, what about India, which collaborates with the U.S. on security matters, from land-based anti-terrorist training to sea-based patrols against piracy, but which lacks a full defense treaty? The Trump Administration refused to grant India an exemption, notwithstanding India showing the USTR empirical data that American companies do not make the specific steel products that Indian firms export to the U.S.

The Section 232 tariffs adversely affected Indian producer-exporters such as Jindal Steel & Power Ltd., JSW Steel Ltd., Steel Authority of India Ltd., Tata Steel, Ltd., and National Aluminum Co., Ltd. India mulled a WTO lawsuit against the U.S.

Two weeks after issuing the Proclamations, and the day before the Section 232 tariffs took effect, the Administration clarified several questions on the array of quota deals to which it had agreed concerning both country-specific exemptions and product-specific exclusions. For example:


Following Russia’s 24 February 2023 invasion of Ukraine, Ukraine also qualified. Via Presidential Proclamations, Section 232 25% steel tariffs were suspended on Ukrainian-origin steel, and on EU steel melted and poured in Ukraine. See, e.g., The President, Proclamation 10588 of May 31, 2023, Adjusting Imports of Steel Into the United States, 88 Federal Register number 107, 36437-36444 (5 June 2023), [www.govinfo.gov/content/pkg/FR-2023-06-05/pdf/2023-12055.pdf](http://www.govinfo.gov/content/pkg/FR-2023-06-05/pdf/2023-12055.pdf) (extending through 1 June 2024 this exemption).


Requests for one-year country- or product-specific exclusions from the Section 232 duties needed to follow DOC procedures, published at 83 Federal Register number 53, 12106-12112 (19 March 2018). Notably, within less than one month of that publication, over 1,300 exclusion petitions (with product exemption requests from 65,000 companies) had been filed. By 1 May 2018, comments to the DOC exceeded 7,000, and by 10 May, DOC received 8,700 product exclusion requests (with 1,167 from one company), and struggled with a backlog of 2,200 such requests. See Rossella Brevetti, Commerce Clearing Backlog of Requests for Tariff Exclusions, 35 International Trade Reporter 659 (17 May 2017). By the end of that month, there were over 700 requests for aluminum product exemptions, and over 13,000 for steel product exemptions. See U.S. Department of Commerce, Bureau of Industry and Security, BIS-2018-0002, Requirement for Submissions Requesting Exclusions from the Remedies Instituted in Presidential International Trade Law E-Textbook (Raj Bhala, 6th Edition, 2025) University of Kansas (KU) Volume Four Wheat Law Library
By 20 June 2018, two days before EU counter-retaliatory tariffs took effect, the DOC said companies had submitted to it over 20,000 requests for product exclusions (including 2,000 for aluminum items) from the Section 232 tariffs. Of those requests, the DOC granted 42 requests for exclusion from the steel duties and denied 56 requests. Though the DOC still had many requests to process, the odds of being granted an exclusion were slim. With respect to aluminum, on 3 July DOC granted its first exclusion request, to Mandel Metals. See BIS Decision Memo, BIS-2018-0002-0020, Bureau of Industry and Security (BIS) Other: Exclusion Granted – Mandel Metals – Plate – HTS 7606123030, www.regulations.gov/document?D=BIS-2018-0002-2235. However, the allowance was for only 100 tons of aluminum plate not available in sufficient quantities in the U.S., to be imported from specific producers in Austria, China, Russia, South Africa, and Switzerland, and DOC saw “no overriding national security concerns.” Id. Mandel Metals had filed 638 exclusion requests in total, and along with the denial of its 637 requests came DOC denials of “15 exclusion requests from three companies, Rusal America, Winter-Wolf International and Alumanate LLC.” Joe Deaux & Rossella Brevetti, U.S. Grants First Aluminum-Tariff Exclusion to Mandel Metals, 35 International Trade Reporter (BNA) 927 (12 July 2018). The request and backlog numbers kept climbing: by 17 September, DOC data showed 40,000 petitions lodged for exemption from the aluminum or steel tariffs, yet DOC decisions on less than 5,000 of these requests. See Jenny Leonard & Mark Niquette, Trump Is Said to Deny Product Exclusions from New China Tariffs, 35 International Trade Reporter (BNA) 1253 (27 September 2018).

Likewise, inconsistent decisions enraged exemption applicants. For example:

The U.S. Commerce Department recently granted a tariff exemption to oil major Chevron for its imports of 4.5-inch Japanese steel tubes for oil exploration.

But the department rejected a similar request from Borusan Mannesmann Pipe to exclude 4.5-inch steel pipes imported from Turkey for casing used to line new oil wells.

The reason: multiple U.S. steelmakers objected to Borusan’s application, arguing they could supply the product, according to the department. Chevron drew no such objections.

When U.S. President Donald Trump slapped a 25 percent tariff on imported steel this spring, his administration allowed companies to apply for exemptions if needed metals were not available in sufficient quality, quantity or in a reasonable time.

But the process for seeking relief is proving slow and controversial as a deluge of applications has buried the small staff initially assigned to the task, prompting the department to hire dozens of extra contract workers. The limited number of decisions made so far are drawing protests from rejected applicants and sparking disputes between U.S. steel mills and importers of products from their foreign competitors.

[The Department of] Commerce has received more than 37,000 exemption requests, far more than it planned to handle. Although 130 employees and contractors are now evaluating the applications, the agency had only ruled on 2,871 of those requests as of August 20 [2018].

The Department has so far approved 1,780 of the applications and denied 1,091. Separately, the department turned back more than 6,000 requests for what it called “filing errors” by applicants, who can fix and resubmit their requests.

Rejected applicants have criticized the Department for taking sometimes misleading objections by domestic suppliers at face value and for not allowing importers a chance to rebut their arguments.
“The Commerce Department is now hard-pressed to spend more than a few minutes reviewing each application,” said Bernd Janzen, a Partner in Akin Gump Strauss Hauer & Feld LLP, which is working with companies pursuing tariff exclusions.

... Twenty exemptions have been approved over the objections from U.S. steelmakers, a sign that its process is “balanced, fair and transparent,” the department said.

... Companies seeking exemptions have complained that Commerce provides little detail on the rationale for denying applications beyond boilerplate language that the product a company wants to import is available from a U.S. supplier.


Thus, Senator Claire McCaskill (Democrat-Missouri) argued the DOC should have published an exclusion list when it first announced the Section 232 action; instead, it was handling the requests in a “chaotic and frankly incompetent manner.” Quoted in See EU to Launch Counter-Tariffs Against U.S. on Friday, BBC News, 20 June 2018, www.bbc.com/news/business-44549712. [Hereinafter, EU to Launch].

The controversies were foreseeable, because by late July 2018, nearly 30,000 requests had been lodged, prompting legislators to clamor for a “grandfather” exclusion that would cover all U.S. infrastructure projects using imported aluminum and steel that had been started before the Trump Administration imposed, as well as an extension of the duration of the exclusions granted (which had been set at one year), and a process to appeal request denials. See Len Bracken, Lawmakers Push Commerce Secretary Ross on Tariff Exclusions, 35 International Trade Reporter (BNA) 107 (26 July 2018). By early September, DOC had received specific product exclusion requests, and processed just 10,000 of them. Senator Jerry Moran (Republican-Kansas) pointed out the DOC “is being consumed by the exclusion process,” which crowded out its core “responsibility to promote trade and create opportunities for Kansas and U.S. businesses.” Quoted in Len Bracken, Senate Panel Eyes Tariff Exclusions, Trade Promotion Actions, 35 International Trade Reporter (BNA) 1193 (13 September 2018).

The final list of countries subject to aluminum tariffs is Proclamation 9758 of 31 May 2018, Adjusting Imports of Aluminum Into the United States, 83 Federal Register number 108, 25849-25855 (5 June 2018), and to steel tariffs is Proclamation 9759 of 31 May 2018, Adjusting Imports of Steel into the United States, 83 Federal Register number 108, 25857-25877 (5 June 2018). On 29 August 2018, the President issued Proclamations to allow interested parties to petition for an exclusion from a quota. That meant exclusions could be sought not only from the 10% or 25% aluminum and steel tariffs, respectively, from non-quota exporting countries, but also from quotas applicable to the specific countries subject to quotas. In particular, aluminum importers could try to keep the product they bring into the U.S. from being subject to the quota caps applicable to Argentina. Steel importers could do so with respect to Argentina, Brazil, and Korea. See Proclamation 9776 of 29 August 2018, Adjusting Imports of Aluminum Into the United States, 83 Federal Register number 171 45025-45030 (4 September 2018), www.gpo.gov/fdsys/pkg/FR-2018-09-04/pdf/2018-19283.pdf; Proclamation 9777 of 29 August 2018, Adjusting Imports of Steel Into the United States, 83 Federal Register number 171 45019-45023 (4 September 2018), www.gpo.gov/fdsys/pkg/FR-2018-09-04/pdf/2018-19284.pdf.

By October 2018, the backlog of requests from U.S. steel and aluminum importers had reached crisis proportions, and caused job losses. For example (as of 26 September), there had been 30,365 steel product exclusion requests. Of these, 77.3% had not received a decision, and 31.7% of the requests filed in April 2018 still had not received a decision. Rossella Brevetti, Christina Brady & Jasmine Han, U.S. Manufacturers Seeking Tariff Relief Find Backlogs, Red Tape, 35 International Trade Reporter (BNA) 1311 (11 October 2018). Then (as of 8 October), the DOC reported 39,279 steel and 4,939 aluminum exclusion requests had been filed, but that it had granted just 7,670 steel tariff exclusions and 663 aluminum tariff exclusions. Brian Flood & Len Bracken, Group Sues for Greater Transparency on Trump Metal Tariffs, 35 International Trade Reporter (BNA) 1369 (25 October 2018). And, by 14 November, the DOC had received over 81,000 steel exclusion, and over 7,000 aluminum exclusion, requests, granting over 13,000 and 800, respectively.

In general, the quota deals the U.S. reached with Argentina, Brazil, and Korea were alternatives to imposition of Section 232 tariffs on steel or aluminium from those countries.\textsuperscript{176} The quotas were absolute, not TRQs. So, Argentine, Brazilian, and Korean imports were forbidden from entry into the U.S. if the absolute quota were filled. (With a TRQ, once the in-quota threshold were reached, the importer could pay the higher tariff on above-quota shipments.) The U.S. set the steel and aluminium quotas using historical average volumes of shipments from these countries.

Not surprisingly, the backlog crisis continued in 2019. As of 15 February, for steel, the figures were 101,118 requests, 16,346 approvals, 5,564 denials, and 19,666 objections; for aluminum, there were 11,178 requests, 2,946 approvals, 515 denials, and 771 objections. Thus, thousands of petitions had yet to be decided. Without doubt, as the objection figures indicate, product exclusion requests divided America:

The tariff exclusion process has pitted big steel firms such as Nucor Corp. and U.S. Steel Corp. against smaller ones who argue that they can’t get needed steel from domestic sources. As of Sept. 26, there were approximately 13,645 objections to requests for exclusion. Nucor leads with 3,097 and U.S. Steel is next with 2,033....

... AK Steel filed an estimated 1,314 objections.

\textit{Id.} (Similar, albeit smaller, figures pertained to the aluminum sector.) The difficulties for smaller steel-using companies were compounded by the requirement that exclusion requests had to be filed on a product-by-product basis, thus raising their costs of filing, and they had no right to appeal an adverse decision, thus giving them no recourse if opposition from the likes of Nucor and U.S. Steel served to veto their requests. In other words, unlike Section 301 product exclusions (discussed in a separate Chapter), Section 232 exclusions were not available regardless of whether an importer filed an exclusion request; rather, Section 232 exclusions were available only for an importer that filed a request for a properly-classified product based on the HTSUS classification of that product for which the importer had been granted its request. Some small companies faced dire straits, such as the Mid-Continent Nail Company, which laid off 185 employees after filing on 18 product exclusion requests on 25 June and receiving no decision (as of 11 October).

In contrast, Tesla won an exclusion from the 10% tariff on Japanese aluminium, which it needed to make battery cells in its Nevada factory that it assembled into packs as the energy source for its Model 3 EV and other energy storage units. See David Shepardson, \textit{U.S. Waives Tariffs on Japanese Aluminum for Tesla Battery Cells}, Reuters, 24 June 2019, \url{www.reuters.com/article/us-tesla-aluminum-tariff/u-s-waives-tariffs-on-japanese-aluminum-for-tesla-battery-cells-idUSKCN1TP2JY}. Tesla imported 10,000 tons of the aluminium sheets of various widths and thickness annually from the Nippon Light Metal Co. Ltd., made the request in April 2019, and the DOC granted it by June. Tesla’s request, to which there were no objections, said no domestic producers could satisfy its requirements as to composition, thickness, or volume. See \textit{id.}

Notably, in July 2019, JSW Steel, an importer of steel slabs, sued the U.S. in the CIT, alleging the DOC wrongfully denied its exclusion request, partly because it “ignored the conclusive evidence that these companies [domestic producers that opposed the exclusion request] are unable to produce the subject products in the required quality or quantity [needed by JSW Steel].” See \textit{JSW Steel (USA) Inc. v. U.S.}, CIT Case Number 1:19-cv-00133 (30 July 2019), \url{www.trumpandtrade.com/wp-content/uploads/sites/783/2019/08/JSW-Steel-vs-United-States-complaint.pdf}.

As of end-July 2019, 836 U.S. steel manufacturers had lodged 62,797 petitions for exclusion from steel tariffs, which had been met with 22,210 objections representing 154 million metric tons of steel. Of those requests, DOC denied 21%, approved 49%, and the balance were pending. See Christine McDaniel, The Bridge, George Mason University, Mercatus Center, \textit{Investigating Product Exclusion Requests for Section 232 Tariffs: An Update}, 21 August 2019, \url{www.mercatus.org/investigating-section-232-an-update}.

\textsuperscript{176} See John Brew & Walter (Sam) Boone, Crowell & Moring LLP, Section 232 – \textit{Not All Quotas Are Created Equal}, This Month in International Trade – January 2023, (30 January 2023), \url{www.cmtradelaw.com/2023/01/section-232-not-all-quotas-are-created-equal/}. [Hereinafter, \textit{Section 232 – Not All Quotas}]

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countries. In no case could steel or aluminium from those countries exceed 500,000 kg or 30% of the annual product-specific quota in a given quarter.

(2) Could it be possible for Argentine, Brazilian, or Korean steel or aluminium to enter the U.S. without a Section 232 tariff once the applicable TRQ was full? Yes. The producer-exporting countries would have to apply to the DOC for an exemption from that tariff (using HTS 9903.80.60 through 9903.80.58, and referring to the relevant HTS Chapter, 72 or 73). If DOC granted the exemption request, then the exclusion would be retroactive to the date of that application. However, DOC would charge entry of subject merchandise under an exclusion – called a “quota exclusion entry” – against the quarterly quota limit at the time of that entry, and count it toward the annual limit for that country’s steel or aluminium. So, a quota entry exclusion would use up a quota limit, though the U.S. would continue to accept it until the end of the annual quota period, even if the quarterly or annual quota limits actually had been reached. CBP monitored any quota exclusion entries over the relevant quarterly or annual limit, tagging them as “exclusion quota overflow.”

(3) As to Korea specifically, it agreed (in the KORUS revision, discussed in a separate Chapter) to reduce its steel exports to America by 30%, in exchange for the rest of its steel being excluded from the Section 232 tariffs. Much of the steel Korea exports originated in China (including steel subject to U.S. AD-CVD orders), and Korea processes it before shipping it onward. Under the deal, Korea said it would limit its annual steel exports to America to 70% of the average of its steel exports between 2015-2017 (to 2.7 million metric tons annually). Note this limit is an absolute quota, not a TRQ, meaning that the supply curve of Korean steel into the U.S. market is vertical once the limit is reached, i.e., no more of such merchandise can enter America once the quota fills up.

Query whether this agreement constituted a VER, and violated Article 11 of the WTO Safeguards Agreement? Would the U.S. invoke the GATT Article XXI national security provision as a defense, given that the violation is of a different accord? (Such claims and defenses are discussed later in this Chapter.)

(4) Argentina, Australia, Brazil, and the EU won “suspensions,” i.e., temporary exemptions – spanning roughly five weeks, until 30 April 2018 – of the 25% and 15% tariffs on their steel and aluminum exports, respectively.

(5) For Argentina, Australia, and Brazil, on 1 May 2018, those suspensions were extended with no end date, thanks to an “agreement in principle” about quota limits

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177 See Section 232 – Not All Quotas.
on their steel and aluminum shipments to the U.S.\textsuperscript{179} Argentina received an annual per steel and per aluminum product quota of 180,000 metric tons.\textsuperscript{180} For aluminum, that figure equalled the average annual shipment volume to the U.S. during 2015-2017, and for steel, it was 135% of the average.

However, for Argentina and Brazil, the end date came on 2 December 2019: President Trump lifted the suspensions, and re-imposed 25\% and 10\% tariffs on all steel and aluminium, respectively, from Argentina and Brazil.\textsuperscript{181} He did so after accusing those countries of “a massive devaluation” of their currencies, the Brazilian \textit{real} and Argentine \textit{peso}, against the U.S. dollar, thus making their merchandise cheaper for U.S. buyers, which led to a flood of imports, and depressed U.S. farm exports to those countries, and to third countries.\textsuperscript{182} Ironically, although “[b]oth countries have actively been trying to strengthen the \textit{real} and the \textit{peso} against the dollar [including through intervention by the Brazilian central bank, and imposition of Argentine currency controls],” “[t]heir currencies have been buffeted by weakness that analysts partially attribute to Trump’s larger trade battle with China [discussed in a separate Chapter].”\textsuperscript{183} In other words, “Mr. Trump … abruptly decided to restore the countries as targets amid fears that their agricultural producers are outflanking U.S. farmers in global commodity markets. Brazil’s exports of farm products like soyabeans to China have grown rapidly during the U.S.-China trade war.”\textsuperscript{184}

(6) For Canada, the EU, and Mexico, on 1 May 2018, those suspensions were extended for one month, through 31 May, while negotiations continued. The U.S. indicated it would grant Canada and Mexico a permanent exemption, if they agreed to American demands in the contemporaneous \textit{NAFTA} renegotiations, such as with respect to tightening auto ROOs and retaining the Chapter 19 dispute settlement mechanism. With the EU, the U.S. sought resolution of a wide array of historical trade disputes before it would grant a permanent exemption, while the EU insisted


\textsuperscript{180} See Jorgelina do Rosario, \textit{Argentina Agrees to Steel, Aluminum Quotas From U.S.}, 35 International Trade Reporter 613 (BNA) (3 May 2018).


\textsuperscript{182} \textit{Quoted in Trump to Hit}.

\textsuperscript{183} \textit{Trump, Citing U.S. Farmers}.

\textsuperscript{184} \textit{Trump to Hit}.
the key topic for discussion should be global overcapacity in the steel and aluminum industries.\(^\text{185}\)

(7) Any steel or aluminum articles otherwise eligible for preferential (DFQF) treatment under GSP or AGOA that were subject to the 25% and 10% duties, respectively, lose the GSP or AGOA preference. That is, these articles are ineligible for developing country and LDC preference schemes.

For all other countries – including America’s loyal friend, Japan – the U.S. refused a country-specific exemption from the respective 25% and 10% steel and aluminum tariffs. Additionally, no duty drawback was allowed on merchandise incorporating steel or aluminum imports subject to these tariffs that subsequently was exported out of the U.S.

On 31 May 2018, the Administration declined to renew any of the temporary exemptions. Hence, the steel and aluminum tariffs remained in effect on 1 June 2018, as they had been since 23 March, including on imports from Canada, Mexico, the EU, and Japan.\(^\text{186}\) With respect to both steel and aluminum, Korean merchandise was exempt because of the export quotas to which it agreed. With respect to steel, Argentina and Brazil had reprieve with no expiry date, thanks to their agreement to establish steel quotas. (Australian steel also appeared exempt, but implementation of this exemption was unclear, and not clarified by the White House’s own “What You Need to Know” document, which it listed as a “2 minute read.”\(^\text{187}\)) With respect to aluminum, only Argentina and Australia got an indefinite reprieve, because of their willingness to set quotas and take various internal measures. Alongside the tariffs was no effort to address overcapacity in the Chinese steel and aluminum industries.

The Pentagon openly disagreed with the White House in initiating a Section 232 action. Secretary of Defense James Mathis published a “consolidated position from the DOD:”

DoD believes that the systematic use of unfair trade practices to intentionally erode our innovation and manufacturing industrial base poses a risk to our national security. As such, DoD concurs with the Department of Commerce’s conclusion that imports of foreign steel and aluminum based on unfair trading practices impair the national security. ....

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[H]owever, the U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production. Therefore, DOD does not believe that the findings in the [DOC’s Section 232] Reports impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements.\(^{188}\)

The DOD favored targeted tariffs, which would shield our allies, and collaborative solutions to deal with the underlying problems of Chinese trans-shipment and over-capacity.

III. Aftermath of March 2018 Presidential Steel and Aluminum Proclamations

- Retaliation and WTO Litigation

Foreign trade partners reacted swiftly to the initial (March 2018), interim (April), and final (May) White House announcements, and the DOC Reports (January). China called the DOC Reports “baseless,” and a disguised safeguard measure, thus entitling China under Article 8 of the WTO Agreement on Safeguards to draw a list of concessions to the U.S. it would suspend.\(^{189}\) China, along with the EU, India, and Japan read Article 8:3 to allow a Member to trigger immediately suspensions of “substantially equivalent concessions or other obligations” in a case in which another Member imposed safeguard tariffs without presenting evidence of an “absolute increase in imports.” After studying the steel and aluminum products against which America was taking action, they said there was no absolute increase in imports into America of at least half of them.\(^{190}\)

By taking action right away, victims of the offending safeguard would not need to abide by the usual three-year moratorium on safeguard counter-measures under the Agreement. And, they would not suffer the “Three Year Pass” (discussed in a separate Chapter), whereby the U.S. effectively would get away with its 25% and 10% steel and aluminum tariffs for the 18 months it would take the victims to win a DSU case to go through to appeal, plus the standard 15-month RPT the U.S. would have to comply with an adverse Appellate Body Report. Invoking Article 8:3, they could start their prospective remedy now, not three years later.

Moreover, triggering Article 8:3 of the Safeguards Agreement allowed China and the other Members to insulate itself themselves from catalyzing a trade war with their own unilateral measures: by characterizing America’s Section 232 action as a veiled safeguard, China could accuse the U.S. of acting outside the lines, while its retaliation stayed within them. Of course, the U.S. did not notify the WTO of its Section 232 action as a “safeguard,” which it was obliged to do if that action indeed was a safeguard. And, if it was, then the


\(^{189}\) Quoted in U.S. Commerce Department Proposes; China Adopts.

\(^{190}\) See Bryce Baschuk, EU Tells WTO It May Retaliate Against $3.3 Billion in U.S. Goods, 35 International Trade Reporter (BNA) 689 (24 March 2018). [Hereinafter, EU Tells WTO.]
U.S. would have to offer China – and all other WTO Members with a substantial export interest in the subject merchandise – the opportunity for consultations with a view to them suspending equivalent trade concessions against the U.S.

So, China contemplated safeguard-like retaliation on American coal, electronics, sorghum, and soybean exports, and shifting LCA purchases from Boeing to Airbus. Specifically, China listed 128 American exports it hit (effective 2 April 2018) in a two-tiered fashion:¹⁹¹

1. A first group of 120 items, including fruit (fresh and dried), ginseng, nuts, rolled steel bars, and wine, would draw a 15% tariff, if the two countries could not reach an agreement on compensation.

2. A second group of 8 items, which included frozen pork and other processed agricultural goods, and scrap aluminum, would draw a 25% tariff, assuming no compensation agreement, and following China’s evaluation of the effects of retaliation against the first group.

The Chinese tariffs, affecting $3 billion of trade, were worth $611.5 million. China and other partners also had planned ahead: during 2017, in anticipation of the possibility of their exports being hit with a Section 232 action, they upped steel exports to the U.S. by 15%.¹⁹²

The EU also promised action. Its 10-page target list was staggering, from canoes to manicure and pedicure preparations, “even ‘sinks and washbasins, of stainless steel’ – the proverbial kitchen sink.”¹⁹³ The EU list also was calibrated to increase pressure on the U.S.: the EU spelled out a first-stage, 25% tariff against 182 American exports, such as cheese, cranberries, juice, Kentucky bourbon, peanut butter, Harley-Davidson motorcycles, Levi’s jeans, and sweetcorn, followed by second-stage 10%-50% tariff on another 158 exports, including footwear, IT, and T&A merchandise.¹⁹⁴ Japan said it would consider retaliatory


¹⁹² See Toluse Olorunnipa, Republicans Challenge Trump on Steel, Aluminum Tariffs, 35 International Trade Reporter 252 (22 February 2018).


¹⁹⁴ See EU to Launch; Bryce Baschuk, EU, Japan, India Pledge to Retaliate Against U.S. Metal Tariffs, 35 International Trade Reporter (BNA) 685 (24 May 2018). The second-stage would take effect on 23 March 2021, three years after America imposed the Section 232 tariffs, or as soon as a DSU Panel or the Appellate Body found that imposition was illegal under GATT-WTO rules. See EU Tells WTO.

The deleterious effect of the EU counter-retaliation was clear. For instance, with the 25% tariff on bourbon, sales in the EU of the beverage (especially distilled by small U.S. producer-exporters) dropped to

levies on $450 million worth of American imports, plus a WTO lawsuit co-filed with the EU against the U.S.\textsuperscript{195} India promised tariffs between 5% and 100% on 20 American products, including apples, golf carts, motorcycles, nuts, soybeans, and wheat, and filed its own lawsuit (discussed below). By November 2018, seven countries – Canada, China, EU, India, Mexico, Russia, and Turkey – had retaliated against the Section 232 tariffs the U.S. imposed on them, with additional levies on over $25 billion worth of American exports.\textsuperscript{196}

Jamaica, too, had its worries: it is a top producer of bauxite, which is an input into aluminum.\textsuperscript{197} Chinese and Russian interests held alumina refineries in Jamaica, and such FDI bolstered Jamaica’s economy (including by cutting the country’s debt from 140% to 105% of GDP). The Section 232 action, coupled with trade sanctions imposed by the Trump Administration against Russia, could hobble Chinese and Russian aluminum exports to America, with adverse upstream knock-on effects for Jamaica’s bauxite sector and FDI inflows.

- **Jobs, Votes, and “Steelmageddon”**

Would the Section 232 tariffs boost jobs? That was one of many questions concerning the impact on the U.S. economy of Section 232 steel and aluminum tariffs.\textsuperscript{198} Between 1990 and November 2018, the number of workers at steel and iron mills in near zero. See Gerald Porter Jr. & William Mathis, *Tariffs Make U.S. Bourbon an Endangered Species in European Bars*, 35 International Trade Reporter (BNA) 1561 (29 November 2018).

\textsuperscript{195} See Brian Yap, *Japan Could Retaliate Against Trump’s Metals Tariffs*, 35 International Trade Reporter (BNA) 547 (19 April 2018).

\textsuperscript{196} See Bryce Baschuk, *Trump’s Steel, Aluminum Tariffs to Be Investigated by WTO Panel*, 35 International Trade Reporter (BNA) 1537 (29 November 2018).

In April 2019, with no end in sight to the Section 232 tariffs against its steel and aluminium, notwithstanding its strong efforts during and after the USMCA negotiations, Canada announced it was considering a new set of retaliatory duties, possibly covering many agricultural items (e.g., apples, ethanol, pork, and wine), to refresh its initial list (on which it had, for instance, maple syrup, orange juice, toilet paper, and whiskey) and thereby diversify its leverage points (and thus possibly galvanize support for its efforts) against the Trump Administration. *Canada Looks at Fresh Tariffs on U.S. Goods, Silent on Details Revealed by Envoy*, REUTERS, 10 April 2019, [www.reuters.com/article/us-trade-nafta-canada/canada-looks-at-fresh-tariffs-on-u-s-goods-silent-on-details-revealed-by-envoy-idUSKCN1RL2MA](www.reuters.com/article/us-trade-nafta-canada/canada-looks-at-fresh-tariffs-on-u-s-goods-silent-on-details-revealed-by-envoy-idUSKCN1RL2MA).


\textsuperscript{197} See Lucien Chauvin, *Jamaica Concerned Over Collateral Damage of U.S. Tariffs*, 35 International Trade Reporter (BNA) 533 (19 April 2018).

\textsuperscript{198} In March 2023, the ITC issued a 315-page report on the economic impact of Section 232 steel and aluminum tariffs, as well as China Section 301 tariffs (discussed in a separate Chapter), on U.S. industries. See U.S. International Trade Commission, *Economic Impact of Section 232 and 301 Tariffs on U.S. Industries*, Publication Number 5405, Investigation Number 332-591 (March 2023), [www.usitc.gov/publications/332/pub5405.pdf](www.usitc.gov/publications/332/pub5405.pdf). The ITC found many importers largely absorbed higher import prices through decreased profit margins, without substantial increases to consumer prices. The ITC did not reach definitive conclusions regarding the Section 301 tariffs.

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America fell by 53% (to 87,700).\textsuperscript{199} Behind the Section 232 tariff wall, in 2018, steel production capacity utilization hit 80%, and output rose 4%, yet employment increased only 1%. The reality is that the same number of workers are required to operate a blast or electric arc furnace at either 100% or 70% capacity utilization. The rising productivity of steel workers – roughly a doubling in 28 years – helps explain this reality. In 2018, the average steel worker produced about 1,00 tons of steel \textit{per capita}, whereas in 1990, the average steel worker produced 478 tons \textit{per capita}.

Following Neoclassical Economic Theory, what ought to happen when trade protection is granted is that the protected industry raises the prices of its product by an amount up to, but certainly no higher, than the tariff allows. For instance, with as Section 232 steel tariff of 25%, a U.S. producer ought to raise its prices by no more than 25%, and then use the extra revenue – up to $25 on every $100 of sales – wisely by reinvesting that revenue in property, plant, equipment, on the job training so as to enhance its efficiency and regain its lost international comparative advantage. In practice, however, that farsighted, economically rational response, did not necessarily occur. To the contrary, in June 2018, the DOC said it was investigating “illegitimate profiteering” by some companies.\textsuperscript{200} By withholding steel in their inventory from consumers, some companies engineered prices of far more than 25%.

Aside from unscrupulous, price-gouging behavior by some market participants, it seemed clear that the Section 232 tariffs would benefit a concentrated few, but hurt many.\textsuperscript{201} For instance, steel mills with excess capacity could be restarted, albeit with delay. U.S. Steel was an example: it considered restarting one of its two idled blast furnaces at its Granite City, Illinois facility, and thus hiring 500 workers, but the process would take four months. Steel producers that rely on specialty steel imports might end up laying off workers. Russian-based Novolipetsk Steel PAO was an example: it has plants in Indiana and Pennsylvania that make steel sheet for customers like Caterpillar, Inc., using steel slab imports, and considered laying off up to half of its 1,200 workers at those plants.

The net calculation about jobs also mattered. That is, might steel or aluminum jobs be won back to the U.S. from overseas, but thanks to higher steel and aluminum prices, U.S. consumers forced to cut back on purchases, resulting in no appreciable gains in jobs? Consider this report in July 2018:

\begin{quote}
The U.S. steel industry is on an upswing since [in March 2018] President Donald Trump announced tariffs of 25 percent on imported steel and 10 percent on imported aluminum. ...
\end{quote}

\begin{footnotes}
\footnote{199}{See Joe Deaux, \textit{Why Trump’s Tariffs Didn’t Help Create More Steel Jobs}, Bloomberg Law International Trade News (30 January 2019).}
\end{footnotes}
... But ... workers, unions, and employers shouldn't be popping the champagne just yet. By weakening cheaper import competition from foreign manufacturers, U.S. steel producers are allowed to gain more market share and sell at higher prices. Doing this puts more financial pressure on industries that rely on steel, which could force them to cut jobs.

Among the winners in the recent tariff war are Century Aluminum and U.S. Steel. Both plan to reopen or expand production at existing mills. Other companies even have plans to build new facilities. More than 20 steel and aluminum plants intend to boost production and will return more than 7,000 jobs....

These older, retooled plants “are not the future of steel making,” John Magnus, President of TradeWins LLC, a trade law and policy consultancy in Washington, said. Some steel producers may be able to operate in the black for a while, “but it’s not sensible for the long term” because of higher prices and retaliation, he said. “It is good to see a domestic supply response, but the details matter a lot.”

Almost 19,000 steelworkers were laid off in 2015 as steel production idled, according to the United Steelworkers. From 2000 to 2016, 48,000 domestic steel jobs and 17 million tons of domestic steel production capacity were lost.

Note the magnitude of those job losses. Was it realistic to expect Section 232 tariffs would result in that many net job gains? Consider the historical fact that Section 201 steel tariffs, from 8%-20% on all steel imports (except from Canada, Israel, Jordan, and Mexico), which President George W. Bush imposed in 2002, “failed” to preserve jobs: 200,000 jobs were lost, and in 2003 the tariffs were cancelled.

Moreover, counter-retaliation affected the answer. That is, counter-retaliation thus became a matter of political economy: China (as well as the other countries) was quite aware it could counter-retaliate against the Section 232 steel and aluminum tariffs to maximize political pressure on the Trump Administration to back down. And it (and the EU, Canada, and Mexico) did precisely that: China intentionally hit back at U.S. exports so as to imperil American jobs in electorally significant districts. For example, China’s retaliation list specifically targeted pro-Trump areas of the U.S.:

Of the 10 states that face potential Chinese tariffs on more than $1 billion of their exports, seven backed Trump in 2016....

The state with the highest value of exports affected is Louisiana, at $6 billion, amounting to 2.6 percent of the state's economic output in 2016.

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203 See Steel, Aluminum Plants.
Louisiana is followed by Washington State, which was won by Hillary Clinton, at $5.3 billion, or 1.1 percent of gross state product, and Texas at $4 billion, or 0.2 percent of gross state product.

Ohio and Michigan, swing states which went to Trump after they supported Barack Obama in 2012, are also heavily exposed. Indeed, Chinese targeting was so precise that it not only distinguished among states, but also counties, on political “Red” versus “Blue” colors:

[A]bout 81 percent of the counties whose workforce will be affected by Chinese retaliatory tariffs voted for Trump. About 1.1 million jobs in counties that backed Trump would be affected. Jobs at risk in counties that supported Clinton amount to about 970,000.

Ironically, the Section 232 steel and aluminum tariffs undermined America’s efforts to pressure Canada and Mexico to agree to its demands for a “NAFTA 2.0,” and its efforts to encourage other WTO Members, especially the EU, to join it in pressuring China to alter its IP-infringing behavior and Made in China 2025 industrial policy.

After all, why should America’s friends support such outcomes if the U.S. failed to exempt steel and aluminum from friendly sources? But, from the Trump Administration perspective, “America First” was the theme unifying its actions, even if that meant “Friends

204 Saleha Mohsin, China Tariff Retaliation Threatens Key States in Trump Country, 35 International Trade Reporter (BNA) 667 (17 May 2018) (discussing the results of a May 2018 study by the American Action Forum, a group opposed to protectionist policies, which “examine[d] retaliatory tariffs on $3 billion worth of American exports China has imposed in response to levies Trump placed on steel and aluminum imports and tariffs on another $50 billion worth of U.S. exports China has announced but not yet imposed based on additional tariffs Trump has threatened”). [Hereinafter, China Tariff Retaliation.]

One of the counter-retaliation ideas circulating among America’s trading partners was to strike back directly at enterprises in which President Trump had a personal financial interest, such as any Trump-branded merchandise his businesses export, or buildings or resorts he seeks to build or expand (in short, to retaliate by taxing Trump), and possibly even use anti-corruption laws to impose sanctions on those enterprises (assuming a factual predicate existed for doing so). See Bob Bryan & Allan Smith, America’s Closest Allies are Furious about Trump’s Tariffs, and Now an Unorthodox Idea to Go After Him is Gaining Steam, BUSINESS INSIDER, 24 June 2018, www.businessinsider.com/canada-france-trump-organization-tariffs-trade-response-2018-6.


The products targeted by China “seems optimally designed to especially agitate Trump’s red-state base,” said Mark Muro, a Senior Fellow at Brookings. “This suggests that Chinese officials have a canny feel for the geography of U.S. trade exposure and are pushing buttons that ensure the U.S. political system mobilizes pushback.”

Id.
Second,” and hopes that its economic nationalism would revitalize domestic manufacturing, even if history furnished plenty of counter-examples.\(^{206}\)

Roughly seven months after the Section 232 tariffs were imposed, data suggested they had failed to have a net positive effect on employment in the steel sector – but, they had enriched steel companies, such as Nucor, which had lobbied for them:

While [President Donald J.] Trump has played up the narrative of downtrodden steel workers losing jobs to unscrupulous foreign competitors, most of the benefit from his 25 percent tariffs are flowing to the already strong bottom lines of Nucor and other modernized and globally competitive U.S. steel firms.…

Even if tariffs prompt such firms to expand, they are not likely to add large numbers of factory jobs, because they have stayed competitive by slashing the amount of labor required to make steel.

… The [Commerce] [D]epartment said broad [Section 232] tariffs on imports were needed because of rampant “chicanery” by foreign producers who evaded existing countervailing and anti-dumping duties, which are applied narrowly to specific products.

Nucor has led the [steel] sector’s transformation to labor-saving plants since the 1970s, replacing older blast furnaces with more efficient modern electric arc furnaces.

Trump’s tariffs may prove pivotal in extending the life of older, less efficient plants, such as U.S. Steel’s Granite City plant near St. Louis …. The company credits tariffs for its decision to add 800 jobs by restarting two blast furnaces it had idled in 2015. A total of 1,500 workers will now work in a factory where sparks fly and molten steel is still poured from giant ladles in a labor-intensive, multi-step process.

At Nucor’s plant in Sedalia [], by contrast, 225 people will make steel with a high-tech furnace that shoots electricity through scrap metal to melt it into new products. That technology is now used to produce nearly 70 percent of U.S. steel – with a third less labor and energy ….\(^{207}\)

About one and on-half years after the Section 232 steel tariffs were imposed, data continued to confirm the same trend, namely, differential effects of the tariffs on America’s steel


industry, negative for those clinging to old-fashioned, blast-furnaced technology, and positive for the others using new, EAFs:

Exuberance over the levies dramatically boosted U.S. output just as the global economy was cooling, undercutting demand. That dropped prices, creating a stark divide between companies like Nucor Corp., that use cheaper-to-run electric arc furnaces to recycle scrap into steel products, and those including U.S. Steel Corp., with more costly legacy blast furnaces.

Since Trump announced the tariffs 16 months ago [in March 2018], U.S. Steel has lost almost 70% of its [stock] market value, or $5.5 billion, and idled two American furnaces in mid-June that couldn’t be run profitably at the lowest prices since 2016. Meanwhile, Nucor, down around 20%, has touted $2.5 billion in expansion projects.

The President’s actions likely “sped up” up an unavoidable “evolution,” said Nucor Chief Executive Officer John Ferriola…. “Are some companies are going to suffer? Absolutely. We’ll we see some capacity go away, I’m sure of it.”

With the stronger steelmakers aggressively boosting capacity to grab market share, a dip in demand has left older, more costly blast furnaces at U.S. Steel and AK Steel Holding Corp. struggling to compete, even with foreign steel nudged out of the equation.

“Be careful what you wish for,” said Timna Tanners, an analyst at Bank of America who has dubbed the industry’s push to add capacity without enough demand “Steelmageddon.” She called it “ironic” that the tariffs are “punishing some steel companies.”

“Not all plants are the same,” said Mark Millett, CEO of Steel Dynamics Inc., who in November [2018] announced a new $1.8 billion EAF mill to be built in the U.S. southwest. “Not all projects are the same.”

Suppliers to blast furnaces are sounding the alarm. In laying out his vision for iron-ore miner Cleveland-Cliffs Inc. …. CEO Lourenco Goncalves painted a bleak future for what makes up the overwhelming majority of his current customers.

That’s why Cliffs is investing $830 million in a Toledo, Ohio-based plant that will produce hot briquetted iron for electronic-arc furnaces run by firms such as Nucor…. They invested in the plant because “we were able to see the future of steelmaking in the United States,” Goncalves said…. 
Many “blast furnaces will shut down.,” he added.208 Apparently, then, Section 232 tariffs were used in two different ways by domestic steel producers.

On the one hand, companies wedded to older, blast-furnace technology, continued with their business model. They added new jobs paid for by extra revenues made possible by their ability to raise their prices behind the tariff wall. But, whether those additions resulted in net gains was dubious: six days before Christmas 2019, U.S. Steel announced it was closing its Great Lakes Works facility near Detroit, and laying off 1,545 workers, because “it was just too high-cost to run.”209 (U.S. Secretary of Commerce Wilbur Ross (1937–) insisted the Section 232 steel tariffs were working: U.S. Steel was using the protection afforded by Section 232 so as to “rationaliz[e] a bit their [sic] production so that they will be more competitive in the future as we continue to go forward.210)

On the other hand, companies committed to changing their business model raised their prices behind that same tariff wall, but spent the extra revenues on new, labor-saving technology. The net effect was job loss, amplified by the global glut in steel. Moreover, “Trump’s strategy centered on shielding U.S. steel mills from foreign competition with … [the Section 232] 25% tariff imposed in March 2018,” and “[h]e … promised to boost steel demand through major investments in roads, bridges and other infrastructure.”211 In fact, “higher steel prices resulting from the tariffs dented demand from the Michigan-based U.S. auto industry and other steel consumers,” while “the Trump Administration has never followed through on an infrastructure plan.”212

To be sure, insofar as Section 232 is supposed to be about preserving American national security from impairment by imports, the tariffs may have expanded domestic capacity and output. But, to sell them politically as a jobs program was at variance both with the data and the statutory purpose.

● Multinational Business Planning:


211 Trump Steel Tariffs Bring.

212 Trump Steel Tariffs Bring.
Harley-Davidson Case Study

One answer to the question of whether the Section 232 steel and aluminum cases would create or destroy domestic jobs came from an American icon: 115-year old, Milwaukee-based Harley-Davidson, which had 2,100 employees at its four U.S. facilities (as of year-end 2017). In June 2018, following the EU’s decision to counter-retaliate against its motorcycle exports from the U.S. to the Continent, Harley-Davidson announced it had no choice but to shift some production from America to the EU, specifically, output it made in America for shipment to the EU. The EU tariffs would impose a “substantial” burden on market access, if the company were to attempt to pass on 25% tariffs to European consumers. (The EU’s applied MFN motorcycle tariff was 6%; with its counter-retaliation, Harley would face a 31% levy, meaning thanks to the 25% duty an additional $2,200 average cost per bike.) Better, then, not to alienate European customers; Harley opted to jump the new tariff wall and make motorcycles in Europe, saying that was “the only sustainable option to make its motorcycles accessible to customers in the EU and maintain a viable business in Europe.”

That was not how President Trump saw Harley-Davidson’s business planning. He blasted the company, tweeting:

“A Harley-Davidson should never be built in another country – never! Their employees and customers are already very angry at them. If they move, watch, it will be the beginning of the end – they surrendered, they quit! The Aura will be gone and they will be taxed like never before.”

To be sure, there was evidence of the opposite phenomenon. Some foreign companies opted to do the reverse: jump America’s Section 232 tariff wall by diverting investment toward, and boosting output in, the U.S.:

British-owned GFG Alliance, has said it plans to invest $5bn over several years to reopen a shuttered steel plant in South Carolina. The firm says the move will put about 125 people back to work “immediately.”


214 Quoted in Harley-Davidson to Make.


Trump enjoyed the support of a group called “Bikers for Trump” in his 2016 presidential campaign and he invited Harley-Davidson representatives to the White House in February 2017 shortly after he took office, greeting them with the words “Made in America, Harley-Davidson.”
The President proceeded to endorse a boycott of Harley-Davidson.216 Embedded in the tweet was a proposition that iconic brands are akin to GI products – Harley’s bikes are like Dom Perignon’s bubbly. That is, at least in the minds of consumers, a Harley bike not “Made in America” is like sparkling white wine not made in the Champagne region of France.

Yet motorcycles, unlike champagne, are not geographically indicated as a matter of law. Moreover, motorcycle manufacturing benefits from global supply chains, whereas wine relies on terroir. So, with a factory in Australia, and assembly plants in Brazil and India, Harley said it would rev up investment and output overseas. Again, jumping tariff walls – for example, India’s 100% applied MFN rate on motorcycles – was the justification.217 That did not comfort workers in Kansas City, Missouri, who felt the blow: in January 2017, Harley announced it would shutter their facility, and consolidate production in its York, Pennsylvania factory; and in May, it announced it would open an assembly plant in Thailand. Harley denied shifting jobs from Kansas City to Thailand, but rather said it was responding to President Trump’s decision to withdraw the U.S. from TPP. With output in Thailand, Harley would avoid a 60% Thai tariff on motorcycles, bring them closer to the growing Asia-Pacific market, and help them qualify for tax benefits on exports from Thailand to Southeast Asian countries, and obtain DFQF treatment among the CPTPP.11 Moreover, Harley faced declining demand in the U.S., thanks to America’s aging population and a diminution in brand loyalty. So, Harley sought to increase overseas sales from 43% to 50% of its global annual sales volume.

● PF Status for Merchandise Entered into FTZs?

The Steel and Aluminum Proclamations failed to define the status of merchandise brought into FTZs. The original (March) Proclamations Mr. Trump issued said tariffs apply to subject merchandise entered or withdrawn from a warehouse for consumption. What about steel and aluminum imports entered or withdrawn from an FTZ? Annexes to the Proclamations would help resolve this uncertainty.

Might there be an analogy to the January 2018 Section 201 actions against Washers and Solar Panels (discussed in a separate Chapter), whereby subject merchandise had to be admitted under PF status? Recall PF status means the tariff owed on products withdrawn from the FTZ, after any assembly or manufacturing in the FTZ, is based on the dutiable status of the articles when they are initially imported into the FTZ. So, if steel or aluminum is entered into an FTZ as PF status, then the 25% and 10% tariffs would be locked in upon that entry (on top of the applied MFN tariffs), notwithstanding any assembly or manufacturing done in the FTZ incorporating these inputs that results in a finished good.


that otherwise would have a lower dutiable status (i.e., lower applied MFN rate). Put differently, forcing PF status on inputs subject to a trade remedy potentially changes a typical tariff escalation scenario (in which tariffs on inputs are lower than on finished goods) into a tariff inversion scenario (with the higher tariffs on inputs), because of the incorporation of the remedial tariffs under compulsory PF status.

The subsequent (April) 2018 Proclamations clarified that goods made in the U.S. would be exempt from the Section 232 tariffs. That is, suppose an item is made – that is, manufactured and substantially transformed – in an FTZ into a steel or aluminum product that otherwise would be subject to the 25% or 10% Section 232 tariff, and that product is entered from the FTZ into the U.S. The steel or aluminum product is considered as originating in the U.S. (“Made in America”), and not subject to the tariffs. In effect, the product is “domestic status” merchandise. The Proclamations also indicated that any article subject to the 25% or 10% steel and aluminum duties had to be designated as PF status upon its admission to an FTZ. (Any article with NPF status that was made in the FTZ was not subject to those duties.)

- **May 2019 Deals with Canada and Mexico**

  On 17 May 2019, the U.S. announced it had reached an agreement with Canada and Mexico to lift the 25% and 10% tariffs it had been imposing on their steel and aluminum shipments for nearly one year, and restore DFQF treatment across North America on steel and aluminum products as had occurred under NAFTA 1.0. Likewise, the two NAFTA Parties agreed to end their counter-retaliatory measures against the U.S.

**GOVERNMENT OF CANADA, GLOBAL AFFAIRS, JOINT STATEMENT BY CANADA AND THE UNITED STATES ON SECTION 232 DUTIES ON STEEL AND ALUMINUM (17 MAY 2019)**

After extensive discussions on trade in steel and aluminum covered by the action taken pursuant to Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. §1862), the United States and Canada have reached an understanding as follows:

1. The United States and Canada agree to eliminate, no later than two days from the issuance of this Statement [i.e., 12:01 AM Eastern Time on 20 May 2019]:

   a. All tariffs the United States imposed under Section 232 on imports of aluminum and steel products from Canada; and

   b. All tariffs Canada imposed in retaliation for the Section 232 action taken by the United States (identified in Customs Notice 18-08 Surtaxes Imposed on Certain Products Originating in the United States, issued by the Canada Border Services Agency on June 29, 2018 and revised on July 11, 2018).
2. The United States and Canada agree to terminate all pending litigation between them in the World Trade Organization regarding the Section 232 action.

3. The United States and Canada will implement effective measures to:
   a. Prevent the importation of aluminum and steel that is unfairly subsidized and/or sold at dumped prices; and
   b. Prevent the trans-shipment of aluminum and steel made outside of Canada or the United States to the other country. Canada and the United States will consult together on these measures.

4. The United States and Canada will establish an agreed-upon process for monitoring aluminum and steel trade between them. In monitoring for surges, either country may treat products made with steel that is melted and poured in North America separately from products that are not.

5. In the event that imports of aluminum or steel products surge meaningfully beyond historic volumes of trade over a period of time, with consideration of market share, the importing country may request consultations with the exporting country. After such consultations, the importing party may impose duties of 25 percent for steel and 10 percent for aluminum in respect to the individual product(s) where the surge took place (on the basis of the individual product categories….). If the importing party takes such action, the exporting country agrees to retaliate only in the affected sector (i.e., aluminum and aluminum-containing products or steel). [This final sentence meant that if the U.S. were to re-impose Section 232 duties on, for example, Canadian aluminum, then Canada could retaliate only in the same sector, i.e., against U.S. aluminum.]

Note the Joint Statement (the terms of which were the same for Mexico) included Canada (and Mexico) dropping their WTO cases against the U.S., heightened monitoring efforts against third country diversion (to ensure that steel and aluminum is “melted, poured, or smelted regionally,” i.e., in North America), and also allowed for the re-imposition of tariffs if insufficient efforts (including monitoring and consultations) were made to prevent an import surge (measured against a historical benchmark).219 Paragraphs 3, 4, and 5, respectively, set forth these terms.

What prompted the tripartite deal?220 One motivation surely was to unblock the legislative processes toward passage of the USMCA in Congress, and ratification by

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Canada and Mexico. These processes had slowed to a halt, and opposition to NAFTA 2.0 had gained traction after the three countries signed it on 30 November 2018. Canada and Mexico used dropping the Section 232 action as a bargaining chip to push for their ratifications. With Prime Minister Trudeau seeking re-election in October 2019 (which he won), and newly elected President Obrador seeking to resolve the matter, along with President Trump hoping to see the USMCA enacted before the November 2020 U.S. election, the political starts in each country were aligned.

Another motivation was for the U.S. to solidify its support in its Section 301 Trade War against China (discussed in a separate Chapter). Unnecessarily prolonging antagonism from its staunch Northern and Southern neighbors made no sense as that War escalated through the increase in Wave Three tariffs (from 10% to 25%), the threat of Wave Four tariffs, and the blacklisting of Huawei. Canada and Mexico ending their counter-retaliation against U.S. exports (e.g., beef, bourbon, ketchup, pork, and household items, as listed above) was welcome news to American farmers and manufacturers which had suffered from those actions, plus Chinese counter-retaliation in the Section 301 case – and which formed part of Mr. Trump’s political base as he sought re-election. That said, the Joint Statement obviously did not cover steel and aluminum imports from the EU, which remained subject to the Section 232 action.

The President did opt to cut the Section 232 tariffs on Turkish steel from 50% to 25%. But, the gesture was short-lived. Hardly six months later, in October 2019, Mr. Trump made one of the most controversial national security decisions of his Presidency: the withdrawal of American troops from Syria. Kurdish forces had fought alongside those troops against ISIS, and regarded the decision as a betrayal. Turkish forces quickly moved into Syria, imperilling the Kurds (who the Turks regarded as aligned with a banned terrorist organization in Turkey that had waged a long, violent campaign against Turkish rule). The Turkish deployment into Syria caused the President to re-impose tariffs on Turkish merchandise. Specifically, he increased tariffs on Turkish steel back up to 50%, though set no date for the hike, and ceased negotiations with Turkey on a bilateral FTA.

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221 See The White House, Proclamation on Adjusting Imports of Steel into the United States, 16 May 2019, [www.whitehouse.gov/presidential-actions/proclamation-adjusting-imports-steel-united-states/](http://www.whitehouse.gov/presidential-actions/proclamation-adjusting-imports-steel-united-states/). The President justified as follows: “since the implementation of the higher tariff . . ., imports of steel articles have declined by 12 percent in 2018 compared to 2017 and imports of steel articles from Turkey have declined by 48 percent in 2018, with the result that the [U.S.] domestic industry’s capacity utilization has improved at this point to approximately the target level recommended in the . . . [January 2018 Department of Commerce] Report.” Id.


In June 2020, the President threatened to reverse course, invoke Paragraph 5 of the May 2019 Joint Statement, and reimpose 10% duties on Canadian aluminum imports. He gave Canada until 1 July to restrict its own exports, otherwise he would hit that merchandise with the duties just as the USMCA entered into force (as discussed in separate Chapters). The USTR, Ambassador Robert E. Lighthizer, alleged Canadian aluminum had surged into the U.S., and American aluminum producers were suffering the double blow of that increased supply and decreased demand (associated with the COVID-19 pandemic-induced recession). Interestingly, the major U.S. aluminum producers were not like-minded.

On the one hand, the American Primary Aluminum Association (which represents Century Aluminum and Magnitude 7 Metals L.L.C.) favored re-imposition of the 10% duty, ascribing the blame for the collapse in U.S. prices on imports). On the other hand, the Aluminum Association of the U.S. (of which Alcoa Corp., America’s top producer, plus Rio Tinto Group, and many aluminum-parts makers), said that imports had hardly changed since 2017, and the real cause of the industry’s woes was China’s overcapacity due to government subsidies. This Association preferred free-trade outcomes with countries, like Canada, which themselves practice free trade. Consider the different positions of the two sides: to what extent do the members in the two Associations produce aluminum in the U.S. vis-à-vis import it from Canada? Consider, too, the effect of again levying tariffs on Canadian aluminum on U.S.-Canada ties, and U.S. credibility around the world?

As per below, in August, the President made good on his threat. Canada counter-retaliated, and the two nations were headed for an Aluminum Trade War.

IV. Conflict with Canada

- August 2020 U.S. Re-imposition of 10% Aluminum Tariffs and Canadian Counter-retaliation

In studying President Trump’s Proclamation re-imposing 10% tariffs on aluminum from Canada (excerpted below), reflect upon five points. First, think about the rationale as to import surge. How persuasive is the data offered concerning the existence of an import surge? Should it matter that the exporters of aluminum from Canada include a major American MNC, Alcoa? What of the measurement time period from which the data are drawn?

Second, observe the scope of the Proclamation. Only raw aluminum – that is, non-alloy, unwrought aluminum – originating in Canada is affected. To be sure, that merchandise is the largest type of aluminum exports from Canada. However, the scope excludes derivative aluminum products.

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225 See U.S. Poised.
Third, consider the specific types of entry of subject merchandise to which the *Proclamation* applies? By its terms, it covered entries for consumption, and withdrawals from warehouses. How, then, is subject merchandise admitted to an FTZ treated? The *Proclamation* negates Section 81c of the *Foreign Trade Zone Act* (discussed in a separate Chapter), in that PF status does not provide an importer with protection from additional duties on subject merchandise after the date the importer elected PF status. To see the implication of this negation, consider the following hypothetical example that illustrates the conventional difference between PF and Non-Privileged status.

Suppose Canadian non-alloyed unwrought aluminum admitted into an FTZ under Non-Privileged Foreign status before 16 August 2020 (the effective date of the re-imposition of 10% tariffs) that is used to produce or manufacture merchandise, arguably it should not be subject to the additional duty. That is because the item withdrawn from the FTZ and entered into the U.S. for consumption would be a finished product, whereas the scope of the *Proclamation* excludes downstream products. Conversely, if that Canadian non-alloyed unwrought aluminum used to make a finished good was admitted in PF status, then the value of that raw aluminum would be subject to the additional 10% duty when the finished article is entered for consumption on or after 16 August. Why? Because PF status locks in the tariff on merchandise admitted to an FTZ in the condition of that merchandise as it is brought into the Zone – in this case, raw aluminum, which is precisely within the scope of the *Proclamation*.

Fourth, observe three key details: (1) unavailability of drawback; (2) availability of continued product-specific exclusions, and (3) lack of a sunset date. What explains these important details? That is, why is drawback unavailable for tariffs imposed under a trade remedy? Why is a previously-granted exclusion from such tariffs extended? And, could the tariffs on non-excluded items continue indefinitely?

Fifth, Prime Minister Justin Trudeau of Canada vowed to impose counter-retaliatory tariffs on U.S. products, and so he did – within 24 hours of President Trump’s action. Dubbing as “ludicrous” the proposition that Canadian aluminum threatened American national security, the PM’s Deputy, Chrystia Freeland, intoned:

> At a time when we are fighting a global pandemic [*i.e.*, COVID-19] … a trade dispute is the last thing anyone needs – it will only hurt the economic recovery on both sides of the border.

> …

> Any American who buys a can of beer or a soda or a car or a bike will suffer. In fact, the washing machines Trump stood in front of yesterday will get more expensive.\(^\text{226}\)

Her reference to washing machines was intentionally ironic. President Trump announced the 10% tariffs at a Maytag facility in Ohio while touting his “America First” trade

policy. Overall, the two NAFTA 2.0 Parties, which had hardly one month earlier, on 1 July 2020, celebrated the entry into force of USMCA, seemed poised for an Aluminum War. What Mr. Trump called “absolutely necessary to defend our aluminum industry,” Mr. Trudeau said had “no justification.”

Canada’s counter-retaliation, effective 16 September 2020 and terminable only if and when the U.S. dropped its 10% tariff, covered $2.7 billion worth of U.S.-origin aluminum products, thus impeding those exports and the American jobs dependent on them. Canada identified 68 products comprised of aluminum or steel, including bicycles, golf clubs, refrigerators, and washing machines. Nevertheless, “Michael Bless, Chief Executive of Century Aluminum, said the move [i.e., President Trump’s Proclamation excerpted below] ‘helps to secure continued domestic production of this vital strategic material and level the playing field for thousands of American aluminium workers.’”

THE WHITE HOUSE, PROCLAMATION ON ADJUSTING IMPORTS OF ALUMINUM INTO THE UNITED STATES (6 AUGUST 2020)

1. On January 19, 2018, the Secretary of Commerce (Secretary) transmitted to me a Report on his investigation into the effect of imports of aluminum articles on the national security of the United States under Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862). The Secretary found and advised me of his opinion that aluminum articles were being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States.

2. In Proclamation 9704 of March 8, 2018 (Adjusting Imports of Aluminum Into the United States), I concurred in the Secretary’s finding that aluminum articles were being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States, and decided to adjust the imports of aluminum articles, as defined in Clause 1 of Proclamation 9704, by imposing a 10 percent ad valorem tariff on such articles imported from most countries. I further stated that any country with which we have a security relationship is welcome to discuss with the
United States alternative ways to address the threatened impairment of the national security caused by imports from that country, and noted that, should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on aluminum articles imports from that country and, if necessary, adjust the tariff as it applies to other countries as the national security interests of the United States require.

3. In Proclamation 9893 of May 19, 2019 (Adjusting Imports of Aluminum Into the United States), I noted that the United States had successfully concluded discussions with Canada on satisfactory alternative means to address the threatened impairment of the national security posed by aluminum imports from Canada. In particular, the United States agreed on a range of measures with Canada that were expected to allow imports of aluminum from Canada to remain stable at historical levels without meaningful increases, thus permitting the domestic capacity utilization to remain reasonably commensurate with the target level recommended in the Secretary’s Report. These included measures to monitor for and avoid import surges.

4. In light of this agreement, I determined that, under the framework in the agreement, imports of aluminum from Canada would no longer threaten to impair the national security, and thus I decided to exclude Canada from the tariff proclaimed in Proclamation 9704, as amended. I noted that the United States would monitor the implementation and effectiveness of the measures agreed upon with Canada in addressing our national security needs, and that I may revisit this determination as appropriate.

5. In Proclamation 9704, I also directed the Secretary to monitor imports of aluminum articles and inform me of any circumstances that in the Secretary’s opinion might indicate the need for further action under Section 232 ... with respect to such imports.

6. The Secretary has now advised me that imports of non-alloyed unwrought aluminum from Canada, which accounted for 59 percent of total aluminum imports from Canada during June 2019 through May 2020, increased substantially in the twelve months following my decision to exclude, on a long-term basis, Canada from the tariff proclaimed in Proclamation 9704. Imports of non-alloyed unwrought aluminum from Canada during June 2019 through May 2020 increased 87 percent compared to the prior twelve-month period and exceeded the volume of any full calendar year in the previous decade. Moreover, imports of these articles from Canada continue to increase, reaching in June of this year the highest level of any month since I decided to adjust imports of aluminum articles in Proclamation 9704. The increase in imports of these articles from Canada is principally responsible for the 27 percent increase in total aluminum imports from Canada during June 2019 through May 2020.

7. Canada is the largest source of United States imports of non-alloyed unwrought aluminum, accounting for nearly two-thirds of total imports of these articles from all countries in 2019 and approximately 75 percent of total imports in the first five months of 2020. The surge in imports of these articles from Canada coincides with a decrease in
imports of these articles from other countries and threatens to harm domestic aluminum production and capacity utilization.

8. In light of the Secretary’s information, I have determined that the measures agreed upon with Canada are not providing an effective alternative means to address the threatened impairment to our national security from imports of aluminum from Canada. Thus, I have determined that it is necessary and appropriate to re-impose the 10 percent \textit{ad valorem} tariff proclaimed in \textit{Proclamation 9704} … on imports of non-alloyed unwrought aluminum articles from Canada, commensurate with the tariff imposed on such articles imported from most countries.

9. The United States will continue to monitor the implementation and effectiveness of the measures agreed upon with Canada in addressing our national security needs, including with respect to imports of other aluminum articles. In particular, the United States will monitor for import surges of articles that continue to be exempt from the tariff proclaimed in \textit{Proclamation 9704}, to ensure that exports of non-alloyed unwrought aluminum to the United States are not simply reoriented into increased exports of alloyed, further processed, or wrought aluminum articles.

10. Section 232 of the \textit{Trade Expansion Act of 1962}, as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

\textbf{NOW, THEREFORE, I Donald J. Trump, President of the United States…, by the authority vested in me by the Constitution and the laws of the United States …, including Section 232 … do hereby proclaim … :}

(1) Clause 2 of \textit{Proclamation 9704}, as amended, is further amended in the second sentence by deleting “and” before “(d)” and inserting before the period at the end: “, (e) on or after 12:01 a.m. Eastern Daylight Time on August 16, 2020, from all countries except Argentina, Australia, and Mexico; and (f) on or after 12:01 a.m. Eastern Daylight Time on August 16, 2020, from Canada, except with respect to imports of non-alloyed unwrought aluminum provided for in Sub-Heading 7601.10, which shall be subject to the additional 10 percent \textit{ad valorem} rate of duty.” [That is, the exemption from the tariff is removed.]

(3) The modifications made by Clause 1 of this \textit{Proclamation} shall be effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. Eastern Daylight Time on August 16, 2020, and shall continue in effect, unless such actions are expressly reduced, modified, or terminated.

(4) Any exclusion of aluminum articles from Canada granted by the Secretary of Commerce pursuant to Clause 3 of \textit{Proclamation 9704}, as amended, that has not expired shall be valid under the modifications to the HTSUS made by this \textit{Proclamation}. Previously granted exclusions that have expired may be renewed.
Any imports of non-alloyed unwrought aluminum articles from Canada provided for in Sub-Heading 7601.10 that were admitted into a United States Foreign Trade Zone under “privileged foreign status” as defined in 19 C.F.R. 146.41 prior to 12:01 a.m. Eastern Daylight Time on August 16, 2020, shall be subject upon entry for consumption on or after such time and date to the 10 percent ad valorem rate of duty imposed by Proclamation 9704…. Any imports of non-alloyed unwrought aluminum articles from Canada provided for in Sub-Heading 7601.10, except any articles that are eligible for admission under “domestic status” as defined in 19 C.F.R. 146.43, that are admitted into a United States Foreign Trade Zone … shall be admitted only as “privileged foreign status” …., and shall be subject upon entry for consumption … to the 10 percent ad valorem rate of duty….

Non-alloyed unwrought aluminum articles provided for in Sub-Heading 7601.10 shall not be subject upon entry for consumption to the duty established in Clause 2 of Proclamation 9704 … merely by reason of manufacture in a U.S. Foreign Trade Zone. However, non-alloyed unwrought aluminum articles provided for in Sub-Heading 7601.10 admitted to a U.S. Foreign Trade Zone in “privileged foreign status” pursuant to Clause 5 of this Proclamation, shall retain that status….

No drawback shall be available with respect to the duties imposed pursuant to this Proclamation.

September 2020 Climb Down

The day before Canada’s dollar-for-dollar counter-retaliation would have taken effect, the U.S. climbed down. On 15 September 2020, the Trump Administration announced it was removing its 10% tariffs on Canadian aluminum (retroactive to 1 September). Said the USTR:

After consultations with the Canadian government, the United States has determined that trade in non-alloyed, unwrought aluminum is likely to normalize in the last four months of 2020, with imports declining sharply from the surges experienced earlier in the year. Average monthly imports are expected to decline 50 percent from the monthly average in the period of January through July. Accordingly, the United States will modify the terms of the 10 percent tariff imposed in August on imports of Canadian non-alloyed unwrought aluminum.232

Without doubt, the U.S. set up a managed trade outcome: the USTR “expect[ed] that shipments of non-alloyed, unwrought aluminum from Canada for the remainder of 2020 will be no greater than the following monthly volumes,” namely, 83,000 tons, 70,000 tons,

83,000 tons, and 70,000 tons in September, October, November, and December 2020, respectively. But, warned the USTR:

Six weeks after the end of any month during this period, the United States will determine whether actual shipments met expectations. If actual shipments exceeded 105 percent of the expected volume for any month during the four-month period, then the United States will impose the 10 percent tariff retroactively on all shipments made in that month.

If shipments in any month exceed the expected volume, the United States expects that shipments in the next month will decline by a corresponding amount.

In addition to the forgoing, if imports exceed 105 percent of the expected volume in any month the United States may re-impose the 10 percent tariff going forward.\(^{233}\)

For the time being, at least, the Aluminum War with Canada seemed settled.

V. December 2022 WTO Steel and Aluminum Measures Panel Reports

- WTO Consistency of American Steel and Aluminum Quotas?

Article XI:1 of GATT forbids WTO Members from implementing QRs, including quotas. Article 11 of the Safeguards Agreement prohibits them from entering into VERs. Did the Trump Administration risk violating either or both of these rules, by asking its friendly trading partners, such as Canada, the EU, and Mexico, to limit their steel and aluminum shipments to the America in exchange for a permanent exemption from the Section 232 tariffs?\(^{234}\) Did the Administration violate these rules when it persuaded Korea to accept a 70% cap on its steel and aluminum exports as a quid pro quo for an exemption, along with finalizing KORUS renegotiations?

To the extent the Administration imposed an outright quota on foreign steel and aluminum, it risked violating both rules. If its measure was a TRQ, which it could argue is not a QR and thus immune from a GATT Article XI:1 claim, then it risked transgressing Article 11 of the Safeguards Agreement. In all instances, the U.S. could invoke the GATT Article XXI national security exemption, but would that defense be effective against a claim not made under GATT? (The answer came in December 2022 with WTO Panel Reports, discussed below.) Appellate Body precedent the U.S. had helped set, ironically against China, when China sought to use GATT to defend against claims it had violated

\(^{233}\) September 2020 USTR Statement.

terms of its 2001 WTO Protocol of Accession, could be used against America. The jurisprudence indicated a provision of GATT can be used as a “shield” against the “sword” of a claim under GATT, but not against a different “sword,” such as the Protocol. Here, the different “sword” was the Safeguards Agreement. Simply put, GATT might not work as an inter-textual defense, but rather only as an intra-textual one. That outcome, however, seems perverse: should not national security be an across-the-board “shield”? The U.S. might also try, in instances of a quota or TRQ with a country with which it has an FTA (such as Korea), the argument that GATT Article XXIV immunized it, at least against an Article XI:1 claim.

By the end of May 2018, it was clear the U.S. faced significant counter-retaliatory measures against the Section 232 steel and aluminum tariffs it began imposing on 23 March. Members across the world notified the WTO they would impose countermeasures under Article 8:3 of the Safeguards Agreement, which collectively would total $3.45 billion worth of tariffs on American merchandise they import: “The EU said it may immediately retaliate with $1.60 billion in tariffs; Russia promised $537.6 million in tariffs; Turkey pledged $266.6 million worth of tariffs; Japan said it may retaliate with $264.3 million in tariffs; and India said it could impose $165.6 million worth of tariffs on U.S. goods.”

India did so, initially setting an effective 21 June 2018, which India subsequently deferred to 18 September, then 2 November, then 17 December, then 1 April 2019, and then to 2 May, in the hopes of reaching a negotiated settlement and avoiding a nasty trade war as had happened to China and the U.S. in the context of Section 301 (discussed in a separate Chapter). India threatened to boost the walnut tariff from 30% to 120%, India hiked from 30% to 70% its tariff on Bengal gram, i.e., channa (chickpeas) and Masoor dal.


India’s counter-retaliatory list included a 30% tariff on apples. India was the second largest market for Washington State apples, after Mexico. Hence, along with Mexican counter-retaliation against apples (discussed above), the Indian action threatened serious damage to that State’s apple orchards. See Paul Shukovsky, Mexico Takes Bite Out of Washington State Apple Exports, 35 International Trade Reporter (BNA) 802 (14 June 2018).

(red lentils), and on lentils from 30% to 40% (though query why American imports of these Indian culinary items would be preferred in India to domestic like products). And, India warned of more to come: “India reserves the right to adjust the specific products for which [tariffs would apply], and its right to adjust the additional rate of duty imposed on such products.” The Indian Steel Association expressed concern that up to 17% of global exports of steel (80 million tons) could be diverted from the U.S. and China to India and other third countries, some of which might be dumped.

When President Trump withdrew India’s GSP status as a BDC, effective 5 June 2019 (also discussed in a separate Chapter), India pulled its trigger, imposing its countervailing duties of up to 70% on American merchandise effective 16 June. India’s

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238 Quoted in India Moves Ahead.


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Canada, too, contemplated measures to combat trade diversion and avoid becoming a literal dumping ground for Chinese and other foreign steel, specifically, the use of tariff and quota safeguards on steel products such as energy tubular, hot-rolled sheet, plates, pre-paint, rebar, hot rolled sheet, pre-paint, and wire rod. See Josh Wingrove, Canada Eyes New Quotas, Tariffs to Halt Flood of Diverted Steel, 35 International Trade Reporter (BNA) 967 (19 July 2018). In October 2018, Canada implemented safeguards in the form of a 25% TRQ on seven types of steel imports (concrete reinforcing bar, energy tubular products, heavy plate, hot-rolled sheet, pre-painted steel, stainless steel wire, and wire rod), with the in-quota thresholds set at recent import volumes. The Canadian counter-measures affected imports from China, Turkey, and several other countries, but Canada exempted those from the U.S. (as its steel was subject to separate duties), as well as Chile, Israel, Mexico, and developing countries. See Natalie Wong & Josh Wingrove, Canada Announces Safeguard Tariffs in Response to Trump Levy (1), 35 International Trade Reporter (BNA) 1356 (18 October 2018).

Interestingly, in June 2018, amidst the steel and aluminum trade war, India’s Tata Steel merged with the EU’s Thyssenkrupp, resulting in the EU’s third largest steel producer. See Tata Steel and Thyssenkrupp Merger Welcomed by Unions, BBC NEWS, 30 June 2018, www.bbc.com/news/business-44659500. Though publicized as motivated to create a pan-European company, because Tata’s U.K. plants (e.g., at Port Talbot) would merge with Thyssenkrupp’s on the Continent, perhaps the combination was both a hedge against Brexit and adverse effects from the trade war.

The reality of dumping of Chinese aluminum in third countries was made plain in October 2018, when Pittsburgh-based Alcoa announced it would shut two plants it operated in Spain, resulting in a diminution of 6% of its overall capacity, and the loss of 686 jobs. Closure of the Aviles and La Coruna smelters, which Alcoa said were its “least productive,” was due to competition from cheap Chinese products, made possible because of Chinese overcapacity. Quoted in Joe Deaux, Trump Tariffs Fail to Shield Alcoa Plants from China’s Glut (1), 35 International Trade Reporter (BNA) 1395 (25 October 2018).

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strengthened measures, which it said were “it is necessary in the public interest,”241 covered 28 product categories “originating in or exported from” America,242 including almonds, apples, chemicals (e.g., boric and phosphoric acid), diagnostic reagents, hot-rolled coiled products, metals, motorcycles, pulses, and walnuts, from which India expected about $217 million in duty collections.243 Predictably, Mr. Trump called India’s action “unacceptable” and demanded “the tariffs must be withdrawn!”244 Not only did he offer nothing in return, he also falsely accused India of “for years … put[ting] very high Tariffs against the United States….”245

The trade values of some targeted items were significant. For instance, India is the largest and second largest buyer of American almonds and apples (at least those from Washington State), respectively ($543 and $156 million, respectively, as of 2018).246 Indeed, India bought over half of all America’s almond exports. India’s anticipated tariff collections roughly matched the value of America’s Section 232 tariffs on Indian steel and aluminum shipments.

Like India, the EU also not only imposed the counter-retaliatory tariffs it had announced earlier (as above), with effect on 22 June 2018, but also would “impose rebalancing measures and take any necessary steps to protect the EU market from trade diversion caused by these U.S. restrictions” (with effect no later than early July).247 The EU said it was “determined to shield the EU steel and aluminum markets from damage caused by additional imports that might be coming into the EU as a result of the closure of the U.S. market.”248 So, if the EU had to raise steel and aluminum tariffs on third-country shipments (e.g., from India or Japan) that might be diverted away from the U.S. (because of the Section 232 action) to the EU, then it would do so. That was a kind of pre-emptive strike taken as an anticipatory self-defense measure. It also was redolent of the tit-for-tat tariff hikes that spread across the globe after the 1930 U.S. Smoot-Hawley Tariff Act.

242 India Increases Tariffs.
243 India to Impose. The phrase “or exported from” presumably covered non-originating merchandise trans-shipped through the U.S., for example, articles from Canada of Mexico.
244 See Government of India Notification No. 17.
247 See India to Impose.
As for America’s NAFTA partners, Canada announced tariffs effective 1 July 2018 on $12.6 billion worth of American products (including a 25% tariff on many steel, iron, and aluminum products, and a 10% tariff on over 250 goods, such as beer kegs, dishwasher detergent, ketchup, lawn mowers, pizza, orange juice, roasted coffee, whiskey, and yoghurt).<sup>249</sup> Included in the Canadian counter-retaliatory list were key exports from Kansas: not only beef and other meat products, but also $40 million worth (based on 2017 data) of aluminum plates, household and toilet articles, motorboats and outboard motors, and sheet metal.<sup>250</sup> Though calculated to match the value of Canadian exports hurt by America’s Section 232 tariffs, Canada’s move was its strongest trade action since the Second World War.<sup>251</sup> Prime Minister Justin Trudeau decried America’s levies against his country as not only lacking common sense, but also an “affront” to the longstanding relationship between Canada and the U.S., especially to the “thousands of Canadian soldiers who fought and died alongside their American comrades-in-arms” in Afghanistan.<sup>252</sup>

Mexico’s counter-strike list for new duties against $3 billion worth of U.S. merchandise encompassed apples, blueberries, bourbon, cheese, grapes, motor boats, pork, and steel.<sup>253</sup> In specific, the Mexican levies, announced 5 June with immediate effect, were:

1. A 25% tariff on over 40 steel product designations, including bars and flat-rolled steel. Mexico, which is a net steel importer, also added a 15% tariff on steel from third countries, to counter any diversion from such countries away from the American market. Like the EU, Mexico anticipated that steel exporters would look for markets other than the U.S., because of the

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<sup>251</sup> See Canada Retaliatory Tariffs; Greg Quinn & Josh Wingrove, Canada Retaliates with Tariffs on $12.8 Billion of U.S. Goods, 35 International Trade Reporter (BNA) 772 (7 June 2018).


American Section 232 tariffs, and that Mexico might be one such market. Mexico’s 15% tariff on steel was a kind of anticipatory self-defense, or pre-emptive strike, of its steel industry against third-country diversion.

(2) A 20% tariff on pork legs and shoulders, as well as ham and sausages. Mexico is (as of 2017) America’s biggest pork export market, and this retaliatory tariff hit the major American pork-exporting states – Iowa (the biggest hog-producing State, with 30% of all U.S. hog inventory), North Carolina, Minnesota, and Illinois – especially hard.

(3) A 20% tariff on apples, cranberries, grated and parmesan cheese, and potatoes. Here again, Mexico hit back on products that mattered. For apples, Mexico was America’s top export market, accounting for 25% of all apple exports. Washington State was hit especially hard, as it accounts for 85% of all apples exported from the U.S. to Mexico. For potatoes, Mexico was America’s second largest export market, representing 10% of all exports from the U.S., with Idaho, Washington, and Wisconsin the top producers-exporters. For cranberries, Mexico was America’s 16th largest market, accounting for roughly one-half of one percent of U.S. exports, with Wisconsin, Massachusetts, and New Jersey the top producer-exporters. Wisconsin was vulnerable with respect to cheese, as it produces almost half of all American Parmesan cheese.

(4) A 25% tariff on bourbon, whisky, and fresh cheese. Kentucky and Tennessee were in the firing line on the first two products, and Wisconsin was vulnerable with respect to fresh cheese, as it makes more cheese (excluding cottage cheese) than any other State (with California and Idaho second and third).

(5) A tariff ranging from 7%-15% on air pumps, aluminum kitchen wares, fans, lamps, certain categories of metal furniture, lamps, lighting fittings, and motor boats.

Mexico also considered retaliation against American “grains, especially feed corn and soybeans, used to fatten Mexico’s cows, hogs and chickens.” Mexico started diverting purchases of those commodities toward Argentinian and Brazilian suppliers, though it could not reduce dependence on the far larger U.S. producers quickly.

Note the pattern of Mexico’s retaliatory list, and indeed that of most other countries: Mexico fired at products that were politically sensitive, i.e., it singled out products that would cause American constituents to lobby their Senators and Congressman to end the trade war, and those particular politicians tended to be from the same political party as

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President Trump, and held influential leadership positions in Congress.\textsuperscript{255} As Bosco de la Vega, head of Mexico’s largest agricultural lobby, the National Farm Council, noted with respect to possible tariffs on U.S. grains: “any move against grains would aim at the U.S. corn belt, mentioning states such as Missouri, Kansas, Iowa and Nebraska, all of which voted for Trump in the 2016 election.”\textsuperscript{256} Conversely, Iowa Secretary of Agriculture Mike Naig (Republican) expressed the sentiment not only of his state’s farmers and livestock producer-exporters, but of all American businesses shipping overseas: “If our customers around the world start going to other parts of the world for their supplies, that is a serious problem.”\textsuperscript{257}

Note, also, about 16% of America’s exports go to Mexico (as of 2017), whereas about 80% of Mexico’s exports are destined for the U.S. Thus, notwithstanding the bilateral trade balance between the two countries, Mexico is far more dependent on America as an export market than vice versa. That unequal reliance is indicative of how seriously adverse the American Section 232 action was felt in Mexico, and explains why Mexico sought to lessen this dependency by forging ahead with \textit{CPTPP} after America’s January 2017 withdrawal from \textit{TPP}, and why it expanded its FTA with the EU.

All such moves were in addition to China’s which on 2 April 2018 had begun imposing “$611.5 million worth of retaliatory duties on 128 U.S. products. And, all such moves, the Members said, were “substantially equivalent concessions or other obligations” in response to America’s steel and aluminum safeguard launched on the pretense of national security.

- **Controversial GATT Article XXI Findings**

Many WTO Members threatened a \textit{DSU} case against the U.S. for its imposition of Section 232 duties on their steel and aluminum exports, raising the specter of a showdown over GATT Article XXI. (This provision is discussed in a separate Chapter.) That specter materialized on 5 April 2018, when China filed suit against the U.S., with China following through on its contention that the Section 232 action 25% steel and 10% aluminum duties were disguised safeguards (“safeguards measures in substance,” as China put it in its \textit{DSU} complaint), and failed to meet the criteria for safeguard actions set out GATT Article XIX and the WTO \textit{Safeguards Agreement}.\textsuperscript{258} China’s complaint alleged:

\begin{itemize}
  \item \textit{Quoted in Mexico Studies Tariffs}.
  \item \textit{Quoted in Trump Tariffs: Mexico Retaliates}.
\end{itemize}
the United States has failed to make proper determination and to provide reasoned and adequate explanation of “unforeseen developments,” imports “in such increased quantities” and “under such conditions,” and “cause or threaten to cause serious injury to domestic producers,” and the United States has also failed to follow proper procedural requirements including, for example, notification and consultation procedures, and has failed to apply the measures in a proper manner, for example, application irrespective of source of supply and only for necessary period of time.\(^{259}\)

China further argued the Section 232 tariffs breached U.S. bindings for OCDs and ODCs under GATT Article II:1(a)-(b), violated the U.S. MFN obligation under Article I:1 because they were selectively applied against certain Members, such as China, and were administered in a non-transparent (namely, non-uniform, partial and unreasonable manner) in breach of Article X:3(a).

Other Members followed the Chinese lead, such as India on 23 May.\(^{260}\) The Indian complaint noted “the United States imposed 25 percent and 10 percent of additional import

\(^{259}\) Complaint, ¶ B (first bullet point).


Likewise, on 5 June Mexico filed a complaint against the U.S., which included an “as such” challenge. See World Trade Organization, United States – Certain Measures on Steel and Aluminum Products (Request for Consultations by Mexico), 5 June 2018; Daina Beth Solomon, Mexico to Start WTO Dispute Settlement Over U.S. Tariffs, REUTERS, 4 June 2018, www.reuters.com/article/us-usa-trade-mexico/mexico-to-start-wto-dispute-settlement-over-u-s-tariffs-idUSKCN1J022L. Mexico’s Minister of the Economy, Ildefonso Guajardo, said that it was “not understandable” for the U.S. to invoke a trade action on national security grounds against America’s “traditional allies.” Quoted in Bryce Baschuk, Mexico Challenges U.S. Metal Tariffs in WTO, 35 International Trade Reporter (BNA) 753 (7 June 2018).

On 6 June 2018, Canada and the EU filed separate but collaborative WTO complaints against the U.S. See World Trade Organization, United States – Certain Measures on Steel and Aluminum Products (Request for Consultations by Canada), WT/DS550/1 (5 June 2018); World Trade Organization, United States – Certain Measures on Steel and Aluminum Products (Request for Consultations by the European Union), WT/DS548/1 (5 June 2018). Unlike the Chinese and Indian complaints, the Canadian and EU complaints included “as such” challenges to Section 232, alleging the statute was illegal (notwithstanding how it is applied), Canada argued GATT-WTO rules “require the United States to account for economic welfare and other factors that are not necessary for the protection of its essential security interests,” and similarly the EU said Section 232 is inconsistent with the balance of America’s obligations in the WTO Agreement and its annexed agreement. However, following the 2021 decision by the Biden Administration to remove Section 232 tariffs on EU steel and aluminum imports, the EU suspended its WTO case against the U.S.

On 12 June 2018, Norway – which had been a complainant in just three DSU cases that led to the establishment of a Panel, in 2002 (DS254, a steel safeguard case against the U.S.), 2006 (DS328, a salmon safeguard case against the EU), and 2011 (DS401, a fur seals marketing restrictions case against the EU), and which exports both steel and aluminum to the U.S. – became the sixth WTO Member to sue the U.S. over its Section 232 steel and aluminum actions, saying “we all benefit from a situation where right trumps International Trade Law E-Textbook (Raj Bhala, 6th Edition, 2025) University of Kansas (KU) Volume Four Wheat Law Library

In December 2022, the Panel issued its 79-page Report. See World Trade Organization, Panel Report, United States – Certain Measures on Steel and Aluminum Products (Complaint by Norway), WT/DS552/R (9 December 2022), www.wto.org/english/tratop_e/dispu_e/552r_e.pdf. The Panel findings were essentially the same as those in its Report in the case brought by China (summarized supra), with the additional conclusion that America’s Section 232 action violated GATT Article XI:1 (because it entailed quotas on Argentinian, Brazilian, and Korean steel and aluminum). See id., Sections 7-8.


In December 2022, the Panel issued its 94-page Report. See World Trade Organization, Panel Report, United States – Certain Measures on Steel and Aluminum Products (Complaint by Switzerland), WT/DS556/R (9 December 2022), www.wto.org/english/tratop_e/dispu_e/556r_e.pdf. The Panel findings were essentially the same as those in its Report in the case brought by China (summarized supra), with the additional conclusion that America’s Section 232 action violated GATT Article XI:1 (because it entailed quotas on Argentinian, Brazilian, and Korean steel and aluminum). See id., Sections 7-8.

In the history of the WTO, Switzerland had brought only four other cases. See Bryce Baschuk, Switzerland Files WTO Challenge Against U.S. Metal Tariffs, 35 International Trade Reporter (BNA) 912 (12 July 2018). Turkey followed Switzerland, becoming the ninth Member to sue the U.S., and also imposed tariffs on an array of American imports (e.g., 120% on cars, 50% on rice, and 140% on spirits, along with extra duties on cosmetics, food, and tobacco), and supported a boycott of U.S. electronics (e.g., iPhones). See World Trade Organization, United States – Certain Measures on Steel and Aluminum Products – Request for Consultations by Turkey, WT/DS564/1 (15 August 2018), www.wto.org/english/news_e/news18_e/dsrfe564_20aug18_e.htm; Bryce Baschuk, Turkey Launches WTO Dispute Over Trump’s Metal Tariffs (1), 35 International Trade Reporter (BNA) 117 (23 August 2018); Onur Ant, Turkey Announces Tariffs on U.S. Goods from Cars to Alcohol (1), 35 International Trade Reporter (BNA) 1118 (23 August 2018).

In December 2022, the Panel issued its 89-page Report. See World Trade Organization, Panel Report, United States – Certain Measures on Steel and Aluminum Products (Complaint by Turkey), WT/DS564/R (9 December 2022), www.wto.org/english/tratop_e/dispu_e/564r_e.pdf. The Panel findings were essentially the same as those in its Report in the case brought by China (summarized supra), with the additional conclusion that America’s Section 232 action violated GATT Article XI:1 (because it entailed quotas on Argentinian, Brazilian, and Korean steel and aluminum). See id., Sections 7-8.

Ironically, save for China, India, and Mexico, all of the complainants against the U.S. Section 232 steel and aluminum tariffs were NATO allies, and Russia is a NATO partner country.

By December 2018, all nine dispute settlement Panels had been established. See Bruce Baschuk, Switzerland, India Join WTO Dispute Over U.S. Metal Tariffs, 35 International Trade Reporter (BNA) 1573 (6 December 2018). The U.S. response to all complaints was straightforward and predictable:

The President determined that tariffs were necessary to adjust the imports of steel and aluminum articles that threaten to impair the national security of the United States. Issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement. Every Member of the WTO retains the authority to determine
for itself those matters that it considers necessary to the protection of its essential security interests, as is reflected in the text of Article XXI of the GATT 1994.

World Trade Organization, *United States – Certain Measures on Steel and Aluminum Products, Communication from the United States*, WT/DS547/7 (6 July 2018) (responding on 28 May to the Indian complaint, with nearly identical responses to all other complaints). The U.S. also said there is no basis in Article 8:2 of the *Safeguards Agreement* for the counter-retaliatory measures imposed by other Members, because the Section 232 tariffs were not safeguard measures. As noted above, the U.S. lost all of the cases.


These cases were “politically fraught confrontation[s]” that the WTO had long sought to avoid. On the one hand, an American victory under GATT Article XXI “could entice the body’s 164 Members to use the national security justification to impose protectionist measures for economic gain;” on the other hand, an American loss could provoke “President Donald Trump ... [to] decide to leave the WTO entirely.” Bryce Baschuk, *Trump’s Steel, Aluminum Tariffs to Be Investigated by WTO Panel*, 35 International Trade Reporter (BNA) 1537 (29 November 2018). The U.S. delegation to the WTO made clear that “[a]ny review of America’s essential security interests ‘would undermine the legitimacy of the WTO’s dispute settlement system and even the viability of the WTO as a whole.’” *Quoted in id.*

In May 2019, with the U.S. removal of Section 232 tariffs on Canadian and Mexican steel and aluminum, the cases involving Canada and Mexico were dropped. See WTO Panel Report, *United States – Certain Measures on Steel and Aluminum Products*, WT/DS550/R (11 July 2019, complaint by Canada) and *United States – Certain Measures on Steel and Aluminum Products*, WT/DS551/R (11 July 2019, complaint by Mexico) (both describing the actions and stating that a mutually agreeable solution was reached under *DSU* Article 12:7).

In August 2023, a WTO Panel rejected China’s claim that its retaliatory tariffs against the U.S. Section 232 steel and aluminum tariffs were justified:

8.1. For the reasons set forth in this *Report*, the Panel concludes:

a. Article 8:2 of the *Agreement on Safeguards* and Article XIX.3(a) of the GATT 1994 do not apply to China’s additional duties measure. Accordingly, the application of Articles I and II of the GATT 1994 is not suspended in relation to that measure.

b. Regarding the United States’ claim under Article I:1 of the GATT 1994:

i. China’s additional duties measure is inconsistent with Article I:1 of the GATT 1994 because, with respect to customs duties imposed on or in connection with importation, it fails to accord an advantage granted to products originating outside the United States immediately and unconditionally to products originating in the United States.

c. Regarding the United States’ claims under Articles II:1(a) and II:1(b) of the GATT 1994:

i. China’s additional duties measure is inconsistent with Article II:1(b) of the GATT 1994 because it results in the imposition of ordinary customs duties on 123 tariff lines in excess of the bound rates set forth in China’s Schedule.
duty on certain steel products and aluminum products respectively from all countries except Canada, Mexico, Australia, Argentina, South Korea, Brazil and the European Union, which took effect from 23 March 2018.” India alleged America’s action violated no less than six different categories of GATT-WTO rules:

- Articles XIX:1(a), XIX:2 of the GATT 1994 and Articles 2:1, 2:2, 3:1, 4:1, 4:2, 5:1, 7, 9:1, 11:1(a), 12:1, 12:2 and 12:3 of the Agreement on Safeguards because the measures at issue are, in effect and in substance, safeguard measures and the United States has adopted and implemented the measures at issue inconsistently with its obligations, both substantive and procedural.

- Article 11:1(b) of the Agreement on Safeguards and [GATT] Article XI:1 ... to the extent that the United States seeks, through the adoption of the measures at issue, any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.

- [GATT] Article II:1(a) and (b) …, because the United States has imposed import duties on certain steel and aluminum products in excess of the duties set forth and provided in … the United States’ Schedule of Concessions and Commitments annexed to … GATT.

- [GATT] Article I:1 …, because the measures at issue do not apply uniformly to all imports of certain steel and aluminum products into

ii. China’s additional duties measure is inconsistent with Article II:1(a) of the GATT 1994 because it imposes ordinary customs duties on United States-origin imports in excess of those set forth in China’s Schedule, thus according to those imports treatment less favourable than that provided for in China’s Schedule.

8.2. Under Article 3:8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. The Panel concludes that, to the extent that China’s additional duties measure is inconsistent with certain provisions of the GATT 1994, it has nullified or impaired benefits accruing to the United States under that Agreement.

8.3. Pursuant to Article 19:1 of the DSU, the Panel recommends that China bring its WTO-inconsistent measure into conformity with its obligations under the GATT 1994.
Succinctly put, India argued the Section 232 steel and aluminum tariffs were a disguised safeguard that paid no heed to the criteria for a safeguard, breached the MFN, tariff binding, and transparency rules. By waiting roughly six weeks after China lodged its complaint, India had the advantage of taking on the argument that America’s bilateral deals with certain, but not other, WTO Members, were illegal VERs (a point discussed above).

In December 2022, the Panel issued its 84-page Report. The Panel held the U.S. Section 232 25% and 10% duties on steel, aluminum, and derivative products violated America’s tariff binding under GATT Article II:1(a)-(b), and the country exemptions America granted to Australia, Argentina, Brazil, Korea, and to Canada and Mexico, without extending them immediately and unconditionally to all other WTO Members, violated America’s MFN obligation under GATT Article I:1. The Panel further held the U.S. took the Section 232 action under GATT Article XXI (national security), not under Article XIX (safeguards), hence the latter provision was irrelevant to the case. The Panel rejected America’s Article XXI(b) argument, i.e., its invocation of its “essential security interests” to justify the Section 232 measures; the Panel held these measures were not (in the language of Article XXI(b)(iii)) “taken in time of war or other emergency in international relations,” and thus the Article I:1 and II:1 violations could not be justified.

Contrary to the American argument, the Panel said global excess capacity in the steel and aluminum industries, and any irreversible damage to the U.S. steel and aluminum industries as a result of this excess capacity that would harm their ability to address national emergencies, did not constitute an “emergency in international relations.” Rather, said the Panel: “the Panel is not persuaded that the situation to which the United States refers rises to the gravity or severity of tensions on the international plane so as to constitute an

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261 Indian Complaint, 2-3.
‘emergency in international relations’ during which a Member may act under Article XXI(b)(iii).”

Obviously, in rendering this holding, the Panel – after a lengthy textual (grammatical) and contextual analysis of GATT Article XXI(b), and negotiating histories from GATT, the ITO Charter, and Uruguay Round – also rejected America’s argument that Article XXI is self-judging and non-justiciable. The Panel exercised judicial economy and did not rule on China’s GATT Article X transparency claim. (The portion of the Panel Report concerning Article XXI is excerpted in a separate Chapter.)

At a January 2023 WTO meeting, China’s Ambassador to the WTO, Li Chenggang, intoned: “These troubling behaviors of the U.S. have clearly depicted an image of the U.S. as a unilateral bully, a rule breaker, and a supply chain disruptor.” Deputy USTR Maria Pagan fired back: “A WTO that serves to shield China’s non-market policies and practices is not in anyone’s interest.” The USTR also decried the ruling:

In one of the most high-profile and potentially explosive cases to come to the WTO, the three-person adjudicating Panel said the U.S. measures were inconsistent with WTO rules and recommended the United States bring them into conformity.

The United States said it strongly rejected the “flawed” interpretation and conclusions of the Panel.

The case hinged on the exemption from global trade rules the WTO allows in cases of national security.

The central U.S. argument was that national security is for countries themselves to judge and certainly not something to be assessed by three WTO adjudicators sitting in Geneva.

The Office of the U.S. Trade Representative said in a statement that the United States would not “stand idle by” while Chinese overcapacity posed a threat to its steel and aluminum sectors and its national security.

266 Quoted in China, U.S. Spar at WTO.
“We do not intend to remove the Section 232 duties as a result of these disputes,” it said, adding the Panel Report reinforced the need for WTO reform.268

Legally, of course, no organ of the WTO could compel a change in U.S. law: at worst, the U.S. could pay compensation to China (and the other victorious complainants, which was highly unlikely), or suffer retaliation. The U.S. appealed the Panel Report (as well as the Reports in the cases brought by Norway, Switzerland, and Turkey) knowing full well it was doing so into a void of which it had been the prime cause, having blocked appointments of new Appellate Body members (as discussed in a separate Chapter).269

To be sure, more than a disagreement about the interpretation of GATT Article XXI was at stake. As it approached the 2024 Presidential election, the Biden Administration did not want to alienate a constituency it had won back from President Trump in the 2020 Presidential election:

If there were any hope President Joe Biden would undo his predecessor’s divisive trade tariffs that caused upheaval in the global steel and aluminum markets, it all but evaporated….

The U.S. Trade Representative issued a strong rebuke of the World Trade Organization’s decision that former President Donald Trump’s 25% tariffs on steel imports and 10% duty on aluminum violates international rules. It’s the strongest statement yet from the White House that Biden has no intention to remove the duties, which would potentially alienate one of his most important bases of support: steelworkers.

“The Biden Administration is committed to preserving U.S. national security by ensuring the long-term viability of our steel and aluminum industries, and we do not intend to remove the Section 232 duties as a result of these disputes,” Adam Hodge, a Spokesman for the U.S. Trade Representative, said….

There was much discussion in the leadup to the 2020 election and the early days of Biden’s Presidency whether he would roll back the tariffs, which manufacturers from Caterpillar Inc. to Whirlpool Corp. to Harley Davidson Inc. had long complained were hurting US companies. The President instead chose to make some soft concessions to key allies, such as the European Union, while keeping the Section 232 tariffs, which the US sees as vital for national security, in place for most others.

Two industry insiders familiar with the matter said the USTR’s stance on the ruling gives them certainty the President won’t roll back the Section 232 tariffs. The metals industry already was taking a victory lap with US Steel Corp. commending Biden for defending the industry and the United Steelworkers calling the WTO’s decision “just plain wrong.”

At least from the perspective of stirring up yet more bipartisan animosity against the WTO dispute settlement system, feeding its long-standing criticism of judicial over-reach, the Panel decision indeed seemed “just plain wrong.”

VI. Product Exclusion Usage

Interestingly, in July 2023, GAO published a 66-page Report on the usage and administration of Section 232 steel and aluminum product exclusion programs. GAO concluded importers had used only a small portion of DOC-approved product exclusions. That was because in their product exclusion requests, importers over-claimed the quantities at stake. They paid no duties on the unused overage, and thus potentially deprived the government of millions of dollars of tariff revenue. The study was based on import entry data from March 2018 through September 2021, and two distinguished practitioners well summarize its key points.

JOHN BREW & WALTER (SAM) BOONE, CROWELL & MORING LLP, GAO REPORT ON SECTION 232 EXCLUSIONS SIGNALS INCREASED ENFORCEMENT FOR STEEL AND ALUMINUM IMPORTERS (15 AUGUST 2023)

… The [GAO] Report detailed the shortcomings of … BIS … and CBP in administering the Section 232 exclusion programs. …

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272 As a result of the GAO Report, on 15 February 2024, CBP changed its Section 232 product exclusion policy. CBP began deactivating certain products that had been granted exclusions from Section 232 tariffs, once those products reached 95% of the quantity limit of a Section 232 exclusion. That way, per the Report, importers could not exceed the exclusion limits yet avoid paying the Section 232 tariff. The new regime applied to exclusions for (1) EU states subject to Section 232 TRQs, (2) any country subject to both tariffs and quotas, and (3) any non-quota country. In all other circumstances, CBP continued to de-activate a product exclusion only when that product hit the 100% quantity limit threshold for an exclusion. See U.S. Customs and Border Protection, CSMS # 58942510 – Guidance: New Threshold for Deactivating Section 232 Exclusions, (5 January 2024), https://content.govdelivery.com/bulletins/gd/USDHSCBP-383642e?wgt_ref=USDHSCBP_WIDGET_2.
The BIS established the steel and aluminum exclusion programs in 2018 which allows organizations to submit requests which once granted permit a certain amount of steel or aluminum imports to avoid paying 25% and 10% tariffs respectively. While the steel and aluminum exclusion programs offer importers the opportunity for massive duty savings, the U.S. government has missed out on a significant amount of revenue since the inception of the program. Due to the massive administration burden on BIS and CBP to run and implement these exclusion programs, GAO identified several issues where enforcement of the exclusions is lacking. … GAO proposed four recommendations: 1) for CBP to take additional steps to recover the duties owed by importers as a result of invalid use of Section 232 exclusions; 2) for CBP to ensure that controls are implemented to prevent importers from exceeding the approved quantities of their Section 232 exclusions; 3) for BIS to evaluate the results of the certification requirement; and, 4) for BIS to develop a more consistent data transfer process. Both BIS and CBP concurred with these recommendations.

The headline number from the Report is that GAO estimates that importers may owe about $32 million in duties because of invalid use of Section 232 exclusions, as of November 10, 2021. The analysis showed that during the period of review, importers properly utilized 61,243 exclusions to avoid paying Section 232 duties. However, there were 3,959 instances of invalid use related to five exclusion parameters: exclusion identification number, HTSUS code, country of origin, validity period, and quantity. Of those 3,959 instances of incorrect use, 3,884 or 98% related to quantity. One of the reasons for the loss in revenue is that CBP lacks effective controls to prevent importers from exceeding the approved exclusion quantities. … [O]f the $32 million in lost revenue, an estimated $29.4 million of the duties were caused by invalid use related to the quantity parameter. … CBP only had 90 days to develop and implement a method for validating Section 232 exclusion claims and did not have the resources to update ACE programming to provide for automatic validation of exclusion quantities. … [E]stablishing an automated quantity control would have been highly time and labor intensive because then ACE would need to be programmed to track each exclusion’s quantity individually before it can automatically deactivate the exclusion when the approved quantity has been reached. Currently, CBP needs to manually deactivate exclusions that have reached quota but the lag time between when importers reach approved quantities and CBP’s manual deactivation allows importers to overclaim exclusions and not pay duties on the overage. … [U]ntil CBP implements more effective controls to prevent overclaiming and to recover duties owed, the U.S. government is at risk of losing millions of dollars in revenue. …

The GAO Report analyzed the utilization of approved Section 232 exclusions. During the period of review, only 29% of steel exclusions and 38% of aluminum exclusions were used. When exclusion utilization is measured in terms of quantity importers used an even smaller fraction of what BIS approved, partially because importers often do not use the full quantity even when they use exclusions. During the period of review, only 9% of steel exclusion quantity and 9% of aluminum exclusions were used. … [T]hese exclusions resulted in an estimated $2.2 billion in tariff savings for steel importers and $440 million for aluminum importers. The Report offers several explanations for why exclusion usage is so low. First,
there are many granted redundant exclusion requests where exclusions have the same HTSUS code, approval date, countries of origin, and IOR name. Another explanation is that BIS approved exclusions with exceedingly large quantities which far exceeded historical import figures.

As both BIS and CBP take steps to address GAO’s four recommendations for Executive Action …, it is clear that maintaining the Section 232 exclusion process has proved to be a tremendous burden for BIS and CBP. … [R]equesting organizations confirm that their Section 232 requests are in accordance with Commerce’s guidelines. Importers should also track the usage of their exclusions to prevent exceeding the quotas and file any renewal exclusions in a timely manner. Failure to maintain a robust system of submitting and monitoring one’s own Section 232 exclusions could end up costing importer’s millions in duty savings opportunities.
Chapter 9

SECTION 232 (CONTINUED):
STEEL AND ALUMINUM DERIVATIVES, AND GREEN DEAL

I. January 2020 Expansion of March 2018 Proclamations to Derivatives

On 24 January 2020, President Donald J. Trump (1946-, President, 2017-2021) issued a Proclamation extending the initial March 2018 Section 232 orders to derivative (i.e., downstream) steel and aluminum products. The Proclamation (excerpted below) bespeaks the theory underlying his Administration’s trade policy: Mercantilist-style economic nationalism encapsulated in the (in)famous phrase, “America First.” That is, imports of goods (such as steel and aluminum, from whatever source, friend or foe) necessary for America’s national security potentially undermine the U.S. industrial base, and certainly do so if American producers cannot maintain at least an 80% production capacity utilization rate. If that metric is violated, then imports of those goods must be adjusted (downwards) under Section 232 to revitalize U.S. producers and, by extension, redress trade imbalances and boost export earnings for imperilled U.S. producers to invest in their operations to regain their international competitive advantages.

Data indicated that although steel and aluminum imports declined since the March 2018 orders, “imports of derivative products, like steel nails and aluminum cables, ha[d] increased.” Indeed, foreign derivative product producers were upping shipments of their finished merchandise, arguably to circumvent the Section 232 tariffs on raw steel and aluminum they use as inputs for their goods. Yet, whether imports were to blame was debated:

While steel prices initially rose, they’re down about 30% since the President’s announcement in March 2018. Steel companies, as well as American aluminum producers, including Alcoa Corp. and Century Aluminum Co., have seen shares fall because of declining demand – alongside a dip in manufacturing activity, and because of increased domestic supply coming online.

274 Documents References:
(1) Havana (ITO) Charter Preamble, Article 99
(2) GATT Article XXI
(3) Relevant provisions in FTAs


276 Trump Increases Tariffs.

277 Trump Expands Aluminum.
Also debated were four other points about this Proclamation.278

First, the Proclamation defined a “derivative” product, as it should. Without a precise answer to the question – How much foreign steel or aluminum must a foreign good have to qualify as a “downstream” product? – the scope of application of the Proclamation beyond raw steel and aluminum would be limitless. Regrettably, the Proclamation lacked transparency. Its Annex I and II lists of aluminum and steel derivatives, respectively, were not published simultaneously with the Proclamation itself. Not until 27 January, three days after the Proclamation, were they published.279 Examples from Annex I of aluminium derivatives subject to the 10% duty were aluminium stranded wire, body stampings for tractors, bumper stampings for motor vehicles, cables, and plaited bands. Annex II steel derivatives subject to the 25% duty included body stampings for tractors, bumper stampings for motor vehicles, corrugated nails, drawing pins, steel nails, and tacks.

Second, the Proclamation exempted only those countries the President had agreed to exempt from the initial Section 232 action. For downstream steel products, that meant no duties on derivative steel merchandise from Argentina, Australia, Brazil, and Korea, and thanks to the USMCA (discussed in a separate Chapter), Canada and Mexico. For aluminum derivatives, along with merchandise from the USMCA Parties, Argentine and Aussie products were exempt.

Third, this Proclamation was issued long after the 90-day statutory deadline Section 232 sets for modifying trade remedy orders. The Proclamation called for 25% and 10% tariffs on downstream steel and aluminum products, respectively, effective 8 February 2020. But, the original Section 232 order was dated 8 March 2018. Litigation in the CIT (namely, the November 2019 Transpacific Steel decision, excerpted above) cast doubt

278 A fifth point is that like raw steel and aluminum goods, derivative products were eligible for product exclusions.
280 See also the CIT decisions in PrimeSource I and II, that is, respectively: (1) PrimeSource Building Products, Inc. v. U.S., Number 20-00032, Slip Opinion 21-8 (27 January 2021) (declining to dismiss a challenge alleging that President Trump lacked the ability to modify existing Section 232 steel duties to include, later on, Section 232 duties on steel derivative products), www.cit.uscourts.gov/sites/cit/files/21-08.pdf; and (2) PrimeSource Building Products, Inc. v. U.S., Number 20-00032, Slip Opinion 21-36 (5 April 2021), www.cit.uscourts.gov/sites/cit/files/21-36.pdf (holding President Trump’s Proclamation 9980 of 24 January 2020 imposing Section 232 duties of 25% on steel derivative products, and 10% on aluminum-derivative products, invalid, because he issued it outside the applicable statutory 105-day time frame, that is, after the authority delegated to him by Congress in Section 232 had expired: “any determination the President could have made to adjust the duties on imports of derivatives of the articles named in Proclamation 9705 [i.e., Proclamation 9705, Adjusting Imports of Steel Into the United States, 83 Federal Register 11,625 (15 March 2018)] was required by the statute to have been made during the 90-day period commencing with the President’s receipt of a report of the Commerce Secretary satisfying the requirements of Section 232(b)(3)(A), and any action to implement that determination was required to have been taken, if at all, during the 15-day period following that determination. … Because the President issued Proclamation 9980 after the Congressionally-delegated authority to adjust imports of the products addressed in that International Trade Law E-Textbook (Raj Bhala, 6th Edition, 2025) University of Kansas (KU) Volume Four Wheat Law Library
on the President’s authority to expand his original order almost two years after that order. Per a 17 January 2020 memo, the DOJ Office of Legal Counsel said the 90-day deadline was irrelevant – the President is empowered to modify extant Section 232 orders (essentially) at any point. Foreign producer-exporters of the potentially subject merchandise obviously disagreed with the DOJ, and continued litigation ensued.

Fourth, with respect to FTZ entry, the Proclamation made clear derivative merchandise must be admitted as PF Status. Once admitted out of the FTZ into the U.S. as entry for consumption, Section 232 duties would apply.

THE WHITE HOUSE, PROCLAMATION ON ADJUSTING IMPORTS OF DERIVATIVE ALUMINUM ARTICLES AND DERIVATIVE STEEL ARTICLES INTO THE UNITED STATES (24 JANUARY 2020)

2. In Proclamation 9704 of March 8, 2018 (Adjusting Imports of Aluminum Into the United States), and Proclamation 9705 of March 8, 2018 (Adjusting Imports of Steel Into the United States), I concurred in the [Commerce] Secretary’s findings that aluminum articles and steel articles were being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States. I therefore decided to adjust the imports of aluminum articles, as defined in Clause 1 of Proclamation 9704, … by imposing a 10 percent ad valorem tariff on such articles imported from most countries, beginning March 23, 2018. I also decided to adjust the imports of steel articles, as defined in Clause 1 of Proclamation 9705, … by imposing a 25 percent ad valorem tariff on such articles imported from most countries, beginning March 23, 2018.

... 

5. The Secretary [of Commerce] has informed me that domestic steel producers’ capacity utilization has not stabilized for an extended period of time at or above the 80 percent capacity utilization level identified in his report as necessary to remove the threatened impairment of the national security. Stabilizing at that level is important to provide the industry with a reasonable expectation that market conditions will prevail long enough to justify the investment necessary to ramp up production to a sustainable and profitable level. Capacity utilization in the aluminum industry has improved, but it is still below the target capacity utilization that the Secretary recommended in his report. Although imports of aluminum articles and steel articles have declined since the imposition of the tariffs and quotas, the Secretary has informed me that imports of certain...
derivatives of aluminum articles and imports of certain derivatives of steel articles have significantly increased since the imposition of the tariffs and quotas. The net effect of the increase of imports of these derivatives has been to erode the customer base for U.S. producers of aluminum and steel and undermine the purpose of the Proclamations adjusting imports of aluminum and steel articles to remove the threatened impairment of the national security.

6. The derivative articles the Secretary identified are described in Annex I (aluminum) and Annex II (steel) to this Proclamation. For purposes of this Proclamation, the Secretary determined that an article is “derivative” of an aluminum article or steel article if all of the following conditions are present: (a) the aluminum article or steel article represents, on average, two-thirds or more of the total cost of materials of the derivative article; (b) import volumes of such derivative article increased year-to-year since June 1, 2018, following the imposition of the tariffs in Proclamation 9704 and Proclamation 9705, … respectively, in comparison to import volumes of such derivative article during the 2 preceding years; and (c) import volumes of such derivative article following the imposition of the tariffs exceeded the 4 percent average increase in the total volume of goods imported into the United States during the same period since June 1, 2018. …

7. From June 2018 to May 2019, import volumes of steel nails, tacks, drawing pins, corrugated nails, staples, and similar derivative articles increased by 33 percent, compared to June 2017 to May 2018, and increased by 29 percent, compared to June 2016 to May 2017. From January 2019 to November 2019, import volumes of such articles increased by 23 percent, compared to the same period in 2017. Similarly, from June 2018 to May 2019, import volumes of aluminum stranded wire, cables, plaited bands, and the like (including slings and similar derivative articles) increased by 152 percent, compared to June 2017 to May 2018, and increased by 52 percent, compared to June 2016 to May 2017. From January 2019 to November 2019, import volumes of such articles increased by 127 percent, compared to the same period in 2017. Finally, from June 2018 to May 2019, import volumes of bumper and body stampings of aluminum and steel for motor vehicles and tractors increased by 38 percent, compared to June 2017 to May 2018, and increased by 56 percent, compared to June 2016 to May 2017. From January 2019 to November 2019, import volumes of such articles increased by 37 percent, compared to the same period in 2017.

8. It is the Secretary’s assessment that foreign producers of these derivative articles have increased shipments of such articles to the United States to circumvent the duties on aluminum articles and steel articles imposed in Proclamation 9704 and Proclamation 9705, and that imports of these derivative articles threaten to undermine the actions taken to address the risk to the national security of the United States…. As detailed in the Secretary’s reports, domestic production capacity to produce aluminum articles and steel articles for national defense and critical infrastructure is essential to United States national security. This domestic production capacity is used to provide the essential inputs of aluminum and steel used in derivative aluminum articles and derivative steel articles. The Secretary has assessed that reducing imports of the derivative articles described in Annex I and Annex II to this Proclamation would reduce circumvention and facilitate the
adjustment of imports that Proclamation 9704 and Proclamation 9705, ... made to increase domestic capacity utilization to address the threatened impairment of the national security of the United States.

9. Based on the Secretary’s assessments, I have concluded that it is necessary and appropriate in light of our national security interests to adjust the tariffs imposed by previous Proclamations to apply to the derivatives of aluminum articles and steel articles described in Annex I and Annex II to this Proclamation. This action is necessary and appropriate to address circumvention that is undermining the effectiveness of the adjustment of imports made in Proclamation 9704 and Proclamation 9705, ... and to remove the threatened impairment of the national security of the United States found in those Proclamations.

10. Section 232 of the Trade Expansion Act of 1962, ... authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security of the United States.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States ..., by the authority vested in me by the Constitution and the laws of the United States ..., including Section 232 ..., do hereby proclaim ...:

(1) [T]o establish increases in the duty rate on imports of certain derivative articles, ... Chapter 99 of the HTSUS is modified as provided in Annex I and Annex II to this Proclamation. Except as otherwise provided in this Proclamation, all imports of derivative aluminum articles specified in Annex I to this Proclamation shall be subject to an additional 10 percent ad valorem rate of duty, and all imports of derivative steel articles specified in Annex II to this Proclamation shall be subject to an additional 25 percent ad valorem rate of duty, with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern standard time on February 8, 2020. These rates of duty, which are in addition to any other duties, fees, exactions, and charges applicable to such imported derivative aluminum articles or steel articles, shall apply to imports of derivative aluminum articles described in Annex I ... from all countries except Argentina, ... Australia ..., Canada, and ... Mexico and to imports of derivative steel articles described in Annex II ... from all countries except Argentina, Australia, Brazil, Canada, Mexico, and South Korea. The Secretary shall continue to monitor imports of the derivative articles ... and shall, from time to time, in consultation with the ... USTR, review the status of such imports with respect to the national security of the United States. In the event of a surge of imports of any derivative article ... the Secretary, with the concurrence of the USTR, is authorized to extend application of the tariff imposed by this Proclamation on imports of any derivative article experiencing such surge from such country, or to adopt appropriate quotas for imports of such derivative article from such country, or to negotiate a voluntary agreement with such country to ensure that imports of such derivative article from such country do not undermine the effectiveness of the adjustment of imports made in Proclamation 9704 and Proclamation 9705, as amended. ...
(2) The Secretary, in consultation with the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the USTR, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and such other senior executive branch officials as the Secretary deems appropriate, is hereby authorized to provide relief from the additional duties set forth in Clause 1 of this Proclamation for any derivative article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality and is also authorized to provide such relief based upon specific national security considerations. Such relief shall be provided for a derivative article only after a request for exclusion is made by a directly affected party located in the United States. …

(3) Any derivative article described in Annex I or Annex II to this Proclamation, except those eligible for admission under “domestic status” as defined in 19 CFR 146.43, that is subject to the duty imposed by Clause 1 of this Proclamation and that is admitted into a U.S. foreign trade zone on or after 12:01 a.m. Eastern Standard Time on February 8, 2020, may only be admitted as “privileged foreign status” as defined in 19 CFR 146.41, and will be subject upon entry for consumption to any ad valorem rates of duty related to the classification under the applicable HTSUS subheading. …

(4) Derivative articles shall not be subject upon entry for consumption to the duty established in Clause 1 of this Proclamation merely by reason of manufacture in a U.S. foreign trade zone. However, derivative articles admitted into a U.S. foreign trade zone in “privileged foreign status” pursuant to Clause 3 of this Proclamation shall retain that status consistent with 19 CFR 146.41(e).

(5) No drawback shall be available with respect to the duties imposed on any derivative article….

II. Making Peace with EU

Alas, neither the Steel nor Aluminum War with the EU was over, notwithstanding the avowed trade policy goal of President Trump’s successor, President Joseph R. Biden (1942-, President, 2021-) to repair trade relations with America’s traditional allies. In April 2021, the new Administration debated whether to continue with the Section 232 actions:

The Biden Administration faces a major dilemma in its dispute with the European Union over Trump-era steel and aluminum tariffs: back down to avoid acute pain for Harley-Davidson Inc and whiskey distillers or stick with the duties even though they are now exacerbating acute shortages for U.S. manufacturers.

The EU has threatened to double the tariffs on Harley-Davidson motorcycles, American-made whiskey, and power boats to 50% on June 1 [2021], cutting off any residual hope of exports to the continent.
President Joe Biden has pledged that he will maintain the tariff protections for the steel and aluminum industries until the problem of global excess production capacity – largely centered in China – can be addressed.

…

The Milwaukee-based company [Harley-Davidson] is betting heavily on Europe, its second-largest market, to help fuel its turnaround strategy. But higher tariffs would give its rivals including Triumph, Honda and Suzuki a massive pricing advantage.

In Bristol, Pennsylvania, the craft distiller of Dad’s Hat Pennsylvania Rye Whiskey recently managed to ship its first pallet to a European distributor in over two years after the current 25% tariffs stunted a growing export business in 2018.

“If you double those tariffs, forget about it. It would be done,” Mountain Laurel Spirits LLC owner Herman Mihalich said of his export prospects.

…

The United Steelworkers union and the mills that employ its members are urging the administration to continue backing the Section 232 tariffs on steel and aluminum, arguing that lifting them would allow subsidized Chinese steel to flood back into the U.S. market via third countries.

…

U.S. Trade Representative [Katherine] Tai told Senators that she is working with EU counterparts to find a solution, but they must address the issue of excess capacity in China, which produces half the world’s steel.

She said she hopes that EU officials see the problem “as serious a challenge to their ability to produce and compete in steelmaking as we see it, and working together we will be able to resolve these sets of tariffs so that we can join forces on the bigger picture.”

The EU has never accepted the premise of the 25% steel and 10% aluminum tariffs imposed by former president Donald Trump in March 2018, duties based on a Cold War-era trade law to protect domestic industries deemed critical to national security.

Critics from the EU to metals-consuming industries and the U.S. Chamber of Commerce argued that the metals were commodities available in ample quantity to meet U.S. defense needs and that European producers in countries that are trusted U.S. allies present no threat to U.S. security.

…

When the tariffs were imposed, the steel industry looked very different from its current supply-constrained condition. Imports were flooding in, taking nearly 30% of the U.S. market, and holding U.S. Midwest hot-rolled steel spot prices below $600 per ton.
The goal of the tariffs was to return U.S. steel mills to 80% of capacity use, a level at which they could thrive, and imports sank to around 15% of the U.S. market in January.

But this week [26-30 April 2021], amid severe shortages caused by the coronavirus pandemic, that spot price is pushing $1,500 a ton, making it cheaper in some cases to import steel and pay the 25% tariff, some steel users say.

…

The industry had shut down as much as 30% of its capacity during the coronavirus pandemic, and it has been slow to reopen. Several blast furnaces shut last year remain idled, and newly built electric-arc furnace mills prompted by the tariffs have been slow to ramp up production.

The industry has also consolidated, increasing its pricing power, with iron ore miner Cleveland-Cliffs Inc last year acquiring both AK Steel and the U.S. assets of Arcelor Mittal, while U.S. Steel bought Arkansas mini-mill producer Big River Steel. Both are still idling older plants.

Nucor Corp, the largest U.S. steelmaker, last week reported the highest-ever first quarter profit in its history, citing strong demand and higher prices.

…

The Trump Administration had promised a rust belt jobs revival when it imposed the tariffs in 2018. But after rising in 2019 followed by COVID-19 shutdowns, iron and steel mill employment in February was down about 2,300 jobs from pre-tariff levels….\(^\text{283}\)

Among the several points in this report, note especially the persistent problem of Chinese overcapacity, and the different domestic U.S. interests at stake.

Given that problem – and mindful of the fact that less than 1% of all steel consumed in the U.S. originated in China\(^\text{284}\) – May 2021, America and the EU inched toward a solution of their part of the Steel and Aluminum Trade War. They were not the cause of each other’s woes, yet the tariffs they imposed on each other spread misery across their economies. So, the EU announced it would forbear from doubling to 50% its counter-


\(^{284}\) See Jenny Leonard, *U.S., EU Set to Reach Temporary Tariff Truce Over Metals*, Bloomberg, 14 May 2021, www.bloomberg.com/news/articles/2021-05-14/u-s-eu-set-to-reach-temporary-tariff-truce-in-metals-dispute?sref=7sxw9Sxl. To be sure, the de minimis sourcing from China was due not only to Section 232 tariffs, but also AD/CVD duties. See Taisei Hoyama, *U.S. and EU Reach Metals Tariff Truce to Focus on Mutual Rival China*, Nikkei Asia, 19 May 2021, https://asia.nikkei.com/Economy/Trade/US-and-EU-reach-metals-tariff-truce-to-focus-on-mutual-rival-China (reporting: “Anti-dumping duties and other barriers have already cut into American steel imports from China, which accounted for just 1.8% of the total by volume last year [2020]…. While Germany ranked fifth at 4%, it was outpaced by Canada, Brazil, Mexico and South Korea.”).
retaliatory duties on a variety of U.S. exports (including bourbon and whiskey, plus Harley-Davidson motorcycles and Levi-Strauss blue jeans), which it had threatened to do so effective 1 June 2021. The two sides gave themselves until year-end 2021 for a dialog on what to do about Chinese overcapacity. As EU Trade Commissioner Vladis Dombrovskis put it:

“By suspending our measures, we are creating the space to resolve these issues before the end of the year.

“The EU is not a national security threat to the U.S. But the distortions created by global excess capacity – driven largely by third parties – pose a serious threat to the market-oriented EU and U.S. steel and aluminium industries and the workers in those industries.”

But, in the meantime, they left their extant levies in place.

Toward a permanent resolution of the Section 232 dispute (and related WTO cases), in June 2021 the U.S. and EU pledged their joint commitment on four points. In their U.S.-EU Summit Statement, they said they would: (1) engage in discussions to allow the resolution of existing differences on measures regarding steel and aluminum before year-end 2021, (2) collaborate to resolve tensions arising from the U.S. application of tariffs on imports from the EU under Section 232, and boost trade from its 2020 lows, (3) ensure the long-term viability of the American and European steel and aluminum industries, and (4) address excess capacity, in part through a new Working Group. However, how effective could a resolution be, especially concerning point (4), when the major culprits responsible for over-capacity, including China, which produced more than half of the world’s steel, were not engaged?

III. October 2021 U.S.-EU Global Arrangement on Sustainable Steel and Aluminum

In October 2021, the U.S. and EU answered that question with a pivot. Instead of addressing the world overcapacity, they would focus on climate change. They announced a 70-paged “Green Deal,” namely, the Global Arrangement on Sustainable Steel and Aluminum. The Deal consisted of three key parts.


286 Quoted in Sam Fleming, EU Signals U.S. Trade Detente by Shelving Planned Tariffs Increase, FINANCIAL TIMES, 17 May 2021, www.ft.com/content/603c83bc-0c0e-4bd9-9fb3-0f5ea5b264c0?shareType=nongift (Emphasis added.)


289 U.S., EU End Steel and Aluminum.
First, beginning 1 January 2022, the U.S. agreed to forego for two years the 25% and 10% Section 232 tariffs on EU-origin steel and aluminum, respectively. That is, “the two sides agreed to pause punitive measures on each other’s goods, and set a deadline of” 31 October 2023 to “find[] a permanent solution to the [steel and aluminum wars triggered by the U.S. 2018 Section 232 action].”\(^{290}\) Instead, America replaced the absolute quota (discussed earlier) with a TRQ consistent with historic levels of EU steel and aluminum imports into the U.S.:

For steel imports from the EU, the annual import volume is set at 3.3 million metric tons (MMT) under 54 product categories. This amount will also be allocated on an EU member state basis and will be in line with historically based volumes from 2015-2017. Steel product imports must be “melted and poured” in the EU in accordance to U.S. requirements and rules to be eligible as well. Calculation of the TRQ will take place each year on a quarterly basis. Any unused TRQ volume from the first quarter of that specific year – and only up to 4% of the allocated quota for that quarter – will roll over to the third quarter of that year. Unused TRQ volumes between the second quarter and the fourth quarter as well as between the third quarter and first quarter of the next year, are subject to the same roll-overs. The TRQ will be allocated on a first-come, first-served basis for each of the 54 categories from each EU member state, and the U.S. will provide updated information regarding the use of the quarterly quota on a public website.

For aluminum imports from the EU, the annual import volume is set at 18 thousand metric tons (TMT) for unwrought aluminum under two product categories, and 366 TMT semi-finished (wrought) aluminum under 14 product categories. The amount will be allocated on an EU member state basis similar to the quota for steel; however, the volumes will be in line with 2018-2019 historical levels – with the exception of foil, where 2021 annualized data will be used. Importers of aluminum steel will need to provide a Certificate of Analysis for each aluminum product. The TRQ for aluminum will be administered on a semi-annual basis, with no more than 60% of the TRQ to be filled in the first half of a given year.\(^{291}\)

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\(^{291}\) Frances Hadfield, Sam Boone & Martin Yerovi, Crowell & Moring LLP, *Court of International Trade Denies Expansion of Bifacial Solar Panel Tariffs*, This Month in International Trade (November 2021), [www.crowell.com/NewsEvents/AlertsNewsletters/all/The-Month-in-International-Trade-November-2021#ITB03](https://www.crowell.com/NewsEvents/AlertsNewsletters/all/The-Month-in-International-Trade-November-2021#ITB03). The duty exemption and TRQ regime were promulgated by *Presidential Proclamation*, which were published in the Federal Register on 3 January 2022. See *Presidential Proclamation 10327, Adjusting Imports of Aluminum into the United States* (27 December 2021), [https://public-inspection.federalregister.gov/2021-28514.pdf](https://public-inspection.federalregister.gov/2021-28514.pdf); *Presidential Proclamation 10328, Adjusting Imports of Steel into the United States* (27 December 2021), [https://public-inspection.federalregister.gov/2021-28516.pdf](https://public-inspection.federalregister.gov/2021-28516.pdf). The TRQ system affected steel and aluminum imports from 15 of the 27 EU states: Austria; Belgium; Bulgaria; Croatia; Cyprus; Czechia (Czech Republic); Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Malta; Netherlands; Poland; Portugal; Romania; *International Trade Law E-Textbook* (Raj Bhala, 6th Edition, 2025) University of Kansas (KU) Volume Four Wheat Law Library
In return for America’s cancellation of Section 232 duties for in-quota shipments, the EU eliminated its retaliatory duties on U.S.-origin merchandise. Specifically:

Washington will allow EU countries duty-free access for steel and aluminum exports to the United States in volumes comparable to those shipped before tariffs imposed by former President Donald Trump’s Administration in 2018.

In response, the EU removed retaliatory tariffs on U.S. products including whiskey, power boats and Harley-Davidson motorcycles.\(^\text{292}\)

Note that eligible in-quota products enter free of Section 232 duties, but above-quota shipments remained subject to those duties. Note, too, the caveat concerning historic volumes: in effect, the U.S. and EU decided to manage trade around those volumes. Note also the White House Fact Sheet (excerpted below) made no mention of the U.S. dropping its Section 232 tariffs effective 1 January 2022. In fact, per the EU Questions and Answers Slovakia; Slovenia; Spain; and Sweden. The TRQs (explained more fully above) – governing 54 categories of steel “melted and poured” in the EU, and 14 categories of EU-origin aluminum – took effect for steel and aluminum entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 AM. EST on 1 January 2022. The TRQs were “first-come, first-served,” hence once a TRQ was filled, over-quota duties apply. The TRQ amounts were calculated annually for each EU country, but (on a country-specific basis) administered quarterly. The TRQs were scheduled to last through 23 December 2023. Notably, effective 1 January 2022, EU-origin derivative steel and aluminum articles were not subject to Section 232. The process for seeking exclusions from Section 232 tariffs remained largely the same. Thus, thanks to the October 2021 U.S.-EU deal:

In October 2021, the U.S. announced that it would establish a tariff rate quota for steel and aluminum products from the EU in exchange for the EU suspending its retaliatory tariffs. Steel from the EU operates with a quota managed on a quarterly basis with limits and carry forward amounts set by the Department of Commerce. Each quarter has initial limit of 25% of the annual country limit for each HTS group but the unused quota amount from the first quarter of the year will be combined into the third quarter, while the unused second quarter will combine into the fourth quarter. Aluminum from the EU operates on a semi-annual and annual quota where no more than 60 percent of the tariff-rate quota to be filled in the first half of the year. Importers can still bring in products from the EU once the quota for that specific HTS is full but will need to pay the Section 232 tariffs for the amount that exceeds the tariffs.

\textit{Section 232 – Not All Quotas.} Note, however, this arrangement differed from the quota deals set in March 2018 with Argentina, Brazil, and Korea (discussed above). With respect to the EU, quota exclusion entries did not count against the EU’s quarterly or annual quota. So, EU producer-exporting countries could apply for a quota (under HTS 9903.80.65 through 9903.81.19), and if the DOC granted the request, then the shippers could enter their steel or aluminium anytime during the relevant quota year, and not worry whether the TRQ threshold applicable to them was reached. That meant EU-origin steel and aluminium were “significantly less likely to fill up compared to the other quota agreements.” \textit{Id.}

\(^{292}\) U.S., EU End Steel and Aluminum.
document (also excerpted below), the two sides agreed on this point. Of course, the U.S. Section 232 duties and EU retaliatory measures would be re-imposed if, after the two-year suspension, there was neither an agreement nor an extension of negotiations.

Notably, in December 2023, the EU unilaterally decided to extend its truce on counter-retaliatory steel tariffs. Politics drove that decision:

The EU is set to extend its truce [for approximately 15 months] with the U.S. over steel tariffs imposed by Donald Trump until after Presidential elections next year [November 2024].

European Trade Commissioner Valdis Dombrovskis … [said] he was in favour of postponing the reimposition of retaliatory tariffs on American goods such as bourbon whiskey and Harley-Davidson motorbikes. Washington had also agreed to suspend its levy on steel and aluminium, and the two sides continue to work towards solving the years-long dispute, he said.

“We are focusing … on the extension of the current suspension of tariffs on the US side and our retaliatory tariffs.”

The EU suspended its tariffs in October 2021 as part of a deal with the Biden administration, but they would automatically be reapplied on January 1 [, 2024] unless Brussels takes an explicit decision to delay them. Dombrovskis expected EU governments to approve the proposal….

Under the 2021 agreement, Washington lifted the Trump-era tariffs on European steel and aluminium but introduced tariff-free quotas instead. EU exporters pay about €350mn annually on metal exceeding the quota.

EU officials say they are aware of President Joe Biden being reluctant to permanently lift the tariffs before elections as he fights for votes in steelmaking states such as Ohio and Pennsylvania.

Manifestly, EU officials were concerned – scared, candidly – that Donald J. Trump might be re-elected to the Presidency in November 2024. The EU did not want to hand the

294 Andy Bounds, EU to Extend Trade Truce with U.S. until after Presidential Election, Financial Times, 14 December 2023, www.ft.com/content/07c68a2f-3b22-4029-ac08-ac1e36edf2a2?shareType=nongift. (Emphasis added.)
Trump campaign any “ammunition,” as it were, that could be used against its opponents, most notably, President Joseph R. Biden. To be sure, the fundamental goal of the EU remained unchanged, namely, for America to remove all TRQs as part of a Green Steel Deal.²⁹⁶ But the EU appreciated the willingness and ability of the President Biden to meet that goal would be vastly strengthened upon his re-election.

The President reciprocated: on 28 December 2023, Mr. Biden issued a Steel Proclamation and Aluminum Proclamation continuing the TRQ system to exempt imports of EU-origin steel and aluminum from the 25% and 10% Section 232 duties, respectively.²⁹⁷ The TRQs entered into force for two years, from 1 January 2024 through 31 December 2025 – well past the November 2024 Presidential Election. There were no changes to the aggregate TRQ volume thresholds, and previously granted product exclusions were extended for these two years. Interestingly, the two Proclamations explained that steel and aluminum inventory existing in an FTZ under PF status before 1 January 2024, and entered thereafter, would be subject to the EU TRQ as of the date of entry for consumption of the relevant merchandise.

Second, both sides agreed to continue negotiations on steel and aluminum controversies, and especially to work toward de-carbonizing steel and aluminum by retaining tariffs on that merchandise from other countries that “fail to hit standards for low-carbon steel production.”²⁹⁸ Here, the U.S. and EU had yet to work out details. The thrust was to reach a global accord that would curtail importation of steel and aluminum made with carbon-intensive processes, i.e., with a high carbon footprint.²⁹⁹ This second point

²⁹⁶ See EU Weighs Concession. [Hereinafter, EU Weighs Concession.]
²⁹⁸ EU-U.S. Green Steel Deal.
²⁹⁹ Just how far up the supply chain would the U.S. and EU trace steel and aluminum for its carbon intensiveness? The further up that chain, the more controversial the measurement of carbon content might be. For example, in January 2022, the EU proposed green labels for gas and nuclear investments, which caused concern:

Experts advising on the European Union’s sustainable finance taxonomy are concerned a draft plan to include gas and nuclear relies too heavily on promises to make those fuels green in future, rather than assessing their real impact today.

Nathan Fabian, who chairs the expert group, said some advisers were concerned the draft risked hurting the taxonomy’s mission to provide clarity to investors about the environmental impact of investments.
took direct aim at China, because it not only accounted for over half of global crude steel output (by far the world’s largest producer), but also was a prime culprit for producing dirty steel:

But rather than just a simple return to the status quo from 2018, the United States and the European Union plan to address the existential threat of climate change and production overcapacity in the steel industry, which is one of the biggest CO₂ emitters in the world.

“Together, the United States and European Union will work to restrict access to their markets for dirty steel and limit access to countries that dump steel in our markets, contributing to worldwide over-supply,” the White House said in a Fact Sheet [excerpted below] without naming China directly.

Under the draft plan, … gas plants can earn a green label if they meet criteria including an emissions limit of 270 g[rams] of CO₂ equivalent per kWh, or if their annual emissions average 550 kg CO₂e per kW or less over 20 years.

That would judge the environmental performance of a gas plant over 20 years, with no guarantee that its emissions would drop over time, said Fabian, who is also Chief Responsible Investment Officer at the U.N.-backed Principles for Responsible Investment.

“So, it’s possible to have very high emissions in the start and then for the asset simply to fall out of taxonomy alignment later in its life but still operate,” he said.

Simon Jessup & Kate Abnett, EU Advisers Concerned About Plan for Green Labels on Gas, Nuclear Investments, REUTERS, 17 January 2022, www.reuters.com/markets/europe/eu-advisers-concerned-about-plan-green-labels-gas-nuclear-investments-2022-01-17/. See also Climate Change: EU Moves to Label Nuclear and Gas as Sustainable Despite Internal Row, BBC NEWS, 8 February 2022, www.bbc.com/news/world-europe-60229199 (reporting: “Nuclear and natural gas energy plants could be counted as ‘green energy’ under controversial EU plans…. The European Commission says it has decided that both types of energy can classify as ‘sustainable investment’ if they meet certain targets. But the move has divided the EU, and been fiercely opposed by some members [including Austria, Luxembourg, and Spain, but supported France and Poland]. … The EU has set itself a goal of becoming climate neutral by 2050 and the Commission argues that to get there, a great deal of private investment is needed. Its proposals are meant to guide investors. … EU officials were keen to stress that the change was not a requirement for any state or company to invest in gas or nuclear. It is instead a highly technical set of rules, called the ‘EU Taxonomy,’ about what classifies as ‘sustainable’ so that private investors can decide where to put funds…. It also regulates what can be said to be environmentally friendly, so that climate-conscious investors can make informed decisions. The list is supposed to recognize green projects that make a ‘substantial’ contribution to at least one of the EU’s environmental goals, ‘while not significantly harming any’ of them. Commission officials point to the strict limits on what qualifies. For example, natural gas generation is under a strict CO₂ emissions limit, and a requirement to switch to low-carbon gas by 2035. Nuclear power, meanwhile, must be in countries with clear plans and funding for dealing with nuclear waste.”).

The point is if the U.S. and EU required that steel and aluminum be made with energy inputs that have a green label, but the criteria for obtaining such a label was dubious, then so, too, would be the measurement of the carbon intensiveness of that steel or aluminum, because that measurement incorporated the green labeling criteria.

… [President Joseph R.] Biden was more explicit, saying the arrangement with the EU would help “restrict access to our markets for dirty steel from countries like China.”

The global deal is to be worked out over the next two years to promote “green” steel and aluminum production and will be open to other countries that want to join, including China, whose steel sector is responsible for 10%-20% of the country’s CO₂ emissions.

“The arrangement is, of course, open to all like-minded partners. Steel manufacturing is one of the highest carbon emission sources globally,” [European Commission President Ursula] von der Leyen said.³⁰¹

Importantly, the U.S. and EU were “well placed to apply pressure” on China:

A decent chunk of their domestic production stems from electrically powered furnaces burning scrap metal. These emit far fewer greenhouse gases than the carbon-belching blast furnaces that produce most Chinese steel. The United States, Germany, and Italy are also the world’s three biggest steel importers, while China accounts for half its production. Coordinated pressure by buyers could thus lead to significant emissions reductions in a sector that pumps out 3 billion ton of carbon dioxide a year, not far off 10% of humanity’s total.³⁰²

Of course, whether that pressure might have the opposite effect on China, given its sensitivity to 19th and 20th century imperialism (discussed elsewhere), was a possibility.

By December 2022, the details of the carbon tariff on steel and aluminum imports reportedly were taking shape – a climate-friendly, China-unfriendly one:

The U.S. and European Union are weighing new tariffs on Chinese steel and aluminum as part of a bid to fight carbon emissions and global overcapacity.…

The move would mark a novel approach, as the U.S. and EU would seek to use tariffs – usually employed in trade disputes – to further their climate agenda. …

…

The new framework, which builds on a related U.S.-EU agreement last year [October 2021], is mainly aimed at China, the world’s biggest carbon emitter and producer of steel and aluminum, as well as other large polluting nations.…

…

³⁰¹ U.S., EU End Steel and Aluminum.
³⁰² EU-U.S. Green Steel Deal.
China opposed tariffs because they violate World Trade Organization rules, Foreign Ministry Spokeswoman Mao Ning said…, adding her nation would “take all necessary measures to safeguard our legitimate rights and interests.”

Other countries have expressed interest in joining the talks, but the new framework would likely not include them at first. That could mean steel and aluminum imports from Japan and others risk being targeted by new duties. The goal, however, is to open the deal to other countries as quickly as possible, as long as they can meet the agreement’s ambitions….

…

U.S. officials are also still deliberating the tariff rate, or band of tariff rates that would be applied to other countries, and the U.S. has told EU officials that they’d like the agreement to be legally binding….303

And, in September-October 2023, the U.S. and EU emphasized their shared interest in coordinating and measuring excess steel capacity caused by NME practices in China, with a view to hitting output from that capacity tariffs.304

Under what legal authority would the U.S. impose green tariffs? The most obvious answer was Section 232 of the 1962 Trade Expansion Act. Under Section 232, there were two options. First, the U.S. could launch a new Section 232 investigation, presumably to consider whether imports of dirty steel and aluminum needed to be “adjusted” because they “impaired” “national security,” with “national security” meaning (at a minimum) climate change. Second, the Biden Administration could convert the existing case launched by the Trump Administration “into a new inquiry that targets carbon emissions and overcapacity,” with those targets posing an “impairment” to “national security.”305

Third, America and the EU agreed also to keep working toward a solution to global overproduction. Of course, as the Commission President indicated, China could join the Arrangement. And, given that the deal was to be negotiated across two years, it had the opportunity to do so. Query whether China would, or the CCP politically could, participate in any accord that impinged on its Made in China 2025 industrial policy or adversely affected the operation of its SOEs. (These topics are discussed in separate Chapters.) Shuttering excess steel or aluminium capacity on the Mainland risked making redundant tens of thousands of workers, and worsening the COVID pandemic-induced slowdown in the Chinese economic juggernaut. The result could be mass social unrest that would shake the legitimacy of the CCP to deliver on its promise of common economic prosperity for all Chinese people in exchange for authoritarian political control.


305 U.S., EU Weight Climate-Based.
Overall, the *Green Steel Deal* was clever. It (1) resolved a major dispute between two allies, America and the post-Brexit EU,\(^{306}\) (2) brought them together to face two common threats, to the environment, from dirty steel, and to their national security, from China, and (3) put the burden on China to implement environmentally-friendly, output-limiting mechanisms. As the EU Commission put it: “The *Global Arrangement* will seek to ensure the long-term viability of our industries, encourage low-carbon intensity steel and aluminum production and trade, and restore market-oriented conditions.”\(^{307}\)

In studying the White House *Fact Sheet* and EU *Questions and Answers* (both excerpted below), notice how much more thorough and objective the European version is in comparison with the American account. As to the terms of the *Deal* itself as set out in the USTR *Announcement* (also excerpted below), consider the differences between the treatment of steel versus aluminium. Consider, too, the TRQs and ask how the EU benefits from the *Deal*. To be sure, the removal of 25% and 10% tariffs on its steel and aluminium entering the U.S. market is significant. But, the TRQ covers 54 steel and 14 aluminium products, and must be divided among the 27 EU countries on a quarterly basis. The TRQ thresholds are set at pre-Section 232 case levels, which are fairly low. In other words, as is so common in International Trade Law, the “devil” – here, in terms of commercially meaningful market access for the EU to the U.S. – is in the “details” of the *Deal*.

Additionally, in studying the *Green Steel Deal*, consider the possible WTO legal challenges and defenses that might be implicated by its terms. The U.S. and EU sought to erect tariffs in a way that was GATT-WTO compliant. But, how?:

… [T]he U.S. had proposed joint tariffs to hit steel produced with high carbon emissions and global steel overcapacity, while allowing for preferential access for participants of the arrangement that meet its standards. …

… The EU worries that any joint action could be deemed arbitrary and go against international trade rules, which is a red line for Brussels.\(^{308}\)

For instance, consider the following back-and-forth: The *Green Steel Deal* prefers clean over dirty steel – for a good reason, of course, fighting climate change. But that means the

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\(^{306}\) The U.K. was not covered by this arrangement. The Section 232 tariff relief did not apply to steel or aluminum melted and poured in Britain. That was because of the Brexit mess over Northern Ireland and, specifically, America’s concerns that the U.K.’s threats to invoke Article 16 invocation threatened renewed “Troubles” across Ireland (discussed in a separate Chapter). See Aime Williams & Andy Bounds, *Brexit Fears Hold Back U.S.-U.K. Trade Deal*, FINANCIAL TIMES, 1 December 2021, [www.ft.com/content/608e5634-9894-449d-9a09-4f903f0ce7169?shareType=nongift](https://www.ft.com/content/608e5634-9894-449d-9a09-4f903f0ce7169?shareType=nongift). Consequently, unless America cancelled its Section 232 duties on British aluminium and steel, the U.K. threatened to retaliate by hiking its “existing retaliatory duties on high-profile U.S. goods including whiskey, cosmetics, and clothing,” and (2) imposing punitive tariffs on an expanded array of U.S.-origin merchandise. Aime Williams, *U.K. Threatens to Impose tariffs on More U.S. Goods in Dispute Over Steel Duties*, FINANCIAL TIMES, 8 December 2021, [www.ft.com/content/fb62b8a4-9fdd-429c-b833-e128a60e805?shareType=nongift](https://www.ft.com/content/fb62b8a4-9fdd-429c-b833-e128a60e805?shareType=nongift).

\(^{307}\) Quoted in *U.S., EU End Steel and Aluminum.*

\(^{308}\) *U.S., EU Plan New Chinese.*

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Deal discriminates against dirty steel producers (such as in China) in favor of clean ones (as in the EU). So, producer-exporters of dirty steel may argue that discrimination violates the GATT MFN rule (Article I:1) and the prohibition against quantitative restrictions (Article XI:1). There could also be transparency issues (Article X:3), if the specifics of the Deal are not clearly spelled out and administered fairly. Conversely, the likely respondents in any such DSU litigation, the U.S. and EU, will need to defend against these claims, and can invoke the environmental exceptions in GATT Articles XX(b) and (g), which allow for derogations from GATT rules to protect human, animal, and plant health, and conserve exhaustible natural resources. The U.S. and EU may have helpful precedents dating back to the 1980s, including cases (discussed in other Chapters) involving tuna-dolphins, turtle-shrimp, gasoline, and asbestos. However, the complainants (possibly China) may argue GATT does not allow for prohibiting imports based on how they are made, rather only on the products per se.

Consider what incentives the Green Steel Deal creates to re-configure steel and aluminium product supply chains toward countries with low-carbon intensive production, based on applicable ROOs, to qualify for duty-free treatment. Note the Green Steel Deal:

requires EU steel and aluminum to be entirely produced in the bloc – a standard known as “melted and poured” – to qualify for duty-free status [into the U.S.]. The provision is aimed at preventing metals from China and non-EU countries from being minimally processed in Europe before export to the United States.309

In effect, “melted and poured” is a ROO that takes the form of a specified process. (Such ROOs are discussed in a separate Chapter.) One such non-EU country, which of course is a long-standing American and European ally, is Japan. Thus, shortly after announcing the Deal, the U.S. promised bilateral negotiations with Japan with a view to Japanese steel satisfying the “melted and poured” ROO and (assuming it was low carbon intensivity), qualifying for DFQF treatment into the U.S.310

Enforcement of the terms of the Green Steel Deal was yet another important topic for the U.S. and EU. Their customs authorities needed to police anti-circumvention rules to ensure unscrupulous producer-exporters, importers, and customs brokers do not try to get around ROOs and falsely claim their steel or aluminium products are from a clean country, when they are not.

Finally, accompanying the Green Steel Deal was the U.S.-EU Joint Statement on Steel and Aluminum, that is, on Excess Capacity. This document evinced the underlying strategic linkage the U.S. and EU drew between fighting climate change and reducing actual and potential output in steel and aluminium. As long as there was excess capacity in


310 U.S. to Open Talks with Japan.
these industries, entailing high-carbon intensive production, they would contribute to global warming.

Consider all the above issues in relation to this Statement. That is, what are the benefits to the EU from limiting actual and potential steel and aluminium output? What GATT-WTO claims and defenses may arise from restricting production capacity? How might cross-border supply chains be affected?

THE WHITE HOUSE, FACT SHEET: THE UNITED STATES AND EUROPEAN UNION TO NEGOTIATE WORLD’S FIRST CARBON-BASED SECTORAL ARRANGEMENT ON STEEL AND ALUMINUM TRADE (31 OCTOBER 2021)\(^{311}\)

Arrangement Will Remove European Union tariffs and lower costs for American families.

Arrangement will counter flood of cheap steel by other countries, including the People’s Republic of China (PRC), that harms our industries and our workers.

Today, the United States and the European Union announced their commitment to negotiate the world’s first carbon-based sectoral arrangement on steel and aluminum trade by 2024. This announcement delivers a major win in the fight to address the climate crisis while protecting our workers and industry, and enabling them to compete in the global marketplace. The President believes that climate action must mean good jobs – and today’s announcement demonstrates that we can work with our partners and allies to both reduce emissions, and protect and create good-paying union jobs at home.

The United States and the European Union also used the strength of their partnership to come to an interim arrangement for trade in the steel and aluminum sectors that modifies tariffs on European Union steel and aluminum providers, addresses global overcapacity, and toughens enforcement mechanisms to prevent leakage of Chinese steel and aluminum into the U.S. market. As a result of the arrangement, the Europe Union will remove its tariffs on a wide range of products, protecting American jobs, reducing costs for middle-class families, and maintaining U.S. export competitiveness.

Together, the United States and European Union will work to restrict access to their markets for dirty steel and limit access to countries that dump steel in our markets, contributing to worldwide over-supply. This arrangement will be open to any interested country that wishes to join and meets criteria for restoring market orientation and reducing trade in high-carbon steel and aluminum products.

This Arrangement will:

- Be a global first in the fight against climate change and countering distortive economic practices that harm our interests. Never have two global partners

aligned their trade policies to confront the threats of climate change and global market distortions, ensuring that trade works to solve the challenges of the 21st century. The deal demonstrates President Biden’s commitment to putting U.S. workers and communities at the center of our trade agenda.

- Protect American jobs and industry and provide them with an advantage. American-made steel and aluminum is produced with far fewer emissions than dirtier alternatives made in the PRC and elsewhere. To date, American steel companies and workers have received no benefit for their low-carbon production. Low-carbon steel across all production types – and the workers who make it – will be incentivized and rewarded going forward.

- Results in lower prices for American consumers and families by providing relief for American manufacturers who rely on readily accessible, affordable steel and aluminum to make their products. Steel and aluminum are essential components of many manufactured goods, including automobiles, household appliances, building materials, and more.

- Demonstrate the climate ambition and global leadership of the Biden-Harris Administration. Steel and aluminum production are two of the most carbon-intensive industrial sectors, accounting for roughly 10 percent of all carbon emissions – comparable to the total emissions of India. A carbon-based sectoral arrangement will drive investment in green steel production in the United States, Europe, and around the world, ensuring a competitive U.S. steel industry for decades to come.

- Showcase the strength of the U.S.-EU relationship. The United States and European Union pledged at the U.S.-EU Summit in June to use the size of their collective economies to update the rules of the 21st century. Today’s announcement delivers on that promise and builds on the successful resolution of the 17-year Boeing-Airbus dispute and the creation of the U.S.-EU Trade & Technology Council [discussed in separate Chapters].

EUROPEAN COMMISSION, QUESTIONS AND ANSWERS: EU-U.S. NEGOTIATIONS ON TRADE ON STEEL AND ALUMINUM (31 OCTOBER 2021)312

What is the Global Arrangement on Sustainable Steel and Aluminium?

The Arrangement is intended to facilitate the decarbonising of the steel and aluminium industries, as well as addressing the issue of overcapacity in these industries caused by non-market practices in some economies.

The EU and US have agreed to start discussions on this Arrangement as soon as possible, and conclude them within two years. We want to make this Arrangement open to all like-minded economies.

**How will the Arrangement help achieve decarbonization?**

Each participant in the Arrangement should undertake to facilitate trade in steel and aluminium that meets relevant standards, for instance as regards low-carbon intensity.

They should ensure that domestic policies support the production of steel and aluminium with low carbon intensity.

In addition, they should consult on government investment in decarbonisation, and refrain from non-market practices that contribute to high carbon intensity steel and aluminium production.

**How will the Arrangement restore market-oriented conditions in the steel trade?**

Each participant will promote trade in carbon friendly steel and aluminium.

Each participant will ensure that domestic policies encourage "Green Steel and Aluminium production."

Participants would undertake to apply measures in line with their trade defense rules.

Moreover, they will refrain from non-market practices that contribute to non-market-oriented capacity.

They will also screen inward investments from non-market-oriented actors in accordance with their respective domestic legal framework.

**Is this Arrangement exclusive to the EU and the U.S.?**

No; the EU and the US will encourage other like-minded economies to participate.

Will you negotiate one arrangement for both sectors or two separate arrangements?

This is not yet decided, and will depend upon further consultations between the EU and US and with the respective industries.

**What did the U.S. do with the Section 232 tariffs?**

The U.S. has announced that it will no longer apply the Section 232 tariffs on a certain amount of EU exports of steel and aluminium (under “tariff-rate quotas” (TRQs)), effective as of 1st January 2022.

These TRQs amount to the historical volumes of EU steel and aluminium exports to the U.S.
What are “historical volumes”?

The volume of EU steel and aluminium that was exported to the U.S. prior to the imposition of the 232 measures in 2018 and the volume of EU aluminium prior to 2020 with exception of aluminium foil for which the baseline is annualised 2021 data.

What is the EU doing in response?

The EU intends to suspend its rebalancing measures against the U.S. that were introduced in June 2018 in response to the U.S. Section 232 tariffs on steel, aluminium and derivative products. It will also suspend the increase in rebalancing measures set for 1 December.

In addition, the EU has agreed with the US that both sides will hit the pause button on their respective WTO cases against each other.

What are the “rebalancing measures”?

The U.S. tariffs applied towards the EU from June 2018 affected €6.4 billion of European steel and aluminium exports, and further tariffs applied from February 2020 affected around €40 million of EU exports of certain derivative steel and aluminium products.

In response, the EU introduced rebalancing measures in June 2018 on US exports to the EU in a value of €2.8 billion.

The remaining rebalancing measures, affecting exports valued up to €3.6 billion, were scheduled to enter into force on 1 June 2021. The EU suspended these measures until 1 December 2021 in order to give space for the parties to work together to reach a longer-term solution.

Following today’s announcement by the U.S., all these measures will be suspended.

What are the next steps?

The EU will initiate its decision-making procedure under the EU Trade Enforcement Regulation with a view to suspend the rebalancing measures. The decision-making involves an examination and voting procedure with Member States.

How will this help EU workers and business?

The removal of the Section 232 tariffs on historical volumes of EU exports of steel and aluminium should reduce costs for steel and aluminium exporters, helping to support the sustainability of two industries that together employ 3.6 million people in the EU.

UNITED STATES TRADE REPRESENTATIVE, ANNOUNCEMENT OF ACTIONS ON EU IMPORTS UNDER SECTION 232 (31 OCTOBER 2021)313

Steel

The United States will replace the existing 25 percent tariff on EU steel products under Section 232 with a tariff-rate quota (TRQ) with a date of effectiveness of January 1, 2022. [Per Footnote 1, “Those steel articles are subject to U.S. Presidential Proclamation 9705 of March 8, 2018 (www.govinfo.gov/content/pkg/FR-2018-03-15/pdf/2018-05478.pdf).]

Under the TRQ arrangement, historically-based volumes of EU steel products will enter the U.S. market without the application of Section 232 tariffs as follows:

1. **TRQ Amount:** The aggregate annual import volume under the TRQ is set at 3.3 MMT under 54 product categories and allocated on an EU member state basis in line with the 2015-2017 historical period. A breakdown of the said 54 product categories is enclosed in Annex 1 [not excerpted herein].

2. **Derivative Products:** Imports of derivative articles of steel, as referenced in Proclamation 9980, from the EU will not be subject to Section 232 duties. [Per Footnote 2, “U.S. Presidential ‘Proclamation 9980 of January 24, 2020” (www.federalregister.gov/documents/2020/01/29/2020-01806/adjusting-imports-of-derivative-aluminum-articles-and-derivative-steel-articles-into-the-united).”]

3. **Eligible products:** In order to be eligible for duty-free treatment under the quota, steel imports must be “melted and poured” in the EU according to current [i.e., per Footnote 3, as of 30 October 2021.] U.S. requirements and rules implementing this arrangement. An importer shall provide relevant documentation substantiating compliance with U.S. requirements. Failure to comply could result in remedies and/or penalties as provided for under U.S. law.

4. **Exclusions:** The United States will maintain its exclusions process, as implemented under Section 232 of the Trade Expansion Act of 1962, available for steel products imported from the EU, but will not count imports of excluded steel products from the EU against the TRQ. The United States will extend the application of exclusions granted for and utilized in U.S. fiscal year 2021 for steel products imported from the EU for a period of two calendar years without the need to reapply, i.e., until 31 December 2023. [Per Footnote 4, “This corresponds to the volume of exclusions entered in the period October 1, 2020 to September 30, 2021.”] These exclusions will be available for the U.S. exclusion holder and corresponding EU exporter or exporters. No Section 232 duty will apply to these U.S. imports from the EU.

5. **Tariff Rate:** Section 232 steel products from the EU that are within-quota will enter free of any Section 232 duty while all Section 232 steel products entering above-quota will continue to be subject to a Section 232 duty of 25 percent, provided that they are not subject to an exclusion as per point 4 above.

6. **Administration:** The TRQ will be calculated for each year of the measure and administered on a quarterly basis. Any unused TRQ volume from the first quarter
of the year, up to 4 percent of the allocated quota for that quarter, will roll over to the third quarter; any unused TRQ volume from the second quarter of the year, subject to the same limit, will roll over into the fourth quarter; and any unused TRQ volume from the third quarter, subject to the same limit, will roll over into the first quarter of the following year. The TRQ will be allocated on a first-come, first-served basis for each product category from each EU member state. The United States will provide on a public website updated information on the utilization of the quarterly quota for each product category, including information on the transferred unused TRQ volumes from one quarter to another.

7. **Adjustment:** The United States will conduct annual reviews of the TRQ to calculate the level of U.S. steel demand (apparent consumption) in the previous year when such data becomes available from the World Steel Association. For each 6 percent that this calculated level is above or below U.S. steel demand in 2021, the TRQ volume would increase or decrease, respectively, by 3 percent relative to the level outlined in point 1 in the subsequent twelve-month period. Should the calculated level of U.S. steel demand not be at least 6 percent above or below the U.S. fiscal year 2021 level, then the TRQ volume in the subsequent year would be at the level outlined in point 1 above.

8. **Review:** Starting no later than April 1, 2022, the United States will evaluate utilization and administration of the TRQ every three months and, at the request of the EU, enter into consultations to address any substantial under-use of the TRQ.

**Aluminum**

The United States will replace the existing 10 percent tariff on EU aluminum products under Section 232 with a tariff-rate quota (TRQ) with a date of effectiveness of January 1, 2022. [Per footnote 5, “Those aluminum articles are subject to U.S. Presidential Proclamation 9704 of March 8, 2018 (www.govinfo.gov/content/pkg/FR-2018-03-15/pdf/2018-05477.pdf).”] Under the TRQ arrangement, historically-based volumes of EU aluminum products will enter the U.S. market without the application of Section 232 tariffs as follows:

1. **TRQ Amount:** The aggregate annual import volume under the TRQ is set at 18 thousand metric tons (TMT) for unwrought aluminum under two product categories, and 366 TMT for semi-finished (wrought) aluminum under 14 product categories. The import volumes will be allocated on an EU member state basis in line with the 2018-19 historical period, with the exception of foil (7607), where 2021 annualized data will be utilized. A breakdown of the said product categories is enclosed in Annex 2 [not excerpted herein].

2. **Derivative Products:** Imports of derivative articles of aluminum, as referenced in Proclamation 9980, from the EU will not be subject to Section 232 duties. [Per Footnote 6, that is “U.S. Presidential “Proclamation 9980 of January 24, 2020”]
3. **Entry Documentation**: An importer shall provide a Certificate of Analysis for each aluminum product entered into the United States, as required by current [i.e., per Footnote 7, as of 30 October 2021] U.S. law and rules implementing this arrangement. Failure to provide this documentation could result in remedies and/or penalties as provided for under U.S. law.

4. **Exclusions**: The United States will maintain its exclusions process, as implemented under Section 232 of the *Trade Expansion Act of 1962*, available for aluminum products imported from the EU. [Note that in contrast to the TRQ for steel, per Paragraph 4 above, for aluminum, there is no language concerning additional benefits for aluminum exclusions, which suggests that for such exclusions, re-application is required on annual basis.]

5. **Tariff Rate**: Section 232 aluminum products from the EU that are within-quota will enter free of any Section 232 duty, while all Section 232 aluminum products entering above-quota will continue to be subject to a Section 232 duty of 10 percent, provided that they are not subject to an exclusion as per point 4 above.

6. **Administration**: The TRQ is calculated for each year of the measure and administered on a semi-annual basis, with no more than 60 percent of the TRQ to be filled in the first half of the year. The United States will provide on a public website updated information on the utilization of the semi-annual quota for each product category.

**UNITED STATES – EUROPEAN UNION, JOINT STATEMENT ON STEEL AND ALUMINUM (30 OCTOBER 2021) (EXCESS CAPACITY)**

Given the joint desire of the United States and … EU to address non-market excess capacity so as to preserve their critical steel and aluminum industries, the United States and … EU agree to the following:

1. **Ongoing Cooperation**

   a. **Trade Remedy/Customs Cooperation**: To advance their efforts to address excess capacity, both sides agree to expand U.S./EU coordination involving both trade remedies and customs matters. The United States will also share public information and best practices with EU officials and/or member state officials, as appropriate, on topics including how detection of fraud/evasion and circumvention of duties is approached and possible self-initiation.

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Officials could also coordinate industry engagement with relevant sectors to hear their views and share observations/concerns. Insofar as customs cooperation is concerned, it may take the form of mutual administrative assistance in accordance with the *U.S.-EU Agreement on Customs Cooperation and Mutual Assistance in Customs Matters*.

b. *Monitoring*: The United States and the EU will monitor steel and aluminum trade between them.

c. *Cooperation on Non-Market Excess Capacity*: The United States and the EU agree to regularly meet to consult with a view to developing additional actions in order to contribute to adjustments and solutions and address non-market excess capacity in the global steel and aluminum sectors.

d. *Review*: The United States and the EU agree to review the operation of this arrangement, and ongoing cooperation, on an annual basis, including in light of changes in the global steel and aluminum markets, U.S. demand, and imports.

2. **Global steel and aluminum arrangements to restore market-oriented conditions and address carbon intensity**

Steel and aluminum manufacturing is one of the highest carbon emission sources globally. Excess capacity generates unnecessary greenhouse gas emissions, deflates prices of high emissions products and hinders the development and scaling up of competitive solutions for lower emissions production. For steel and aluminum trade to be sustainable, producers and consumers must address both global non-market excess capacity as well as the carbon intensity of the industries. Against this backdrop, the United States and the EU are resolved to negotiate, in accordance with their respective institutional frameworks, future arrangements for trade in these sectors that take account of both issues. The United States and the EU will invite like-minded economies to participate in the arrangements and contribute to achieving the goals of restoring market-oriented conditions and supporting the reduction of carbon intensity of steel and aluminum across modes of production. The United States and the EU will seek to conclude the negotiations on the arrangements within two years. In order to encourage similar efforts by other steel producing economies, the United States and the EU will consult with respect to bringing these matters into relevant international fora for discussion, as appropriate.

Compatible with international obligations and the multilateral rules, including potential rules to be jointly developed in the coming years, each participant in the arrangements would undertake the following actions: (i) restrict market access for non-participants that do not meet conditions of market orientation and that contribute to non-market excess capacity, through application of appropriate measures including trade defense instruments; (ii) restrict market access for non-participants that do not meet standards for low-carbon intensity; (iii) ensure that domestic policies support the objectives of the arrangements and support lowering carbon intensity across all modes of production;
(iv) refrain from non-market practices that contribute to carbon-intensive, non-market oriented capacity; (v) consult on government investment in decarbonization; and (vi) screen inward investments from non-market-oriented actors in accordance with their respective domestic legal frameworks.

To enhance their cooperation and facilitate negotiations on a global sustainable steel and aluminum arrangements, the United States and the EU agree to form a technical Working Group. Through the Working Group, the United States and the EU will, among other things, confer on methodologies for calculating steel and aluminum carbon-intensity and share relevant data.

3. WTO Disputes

The United States and the EU agree to suspend by November 5, 2021, pursuant to DSU Article 12:12, the WTO disputes they have initiated against each other regarding the U.S. Section 232 measures … [WTO case number DS548] and the EU’s additional duties … [WTO case number DS559]. Regarding the matters that are before these Panels, the United States and the EU mutually agree to resort to arbitrations pursuant to DSU Article 25, as set out below and so as to fully preserve the work of the parties and the Panels and procedural steps in these disputes. The United States and the EU will agree by 17 December 2021 on the procedures to be followed in an arbitration of those matters, in accordance with the present arrangement. Upon agreement on these procedures, the EU and the United States will terminate their respective disputes before the Panels, and the arbitrations will be suspended, without temporal limit. The United States and the EU intend for DSU rules and practices on Panel proceedings to govern the arbitration and to be reflected as appropriate in the agreement on arbitration procedures.

The arbitration procedures will permit the complaining party in each dispute to bring the matter forward from the Panel into the arbitration, so as to preserve the work in each dispute and allow the arbitrators to continue the Panel process on the basis of the procedural steps and work already performed and make findings on that matter. The three Panelists in each dispute will serve as arbitrators, if available, and otherwise will be replaced by agreement of the parties or by the Director General of the WTO, within one week from the complaining party’s request.

Before resuming an arbitration, a complaining party will first seek to consult at the Ministerial level with the other party with a view to reaching an alternative solution. A complaining party may request to resume the arbitration at any time after the lapse of a 30-day consultation period and no sooner than 12 months after the issuance of the present statement.

An arbitration may be resumed only if a complaining party considers that this arrangement is not providing the benefits envisioned. The United States and the EU also intend not to initiate any new WTO dispute relating to these matters for so long as each party considers this arrangement to be operating satisfactorily.

IV. Making Peace with Japan, and Emergence of a Two-Tier Market
In February 2022, the Biden Administration agreed to end America’s Section 232 25% on Japanese-origin steel. The key terms of this accord — which, unlike the Administration’s October 2021 agreement with the EU, did not cover aluminum — are as follows. In reviewing them, consider whether the U.S. had concluded China and other major steel manufacturing countries, which had chronic over-capacity and thus contributed to over-production, over-exportation, dumping (including of illegally subsidized merchandise), were not amenable to a global solution to these market distortions.

After all, there had been no resolutions through the OECD, nor via bilateral talks. Indeed (as discussed in a separate Chapter), China had met only 60% of its purchase targets under the two-year January 2020 Phase One Agreement — and that obligation was supposed to be the precursor for a “Phase Two” deal resolving structural problems like overcapacity and subsidization in Chinese steel and aluminum SOEs. So, following up on the Green Deal with the EU, did the U.S. seek to address market distortions in an environmentally friendly way by bifurcating the world steel (and possibly aluminum) market based on carbon-intensiveness?

In Tier One, producers like the U.S. and EU would trade steel amongst themselves that was “clean.” In Tier Two, China and other producers could trade their “dirty” steel, but they would be shut out of the Tier One market because of the high-carbon content of their products. The February 2022 suspension of Section 232 tariffs signaled the Biden Administration wanted Japan in Tier One. Indeed, the U.S.-Japan accord explicitly mentioned the two governments would collaborate to establish criteria for defining environmentally friendly steel. Succinctly put, it seemed the U.S. had skillfully constructed a way to keep out Chinese steel, based on the defensible ground (e.g., the environmental exceptions in GATT Article XX(b)-(g), discussed in separate Chapters) it was not green, rather than on more controversial Section 232 or 301 grounds. And yet, the broad national security concerns of America and its allies would be met by forging ahead with their own market for strategic goods and limiting their reliance on China for such goods. The arrangements with the EU and Japan thus complemented AUKUS and other military postures in the Indo-Pacific region.

The February 2022 U.S.-Japan steel accord consisted of two documents. The first document, the Announcement of Actions whereby the Biden Administration agreed to lift the Trump-era 25% steel tariffs (effective 1 April 2022) on 54 product categories of Japanese steel (set out in Annex 1 of the Announcement) and set TRQs for them, consisted

See also Proclamation 10356 of March 31, 2022, Adjusting Imports of Steel Into the United States, 87 Federal Register number 63 (1 April 2022), www.govinfo.gov/content/pkg/FR-2022-04-01/pdf/2022-07136.pdf (whereby President Biden altered the Section 232 action against Japanese steel after successful negotiations with Japan for a TRQ, and eliminated the Section 232 duty on Japanese steel derivatives).

of the first 12 points listed below. The second document, a *Joint Statement*, consisted of the last two points.

1. The steel had to be “melted and poured” in Japan to be eligible for in-quota treatment without Section 232 duties. (The “melted and poured” requirement was the typical ROO for steel.)

2. The aggregate annual import volume under the TRQ was set at 1.25 MMT under 54 product categories and allocated in line with the 2018-2019 historical period. Thus, the U.S. suspended duties on Japanese steel shipments up to 1.25 million tons a year, which was the average the U.S. had imported from Japan in 2018 and 2019. (Interestingly, “Japanese steel exports to America … [had fallen] to around 720,000 tons in 2020 from around 1.73 million tons in 2017, before the additional duties were imposed.”)

3. The 54-product category TRQs were administered on a “first-come, first-served,” and once a TRQ was filled, the 25% tariff applied to all over-quota (i.e., above-quota threshold) shipments.

4. The TRQ quantities were administered on a quarterly basis, calculated based on 2018-2019 historical imports.

5. Concerning TRQ underfill, any unused TRQ volume from the 1st quarter of a given year, up to 4% of the allocated quota for that quarter, would roll over to the 3rd quarter of that same year. Any unused TRQ volume from the 2nd quarter of the year, subject to the same 4% limit, would roll over into the 4th quarter of that year. Any unused TRQ volume from the 3rd quarter, subject to the 4% cap, would roll over into the 1st quarter of the following year. (There would be no roll-overs of underfilled quotas in the 4th quarter of a year.)

6. The U.S. would regularly check domestic steel consumption and Japanese capacity utilization, and possibly adjust the TRQs as appropriate.

7. The Section 232 product exclusion process remained operative for Japanese steel. That is, upon successful application to DOC by an importer of subject merchandise, that merchandise would be from Section 232 duties. However, like the March 2018 quota arrangements for Argentine, Brazilian, and Korean steel and aluminium (discussed earlier), and like that for U.K.

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subject merchandise (discussed below) and unlike the October 2021 arrangement for EU-origin subject merchandise (discussed above), any Japanese-origin quota exclusion entries would count against the relevant quantitative limits.\footnote{See Section 232 – Not All Quotas.} In other words, the Japanese TRQ was coupled with a deduction for exclusion entries from the TRQ threshold.

(8) Japanese-origin derivative articles of steel were not subject to 25% Section 232 duties.

(9) Japan initiated (by July 2022) domestic measures to establish more market-oriented conditions for steel, including reform of Japan’s AD, CVD, and safeguard measures.

(10) The U.S. and Japan expanded coordination on trade remedies and customs matters, including monitoring and sharing steel import – and, on this topic, aluminum, too – data with respect to NMEs.

(11) The U.S. and Japan conferred on global steel and aluminum arrangements to address global excess capacity, the problems of circumvention, evasion, and fraud problems of AD, CVD, and safeguard measures, and possible self-initiation of trade remedy petitions.

(12) The U.S. and Japan also conferred on the carbon intensity of the steel – and, again, aluminum – industries (including studying methodologies to calculate steel and aluminum carbon-intensity and sharing steel and aluminum emissions data).

Manifestly, the 12th point connected to the October 2021 U.S.-EU Green Deal, and the emergence of a two-tier steel market. Under that Deal, the U.S. and EU aimed not only to address Chinese steel overcapacity, but also reach an agreement on sectoral carbon emissions, by 2024.\footnote{See Aimee Williams, U.S. and Japan Reach Deal to Roll Back Trump-Era Steel Tariffs, FINANCIAL TIMES, 7 February 2022, www.ft.com/content/1f4d1447-4613-4424-8f8f-bb64cdee7d4c?shareType=nongift.} Presumably, Japan would join the talks. Would India?

V. Making Peace with Post-Brexit U.K.

In March 2022, the Biden Administration settled the Trump-era steel and aluminum dispute with another vital ally, the U.K., America and Britain agreed to implement a TRQ system to exempt U.K.-origin steel and aluminum from the 25% and 10% Section 232 duties, respectively.\footnote{See U.S. Rolls Back Trump-Era Tariffs on U.K. Steel, BBC NEWS, 22 March 2022, www.bbc.com/news/business-60839343.} The U.S. scrapped these tariffs on U.K.-origin subject merchandise and replaced them with TRQs allowing annual duty-free entry of up to 500,000 tons of steel, and 12,300 tons of aluminum. This deal was contained in two documents, a DOC
Announcement, and a Joint Statement. Both are excerpted below. The gist of the deal was as follows:322

(1) U.K. steel “melted and poured” in the U.K. with a U.K. country of origin became eligible for in-quota TRQ treatment without Section 232 duties on 1 June 2022.

(2) U.K. semi-finished (wrought) aluminum must not contain primary aluminum from the PRC, Russia, or Belarus, and importers are required to supply a certificate of analysis for smelted (i.e., unalloyed) primary aluminum.

(3) 54 TRQ product categories of U.K. steel, and 16 TRQ product categories of aluminum, were covered by the deal.

(4) The TRQs were “first-come, first-served,” and once a TRQ was filled, the 25% steel and 10% aluminum over-quota duties apply.

(5) Each TRQ product category threshold was administered on a quarterly basis, calculated based on historical import amounts.

(6) The Section 232 product exclusion process stayed in place for U.K. steel and aluminum. Approved product exclusions exempt U.K. steel and aluminum from Section 232 duties, and importers were entitled to seek additional exclusions. However, like the March 2018 quota arrangements for Argentine, Brazilian, and Korean steel and aluminium (discussed earlier), and like that for Japanese-origin subject merchandise (also discussed earlier) and unlike the October 2021 arrangement for EU-origin subject merchandise (also discussed), any U.K.-origin quota exclusion entries would count against the relevant quantitative limits.323 In other words, the British TRQ was coupled with a deduction for exclusion entries from the TRQ threshold.

(7) U.K. derivative articles of steel and of aluminum were no longer subject to 25% or 10% Section 232 duties.

(8) On or before 1 September 2022, the U.S. evaluated TRQ usage every 3 months and, if requested by the U.K., consult to address under-usage.

(9) Both governments agreed to increase coordination on trade remedies and customs matters, including monitoring and sharing steel and aluminum import data.

(10) The U.S. and U.K. also agreed to establish more market-oriented conditions for steel and aluminum, such as AD/CVDs and safeguards.

323 See Section 232 – Not All Quotas.
The U.S. and U.K. pledged to work on global steel and aluminum arrangements to address global non-market excess capacity and the carbon intensity of the steel and aluminum industries (including methodologies to calculate steel and aluminum carbon-intensity and sharing steel and aluminum emissions data).

In exchange for the elimination of Section 232 duties via the TRQ mechanism, the U.K. agreed to suspend its retaliatory tariffs imposed on U.S. whiskey, blue jeans, and motorcycles.\(^{324}\)

However, the most remarkable feature of the Anglo-American settlement was it – unlike the U.S. deals with the EU and Japan – addressed Chinese steel and aluminum imports.

That is, for the first time, America required any U.K. steel producer owned or controlled by a Chinese entity to provide an attestation that there is no evidence of market distorting practices by that U.K. producer. The attestation had to be verified by an annual strategic audit conducted by an independent third party of the U.K. steel producer, and the audit had to cover the financial records of it and any U.K. parent company to identify any subsidies provided by a government controlled or directed entity in China. All audit results had to be provided to U.S. authorities. Notably, in 2020, a Chinese group acquired one of Britain’s most important and iconic companies, British Steel.

Two other features of this deal were noteworthy. First, given Russia’s 24 February 2022 invasion of Ukraine, in which Belarus collaborated, the U.S. and U.K. agreed to purge Russian and Belarussian (as well as Chinese) aluminum from its exports to the U.S. Second, in view of the October 2021 Green Deal, the American and Britain promised to work on ways to measure, and ultimately cut, the carbon intensity of steel and aluminum.

Thereafter, in May 2022, the U.S. agreed to suspend for one year imposition of Section 232 tariffs on Ukrainian-origin steel.\(^{325}\) The U.S. noted “Ukraine’s steel industry is uniquely important to the country’s economic strength, employing 1 in 13 Ukrainians with good-paying jobs.”\(^{326}\) Oddly, however, the suspension did not cover aluminum, of which Ukraine also was a producer-exporter.\(^{327}\)

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\(^{326}\) Raimondo Announces Temporary Suspension (also stating: “Some of Ukraine’s largest steel communities have been among those hardest hit by Putin’s barbarism, and the steel mill in Mariupol has become a lasting symbol of Ukraine’s determination to resist Russia’s aggression. Many of Ukraine’s steel mills have continued to pay, feed, and even shelter their employees over the course of fighting. Despite nearby fighting, some Ukrainian mills have even started producing again.”).

UNITED STATES DEPARTMENT OF COMMERCE, ANNOUNCEMENT OF ACTIONS ON U.K. IMPORT UNDER SECTION 232 (22 MARCH 2022)

Steel

Steel Tariff Rate Quota:

The United States will replace the existing 25 percent tariff on the UK’s steel products under Section 232 with a ... TRQ with a date of effectiveness of June 1, 2022. Under the TRQ arrangement historically-based volumes of U.K. steel products will enter the U.S. market without the application of Section 232 tariffs as follows:

(1) TRQ Amount:
The aggregate annual import volume under the TRQ is set at 0.5 ... MMT under 54 product categories and allocated in line with the 2018-2019 historical period. A breakdown of the said 54 product categories is enclosed in Annex 1.

(2) Derivative Products:
Imports of derivative articles of steel, as referenced in Proclamation 9980 [i.e., U.S. Presidential Proclamation 9980 of January 24, 2020329], from the U.K. will not be subject to Section 232 duties.

(3) Eligible products:
   a. Subject to the exception provided for in Paragraph 3.b., in order to be eligible for duty-free treatment under the quota, steel imports must be “melted and poured” in the U.K. and have a U.K. country of origin, according to current U.S. requirements and rules implementing this arrangement. An importer shall provide relevant documentation substantiating compliance with U.S. requirements. Failure to comply could result in remedies and/or penalties as provided for under U.S. law.

   b. Steel imports which are melted and poured in the U.K. but further processed in the EU, conferring an EU country of origin, and subsequently imported into the United States may be eligible for duty-free treatment under the quota and count against the U.K. TRQ volume, not to exceed 37.8 ... TMT annually under 54 quota product categories and allocated in line with the 2021 historical period. ... The U.K. will provide quarterly updates, including notification on reaching the quota volume limit to the in-quota rates.

(4) Exclusions:

The United States will maintain its exclusions process, as implemented under Section 232 of the *Trade Expansion Act of 1962*, available for steel products imported from the U.K.

(5) Tariff Rate:
Section 232 steel products from the U.K. that are within-quota will enter free of any Section 232 duty while all Section 232 products entering above-quota will continue to be subject to a Section 232 duty of 25 percent, provided that they are not subject to an exclusion as per Paragraph 4 above.

(6) Administration:
The TRQ will be calculated for each year of the measure and administered on a quarterly basis. Any unused TRQ volume from the first quarter of the year, up to 4 percent of the allocated quota for that quarter, will roll over to the third quarter; any unused TRQ volume from the second quarter of the year, subject to the same limit, will roll over into the fourth quarter; and any unused TRQ volume from the third quarter, subject to the same limit, will roll over into the first quarter of the following year. The TRQ will be allocated on a first-come, first-served basis for each product category. The United States will provide on a public website updated information on the utilization of the quarterly quota for each product category, including information on the transferred unused TRQ volumes from one quarter to another.

(7) Adjustment:
The United States will conduct annual reviews of the TRQ to calculate the level of U.S. steel demand (apparent consumption) in the previous year when such data becomes available from the World Steel Association. For each 6 percent that this calculated level is above or below U.S. steel demand in 2021, the TRQ volume would increase or decrease, respectively, by 3 percent relative to the level outlined in Paragraph 1 in the subsequent twelve-month period. Should the calculated level of U.S. steel demand not be at least 6 percent above or below the U.S. fiscal year 2021 level, then the TRQ volume in the subsequent year would be at the level outlined in Paragraph 1 above.

(8) Review:
Starting no later than September 1, 2022, the United States will evaluate utilization and administration of the TRQ every three months and, at the request of the UK, enter into consultations to address any substantial under-use of the TRQ.

**Aluminum**

The United States will replace the existing 10 percent tariff on U.K. aluminum products under Section 232 [per *Presidential Proclamation 9704* of March 8, 2018] with a … TRQ with a date of effectiveness of June 1, 2022. Under the TRQ arrangement,

historically-based volumes of U.K. aluminum products will enter the U.S. market without the application of Section 232 tariffs as follows:

(1) TRQ Amount:

The aggregate annual import volume under the TRQ is set at 0.9 … TMT for unwrought aluminum under 2 product categories and 11.4 TMT for semi-finished (wrought) aluminum, other than foil ([HTS] 7607), under 12 product categories. The import volumes for these categories will be allocated in line with the 2018-19 historical period. For foil (7607) the annual import volume under the TRQ is set at 9.3 TMT under 2 product categories. The import volumes for foil (7607) will be allocated in line with the 2021 reference period. A breakdown of the said product categories is enclosed in Annex 2.

(2) Derivative Products:

Imports of derivative articles of aluminum, as referenced in Proclamation 9980 [i.e., Presidential Proclamation 9980 of January 24, 2020331], from the U.K. will not be subject to Section 232 duties.

(3) Eligible Products:

In order for semi-finished (wrought) aluminum products to be eligible for duty-free treatment under the quota they must not contain primary aluminum from the People’s Republic of China, the Russian Federation or the Republic of Belarus.

(4) Entry Documentation:

An importer shall provide a Certificate of Analysis for each aluminum product entered into the United States, as required by current6 U.S. law and rules implementing this arrangement. In addition, the importer shall provide the Certificate of Analysis for the smelted (i.e., unalloyed) primary aluminum used in the manufacturing of the product entered into the United States. Failure to provide this documentation could result in remedies and/or penalties as provided for under U.S. law.

(5) Exclusions:

The United States will maintain its exclusions process, as implemented under Section 232 of the Trade Expansion Act of 1962, available for aluminum products imported from the U.K.

(6) Tariff Rate:

Section 232 aluminum products from the UK that are within-quota will enter free of any Section 232 duty, while all Section 232 aluminum products entering above quota will continue to be subject to a Section 232 duty of 10 percent, provided that they are not subject to an exclusion as per Paragraph 5 above.

(7) Administration:

The TRQ is calculated for each year of the measure and administered on a semi-annual basis. The United States will provide on a public website updated information on the utilization of the semi-annual quota for each product category.

STEEL AND ALUMINUM, U.S.-UK JOINT STATEMENT (22 MARCH 2022)\(^{332}\)

Given the joint desire of the United States and the United Kingdom to address non-market excess capacity so as to preserve their critical steel and aluminum industries, the United States and the U.K. will implement the following arrangement.

**Ongoing Cooperation**

(a) Customs Cooperation:

Both sides agree to expand U.S./U.K. coordination involving customs matters. The United States and the U.K. will also share publicly available information and best practices, as appropriate, on topics including how detection of fraud, evasion and circumvention of duties is approached. Officials may also coordinate industry engagement with relevant sectors to hear their views and share observations and concerns. Customs cooperation may take the form of mutual administrative assistance in accordance with the *U.S.-U.K. Agreement on Customs Cooperation and Mutual Assistance in Customs Matters*.

(b) Trade Remedy Cooperation:

The United States and the U.K. agree to share publicly available information on trade remedies and best practices, including on possible self-initiation of trade enforcement actions.

(c) Monitoring:

The United States and the U.K. will monitor steel and aluminum trade between them.

(d) Cooperation on Non-Market Excess Capacity and Carbon Intensity:

While the United States and the U.K. have measures and protections in place to address issues relating to unfairly traded imports and surges in imports of products,
and to ensure domestic industries operate in market-oriented conditions, both countries recognize that these actions alone are insufficient to address the global market distortions caused by carbon intensive non-market excess capacity. In order to establish more market-oriented conditions for steel and aluminum industries, the United States and the U.K. will continue to take effective and appropriate domestic measures, such as antidumping, countervailing duty, and safeguard measures or other measures. The U.K. and the United States may share publicly available import data with respect to steel including from third-country markets and will consult each other regarding import surges to enable each country to take appropriate steps to address non-market excess capacity effectively and in a timely manner.

The U.K. and the United States will confer on non-market excess capacity and on the situation in global steel and aluminum markets, including market trends and price differences between markets, domestic industry’s conditions, and analysis on import and export data, including as to third-country markets. The United States and the U.K. will also confer, upon request of either government, on market-distorting influence or ownership in their respective steel and aluminum industries. The United States and the U.K. agree to regularly meet to consult with a view to considering additional actions in order to contribute to adjustments and solutions to address non-market excess capacity in the global steel and aluminum sectors.

The U.K. and the United States will confer on entering into discussions on global steel and aluminum arrangements to address both non-market excess capacity as well as the carbon intensity of the steel and aluminum industries. To facilitate these discussions and seek shared understandings, the U.K. and the United States will (1) share publicly available data and analysis on non-market excess capacity and its effects on their respective steel and aluminum industries and (2) confer on methodologies for calculating steel and aluminum carbon-intensity and will to the extent feasible share relevant data, including relating to emissions in the steel and aluminum sectors.

(e) Review:

The United States and the U.K. agree to review the operation of this arrangement, and ongoing cooperation, on an annual basis, including in light of changes in the global steel and aluminum markets, U.S. demand, and imports.

U.S. Entry Requirements, U.K. Annual Strategic Audit and U.K. Procedures

(a) Steel from any U.K. steel production facility will be admitted into the United States at the in-quota rate under the applicable … TRQ for UK steel (until such time as that quota is exhausted) provided it is “melted and poured” in the U.K. and imported into the United States from the U.K. or the EU, as per the provisions in the [above-excerpted] U.S. Statement of March 22, 2022, Paragraphs 3(a) and 3(b) in the section titled “Steel Tariff-Rate Quota”.
(b) The United States and U.K. are committed to ensuring that steel exports from the UK to the United States under the applicable TRQ for steel are not supported by market distorting practices. To this end, the UK will provide to the United States, in the case of any known UK steel producer that is owned or controlled by a company registered in China or a Chinese entity, and which exports steel to the United States under the applicable TRQ for UK steel, an attestation. The attestation will be based on an annual strategic audit conducted by an independent third party, to the effect that there is no evidence of market distorting practices by that producer in the UK that would materially contribute to non-market excess capacity of steel. The audit will include an assessment of the steel producer’s and its (if any) U.K. parent company’s financial records including any subsidy provided by any Government controlled or directed entity in China, and any other relevant records to allow the auditor to evaluate whether there are any market distorting practices in the U.K. by that producer that would materially contribute to non-market excess capacity of steel. The results of such audit will be made available to the United States upon completion. The United States will protect any audit properly identified as containing proprietary information from public disclosure to the extent permitted by U.S. law.

(c) Steel from any U.K. steel producer that is owned or controlled by a company registered in China or a Chinese entity will be eligible for entry at the in-quota rate for 6 months from June 1, 2022, within which the UK will provide the first annual attestation. If the attestation is not provided by December 1, 2022, and then annually on December 1 thereafter, the United States reserves the right to temporarily deny access for the UK steel producer to the in-quota rate for the applicable TRQ. Where at any time access has been denied, and where the UK submits an attestation, the United States will restore the access of the affected producer to the in-quota rate within 8 weeks. Where a UK steel producer has been denied access to the in-quota rate for the applicable TRQ, the U.S. 232 exclusion process referred to in Paragraph 4 of the [above-excerpted] U.S. Statement of March 22, 2022, on Steel Tariff-Rate Quota remains available to that producer.

VI. Emissions Standards versus CBAM?

The October 2021 U.S.-EU Global Arrangement on Steel and Aluminum was set to expire after two years. By June 2023, the two sides were far apart on a final settlement of the Section 232 25% steel and 10% aluminum tariffs, raising the specter the U.S. would reimpose the remedies. To be sure, they had a common vision of “form[ing] a sustainable steel club that would prioritize low carbon production,” which also would reduce their reliance on Chinese steel and aluminum imports. But, they disagreed on how to implement this vision.

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333 Andy Bounds, EU Rejects U.S. Offer to End Steel Tariff Dispute, FINANCIAL TIMES, 28 June 2023, www.ft.com/content/42d968e5-cb13-4ceb-9f93-b1a321303a14?shareType=nongift. [Hereinafter, EU Rejects U.S. Offer.]
The EU believed America’s “proposed solution is likely to breach World Trade Organization rules because it discriminates in favor of domestic producers….” The U.S. wanted to:

- allow club members to set emissions standards, and levy tariffs on those who do not meet them…. To join, governments would also have to commit to not overproduce steel and aluminium and to limit the role of state-owned enterprises.334

That, said the EU, could raise problems under GATT Article III national treatment principles.

So, the EU called for use of a carbon border adjustment mechanism, arguing “its new … CBAM, which will levy tariffs on imports according to their carbon intensity, is the right answer.”335 In effect, CBAM, along with traditional TDIs like AD-CVD and safeguard remedies, would help combat over-production. Under the EU’s emissions trading system, companies must:

- buy permits to pollute, with the price of a ton of carbon hitting €90 in recent months [Spring 2023]. Its CBAM would force importers to pay the same price for seven sectors, including steel and aluminium, if the country of origin has a lower, or no, carbon price.336

But the EU was ahead of America. The U.S. was too politically polarized to implement a national carbon pricing system and CBAM:

- One challenge is that the U.S. doesn’t yet have a methodology to price carbon emissions, nor does it have a system it applies domestically on its own firms….

- … The EU already has such tools in place, through an internal trading system and its carbon border adjustment mechanism, which levies an equivalent price on carbon intensive goods produced outside the bloc.337

The U.S. could not, or would not, take on its powerful hydrocarbon lobby, for which carbon pricing was anathema. Indeed, the Biden Administration was “wary of levying charges on heavy industry in states the president needs to retain in the 2024 election such as Pennsylvania, Michigan, and Illinois.”338
Chapter 10

SECTION 232 (CONTINUED):
ADDITIONAL CONTROVERSIES

I. May 2018 Section 232 Auto Investigation

● May 2018 Investigation Announcement

On 23 May 2018, Donald J. Trump (1946-, President, 2017-2021) announced he had instructed the DOC to initiate the third Section 232 investigation of his Presidency, namely, against imports of automobiles, including light trucks, SUVs, and vans, plus auto parts. The President called for consideration of a global tariff of up to 25% on all such merchandise, arguing “[c]ore industries such as automobiles and automotive parts are critical to our strength as a Nation.”

His Secretary of Commerce, Wilbur Ross (1937-), added:

“There is evidence suggesting that, for decades, imports from abroad have eroded our domestic auto industry,” said Secretary Ross. “The Department of Commerce will conduct a thorough, fair, and transparent investigation into whether such imports are weakening our internal economy and may impair the national security.”

During the past 20 years, imports of passenger vehicles have grown from 32 percent of cars sold in the United States to 48 percent. From 1990 to 2017, employment in motor vehicle production declined by 22 percent, even though Americans are continuing to purchase automobiles at record levels. Now, American owned vehicle manufacturers in the United States account for only 20 percent of global research and development in the automobile sector, and American auto part manufacturers account for only 7 percent in that industry.

Automobile manufacturing has long been a significant source of American technological innovation. This investigation will consider whether the decline of domestic automobile and automotive parts production threatens to weaken the internal economy of the United States, including by potentially reducing research, development, and jobs for skilled workers in connected vehicle systems, autonomous vehicles, fuel cells, electric motors.

Documents References:
(1) Havana (ITO) Charter Preamble, Article 99
(2) GATT Article XXI
(3) Relevant provisions in FTAs


Exactly how broad the investigation would be was unclear. “Motor vehicles and parts” is a broad, undefined category, and the official pronouncements were inclusive: “automobiles, including cars, SUVs, vans and light trucks, and automotive parts.”\footnote{Public Hearing Notice, 24735.} So, for example, were components of vehicular air-conditioning systems, such as freon, included? What about mirrors used on the reverse side of car eyeshades, or removable picnic tables built into the trunks of SUVs?

10 Doubts

Naturally, the statutory legal criteria for the Section 232 auto investigation were the same as those in the steel and aluminum cases. However, the auto investigation raised even more serious doubts than the cases against steel and aluminum, in at least 10 respects. One of them concerned the criteria: the auto investigation referred to the \textit{NSIBR}, published at Section 705.4 of the CFR, which contain eight criteria. The Trump Administration added six criteria, five of which were based on the \textit{NSIBR} criteria and adjusted for the auto context, but one of which appeared novel:\footnote{The criteria are quoted from the \textit{Public Hearing Notice}, 24736. The adaptations for the automotive industry, and the novel tenth criterion, are evident from comparing \textit{Public Hearing Notice}, 24736 with 15 C.F.R. § 705.4(a)(1)-(5), (b)(1)-(3), www.gpo.gov/fdsys/pkg/CFR-2018-title15-vol2/pdf/CFR-2018-title15-vol2-sec705-4.pdf.}

\begin{enumerate}
\item “The quantity and nature of imports of automobiles, including cars, SUVs, vans and light trucks, and automotive parts and other circumstances related to the importation of automobiles and automotive parts.”
\end{enumerate}
(4) “The existing and anticipated availability of human resources, products, raw materials, production equipment, and facilities to produce automobiles and automotive parts.” 346

(5) “The growth requirements of the automobiles and automotive parts industry to meet national defense requirements and/or requirements to assure such growth, particularly with respect to investment and research and development.” 347

(6) “The impact of foreign competition on the economic welfare of the U.S. automobiles and automotive parts industry.” 348

(7) “The displacement of any domestic automobiles and automotive parts causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects.” 349

(8) “Relevant factors that are causing or will cause a weakening of our national economy.” 350

(9) “The extent to which innovation in new automotive technologies is necessary to meet projected national defense requirements.”

(10) “Whether and, if so, how the analysis of the above factors changes when U.S. production by majority U.S.–owned firms is considered separately from U.S. production by majority foreign-owned firms.”

(11) “Any other relevant factors.” 351

The first nine criteria were familiar, as was the eleventh: they were the ones used in earlier Section 232 cases, adapted for the automotive industry. But, the tenth criterion never had been used before. Was the Trump Administration sending a protectionist, even xenophobic, message that domestic production by domestic, but not foreign, companies enhances American national security.

Second, did auto imports truly threaten to impair American national security? Autos are a consumer good. As the Association of Global Automakers argued in opposition to any Section 232 action, “America does not go to war in a Ford Fiesta.”\(^{352}\) Similarly, the Alliance of Automobile Manufacturers (the members of which include Daimler, GM, Ford, and Toyota), not only intoned “there is no basis to claim that auto-related imports are a threat to national security,” but also highlighted the fact 98% of U.S. auto imports come from America’s allies.\(^{353}\) That is, nearly 25% of all autos sold in America are imported, but allied countries are the largest sources of cars and car parts.\(^{354}\) The U.S. (in 2017) imported 8.3 million, and exported nearly two million, vehicles. Of the imports, 2.4 million came from Mexico, and 1.8 million from Canada – 50.6% from America’s NAFTA partners.\(^{355}\) Other major car exporters to America were Germany, Japan, and Korea (accounting for 11%, 21%, and 8% of U.S. vehicle imports, respectively, in 2017), allies that disagreed with the auto case and that already were angered by the steel and aluminum cases.\(^{356}\) Moreover, about 12 million cars and trucks were made in the U.S. (in 2017), including by German, Japanese, and Korean companies, all of which had large U.S.-based manufacturing and assembly plants. The majority of Japanese and Korean vehicles sold in the U.S. were made in the U.S. How, then, were friendly foreign imports undermining American national security?

Third, were the figures quoted by Secretary Ross illustrative of a significant increase in all types of vehicles and components? He spoke of a 16% increase in imports between 1997-2017, and a 22% drop in employment between 1990-2017. What he did not mention was that since 2009, auto output in the U.S. grew 124%.\(^{357}\) Obviously, the variables he cited did not match, and he conflated correlation with causation: were imports to blame for the decline in employment, or were their other factors, such as automation and recession? Equally obviously, the time periods were not co-extensive. In essence, a persuasive case had yet to be made that imports were a cause of declines in American automotive output and employment (e.g., imports increased relative to domestic production), and that such declines impaired national security, though of course, Section 232 requires neither a showing of causation nor injury.

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\(^{353}\) *Automakers Warn.*


Fourth, what would the Section 232 action mean for the American economy? On the one hand, “[t]he White House thinks the penalties would encourage domestic investment and automotive production and support U.S. workers....” But on the other hand:

But America’s carmakers, including Ford, General Motors and Fiat Chrysler, are wary as they watch what’s happening to other companies caught in Trump’s trade war, such as Harley-Davidson. The motorcycle maker suddenly found the European Union imposing tariffs on its U.S.-manufactured products after Trump [in March 2018] instituted penalties [under Section 232] on steel and aluminum from Europe.

The auto industry is ... raising concerns about the intricacy and global nature of how cars and trucks are made, with parts crossing borders many times to build one automobile. Domestic and foreign brands alike are concerned that penalties would disrupt sales and hurt their bottom lines.

Unlike the steel and aluminum tariffs – where some companies, unions and lawmakers offered measured support for the president’s attention and protection – there is near-unanimous opposition among those same groups against the push to impose tariffs on cars.

... A tax on foreign autos could have far deeper impacts than the steel and aluminum duties Trump has already imposed [under Section 232, in March 2018]. The U.S. imported some $360 billion in cars, car parts and engines last year [2017], compared to $29 billion in steel and $18 billion in aluminum.

... The probe is geared at helping domestic brands, but even the Big Three automakers are making it clear they aren't asking for tariff protection.

... Most cars made in the U.S. today are composed of only about 75 percent U.S. content, for example, meaning manufacturers would still have to pay the tariffs on the remaining 25 percent of parts. Of the top 10 domestically produced cars with the most U.S. content, four are made by the Japanese brand Honda.

A 25 percent tariff, as the administration has threatened, would lead to a loss of 195,000 jobs in the U.S. auto industry [representing 1.9% of the labor force in the auto and auto parts industry] over a three-year period, as production would drop off by 1.5 percent, according to a recent study from the Peterson Institute for International Economics. The study projected that if other countries retaliate [in kind, with tariffs on the same merchandise],
U.S. job losses could reach 624,000 [representing 5% of the auto and auto parts workforce, owing to an output decline of 4%].

So, consider the significance of the cost to American consumers of a comprehensive 25% auto and auto parts tariff. Many car and component companies could not absorb that increase, and would need to choose between laying off employees or passing on the tariff to consumers. Average American households, given their already high levels of debt, could not themselves absorb those increases:

U.S. American consumers would have to pay $5,000 to $7,000 more for their vehicles on average, potentially reducing U.S. auto sales by 4 million to 5 million units a year….

“It’ll hurt the U.S. as much as it’ll hurt Canada,” said [Jerry] Dias [Canadian President, UNIFOR, which represents Canadian autoworkers at FCA, Ford, and GM], who pointed out that the majority of parts in Canadian-built vehicles come from the U.S. …

The problem with auto tariffs is that it takes a long time to shift production, meaning American consumers would pay the price for several years, said Flavio Volpe, president of the Automotive Parts Manufacturers’ Association, which represents Canada’s auto suppliers.

“If your objective is to have the American companies as well as the Japanese set up on the U.S. side of the border, you’re asking private companies to absorb billions of dollars of costs,” Volpe said, adding that it would make the North American industry less competitive against rising Chinese players. “At a time when the U.S. is targeting China, it is infinitely dumb.”

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The 195,000 and 624,000 figures are how many workers would become unemployed in the national economy because of macroeconomic adjustment to the shock. The percent change of employment in the auto and part industries are displaced workers who may find other jobs or be unemployed.

Id., footnote 1.

Tariffs on auto parts would cause the cost of a U.S.-origin car to jump by $2,000.360

So, many consumers might postpone or avoid altogether a new car purchase altogether, substitute a cheaper, U.S.-made vehicle, or perhaps look to the used car market. The diminution in demand for cars could lead to a vicious downward spiral across the North American vehicle and parts industries. The multiplier effects to other goods and services sectors could push the American economy into recession. Those effects could be exacerbated by counter-retaliation against the U.S., for example by Canada, which is America’s top export destination for motor vehicles. The EU, too, would counter-retaliate, as it warned in its 10-page comment letter to the DOC arguing against any Section 232 action:

Likewise, “[t]he Alliance of Automobile Manufacturers, representing General Motors Co, Ford Motor Co, Daimler AG, Toyota and others,” said in its 27 June 2018 comment letter to the DOC against deployment of Section 232 on auto and auto part imports:

“We believe the resulting impact of tariffs on imported vehicles and vehicle components will ultimately harm U.S. economic security and weaken our national security,” the group wrote, calling the tariffs a “mistake” and adding imposing them “could very well set a dangerous precedent that other nations could use to protect their local market from foreign competition.”

The Alliance said its analysis of 2017 auto sales data showed a 25 percent tariff on imported vehicles would result in an average price increase of $5,800, which would boost costs to American consumers by nearly $45 billion annually.

Automakers are concerned tariffs would mean less capital to spend on self-driving cars and electric vehicles.

“We are already in the midst of an intense global race to lead on electrification and automation. The increased costs associated with the proposed tariffs may result in diminishing the U.S.’ competitiveness in developing these advanced technologies,” the Alliance wrote.

Toyota said in a statement Wednesday that new tariffs “would increase the cost of every vehicle sold in the country.” The automaker said the tariffs would mean even a Toyota Camry built in Kentucky “would face $1,800 in increased costs.”

Quoted in Automakers Warn.

To be sure, auto producers were concerned about their own bottom lines adversely affected by multiple Section 232 cases. In September 2018, Ford said the 10% aluminum and 25% steel tariffs had cost Ford $1 billion in profits since their initial imposition in March, and warned new Section 232 tariffs on auto and auto parts would cost 300,000 auto-sector jobs nationwide in factories and dealerships. See Nick Carey & David Shepardson, Trump Metals Tariffs Will Cost Ford $1 billion in Profits, CEO Says, REUTERS, 26 September 2018, www.reuters.com/article/us-ford-motor-tariffs/trump-metals-tariffs-will-cost-ford-1-billion-in-profits-ceo-says-idUSKCN1M61ZN.

EU companies make close to 2.9 million cars in the United States, supporting 120,000 jobs – or 420,000 if car dealerships and car parts retailers are included.

Imports had, it said, not shown a dramatic increase in recent years and largely grown alongside overall expansion of the U.S. car market, with increased demand that could not be met by domestic production.

... [T]ariffs on cars and car parts could undermine U.S. auto production by imposing higher costs on U.S. manufacturers. The EU had calculated that a 25 percent tariff would have an initial $13-14 billion negative impact on U.S. gross domestic product with no improvement to its current account balance.

Assuming counter-measures along the lines of those taken in response to existing U.S. [Section 232] import tariffs on steel and aluminum, up to $294 billion of U.S. exports – 19 percent of overall U.S. exports – could be affected....

Simply put, 25% Section 232 tariffs could be a major self-inflicted wound to the American economy.

Fifth, was there a “China card” to play in the Section 232 auto investigation? China is not an exporter of cars, light trucks, or SUVs to America, though it is a source of various parts. The Pentagon had opposed the steel and aluminum tariffs, and it would not be a surprise if it opposed the auto case, too, finding that the merchandise in question is not strategic, and there is no Sino-American great power conflict at stake. At best, any “China card” seemed pre-emptive, that is, the Trump Administration sought to blunt China’s aspirations to enter the American automotive market.

Sixth, were America’s NAFTA partners the real targets of the Section 232 auto case? Announcing the investigation appeared to be an unartful negotiating tactic to pressure Canada and Mexico on auto ROOs in the theretofore unsuccessful NAFTA renegotiations. Consider Canada’s vulnerability:


As the EU applies a 10% MFN rate on cars, compared with America’s 2.5% duty, with no 25% retaliation or counter-retaliation, the EU tariff is 75% higher than the American one. With 25% retaliation and counter-retaliation added to the applied MFN rates, the difference in tariff narrows to 21.4% (the percentage difference between 35%, which is the sum of 25% and 10% by the EU, and 27.5%, which is the sum of 25% and 2.5% by the U.S.). However, as a practical matter, the cumulative EU tariff is a significant impediment, insofar as consumers respond to absolute values. Prospective European consumers of U.S. car imports find a 35% cumulative EU barrier even worse than prospective American consumers of EU car imports find a 27.5% impediment.


363 See Trump Threatens.
Motor vehicles and parts were Canada’s biggest export after energy products, representing about 16 percent of the C$7.4 billion ($5.7 billion) in shipments over the first four months of this year [2018]. The Canadian auto industry directly employs about 130,000 people and contributes more than C$20 billion annually to gross domestic product, according to the Canadian Vehicles Manufacturers’ Association, which represents the Canadian arms of General Motors Co., Ford Motor Co. and Fiat Chrysler Automobiles NV.

If the tariffs are implemented, they would shave about 0.6 percent off Canadian economic growth….

…

With the economy growing at about 2.2 percent, that’s lopping off more than a quarter of growth….

Five automakers – GM, Ford, FCA, Toyota Motor Corp. and Honda Motor Co. – produced about 2.2 million vehicles in Canada last year [2017]. Approximately 85 percent of those vehicles are exported, with the vast majority going to the U.S. The most popular models shipped to the U.S. include the Toyota RAV4 and the Honda Civic, both assembled in Ontario plants. Manifestly, a 25% tariff on such exports would pose an a major impediment to U.S. market access, and “threaten an ever-shrinking sector in Canada that lost 53,000 jobs between 2001 and 2014.” (Reinforcing this vulnerability was personal invective: White House trade advisor Peter Navarro said “there’s a ‘special place in hell’ for foreign leaders like [Canadian Prime Minister Justin] Trudeau who engage in bad faith with [President] Trump…."

Mexico, too, was vulnerable to a 25% tariff, even though many of the Canadian jobs were lost to Mexico:

Canada’s loss has been Mexico’s gain, as production there has soared thanks to NAFTA and other trade deals. In 2008, Mexico surpassed Canada for the first time to become the second-largest North American producer of light vehicles…. While total Canadian production may decline by 135,000 units between 2016 and 2020, Mexico’s are forecast to rise by 850,000. The threat of tariffs add to the uncertainty in the industry, which faces a potential trade overhaul as a result of NAFTA negotiations.

In other words, Mexico’s aspirations for growth in the American market were imperiled by the Section 232 action.
Seventh, would the uncertainty created by the Section 232 auto case cause auto and auto parts companies to re-think their supply chains, with a view to re-ordering them outside of the U.S.? After all, Canada and Mexico were CPTPP members, and have FTAs with the EU. So, automotive products originating in Canada and Mexico would have DFQF access to the TPP 11 countries, and the EU. Of course, such re-ordering would take time, and depend on the position of a firm in the commercial chain, and as an importer, exporter, or both. But, in the long run, investing more heavily in operations outside the U.S. might have the advantages of enhancing market access in third countries, and hedging against U.S. political risk.

Eighth, would this uncertainty deter foreign companies from investing in the U.S. and hiring Americans? Volvo, a China’s Zhejiang Geely Holding Group, answered in the affirmative. Before the Section 232 auto investigation, Volvo had been importing all of the vehicles it sold in America. With rising U.S. demand for its cars, it built a new factory in South Carolina, which initially employed 900 Americans. Volvo planned to boost production via a $1.1 billion factory expansion, and increase to 4,000 its labor force. They would make cars not only for domestic sale, but also for exportation. But, two prospects imperiled Volvo’s plans: Section 232 tariffs imposed by the U.S. on auto parts Volvo imported to incorporate into finished vehicles; and counter-retaliatory tariffs imposed by China, the EU, and other countries on the vehicles it exports.

Volvo was not alone in this response. BMW, too, said a Section 232 action against car and car parts would compel it to reduce its investment and workforce at its Spartanburg, South Carolina factory. That plant is BMW’s largest production facility in the world, and BMW exports annually 70% of the vehicles that roll off its assembly lines. However, the counter-retaliatory measures China and the EU took in the Section 232 steel and auto cases included tariffs on those exported vehicles, which BMW said it could not “completely absorb,” and thus would have to raise prices on models shipped from South Carolina to China. And, the American 25% and 10% steel and aluminum tariffs, respectively, had raised the cost of inputs BMW imported for use in those exports. If the U.S. proceeded with Section 232 auto and auto part tariffs, then foreign countries again would counter-retaliate. At that point, BMW could not absorb the higher counter-retaliatory tariffs on its car exports, nor the higher U.S. tariffs on its auto part imports. BMW would have to shift production and jobs to China and the EU.

When China did impose counter-retaliatory measures, not only in response to the U.S. Section 232 steel and aluminum actions, but also in the Section 301 case (discussed in a separate Chapter), BMW said it would have to raise the price of two crossover SUV

models it makes in Spartanburg, South Carolina and ships to China: the X4, X5, and X6.\textsuperscript{370} China had lowered its applied MFN auto tariff from 25% to 15%, but its 25% counter-retaliation (effective 6 July 2018) meant BMW (and all other auto) shipments from the U.S. to China faced a 40% tariff. So, BMW – which in 2017 had exported over 100,000 vehicles from America to China – said it would raise its retail prices in China on those two models by 4%-7%. BMW might have liked to raise them further, but stiff competition in China among luxury brands impelled it to absorb the remainder of the 25% counter-retaliatory tariff – and, consider shifting production and jobs overseas. In November 2018, BMW weighed shifting production from its Spartanburg facility – which was its largest in the world, employing 10,000 workers, and which exported 70% of its production to China and other countries – to China.\textsuperscript{371}

Most notably, GM – America’s largest automaker – joined Volvo and BMW in saying tariffs of up to 25% on autos and auto parts would threaten American jobs.\textsuperscript{372} GM has (as of June 2018) 110,000 employees at its 47 manufacturing facilities across the U.S., and (between 2009-2018) invested over $22 billion in these facilities. Seventy percent of the cars GM sells in the U.S. (as of 2017) are made in those facilities, while the remaining 30% are imported (86% of the imports are from Canada or Mexico, thanks to NAFTA, and the remaining 14% are from China or the EU). A Section 232 action, and the foreseeable counter-retaliation by other countries, would raise the cost of inputs GM imports, and impede market access for finished vehicles – just as would happen with Volvo and BMW. So, in its comment filed with the DOC, GM warned that a trade war in cars and car parts would “lead to a smaller GM, a reduced presence at home and abroad for this iconic American company, and risk less – nor more – U.S. jobs.” GM would be forced to raise prices (on domestic car sales, due to higher imported input costs caused by the Section 232 tariffs, and on foreign sales, due to counter-retaliatory duties on finished vehicles), which would lead to lower sales, and thus a vicious cycle of shrinking output and employment, not to mention investment, R&D, and innovation.

Ninth, would the Section 232 case embolden WTO Members other than the U.S. to implement protectionist measures under the guise of national security? Consider the remarks of former Appellate Body Chairman, Georges Abi-Saab, who also served as Chair of the Panel in the 2019 \textit{Russia Transit Traffic} case (excerpted in a separate Chapter), about America’s anticipated invocation of GATT Article XXI to justify Section 232 tariffs on autos and auto parts:

\begin{quote}
Frankly I think, if I were a lawyer (working on the case) I wouldn’t accept to take such a case – not only on moral aspects, but I think it would be very difficult to make it prevail.
\end{quote}

\begin{footnotes}
\footnotetext[371]{See Gabrielle Coppola, \textit{BMW May Shift Production to China from U.S. as Trade War Bites}, 35 International Trade Reporter (BNA) 1484 (15 November 2018).}
\footnotetext[372]{See \textit{GM Says}.}
\end{footnotes}
I would say strategic raw materials may be easier to prove than a final product like a car. The further you get away from it (armed conflict and the breakdown of law and civil order), the more you have to prove how this relates to national security.\(^{373}\)

Moreover, if WTO challenges against alleged GATT breaches were met by respondents with invocation of the Article XXI national security exception, then the threat to the WTO dispute settlement system, and indeed the GATT-WTO trade order, would be grave indeed. As Japan’s Minister of Trade, Hiroshige Seko, said: “Imposing broad, comprehensive restrictions on such a large industry could cause confusion in world markets, and could lead to the breakdown of the multilateral trade system based on WTO rules.”\(^{374}\) In effect, America’s steel and aluminum cases, followed by its auto case, would have catalyzed the demise of the liberal multilateral trade order.

Finally, would the U.S. grant selected country-specific and/or product-specific exemptions to any Section 232 tariffs it imposed? For example, would Korea receive one, as it had from the steel and aluminum tariffs, thanks to its agreement to revise KORUS? If so, then what price would Korea have to pay? Would it be a VER, which, as in the steel and aluminum case, might be illegal under GATT-WTO rules?

II. July 2018 Section 232 Presidential Auto Proclamation and Aftermath

Not surprisingly, the prospect of a Section 232 investigation attracted widespread opposition in the U.S. The DOC had until February 2019 to report its findings to the President. Nevertheless, by mid-July 2018, about 2,300 comments were submitted to the DOC from foreign governments (including Japan and Korea, which both manufacture vehicles in, and export them to, the U.S.), individuals, industry groups, and unions, including globally integrated auto producers like GM, and antique auto enthusiasts – and only three supported a Section 232 case (with the UAW providing the strongest support, but still calling for targeted action to support re-investment in America’s auto factories and prevent anymore offshoring of production and jobs).\(^{375}\) As the investigation proceeded in


\(^{374}\) *Quoted in* Trump Threatens. (Emphasis added.) Likewise, he and EU Trade Commissioner Cecilia Malmstroem said in May 2018 joint statement they issued after meeting with the USTR, Ambassador Robert Lighthizer: “This would cause serious turmoil in the global market and could lead to the demise of the multilateral trading system based on WTO rules.” *Quoted in* EU-Japan Joint Statement, 31 May 2018, [http://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156907.pdf](http://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156907.pdf), and in Nikos Chrysoloras, *Car Tariffs May Lead to Demise of Global Trade System: EU, Japan*, 35 International Trade Reporter (BNA) 756 (7 June 2018). (Emphasis added.)

the U.S., foreign countries devised strategies to counter any Section 232 tariffs their autos or auto parts might face.

The EU drew up a counter-retaliation list of American exports, pledging to impose steep tariffs on up to €20 billion worth of U.S. imports.\textsuperscript{376} Mexico pledged to defend its interests, possibly by accepting an annual DFQF cap of 2.4 million vehicles, with cars and SUVs above that limit subject to Section 232 tariffs.\textsuperscript{377} Canada declared it would respond “proportionately,” though whether it could afford a dollar-for-dollar response was dubious.\textsuperscript{378} Auto and auto parts suppliers in Canada were dependent on the American market to a greater degree than its aluminum and steel producers, making the Canadian tit-for-tat response to the Section 232 aluminum and steel tariffs less difficult. And, in July 2018, Japan and Korea joined the EU, Canada, and Mexico to discuss the common threat of another Trump Administration Section 232 action, vowing not only counter-retaliatory tariffs, but also a WTO lawsuit.\textsuperscript{379} These countries, representing nearly $1 trillion in global


\textsuperscript{378} See Kristine Owram & Josh Wingrove, \textit{Facing Trump Auto Tariff Threat, Canada Response Isn’t So Clear}, 35 International Trade Reporter (BNA) 1004 (26 July 2018).


The U.S. agreed to a similar arrangement with the EU – it would hold off on imposing Section 232 tariffs on European auto and auto parts while the EU remained engaged with the U.S. in a possible bilateral FTA. See Richard Bravo, Jenny Leonard & Shawn Donnan, \textit{Trump’s European Union Trade Talks Quickly Become Contentious}, 35 International Trade Reporter (BNA) 1385 (25 October 2018).

auto exports, also broached the subject of a plurilateral agreement to slash tariffs on autos, which would be an open one (meaning it would be extended on an MFN basis under GATT Article I:1 to all WTO Members). When, in November, GM announced plans to close five North American facilities, including in Ohio, Maryland, and Michigan, and lay off 15,000 workers, President Trump renewed calls for imposition of a 25% tariff on auto imports.\(^{380}\) GM said its decision was based on sluggish demand for six models of sedans, which it would stop manufacturing, and explained it was not offshoring production and employment of those sedans. The President insisted tariffs would save jobs.

On 17 February 2019, the end of the 270-day investigation deadline, the DOC delivered its Section 232 report to the President.\(^{381}\) This Report was not published until July 2021, after the Trump Presidency ended.\(^{382}\) When, at the insistence of Congress and the auto industry, the Report finally was published (in redacted form), it became clear DOC recommended to President Trump 25% additional duties on passenger cars and 35% on SUVs. The Report discussed the application to the auto industry of the Section 232 “national security” standards.

At the time, i.e., in February 2019, it was reported that the DOC called for tariffs, possibly of up to 20%-25%, on fully assembled vehicles and parts, plus targeted tariffs on components and technologies used for EVs and automated, internet-connected, and shared vehicles. Under the Section 232 timelines, the President had 90 days to decide on a course of action. Mr. Trump opted not to impose any duties.

Opposition to taking any action was considerable. No American auto producer had called for the investigation when it was launched in May 2018, and many feared slapping tariffs on auto and auto parts imports would cause job losses, boost the cost of vehicles to consumers, and drive R&D and investment offshore. Indeed, the Center for Automotive Research in Ann Arbor, Michigan, forecast that a 25% tariff would cause job losses of 336,900 in auto and auto-related sectors, and raise the cost of light-duty vehicles by an average of $2,750, forcing many consumers to buy used cars, and thereby driving down annual new sales by 1.3 million units.\(^{383}\)

Nevertheless, the President remarked that “I love tariffs, but I also love them to negotiate,” signalling he might take action as leverage in FTA negotiations to compel the


\(^{383}\) See *U.S. Agency*.
EU and Japan to open their markets further to American car and car part exports.\footnote{Quoted in U.S. Agency.}\footnote{Quoted in European Car Imports No Threat to U.S. National Security: VDA, REUTERS, 17 February 2019, www.reuters.com/article/us-germany-trade-autos/european-car-imports-no-threat-to-u-s-national-security-vda-idUSKCN1Q60J.} The President’s remark belied the logic that any Section 232 action was needed to defend America’s national security. To the contrary, Germany’s car industry pointed out it strengthens America by employing over 113,000 workers across 300 factories in the U.S., and is largest exporter of cars from America, with many such exports shipped to China.\footnote{Quoted in David Lawder & David Shepardson, Automakers Brace for U.S. Government Report on Import Tariffs, REUTERS, 15 February 2019, www.reuters.com/article/us-usa-trade-autos/automakers-brace-for-us-government-report-on-import-tariffs-idUSKCN1Q503G.} The same doubt, of course, had been cast on the Section 232 steel and aluminum actions, especially with that merchandise coming from close allies like Canada and Mexico. In the auto case, Canada and Mexico secured a guarantee from America in the USMCA negotiations (discussed in a separate Chapter) that they could each export 2.6 million vehicles duty-free to the U.S., should the President take action. As Senator Robert Portman (1955-, Republican-Ohio), a former USTR said: “There is no way that minivans from Canada are a national security threat.”\footnote{Quoted in Shawn Donnan, Jenny Leonard & Margaret Taley, Trump Set to Delay Auto Tariffs Amid EU, Japan Trade Talks, BLOOMBERG, 15 May 2019, www.bloomberg.com/news/articles/2019-05-15/trump-said-to-delay-auto-tariffs-amid-eu-japan-trade-talks. [Hereinafter, Trump Set.]}

Indeed, he sponsored legislation (Senate Bill 365) in February 2019, to shift responsibility for Section 232 investigations from the DOC to the Pentagon.

The most compelling case that auto and auto parts threatened American national security was their contribution to the U.S. trade deficit. Imports of vehicles and their parts accounted for about half that deficit, and trade with China accounted for the other half. Therefore, the argument went, America could correct its trade imbalance, which undermined its economic security, and, in turn, bolster its national security, if it took on foreign car and car parts imports through Section 232 the way it did in taking on China through Section 301 (discussed in a separate Chapter):

… the justification for auto tariffs is not that the imports of vehicles and auto parts per se are a threat to national security, but it’s the portion they contribute to the overall U.S. trade deficit that could cause harm.

“The reason autos are very important to our trade picture is about half of our trade deficit comes from the single product, automotive, and about the other half of our trade deficit comes from a geographic area and that’s called China,” [U.S. Commerce Secretary Wilbur] Ross said….\footnote{Quoted in Shawn Donnan, Jenny Leonard & Margaret Taley, Trump Set to Delay Auto Tariffs Amid EU, Japan Trade Talks, BLOOMBERG, 15 May 2019, www.bloomberg.com/news/articles/2019-05-15/trump-said-to-delay-auto-tariffs-amid-eu-japan-trade-talks. [Hereinafter, Trump Set.]} This argument was consistent not only with the “America First” rhetoric of the Administration of President Donald J. Trump, but also had its roots in Mercantilism. Simply put, Mercantilist theory (discussed in a separate Chapter) holds that a nation is more secure if it runs export surpluses, and invests its export revenues in its military and to secure the sea lanes for its commercial fleet. That theory, of course, is precisely what Smith’s Law
of Absolute Advantage and Ricardo’s Law of Comparative Advantage combat. And, that large, long-run trade deficits are economically, much less militarily, deleterious is by no means a proposition accepted across the Economics profession (as also discussed in a separate Chapter). But, in the view of the Trump Administration, the gains from free trade those Laws predict do not flow when trade is not free, thanks to unfair trade practices.

Moreover, there was a second reason for linking auto imports to economic security and, therefore, national security. The President agreed with the DOC’s Section 232 conclusion that “imports of cars and certain auto parts harm national security” because of the “declining markets share of ‘American-owned’ producers since the 1980s,” that is, the “reduced sales of domestic brands,” which in turn has “undermined U.S. automakers’ ability to invest in research and development.” Accordingly, the conditions of competition for U.S. auto makers had to be re-balanced by slashing imports, so they could regain market share and earn profits, and reinvest the gains in the nation’s industrial infrastructure which underpinned its military preparedness.

THE WHITE HOUSE, PROCLAMATION 9888, ADJUSTING IMPORTS OF AUTOMOBILES AND AUTOMOBILE PARTS INTO THE UNITED STATES (17 MAY 2019)

1. On February 17, 2019, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effects of imports of passenger vehicles (sedans, sport utility vehicles, crossover utility vehicles, minivans, and cargo vans) and light trucks (collectively “automobiles”) and certain automobile parts (engines and engine parts, transmissions and powertrain parts, and electrical components) on the national security of the United States under section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862).

2. The Report found that automotive research and development (R&D) is critical to national security. The rapid application of commercial breakthroughs in automobile technology is necessary for the United States to retain competitive military advantage and meet new defense requirements. Important innovations are occurring in the areas of engine and powertrain technology, electrification, lightweighting, advanced connectivity, and autonomous driving. The United States defense industrial base depends on the American-owned automotive sector for the development of technologies that are essential to maintaining our military superiority.

3. Thus, the Secretary found that American-owned automotive R&D and manufacturing are vital to national security. Yet, increases in imports of

automobiles and automobile parts, combined with other circumstances, have over the past three decades given foreign-owned producers a competitive advantage over American-owned producers.

4. American-owned producers’ share of the domestic automobile market has contracted sharply, declining from 67 percent (10.5 million units produced and sold in the United States) in 1985 to 22 percent (3.7 million units produced and sold in the United States) in 2017. During the same time period, the volume of imports nearly doubled, from 4.6 million units to 8.3 million units. In 2017, the United States imported over 191 billion dollars’ worth of automobiles.

5. Furthermore, one circumstance exacerbating the effects of such imports is that protected foreign markets, like those in the European Union and Japan, impose significant barriers to automotive imports from the United States, severely disadvantaging American-owned producers and preventing them from developing alternative sources of revenue for R&D in the face of declining domestic sales. American-owned producers’ share of the global automobile market fell from 36 percent in 1995 to just 12 percent in 2017, reducing American-owned producers’ ability to fund necessary R&D.

6. Because “[d]efense purchases alone are not sufficient to support … R&D in key automotive technologies,” the Secretary found that “American-owned automobile and automobile parts manufacturers must have a robust presence in the U.S. commercial market” and that American innovation capacity “is now at serious risk as imports continue to displace American-owned production.” Sales revenue enables R&D expenditures that are necessary for long-term automotive technological superiority, and automotive technological superiority is essential for the national defense. The lag in R&D expenditures by American-owned producers is weakening innovation and, accordingly, threatening to impair our national security.

7. In light of all of these factors, domestic conditions of competition must be improved by reducing imports. American-owned producers must be able to increase R&D expenditures to ensure technological leadership that can meet national defense requirements.

8. The Secretary found and advised me of his opinion that automobiles and certain automobile parts are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States. The Secretary found that these imports are “weakening our internal economy” and that “[t]he contraction of the American-owned automotive industry, if continued, will significantly impede the United States’ ability to develop technologically advanced products that are essential to our ability to maintain technological superiority to meet defense requirements and cost effective global power projection.”
9. The Secretary therefore concluded that the present quantities and circumstances of automobile and certain automobile parts imports threaten to impair the national security as defined in Section 232….

10. In reaching this conclusion, the Secretary considered the extent to which import penetration has displaced American-owned production, the close relationship between economic welfare and national security, see 19 U.S.C. 1862(d), the expected effect of the recently negotiated … USMCA, and what would happen should the United States experience another economic downturn comparable to the 2009 recession.

11. … [T]he Secretary recommended actions to adjust automotive imports so that they will not threaten to impair the national security. One recommendation was to pursue negotiations to obtain agreements that address the threatened impairment of national security. In the Secretary’s judgment, successful negotiations could allow American-owned automobile producers to achieve long-term economic viability and increase R&D spending to develop cutting-edge technologies that are critical to the defense industry.

12. I concur in the Secretary’s finding that automobiles and certain automobile parts are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States, and I have considered his recommendations.

As Paragraph 11 intimates, the President steered a middle course.390

Via the Proclamation, President Trump opted to defer for 180 days – meaning a 14 November 2019 deadline – a decision on whether to impose Section 232 measures on foreign auto and auto parts. He had good reason to do so: he needed as many allies as he could get in the Sino-American Trade War. Imposing tariffs on Canadian, European, Japanese, Korean, and other car and car parts would both alienate those allies, and weaken the ability of those economies to cope with the extant Section 301 tariffs America already was imposing on the products they made in, and shipped from, China. By November 2019, some of those allies felt confident the President would elect not to impose Section 232. For example, Japan noted it had struck a bilateral FTA with America (discussed in a separate Chapter) in which it said it received “unusually clear” assurances its cars and car parts exports would suffer no tariffs or quotas.391 The EU pointed out its companies were


391 Robin Harding & Lionel Barber, Japan’s Foreign Minister Sees Progress on End to U.S. Car Tariffs, FINANCIAL TIMES, (quoting Toshimitsu Motegi, Minister of Foreign Affairs, Japan), 3 November 2019, www.ft.com/content/54b543e6-fe14-11e9-b7bc-f3fa4e7dd47?shareType=nongift.
investing in and/or expanding production capacity in the U.S. – BMW and Daimler to manufacture SUVs, and Volkswagen to make EVs.\textsuperscript{392}

The President took no action by the 14 November deadline. As a result, he essentially forfeited the opportunity to impose any Section 232 remedy under the investigation launched in May 2018.\textsuperscript{393} The 1962 Trade Act established deadlines, and Mr. Trump missed the one his Administration had set. Moreover, in its November 2019 decision in \textit{Transpacific Steel v. United States} (excerpted earlier), rejected the President’s expansive view of his authority under the \textit{Act}. The CIT held (1) Section 232 does not violate the Non-Delegation Doctrine, and (2) the President exceeded his authority under Section 232 when, in August 2018, he doubled the tariff to 50% on Turkish steel imports – because he did so after exceeding the time limit (an “intelligible principle”) for such action. Recall from that decision the Court said: “The President’s \textit{expansive view} of his power under Section 232 is \textit{mistaken}, and at odds with the language of the statute, its legislative history, and its purpose \textsuperscript{[Emphasis added.]}.” And, the CIT it reasoned: “Although the statute grants the President great discretion in deciding what action to take, it cabins the President’s power both substantively, by requiring the action to eliminate threats to national security caused by imports, and procedurally, by \textit{setting the time in which to act} \textsuperscript{[Emphasis added.]}.”

However, the President had two other options. First, he could invoke an obscure provision in the \textit{Act}. This provision states: “[T]he President shall take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security.” For “such other action,” the \textit{Act} sets no time frame – rather, it obliges the President only to publish his action in the Federal Register. Second, he could invoke the IEEPA.

\textbf{III. July 2018 Section 232 Uranium Investigation}

\begin{itemize}
  \item \textbf{Why Uranium Matters}
\end{itemize}

For the fourth time in five months, the Trump Administration launched a Section 232 investigation, in July 2018 on imports of Uranium, following up on the March steel and aluminum investigations, and July auto investigation.\textsuperscript{394} At issue, the DOC said, was

\begin{itemize}
  \item \textit{See U.S. May Not Need to Impose Auto Tariffs This Month: Bloomberg, Citing Ross, Reuters, 3 November 2019, www.reuters.com/article/us-usa-trade-autos/u-s-may-not-need-to-impose-auto-tariffs-this-month-bloomberg-citing-ross-idUSKBN1XD0C3.}
  \item \textit{See Andrew Mayeda, U.S. Launches Probe of Uranium Imports That May Lead to Tariffs, 35 International Trade Reporter (BNA) 993 (26 July 2018). [Hereinafter, \textit{U.S. Launches.}] Interestingly, Uranium was the subject of a Section 232 case in 1989, but no trade remedy followed that investigation.}
  \item For yet another Section 232 investigation the Administration undertook, this one against Titanium sponge, see, The White House, Memorandum on the Effect of Titanium Sponge Imports on the National Security (27 February 2020), www.whitehouse.gov/presidential-actions/memorandum-effect-titanium-sponge-imports-national-security/. In this case, the Administration found that Titanium sponge was being imported into the U.S. in such quantities and under such circumstances as to threaten and impair national
\end{itemize}
“whether the present quantity and circumstances of Uranium ore and product imports into the U.S. threaten to impair the national security.”\textsuperscript{395} The DOC signalled its impression immediately, noting six facts:\textsuperscript{396}

(1) Uranium powers 99 U.S. commercial nuclear reactors. Those reactors produce 20\% of the electricity in America’s electric grid, which is part of the nation’s critical infrastructure. Uranium accounts for roughly 20\% of the costs incurred by the reactors.

(2) Uranium is a required element in America’s nuclear arsenal, and powers the U.S. Navy’s fleet of aircraft carriers and nuclear submarines.

(3) U.S. Uranium production had met 49\% of U.S. domestic consumption requirements in 1987. In 2018, it had fallen to 5\% of those requirements.

(4) Three American companies with mining operations have been idled in recent years.

(5) The two U.S. companies that requested the Section 232 investigation in their January 2018 petition that triggered the investigation (Energy Fuels Inc. and Ur-Energy Inc.) account for over half of all Uranium mined in America operate at a reduced capacity. They shed over half their labor force in 2016-2017. Energy Fuels and Ur-Energy argued that 25\% of the American market should be reserved for American producers, that is, that at least 25\% of purchases by the U.S. military and civilian nuclear industry should be from domestic sources.

(6) Shuttered mines would take years to reopen under current environmental permitting regulations.

Moreover, in 2019, the U.S. imported 93\% of its Uranium, whereas 10 years earlier that figure was 85.8\%.\textsuperscript{397} Worryingly, SOEs in Kazakhstan and Russia offered competition to American producers, and (in 2016), 90\% of the Uranium used in U.S. reactors came from overseas.\textsuperscript{398}

However, as to the major sources they included some allies: Canada; Kazakhstan; Australia; Russia; and Uzbekistan. Moreover, imports were not clearly to blame for an alleged national security impairment:

\footnotesize
\textsuperscript{395} Quoted in U.S. Launches.
\textsuperscript{396} See Jim Efstathiou Jr., Uranium Tariffs Threaten Nuclear Plants Trump Is Trying to Save, 35 International Trade Reporter (BNA) 1015 (26 July 2018) [hereinafter, Tariffs Threaten]; Thompson Hine LLP, Department of Commerce Initiates Section 232 Investigation into Uranium Imports, LEXOLOGY, 18 July 2018, \url{www.lexology.com/library/detail.aspx?g=0a3f5c8d-5f07-4b2d-b837-2f9a5586d96d}.
\textsuperscript{397} See Neil Hume, Donald Trump’s Uranium Move Tipped to Revive Demand, FINANCIAL TIMES, 15 July 2019, \url{www.ft.com/content/4e0aa09e-a6ef-11e9-984e-fac83235aa04}. [Hereinafter, Donald Trump’s Uranium.]
\textsuperscript{398} See U.S. Launches.
Uranium prices have slumped since the 2011 Fukushima disaster led big buyers including Japan and Germany to shut down or decommission reactors. Compounding the problem was a global supply glut that prompted Kazakhstan, the world’s biggest producer, to cut back last year. Canada’s Cameco Corp., the top North American supplier, followed suit in November.\footnote{Tariffs Threaten.}

In other words, as in the steel and aluminum cases, global over capacity was a causal factor, and unlike those cases, there preferences were shifting away from nuclear power.

Nevertheless, the Trump Administration soldiered on with its Section 232 investigation, which encompassed the entire vertical chain in the Uranium sector – mining, enrichment, and industrial and defense consumption. The case fit into a broader picture in which the Trump Administration sought “to shore up nuclear and coal plants, generators that are considered ‘fuel-secure,’ because they store fuel on site and aren’t dependent on pipelines that can be disrupted, wind that stops blowing or a sun that sets.”\footnote{Tariffs Threaten.} Yet, most U.S. utility companies had sufficient Uranium supplies under long-term contracts running through 2020-2021. Imposing Section 232 tariffs on imported Uranium would raise its cost to U.S. producers, immediately so if the supplies under those contracts were not grandfathered.\footnote{In October 2018, U.S. utility companies commented to the DOC that a 25% tariff on Uranium imports would raise the costs for nuclear power generation by $500-$800 million annually. \textit{See} Ari Nater, \textit{Nuclear Companies Say Uranium Tariff May Cost $800 Million a Year}, \textbf{35} International Trade Reporter (BNA) 1297 (4 October 2018).}


1. Mandate that U.S. nuclear power plants purchase a minimum of 5% of their radioactive fuel from U.S. mines (\textit{i.e.}, effectively 2-2.5 million pounds of Uranium).
2. Increase that 5% purchase quota by 5 percentage points each year.

This remedy would help mines in the U.S., particularly the two, small, Colorado-based petitioning mining companies – Energy Fuels Inc. and Ur-Energy Inc. The entire output of Uranium from U.S. mines (as of 2018) is about 700,000 pounds of Uranium. Because that
figure is less than what nuclear power producers need, they import almost all their Uranium from Australia, Canada, Kazakhstan, and Russia.

Of course, a 5% graduated quota would harm the power plant operators, by raising their feedstock costs at a time when they are competing with ever-cheaper alternative energy sources, particularly NG, solar, and wind. These operators – collectively, the Ad Hoc Utilities Group, the members of which included Dominion Energy Inc., Duke Energy Corp., and Exelon – pointed out the utilitarian economic calculation favoured them: “The U.S. nuclear industry supports 100,000 jobs, while the two petitioners support a total of 150 jobs.” Still, the DOC’s recommended remedy was less than what the petitioners sought: they wanted an immediate 25% domestic market quota. The nuclear power operators said that remedy would cost them $800 million per year.

- **President Trump Says “No”**

The President rejected the DOC recommendation and declined to provide any relief under Section 232. He decided Uranium imports did not impair America’s national security:

THE WHITE HOUSE, DONALD J. TRUMP, MEMORANDUM ON THE EFFECT OF URANIUM IMPORTS ON THE NATIONAL SECURITY AND ESTABLISHMENT OF THE UNITED STATES NUCLEAR FUEL WORKING GROUP (12 JULY 2019)

Section 1:
The Secretary of Commerce’s Investigation into the Effect of Uranium Imports on the National Security.

(a) On April 14, 2019, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effect of imports of Uranium (Uranium ore, Uranium concentrate, Uranium hexafluoride, enriched Uranium, and enriched Uranium in fuel assemblies) on the national security of the United States under Section 232 of the [Trade Expansion] Act [of 1962, as amended, 19 U.S.C. Section 1862].

(b) The Secretary found and advised me of his opinion that Uranium is being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States as defined under Section 232 of the Act. Currently, the United States imports approximately 93 percent of its commercial Uranium, compared to 85.8 percent in 2009. The Secretary found that this figure is because of increased production by foreign state-owned enterprises, which have distorted global prices and made it more difficult for domestic mines to compete.

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404 Quoted in Trump Weighs Limits.
(c) ... I do not concur with the Secretary’s finding that Uranium imports threaten to impair the national security of the United States as defined under section 232 of the Act. Although I agree that the Secretary’s findings raise significant concerns regarding the impact of Uranium imports on the national security with respect to domestic mining, I find that a fuller analysis of national security considerations with respect to the entire nuclear fuel supply chain is necessary at this time.

Causation may have been one reason the President opted against providing a remedy.

Following the 2011 disaster at Japan’s Fukushima reactor, Japan shutdown all 40 of its reactors, and along with Germany, scrapped plans to build new facilities. The demand for Uranium plunged, and thus so did prices, and did not start rising until 2018, thanks in part to cuts in supply by producers in response to slack demand. Pinning blame for a threat to domestic national security on these unforeseeable and exogenous factors – though arguably permitted by the Section 232 statutory language, which contains no rigorous causation standard – would have generated yet more howls that the Trump Administration abused the law and alienated allies in doing so. Indeed, the President’s decision came as welcome news to Canada, as its companies are among America’s biggest Uranium suppliers.

However, the President mandated (in Section 2 of his above-quoted Memorandum) a 90-day review of America’s entire Uranium supply chain, from domestic mining and importation of Uranium oxide to the production of fuel. He asked for options from a specially-created inter-agency Nuclear Fuel Working Group to boost domestic production, particularly for supply as fuel to the U.S. Navy for nuclear-powered aircraft carriers and submarines. Among the options the Group contemplated were direct governmental purchases, authorized under the 1950 Defense Production Act (Public Law 81-774, 50 U.S.C. Sections 4501 et seq.) of Uranium from domestic producers (e.g., Energy Fuels and Ur-Energy, Inc., the unsuccessful petitioners in the Section 232 case) “to revive the flagging domestic mining industry.” Not surprisingly, this option was suggested to the Group by the industry itself:

The Uranium Producers of America, which represents miners including Cameco, is requesting “federal actions facilitating domestic Uranium production” of at least 7.5 million pounds per year by 2025 and 10 million pounds per year by 2030, according to a letter the Santa Fe, New Mexico, trade group sent to the Working Group … [in August]. That includes millions of pounds via contracts with the Department of Defense,

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406 See Donald Trump’s Uranium.
requirements that government-owned utilities buy domestic Uranium, and the creation of a new “Federal Uranium Security Stockpile.”

“We may not be able to continue any operations without immediate relief from the impact of state-backed entities, which have distorted global prices and made it more difficult for free market mines in the U.S. to compete,” the group wrote in the letter, which included a request to direct payments to domestic Uranium companies.

In a separate letter, the Nuclear Energy Institute, which represents nuclear reactor operators, also recommended the working group use the Defense Production Act to “accelerate the procurement” of domestic Uranium as well as “incentivize” the annual purchase of domestic Uranium through a tax credit for nuclear utilities.409

Additional measures the Working Group considered, at the behest of the domestic industry, included expanding the DOE’s “loan program to include domestic Uranium projects,” and to modernize NRC regulations.410

In December 2019, the Working Group issued its Report. Unsurprisingly, it called for changing the status quo with respect to America’s nuclear industrial base and fuel cycle in which 90% of America’s Uranium, “used to power nuclear reactors and submarines as well as to make nuclear weapons,” is imported from Australia, Canada, Kazakhstan, and Russia.”411 The Working Group recommended the President direct the federal government, pursuant to the Defense Production Act, to buy Uranium from domestic sources.412 Additionally, the “Energy Department, home of the National Nuclear Security Administration, which maintains the nation’s nuclear stockpile, would be involved in the effort as well, which could include the creation of a new national Uranium stockpile” amounting to as large as 10 million pounds per year.

- **Dependence on Russia for Enriched Uranium**

An additional point to note about the Uranium Section 232 investigation comes from a June 2023 analysis published in The New York Times, which raises the question whether the decision not to “adjust” imports was the correct one – even though the intervening variable, as it were – Russia’s February 2022 attack on Ukraine – may have been unforeseeable.:

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409 *White HouseConsidering.*
410 *White HouseConsidering.*
In a cavernous, Pentagon-sized facility nestled in an Appalachian Valley, thousands upon thousands of empty holes line the bare concrete floor.

A mere 16 of them house the spindly, 30-foot-tall centrifuges that enrich Uranium, converting it into the key ingredient that fuels nuclear power plants. And for now, they are dormant.

But if each hole housed a working centrifuge, the facility could get the United States out of a predicament that has implications for both the war in Ukraine and for America’s transition away from burning fossil fuels. … American companies are paying around $1 billion a year to Russia’s state-owned nuclear agency to buy the fuel that generates more than half of the United States’ emissions-free energy.

It is one of the most significant remaining flows of money from the United States to Russia, and it continues despite strenuous efforts among U.S. allies to sever economic ties with Moscow [through sanctions, discussed in separate Chapters]. The enriched Uranium payments are made to subsidiaries of Rosatom, which in turn is closely intertwined with Russia’s military apparatus.

The United States’ reliance on nuclear power is primed to grow as the country aims to decrease reliance on fossil fuels. But no American-owned company enriches Uranium. The United States once dominated the market, until a swirl of historical factors, including an enriched-Uranium-buying deal between Russia and the United States designed to promote Russia’s peaceful nuclear program after the Soviet Union’s collapse, enabled Russia to corner half the global market. The United States ceased enriching Uranium entirely.

The United States and Europe have largely stopped buying Russian fossil fuels as punishment for the Ukraine invasion. But building a new enriched Uranium supply chain will take years – and significantly more government funding than currently allocated.

That the vast facility in Piketon, Ohio, stands nearly empty more than a year into Russia’s war in Ukraine is a testament to the difficulty.

Roughly a third of enriched Uranium used in the United States is now imported from Russia, the world’s cheapest producer. Most of the rest is imported from Europe. A final, smaller portion is produced by a British-Dutch-German consortium operating in the United States. Nearly a dozen countries around the world depend on Russia for more than half their enriched Uranium.
The company that operates the Ohio plant says it could take more than a decade for it to produce quantities that rivaled Rosatom. The Russian nuclear agency, which produces both low-enriched and weapons-grade fuel for Russia’s civilian and military purposes, is also responsible in Ukraine for commandeering the Zaporizhzhia nuclear power plant, Europe’s biggest….\textsuperscript{413}

Obviously, there is a difference between unenriched and enriched Uranium. And, the post-Cold War arrangement had good intentions – closer relations based on interdependence. Alas, is this case, Russian-American trade, in which the theory of peace through trade (discussed in separate Chapter) went awry? Is it also a case of the need for industrial policy (also discussed in a separate Chapter).

IV. June 2020 Section 232 Vanadium Investigation

By no means did the conclusion of the Uranium investigation lessen U.S. interest in the link between imports and national security. In June 2020, America launched another Section 232 investigation.

U.S. DEPARTMENT OF COMMERCE, PRESS RELEASE, U.S. SECRETARY OF COMMERCE WILBUR ROSS INITIATES SECTION 232 INVESTIGATION INTO IMPORTS OF VANADIUM (2 JUNE 2020)\textsuperscript{414}

U.S. Secretary of Commerce Wilbur Ross has initiated an investigation into whether the present quantities or circumstances of vanadium imports into the United States threaten to impair the national security. This decision follows review of the petition filed by domestic producers, AMG Vanadium LLC (Cambridge, OH), and U.S. Vanadium LLC (Hot Springs, AR), on November 19, 2019, requesting that the Department of Commerce launch an investigation into vanadium imports under Section 232 of the Trade Expansion Act of 1962, as amended. Secretary Ross sent a letter to Secretary of Defense Mark Esper informing him of the investigation.

“Vanadium [which is a rare earth] is utilized in our national defense and critical infrastructure, and is integral to certain aerospace applications,” said Secretary Ross. “We will conduct a thorough, fair, and transparent investigation to determine whether vanadium imports threaten to impair U.S. national security.”

Vanadium is a metal used in production of metal alloys and as a catalyst for chemicals across aerospace, defense, energy, and infrastructure sectors. Designated a strategic and critical material, vanadium is used for national defense and critical infrastructure applications. Examples include aircraft, jet engines, ballistic missiles, energy storage,


bridges, buildings, and pipelines. Vanadium is a key component in aerospace applications due to its strength-to-weight ratio, the best of any engineered material. U.S. demand is supplied entirely through imports.

The petitioners assert that domestic industry is adversely impacted by unfairly traded low-priced imports, limited export markets due to value-added tax regimes in other vanadium producing countries, and the distortionary effect of Chinese and Russian industrial policies.

**DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, NOTICE OF REQUEST FOR PUBLIC COMMENTS ON SECTION 232 NATIONAL SECURITY INVESTIGATION OF IMPORTS OF VANADIUM, FEDERAL REGISTER, (3 JUNE 2020)**

**Background**

On May 28, 2020, in response to a petition, the Secretary initiated an investigation under Section 232 of the *Trade Expansion Act of 1962*, as amended (19 U.S.C. § 1862), to determine the effects on the national security from imports of vanadium. If the Secretary finds that vanadium is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in his report on the findings of the investigation.

**Written Comments**

This investigation is being undertaken in accordance with part 705 of the National Security Industrial Base Regulations (15 CFR parts 700 to 709) (“NSIBR”) [excerpted above]. …

The Department is particularly interested in comments and information directed to the criteria listed in § 705.4 of the NSIBR as they affect national security, including the following:

1. Quantity of or other circumstances related to the importation of vanadium;
2. Domestic production and productive capacity needed for vanadium to meet projected national defense requirements;
3. Existing and anticipated availability of human resources, products, raw materials, production equipment, and facilities to produce vanadium;
4. Growth requirements of the vanadium industry to meet national defense requirements and/or requirements for supplies and services necessary to assure such growth including investment, exploration, and development;
5. The impact of foreign competition on the economic welfare of the vanadium industry;
6. The displacement of any domestic vanadium production causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects;

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Relevant factors that are causing or will cause a weakening of our national economy; and

Any other relevant factors, including the use and importance of vanadium in critical infrastructure sectors identified in Presidential Policy Directive 21 (February 12, 2013) (for a listing of those sectors see www.dhs.gov/cisa/critical-infrastructure-sectors).

In addition to Uranium, the Trump Administration launched Section 232 investigations of Vanadium, Titanium sponge, and transformers and their components. That Administration did not reveal the results of these other reports, but in July 2021, as with the Uranium results, the Biden Administration did so.416


Though the DOC found all four materials [Uranium, Vanadium, Titanium sponge, and transformers and their components] as essential to U.S. national security, it only determined that imports of transformers and their inputs, Titanium sponge, and Uranium posed threats. The DOC concluded that Vanadium imports did not pose a threat – which eliminates the rationale for the Biden Administration to impose any tariffs or import restrictions – while also providing non-trade actions to ensure a reliable domestic source of the mineral. These recommendations included expanding the National Defense Stockpile to include Vanadium and further government promotion of recycling efforts.

Transformers and their components were the only products of the four reports that received a recommendation for tariffs or quotas from the DOC. Specifically, the DOC determined that large power transformers, laminations for incorporation into transformers, and stacked and wound cores for incorporation into transformers were being imported at a level that posed a threat to U.S. national security. The DOC provided alternative options to tariffs and quotas – which included negotiating bilateral or trilateral deals with trading partners to reduce imports, imposing domestic content requirements for transformers, and changing the Harmonized Tariff classification for laminations and cores to the steel … HTS category.

Both Titanium sponge and Uranium imports were also classified as a threat to national security – though the DOC did not recommend imposing tariffs on either of the two products. For Titanium sponge the DOC suggested expanding the National Defense Stockpile to include Titanium sponge and temporary compensation to U.S. producers to cover the difference between their current production costs and global purchase prices. The DOC also recommended that the U.S. Government take a multilateral approach to combat global market distortion by non-market actors. Alternatively, the DOC determined that the U.S. Government should enact an import waiver in order to “achieve a phased-in reduction of Uranium imports” over a 5-year period. The import waiver could be achieved through a target zero quota towards countries with … SOEs that distort the Uranium market or through a global zero quota on all imports of Uranium.

V. September 2021 Rare Earth Magnets Investigation

The transition from the Administrations of President Donald J. Trump to President Joseph R. Biden (1942, President, 2021-) did not spell an end to U.S. use of Section 232. To the contrary, on 21 September 2021, Mr. Biden’s DOC announced a Section 232 investigation to determine the effects on national security of the import of neodymium-iron-boron permanent magnets.

DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, NOTICE OF REQUEST FOR PUBLIC COMMENTS ON SECTION 232 NATIONAL SECURITY INVESTIGATION OF NEODYMIUM-IRON-BORON (NdFeB) PERMANENT MAGNETS, 86 FEDERAL REGISTER NUMBER 184, 53277-53278 (27 SEPTEMBER 2021)418

Summary

… [T]he Secretary of Commerce (Secretary) initiated an investigation to determine the effects on the national security from imports of neodymium-iron-boron (NdFeB) permanent magnets (sometimes referred to as neodymium magnets, neo magnets, or rare earth magnets). This investigation has been initiated under Section 232 of the Trade Expansion Act of 1962, as amended.

Background

… Numerous critical national security systems rely on NdFeB permanent magnets, including fighter aircraft and missile guidance systems. In addition, NdFeB permanent magnets are essential components of critical infrastructure, including electric vehicles and wind turbines. The magnets are also used in computer hard drives, audio equipment, and MRI devices. If the Secretary finds that NdFeB permanent magnets are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in her report on the findings of the investigation.

418 www.govinfo.gov/content/pkg/FR-2021-09-27/pdf/2021-20903.pdf
**Written Comments**

This investigation is being undertaken in accordance with part 705 of the *National Security Industrial Base Regulations* (15 CFR parts 700 to 709) ("NSIBR") [discussed earlier]. …

The Department is particularly interested in comments and information directed to the criteria listed in § 705.4 of the NSIBR as they affect national security, including the following:

(i) Quantity of or other circumstances related to the importation of NdFeB permanent magnets;
(ii) Domestic production and productive capacity needed for NdFeB permanent magnets to meet projected national defense requirements;
(iii) Existing and anticipated availability of human resources, products, raw materials, production equipment, and facilities to produce NdFeB permanent magnets;
(iv) Growth requirements of the NdFeB permanent magnets industry to meet national defense requirements and/or requirements for supplies and services necessary to assure such growth including investment, exploration, and development;
(v) The impact of foreign competition on the economic welfare of the domestic NdFeB permanent magnets industry;
(vi) The displacement of any domestic NdFeB permanent magnets production causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects;
(vii) Relevant factors that are causing or will cause a weakening of our national economy; and
(viii) Any other relevant factors, including the use and importance of NdFeB permanent magnets in critical infrastructure sectors identified in *Presidential Policy Directive 21* (Feb. 12, 2013).

**VI. March 2022 1950 DPA Invocation for Battery Metals**

The transition from the Administrations of Presidents Trump to Biden also did not spell an end to U.S. use of the 1950 *Defense Production Act*. To the contrary, on 30 March 2022, it was revealed President Biden intended to invoke this Cold-War era statute to boost domestic production of so-called “battery metals.” Via an *Executive Order*, Mr. Biden planned to issue a “Presidential Determination” “aimed at increasing the supply of minerals for EV batteries.”

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President Joe Biden plans … to invoke Cold War powers to encourage domestic production of critical minerals for electric-vehicle and other types of batteries, according to people familiar with the matter.

The White House is poised to add battery materials to the list of items covered by the 1950 Defense Production Act – the same authority wielded by Harry Truman to make steel for the Korean War and Donald Trump to spur mask production to tackle the coronavirus pandemic. …

Adding minerals like lithium, nickel, graphite, cobalt, and manganese to the list could help mining companies access $750 million under the Defense Production Act’s Title III fund. The move also could aid recycling of battery materials. …

Instead of loans or direct purchases for minerals, the directive would fund production at current operations, productivity and safety upgrades, and feasibility studies, the person said. In addition to EV batteries, the directive also would apply to large-capacity batteries.

Administration officials are working to ensure production will occur under strong environmental and labor standards. Amid concerns from critics, including some Democratic members of Congress, aides are taking steps to make sure the presidential actions won’t skirt environmental reviews or permit regulations. …

The Biden Administration already has allocated vast amounts aimed at developing a U.S. battery supply chain and weaning the auto industry off its reliance on China, the leading producer of lithium-ion cells. Energy independence advocates have also pushed the administration to focus further upstream on mining and on minerals processing, a key step in the EV sector that’s also largely dominated by China.

The number of mineral commodities, excluding fuels, for which the U.S. is reliant on imports for more than a quarter of demand has jumped to 58 products from 21 in 1954. … [As of 2020, America’s net import dependence on minerals used in EVs and in the supply chains for other clean energy products was 100% for natural graphite, manganese, and rare earths, and roughly 90% for vanadium, 80% for antimony, 75% for cobalt, 50% for lithium, and 35% for copper.]

While DPA would provide easier funding access to elevate battery metal projects, it does not speed up the permitting process to get mines approved.

Climate change advocates, environmental groups and indigenous groups have been vocal about the dirty hazards of mining, including its impacts on
water supplies and nearby communities. A year ago, the U.S. Agriculture Department ordered the Forest Service to rescind two documents that finalized a land swap involving Native American land in Arizona that would have become North America’s largest copper mine.

Copper is largely seen as the most critical metal by volume needed to power electric vehicles and the energy transition. The decision last year to block the Resolution copper mine had followed vocal opposition from the local San Carlos Apache tribe that said the mine was located on a sacred and holy place. 420

And so, the President took exactly this step. 421 In so doing, note the tension between national security, defined in terms of decoupling from China with respect to battery metals, and respect for environmental and Native American rights. The DPA contains no obvious mechanism for managing this tension, nor does Section 232. 422

420 Biden Poised to Use Cold-War Powers.
422 Notwithstanding the tension between national security and environmental and indigenous persons rights, there is a complementarity of national security with industrial policy (a topic discussed in a separate Chapter), exemplified with respect to lithium and EV batteries. In September 2023, the Biden Administration considered one of the largest loans ever to a private entity:

The U.S. Energy Department is in talks to lend a record $1 billion to the developer of one of the country’s largest lithium deposits in a push to build out a domestic supply of critical minerals.

The Biden administration and Lithium Americas Corp. are negotiating the terms of an agreement that would fund more than half of the cost of the Thacker Pass mine in Nevada....

... The outlay, which could exceed the $1 billion mark, would be the largest-ever loan awarded to a mining company through the Energy Department’s Loan Programs Office. The $2.2 billion project 500 miles (805 kilometers) northeast of San Francisco has been pegged as one of the country’s most promising opportunities to produce the metal used in electric-vehicle batteries, solar panels, and wind turbines.

... Biden is walking a fine line by trying to balance the raw-material demands of the energy transition against campaign promises to protect the environment. China has long dominated global supplies of commodities crucial to electric vehicles....

... Thacker Pass raised the ire of environmentalists and tribal groups who unsuccessfully argued in court that it posed a threat to the surrounding landscape and was inadequately vetted.

... The company said it expected the loan program to provide up to 75% of Thacker Pass’ total capital costs for construction....

Note, too, the controversy surrounding the contexts in which President Biden invoked the *DPA*:

Republican Senator Pat Toomey [Pennsylvania] … blasted President Joe Biden for what he called the increasing and “irresponsible” use of a Cold War-era defense law to boost production of baby food, solar panel components and other non-defense items.

Toomey, the top Republican on the Senate Banking Committee, told Biden that using the *Defense Production Act* in this way disrupted supply chains and violated the intent of the law to make goods available in actual national security emergencies.

“If your Administration continues to abuse the *DPA* and skirt legitimate questions surrounding its use, Congress may have to curtail the executive branch’s ability to so easily invoke it,” Toomey wrote in a letter. …

… Biden’s predecessor, Donald Trump, invoked the *DPA* in 2019 to stockpile rare earths, the specialized minerals used to make magnets found in weaponry and EVs, and then again in March 2020 to order General Motors to produce life-saving ventilators.

Biden has made broader use of the *DPA* in his presidency, including using it to ramp up production of supplies used in the response to COVID-19, infant formula, and solar panel components. The 1950 law gives the Pentagon wide powers to procure equipment necessary for national defense.

…

Toomey said Biden had waived a requirement to notify the Senate Banking Committee, which oversees the law, prior to any *DPA* expenditures, on six separate occasions since March, and expressed concern he was using the law to advance a partisan agenda.

He said a future Republican president could decide the *DPA* is a convenient means for funding construction of a border wall or finishing a long-stalled natural gas pipeline, even though these projects were not related to the defense-industrial base.423

What, then, is the line between projects that are related to America’s “defense-industrial base,” and those that are not but rather motivated by a “partisan agenda”? Is that line impossible to draw, because so many projects enhance national security, and enhancing national security is good politics?

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1. Executive Summary

As required by the statute, the Secretary considered all factors set forth in Section 232(d). In particular, the Secretary examined the effect of imports on national security requirements, specifically:

i. domestic production needed for projected national defense requirements;

ii. the capacity of domestic industries to meet such requirements, including the commercial demand needed for economic viability;

iii. existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense;

iv. the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth; and

v. the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries; and the capacity of the United States to meet national security requirements.

In preparing this Report, the Secretary also recognized the close relationship between the economic welfare of the United States and its national security. Factors that can compromise the nation’s economic welfare include, but are not limited to, the impact of “foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills, or any other serious effects resulting from the displacement of any domestic products by excessive imports.” See 19 U.S.C. 1862(d). In particular, this report assesses whether NdFeB magnets are being imported “in such quantities” and “under such circumstances” as to “threaten to impair the national security.” [19 U.S.C. 1862(b)(3)(A).]

The investigation was initiated to evaluate the effects of imports of NdFeB magnets on the national security. There are two types of NdFeB magnets – sintered [i.e., coalesced or compressed] and bonded [i.e., connected or joined]. However, the investigation and this Report largely focus on sintered NdFeB magnets because: (1) Sintered NdFeB magnets comprise over 93 percent of the global NdFeB magnet market and are forecast to grow to over 97 percent of the global market by 2030; (2) Sintered NdFeB magnets have a greater maximum energy product than bonded NdFeB magnets, making them essential in high-temperature applications required by the defense and critical infrastructure sectors; and (3) Sintered NdFeB magnets are less easily substituted for than their bonded counterparts.
NdFeB magnets are the strongest permanent magnets commercially available and improve the efficiency of electrical machines. NdFeB magnets are used in hundreds of products ranging from the ubiquitous, such as headphones and air conditioners, to the highly specialized, like industrial robots. Of particular importance for evaluating the effects of imports of NdFeB magnets on the national security are NdFeB magnets’ use in defense systems, including ship propulsion systems and guided missile actuators, as well as numerous critical infrastructure applications such as electric vehicle motors and offshore wind turbine generators. Although NdFeB magnets’ value tends to be small relative to the cost of the end-product, they are nonetheless key to product performance.

NdFeB magnets are composed of about 69 percent iron, 30 percent rare earths, and one percent boron by weight. NdFeB magnets contain a mix of rare earth elements, primarily neodymium, praseodymium, dysprosium, and terbium, depending on the end use. NdFeB magnets’ iron-boron component is made up of American Iron and Steel Institute 1001 steel and ferroboron. Small amounts of material, such as nickel and copper, dry-sprayed epoxy, or e-coat (epoxy), are also used to coat NdFeB magnets to prevent corrosion. The rare earth element component constitutes the largest portion of NdFeB magnet cost.

There are five main value chain steps prior to the production of NdFeB magnets: mixed rare earth element mining, processing of rare earth elements into rare earth carbonates, separation of rare earth carbonates into individual rare earth oxides, reduction of rare earth oxides into metals, and alloying of rare earth metals. Magnet manufacturers then process rare earth alloys into either sintered or bonded NdFeB magnets. Sintered magnets are produced by compacting powdered alloy into a solid mass by vacuum pressure without melting it to the point of liquefaction. Bonded magnets are made of rapidly quenched NdFeB magnetic powder mixed into binder and shaped through compression, injection molding, or calendaring.

Except for rare earths mining, the United States is not presently a major participant in the NdFeB magnet value chain. The United States has extremely limited capacity to manufacture NdFeB magnets and is nearly one hundred percent dependent on imports to meet commercial and defense requirements. In 2021, the United States imported 75 percent of its sintered NdFeB magnet supply from China, with nine percent, five percent, and four percent coming from Japan, the Philippines, and Germany, respectively. There is currently only one firm in the United States, Noveon (formerly Urban Mining Company), that produces sintered NdFeB magnets, albeit in small quantities. The United States has no domestic production of rare earth oxides or metal. The United States is dependent on foreign sources, especially China, for NdFeB magnets.

China dominates all steps of the global NdFeB magnet value chain. In 2020, China controlled about 92 percent of the global NdFeB magnet and magnet alloy market. China also dominated the 2020 upstream value chain steps, controlling about 58 percent of the rare earth mining market, 89 percent of the oxide separation market, and 90 percent of the metallization market. China controls an even higher percentage of the heavy rare earth
mining market, including dysprosium and terbium, which are critical for high performance NdFeB magnets. China’s dominant position in the global NdFeB magnet value chain enables it to set prices at levels that can make production unsustainable for firms operating in market economies.

China is the only country with operations in all steps of the NdFeB magnet value chain, including upstream (mining, carbonates production, and separation to oxides) and downstream (metal refining, alloy production, and final magnet production) markets. All other countries maintain operations in only some steps of the upstream or downstream magnet value chain. Firms in the European Union, and especially Japan, specialize in the production of NdFeB magnets and alloys, but have no mining capacity. Japan is the second largest producer of NdFeB magnets after China, comprising about seven percent of the global market. Japanese firms also maintain magnet, alloy, and metal capacity in other countries. Firms in Germany, Finland, the Netherlands, and Slovenia produce minimal amounts of NdFeB magnets (less than one percent of global production). Japanese and European firms are almost completely reliant on imported feedstocks to produce metals, alloys, and ultimately NdFeB magnets.

The top upstream producers of rare earth minerals in 2021 were China (60 percent), the United States (15 percent), Burma, (nine percent), and Australia (eight percent). Malaysia comprises seven percent of the 2020 market for rare earth oxide separation, due entirely to the Australian firm Lynas Rare Earths. Outside of China, production of metals is fragmented between Estonia, Laos, Thailand, the United Kingdom, Vietnam, and other countries, with no country having more than three percent of the market.

The NdFeB magnet value chain’s fragmentation means that even countries which produce NdFeB magnets remain dependent in part on Chinese inputs. Japan began diversifying its sources of rare earth elements, carbonates, and oxides away from China in the early 2010s, and the European Union has ongoing initiatives to develop a resilient non-Chinese NdFeB magnet supply chain. Despite these efforts, both economies and the United States remain reliant, to differing degrees, on Chinese inputs. China has previously appeared to leverage its market dominance to achieve foreign policy outcomes. For example, in 2010 China restricted exports of rare earth elements to Japan for two months after a collision between a Chinese fishing boat and the Japanese coast guard in disputed waters. Dependence on China leaves U.S. firms and U.S. allies vulnerable to similar Chinese coercion that could have a negative impact on national defense and the preservation of domestic critical infrastructure, such as transportation and energy.

Ongoing efforts by the U.S. Government and the private sector are intended to mitigate this reliance on Chinese inputs and to establish U.S. production capacity at all steps of the NdFeB magnet value chain. The Department of Defense and the Department of Energy have made limited investments in organizations with the goal of reestablishing domestic production capacity throughout the supply chain. Noveon plans to expand production over the next four years. In addition, three U.S.-headquartered firms – MP Materials, Quadrant Magnetics, and USA Rare Earth – and the German company Vacuumschmelze plan to establish U.S. NdFeB magnet manufacturing facilities by 2026.
Noveon and MP Materials have received Department of Defense funding. MP Materials and USA Rare Earth are also looking to develop U.S. capacity in pre-magnet value chain steps, including rare earths mining, rare earth carbonates processing, rare earth oxides separation, metallization, and alloying. Other non-magnet makers are considering building U.S. facilities to produce rare earth oxides and metals. These efforts, if successful, have the potential to create a complete supply chain to produce NdFeB magnets in the United States. Based on forecasted NdFeB magnet production, domestic sources could potentially satisfy up to 51 percent of total U.S. demand by 2026.

If successful, these efforts to produce NdFeB magnets in the United States will be more than sufficient to satisfy U.S. defense-related demand. However, given the fact that defense demand accounts for only a small percentage of total demand, domestic firms in the NdFeB magnet value chain cannot rely solely on defense-related contracts to be viable. The nascent U.S. NdFeB magnet value chain will require substantial and consistent commercial demand and need a broad customer base to be economically sustainable. While domestic production is expected to be substantially less than total U.S. demand, direct U.S. demand for NdFeB magnets will be less than total demand because many NdFeB magnets are integrated into intermediate and final products overseas. These products – and the embedded magnets – are then imported into the United States. In addition, firms that integrate NdFeB magnets in the U.S. may be unwilling to pay a premium for domestic magnets, which are expected to cost more than their Chinese counterparts.

On a potentially positive note, global and domestic demand for NdFeB magnets is forecast to increase dramatically by 2030 and even more so by 2050. The increase in demand is largely driven by global efforts to reduce greenhouse gas emissions which boost the electric vehicle and wind turbine industries. Substantial demand growth may result in a supply crunch for NdFeB magnets but also represents a critical opportunity to establish and maintain a resilient and economically viable domestic NdFeB magnet supply chain.

1. **Findings**

In conducting the investigation, the Secretary came to the following key findings:

1. **NdFeB magnets are essential to U.S. national security:**

   a. NdFeB magnets are required for national defense systems. NdFeB magnets are currently irreplaceable in key defense applications such as fighter aircraft and missile guidance systems.

   b. NdFeB magnets are required for critical infrastructure. NdFeB magnets are used in critical infrastructure sectors including but not limited to the energy sector (e.g., offshore wind turbines), the healthcare and public health sector (e.g., some open MRI machines and other medical equipment), and the critical manufacturing sector (e.g., electric vehicle motors).
c. NdFeB magnets are required for infrastructure that is critical for climate change mitigation, identified by the President as an essential element of U.S. national security, and the transition to a green economy. In particular, NdFeB magnets are the technology of choice for electric vehicles and offshore wind turbines.

2. **Total domestic demand for NdFeB magnets is expected to grow:**
   a. Total U.S. consumption of NdFeB magnets is forecast to more than double from 2020 to 2030, driven by increased demand from the electric vehicle and wind energy industries.
   b. Total domestic demand growth provides an opportunity to develop the U.S. NdFeB magnet industry if enough end-user applications are manufactured in the United States and the price differential between U.S. and Chinese magnets is narrowed.

3. **The United States and its allies are dependent on imports from China:**
   a. The United States is essentially one hundred percent dependent on imports of sintered NdFeB magnets and is highly dependent on imports of bonded NdFeB magnets, primarily from China. The United States also lacks domestic capacity at various earlier steps in the NdFeB magnet value chain.
   b. U.S. allies are also dependent on Chinese production, which provides China political leverage.

4. **The United States will continue to depend on imports:**
   a. There are multiple firms that intend to establish domestic capacity at different steps of the NdFeB magnet value chain. Although these plans have the potential to create a U.S. NdFeB magnet value chain from mine to magnet, they will not produce enough magnets to eliminate U.S. dependence on Chinese imports.
   b. Domestic NdFeB magnet manufacturing will be constrained by capacity limitations at earlier steps in the value chain, in particular rare earth metal refining and NdFeB alloy production. Some U.S. NdFeB magnet manufacturers will have to rely on imported metal and alloy feedstocks to produce NdFeB magnets.
   c. The U.S. NdFeB magnet industry will struggle to fulfill total critical infrastructure demand.

5. **The U.S. NdFeB magnet industry faces significant challenges:**
a. The nascent U.S. NdFeB magnet industry faces significant barriers to reaching its production targets. These include but are not limited to Chinese competition, financial and human capital constraints, and consistent demand for more expensive domestic magnets.

1.2 Determination

Based on the findings in this report, the Secretary concludes that the present quantities and circumstances of NdFeB magnet imports threaten to impair the national security as defined in Section 232 of *Trade Expansion Act of 1962*, as amended.

1.3 Recommendations

The Department has identified several non-exhaustive actions that would facilitate the development of a domestic NdFeB magnet industry, support a reliable supply of NdFeB magnets, and lessen the risk that NdFeB magnet imports threaten the national security. The Secretary recommends pursuing all proposed actions.

1. The U.S. Government should engage with allies through existing fora to efficiently develop production from diverse sources, promote research on NdFeB magnet-related technologies, encourage intellectual property licensing, and cooperate on foreign investment review mechanisms.

2. To bolster the U.S. NdFeB magnet industry by targeting domestic supply the U.S. Government should:

   a. Establish a tax credit for domestic manufacturing of rare earth elements, NdFeB magnets, and NdFeB magnet substitutes.

   b. Continue to direct *Defense Production Act (DPA)* Title III funding to firms in the U.S. NdFeB magnet industry, in particular to establish metal refining and alloy production facilities.

   c. Encourage eligible NdFeB magnet industry participants to use Export-Import Bank financing through the Make More in America Initiative and the China and Transformational Exports Program.

   d. Allocate additional funding to NdFeB magnet industry participants through other applicable instruments, such as the *Bipartisan Infrastructure Law*.

   e. Use the Defense Priorities and Allocations System to facilitate NdFeB magnet industry participants’ acquisition of critical equipment and feedstock.
f. Evaluate the use of export controls for domestic producers who face difficulties acquiring feedstocks from domestic sources due to competition with foreign consumers.

g. Increase the National Defense Stockpile inventories of rare earth elements and other strategic and critical materials related to NdFeB magnets.

3. To promote the development of a domestic industry by enhancing domestic demand the U.S. Government should:

a. Establish a forum under a lead U.S. Government agency to facilitate cooperation and share information about industry-wide issues between producers and consumers of NdFeB magnets, alloys, rare earth metals, and rare earth oxides. In particular, the U.S. Government should use DPA Title VII to promote offtake agreements using voluntary agreements.

b. Promote the recycling and reprocessing of NdFeB magnets by developing labeling requirements for end-of-life products using NdFeB magnets, leveraging the Defense Logistics Agency’s Strategic Material Recovery and Reuse Program, U.S. Government-owned data centers, and other U.S. Government-owned products like electric vehicles to establish a source of recyclable feedstock, and exploring reuse of other potential feedstocks such as heavy mineral sands and coal tailings.

c. Mandate minimum domestic and ally content requirements for NdFeB magnets used in U.S. Government-owned electric vehicles and offshore wind turbines that power U.S. Government-owned buildings. NdFeB magnets used in these products should be produced domestically or by allies and contain feedstock sourced domestically or from allies. To minimize disruption, content requirements can be phased-in and waived if there are insufficient eligible sources.

d. Establish a consumer rebate for products, such as electric vehicles, that use U.S. or ally produced NdFeB magnets.

4. To support the medium- to long-term development of the U.S. NdFeB magnet industry and enhance the resiliency of the U.S. NdFeB magnet supply chain, the U.S. Government should:

a. Continue to fund research to reduce the use of rare earth elements in NdFeB magnets, develop magnets that can substitute for NdFeB magnets, and develop technologies that avoid the use of magnets – including NdFeB magnets – in electric vehicle motors and wind turbine generators.
b. Support the development of the human capital required by the nascent NdFeB magnet industry, including materials scientists and production line workers, through applicable funding sources.

5. The U.S. Government should continue to monitor the NdFeB magnet value chain to ensure that U.S. and ally firms are not adversely impacted by non-market factors or unfair trade actions, such as intellectual property violations or dumping.

VII. February 2024 Section 232 Smart Cars Investigation

By no means are the aforementioned additional controversies exhaustive of recent Section 232 investigations. For example, in February 2024, the Biden Administration:

launched an inquiry that could ultimately result in import restrictions on smart automobiles that incorporate technology from China and other countries of concern.

… [A]utomobiles increasingly leverage advanced technologies to enable navigational tools, provide driver assist features, and reduce operating costs and carbon emissions through fast and efficient charging. These vehicles are constantly connecting with personal devices, other cars, U.S. infrastructure, and their original manufacturer.

As a result, … the incorporation into connected vehicles of information and communication technologies and services provided by persons or entities owned, controlled, or subject to the jurisdiction or direction of a foreign adversary (currently defined to include China, Russia, Cuba, Iran, and North Korea) can create risks; e.g., by offering a direct entry point to sensitive U.S. technology and data or by bypassing measures intended to protect U.S. persons’ safety and security. This, in turn, may pose undue risks to critical infrastructure in the U.S. and unacceptable risks to national security. …

Note the focus on China, indicating this Section 232 case could be considered within the context of the Sino-American Trade War (discussed in a separate Chapter), and impelled in part by Presidential election-year campaign politics to burnish “tough on China” credentials:

Citing potential national security risks, the Biden Administration says it will investigate Chinese-made “smart cars” that can gather sensitive information about Americans driving them.

The probe could lead to new regulations aimed at preventing China from using sophisticated technology in electric vehicles and other so-called

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connected vehicles to track drivers and their personal information. Officials are concerned that features such as driver assistance technology could be used to effectively spy on Americans.

While the action stops short of a ban on Chinese imports, President Joe Biden said he is taking unprecedented steps to safeguard Americans’ data.

“China is determined to dominate the future of the auto market, including by using unfair practices,” Biden said … “China’s policies could flood our market with its vehicles, posing risks to our national security. I’m not going to let that happen on my watch.”

But what, exactly, was the alleged national security threat?

The fact was “[f]ew Chinese cars are … imported to the United States, in part because of steep tariffs the U.S. imposes on vehicles imported from China.” To be sure, “[s]ome Chinese companies … sought to avoid U.S. tariffs by setting up assembly plants in nearby countries such as Mexico,” hence – owing to USMCA DFQF treatment for originating merchandise (discussed in a separate Chapter) – tariffs could not rectify the purported threat. So, was the U.S. argument akin to anticipatory self-defense?

Commerce Secretary Gina Raimondo said connected cars “are like smartphones on wheels” and pose a serious national security risk.

“These vehicles are connected to the internet. They collect huge amounts of sensitive data on the drivers – personal information, biometric information, where the car goes,” she … [said]. “So, it doesn’t take a lot of imagination to figure out how a foreign adversary like China, with access to this sort of information at scale, could pose a serious risk to our national security and the privacy of U.S. citizens.”

Data collection is not the only concern, she and other officials said. Connected vehicles could also be remotely enabled or manipulated by bad actors.

“Imagine if there were thousands or hundreds of thousands of Chinese-connected vehicles on American roads that could be immediately and simultaneously disabled by somebody in Beijing,” Raimondo said. “So, it’s scary to contemplate the cyber risks, espionage risks that these pose.”


427 *Biden Orders U.S. Investigation.*

428 *Biden Orders U.S. Investigation.*
Mao Ning, China’s Ministry of Foreign Affairs spokesperson, replied the U.S. was “overstretch[ing] the concept of national security.”\textsuperscript{429}
Chapter 11

SECTION 232 (CONTINUED): PRESIDENTIAL AUTHORITY

I. November 2019 and July 2020 CIT Transpacific I and II Cases

**TRANSPACIFIC STEEL LLC V. UNITED STATES, UNITED STATES COURT OF INTERNATIONAL TRADE, NUMBER 19-00009, SLIP OPINION 19-142 (15 NOVEMBER 2019) (TRANS PACIFIC I)**

Claire R. Kelley, Judge
Jane A. Restani, Judge

Transpacific Steel LLC (“Transpacific” or “Plaintiff”) seeks a refund of the difference between the 50 percent tariff imposed on certain steel products (“steel articles”) from the Republic of Turkey (“Turkey”), pursuant to Presidential Proclamation 9772, issued on August 10, 2018 [83 Federal Register 40,429 (15 August 2019)], and the 25 percent tariff imposed on steel articles from certain other countries. … Plaintiff contends relief is warranted because Proclamation 9772 lacks a nexus to national security as statutorily required, fails to follow mandated procedures within the statute, arbitrarily distinguishes importers of steel products from Turkey and importers of steel products from all other countries in violation of equal protection under the Fifth Amendment, and violates Fifth Amendment Due Process guarantees. … Defendants move to dismiss Plaintiff’s Amended Complaint pursuant U.S. Court of International Trade … Rule 12(b)(6) for failure to state a claim for which relief may be granted. … Defendants’ motion to dismiss is denied. Based upon the facts alleged, Plaintiff’s arguments that the President failed to follow the procedure set forth in the statute and, further, that singling out importers from

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430 Documents References:
(1) Havana (ITO) Charter Preamble, Article 99
(2) GATT Article XXI
(3) Relevant provisions in FTAs

431 Footnotes omitted.

For another challenge to Presidential authority under Section 232 in the steel tariff context, see Universal Steel Products, Inc., et al. v. U.S., CIT Case Number 19-00209 (3 December 2019). In that case, a three-judge CIT panel held unanimously in favor of the U.S. government against the argument by an importer that the Section 232 steel duties were illegal under the 1962 Act (e.g., because President Trump’s Proclamation 9705 was overly broad in its interpretation of “national security”). The panel also ruled against the argument that the duties were illegal under the APA. The Court held the DOC Section 232 Steel Report, and President Trump’s decision that steel imports represented an impending threat to U.S. national security, were not reviewable. See Universal Steel Products, Inc. v. U.S., Number 19-0029, Slip Opinion 21-12 (4 February 2021), www.cit.uscourts.gov/sites/cit/files/21-12-A.pdf. The CIT Panel also ruled the undefined duration of the Section 232 steel duties did not violate Section 232, and that the President’s modification of the Section 232 steel duties on Canadian, Mexican, and EU steel products were permissible. See also the CIT decision in Transpacific Steel LLC v. U.S., Slip Opinion 20-98 (14 July 2020) (holding President Donald J. Trump’s Proclamation Number 9772 (10 August 2018), which doubled from 25% to 50% the Section 232 additional duties on certain Turkish-origin steel products, is unlawful and void, but not extending this conclusion to the initial imposition of the 25% tariff).
Turkey violated the equal protection guarantees under the U.S. Constitution, support its claim for a refund and defeat Defendants’ motion to dismiss. See Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009)….  

**Background**

Section 232 of the Trade Expansion Act of 1962, as amended 19 U.S.C. § 1862…, (“Section 232”) delineates the particular circumstances of when and how the President may take action to address imports that threaten to impair the national security of the United States. The statute also sets forth the conduct and timing of the antecedent investigation into the potential national security threat.

Specifically, Section 232 authorizes the Secretary of Commerce to commence an investigation “to determine the effects on the national security of imports” of any article, and to consult with the Secretary of Defense and other officials. 19 U.S.C. § 1862(b). Within 270 days, the Secretary of Commerce must then report the investigation’s findings to the President. See 19 U.S.C. § 1862(b)(3)(A). In that report, the Secretary must advise the President if “such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security[.]” *Id.* Within 90 days after receiving the Secretary’s affirmative findings, the President must determine whether he or she concurs. 19 U.S.C. § 1862(c)(1)(A)(i). Should he or she concur, the statute empowers the President to act to end that threat to national security. 19 U.S.C. § 1862(c)(1)(A)(ii). In doing so, the President must “determine the nature and duration of the action” that in his or her judgment “must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.” *Id.* If, and once, the President decides to act, he or she must implement the action within 15 days. 19 U.S.C. § 1862(c)(1)(B).

On April 19, 2017, the Secretary of Commerce initiated an investigation to determine the effect of steel imports on national security. …. The Secretary issued his report and recommendation to the President on January 11, 2018 (“Steel Report” or “January 11 Report”), within the time frame provided under Section 232. [This Report is discussed below.] … On March 8, 2018, within 90 days of receiving the report, the President issued *Proclamation 9705* [83 Federal Register 11,625 (15 March 2018)] imposing a 25 percent tariff on imports of steel articles from all 4 countries, including Turkey, effective March 23, 2018….  

On August 10, 2018, the President issued *Proclamation 9772*, which imposed a 50 percent tariff on steel articles imported from Turkey as of August 13, 2018. See *Proclamation 9772*….  

**Discussion**

Plaintiff has stated a claim for which relief may be granted. Plaintiff’s factual allegations, which appear to be undisputed, support its claim to a refund of excess duties. Plaintiff alleges facts to demonstrate that, at the very least, the President issued
Proclamation 9772 in violation of the equal protection component of the Fifth Amendment and without observing the statutorily required procedure under section 232. Either theory defeats Defendants’ motion to dismiss.

Plaintiff’s arguments that Proclamation 9772 violates equal protection are sufficient to defeat Defendants’ motion to dismiss. “[A] classification neither involving fundamental rights nor proceeding along suspect lines … cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” Armour v. City of Indianapolis, 566 U.S. 673, 680 (2012) (quotation marks and citation omitted). Defendants do not have a high hurdle to clear to survive a rational basis challenge – Defendants merely need to articulate any set of facts that rationally justify a distinction in classification, irrespective of whether the President himself actually justified his action at the time it was taken. See Nordlinger v. Hahn, 505 U.S. 1, 15 (1992). Especially in the area of economic regulation, this standard is forgiving. See Armour v. City of Indianapolis, 566 U.S. at 680 (noting “where ‘ordinary commercial transactions’ are at issue, rational basis review requires deference to reasonable underlying legislative judgments”) (citations omitted); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469 (1981) (sustaining legislation treating plastic and non-plastic milk containers differently). Given this standard, it is difficult to imagine Presidential action in connection with Section 232 where one would be at a loss to conjure a rational justification; yet, the reality of this case proves otherwise. Defendants submit no set of facts that justify identifying importers of steel from Turkey as a class of one.

In their motion to dismiss, Defendants point to a general need to increase the tariffs. … A general need to increase tariffs, however, does not explain the singular imposition of a 50 percent tariff on Turkish steel articles. Defendants also attempt to distinguish imports from Turkey as a class by referring to “the relatively high import volumes” of steel from Turkey and the 14 anti- dumping and countervailing duty (“AD/CVD”) orders against its steel exports. … However, the Steel Report identifies five countries with higher 6 steel import volumes than Turkey. … Further, the 14 AD/CVD orders on Turkish steel products do not make Turkey remarkable but typical, compared, for example, to China’s 28 AD/CVD orders, India’s 15 AD/CVD orders, Japan’s 14 AD/CVD orders, and Taiwan’s 13 AD/CVD orders. … Defendants’ contention, that it is rational to “confront the national security threat from imports from all countries by specifically targeting countries” with high import volumes or numerous AD/CVD orders, does not explain what differentiates Turkey from other similarly situated countries – for the President to target alone. … At oral argument, when pressed on this question, counsel for Defendants offered other possible reasons but did not connect them to Turkey. … Whatever the President’s real motivation may be, it is not this court’s concern. See FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 315 (1993) (“[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the [decision maker].”). But we also cannot sustain a classification for which there is no offered – or even possible – rational justification tethered to the statute. …

Plaintiff also alleges facts that demonstrate that the President issued Proclamation 9772 in violation of the procedure set forth by Congress. The statute’s clear and
unambiguous steps – of investigation, consultation, report, consideration, and action – require timely action from the Secretary of Commerce and the President. However, the President did not issue Proclamation 9772 following this procedural path. The Secretary of Commerce submitted his Report to the President on January 11, 2018, which launched a 90-day period for the President to act. The President acted on March 8, 2018 by imposing a 25 percent tariff on steel articles through Proclamation 9705. See 19 U.S.C. § 1862(c)(1)(B). However, the President issued Proclamation 9772 on August 13, 2018, far beyond the 90 days permitted to decide to act and the further 15 days allowed for implementation, to impose a 50 percent tariff on steel articles from Turkey. See id. The Secretary’s January 11 Report, which serves as the foundation for Proclamation 9705, does not serve as the foundation for Proclamation 9772.

The attempt to justify Proclamation 9772 as a continuation or modification of Proclamation 9705 fails. … Defendants contend that the President retains power to modify any action taken under Section 232, without conducting a new investigation or following the procedures set forth in the statute. … Likewise, the President seems to have envisioned the Secretary of Commerce’s January 11 Report as empowering him to take ongoing action. The President in Proclamation 9705 states “[t]he Secretary shall continue to monitor imports of steel articles and shall, from time to time, … review the status of such imports with respect to the national security. The Secretary shall inform the President of any … need for further action by the President.” Proclamation 9705, … ¶ (5)(b). In Proclamation 9772, the President invokes Proclamation 9705 stating, “I also directed the Secretary to monitor imports of steel articles and inform me of any circumstances that in the Secretary’s opinion might indicate the need for further action under Section 232 with respect to such imports.” Proclamation 9772, … ¶ 3. The President’s expansive view of his power under Section 232 is mistaken, and at odds with the language of the statute, its legislative history, and its purpose.

Section 232 requires that the President not merely address a threat to national security; he must do all, that in his judgment, will eliminate it. See 19 U.S.C. §§ 1862(c)(1)(A), (c)(3)(A) (instructing the President to take action “so that such imports will not threaten to impair the national security”). Although the statute grants the President great discretion in deciding what action to take, it cabins the President’s power both substantively, by requiring the action to eliminate threats to national security caused by imports, and procedurally, by setting the time in which to act.

In 1988, Congress added specific time limits to Section 232, which preclude 12 day deadline for the President to implement any action. Id. at 1258; see also H.R. REP. 13 President to act against imports that threaten the national security. They also fix a 15-day deadline for the President to implement any action. Id. at 1258; see also H.R. REP. No. 100-576 at 711 (1988). President to do all that he thought necessary as soon as possible. See TRADE REFORM LEGISLATION: HEARINGS BEFORE THE SUBCOMM. ON TRADE OF THE H. COMM. ON WAYS & MEANS, 99th Cong., 2d Sess. 1282 (1986) (statement of Hon. Barbara...
B. Kennelly, former Member, H. Comm. on Ways & Means) (discussing the need to set a deadline by which the President should act); Comprehensive Trade Legislation: Hearings Before the Subcomm. on Trade of the H. Comm. on Ways & Means, 100th Cong., 1st Sess. 466-67 (1987) (statement of Phillip A. O’Reilly, Chairman and CEO of Houdaille Industries, Inc., accompanied by James H. Mack, Public Affairs Director) (discussing delays in section 232 implementation); H.R. Rep. No. 99-581, pt. 1, at 135 (1986) (“The Committee believes that if the national security is being affected or threatened, this should be determined and acted upon as quickly as possible.”); H.R. Rep. No. 100-40, pt. 1, at 175 (1987) (“The Committee believes that if the national security is being affected or threatened, this should be determined and acted upon as quickly as possible.”).

Defendants also argue requiring the procedures of 19 U.S.C. § 1862(b)-(c) in support of Proclamation 9772 make no sense, because, by implication, these procedures would then have to be followed “any time a tariff is reduced or an exception is made for a particular product.” … However, the statute specifically grants the President power to “determine the … duration of the action[,]” a power to end any action. 19 U.S.C. § 1862(c)(1)(A)(ii). Likewise, Defendants’ arguments that each exception from the steel tariffs for a particular product would require a new set of procedures are meritless, when Proclamation 9705 authorized the Secretary of Commerce to establish the overall process to exempt particular products, under certain conditions. …

The procedural safeguards in Section 232 do not merely roadmap action; they are constraints on power. The Supreme Court has made clear that Section 232 avoids running afoul of the non-delegation doctrine because it establishes “clear preconditions to Presidential action.” Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 559 (1976). [The “Non-Delegation Doctrine,” developed by the U.S. Supreme Court in a series of cases dating back to the early years of the Court, forbids Congress from delegating its authorities as set out in the Constitution to the Executive or Judicial branches. This Doctrine protects the separation of powers among the three branches of government. Not since the 1930s has the U.S. Supreme Court invalidated a law as an impermissible delegation of power, i.e., one lacking an intelligible principle.] The time limits, in particular, compel the President to do all that he can do immediately, and tie presidential action to the investigative and consultative safeguards. If the President could act beyond the prescribed time limits, the investigative and consultative provisions would become mere formalities detached from Presidential action. However, Congress affirmatively linked the investigative and consultative safeguards to Presidential action, and Congress strengthened that link when it imposed time limits on the President’s discretion to take action. Congress embedded these limits within its broad delegation of power to the President. As this court has recognized, “the broad guideposts of subsections (c) and (d) of section 232 bestow flexibility on the President and seem to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach.” Am. Inst. for Int’l Steel v. United States, … 376 F. Supp. 3d 1335, 1344 (2019) (“AIIS”). Further, it may be the case that judicial review will be unable to reach “a gray area where the President could invoke the statute to act in a manner constitutionally reserved for Congress but not objectively outside the President’s statutory authority.” Id.
at 14. The broad discretion granted to the President and the limits on judicial review only reinforce the importance of the procedural safeguards Congress provided, and which the President appears to have ignored.

Therefore, the Plaintiff has stated a claim for a refund because after the time periods set by Congress for Presidential action had passed, the President lacked power to take new action and issued Proclamation 9772 without the procedures as required by Congress.

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Concurring Opinion, 
Gary S. Katzmann, Judge

I agree with my colleagues that the instant litigation can continue in the face of the Government’s motion to dismiss the plaintiff’s complaint, although the ultimate outcome remains for determination after further proceedings. I write separately to note what is before the court in this case – whether a statute has been violated – and what is not – whether that statute is constitutional.

The question before us at this preliminary stage is this: Has the plaintiff, an American importer of Turkish goods containing steel articles subjected to tariffs imposed by Presidential Proclamation invoking Section 232 of the Trade Expansion Act of 1962, as amended in 18 U.S.C. § 1862 (“Section 232”), countered the Government’s motion by alleging sufficient facts in its complaint that those tariffs have been imposed in violation of that statute, which provides that the President may impose tariffs on imports which “threaten to impair the national security”?

Not before us now is the fundamental constitutional question: Does Section 232, which provides power to the President in international trade without meaningful limitation, violate the Constitution’s separation of powers, as it is Congress that exclusively has the “power To lay and collect Taxes, Duties, Imposts and Excises” and “to regulate commerce with Foreign nations?” U.S. Const. art 1 § 8. That question was presented to this Court earlier this year in American Institute for International Steel, Inc. v. United States, … 376 F. Supp. 3d 1335 (2019) (“AIIS”). There, this Court unanimously concluded that it was bound by the Supreme Court decision in Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548 (1976), which, in different circumstances involving licensing fees, stated that section 232’s standards were “clearly sufficient” to confine presidential action consistent with the separation of powers. In a dubitante [doubting] opinion in AIIS, 376 F. Supp. 3d at 1345-52, I respectfully suggested that Section 232, lacking ascertainable standards, “provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress,” in violation of the separation of powers. Id. at 1352. “[T]he fullness of time” and “real recent actions” may provide an empirical basis to revisit assumptions and inform understanding of the statute. Id.

I submit that the case before us may well yield further evidence of the infirmity of the statute. To so note is not to diminish, in other arrangements not involving constitutional authority lodged exclusively in Congress, the dependence of Congress on executive
officials to implement its programs. See Gundy v. United States, 139 S. Ct. 2116, 2147 (2019); AIIS, 376 F. Supp. 3d at 1352. Nor is it to diminish the flexibility allowed the President in the conduct of foreign affairs, see United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), or, for example, the authority of the executive to impose sanctions on foreign entities which endanger American interests. ….

In the end, as the case before us is framed, we proceed assuming the constitutionality of the statute. The statute’s investigatory and consultative steps, within prescribed time limits, are not advisory and, as my colleagues have set forth, cannot be ignored without consequence. Based on the facts alleged in the complaint, the violation of procedure and the absence of a rationale to justify differential treatment, warrant the conclusion at this preliminary stage that the Government has failed to show that plaintiff’s complaint must be dismissed for failure to state a claim for a refund of duties on which relief can be granted.

**TRANSPACIFIC STEEL LLC V. UNITED STATES, UNITED STATES COURT OF INTERNATIONAL TRADE, NUMBER 19-00009, SLIP OPINION 20-98, 466 F. SUPP. 3D 1246 (14 JULY 2020) (“TRANSPACIFIC II”)**

Claire R. Kelley, Judge
Jane A. Restani, Judge

The question before us is whether President Trump issued Proclamation No. 9772 of August 10, 2018, 158 Fed. Reg. 40,429 (Aug. 15, 2018) (“Proclamation 9772”) in violation of the animating statute and constitutional guarantees. We hold that he did. Proclamation 9722 is unlawful and void.

Plaintiff Transpacific Steel LLC (“Transpacific”), a U.S. importer of steel, requests a refund of the additional tariffs it paid pursuant to Proclamation 9772 on certain steel products from the Republic of Turkey (“Turkey”). See Proclamation No. 9772 of March 8, 2018, 83 Fed. Reg. 11,625 (Mar. 15, 2018) (“Proclamation 9705”) (imposing a 25 percent tariff duty on steel products from several countries); Proclamation 9772 (imposing a 50 percent tariff duty on steel products from Turkey alone). Plaintiffs argue that Proclamation 9772 is unlawful because it lacks a nexus to national security, was issued

Footnotes omitted.

For another challenge to Presidential authority under Section 232 in the steel tariff context, see Universal Steel Products, Inc., et al. v. U.S., CIT Case Number 19-00209 (3 December 2019). See also the CIT decision in Transpacific Steel LLC v. U.S., Slip Opinion 20-98 (14 July 2020) (holding President Donald J. Trump’s Proclamation Number 9772 (10 August 2018), which doubled from 25% to 50% the Section 232 additional duties on certain Turkish-origin steel products, is unlawful and void, but not extending this conclusion to the initial imposition of the 25% tariff.).

For subsequent Federal Circuit level litigation in the case, see Transpacific Steel LLC v. U.S., Number 2020-2157 (10 December 2020) (non-precedential motion denying motion by Trump Administration for stay of final judgment pending appeal of the CIT decision that the President’s doubling of Section 232 duties on Turkish steel, from 25% to 50%, was untimely and unlawful; dissent by Judge Taranto), www.cafc.uscourts.gov/sites/default/files/opinions-orders/20-2157.ORDER.12-11-2020_1700217.pdf. Note this Federal Circuit ruling suggested the Court did not view it likely the Administration would prevail on the merits of the appeal, hence Transpacific was likely to be repaid the excess duties it had paid.
without following mandated statutory procedures, and singles out importers of Turkish steel products in violation of Fifth Amendment Equal Protection and Due Process guarantees.

Discussion

II. Whether the President Exceeded His Authority by Issuing a Proclamation Purported to Lack a Nexus to National Security

Plaintiffs contend that the President exceeded his authority in issuing Proclamation 9772 because the Proclamation lacked a nexus to Section 232’s national security objective, which would render the Proclamation ultra vires. … Accordingly, they contend that the court may review whether the issuance of the Proclamation 9772 falls within the authority granted to the President under the statute. … Citing various D.C. Circuit Court opinions, Plaintiffs argue that this court should engage in such review to determine whether the President acted in conformity with Section 232. … See id. at 14-16 (citing Independent Gasoline Marketers Council, Inc. v. Duncan, 492 F. Supp. 614 (D.D.C.1980); AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir. 1979) (en banc); United States Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996)).

Turning to the facts at hand, Plaintiffs argue that Proclamation 9772 was not motivated by proper national security considerations, such as those listed in 19 U.S.C. § 1862(d), but was issued to employ “diplomatic leverage against a foreign government.”8 See id. at 18–22.

They further contend that because imports of Turkish steel products comprise only a comparatively small percentage of steel products imported into the United States, doubling tariffs on those products would have too remote an effect to address national security concerns detailed in the Steel Report [i.e., U.S. Department of Commerce, The Effect of Imports of Steel on the National Security (11 January 2018). The Court observed in Footnote 5 of its opinion that: “A summary of the Steel Report was not published in the Federal Register until July 6, 2020, even though 19 U.S.C. § 1862(b)(3)(B) requires that “any portion of the report submitted by the Secretary … which does not contain classified information or proprietary information shall be published in the Federal Register.”]

The government responds that any analysis of whether Proclamation 9772 has a nexus to Section 232’s national security purpose requires the court to engage in an improper inquiry into the President’s fact-finding. … It contends that the Court cannot analyze the President’s action beyond inquiring whether the action taken was “of a type permitted by the statute.” … In the government’s view, any evaluation of the President’s motivations is foreclosed. …

The Court declines to consider proffered evidence of the President’s “true motive” or question his fact-finding. Even if warranted, such an inquiry is unnecessary to the disposition of this matter. What is evident is that the President acted beyond the procedural limitations set forth in the statute in issuing Proclamation 9772, rendering his action ultra
vires. In addition to acting outside of the time limitations as noted above, he acted without a proper report and recommendation by the Secretary on the national security threat posed by imports of steel products from Turkey. …

The Steel Report assesses the impact of steel imports in the aggregate on national security and makes no finding regarding Turkey specifically. … Other than the Steel Report, Proclamation 9772 mentions informal discussions between the President and the Secretary regarding the changes to capacity utilization in the domestic steel industry after Proclamation 9705 and how additional tariffs on steel products from Turkey would be “a significant step toward ensuring the viability of the domestic steel industry.” … The President is not authorized to act under Section 232 based on any off-handed suggestion by the Secretary; the statute requires a formal investigation and report. See 19 U.S.C.A. § 1862(b), (c). To clarify, the Court does not decide that there was not a national security threat meriting new duties, but instead simply holds that there was no procedurally proper finding of that threat. Thus, the President was not empowered under Section 232 to issue Proclamation 9772.

III. Equal Protection

In addition to their statutory claims, Plaintiffs raise a Fifth Amendment Equal Protection challenge to Proclamation 9772. … Their basic contention is that the Proclamation discriminates between similarly situated importers based on the origin of their imports without rational justification. … Plaintiffs argue that the government has offered no sensible reason for targeting imports from Turkey and that no reasonable rationale is apparent. … Although Plaintiffs acknowledge that Turkey is named in the Steel Report, they argue that the Secretary's determination was based on the import of steel products in the aggregate and that nothing in the Steel Report supports additional duties on Turkish steel products alone. … At base, Plaintiffs argue that that Proclamation 9772 drew an arbitrary and irrational distinction by doubling the tariff rate on Turkish steel products and was based on an impermissible purpose. …

The government responds that to succeed on their equal protection claim, Plaintiffs must first show that the government “intended to discriminate against the claimant or group,” and then show that the classification lacks a connection to an “identifiable state interest.” … Because the Plaintiffs cannot show that the President intended to discriminate against any importers of Turkish steel products, the government argues that the Plaintiffs’ equal protection claim fails. … The government further argues that levying additional tariffs on Turkish steel products alone was a reasonable step towards the legitimate purpose of national security, even if it was just an incremental step towards that purpose. … Finally, it contends that Plaintiffs unjustifiably attempt to make a statutory interpretation case into a constitutional one. … In reply, Plaintiffs argue that the government has overstated their “burden to prove their equal protection claim.” … They further point out that discrimination in this case “is clear on the face of the Proclamation,” and that the cases cited by the government involved facially neutral policies. …

At the outset, the government mistakes a factor sufficient to result in an Equal
Protection violation for one necessary to succeed on such a claim. An intent to discriminate or “bare desire to harm a politically unpopular group” will result in a violation of the Constitution’s Equal Protection clause as it “cannot constitute a legitimate government interest,” Romer v. Evans, 517 U.S. 620, 634 (1996) (quoting Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) …, but this does not mean discriminatory motive is required to find a violation. The disparate impact cases cited by the government are inapposite as they do not focus on the central issue here – whether the challenged action was rationally related to a legitimate government purpose. See McCleskey v. Kemp, 481 U.S. 279, 293, 298-99 (1987) (Georgia death penalty statute disproportionately used against Black defendants); Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) (gender-neutral statute that had disproportionately adverse effects on women); Washington v. Davis, 426 U.S. 229, 237-39 (1976) (police officer examination that had disproportionately adverse effects on Black applicants).

The Constitution’s Equal Protection guarantees apply to actions taken by the federal government through the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The fundamental question is whether the government’s action is justified by sufficient purpose. See Romer, 517 U.S. at 635 (“[A] law must bear a rational relationship to a legitimate governmental purpose.”). The Proclamation at issue here distinguishes between imports on the basis of country of origin. … Disparate treatment alone, however, does not violate the Equal Protection Clause, if “(1) a rational purpose underlies the disparate treatment, and (2) [the governmental decisionmaker] has not achieved that purpose in a patently arbitrary or irrational way.” Belarmino v. Derwinski, 931 F.2d 1543, 1544 (Fed. Cir. 1991) (citing United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 177 (1980). Because the purpose need not be articulated at the time, any legitimate purpose is sufficient. See Nordlinger v. Hahn, 505 U.S. 1 (1992) (“[T]his Court’s review does require that a purpose may conceivably or may reasonably have been the purpose and policy of the relevant governmental decisionmaker.”) …; see also Trump v. Hawaii, 138 S.Ct. 2392, 2420 (2018) (considering plaintiffs’ extrinsic evidence, but upholding a challenged Presidential Proclamation “so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.”). Thus, to survive rational basis review, Proclamation 9772 must be a rational way of achieving a legitimate government purpose.

National security is a legitimate purpose, see Trump v. Hawaii, 138 S.Ct. at 2421, so the Court must assess whether additional tariffs on imported steel products from Turkey is a “rational means to serve” this “legitimate end.” City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985). Unlike the determination made by the Court in Trump v. Hawaii, there is no “persuasive evidence” here to support that the President’s Proclamation “has a legitimate grounding in national security concerns.” 138 S.Ct. at 2421. In that case, the “Proclamation explain[ed], in each case the determinations were justified by the distinct conditions in each country.” Id. In contrast, here, Proclamation 9772 is purportedly based on the Steel Report, which evaluated the collective impact of global steel imports on national security, and not the impact of imports from Turkey individually. See Proclamation 9772 ¶ 1; see also Steel Report at 55-57 (concluding that the global excess capacity of steel and imports into the United States “threaten[s] to impair” national
security). The national security concerns were characterized as “[t]he displacement of domestic steel by imports,” and the resulting effect on the United States economy, and the ability to “meet national security requirements.” See Steel Report at 57. Singling out steel products from Turkey is not a rational means of addressing that concern. Section 232 does not ban the President from addressing concerns by focusing on particular exporters, but the decision to increase the tariffs on imported steel products from Turkey, and Turkey alone, without any justification, is arbitrary and irrational.

This case is materially indistinguishable from Allegheny Pittsburgh Coal Co. v. Cnty Com’n of Webster Cnty, 488 U.S. 336 (1989). In that case, the Court declared irrational a county tax assessor’s use of differing methods to assess property value that had been recently sold from property that had not. … The result was that generally “comparable properties” were assessed at vastly different rates depending on the last date of sale. Id. at 341. The Court found that the tax assessor’s practice was arbitrary and that the “relative undervaluation of comparable property” denied the petitioners in that case equal protection. Id. at 346. The Court noted that the West Virginia Constitution establishes a general principle of uniform taxation, and held that the tax assessor’s practice did not accord with the West Virginia Constitution and violated the United States Constitution’s Equal Protection Clause. Id. at 345 (“The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.”) (quoting Hillsborough v. Cromwell, 326 U.S. 620, 623 (1946)). The situation before the Court here is no different. There is no apparent reason to treat importers of Turkish steel products differently from importers of steel products from any other country listed in the Steel Report. The status quo under normal trade relations is equal tariff treatment of similar products irrespective of country of origin. See 19 U.S.C. § 1881. Although deviation from this general principle is allowable, such deviation cannot be arbitrarily and irrationally enforced in a way that treats similarly situated classes differently without permissible justification. Proclamation 9772 denies Plaintiffs the equal protection of the law.

IV. Constitutional Due Process

The Constitution’s Due Process Clause provides that “[n]o person shall … be deprived of life, liberty, or property, without due process of law.” U.S. Const. Amend. V. For Plaintiffs to succeed on their procedural due process claim, the court must first determine that a protected property interest exists. See Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005) (“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire”) (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)). The Court looks to “existing rules or understandings that stem from an independent source such as state law,” in ascertaining whether a protected property interest exists. Id. (citing Paul v. Davis, 424 U.S. 693, 709) (1976)). If an interest exists, the court must then ascertain what process is required under the circumstances. See Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

Plaintiffs contend that Proclamation 9772 violates the Constitution’s guarantee of Due Process. … They identify the property interest as “simply that the plaintiff-imports
paid large amounts of duties to the U.S. Government and incurred numerous other expenses associated with the dislocation attendant to the imposition of 50% tariffs on Turkey.” … They further identify the process owed as “at least a basic level of protection under these circumstances.” … The government responds that Plaintiffs have failed to identify a constitutionally protected property interest. … Because Plaintiffs do not point to an independent source that gives rise to a property interest, the government contends that the only process owed to Plaintiffs is “whatever the statute or regulation provides.” … Because, in the government’s view, that process was afforded here, there is no violation. …

Plaintiffs have failed to fully articulate a property interest beyond various nebulous notions and do so without reference to any independent source establishing that a concrete, protected property interest exists. Further, the process Plaintiffs request is simply that the government be made to comply with the procedures laid out in the statute. Because we hold that Plaintiffs are entitled to that process under the statute, we need not also answer whether any constitutional guarantees of Due Process were violated. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) (Brandeis, J., concurring) (noting that a Court “will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of”). The Court does not foreclose the possibility that a constitutionally-protected property interest may exist, but declines to identify one here. Whatever constitutional minimum process might be owed, it is satisfied by requiring that the President abide by the statute’s procedures.

II. July 2021 Federal Circuit Transpacific II Case

TRANS PACIFIC STEEL LLC V. UNITED STATES, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, NUMBER 2020-2157 (SLIP OPINION 20-2157, 13 JULY 2021)433

[In its decision excerpted below, the Federal Circuit reversed the above-excerpted CIT decision to invalidate the Section 232 tariff increase on Turkish steel products. The Appellate Court held the President retained authority to adjust Section 232 actions outside the statutory timelines, so the later tariff increases President Trump imposed on those products were valid. Which decision is the stronger, that of the CIT or the Federal Circuit? Consider, too, the Dissent in the Federal Circuit case. What do each of these opinions say about Presidential power, the relationship between the Executive and Legislative branches with respect to foreign economic policy and national security under the Foreign Commerce Clause of Article I, Section 8, Clause 3, and the 5th Amendment Due Process Clause requiring Equal Protection? Examine carefully the interpretative methodologies used in each opinion. They all speak of plain meaning, legislative history, and practice. Yet, their outcomes are diametrically opposite. Why? Note that, in the end, the Supreme Court declined to review the Federal Circuit’s decision upholding the validity of President Trump’s decision to double steel tariffs on Turkish steel, which the Appellate Court rendered in Transpacific Steel LLC v. U.S., Number 21-721 (28 March 2022). The Federal

Circuit majority and dissenting opinions contain an excellent point-counter-point analysis of Presidential authority under Section 232.]

**Majority Opinion,**
**Taranto, Circuit Judge**

In Section 232 of the *Trade Expansion Act of 1962*, Pub. L. No. 87-794, 76 Stat. 872, 877, codified as amended at 19 U.S.C. § 1862, Congress provided that if the President receives, and agrees with, a finding by a specified executive officer (now the Secretary of Commerce) that imports of an article threaten to impair national security, the President shall take action that the President deems necessary to alleviate the threat from those imports. *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) (addressing then-current version of § 1862 and holding that permitted action includes requiring licenses for imports and that provision raised no substantial issue of improper delegation of legislative power); *American Inst. for Int’l Steel, Inc. v. United States*, 806 F. App’x 982 (Fed. Cir. 2020) (rejecting nondelegation challenge to the current version of the statute). In its present form, the statute includes provisions, added in 1988, that set forth process and timing standards applicable to the Secretary’s making of the predicate finding of threat, § 1862(b), and set forth certain timing standards applicable to the President’s follow-on decisions if the Secretary finds such a threat, § 1862(c). Of central importance here is § 1862(c)(1). It specifies one period within which the President is to concur or disagree with the Secretary’s finding and to determine the necessary action if the President concurs in the finding and another period within which the President is thereafter to implement the chosen action. § 1862(c)(1). This case involves a challenge to certain presidential action as taken too late under § 1862(c)(1).

In January 2018, the Secretary, in compliance with the process and timing requirements of § 1862(b), found that imports of steel threatened to impair national security because the imports caused domestic steel-production capacity to be used less than the level of utilization needed for operation of the plants to be profitably sustained over time. In March 2018, within the periods prescribed for Presidential action, the President agreed with the Secretary’s finding, determined the needed plan of action, and announced the plan in a proclamation that imposed some tariffs immediately, announced negotiations with specified nations in lieu of immediate tariffs, invited negotiations more broadly, and stated that the immediate measures might be adjusted as necessary. *Proclamation 9705*, 83 Fed. Reg. 11,625 (Mar. 15, 2018). Within a few months, as certain negotiations produced agreements or adequately progressed, the President determined that imports were still too high to allow domestic plant utilization to meet the Secretary’s identified target, and the President raised the tariff on steel from Turkey, one of the largest producers and exporters of steel imported into the United States. *Proclamation 9772* … (Aug. 15, 2018). *Proclamation 9772*’s raising of the tariff on Turkish steel imports is challenged here.

Transpacific Steel LLC, Borusan Mannesmann Boru Sanayi Ve Ticaret A.S., Borusan Mannesmann Pipe U.S. Inc., and the Jordan International Company (together, Transpacific) – importers of Turkish steel (in some cases also producers or exporters) – sued in the Court of International Trade (Trade Court), alleging that the President’s
issuance of Proclamation 9772 was unlawful. The Trade Court held the action unlawful on two grounds. First, the court held that Proclamation 9772 was unauthorized because, unlike the initial Proclamation 9705, it was issued outside the time periods set out in § 1862(c)(1) for Presidential action after the Secretary’s finding (in which the President concurred) of a national-security threat from steel imports. To take this action in August 2018, the court ruled, the President had to secure a new report with a new threat finding from the Secretary. Second, the court held that singling out steel from Turkey for the increased tariff violated the Equal-Protection guarantee of the Fifth Amendment to the Constitution.

We reverse. The President did not violate § 1862 in issuing Proclamation 9772. The President did not depart from the Secretary’s finding of a national-security threat; indeed, the President specifically adhered to the Secretary’s underlying finding of the target capacity-utilization level that was the rationale for the predicate threat finding. Moreover, the President made the determination that further import restrictions were needed to achieve that level in a short period after the Secretary’s finding and after the initial presidential action. And that initial Presidential action (in March 2018) itself announced a continuing course of action that could include adjustments as time passed. In these circumstances, we conclude that the increase in the tariff on steel from Turkey by Proclamation 9772 did not violate § 1862. We do not address other circumstances that would present other issues about presidential authority to adjust initially taken actions without securing a new report with a new threat finding from the Secretary.

Nor did the President violate Transpacific’s Equal Protection rights in issuing Proclamation 9772. The most demanding standard that could apply here is the undemanding rational-basis standard. The President’s decision to take one of a number of possible steps to achieve the goal of increasing utilization of domestic steel plants’ capacity to try to improve their sustainability for national security reasons meets that standard.

I.

A.

Section 1862 empowers and directs the President to act to alleviate threats to national security from imports. It does so by modifying and adding to other Presidential authority granted by Congress.

Subsection (a). The first Subsection of § 1862 refers to two of the pre-existing, continuing statutory grants of Presidential authority and forbids relaxation of import restrictions under those grants if national security would be threatened. Specifically, subsection (a) addresses 19 U.S.C. §§ 1821 and 1351, which grant the President certain discretionary authority regarding tariffs on goods from foreign nations with which the President might enter into Executive agreements. Section 1821(a), which dates to at least 1962, see Trade Expansion Act of 1962, § 201, 76 Stat. at 872, states that the President “may,” for any of the broad trade-related purposes identified in 19 U.S.C. § 1801, enter into trade agreements and, among other things, raise or lower duties (within limits) to carry out such agreements. § 1821. Section 1351, which traces back to 1934, see Tariff Act of 1934, ch. 474, 48 Stat. 943, confers similar authority. § 1351. Subsection (a) of § 1862
forbids the President, when acting under those provisions, “to decrease or eliminate the
duty or other import restrictions on any article if the President determines that such
reduction or elimination would threaten to impair the national security.” § 1862(a).

Subsection (b). The next Subsection sets forth the agency-level processes required
for exercise of § 1862’s own grant of presidential authority to take action against imports
that threaten to impair national security. In particular, Subsection (b) prescribes process
and timing standards for the Secretary of Commerce to make the finding that is a
precondition for the President to take such action under this statute.

If the Secretary receives a request from an agency or department head or an
“application of an interested party,” or on the Secretary’s “own motion,” the Secretary must
“immediately initiate an appropriate investigation to determine the effects on the
national security of imports of the [relevant] article.” § 1862(b)(1)(A). During the
investigation, the Secretary must consult with and seek information and advice from certain
officers – most notably, the Secretary of Defense – and, if appropriate, “hold public
hearings or otherwise afford interested parties an opportunity to present information and
advice relevant to such investigation.” § 1862(b)(2)(A). Within “270 days” of the
investigation’s start, “the Secretary shall submit to the President a report on the findings
of” the investigation. § 1862(b)(3)(A). Based on those findings, the Secretary must include
his “recommendations … for action or inaction.” Id. “If the Secretary finds that such article
is being imported into the United States in such quantities or under such circumstances as
to threaten to impair the national security, the Secretary shall so advise the President in
such report.” Id.

Subsection (c). The next Subsection lays out the President’s authority and
obligation to act under § 1862. As Paragraph (1) makes clear, that authority and obligation
exist only if the President receives a report “in which the Secretary finds that an article is
being imported into the United States in such quantities or under such circumstances as to
threaten to impair the national security.” § 1862(c)(1)(A). In that event, the President
“shall,” within 90 days of receiving such a report, “determine whether the President
concurs with the finding of the Secretary,” i.e., the Secretary’s finding of a threat (not the
Secretary’s recommendation of action or inaction). § 1862(c)(1)(A)(i). “[I]f the President
concurs” in that finding, then the President “shall,” within the same 90 days, “determine
the nature and duration of the action that, in the judgment of the President, must be taken
to adjust the imports of the article and its derivatives so that such imports will not threaten
to impair the national security.” § 1862(c)(1)(A)(ii). Finally, “[i]f the President determines
… to take action to adjust imports of an article and its derivatives, the President shall
implement that action” within 15 days of the action determination. § 1862(c)(1)(B).

In Paragraph (3), Subsection (c) specifically addresses the circumstance in which
one of the actions that the President initially chooses is not a unilateral imposition on
certain imports but, instead, bilateral or multilateral in character, i.e., negotiation of an
agreement that “limits or restricts the importation into, or the exportation to, the United
States of the article that threatens to impair national security.” § 1862(c)(3)(A)(i). To
prevent that Presidential choice from turning into inaction or inadequate action, paragraph
(3) provides for unilateral action if either no agreement is reached within 180 days, *id.*, or an agreement is reached but it “is not being carried out or is ineffective in eliminating the threat to the national security posed by imports of such article,” § 1862(c)(3)(A)(ii) (Emphasis added.) When either of those conditions is met, “the President shall take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security.” § 1862(c)(3)(A). The President must publish in the Federal Register notice of such “additional actions” or of a determination not to take “additional actions.” § 1862(c)(3)(A), (B).

*Subsection (d).* Congress included what amounts to a definitional provision for § 1862. Subsection (d) states a number of “relevant factors” to which the Secretary and the President must “give consideration” in making their determinations regarding “national security.” § 1862(d). Among the factors are the “domestic production needed for projected national defense requirements,” the “capacity of domestic industries to meet such requirements,” the “requirements of growth of such [domestic] industries,” “the impact of foreign competition on the economic welfare of individual domestic industries,” and whether the “weakening of our internal economy may impair the national security.” *Id.* The statute enumerates other considerations as well, and the entire enumeration is set forth “without excluding other relevant factors.” *Id*

B.

1.

On April 19, 2017, the Secretary of Commerce started “an investigation to determine the effects on the national security of imports of steel.” … After following the process, and within the time, prescribed by § 1862(a), the Secretary, on January 11, 2018, sent his report to the President. Publication of a Report on the Effect of Imports of Steel on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended, 85 Fed. Reg. 40,202 (July 6, 2020) (January 2018 Report).

The Secretary found that “the present quantities and circumstance of steel imports are weakening our internal economy and threaten to impair the national security as defined in Section 232.” *Id.* at 40,204 (internal quotation marks omitted). Underlying that finding, the Secretary explained, were “[n]umerous U.S. steel mill closures, a substantial decline in employment, lost domestic sales and market share, and marginal annual net income for U.S.-based steel companies.” … Because the “declining steel capacity utilization rate is not economically sustainable,” the Secretary reported that “the only effective means of removing the threat of impairment is to reduce imports to a level that should, in combination with good management, enable U.S. steel mills to operate at 80 percent or more of their rated production capacity.” …

Based on the finding of a need for 80% average capacity utilization for the sustainable industry required to remove the national-security threat, the Secretary made several recommendations about how to adjust imports that were leaving domestic plants underutilized. The first option was a “global quota or tariff.” … For the global quota, the
Secretary recommended a quota limiting steel imports to 63% of 2017 import levels; for the global tariff, the Secretary recommended a 24% tariff on all steel imports. … The second option was “tariffs on a subset of countries.” *Id.* Under that approach, the Secretary recommended a 53% tariff on all steel imports from “Brazil, South Korea, Russia, Turkey, India, Vietnam, China, Thailand, South Africa, Egypt, Malaysia and Costa Rica.” … For every option, the Secretary noted that “the President could determine that specific countries should be exempted from the proposed” quota or tariff. … But if the President determined that certain countries should be exempt, the “Secretary recommend[ed] that any such determination should be made at the outset and a corresponding adjustment be made to the final quota or tariff imposed on the remaining countries.” …

The Secretary further recommended “an appeal process by which affected U.S. parties could seek an exclusion from the tariff or quota imposed.” … Under that process, the “Secretary would grant exclusions based on a demonstrated: (1) lack of sufficient U.S. production capacity of comparable products; or (2) specific national security-based considerations.” … If an exclusion was granted, the Secretary would also “consider at the time whether the quota or tariff for the remaining products needs to be adjusted to increase U.S. steel capacity utilization to a financially viable target of 80 percent.” …

2.

After receiving the Secretary’s January 11, 2018 Report, with its finding that imports of steel articles threatened to impair national security because they were preventing 80% domestic capacity utilization, the President issued several *Proclamations* relevant here.

*Proclamation 9705.* On March 8, 2018, well within the prescribed 90 days of receiving the report, the President issued *Proclamation 9705.* … The President stated that he “concur[red] in the Secretary’s finding” on steel articles and had “considered [the Secretary’s] recommendations.” … The President “decided to adjust the imports of steel articles by imposing a 25 percent ad valorem tariff on steel articles … imported from all countries except Canada and Mexico.” … The tariffs would take effect on March 23, 2018, and “continue in effect, unless such actions are expressly reduced, modified, or terminated.” …

On the exception, the President explained that “Canada and Mexico present a special case” because of the countries’ “close relation” with and “physical proximity” to the United States and because the President sought “to continue ongoing discussions with these countries.” … The President also stated his willingness to negotiate with “[a]ny country” that has “a security relationship” with the United States in order to discuss “alternative ways to address the threatened impairment of the national security caused by imports from that country.” … The President highlighted, though, that if the negotiations led to an agreement with a country with “a satisfactory alternative means to address” the national-security threat, he “may remove or modify the restriction on steel articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require.” … (Emphasis added.)
In other words, a negotiated deal with one country, if it was generous regarding steel imports from that country, might require lowering imports from other countries by raising the initial tariff imposed on them, so that the 80% capacity-utilization level could be reached.

To facilitate the planned course of action, the President ordered the Secretary to “continue to monitor imports of steel articles,” to consult “from time to time” with various officials “as the Secretary deems appropriate,” and to “review the status of such imports with respect to the national security.” … He also ordered the Secretary to “inform the President of any circumstances that in the Secretary’s opinion might indicate the need for further action by the President” or if “the increase in duty rate provided for in this proclamation is no longer necessary.” …

Proclamations 9711, 9740, and 9759. Thereafter, the President negotiated with many countries, made agreements with some, and adjusted tariffs on countries that did not negotiate or reach an agreement with the United States. For example, two weeks after Proclamation 9705, the President issued Proclamation 9711. … (Mar. 22, 2018). In that Proclamation, the President highlighted that several countries reached out to discuss “satisfactory alternative means to address the threatened impairment to the national security” and noted that he “determined that the necessary and appropriate means to address the threat to the national security posed by imports of steel articles from these countries is to continue ongoing discussions and to increase strategic partnership.” … The President concluded: “[D]iscussions regarding measures to reduce excess steel production and excess steel capacity, measures that will increase domestic capacity utilization, and other satisfactory alternative means will be most productive if the tariff proclaimed in Proclamation 9705 on steel articles imports from these countries is removed at this time.” … Still, the President declared, the exemption would expire on May 1, 2018, if no agreement was reached. … And if an agreement was reached, the President said (as he did in Proclamation 9705), “corresponding adjustments to the tariff” previously set for other countries would be considered. …

About five weeks later, on April 30, 2018, the President issued Proclamation 9740 announcing agreements and further negotiations. … The President announced that negotiations with South Korea had succeeded, producing an agreement “on a range of measures, … including a quota that restricts the quantity of steel articles imported into the United States from South Korea.” … The President also reported that the “United States has agreed in principle with Argentina, Australia, and Brazil on satisfactory alternative means” and temporarily exempted those countries from the 25% ad valorem tariff “to finalize the details” of the agreements. … And he noted that the United States was “continuing discussions with Canada, Mexico and the [European Union].” …

Later, on May 31, 2018, the President, in Proclamation 9759, announced that the United States had reached agreements with Argentina, Australia, and Brazil. …

Proclamations 9772 and 9886. On August 10, 2018, just over five months after the President issued the first Proclamation (Proclamation 9705), he issued the Proclamation
challenged here by Transpacific, *i.e.*, *Proclamation 9772*. 83 Fed. Reg. 40,429 (Aug. 15, 2018). The President explained that the Secretary had monitored imports of steel articles (as directed in *Proclamation 9705*) and, based on that monitoring, the Secretary had “informed [the President] that while capacity utilization in the domestic steel industry has improved, it is still below the target capacity utilization level” identified in the January 2018 *Report* and imports were “still several percentage points greater than the level of imports that would allow domestic capacity utilization to reach the target level.” … The President added that in the “January 2018 *Report*, the Secretary recommended … applying a higher tariff to a list of specific countries” if the President “determine[d] that all countries should not be subject to the same tariff.” … The President also noted that the Secretary’s report had Turkey on the list and that the *Report* explained that “Turkey is among the major exporters of steel to the United States for domestic consumption.” … Then the President declared: “To further reduce imports of steel articles and increase domestic capacity utilization, I have determined that it is necessary and appropriate to impose a 50 percent *ad valorem* tariff on steel articles imported from Turkey, beginning on August 13, 2018.” … The President also highlighted that the Secretary had advised him that the adjustment on steel imports from Turkey “will be a significant step toward ensuring the viability of the domestic steel industry.” …

The 50% *ad valorem* tariff on Turkish steel remained in place for just under nine months – until May 21, 2019 – when it returned to 25%. See *Proclamation 9886* of May 16, 2019…. In the *Proclamation* announcing the return to the 25% level, the President stated that the Secretary had advised him “that, since the implementation of the higher tariff under *Proclamation 9772*, … the domestic industry’s capacity utilization ha[d] improved … to approximately the target level recommended in the Secretary’s *Report*.” … The President determined that “[t]his target level, if maintained for an appropriate period, will improve the financial viability of the domestic steel industry over the long term.” … “Given these improvements,” the President “determined that it [wa]s necessary and appropriate to remove the higher tariff on steel imports from Turkey imposed by *Proclamation 9772*, and to instead impose a 25 percent *ad valorem* tariff on steel imports from Turkey.” … The President also determined that “[m]aintaining the existing 25 percent *ad valorem* tariff on most countries [wa]s necessary and ap- propriate at this time to address the threatened impairment of the national security that the Secretary found in the January 2018 *Report*.” …

C.

On January 17, 2019, while the 50% tariff was in effect, Transpacific sued the United States, two agencies of the United States (the Department of Commerce and U.S. Customs and Border Protection), the President, and the heads of the two agencies, invoking the Trade Court’s jurisdiction under 28 U.S.C. § 1581(i)(2), (4). See *Transpacific Steel LLC v. United States*, No. 1:19-cv-00009, ECF No. 6 (Ct. Int’l Trade Jan. 17, 2019) (Complaint). Transpacific amended its complaint on April 2, 2019, naming the same defendants. … Like the original complaint, the amended complaint alleged that *Proclamation 9772* was unlawful because the President exceeded his authority under 19 U.S.C. § 1862 and violated the Fifth Amendment’s guarantees of Equal Protection and of
procedural due process. …

On April 3, 2019, the government moved to dismiss the suit for failure to state a claim, and on November 15, 2019, the Trade Court denied the motion. Transpacific Steel LLC v. United States, 415 F. Supp. 3d 1267, 1269 (Ct. Int’l Trade 2019) (Transpacific I). The Trade Court held that Transpacific stated a claim that the timing provisions of § 1862(c) foreclosed the President from doing what he did here, namely, announce and put into effect a plan of action within the statutory time periods (as the President did in Proclamation 9705), and then raise tariffs pursuant to the implemented plan after those deadlines passed (as the President did in Proclamation 9772) without obtaining a new report from the Secretary produced through the statutorily specified procedure. … The Trade Court also determined that Transpacific stated a claim that Proclamation 9772 violated the Fifth Amendment’s Equal Protection guarantee because it alleged that there was “no set of facts that justify identifying importers of steel from Turkey as a class of one.” … As for the procedural-due-process claim, the Trade Court did not reach it because the court determined that the President violated the procedural constraints of § 1862. …

Shortly thereafter, the other appellees were permitted to intervene as co-plaintiffs. … [O]n July 14, 2020, the Trade Court issued an opinion and entered judgment for Transpacific. Transpacific Steel LLC v. United States, 466 F. Supp. 3d 1246, 1249 (Ct. Int’l Trade 2020) (Transpacific II). … The Trade Court concluded that Proclamation 9772 was unlawful because the President violated a statutory timing constraint of § 1862 and because singling out importers of Turkish steel products denied them the constitutionally guaranteed equal protection of the laws.

As to § 1862, the Court maintained its view that “there is nothing in the statute to support the continuing authority to modify Proclamations outside of the stated time-lines.” Transpacific II, 466 F. Supp. 3d at 1253. Although the Trade Court recognized that § 1862 before the 1988 amendments let the President “modify previous Proclamations as a form of continuing authority,” the court explained that “the statutory scheme has since been altered, and the court must give meaning to those alterations.” Id. “The 1988 amendments prescribed time limits,” the court noted, “but also deleted language that could be read to give the President the power to continually modify Proclamations.” Id. And the court repeated that nondelegation concerns reinforced its reading. Id. The Trade Court therefore held that “‘modifications’ of existing Proclamations under the current statutory scheme, without following the procedures in the statute, are not permitted.” Id.

As to Equal Protection, the Trade Court concluded that the government flunked the rational-basis standard. “Singling out steel products from Turkey,” reasoned the court, “is not a rational means of addressing” the government’s national-security concern. Id. at 1258. According to the Court, the “status quo under normal trade relations is equal tariff treatment of similar products irrespective of country of origin. Although deviation from this general principle is allowable, such deviation cannot be arbitrarily and irrationally enforced in a way that treats similarly situated classes differently without permissible justification.” Id. … The Court, seeing no permissible justification, concluded: “Proclamation 9772 denies [Transpacific] the equal protection of the law.” Id.
The Court then addressed Transpacific’s procedural-due-process argument. It stated: “[T]he process [Transpacific] request[s] is simply that the government be made to comply with the procedures laid out in the statute. Because we hold that [Transpacific is] entitled to that process under the statute, we need not also answer whether any Constitutional guarantees of Due Process were violated.” Id. at 1259. The Court added: “Whatever constitutional minimum process might be owed, it is satisfied by requiring that the President abide by the statute’s procedures.” Id.

The same day, the Trade Court entered final judgment. … The Court ordered that Proclamation 9772 “is declared unlawful and void” and ordered that the “United States Customs and Border Protection refund [Transpacific] the difference between any tariffs collected on its imports of steel products” under Proclamation 9772 “and the 25% ad valorem tariff that would otherwise apply on these imports together with such costs and interest as provided by law.”…

The government timely appealed the Trade Court’s judgment. …

II.

The government challenges the Trade Court’s rulings that Proclamation 9772 violated 19 U.S.C. § 1862 and the Fifth Amendment’s guarantee of Equal Protection. In response, Transpacific defends those rulings, but it does not present here, or seek a conditional remand to press, its procedural-due-process challenge, which we therefore deem dropped. And although Transpacific briefly asserts a non-delegation challenge simply to preserve it, we have already rejected such a challenge, American Inst. for Int’l Steel, 806 F. App’x at 983, and Transpacific has presented no developed argument on nondelegation that warrants additional discussion. Accordingly, we limit ourselves to the § 1862 and Equal-Protection issues.

We review the judgment on the agency record without deference. See Fedmet Resources Corp. v. United States, 755 F.3d 912, 918 (Fed. Cir. 2014). This appeal involves only legal issues, which we decide de novo. See GPX Int’l Tire Corp. v. United States, 780 F.3d 1136, 1140 (Fed. Cir. 2015).

A.

The Trade Court concluded that § 1862 prohibited the President from raising tariffs in Proclamation 9772 because the President issued that proclamation after the 90-day period for the President to decide to concur or disagree with the Secretary’s January 2018 finding of threat and to determine how to respond to the threat, and after the 15-day period for the President to implement the chosen response, without obtaining a new finding of threat from the Secretary. The Trade Court so concluded even though: Proclamation 9772 was a further implementation of Proclamation 9705; Proclamation 9705 was issued within the two specified time periods and expressly provided for future adjustments; and Proclamation 9772 adhered to the basis of the threat finding in the Secretary’s January
2018 Report, namely, the need for a particular domestic-plant utilization level, which the implementation measures had not yet achieved. We reverse. In these circumstances, we conclude that the Trade Court erred in determining that the President’s issuance of Proclamation 9772 violated § 1862.

The key issue is whether § 1862(c)(1) permits the President to announce a continuing course of action within the statutory time period and then modify the initial implementing steps in line with the announced plan of action by adding impositions on imports to achieve the stated implementation objective. We conclude that the President does have such authority in the circumstances presented here. Specifically, we conclude that the best reading of the statutory text of § 1862, understood in context and in light of the evident purpose of the statute and the history of predecessor enactments and their implementation, is that the authority of the President includes authority to adopt and carry out a plan of action that allows adjustments of specific measures, including by increasing import restrictions, in carrying out the plan over time. Transpacific does not argue that Proclamation 9772 is unlawful under the statute if, as we conclude, the President has the authority to adopt and pursue such a continuing course of action.

In our statutory analysis, we consider text and context, including purpose and history. Judge Reyna, in dissent, reaches different conclusions about these considerations and about the bottom-line result. Our discussion of the individual considerations provides, without further direct reference to Judge Reyna’s dissent, the reasons we take a different view on the points of disagreement.

1.

We start with the text of 19 U.S.C. § 1862(c)(1) and its “ordinary meaning at the time Congress enacted the statute.” New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019) (cleaned up). Subsection (c)(1) states:

(c) Adjustment of imports; determination by President; report to Congress; additional actions; publication in Federal Register

(1)(A) Within 90 days after receiving a re-port submitted under subsection (b)(3)(A) in which the Secretary finds that an article is being imported into the United States in such quantities or under such circum-stances as to threaten to impair the national security, the President shall –

(i) determine whether the President concurs with the finding of the Secretary, and

(ii) if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will
not threaten to impair the national security.

(B) If the President determines under Sub-paragraph (A) to take action to adjust im- ports of an article and its derivatives, the President shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A).

§ 1862(c)(1).

Paragraph (1) contains several time directives. “Within 90 days after receiving a report” with a finding that importation of an article threatens to impair national security, the President “shall,” first, “determine whether the President concurs with the finding of the Secretary,” § 1862(c)(1)(A)(i), and, second, if the President concurs, “determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such im- ports will not threaten to impair the national security,” § 1862(c)(1)(A)(ii). Then, if the President has concurred in the finding of threat and determined the action to be taken in response, the President “shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action under Subparagraph (A).” § 1862(c)(1)(B).

The Trade Court’s interpretation of Subsection (c)(1)’s time directives does not follow from the ordinary meaning of the provision’s language at the time of enactment. In two ways, the Trade Court took too narrow a view of what the ordinary meaning allows.

First: The Trade Court indicated its view that the “necessary implication” of the timing provisions was that no burden-increasing action could be taken after the specified times. Transpacific I, 415 F. Supp. 3d at 1275 n.13; Transpacific II, 466 F. Supp. 3d at 1252 (“[T]he temporal re- strictions on the President’s power to take action pursuant to a report and recommendation by the Secretary is not a mere directory guideline, but a restriction that requires strict adherence. To require adherence to the statutory scheme does not amount to a sanction, but simply ensures that the deadlines are given meaning and that the President is acting on up-to-date national security guidance.”). But that is not a necessary implication of the words.

As a matter of ordinary meaning, a command to “take this action by time T” is often, in substance, a compound command – one, a directive (with conferral of authority) to take the action, and, two, a directive to do so by the pre-scribed time. A violation of the temporal obligation imposed by the second directive does not necessarily negate the primary obligation imposed by – let alone the grant of authority implicit in – the first directive. For example: Most people would understand the directive “return the car by 11 p.m.” to require the return of the car even after 11 p.m. See, e.g., Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1722 (2017) (using a conversation between friends to show ordinary meaning). That is why a real addition of meaning, or at least a resolution of uncertainty, results when “take this action by time T” is followed by words like “or else don’t take it at all.”
The Supreme Court has recognized this linguistic point in the context of statutory commands to executive officers to take action within a specified time. It has made clear that such a command does not, without more, entail lack of authority, or of obligation, to take the action after that date has passed, even though the obligation to act by the specified time has been violated. The Court so ruled in 1986 in Brock v. Pierce County, concluding that “the mere use of the word ‘shall’ in [a statute], standing alone, is not enough to remove the [official’s] power to act after” the time deadline. 476 U.S. 253, 262 (1986). As the Supreme Court summarized the point some years later, Brock held that the particular time command was “meant ‘to spur the Secretary to action, not to limit the scope of his authority,’ so that un- timely action was still valid.” Barnhart v. Peabody Coal Co., 537 U.S. 149, 158 (2003) (quoting Brock, 476 U.S. at 265). In 2003, the Court emphasized: “Nor, since Brock, have we ever construed a provision that the Government ‘shall’ act within a specified time, without more, as a jurisdictional limit precluding action later.” Id.; see also, e.g., id. at 157 (“It misses the point simply to argue that the October 1, 1993, date was ‘mandatory,’ ‘imperative,’ or a ‘deadline,’ as of course it was, however unrealistic the man- date may have been.”); id. at 160-61 (explaining that Brock made clear that “a statute directing official action needs more than a mandatory ‘shall’ before the grant of power can sensibly be read to expire when the job is supposed to be done”); United States v. James Daniel Good Real Prop., 510 U.S. 43, 63 (1993) (“[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.”); United States v. Montalvo-Murillo, 495 U.S. 711, 718–19 (1990); Nielsen v. Preap, 139 S. Ct. 954, 967–68 (2019) (Alito, J., joined by Roberts, C.J., and Kavanaugh, J.).

The common-sense linguistic point, and its application in the statutory setting, formed the backdrop to Congress’s amendments to § 1862 in 1988. The Brock decision issued two years before Congress’s amendments. See Barnhart, 537 U.S. at 160 (“The Coal Act was adopted six years after Brock came down, when Congress was presumably aware that we do not readily infer congressional intent to limit an agency’s power to get a mandatory job done merely from a specification to act by a certain time.”); Nielsen, 139 S. Ct. at 967 (Alito, J., joined by Roberts, C.J., and Kavanaugh, J.) (“This principle for interpreting time limits on statutory mandates was a fixture of the legal backdrop when Congress enacted [the statute at issue].”). We thus disagree with the Trade Court to the extent that it viewed the expiration of the time periods in § 1862(c)(1), standing alone, as automatically equating to the expiration of the President’s authority to take further burden-increasing steps, as he did here.

Second: The Trade Court’s ruling also appears to rest on a premise that the provisions of § 1862(c)(1) at issue apply their time requirements to each individual discrete im- position on imports, rather than to the adoption and initiation of a plan of action or course of action (with choices to impose particular burdens in the carrying out of the plan permissible later in time). The language of the provisions, however, does not support that premise.

The terms “action” and “take action” are not limited in that way, but can readily be
used to refer to a process or launch of a series of steps over time. See, e.g., *Action*, Black’s Law Dictionary 49 (4th ed. 1957) (“an act or series of acts”); Black’s Law Dictionary 26 (5th ed. 1979) (same); Garner’s Dictionary of Modern Legal Usage 19 (2d ed. 1995) (“*action* suggests a process – the many discrete events that make up a bit of behavior – whereas *act* is unitary”); Garner’s Dictionary of Legal Usage 18 (3d ed. 2011) (same); Black’s Law Dictionary 37 (11th ed. 2019) (“The process of doing something”); see also, e.g., *Action*, Random House Webster’s Unabridged Dictionary 20 (2d ed. 2001) (similar); American Heritage Dictionary 17 (3d ed. 1992) (similar); Garner’s Dictionary of Modern American Usage 14 (1998) (“*Act* is unitary, while *action* suggests a process – the many discrete events that make up a bit of behavior.”); Garner’s Modern American Usage 16 (3d ed. 2009) (same). The authorization for the President to determine the “nature and duration of the action,” § 1862(c)(1)(A)(ii), supports, rather than excludes, coverage of a plan implemented over time, including options for contingency-dependent choices that are a commonplace feature of plans of action. The phrase “implement that action,” § 1862(c)(1)(B), likewise conveys an understanding of “action” as covering plans of action. See *Implement*, 1 Shorter Oxford English Dictionary 1330 (5th ed. 2002) (“put (a decision or plan) into effect” (Emphasis added.)); The American Heritage Dictionary of the English Language 660 (1981) (“To provide a definite plan or procedure to ensure the fulfillment of” (Emphasis added.)); see also, e.g., *Implement*, Webster’s New World Dictionary of American English 677 (3rd College ed. 1988) (“to carry into effect” or “give practical effect to”); Random House College Dictionary 667 (Revised ed. 1982) (“to put into effect according to or by means of a definite plan or procedure”).

In short, the ordinary meaning of “action” in context indicates that the time directive applies to the announcement and adoption of the plan of action rather than each act following the adopted plan. Cf. H.R. Rep. No. 100-576, at 711 (1988) (Conf. Rep.) (“The House bill requires the President to decide whether to take action within 90 days after receiving the Secretary’s Report, and to *proclaim* such action within 15 days.”) (Emphasis added.)).

2.


Paragraph (3) specifically bolsters the understanding that the President is not barred, by paragraph (1), from adopting, outside the 15-day period for implementation, specific new burden-imposing measures not decided on and adopted within the period. Paragraph (3) so indicates for the situation when the initially proclaimed action is (bilateral or multilateral) negotiation:
(3)(A) If—

(i) the action taken by the President under paragraph (1) is the negotiation of an agreement which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security, and

(ii) either—

(I) no such agreement is entered into before the date that is 180 days after the date on which the President makes the determination under paragraph (1)(A) to take such action,

or

(II) such an agreement that has been entered into is not being carried out or is ineffective in eliminating the threat to the national security posed by imports of such article,

the President shall take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security. The President shall publish in the Federal Register notice of any additional actions being taken under this section by reason of this Subparagraph.

§ 1862(c)(3)(A).

Subparagraph (A) indicates that one of the President’s options is to try to secure agreements with foreign nations. Negotiation and agreement themselves will typically occur after the 15 days specified in subsection (c)(1)(B) have passed. That is all the more true of the “other actions” the President is directed to take if negotiations fail or if resulting agreements are violated or are ineffective in eliminating the national-security threat. Those provisions run counter to the Trade Court’s view that Congress forbade presidential imposition of newly specified burdens after § 1862(c)(1)’s 90-day and 15-day periods.

More generally, § 1862’s “evident purpose” is an aspect of the context that must be assessed to determine the fair reading of the statute. See Scalia & Garner, Reading Law § 4, at 63 (The presumption against ineffectiveness “follows inevitably from the facts that (1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness.”); see also id. § 3, at 56 (“[C]ontext includes the purpose of the text.”). The manifest purpose of this statute is to enable and obligate the President (in whom Congress vested the power to make the remedial judgments) to effectively alleviate the threat to national security identified in a finding by
the Secretary with which the President has concurred. Reading § 1862(c)(1) to permit announcement of a plan within the specified 15 days, followed by implementation decisions reflecting contingencies affecting achievement of the goal defined by the Secretary’s finding, furthers that evident purpose.

This does not mean that the statutory purpose is furthered by permitting any presidential imposition after the 15-day period, even an imposition that makes no sense except on premises that depart from the Secretary’s finding, whether because the finding is simply too stale to be a basis for the new imposition or for other reasons. The statute indisputably incorporates a congressional judgment that an affirmative finding of threat by the Secretary is the predicate for presidential action, while also incorporating a congressional judgment that how to address the problem identified in the finding is a matter for the President, whose choices about remedy are not constrained by the Secretary’s recommendations. See § 1862(c)(1) (predicating the President’s power on the Secretary’s “find[ing]” and not the Secretary’s “recommendations”). This case involves Presidential adherence to the key finding of a need for a certain capacity-utilization level, with no indication of staleness of that finding. We have no occasion to rule on other circumstances or to decide what aspects of Presidential decisions under § 1862 are judicially reviewable.

It is enough to say that the Trade Court’s categorical narrow reading of § 1862(c)(1) – precluding all impositions adopted after the 15-day period in implementation of a plan announced within the period—obstructs the statutory purpose. This case illustrates why. The threat to national security was tied to an excess of imports overall, from numerous countries, that left domestic capacity utilized less than an identified, plant-sustaining level. As the President struck deals with some countries as contemplated by Proclamation 9705, the agreed-to imports from those countries would logically affect – most relevantly, could reduce – the volume of imports from other countries, lacking agreements with the United States, that could be allowed if the stated goal of overall-imports reduction was still to be met. Paragraph (3) of § 1862(c) and Proclamation 9705 recognize this evident relationship. To prevent the President from increasing the impositions on non-agreement countries after the initial plan announcement would be to impede the President’s ability to be effective in solving the specific problem found by the Secretary.

Transpacific has suggested that the President’s authority to act outside the 15-day period without securing a new report from the Secretary is limited to relaxing impositions imposed initially within that period. … That suggestion, however, assumes a negative answer to the key question of whether the “action” authorized by Paragraph (1) can be a plan under which later measures are imposed. It does not provide support for that answer. And that answer is not supported by the ordinary meaning of the language and conflicts with Paragraph (3) of § 1862(c) and § 1862’s purpose entrusting the President with the duty to adopt effective measures for the threat found by the Secretary.

3.

The “legal and historical backdrop” against which Congress legislated confirms that under § 1862(c)(1), the President has authority to pursue a continuing course of action,
with adjustments (including additional impositions) adopted over time. See Fed. Republic of Germany v. Philipp, 141 S. Ct. 703, 712 (2021) (“Congress drafted the expropriation exception and its predecessor, the Hickenlooper Amendment, against that legal and historical backdrop.”); id. at 711 (interpreting the statute at issue “[b]ased on this historical and legal background”).

a.

Since 1955, Congress has delegated to the President broad discretion to adjust imports of an article that threaten to impair national security, if a designated Executive officer has made a finding of such a threat. Subsequent amendments made changes, including changes to enhance the process leading to the predicate finding at the agency level and, at the presidential level, generally to add to the President’s authority and obligation to act in response to the relevant official’s threat finding. Throughout, Congress has retained the key term “action” in describing the President’s response.

Section 7 of the Trade Agreements Extension Act of 1955 provided in relevant part:

(b) In order to further the policy and purpose of this section, whenever the Director of the Office of Defense Mobilization has reason to believe that any article is being imported into the United States in such quantities as to threaten to impair the national security, he shall so advise the President, and if the President agrees that there is reason for such belief, the President shall cause an immediate investigation to be made to determine the facts. If, on the basis of such investigation, and the report to him of the findings and recommendations made in connection therewith, the President finds that the article is being imported into the United States in such quantities as to threaten to impair the national security, he shall take such action as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security.

… (Emphasis added.) The provision gave the Executive officer the responsibility to make a preliminary “reason to believe” finding, but it did not expressly declare that the officer, after investigation, must make a positive finding of threat as a precondition to presidential action.

In the Trade Agreements Extension Act of 1958, Congress made that precondition explicit and also made other amendments, while keeping the word “action.” See Algonquin, 426 U.S. at 568 (The 1958 amendments “added no limitations with respect to the type of action that the President was authorized to take. The 1958 re-enactment, like the 1955 provision, authorized the President under appropriate conditions to ‘take such action’ ‘as he deems necessary to adjust the imports.’”…). The 1958 statute [in Section 8(b)] provided in relevant part:

(b) Upon request of the head of any Department or Agency, upon
application of an interested party, or upon his own motion, the Director of the Office of Defense and Civilian Mobilization (hereinafter in this section referred to as the “Director”) shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from other appropriate Departments and Agencies, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. If, as a result of such investigation, the Director is of the opinion that the said article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall promptly so advise the President, and, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security as set forth in this section, he shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security.

… (emphases added).

In addition to making explicit that the designated officer must make the threat finding, the 1958 provision embodied four relevant changes from the 1955 version. First, Congress expanded the President’s power by adding that the President may adjust not only the “article” but also “its derivatives,” even though the executive officer’s report had to investigate only the “article.” Second, Congress clarified that the President’s discretion for the “action” included not only the nature of the action (i.e., “such action”) but its duration (i.e., “for such time”). Third, Congress broadened what would suffice as the predicate for the President’s authority: “[W]hile under the 1955 provision the President was authorized to act only on a finding that ‘quantities’ of imports threatened to impair the national security, the 1958 provision also authorized Presidential action on a finding that an article is being imported ‘under such circumstances’ as to threaten to impair the national security.” Algonquin, 426 U.S. at 568 n.24. Fourth, Congress removed the requirement that the relevant officer seek the President’s approval before starting an investigation. These features stayed materially the same until 1988.

In 1962, Congress re-enacted the 1958 provision – without material change, the Supreme Court has noted, though some wording was altered (e.g., the predicate “opinion” became a predicate “finding”) – as Section 232 of the Trade Expansion Act of 1962, Pub. L. No. 87-796, 76 Stat. 872, 977. See Algonquin, 426 U.S. at 568 (“When the national security provision next came up for re-examination, it was re-enacted without material change as § 232(b) of the Trade Expansion Act of 1962.”). Between 1966 and 1988, Congress made various changes to the statute that have not been featured in the arguments made to this court in this case. For example, in 1975, Congress made the Secretary of the Treasury the official with the predicate-finding responsibility and relocated the “unless” clause addressing Presidential disagreement with the predicate threat finding. See Trade

Just before Congress enacted its amendments in 1988, 19 U.S.C. § 1862 read in relevant part:

Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of the Treasury (hereinafter referred to as the “Secretary”) shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from, and shall consult with, the Secretary of Defense, the Secretary of Commerce, and other appropriate officers of the United States, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion.

The Secretary shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation. The Secretary shall report the findings of his investigation under this Subsection with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, his recommendation for action or inaction under this Section to the President within one year after receiving an application from an interested party or otherwise beginning an investigation under this Subsection.

If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall so advise the President and the President shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

§ 1862(b) (1980). (Emphasis and paragraph breaks added.)

In sum, from the beginning, Congress delegated broad powers to the President to combat imports that a designated Executive officer found to threaten to impair national security. The word “action,” which reflected the President’s broad discretion in determining the nature of the act, has always been present. Congress broadened the President’s already broad power in 1958 and, at the same time, reinforced the range of presidential discretion by adding the phrase “for such time.”
b.

Practice under § 1862 during the three decades leading up to the 1988 amendments, and the understanding expressed during that time, provide strong confirmation that the proper meaning of the language at issue here (added by those amendments) is that Presidential authority extends to carrying out a course of remedial measures, including measures that further restrict imports, chosen over time to address the threat identified in the underlying finding. Cfr. Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004) (“We think history and practice give the edge to this latter position.”).

i.

From 1955 to 1988, Presidents frequently adjusted imports, including by increasing impositions so as to restrict imports, without seeking or obtaining a new formal investigation and report after the initial one. In 1959, acting under the 1958 version of § 1862, the relevant official (then, the Director of the Office of Civil and Defense Mobilization) formally investigated and submitted a report to the President stating “his opinion ‘that crude oil and the principal crude oil derivatives and products are being imported in such quantities and under such circumstances as to threaten to impair the national security.’” Proclamation 3729, 24 Fed. Reg. 1,781, 1,781 (Mar. 12, 1959) (quoting the report). The President agreed and issued Proclamation 3729, which put into place a scheme, including licenses, to adjust the imports of crude oil and its derivatives. Id. The President also ordered the “Secretary of the Interior [to] keep under review the imports into [certain areas] of residual fuel oil to be used as fuel” and gave the Secretary the authority to “make, on a monthly basis if required, such adjustments in the maximum level of such imports as he may determine to be consonant with the objectives of this proclamation.” Id. at 1,783, § 2(e). The President further ordered relevant officers to “maintain a constant surveillance of” the imports of the article at issue and “its primary derivatives” and to “inform the President of any circum- stances which, … might indicate the need for further Presidential action.” Id. at 1,784, § 6(a).

The specific imposition initially adopted in Proclamation 3729 was modified at least 26 times before a new investigation and report were completed – 16 years later in 1975. See Restriction of Oil Imports, 43 Op. Att’y Gen. 20, 22 (1975) (1975 AG Opinion) (“Proclamation 3279 has been amended at least 26 times since its issuance in 1959.” (citing 19 U.S.C. § 1862 note)). At least some of those modifications (made without a new report) “radically amended the program.” Algonquin, 426 U.S. at 553; see also 1975 AG Opinion at 22 (“Some of those amendments have been minor administrative[] changes; others have involved major alteration of the means by which petroleum imports were restricted; none have been preceded by a formal § 232(b) investigation and finding.”).

In 1975, the Attorney General formally opined on the proper interpretation of the statute and concluded that it permitted modifications of prior actions:

The normal meaning of the phrase “such action,” in a context such as this,
is not a single act but rather a continuing course of action, with respect to which the initial investigation and finding would satisfy the statutory requirement. This interpretation is amply supported by the legislative history of the provision, which clearly contemplates a continuing process of monitoring, and modifying the import restrictions, as their limitations become apparent and their effects change.

1975 AG Opinion at 21 (emphases added). The Attorney General emphasized the long practice of presidential action resting on that interpretation and added that Congress was aware of this practice. See id. at 22 (“The interpretation here proposed, whereby import restrictions once imposed can be modified without an additional investigation and finding, has been sanctioned by the Congress’ failure to object to the President’s proceeding on that basis repeatedly during the past 15 years.”). The next year, the Supreme Court highlighted the breadth of presidential authority under the statute and added that Congress was aware of presidential practice. See Algonquin, 426 U.S. at 570 (“Only a few months after President Nixon invoked the provision to initiate the import license fee system challenged here, Congress once again re-enacted the Presidential authorization encompassed in § 232(b) without material change…. The Congressional acquiescence in President Nixon’s action manifested by the re-enactment of § 232(b) provides yet further corroboration that § 232(b) was understood and intended to authorize the imposition of monetary exactions as a means of adjusting imports.”).

Congress amended the statute in April 1980, adding what is now Subsection (f), which addresses petroleum and sets out a congressional-disapproval process. Crude Oil Windfall Profit Tax Act, § 402, 94 Stat. at 301. Between the Attorney General’s 1975 Opinion and that amendment, which was the last one before 1988, the President continued to modify measures adopted under the statute without obtaining new formal reports. See PrimeSource Bldg. Prods., Inc. v. United States, 497 F. Supp. 3d 1333, 1375-76, 1387-88 (Ct. Int’l Trade 2021) (Baker, J., concurring in part and dissenting in part) (noting at least seven instances). Between the April 1980 amendment and the inauguration of the new President in January 1981, the President modified a prior proclamation at least four times without a new investigation and report. … It is not disputed before us that the modifications during the decades of practice included impositions of additional restrictions. …

At the time of the 1988 amendments, then, practice under and Executive interpretation of the statute provided a settled meaning of “action” as including a “plan” or a “continuing course of action.” See Oral Arg. at 1:04:06-1:04:21 (Q[uestion]: “The pre-1988 version, you would agree, it gave the President the authority to do subsequent actions years after the initial proclamation? Is that right?” A[nswr]: “That is the way the statute reads.”). This settled meaning is strongly presumed to have continued through the 1988 amendments, which kept the key term “action,” even while making other changes to the provision, indeed the Subsection, in which the term appeared. See, e.g., Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc., 139 S. Ct. 628, 633–34 (2019) (“In light of this settled pre-AIA precedent on the meaning of ‘on sale,’ we presume that when Congress re-enacted the same language in the AIA, it adopted the earlier judicial construction of that phrase.”); Dir.
Overcoming the strong implication of continuity of the settled meaning would require a “clear indication from Congress of a change in policy.” United States v. O’Brien, 560 U.S. 218, 231 (2010) (internal quotation marks omitted). There is no such indication. Congress did not change “action” in 1988. And what it did change fails to imply the narrowing of presidential authority the Trade Court found.

In the 1988 amendments, Congress elaborated on the process by which the executive official responsible for making the predicate finding of threat – by then, the Secretary of Commerce – was to make that decision. § 1862(b). And in numerous ways, Congress acted to “spur” governmental action, not “limit the scope of … authority” previously possessed. Brock, 476 U.S. at 265. Even as to the Secretary, Congress shortened the period for the determination to 270 days (from the earlier one year). § 1862(b). Congress then directed that, once the Secretary makes a finding of threat, the President is to respond to that finding within two short periods – one for the determination whether the President concurred in the finding and the determination what to do about the threat if so, the other for implementing the action the President deemed necessary. § 1862(c)(1). Congress also made express that the presidential action chosen could be a bilateral or multilateral negotiation – something the conferees themselves understood was already implicit in § 1862(c)(1), see Conf. Rep. at 712 – but it put that option under new constraints so that the option would not be used for what ended up as inaction or ineffective action. § 1862(c)(3).

None of the new language in the statute, on its own or by comparison to what came before, implies a withdrawal of previously existing presidential power to take a continuing series of affirmative steps deemed necessary by the President to counteract the very threat found by the Secretary. To be sure, Congress did change “for such time” language to “duration” language, but that change was a “stylistic” one only, not suggesting a change of meaning. Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 343 n.3 (2005); see also Scalia & Garner, Reading Law § 40, at 256 (“stylistic or non-substantive changes” do not imply change of prior meaning); Universal Steel Prods., Inc. v. United States, 495 F. Supp. 3d 1336, 1351–52 (Ct. Int’l Trade 2021); PrimeSource, 497 F. Supp. 3d at 1378 (Baker, J., concurring in part and dissenting in part). The same is true of the change from “take such action … as [the President] deems necessary” to “determine the nature … of the action that, in the judgment of the President, must be taken.”

The new provisions have the evident purpose of producing more action, not less – and of counteracting a perceived problem of inaction, including inaction through delay. In
this context, the directive to the President to act by a specified time is not fairly understood as implicitly meaning “by then or not at all” as to each discrete imposition that might be needed, as judged over time.

There is no material dispute that the background to the 1988 amendments was a perceived problem of inaction, including by delay. The conferees stated the problem: “Present law provides no time limit after the Commerce Secretary’s report for the President’s decision on the appropriate action to take.” Conf. Rep. at 711. Indeed, in 1982, having received a report from the Secretary finding a national-security threat from imports of ferroalloy products, the President was advised by the Office of Legal Counsel that “[n]o time frame constrains the President” in acting on the report. Presidential Authority to Adjust Ferroalloy Imports Under § 232(b) of the Trade Expansion Act of 1962, 6 Op. O.L.C. 557, 562 (1982); …. Congress plainly acted to oblige the President to act within specified periods, but as Transpacific has acknowledged, nothing in the legislative history suggests that, if that duty was breached, the President could not act later. Oral Arg. at 1:02:44-1:03:16 (Q[uestion]: “Where is there any expression of legislative intent that these time limits that were installed in 1988 into section 232(b) were designed to yank away from the President any authority to take action outside of that time limit? Is the answer that there really isn’t anything in the legislative history on that?” A[nswer]: “I would have to agree with Your Honor, yes, there is nothing in the legislative history that says that.”).

The specific focus of Congress’s concern involved Presidential inaction concerning imports of machine tools. Based on a March 1983 request for investigation, the Secretary, in February 1984, sent the President a report finding that “imports in certain machine tools markets did threaten the U.S. national security.” See General Accounting Office, International Trade: Revitalizing the U.S. Machine Tool Industry 9 (1990) (GAO). The President responded that the “report should incorporate new mobilization, defense, and economic planning factors then being developed by an interagency group” and “directed the Secretary of Commerce to update the machine tools investigation.” Statement on the Machine Tool Industry, 1986 Pub. Papers 632, 632-33 (May 20, 1986). Nearly two years later, in March 1986, the Secretary submitted an updated report, and two months after that, the President announced that he agreed with the Secretary’s finding and proclaimed his “action plan,” his “course of action,” id. – to “seek voluntary export restraint agreements to reduce machine tool imports as part of an overall Domestic Action Plan supporting the industry’s modernization efforts,” GAO at 9. About seven months later, in December 1986, the President announced that he reached a five-year voluntary restraint agreement with Japan and Taiwan. Id.; …. It is undisputed that “Congress did not applaud the” President’s delay for the machine-tools articles. Fed. Republic of Germany, 141 S. Ct. at 711. The Trade Court has recognized as much. See Transpacific II, 466 F. Supp. 3d at 1252 (“[T]he 1988 Amendments were passed against the backdrop of President Reagan’s failing to take timely action in response to the Secretary’s report finding that certain machine tools threatened to impair national security and Congress’s resulting frustration.”); Universal Steel, 495 F. Supp. 3d at 1352 n.17 (“The history of the 1988 amendments reveals that the amendments were motivated in no small part by a desire to accelerate Presidential action pursuant to
Section 232. Congress had been frustrated by perceived undue Presidential delay in taking
timely or effective action pursuant to the Secretary’s report that machine tools threatened
to impair the national security.”); id. at 1353 (“Furthermore, the 1988 amendments to
Section 232 were motivated by a desire to prevent Presidential inaction and inefficiency
under Section 232.”).

This history tends to undermine, not support, the Trade Court’s ruling that the new
timing provisions were meant not only to create a duty to act within specified periods but
also to disable the President from acting later if those periods had ended, even if the actions
were needed to effectuate the Secretary’s finding of threat following a timely-announced
plan of action.

4.

Transpacific suggests that the Trade Court’s narrow reading of §1862(c)(1) is
necessary to avoid making § 1862(c)(3) superfluous. ... We disagree. Subsection (c)(3)
makes clear that an initial action can indeed be a plan that leads to additional impositions
well after the time periods of subsection (c)(1) have passed. For example, if an agreement
with one country is “ineffective in eliminating the threat to the national security posed by
imports of such article,” as assessed long after the 90-day and 15-day periods have ended,
the President “shall take such other actions” as necessary “to adjust the imports of such
article so that such imports will not threaten to impair the national security.” §
1862(c)(3)(A). Having recognized that entry into negotiations can be part of the President’s
remedial choice under subsection (c)(1), Congress insisted that the negotiation/agreement
option not be a route to inaction, or a substitute for effective action, by writing very specific
directives that apply in that situation. Those directives are not superfluous of Subsection
(c)(1)’s contemplation of a plan of action with adjustment of implementation choices over
time.

... Transpacific also suggests that the timing provisions were meant to prevent the
President from acting on stale information. ... But that observation does not support the
categorical narrow interpretation adopted by the Trade Court and pressed by Transpacific,
especially given the already-discussed considerations of text and context, including
purpose and history, that strongly undermine the narrow interpretation. Concerns about
staleness of findings are better treated in individual applications of the statute, where they
can be given their due after a focused analysis of the proper role of those concerns and the
particular finding of threat at issue. In so stating, we add, we are not prejudging the scope
of judicial reviewability of presidential determinations relevant to that concern.

Here, there is no genuine concern about staleness. Proclamation 9772, the
challenged proclamation, came only months after the initial announcement, which itself
provided for just such a possible change in the future, and rested on a determination by the
Secretary – about needed domestic-plant capacity utilization – as to which no substantial
case of staleness has been made.

Finally, Transpacific argues that the constitutional-doubt canon supports its narrow
reading of § 1862 because a contrary reading raises serious nondelegation-doctrine concerns. … Under governing precedent, there is no substantial constitutional doubt. See generally Algonquin, 426 U.S. at 550-70; American Inst. for Int’l Steel, 806 F. App’x at 983-91. The Supreme Court in Algonquin concluded that § 1862 – before Congress added the timing deadlines – “easily fulfills” the intelligible-principle standard. 426 U.S. at 559. We have not been shown why the particular interpretation of § 1862(c)(1) at issue raises a materially distinct issue under the nondelegation doctrine.

…

For the foregoing reasons, we reverse the Trade Court’s determination that Proclamation 9772 violated § 1862.

B.

It is well established that the Fifth Amendment’s Due Process Clause has an Equal-Protection guarantee that mirrors the Fourteenth Amendment’s Equal Protection Clause. See Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); U.S. Const. amend. XIV, § 1 (“nor deny to any person within its jurisdiction the equal protection of the laws”); U.S. Const. amend. V (“nor be deprived of life, liberty, or property, without due process of law”). Here, the class allegedly being singled out for unfavorable treatment is the class of “U.S. importers of Turkish steel products.” … Transpacific’s claim of unconstitutional discrimination against that class, we conclude, fails.

The most demanding standard that could apply here is the undemanding rational-basis standard. Transpacific has made no persuasive case that the class of importers of a particular product from a particular country falls into any category for which a heightened standard of review under Equal Protection analysis has been recognized. The Supreme Court “has long held that a classification neither involving fundamental rights nor proceeding along suspect lines cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” Armour v. City of Indianapolis, 566 U.S. 673, 680 (2012)…. Under rational-basis review, Transpacific, as the challenger, has the burden to establish that there is no “reasonably conceivable state of facts that could provide a rational basis for the classification.” Heller v. Doe, 509 U.S. 312, 320 (1993) …; see also FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 313 (1993) (“In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”); Williamson v. Lee Optical of Oklahoma Inc., 348 U.S. 483, 487-88 (1955) (“But the law need not be in every respect logically consistent with its aims to be Constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

Transpacific has failed to meet its burden. Proclamation 9772’s “policy is plausibly related to the Government’s stated objective to protect” national security. Hawaii, 138 S. Ct. at 2420. In Proclamation 9772, the President noted that the Secretary in the January
2018 Report had recommended “applying a higher tariff to a list of specific countries should [the President] determine that all countries should not be subject to the same tariff” – a list that includes Turkey – and stated that “Turkey is among the major exporters of steel to the United States for domestic consumption.” … And the President highlighted that the Secretary “advised [him] that this adjustment will be a significant step toward ensuring the viability of the domestic steel industry.” … For at least those reasons, the President determined that it was “necessary and appropriate” to increase the tariff from 25% to 50% and that the increase would “further reduce imports of steel articles and increase domestic capacity utilization.” … Increasing tariffs on a major exporter is plausibly related to the achievement of the stated objective of achieving the level of domestic capacity utilization needed for plant sustainability found important to protect national security.

Transpacific complains that the President singled out Turkey, even though other countries [namely, Canada, Mexico, Brazil, South Korea, Russia, Japan, Germany, and China] export more [steel]. … But it is rational for the President to try a steep increase on tariffs for only one major exporter to see if that strategy helps to achieve the legitimate objective of improving domestic capacity utilization without extending the increase more widely. That is especially true because the United States’s relations with any given country often will differ, in ways relevant to § 1862, from its relations with other countries. See Totes-Isotoner Corp. v. United States, 594 F.3d 1346, 1357 (Fed. Cir. 2010) (“The reasons behind different duty rates vary widely based on country of origin, the type of product, the circumstances under which the product is imported, and the state of the domestic manufacturing industry. … Further, differential rates may be the result of trade concessions made by the United States in return for unrelated trade advantages.”).

Here, of the eight countries Transpacific mentions, the President was negotiating with at least four [Brazil, Canada, Korea, and Mexico]. … Of those four, the President had reached agreements with two of them (Brazil and South Korea) before issuing Proclamation 9772. … And of the four countries the President might not have been negotiating with, two of them [Germany and Japan] did not appear on the Secretary’s list of a subset of countries to impose tariffs on. … More generally, we see no authority or sound basis for treating Equal Protection analysis under the rational-basis standard as requiring judicial inquiry into differences among particular countries’ relations with the United States that might legitimately affect the possibility of negotiations or furnish reasons not to include particular countries in efforts to reduce overall im- ports of a particular article. See Hawaii, 138 S. Ct. at 2421 (“[W]e cannot substitute our own assessment for the Executive’s predictive judgments on such [foreign-policy] matters, all of which are delicate, complex, and involve large elements of prophecy.”).

The Trade Court concluded that the present “case is materially indistinguishable from Allegheny Pittsburgh Coal Company v. County Commission of Webster County, 488 U.S. 336 (1989).” Transpacific II, 466 F. Supp. 3d at 1258. We disagree. Allegheny must be read narrowly; the Supreme Court has made clear that it is the “exception,” the “rare case.” Armour, 566 U.S. at 686–87; see also Nord-linger v. Hahn, 505 U.S. 1, 16 (1992) (“Allegheny Pittsburgh was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an
acquisition-value tax scheme.”). Allegheny involved a circumstance in which the only apparent basis for the county’s distinction between the favored and dis-favored class was one the county was barred from asserting because the State’s constitution disclaimed it. See Allegheny, 488 U.S. at 338; id. at 345 (“But West Virginia has not drawn such a distinction. Its Constitution and laws provide that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value.”); Armour, 566 U.S. at 686–87 (describing Allegheny as resting on the fact that “in light of the state constitution and related laws requiring equal valuation, there could be no other rational basis for the [challenged] practice”).

In the present case, in contrast, there is no applicable federal-law prohibition on different treatment of the imports of articles from different countries. The Trade Court cited 19 U.S.C. § 1881 when asserting that “[t]he status quo under normal trade relations is equal tariff treatment of similar products irrespective of country of origin.” Transpacific II, 466 F. Supp. 3d at 1258 (citing § 1881). But the Trade Court did not assert that § 1881 is actually a prohibition on the distinction made in implementing § 1862 here. Nor does Transpacific so contend – or even cite § 1881 in defending the Trade Court’s decision. … In fact, § 1881 begins with the phrase, “Except as otherwise provided in this title,” before stating a principle that “any duty or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement under this title or section 350 of the Tariff Act of 1930 [19 U.S.C. § 1351] of this title shall apply to products of all foreign countries, whether imported directly or indirectly.” The exception for “this title,” the government has explained (with no response from Transpacific), refers to Title II of the Trade Expansion Act of 1962, of which Section 232 of that Act, i.e., 19 U.S.C. § 1862, is a part. … The overriding legal bar on the challenged distinction that was present in Allegheny is not present here. …

Transpacific also points to certain sources outside the agency record – i.e., outside the record on which the Trade Court’s judgment rested, by joint motion – to support its argument that the only purpose of Proclamation 9772’s policy is animus toward U.S. importers of Turkish steel. … But Transpacific has not shown how animus towards importers of goods from a particular country (which is not animus towards people from particular countries) would, if shown, alter the applicability of rational-basis review. And in any event, Transpacific’s evidence does not justify altering our conclusion. Nearly all of Transpacific’s extrinsic evidence consists of statements by the President that are too “remote in time and made in unrelated contexts” to “qualify as ‘contemporary statements’ probative of the decision at issue.” Dep’t of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1916 (2020) (plurality opinion) (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977)). And the statement from the President on the same day as Proclamation 9772 does not reflect animus toward U.S. importers of Turkish steel, let alone negate the reasonably conceivable state of facts establishing a rational basis for the policy. …

We must “uphold [Proclamation 9772] so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.” Hawaii, 138 S. Ct. at 2420. Transpacific has failed to establish that Proclamation 9772 had no “legitimate
grounding in national security concerns, quite apart from any … hostility” to U.S. importers of Turkish steel. *Id.* at 2421. We conclude that *Proclamation 9772* did not violate the Equal Protection guarantees of the Fifth Amendment’s Due Process Clause.


Reversed and Remanded

Dissenting Opinion,  
Reyna, Circuit Judge

John Adams warned [in a 2 February 1816 letter to Thomas Jefferson] that “Power must never be trusted without a Check.” The expression of caution from our Founding Father is as much true today as it was at the founding of our nation. It also has exact application to this appeal. The essential question posed by this appeal is whether Congress enacted § 232 to grant the President un-checked authority over the Tariff.

The U.S. Court of International Trade, in a special three judge panel, determined that President Trump exceeded his statutory authority by adjusting tariffs imposed for national security reasons outside the time limits specified in § 232. My colleagues reverse the Court of International Trade holding that § 232 does not temporally limit the President’s authority to act. I would affirm the Court of International Trade and hold that the discretionary authority Congress granted the President under § 232 is temporally limited and that the President in this has case exceeded that authority. I dissent.

Introduction

My dissent is based on three grounds. First, the majority overlooks the context of § 232 as a trade statute. In § 232, Congress has delegated to the Executive Branch certain narrow authority over trade – an area over which Congress has sole constitutional authority – for the purpose of safeguarding national security. The majority expands Congress’s narrow delegation of authority, vitiating Congress’s own express limits, and thereby effectively reassigns to the Executive Branch the constitutional power vested in Congress to manage and regulate the Tariff. See U.S. Constitution, Art. I, § 8. The majority therefore seeks to walk in the shoes of the Founders: its present expansion of Executive Authority is more than legislating from the bench, it is amending the Constitution. Second, § 232 is written in plain words that evoke common meaning and application. The majority articulates no sound reason to diverge from that plain language but expounds at great length, instead, on what the statute does not say or what it purportedly means to say. It engages in statutory leapfrog, hopping here and there but ignoring what it has skipped. Third, § 232’s legislative history shows that Congress in-tended, for good reason, to end the Executive Branch’s historical practice of perpetually modifying earlier actions without obtaining a new report from the Secretary of Commerce and without reporting to Congress.

Discussion

I  
Congress’s Authority Over Trade

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The majority decision is based on a rationale that ignores the history of the U.S. trade law framework. It ignores that significant experience that Congress has in enacting delegation statutes, experience that stretches back to the founding of this country. In vitiating the express limits imposed on a narrow delegation of Congressional authority, the majority tears at the legal framework established by the Founders and Congress and imperils the very relief sought to be provided under § 232.

The Constitution vests in Congress sole power over the Tariff when it confers on Congress the power “To lay and collect Taxes, Duties, Imposts, and Excises” and “To regulate Commerce with foreign Nations.” U.S. Constitution, Art. I, § 8. Only Congress, therefore, has power derived from the Constitution to establish, revise, assess, collect, and enforce tariffs (which may include duties, taxes and imposts) that are assessed and collected upon the importation of goods.

Over time, Congress has delegated to the Executive Branch authority to act on certain matters involving tariffs. For example, Congress has delegated to the Executive Branch authority to negotiate tariff reductions via multi-lateral trade agreements, such as the … GATT (reciprocal and non-reciprocal tariff reduction among the contracting members); regional trade agreements, such as the … NAFTA (eliminating tariffs on almost 100% of the trade among the parties to the agreement); and non-reciprocal programs, such as the … GSP (programs designed to assist the economic development of lesser developed economies). But in each instance, Congress has maintained oversight by, for example, reviewing negotiating objectives and holding hearings. Congress has also held the ultimate authority to approve the results of the Executive Branch’s negotiations.5 Under our constitutional scheme, any statutory limitations placed by Congress on a delegation of authority to the President bind him to act within those limits, and any action taken outside such limits exceeds such authority and is therefore illegal. That precisely is what happened in this case.

Section 232

Section 232 is a trade relief statute, a narrow delegation of authority by Congress to the President to take trade-related action when necessary to safeguard national security. See 19 U.S.C. § 1862. As such, we should be wary of any undue expansion, whether by the Executive or the Judicial branch, of the President’s delegated authority.

The §232 procedures relevant to this appeal are straightforward and clear. At the outset, the Secretary of Commerce initiates an investigation on whether certain importation threatens to impair national security. 19 U.S.C. § 1862(b)(1)(A). Section 232 investigations are trade focused. The “evidence” examined is therefore trade data and economic statistics and any other circumstances involving the production, commercialization, and importation of the good subject to investigation. Factors examined often include U.S. shortages; U.S. and foreign production; excess and underutilized capacity; U.S. shipments and domestic consumption; plant closures; prices; and worker and manufacturing dislocations caused by bilateral or multilateral trade arrangements.
No more than 270 days after the investigation is initiated, the Secretary of Commerce must submit a report to the President on the effects of the importation at issue, whether a threat to national security exists, and the recommended course of action, if any. *Id.* § 1862(b)(3). The President then has 90 days to determine whether he agrees with the Secretary’s findings and, if so, determine “the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports” at issue to address the threat. *Id.* § 1862(c)(1)(A). The President’s “adjustment of imports” may involve increasing or decreasing tariffs on imports of a good or the establishment or elimination of some other trade-related restriction. To the extent the President acts to “adjust imports” under § 232, such adjustments invariably seek to improve the competitiveness of the U.S. industry that produces the same or similar good as that subject to the investigation (in this case, steel).

The President is then required to “implement that action by no later than the date that is 15 days after the day on which the President determines to take action.” *Id.* § 1862(c)(1)(B) (Emphasis added.) The President “shall” also, within 30 days after the President’s determination on whether to take action, submit to Congress a written statement of the reasons for the chosen action or inaction. *Id.* § 1862(c)(2).

Because the procedures set forth in § 232 are trade focused, and the relief provided is trade specific, the subject matter of § 232 flows directly Congress’s constitutional power over the Tariff. The majority decision, however, is untethered from the U.S. trade law context. As such, it answers the wrong question. *See King v. Burwell*, 576 U.S. 473, 492 (2015) (reciting the “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme” (citation and quotation omitted)). The real question is whether Congress has delegated to the President authority to act to adjust imports outside § 232’s time limits. For the reasons below, and as rightly concluded by the Court of International Trade, the answer is no. Congress has placed time limits upon the President that are plain, clear, and unmistakable, and has mandated that, if the President decides to act, he must do so “by no later than” those time limits.

II.

The plain language and legislative history of § 232 demonstrate that the President must act within the specified time limits or else forfeits the right to do so until the Secretary of Commerce provides a new report.

**The Plain Language**

Statutory interpretation begins with the language of the statute. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). If the language is plain, then the inquiry ends, and “the sole function of the courts is to enforce it according to its terms.” *Id.* … Here, § 232 plainly requires that the President “shall,” within 90 days of receiving the Secretary’s report, determine whether she agrees with the report and determine the nature and duration of the action, if any, to take to avoid impairment to national security. 19 U.S.C. §
1862(c)(1)(A). If the President decides to act, she “shall” do so within 15 days of determining that the action is war-ranted. *Id.* § 1862(c)(1)(B).

The Majority decides that “shall” means “may.” … I discern no sound reason for that interpretation permitting the President to modify the action indefinitely outside the statutory time limits. The word “shall” in a statute “normally creates an obligation impervious to judicial discretion.” *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); see also *Kingdom-ware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) (“Unlike the word ‘may,’ which implies discretion, the word ‘shall’ usually connotes a requirement.”); *United States v. Rodgers*, 461 U.S. 677, 706 (1983). Applying the normal legal meaning of “shall,” § 232 requires the President to follow the deadlines set forth in the statute. The result is not draconian: If the President does not act in time, he must obtain a new report from the Secretary of Commerce – which may be the same as or similar to the previous report—in order to be authorized again to take action to avoid impairment of national security. But nothing in § 232 gives the President discretion to ignore the time limits or modify the initial action indefinitely. “[W]ithout ‘any indication’ that [§ 232] allows the government to lessen its obligation, we must ‘give effect to [§ 232’s] plain command.’” *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1321 (2020) (quoting *Lexecon*, 523 U.S. at 35).

The Majority also interprets the word “action” to encompass a “plan of action” that may be modified and completed long after the statutory time limits expire. … This reading is unavailing. Section 232 repeatedly refers to *taking* an action, and plans cannot be taken. Section 232’s use of the word “implement” does not change this conclusion: a tariff can be implemented, but that does not make that tariff a plan of action or series of actions. Further, Congress chose the singular form of “action” even though, there is no question, it was capable of selecting the plural. *See* 19 U.S.C. § 1862(c)(3) (referring to “actions”).

The Majority’s reading should also be rejected because it clashes with several other aspects of § 232, rendering them superfluous, nonsensical, and useless. The Supreme Court has warned against statutory interpretations that “render[] superfluous another portion of that same law.” *Maine*, 140 S. Ct. at 1323…. First, § 232 requires the President to determine the “duration” of “the action” chosen. 19 U.S.C. § 1862(c)(1)(A)(ii). This requirement has no teeth if an “action” may include an open-ended series of actions that may be endlessly modified. Further, § 232 requires the President to provide Congress with a statement of the reasons for the chosen action (or inaction) within 30 days of his determination on whether to take action. *Id.* § 1862(c)(2). Such a requirement is useless to Congress if the statute permits the President to adopt a continuing plan of action that may be changed later.

Section 232 also permits the President to take “such other actions as the President deems necessary” if the President initially selected the action of negotiation and the ensuing negotiations are unfruitful. 19 U.S.C. § 1862(c)(3)(A). The majority argues that this provision’s reference to “other actions” suggests that the President may undertake a plan of action that is modifiable after the time limits expire. … But the opposite is true. The President would have no need for “other actions” if an “action” may include multiple
actions modifiable over long periods. Moreover, Subsection (c)(3) in no way suggests that the President has carte blanche to modify past actions in a continuing fashion without a new report from the Secretary of Commerce and without reporting to Congress. It is irrational to read the subsection on negotiations as expanding the President’s authority under different Subsections pertaining to all other actions excluding negotiations.

The Majority also reduces the statutory deadlines themselves to mere optional suggestions. The Majority reasons that § 232 is analogous to a requirement that a person must “return a car by 11 p.m.”: Even if the 11 p.m. deadline passes, the obligation to return the car still remains. Maj. Op. at 23. For support, the majority cites Brock v. Pierce County, 476 U.S. 253, 265 (1986). But that case is inapposite. The statute in Brock authorized the agency to act “separate and apart” from the provision that contained time limitations. See Barnhart v. Peabody Coal Co., 537 U.S. 149, 177 (2003) (Scalia, J., dissenting). No such separate authorization exists here. Nor does Brock involve the delegation to the President of a Constitutional power belonging to Congress. Because § 232 is such a delegation, extra care should be taken to avoid unduly expanding that delegation – as the majority does now – lest we reweigh the careful balances drawn by both the Founders and Congress.

Lastly, even assuming that an “action” may encompass a “plan of action,” it does not follow that § 232’s deadlines are mere optional suggestions. To the extent “action” can include a “plan of action,” § 232 requires the President to implement the plan, not a part of the plan, “by no later than” a specific deadline. 19 U.S.C. § 1862(c)(1)(B) (requiring the President to “implement that action by no later than the date that is 15 days after the day on which the President determines to take action.”) (Emphasis added.) The majority provides no persuasive reason why a “plan of action” is inherently free of time limits, requiring infinite time for completion of the plan.

Because § 232 is plain, the inquiry ends here. Ron Pair, 489 U.S. at 241.

Legislative History

The legislative history of § 232 also shows that Congress has not authorized the President to carry out open-ended plans of action, modifiable outside the statutory deadlines, without a new report from the Secretary of Commerce and without reporting to Congress. Before Congress amended § 232 in 1988, the provision stated that the President “shall take such action, and for such time, as he deems necessary.” Trade Agreement Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (1962). Under that regime, the President had broad authority to take action and modify that action indefinitely even with- out obtaining a new report from the Secretary of Commerce. For example, President Eisenhower enacted Proclamation 3729, which was modified 26 times over 16 years with no new report or investigation initiated. See Restriction of Oil Imports, 43 Op. Att’y Gen. 20, 22 (1975) (“Proclamation 3279 has been amended at least 26 times since its issuance in 1959.” … In 1987, President Reagan adopted yet another modification to President Eisenhower’s Proclamation. Transpacific Steel LLC v. United Sates, 466 F. Supp. 3d 1246, 1253 (Ct. Int’l Trade 2020). This state of affairs served as the backdrop for
Congress’s 1988 amendments to § 232.

In 1988, “frustrated” with the status quo, id., Congress enacted requirements that the President must set a duration for his action, carry out that action, and report to Congress, all within specific deadlines. Specifically, Congress amended § 232’s language to state that the President “shall determine the nature and duration of the action that, in the judgment of the President, must be taken.” Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1501(a), 102 Stat. 1107, 1258 (1988). (Emphasis added.) Congress also added time limits using the key language, “no later than,” which appears repeatedly throughout § 232. For example, Congress required the President to implement an action by “no later than the date that is 15 days after” the determination to take the action. 19 U.S.C. § 1862(c)(1)(A). Congress also added that, “[b]y no later than” 30 days after the determination on whether to act, the President must inform Congress of the reasons for the action or inaction. 19 U.S.C. § 1862(c)(2). By its plain terms, the language “no later than” bars action that occurs “later than” the statutory deadline. I see no legitimate reason to ignore the word “no” as the Majority does.

The 1988 amendments were a “clear indication from Congress of a change in policy” that overcomes the implication of continuity, United States v. O’Brien, 560 U.S. 218, 231 (2010) …, and the Majority offers no support for its contention that the changes were only stylistic in nature…. Congress’s removal of the language, “for such time[] as he deems necessary,” indicates that the President may no longer act for such time as he deems necessary following the 1988 amendments. Indeed, “[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded.” Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 168 n.16 (1993)…. “To supply omissions transcends the judicial function.” Id. … Congress’s addition of specific deadlines for acting and reporting to Congress compels the conclusion that the President may no longer adopt continuing, open-ended plans of action under § 232.

Congress’s approach in 1988 wisely ensured that the President acted with a current report and thus warded off continuing modifications based on stale information or based on a changed purpose, such as a purpose or reasons not relating to the subject importation’s effect on national security. I agree with the Majority that the purpose of the 1988 amendments was to produce more action, not less. … But that does not negate that Congress has clearly required the President to act within the specified time limits. See also H.R. REP. NO. 99-581, pt. 1, at 135 (1986) (“The Committee believes that if the national security is being affected or threatened, this should be deter- mined and acted upon as quickly as possible.”). Although the majority contends that staleness concerns are not present here given that President Trump acted only a few months after the time limits under § 232 expired, … what is at stake here is not only this case but future readings of this provision. The Majority’s malleable interpretation of § 232 opens the door to modifications of prior Presidential actions absent the Secretary of Commerce’s provision of current information. Instead, we should give life to § 232’s language as plainly written, which gives the President a narrow window for taking an action after receiving a report from the Secretary of Commerce.
The Constitution vests Congress with sole power over the Tariff. U.S. Constitution, Art. I, § 8. When Congress enacted § 232, it delegated to the President limited authority to act to ameliorate harm caused to the national security by sudden increases of imports of certain goods. Congress, however, in clear and plain words expressly limited its delegation of authority. Yet, the majority interprets § 232 in a manner that renders Congress’s express limitations meaningless. I fear that the majority effectively accomplishes what not even Congress can legitimately do, reassign to the President its Constitutionally vested power over the Tariff. I dissent.

III. February 2023 Federal Circuit PrimeSource Case

PRIMESOURCE BUILDING PRODUCTS, INC. V. UNITED STATES, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, SLIP OPINION NUMBER 2021-2066 (7 FEBRUARY 2023)\(^{434}\)

Taranto, Circuit Judge

In 2018, pursuant to § 232 of the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, 877, codified as amended at 19 U.S.C. § 1862, the Secretary of Commerce reported to the President that steel imports threatened national security by contributing to unsustainably low levels of use of domestic steel-producing capacity, and the President, agreeing with the Secretary’s finding, issued Proclamation 9705 to adopt a plan of action to address that threat, starting with imposition of higher tariffs on steel imports from certain countries but providing for monitoring and future adjustments if needed. In 2020, the President issued Proclamation 9980, which, based on the required monitoring, raised tariffs on imports of steel derivatives such as nails and fasteners. That Proclamation was challenged in two cases (before us here) filed in the Court of International Trade (Trade Court) – one by PrimeSource Building Products, Inc.; the other by Oman Fasteners, LLC, Huttig Building Products, Inc., and Huttig, Inc. (collectively, Oman Fasteners) – against the United States, the President, and two federal agencies and their heads (collectively, the government). The Trade Court held Proclamation 9980 to be unauthorized by § 232 because the new derivatives tariffs were imposed after the passing of certain deadlines for Presidential action set forth in § 232. See PrimeSource Building Products, Inc. v. United States, 497 F. Supp. 3d 1333 (Ct. Int’l Trade 2021); PrimeSource Building Products, Inc. v. United States, 505 F. Supp. 3d 1352 (Ct. Int’l Trade 2021); Oman Fasteners, LLC v. United States, 520 F. Supp. 3d 1332 (Ct. Int’l Trade 2021).

The government appeals. After the Trade Court issued its decisions on the merits, we decided Transpacific Steel LLC v. United States, 4 F.4th 1306 (Fed. Cir. 2021), cert. denied, 142 S. Ct. 1414 (2022), which led the Trade Court to issue stays of its judgments in the two cases. In Transpacific, we upheld a Presidential Proclamation that increased

\(^{434}\) Also titled Oman Fasteners LLC. v. U.S., https://cafc.uscourts.gov/opinions-orders/21-2066.OPINION.2-7-2023_2076649.pdf; (Footnotes omitted.)
tariffs on steel beyond Proclamation 9705’s rate, concluding that when the President, within the § 232 time limits at issue, adopts a plan of action that contemplates future contingency-dependent modifications, those time limits do not preclude the President from later adding to the initial import impositions in order to carry out the plan to help achieve the originally stated national-security objective where the underlying findings and objective have not grown stale. We now uphold Proclamation 9980. That Proclamation’s new imposition reaches imports of steel derivatives, which are within § 232’s authorization of Presidential action based on the Secretary’s finding about imports of steel, and there is no staleness or other persuasive reason for overriding the President’s judgment that including derivatives helps achieve the specific, original national-security objective. We therefore reverse the judgments of the Trade Court.

I.

A.

Section 232 “empowers and directs the President to act to alleviate threats to national security from imports.” … For the President to act, the Secretary of Commerce must, under § 232(b), first investigate the effects on national security of imports of an article and submit to the President within 270 days a report detailing the Secretary’s findings about such effects. 19 U.S.C. § 1862(b)(1)(A)-(3)(A). The report must contain the Secretary’s recommendations for action or inaction with respect to imports of that article. Id. § 1862(b)(3)(A). If the Secretary finds that imports of the article “threaten to impair the national security, the Secretary shall so advise the President in [the] report.” Id. Under § 232(c), within 90 days of receiving the Secretary’s report, the President must determine whether to concur in that finding. Id. § 1862(c)(1)(A)(i). If the President concurs in that finding, then within the same 90 days “the President shall” also “determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.” Id. § 1862(c)(1)(A). (Emphasis added.) If the President determines to take action with respect to the import of the article and its derivatives, “the President shall implement that action” within 15 days of the foregoing determinations, id. § 1862(c)(1)(B), that is, within 105 days of the Secretary’s report.

B.

In 2017, the Secretary began investigating steel imports and concluded that they posed a threat to national security. … On January 11, 2018, the Secretary reported to the President that the imports were “weakening our internal economy” and harming “the [domestic] steel industry,” the continued vitality of which “is essential for national security applications.” … The Secretary recommended that the President “take immediate action by adjusting the level of these imports through quotas or tariffs” with the goal of “reducing import penetration rates to approximately 21 percent,” so that “U.S. industry would be able to operate at 80 percent of their capacity utilization.” … The 80 percent rate, the Secretary found, was the minimum “necessary to sustain adequate profitability and continued capital investment, research and development, and workforce enhancement in the steel sector” and to thereby “enable U.S. steel mills to increase operations significantly in the short-term and
improve the financial viability of the industry over the long-term.” …

On March 8, 2018, the President announced his concurrence and remedial plan. Proclamation 9705: Adjusting Imports of Steel into the United States, 83 Fed. Reg. 11,625 (Mar. 8, 2018). He concurred that “steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security.” … He imposed a 25 percent tariff on imports of various steel articles (e.g., flat-rolled products, bars and rods, tubes, pipes, and ingots) from many countries. … The President deemed this an “important first step in ensuring the economic viability of our domestic steel industry.” … He retained the option to “remove or modify” the impositions if the United States and other countries were to come up with suitable alternatives for remedying the security threat. … More generally, the President directed the Secretary to “continue to monitor imports of steel articles,” “review the status of such imports with respect to the national security,” and “inform the President of any circumstances that in the Secretary’s opinion might indicate the need for further action by the President under section 232.” …

In light of, e.g., negotiations between the United States government and some foreign governments, the President issued a variety of follow-up Proclamations to make changes in the impositions of Proclamation 9705, including the August 2018 Proclamation 9772 that was challenged (and upheld by this Court) in Transpacific. 4 F.4th at 1314-16. The Secretary monitored relevant imports, as required, and in January 2020, the President issued a new Proclamation – now covering derivatives of the earlier-covered steel articles – based on information supplied by the Secretary. Proclamation 9980: Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States, 85 Fed. Reg. 5281 (Jan. 24, 2020). [The Court explained in Footnote 1 that “The new Proclamation covered derivatives of aluminum as well as steel articles, but only the steel aspects of the proclamation are at issue before us.”]

The President recited that the Secretary had informed him that “domestic steel producers’ capacity utilization ha[d] not stabilized for an extended period of time at or above the 80 percent capacity utilization level” that was the objective of Proclamation 9705. … The Secretary stated that “imports of certain derivatives of steel articles have significantly increased since the imposition of the tariffs,” and “[t]he net effect of the increase of imports of these derivatives has been to erode the customer base for U.S. producers of . . . steel and under- mine the purpose of the proclamations adjusting imports of . . . steel articles to remove the threatened impairment of the national security.” … The Secretary characterized this increase in imports of steel derivatives as “circumvent[ing] the duties on . . . steel articles imposed in . . . Proclamation 9705” and “threaten[ing] to undermine the actions taken to address the risk to the national security of the United States found in . . . Proclamation 9705.” … The Secretary “assessed that reducing imports of the derivative articles” at issue “would reduce circumvention and facilitate the adjustment of imports that . . . Proclamation 9705, as amended, made to increase domestic capacity utilization to address the threatened impairment of the national security of the United States.” … Accepting the foregoing determinations by the Secretary, the President in Proclamation 9980 extended the 25 percent tariff to certain steel derivative articles, including
nails, staples, and tacks. … He “concluded that it [was] necessary and appropriate” to extend the tariffs to the specified steel derivatives “to address circumvention … and to remove the threatened impairment of the national security.” …

C.

PrimeSource and Oman Fasteners, which import steel nails and fasteners covered by Proclamation 9980, brought suit in the Trade Court to challenge the Proclamation. … They contended that the Proclamation’s extension of the increased tariff to derivatives was contrary to § 232 because it occurred in January 2020, more than 105 days after the President received the Secretary’s report. The Trade Court [i.e., CIT] agreed.

The Trade Court in the PrimeSource case concluded that the 90-day and 15-day limits found in § 232(c) apply to the President’s imposition of increased burdens on imports under the provision, including modifications of an earlier plan of action that had been timely adopted. … The Court held that, insofar as the January 2020 Proclamation 9980 relied on the Secretary’s January 2018 report on steel articles to satisfy the § 232(b) prerequisite to Presidential action, it was untimely under § 232(c). … When the government stipulated that it was relying solely on that report to satisfy the § 232(b) prerequisite, the Trade Court held Proclamation 9980 invalid and entered final judgment against the government. … The Trade Court reached the same result in the Oman Fasteners case. …

In both cases, the government timely appealed and also moved for at least a partial stay of the judgment pending appeal. The Trade Court granted stays, reflecting the government’s newly enhanced chance of success on the merits in light of the intervening decision of this Court in Transpacific. … The Trade Court did, however, note two distinctions of these cases from Transpacific — these cases involve an extension to derivatives of a tariff initially imposed on the articles whose importation was found to threaten national security, not (as in Transpacific) an increase in rate of the initial tariff on the same articles; and the time from Secretary report to challenged Proclamation is much larger than in Transpacific (two years versus seven months). … We have jurisdiction over the Trade Court’s final judgments under 28 U.S.C. § 1295(a)(5).

II.

On appeal, the government maintains that the Trade Court’s decisions are incorrect in light of Transpacific. Appellees defend the Trade Court’s decisions, asserting that factual differences render Transpacific inapplicable and that the government’s reading of § 232 would run afoul of the delegation doctrine.

We review the Trade Court’s interpretation of the statute de novo. GPX International Tire Corp. v. United States, 780 F.3d 1136, 1140 (Fed. Cir. 2015). To the extent relevant here, we may review an allegation that the President acted in violation of the Constitution. USP Holdings, 36 F.4th at 1365. For an asserted statutory violation, review is also available, but it is limited: “For a Court to interpose, there has to be a clear
misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.” *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985). This Court has repeatedly relied on the *Maple Leaf* formulation to indicate the “limited” scope of review of non-constitutional challenges to presidential action. *USP Holdings*, 36 F.4th at 1365-66 & n.3 (discussing “limited” scope, quoting *Maple Leaf*, and also quoting formulations approving review of whether “the President clearly misconstrued his statutory authority” and “whether the President has violated an explicit statutory mandate” (cleaned up)); *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018).

A.

In *Transpacific*, we addressed whether § 232(c)(1) “permits the President to announce a continuing course of action within the statutory time period and then modify the initial implementing steps in line with the announced plan of action by adding impositions on imports to achieve the stated implementation objective.” 4 F.4th at 1318-19. We concluded that the President may do so, explaining:

> [T]he best reading of the statutory text of § 1862, understood in context and in light of the evident purpose of the statute and the history of predecessor enactments and their implementation, is that the authority of the President includes authority to adopt and carry out a plan of action that allows adjustments of specific measures, including by increasing import restrictions, in carrying out the plan over time.

*Id.* at 1319. And we upheld application of that authority to an increase in impositions that could have been adopted initially under § 232(c) where the President had initially announced a plan of action and later found that an increase would help solve the specific capacity-utilization problem that was the basis for the finding that imports threatened national security. *Id.* at 1310, 1332-33.

*Proclamation* 9980 comes within the interpretation of § 232 we adopted in *Transpacific*. The initial *Proclamation* (*Proclamation* 9705) is the same here as in *Transpacific*. … [T]hat proclamation rested on the Secretary’s finding that imports of steel articles were threatening national security by impairing achievement of an 80 percent capacity utilization level found important for domestic steel makers to sustain their operations to meet national-security needs. … *Proclamation* 9705 announced a continuing plan of action aimed at achieving that goal, with monitoring and notice of possible changes in the future. *Id.* ¶¶ 9, 11, clauses 2, 5(b) … (stating that the President “may remove or modify the restriction on steel articles imports,” characterizing “the tariff imposed by this proclamation [a]s an important first step in ensuring the economic viability of our domestic steel industry,” and directing the Secretary to “continue to monitor imports of steel articles” and to “in- form the President of any circumstances that in the Secretary’s opinion might indicate the need for further action by the President under Section 232”). Later, the Secretary informed the President that a significant increase had occurred in imports of steel derivatives, which in simple economic terms constituted a circumvention of the protections
initially adopted to enhance and stabilize domestic steel-making capacity utilization, undermining the effectiveness of the President’s previous tariffs. Proclamation 9980 ¶¶ 5, 8…. In response, the President extended Proclamation 9705’s tariffs to various steel derivative products to address the circumvention threatening the capacity-utilization objective. Id. ¶ 9….

Thus, the President, having “announce[d] a continuing course of action within the statutory time period” (Proclamation 9705), “modif[ied] the initial implementing steps … by adding impositions on imports” (extending the tariffs to derivatives in Proclamation 9980) “in line with the announced plan of action” (Proclamation 9705’s directive to the Secretary to monitor imports and inform the President of any relevant changes) “to achieve the stated implementation objective” (long-term stabilization of the capacity utilization rate at or above 80 percent). Transpacific, 4 F.4th at 1318-19. An imposition on imports of derivatives of the articles that were the subject of the Secretary’s threat finding is expressly authorized as an available remedy by § 232(c). In acting to close a loophole exploited by steel-derivatives importers, the President was making a “contingency-dependent choice[] that [is] a commonplace feature of plans of action,” id. at 1321, adding use of a tool that he could have used in the initial set of measures and later found important to address a specific form of circumvention Congress recognized when it authorized coverage of derivatives of the articles whose imports the Secretary found to threaten national security. See Oral Arg. at 25:03-26:20 (agreeing that the mechanism linking Proclamation 9980 to Proclamation 9705 – foreign steel producers, facing raised tariffs on direct imports, sold steel to foreign derivatives makers not (yet) subject to raised tariffs, impairing market opportunities of domestic steel makers – “is not complicated”).

B.

The attempts by PrimeSource and Oman Fasteners to distinguish Transpacific to reach a different result here are unpersuasive. First, the fact that the Secretary’s 2018 report and Proclamation 9705 did not address the effect of imports of derivatives is immaterial. The President may take action against derivative products regardless of whether the Secretary has investigated and reported on such derivatives. See 19 U.S.C. § 1862(b) (stating that the Secretary’s investigation and report focus on an “article”); id. § 1862(c)(1)(A)(ii) (empowering the President to then adjust imports of both “the article and its derivatives”). There is no textual basis for reading § 232 as empowering the President to do so only at the initial plan-adoption stage, not at later, modification stages. And what we recognized in Transpacific as serving the “evident purpose” of § 232 – permitting the President to act under an announced plan to adjust initial measures over time to reach the initially adopted objective, 4 F.4th at 1323 – applies not only to an increase in tariff rates on the same entries but equally to an extension to derivatives of measures initially imposed only on the underlying articles.

Second, the greater gap in time between the Secretary’s finding and the challenged proclamation (here, nearly two years; in Transpacific, seven months) does not render Transpacific inapplicable. There is no textual basis for a specific time limit on adjustments under a timely adopted plan. Indeed, impositions under § 232 have on numerous occasions
been modified many years after they were first adopted. Id. at 1326–29.

As we noted in *Transpacific*, a different question might be presented where the underlying finding or objective has become substantively stale; here, as in *Transpacific*, we have no occasion to address that issue, because “there is no genuine concern about staleness.” Id. at 1332. *Proclamation* 9980 was issued in pursuit of the same goal first articulated in *Proclamation* 9705 (extended stabilization at 80 percent of domestic capacity utilization) and in response to the “current information” provided to the President by the Secretary under the “requirements for monitoring the import reductions” that were “put in place” by *Proclamation* 9705. Id. at 1332 n.10. And insofar as appellees fault the President for imposing tariffs on some derivatives but not others, and the government for declining to put into the record the updated data the Secretary conveyed to the President, … the criticism is meritless. The information at issue is not part of a legally required and legally consequential decision of the Secretary, cf. *USP Holdings*, 36 F.4th at 1366-67, and so we may not second-guess the facts found and measures taken by the President to support his adjustment, see *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984) (citing *United States v. George S. Bush & Co.*, 310 U.S. 371, 379–80 (1940)); *Chang v. United States*, 859 F.2d 893, 896 n.3 (Fed. Cir. 1988); Oral Arg. at 13:45-16:00 (acknowledging that there is no review of the President’s pertinent factual and remedial-appropriateness determinations).

C.

Reading § 232 to permit the President to modify an initial plan of action to include derivatives, as he did here, does not render it an unconstitutional delegation. The Supreme Court has already rejected a delegation-doctrine challenge to § 232 (in an earlier form), holding that the “clear preconditions to Presidential action” established by § 232, e.g., a finding by the Secretary regarding the existence of a national-security threat, and consideration by the President of “a series of specific factors,” make that authority “far from unbounded.” *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 558–60 (1976) (citations omitted). The same is true today, as those “clear pre-conditions” remain in effect, id., and the President must still consider the statutory factors and act only upon receipt of a report from the Secretary, even if the President possesses the modification authority at issue here, see 19 U.S.C. § 1862(b)-(d). Moreover, if § 232 “easily fulfill[ed] th[e] [intelligible principle] test” in 1976, *Algonquin*, 426 U.S. at 559, it also does so now, given that the 1988 amendments, in adding the present deadlines, further defined the congressional delegation of authority to the President. We have rejected the contention that *Algonquin* does not require rejection of a delegation-doctrine challenge to § 232 in its current form. *Transpacific*, 4 F.4th at 1332-33 (citing *American Institute for International Steel, Inc. v. United States*, 806 F. App’x 982, 983-91 (Fed. Cir. 2020), cert. denied, 141 S. Ct. 133 (2020)); see also *USP Holdings*, 36 F.4th at 1365. We see no basis for concluding otherwise here.

III.

In sum, § 232’s deadlines did not prevent the President from modifying his initial
timely adopted plan of action by issuing Proclamation 9980, and that conclusion does not render § 232 unconstitutional under the delegation doctrine. Because there are no more facts for the Trade Court to find on remand if Transpacific controls, … we reverse the judgments of the Trade Court and remand the cases for entry of judgment against PrimeSource and Oman Fasteners, including dismissal of the claims against the President.

... 

Reversed and remanded
Part Four

EXPORT CONTROLS
Chapter 12

NUCLEAR ITEMS

I. Three Policy Rationales

There is no hiding the fact American export controls serve – or, are supposed to serve – three policy purposes. They are, not necessarily in order or priority, as follows.

● 1st: Protect Commodities in Short Supply

Interestingly, this policy provided the initial basis for export controls in 1940. During the Second World War, America needed to restrict exports to avoid or mitigate scarcity of critical articles, and sought to assure their equitable distribution in the U.S. and to the Allied Powers. Expectations following the War were that the controls would terminate, especially as commodity shortages eased. But, the Cold War provided a new policy justification, and Congress enacted the Export Control Act of 1949 to restrict all American exports to Communist countries. This rational resonates in subsequent statutes (e.g., the 1979 Act, discussed below) by, for example, allowing the President to impose an export control to protect the American economy from a drain of scarce materials or reduce the inflationary impact of foreign demand.

● 2nd: Protect National Security

During the Cold War Era, this rationale meant fighting Communism in part by restricting exports to Communist countries. In the post-Cold War, post-9/11 period, it means (inter alia) combating terrorism and isolating rogue regimes. Both meanings, discussed below, are relevant not only to military articles and technologies, but also to items that could be diverted from civilian use to upgrade significantly the military capabilities of an actual or potential adversary.

● 3rd: Advance Foreign Policy Interests

Foreign policy controls are particularly controversial. Two examples occurred during the Cold War, when Presidents Jimmy Carter (1924-, President, 1977-1981) and Ronald Reagan (1911-2004, President, 1981-1989), in 1979 and 1981, respectively, invoked export control authority for foreign policy purposes. President Carter embargoed grain exports to the former Soviet Union after it invaded Afghanistan. President Reagan banned sales to the Soviet Union by American firms, and their foreign subsidiaries, of commodities and technology relating to oil and gas transmission. The idea was to inhibit the Soviets from building a natural gas pipeline to Western Europe, thereby denying them energy revenues and the opportunity to create dependent clients.

In neither case was a military article at issue. Dubbing grain a dual use article, on

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435 See Public Law 81-11, approved 26 February 1949.
the logic that soldiers eat bread or pasta, is a stretch. The ban aroused the ire of – and inflicted considerable pain on – farmers in the American Midwest and Great Plains region. Not surprisingly, the 1985 Act (discussed below) circumscribed the ability of the President to impose export controls on agricultural products. As for energy supplies, the pipeline was built anyway, and supplies Germany, Poland, and other EU states. It bears the rubric “Friendship Pipeline,” which is rather ironic. Occasionally, Russia battles with Belarus (or other former Soviet bloc countries) though which the pipeline runs, over schemes hatched in Minsk to tax trans-shipment flows, especially in response to export taxes imposed by Moscow. Russia also alleges Belarus occasionally siphons off, without paying, oil and natural gas. To be sure, each side needs the other. In January 2007, Russia briefly turned the spigot off on the Druzhba oil pipeline. But, it relies heavily on energy sales to the west, and thus transshipment. Transit countries get subsidized oil and natural gas from Russia.

There are obvious continuing, examples of export controls rationalized by American foreign policy interests. First, the U.S. subjects to these controls crime control and detection instruments. Traditionally, it has looked askance at efforts to export this equipment to countries that may engage in persistent, gross human rights violations. However, the Administration of President Joseph R. Biden (1942-, President, 2021-) signalled a shift toward a tighter link between arms exports approvals, on the one hand, and the human rights record of the importing country, on the other hand:

Ninety minutes before President Joe Biden took office on January 20th, the United States signed a $23 billion dollar deal to sell F-35 jets, drones, and advanced missiles to the United Arab Emirates.

It was part of flurry of last-minute deals President Donald Trump had told Congress were coming in his last two months in office, forcing the Biden Administration to make quick decisions on whether or not to stick with the geopolitically sensitive weapons sales.

To the surprise of some Democratic allies, Biden has so far kept the lion’s share of Trump’s more controversial agreements [including the UAE deal].

... Longer-term, however, ... Biden’s policy will shift to emphasize human rights over Trump's more commercial approach to exporting military equipment.

Biden’s posture towards arms exports – specifically around reducing weapons used to attack others – could shift sales at Boeing Co. ..., Raytheon Technologies Corp. ..., and Lockheed Martin Corp. That means fewer bullets, bombs and missiles, while security products like radars, surveillance equipment and defenses against attacks get the green light.

... In the early days of the Biden Administration, officials paused weapons sales to Middle East allies, including sales of Raytheon’s and Boeing-made precision guided munitions to Saudi Arabia.
Eventually a determination was made to only sell the Kingdom “defensive” arms, while limiting weapons that could be used to attack out of concern over casualties in Saudi Arabia’s war with Yemen.

…

“While economic security will remain a factor” when reviewing weapons sales, the Biden Administration will “re prioritize” other factors including U.S. national security, human rights, and non-proliferation, [said] a U.S. official.…. 

…

During the transition period from election day in November to Biden’s inauguration, Trump’s team sent notification of $31 billion of foreign arms sales to Congress. Congressional notifications occur for most foreign military sales before a contract can be signed to sell a weapon.

On average, foreign military sales under Trump amounted to $57.5 billion per year, versus an average of $53.9 billion per year for the eight years under his predecessor Barack Obama, in 2020 dollars. 

Consider whether, in a post-9/11 world characterized (inter alia) by renditions, secret prisons, human trafficking and forced labor, and genocide, export controls on nuclear and non-nuclear weapons, and dual-use merchandise, ever should be relegated to commercial or realpolitik priorities.

Second, shipments of goods and technology, exclusive of humanitarian supplies, to certain countries are banned. Those countries are the usual suspects – Iran, Syria, North Korea, and Sudan. Query whether constructive engagement might be preferable to economic isolation. America ended its 54-year long effort at isolating Cuba via a trade embargo in December 2014, a move spanning all or part of 11 U.S. Presidencies that cost the U.S. economy $1.2 billion annually, and inflicting considerable suffering on the Cuban people. Yet, in November 2017, under a twelfth Presidency, the U.S. began re-imposing certain features of the embargo.

In reviewing these export control policy goals, consider the extent to which close allies, or countries the U.S. cultivates to join that camp, may share these purposes. Is it accurate to say that the ultimate choice of what and how to control is an American decision?

Consider also the extent to which export controls are in tension with export promotion initiatives. For example, under the National Export Initiative (NEI) of the Administration of President Barack H. Obama (1961-, President, 2009-2017), the U.S. sought to double exports by 2015. But, the Administration also increased the number of items on the Munitions Control List (MCL) and Commerce Control List (CCL). The longer the list of items subject to export control, the greater the impediment to boosting exports.

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(ceteris paribus, i.e., assuming all other factors are equal). Thus, American producer-exporters have complained the control rules are unnecessarily burdensome, and even undermine what may be stylized as a national security goal, namely, promoting exports.

Finally, in studying export controls not only on nuclear, but also on military and dual-use items, consider a bottom-line, utilitarian question: do they work? Amidst the Sino-American trade War (discussed in a separate Chapter), there is evidence they can forestall, but not ultimately prevent, a determined competitor, adversary, or enemy, willing to engage in coercive behavior, cybertheft, and the like, from gaining what it wants:

Semiconductor Manufacturing International Corp. has likely advanced its production technology by two generations, defying U.S. sanctions intended to halt the rise of China’s largest chipmaker.

The Shanghai-based manufacturer is shipping Bitcoin-mining semiconductors built using 7-nanometer technology…. That’s well ahead of SMIC’s established 14 nm technology, a measure of fabrication complexity in which narrower transistor widths help produce faster and more efficient chips. Since late 2020, the U.S. has barred the unlicensed sale to the Chinese firm of equipment that can be used to fabricate semiconductors of 10 nm and beyond, infuriating Beijing.

SMIC’s surprising progress raises questions about how effective export controls have been and whether Washington can indeed thwart China’s ambition to foster a world-class chip industry at home and reduce reliance on foreign technologies.

Previously, SMIC has said that its core capabilities stand at 14 nm, two generations behind 7 nm, which in turn is roughly four years behind the most advanced technology available now from Taiwan Semiconductor Manufacturing Co. and Samsung Electronics Co. The company has worked with clients on technologies more advanced than 14 nm as early as 2020…

And while the ability to produce a small number of chips using the next level of production technique signals that a company is making technological progress, what determines economic viability – under normal circumstances – is yield, or the percentage of every production run that’s successful. Intel Corp, once the leader in production technology, stalled on one type of production for five years because it couldn’t get enough viable chips to make it profitable to introduce that node into mainstream production.

SMIC is not operating under standard business conditions, however. It is critical to China’s ability to produce chips domestically as the US tries to undercut the country’s tech advancements. Beijing may be willing to subsidize losses at domestic competitors like SMIC – out of fear its
companies won’t have access to key components.

The Trump Administration blacklisted SMIC about two years ago [2020] on national security concerns, citing the company’s ties with the Chinese military, an allegation the chipmaker has denied. Following Washington’s move, American equipment suppliers have been banned from providing the Chinese company with gear “uniquely required” to produce 10 nm or more advanced chips without licenses, although it is not clear exactly what the U.S. Department of Commerce has allowed domestic firms to sell to SMIC since.

…

The Administration of President Joe Biden at one point considered tightening restrictions around SMIC but ruled out any unilateral action to allow for more time to negotiate with other trading partners. Those talks have not borne fruit so far. …

Is, then, the best rationale for export controls not utilitarian, but rather deontological, i.e., it is morally unacceptable to send sensitive technologies to nefarious regimes that cavort with unsavoury characters?

II. Not Just an American Phenomenon

By no means are export controls unique to the U.S. Many, if not most, countries have them. International Trade Lawyers must be versed in all such regimes in which their clients do business. China’s export control regime is a case in point. All three of the aforementioned interests pertinent to the American regime characterize China’s, too. Amidst the Sino-American Trade War, in October 2020, China strengthened its export control rules. The revised rules cover “items of both civilian and military use, military and nuclear products, as well as ‘goods, technologies and services’ that are related to national security, including data related to them.”

China’s action was, in part, counter-retaliation for the U.S. imposing restrictions on transactions (such as government procurement) with the Chinese telecommunications giant, Huawei, and apps sponsored by TikTok and WeChat.

China’s top legislature … passed a law on export control, allowing the government to ban exports of strategic materials and advanced technology to specific foreign companies on its equivalent of the U.S. Department of Commerce’s Entity List [discussed in separate Chapters].

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“China may take countermeasures against any country or region that abuses export-control measures and poses a threat to China’s national security and interests, according to the law,” the official Xinhua News Agency reported.

The inclusion of the phrase “and interests” suggests that the law will give the government more leeway to move against those it wants to punish.

The passage marks another step in the tit-for-tat escalation between China and the U.S., which has been strengthening sanctions on Huawei Technologies.

Concerns have been raised that rare-earth metals, for which China's market share exceeds 60%, may be included in the restricted items. Such a ban would have broad implications worldwide.

Under the concept of adhering to “overall national security,” 11 areas are deemed relevant: politics, land, the military, the economy, culture, society, science and technology, information, ecology, resources, and nuclear.

China’s export control measures apply extraterritorially, to non-Chinese persons (e.g., U.S. businesspersons) who committed acts outside of China (e.g., in the EU). Suspects could be apprehended by Chinese authorities while entering or transiting through China (e.g., Chek Lap Kok Airport in Hong Kong). Punishments include “fines of as much as five million yuan ($746,500) and revocation of export licenses,” and “[b]reaches that jeopardize national security and interests will also face criminal charges, with [again] organizations and individuals outside of China also punishable under the law.”

The Chinese measures (effective 1 December 2020) allow for exportation of controlled items only with official permission. A prospective exporter needs to submit documentation from the end user of the controlled item (or authorities in the jurisdiction of that end user) concerning the name of the end user and the proposed end use. The Chinese government said “[a]pproval or disapproval of exports will be based on eight criteria: national security and interests, international obligations and external commitments, the type of exports, the sensitivity of controlled items, the countries or regions they are bound for, the end users and end uses, relevant credit records of exporting companies, and ‘other factors stipulated by laws and administrative regulations.’”

III. Three Categories and Control Regimes

Since 1940, the American government has applied export controls continuously. Thus, navigating through and complying with export controls is an important area in the

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440 China Lawmakers Pass. [China Passes Export.

441 China Passes Export.

practice of many international trade lawyers, and for some a full-time job. Briefly put, there are three significant control programs, differentiated by the type of export at issue. Under all three programs, a license is required before exportation of the merchandise, technology, or service in question is lawful. The types of licenses, and the licensing authorities, differ depending on the category of proposed export:

(1) **Nuclear Materials and Technology**

Pursuant to the *Atomic Energy Act of 1954*, the Nuclear Regulatory Commission (NRC) is responsible licensing authority for the licensing of nuclear materials and technology.\(^{442}\) Significantly, Section 123 of this Act authorizes the U.S. to negotiate peaceful civilian nuclear cooperation agreements with other countries. America did so in 2024 with respect to the Kingdom of Saudi Arabia, as part of a multi-faceted deal whereby the Kingdom would recognize Israel, Israel would commit to an end the Fifth Israel-Hamas War and accept a two-state solution with Palestine, the Saudis would get nuclear energy technology (such as uranium enrichment, but with safeguards to prevent weaponization) to help it diversify away from fossil fuels, and all parties would solidify their ties against Iran and its allies.

(2) **Defense Articles and Services**

Pursuant to the 1976 *Arms Export Control Act* (*AECA*), the Department of State is the responsible licensing agency.\(^{443}\) Defense articles and services requiring a license are indicated on the Munitions Control List (MCL), which the State Department maintains.

(3) **Non-Military Dual Use Goods and Technology**

Pursuant to the 1979 *Export Administration Act* (*EAA*), as amended, the Bureau of Industry and Security (BIS) of the DOC is responsible for licensing commercial goods and technical data that are susceptible to civilian or military use.\(^{444}\) (Via internal order, on 18 April 2002, the DOC changed the name of its “Bureau of Export Administration” to the BIS. The switch is regrettable at least from the standpoint of intruding on a venerable international central banking organization, the Bank for International Settlements, or BIS, in Basle, Switzerland.) Dual use goods are set out in the CCL, which is maintained by the BIS. Exportation of dual use goods is illegal unless authorized by a BIS-granted license.

For all three kinds of export controls, the lists of controlled items are not lapidary. They change, sometimes frequently. Memorizing those lists would be a task both time-consuming and pointless. However, two key points should be appreciated.

First, the burden of deciding whether merchandise cannot be exported without a


\(^{444}\) See 50 U.S.C. §§ 2401 et seq.
license lies with the exporter. The general presumption is no merchandise needs an export license unless that item is on an export control list, or is destined for a target country. Therein lays the responsibility of the exporter – to determine whether its merchandise fits in a product category needing a license, or will wind up in a target country.

Second, criminal sanctions may result from failure to comply with applicable export restrictions. Punishments are severe, and may create multiple criminal liabilities. For example, violation of export control rules is a “specified unlawful activity” for purposes of money laundering laws under the *Money Laundering Control Act of 1986*.  

To meet the compliance burden and avoid penalties, no short-cut for painstaking legal research should be taken. Put bluntly, to avoid prosecution by the DOJ, it is necessary to deal with one or more relevant American governmental authorities. For instance, the Department of State administers export control rules on military technology, and the DOC – specifically, the BIS (formerly known as the Bureau of Export Affairs) – deals with rules for dual-use technology. They provide an export license, if needed, and may be of service to prospective exporters and their clients. The Departments of Energy and the Treasury (in particular, OFAC) also are involved in certain licensing decisions. BIS provides an excellent publication providing examples of firms and individuals penalized for intentional and inadvertent violations of U.S. export control (and antiboycott) laws, appropriately titled: *Don’t Let This Happen To You!*.

IV. Nuclear Export Control Regime

In addition to the 1954 *Atomic Energy Act*, the 1978 *Nuclear Non-Proliferation Act* governs exports of nuclear materials and technology. The two Acts implicate four government agencies, depending on the product or service being exported. First, the NRC is responsible for regulating exports of nuclear reactors, components, materials, and fuel cycle facilities (collectively, “facilities and materials”). The NRC Office of International Programs issues general and specific licenses pursuant to a control list published in the Code of Federal Regulations. This NRC control list has two parts: one for nuclear facilities and equipment, and the other for nuclear materials. Items on the list require an export license. The NRC Office of Enforcement investigates alleged export control violations.

Second, the Department of Energy, specifically, the National Nuclear Security Administration (NNSA), is charged with licensing exports of nuclear technology and provision of technical assistance overseas. Such assistance concerns “inside the core” activities, meaning it pertains to operation of the core reactor of a nuclear power plant. Similar to the NRC, the DOE grants general and specific authorizations for exports of

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447 See 10 C.F.R. Part 110.
nuclear technology or assistance. The applicable regulations are set out at 10 C.F.R. Part 810. American exporters identify the “810 Regulations” as the most troublesome of the three United States export control programs, and most likely to result in delays or otherwise inhibit exports. That is because of their relatively more expansive wording. However, reforms to this language, consistent with guidelines from the Nuclear Suppliers Group (NSG), have been suggested.\textsuperscript{448}

Third, the BIS is responsible for licensing exports of “outside the core” civilian power plant equipment. These are commercial and dual use technologies, including commodities and know-how for the BOP. The BIS maintains the Nuclear Referral List (NRL), which is part of the Commerce Control List (discussed in a separate Chapter).

Fourth, the Directorate of Defense Trade Controls (DDTC), located in the Department of State, is the licensing authority for nuclear items in defense articles under the \textit{International Traffic in Arms Regulations} (\textit{ITAR}) (discussed in a separate Chapter). The State Department is responsible for administering \textit{ITAR}. Failure to comply with nuclear regulations may result in criminal and civil penalties. An individual offender may face criminal penalties up to $500,000, and 12 years to life imprisonment. If a firm violates nuclear regulations, it may be charged criminally, and face a fine of up to $500,000 imposed by the NRC and Department of Energy. The NRC enforces civil violations, and the penalty is up to $100,000 per violation.

As just one example of what can go wrong, consider the 1990 scandal of the Atlanta branch of the Italian bank, Banca Nazionale del Lavoro (BNL). Pursuant to an export credit guarantee program of the Commodity Credit Corporation (CCC) of the Department of Agriculture, BNL-Atlanta provided a guarantee of payment for shipments of agricultural products from America to Iraq. At the time, the Iraqi President was Saddam Hussein (1937-2006, President, 1979-2003), who sought to acquire WMDs. It so happened the shipping containers held not soybeans and other innocuous farm products, but rather nuclear triggers and other military equipment.

The result was an investigation, involving the Federal Reserve, of the Atlanta branch of BNL and the prosecution of Christopher Drogoul, the manager of the Atlanta branch of BNL. Drogoul pled guilty to wire fraud and making false statements to bank regulators as part of the federal indictment charging him of a scheme to defraud the parent bank and the U.S. government by arranging for over $5 billion in unauthorized loans to individuals and entities in Iraq, including $1.6 billion in American guaranteed loans under the CCC program. Drogoul was sentenced to 37 months in prison. The incident led to further investigations surrounding the bank’s lending practices and the knowledge of BNL headquarters and the White House of Iraq’s borrowing history.

\textbf{V. September 2021 \textit{AUKUS} Nuclear Submarine Agreement}

\textsuperscript{448} For background on the development, role, and functioning of the NSG and international export control regime, see Daniel H. Joyner, \textit{The Nuclear Suppliers Group: History and Functioning}, 11 \textit{INTERNATIONAL TRADE LAW & REGULATION} issue 2, 33-42 (March 2005).
● **Watershed Development**

Strategic competition with China (discussed in separate Chapters) was not expressly mentioned as the motivation for one of the most dramatic developments in post-Cold War security arrangements, but all countries – perhaps most especially China – knew exactly that it was the reason for *AUKUS*:

It is being widely viewed as an effort to counter China’s influence in the contested South China Sea.

The region has been a flashpoint for years and tensions there remain high.

…

The *AUKUS* alliance is probably the most significant security arrangement between the three nations since World War Two.…

The pact will focus on military capability, separating it from the Five Eyes intelligence-sharing alliance, which also includes New Zealand and Canada.

…

“This really shows that all three nations are drawing a line in the sand to start and counter [China’s] aggressive moves,” said Guy Boekenstein from the Asia Society Australia.⁴⁴⁹

The trilateral security pact brought together Australia, the U.K., and U.S. for the express purpose of providing Australia with American and British nuclear-powered submarines and other formidable weaponry and technology. It was “the first time in 60 years” the U.S. shared its submarine technology, “having previously only shared it with the U.K.”⁴⁵⁰ Australia thus would “be to build nuclear-powered submarines that are faster and harder to detect than conventionally powered fleets,” and which could “stay submerged for months and shoot missiles longer distances” (though, as discussed below, Australia said it did not intend to outfit them with nuclear weapons so as not to undermine its commitment to be a nuclear-free nation).⁴⁵¹

In March 2023, the three *AUKUS* powers elaborated on their arrangement to create a fleet of nuclear-powered submarines. Australia would receive deliver of at least three such subs from, and made in, the U.S. The new fleet would be equipped with the most advanced technology available, including Rolls Royce engines made in the U.K. Likewise, Australia would be only the second country, after the U.K., “to receive Washington’s elite nuclear propulsion technology.”⁴⁵² Accordingly:

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⁴⁵⁰ *AUKUS: China Denounces.*

⁴⁵¹ *AUKUS: China Denounces.*

The submarines will be able to operate further and faster than the country’s [Australia’s] existing diesel-engine fleet, and Australia will also be able to carry out long-range strikes against enemies for the first time.

Under the deal, Australian Navy sailors will be sent to U.S. and U.K. submarine bases from this year [2023] to learn how to use the nuclear-powered submarines.

From 2027, the U.S. and U.K. will also base a small number of nuclear submarines in Perth, Western Australia, before Canberra will buy three US-model Virginia-class submarines in the early 2030s – with options to purchase two more.⁴⁵³

President Biden intoned AUKUS “aimed at bolstering peace in the region,” and he “‘stressed the submarines would be ‘nuclear-powered, not nuclear-armed.’” At the same time, it seemed obvious AUKUS was an arrangement whereby Australia was to become the Sheriff, or perhaps more accurately, Deputy Sheriff, in the Indo-Pacific region – a role Australia, given the myriad security challenges it faced from China, it embraced. Australia knew well the importance of the deal to his country:

Australia’s PM said the plan – which will cost Canberra up to A$ 368 bn (£ 201 bn) over 30 years – marked “biggest single investment in Australia’s defense capability in all of its history.”

Anthony Albanese [] said building the submarines in Australian shipyards would also create thousands of local jobs. …⁴⁵⁴

And, after 2027, the three countries planned “to design and build an entirely new nuclear-powered submarine for the U.K. and Australian Navies – a model that is being called SSN-AUKUS,” which would be an “attack craft” designed in Britain, built in Australia and Britain, and use technology from Australia, Britain, and the U.S.⁴⁵⁵

AUKUS had two threats China posed in the Indo-Pacific region in mind. The first was to Taiwan:

In a potential conflict with China, many U.S. military planners believe that only a submarine could operate in the Taiwan Strait. That is because of China’s 2,000 short- to medium-range missiles would sink every surface ship that enters the waters.⁴⁵⁶
The second concerned the Nine Dash Line. *AUKUS* envisioned submarine deployment across the South China Sea, over much of which China, per its Line, claimed sovereignty.

**THE WHITE HOUSE, **JOINT LEADERS STATEMENT ON AUKUS (15 SEPTEMBER 2021)**

As leaders of Australia, the United Kingdom, and the United States, guided by our enduring ideals and shared commitment to the international rules-based order, we resolve to deepen diplomatic, security, and defense cooperation in the Indo-Pacific region, including by working with partners, to meet the challenges of the twenty-first century. As part of this effort, we are announcing the creation of an enhanced trilateral security partnership called “*AUKUS*” – Australia, the United Kingdom, and the United States.

Through *AUKUS*, our governments will strengthen the ability of each to support our security and defense interests, building on our longstanding and ongoing bilateral ties. We will promote deeper information and technology sharing. We will foster deeper integration of security and defense-related science, technology, industrial bases, and supply chains. And in particular, we will significantly deepen cooperation on a range of security and defense capabilities.

As the first initiative under *AUKUS*, recognizing our common tradition as maritime democracies, we commit to a shared ambition to support Australia in acquiring nuclear-powered submarines for the Royal Australian Navy. Today, we embark on a trilateral effort of 18 months to seek an optimal pathway to deliver this capability. We will leverage expertise from the United States and the United Kingdom, building on the two countries’ submarine programs to bring an Australian capability into service at the earliest achievable date.

The development of Australia’s nuclear-powered submarines would be a joint endeavor between the three nations, with a focus on interoperability, commonality, and mutual benefit. Australia is committed to adhering to the highest standards for safeguards, transparency, verification, and accountancy measures to ensure the non-proliferation, safety, and security of nuclear material and technology. Australia remains committed to fulfilling all of its obligations as a non-nuclear weapons state, including with the International Atomic Energy Agency. Our three nations are deeply committed to upholding our leadership on global non-proliferation.

Recognizing our deep defense ties, built over decades, today we also embark on further trilateral collaboration under *AUKUS* to enhance our joint capabilities and interoperability. These initial efforts will focus on cyber capabilities, artificial intelligence, quantum technologies, and additional undersea capabilities.

The endeavor we launch today will help sustain peace and stability in the Indo-Pacific region. For more than 70 years, Australia, the United Kingdom, and the United States, have

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worked together, along with other important allies and partners, to protect our shared values and promote security and prosperity. Today, with the formation of AUKUS, we recommit ourselves to this vision.

PRIME MINISTER OF AUSTRALIA, THE HONORABLE SCOTT MORRISON, MP, TRANSCRIPT (16 SEPTEMBER 2021)458

…

Today, we join our nations in a next generation partnership, built on a strong foundation of proven trust.

We have always seen the world through a similar lens.

We have always believed in a world that favours freedom, that respects human dignity, the rule of law, the independence of sovereign states and the peaceful fellowship of nations.

And while we have always looked to each other to do what we believe is right, we have never left it to each other. Always together, never alone.

Our world is becoming more complex, especially here in our region, the Indo-Pacific.

This affects us all. The future of the Indo-Pacific will impact all our futures.

To meet these challenges, to help deliver the security and stability our region needs, we must now take our partnership to a new level.

A partnership that seeks to engage, not to exclude. To contribute, not take. And to enable and empower, not to control or coerce.

And so, friends, AUKUS is born.

A new enhanced trilateral security partnership between Australia, the United Kingdom and the United States – AUKUS.

A partnership where our technology, our scientists, our industry, our defence forces are all working together to deliver a safer and more secure region that ultimately benefits all.

AUKUS will also enhance our contribution to our growing network of partnerships in the Indo-Pacific region – ANZUS, our ASEAN friends, our bilateral strategic partners, the Quad, Five Eyes countries and, of course, our dear Pacific family.

The first major initiative of AUKUS will be to deliver a nuclear-powered submarine fleet for Australia. Over the next eighteen months we will work together to seek to determine the best way forward to achieve this.

This will include an intense examination of what we need to do to exercise our nuclear stewardship responsibilities here in Australia.

We intend to build these submarines in Adelaide, Australia, in close cooperation with the United Kingdom, and the United States.

But let me be clear, Australia is not seeking to acquire nuclear weapons or establish a civil nuclear capability.

And we will continue to meet all our nuclear non-proliferation obligations.

Australia has a long history of defence cooperation with the United States and the United Kingdom.

For more than a century, we have stood together for the cause of peace and freedom.

Motivated by the beliefs we share, sustained by the bonds of friendship we have forged, enabled by the sacrifice of those who have gone before us, and inspired by our shared hope for those who will follow us.

And so, today, friends, we recommit ourselves to this cause and a new AUKUS vision.

**Implications and Aftermath**

As the White House and Australian PM statements intimate, several aspects of AUKUS were noteworthy. First, the nuclear-powered subs would be built not only in the U.S. (specifically, Groton, Connecticut and/or New Port News, Virginia), but also in Australia (Adelaide). The exportation of subs and technology to Australia would be done in accordance with the above discussed U.S. statutory requirements. The Anglo-American cooperation built on the U.K.’s links to the U.S. on nuclear technology, which “date[d] back to a 1958 defense agreement.”

Under AUKUS, the U.S. “will provide the highly enriched uranium that powers the submarines’ reactors.” It was not, however, immediately clear what else the U.S. might export to Australia. That would depend in part on the sub design Australia chose, but it was “likely to be based either on Britain’s Astute submarines, built by BAE Systems, or the U.S. navy’s equivalent, the Virginia-class, built by America’s General Dynamics Electric Boat and Newport News Shipbuilding.”


Further, an open question was “how much of the silent running and sonar technology of their fleets the British and Americans are going to give the Australians.”462 (“BAE … builds submarines for the Royal Navy at its Barrow-in-Furness site in Cumbria, north-west England.”463) By 2040, PM Morrison said he expected that by 2040, Australia would be building the first nuclear subs.464

Second, the subs would not be nuclear armed; rather, only nuclear powered. That way, Australia would not become a declared nuclear weapons state, but rather remain a non-nuclear weapons state. Still, the ordnance the U.S. would sell to Australia – again, consistent with U.S. military export control laws (discussed in a separate Chapter) – was remarkably powerful:

… Australia would deploy conventional missiles on the submarines, which had larger payloads than the weapons that would have been on the French vessels [for which Australia previously had contracted, as discussed below].

The decision to acquire Tomahawk missiles – which can be fired from either ships or submarines – also marks a major addition to Australia’s capabilities.

“Tomahawks transform a surface navy ship into a strategic asset that can target military facilities ashore from a thousand miles away. This new payload will significantly upgrade the conventional strike power of the Australian navy,” said Eric Sayers, a defence expert at the American Enterprise Institute.

Sayers said the move continued the trend of Canberra adopting common munitions with the U.S., including anti-ship weapons such as the MK48 torpedo and the LRASM, a missile that can be launched from an F-18 fighter jet.

The Tomahawks would give Australia more capability to hit targets in China in any conflict, which is important because the U.S. and its allies would have fewer military assets off the coast of China than the Chinese military.

“The Tomahawk opens the door to long-range strikes against land targets like taking down integrated air and missile-defence systems or aircraft hangars,” Sayers said.465

462 The Nuclear Technology Behind.
463 The Nuclear Technology Behind.
464 The Nuclear Technology Behind.
465 The Nuclear Technology Behind.
Further, *AUKUS* meant America and Britain would “share cyber capabilities, artificial intelligence, and other undersea technologies.” So, how authentic was the commitment of the three nations to non-proliferation? In providing subs and technology Down Under, America and Britain were proliferating nuclear materials to Australia – making it the seventh country to operate nuclear subs – and deploying the finished products – nuclear and conventional – across the Indo-Pacific region.

Third, *AUKUS* provided Britain with a much-needed fillip to its post-Brexit status. PM Boris Johnson had boasted of a new “Global Britain.” But, foreseeable economic and political difficulties associated with Brexit (discussed in a separate Chapter) suggested the new Britain, outside of the EU, was rather diminished. Thus, “Global Britain” “always seemed more a marketing slogan than a coherent foreign policy.” To be sure, the U.K. had “negotiated trade deals with Australia, Japan, and South Korea, and deployed an aircraft carrier to help the United States keep an eye on China in the South China Sea, where Beijing … assert[ed] its own imperial ambitions by constructing a chain of military installations.” But, for Britain along with the U.S. to supply submarines to Australia “confirmed Britain’s status as a military power with nuclear expertise, as well as a trusted ally of the United States,” plus “lent credibility to Mr. Johnson’s effort to build a British presence in Asia, a strategy that at first looked mostly like a nostalgic throwback to its imperial past.”

Several allies welcomed *AUKUS*, most notably, Canada, India, Japan, and Singapore. However, what was not apparent from the White House statement was France’s ire. In entering *AUKUS*, Australia annulled a deal valued at between $37-$90 billion to purchase 12 non-nuclear (i.e., diesel) powered submarines to replace its Collins-class vessels. For both technological and strategic reasons, Australia’s switch made sense:

*Australia first approached Britain to propose that the British and Americans help it deploy nuclear-powered submarines, according to British officials. The Australians concluded that the diesel models provided in the French...*

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468 *Submarine Deal Gives.*
469 *Submarine Deal Gives.*
470 *Submarine Deal Gives.*
471 *Submarine Deal Gives.*
472 See Gideon Rachman, *Why AUKUS Is Welcome in the Indo-Pacific*, FINANCIAL TIMES, 20 September 2021, [www.ft.com/content/cac4b3b0-faec-4648-a49d-8dbcd96eac02?shareType=nongift](http://www.ft.com/content/cac4b3b0-faec-4648-a49d-8dbcd96eac02?shareType=nongift).
473 For a blow-by-blow account of the row between France and the *AUKUS* countries, see George Parker, Sebastian Payne, Anthony Klan, Katrina Manson, Anna Gross & Victor Mallet, *AUKUS: How Transatlantic Allies turned on Each Other over China’s Indo-Pacific Threat*, FINANCIAL TIMES, 24 September 2021, [www.ft.com/content/06f95e54-732e-4508-be92-c3752904ba67?shareType=nongift](http://www.ft.com/content/06f95e54-732e-4508-be92-c3752904ba67?shareType=nongift).
474 *The Nuclear Technology Behind.*
deal were not going to be adequate for a future in which China posed an ever-greater threat.\footnote{Submarine Deal Gives.}

In particular:

The key difference between the French-built and the proposed new submarines is the propulsion technology they will use. The vessels from France – based on that country’s own nuclear-powered Barracuda class – were to have had electric motors charged by diesel engines.

One of the advantages is that diesel-electric submarines tend to be smaller and can be run silently by turning off the diesel motor and relying on battery power. A disadvantage, however, is that the boats need to resurface regularly to run their diesel engines so that the batteries can be recharged – an operation known as “snorting.”

Nuclear-powered submarines, on the other hand, are built for endurance, with the reactor capable of going for decades between refuellings. Heat from the reactor is used to make steam and drive steam turbines to produce electricity.

The biggest benefit of nuclear-powered submarines is that they can stay submerged and remain stealthier for much longer. Conventionally powered vessels do not have the same range without exposing themselves to detection by coming to the surface. Nuclear-powered submarines can carry enough fuel for up to 30 years of operation and only need to return to port for maintenance and supplies.

Nuclear-powered submarines are the “most complex machines that humans make, even more so than the space shuttle,” according to one defence expert. “You have a nuclear reactor at the back, high explosives at the front and in the middle, a hotel, where people live, and the whole thing goes underwater for months at a time.”\footnote{The Nuclear Technology Behind.}

Likewise, from Britain’s perspective, “[i]ts military protocols are more closely aligned with those of the Australian military, making it easier for the Australians to operate vessels also equipped with British technology.”\footnote{Submarine Deal Gives.}

Nevertheless, to add insult to France’s injury, America gave its oldest ally (France), just four hours’ notice before publicly announcing AUKUS. France thus incurred a loss \emph{fait accompli}. France’s Foreign Minister, Jean-Yves Le Drien, thus “accused Australia and the U.S. of lying over a new security pact, that is, “of duplicity, a major breach of trust and
contempt.” France had been “stabbed in the back,” he said, and reacted by recalling its Ambassadors from Washington, D.C., which it never had done before, as well as from Canberra. It left its Ambassador in London in place, because it regarded post-Brexit Britain disdainfully as little more than an American lackey and an intermediary between the U.S. and Australia. Said the Foreign Minister: France saw “no need’ to recall its Ambassador to the U.K., … accus[ing] the country of ‘constant opportunism. Britain in this whole thing is a bit like the third wheel.”

However, to empathize, France’s reaction reflected its concern about its place in the world:

… [T]he newspaper *L’Opinion* asked at the top of its front page a question familiar to anybody who knows “Snow White.”

“Mirror, mirror on the wall, tell me if I’m still a great power?”

Europe is speckled with fading former imperial powers. But France has clung more than most to its past as a great power, still seeing itself as having global interests partly because of territorial possessions in the Indo-Pacific and the Caribbean. Imbued with a sense of grandeur, France harks back to the Enlightenment to speak about fighting obscurantism in the world today and proffers its secular universalism as a model for modern societies. It often punches above its geopolitical weight, though it also overreaches.

The question of whether France is still a great power – not only the answer, but also the fact that it is still being asked – shows how its past glory continues to shape its national psyche. The flip side – the repeated assertion that France is suffering from an existential decline – is one of the most potent themes in French domestic politics….

And so the crisis over the submarines has forced France to look into the mirror and, rather than settling for a soothing ambiguity, seek uncomfortable truths. Was there an unbridgeable divide between France’s vision of itself and its actual power?

…

President Emmanuel Macron and other members of his government learned about the new deal only hours before the United States, Australia and Britain made it public.

All of a sudden, French assumptions about its foreign policy – the West, working alliances, its place in the Pacific – were overturned, said Bertrand
Badie, an expert on French international relations at the Sciences Po University.

“And we were viewed as being small,” Mr. Badie said. “That kills a country like France.’’

…

Steeped in history, France still sees itself as occupying a premier rank in the world’s pecking order, Mr. Badie said. That self-perception shapes the way it deals with other nations, including former colonies where its foreign policy is based on what it still often describes as having “particular responsibilities,” he said. Mr. Badie said that France also has difficulties dealing with emerging powers – “like an old aristocrat who’s now forced to dine next to a peasant who’s become rich, and he finds that unbearable.”

“France is obsessed with one thing, which is rank,’” Mr. Badie said. “France must maintain its rank. We could psychoanalyze this, because some of this is at the level of the subconscious.’’

…

Asked whether the failed submarine deal revealed that France was no longer a great power, Philippe Étienne, the French Ambassador to the United States, said …: “We are a balancing power and an important power. We have our means.”

But to others, the failure was an example of overreaching by France.

“We need a French policy in the Pacific because we have commercial, economic and territorial interests there, but the means we have now don’t allow us to be a credible alternative to the United States in facing China,” said Arnaud Danjean, a French Member of the European Parliament, and a former defense official and diplomat. “The Pacific is the playground of the great powers, the preserve of the United States and China.”

At a time when even France’s greatest sphere of influence, in its former colonies in Africa, is being eroded by competition from China, Russia and Turkey, France needs to draw clear priorities in its foreign policy, Mr. Danjean said.

But trapped in its self-perception as a global power, France struggles to do just that, he said. …

…”

“The French are a little nostalgic for grandeur,” Mr. Danjean said. “But the problem is that with this kind of attitude, the day things don’t work out, you
find yourself precisely in the kind of difficult situation that we’re in now with Australia.”

Ultimately, America (and Australia) and France patched up their differences. The U.S. issued a non-apology apology through a joint statement from President Biden and President Emmanuel Macron: “The U.S. acknowledged that the situation would have benefited from ‘open consultations,’” and the two Presidents “would ‘open a process of in-depth consultations, aimed at creating the conditions for ensuring confidence.”

China’s reaction also was predictable. It said all three countries had a “Cold War mentality,” and lambasted AUKUS as “extremely irresponsible” and “narrow-minded.”

Chinese Foreign Ministry spokesman Zhao Lijian said the alliance risked “severely damaging regional peace … and intensifying the arms race.” He criticized what he called “the obsolete Cold War … mentality” and warned the three countries were “hurting their own interests.” Chinese state media carried similar editorials denouncing the pact, and one in the Global Times newspaper said Australia had now “turned itself into an adversary of China.”

China had reason for concern: they far out-numbered it with respect to nuclear-powered ballistic missile and other nuclear-powered attack submarines. The U.S. and U.K. had 68 and 11 of them, respectively, while China had 12 in total.
Chapter 13

MILITARY ITEMS

I. Military Goods and 1976 Arms Export Control Act

The Arms Export Control Act (AECA) provides the statutory authority for the control of military defense articles and services. It sets forth foreign and national policy objectives for international defense cooperation and military export controls. Section 3(a) of the AECA lays out eligibility requirements for countries or international organizations to receive United States defense articles and defense services provided under the act. Receipt of the defense articles and services is subject to the express conditions of use indicated in the section. Section 4 of the AECA allows for the sale of articles and services to friendly countries “solely” for use in “internal security,” for use in “legitimate self-defense,” to enable the recipient to participate in “regional or collective arrangements or measures consistent with the Charter of the United Nations” to enable the recipient to participate in “collective measures requested by the United Nations for the purpose of maintaining or restoring international peace and security,” and to enable the foreign military forces “in less developed countries to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries.” The AECA also contains the statutory authority for the Foreign Military Sales program, under which the United States government sells defense equipment, services, and training on a government-to-government basis.

Prior to conducting a sale in foreign arms, the AECA requires the President to seek Congressional consideration of the proposed sale. This procedure includes consideration of proposals to sell major defense equipment, defense articles and services, or the re-transfer to other nations of such military items. The procedure is triggered by the executive branch sending a formal report to Congress under Sections 36 of the AECA. In general, the executive branch, after complying with the terms of the applicable section of United States law, is free to proceed with an arms sales proposal unless Congress passes legislation prohibiting or modifying the proposed sale.

The traditional sequence of events for the Congressional review of an arms sale proposal begins with an “informal” classified notification of a prospective arms sale via submission by the Defense Department (on behalf of the President) 20 calendar-days before the executive branch takes further formal action. This “informal” notification is submitted to the Speaker of the House (who traditionally has referred it to the House Foreign Affairs Committee), and to the Chairman of the Senate Foreign Relations Committee. This practice stems from a February 18, 1976, letter of the Defense Department...
making a non-statutory commitment to give Congress these preliminary classified notifications. It has been the practice for such “informal” notifications to be made for arms sales cases that would have to be presented in formal notifications to Congress under the provisions of Section 36(b) of the AECA. These “informal” notifications always precede the submission of the required statutory notifications, however the time period between the submission of the “informal” notification and the statutory notification is not fixed.

Under Section 36(b) of AECA, Congress must be formally notified 30 calendar-days before the Administration can take the final steps to conclude a government-to-government foreign military sale of: major defense equipment valued at $14 million or more; defense articles or services valued at $50 million or more; or design and construction services valued at $200 million or more. In the case of such sales to NATO member states, NATO Japan, Australia, or New Zealand, Congress must be formally notified 15 calendar-days before the Administration can proceed with the sale. However, the military sale value thresholds requiring prior notice thresholds are higher for NATO members, Australia, Japan or New Zealand. These higher thresholds are: $25 million for the sale, enhancement or upgrading of major defense equipment; $100 million for the sale, enhancement or upgrading of defense articles and defense services; and $300 million for the sale, enhancement or upgrading of design and construction services, so long as such sales to these countries do not include or involve later sales to a country outside of this group of nations.

In cases of commercially licensed arms sales, Congress must be formally notified 30 calendar-days before the export license is issued if the sale involves major defense equipment valued at $14 million or more, or defense articles or services valued at $50 million or more (Section 36(c) of the AECA). In the case of such sales to NATO member states, NATO, Japan, Australia, or New Zealand, Congress must be formally notified 15 calendar-days before the Administration can proceed with such a sale. However, the prior notice thresholds are higher for sales to NATO members, Australia, Japan or New Zealand specifically: $25 million for the sale, enhancement or upgrading of major defense equipment; $100 million for the sale, enhancement or upgrading of defense articles and defense services, and $300 million for the sale, enhancement or upgrading of design and construction services, so long as such sales to these countries do not include or involve sales to a country outside of this group of nations. It has not been the general practice for the Administration to provide a 20-day “informal” notification to Congress of arms sales proposals that would be made through the granting of commercial licenses.

The AECA provides for criminal penalties of $1 million or ten years of imprisonment for each violation, or both. AECA also authorizes civil penalties of up to $500,000 and debarment from future exports (See Sec 38(c)-(f), of AECA). The AECA provides the statutory authority for the International Traffic in Arms Regulations (ITAR) (22 C.F.R. 120 et seq), which (as discussed in a separate Chapter) sets out licensing policy for exports (and some temporary imports) of United States Munitions List (USML) items. A license is required for the export of nearly all items on the USML. Canada has a limited exemption as it is considered part of the American defense industrial base. In addition, the United States has signed treaties with the United Kingdom and Australia to exempt certain
defense articles from licensing obligations to approved end-users in those countries, although they have yet to receive Senate ratification. The United States prohibits munitions exports to countries either unilaterally or based on adherence to United Nations arms embargoes. Proscribed countries include Belarus, Burma, China\textsuperscript{488} Haiti, Iran, Liberia, Libya, North Korea, Somalia, Sudan, Syria, and Vietnam. In addition, exports to Iraq, Afghanistan, Rwanda, and D.R. Congo are reviewed on a case-by-case basis. Additionally, any firm engaged in manufacturing, exporting, or brokering of any item on the USML must register and pay a fee to the Directorate of Defense Trade Controls (DDTC) within the Department of State. The DDTC is responsible for administering exports of defense goods and services.

II. Four Practical Issues and Rules on Exports of Military Goods

The following are a series of issues and procedures an International Trade Lawyer should consider in order to steer clear of violations of the Arms Export Control Act:

- 1st: Are Defense Export Controls Applicable to Transaction? Is License Required?

Dual-use controls on dual-use items under the Export Administration Act (discussed below) depend on the end use or end user of that item. In contrast, regulations, such as licensing requirements, governing military items depend on the nature of the item, not the end-use or end-user of that item. Note this crucial threshold question: could a good, service, or technology be used for civilian and/or military purposes, or just military purposes?

Generally, if the former, then EAA rules govern. If the latter, then AECA rules apply. The two regimes are not necessary mutually exclusive. For instance, a military item could contain dual-use components, and for both military and dual-use items, an exporter is responsible for tracing through what it exports all the way to its final destination.

A careful International Trade Lawyer checks if an article for export is covered by the USML, found in Section 121 of the International Trade in Arms Regulations, or any other relevant ITAR. ITAR sets out a licensing policy for exports (and some temporary imports) of USML items. Certain countries are exempted from license requirements pursuant to signed treaties. For example, the U.K. and Australia are exempt from licensing obligations of certain defense articles to approved end-users. If an item or service is listed on the USML, then registration with the DDTC is required.

If Section 121 does not make clear whether the USML covers an item or service, a Commodity Jurisdiction request may be filed. CJ determinations are issued to determine

\textsuperscript{488} In a case that would be comical were it not true, Taiwan purchased from an EU supplier missiles the optical equipment of which subsequently needed. When Taiwan sent them back to the EU producer-exporter, the latter shipped them to the PRC for repairs, understandably raising howls in Taiwan. See Fan Wang, China-Taiwan: Concern at Repair of Taiwanese Military Device in China, BBC News, 4 January 2023, www.bbc.com/news/world-asia-64161966.
whether an item or service will be subject to the \textit{AECA} and the ITAR. In order to submit a CJ request, electronic applications may be submitted to the DDTC using the DS-4076 CJ Request Form. Requests must be submitted electronically. (Paper submissions are returned without action.) The CJ process is open to all applicants and does not require registration with the DDTC.\footnote{For further information, see \url{http://pmddtc.state.gov/commodity_jurisdiction/index.html}.}

\begin{itemize}
\item \textbf{2\textsuperscript{nd}: Registration and Obtaining a License?}

If an export article or service is listed on the USML or relevant ITAR, then a party must register with the DDTC. Any firm engaged in manufacturing, exporting, or brokering of any item on the USML must register with the DDTC at the State Department and pay an annual registration fee depending on whether it will be exporting during the year. Note the coverage of international arms brokerage: any person involved in brokering as to the production or trade of a defense article or service must register, get a license, and disclose its activities. How broad is the definition of “brokering activities”? Might it include advise by a law firm to a client on the structuring of defense article sales, or working with government officials on formulating export requests?\footnote{See \textit{Matthew A. Goldstein, PLLC v. U.S. Department of State}, (United States District Court for the District of Columbia, Number 1:15-cv-00311-RC, 26 January 2016); \textit{Brian Flood, Court Dismisses Challenge to Arms Export Regulations}, International Trade Daily (BNA) (27 January 2016). No substantive decision was reached, as the Court held the plaintiff, a law firm, lacked standing because it failed to show how it would be harmed (\textit{e.g.}, by being compelled to disclose information subject to the attorney-client privilege) if it complied with \textit{AECA} and ITAR. The firm’s clients exported military and homeland security technology, but the Court said it could seek a waiver from them before potentially divulging any privileged information.}

After registering with the DDTC, parties may apply for an export license. Different licenses exist depending on whether you are seeking to temporarily or permanently import or export an item. License requests may be submitted via the DTrade system, through the Electronic Licensing Entry System (ELLIE) (only to amend DSP-85 licenses, through the use of DSP-119), or by sending in hardcopy applications for licenses (a limited option). Utilizing the electronic DTrade system is the preferred method of defense export licensing. The DDTC receives and adjudicates export authorization requests from those properly registered and seeking to permanently export unclassified defense articles via the Form DSP-5, temporarily import unclassified defense articles via Form DSP-61, or temporarily export unclassified defense articles via Form DSP-73. Parties may check the status of their DTRADE application by utilizing DDTC’s web based “MARY” system.\footnote{See \url{https://mary.dtas-online.pmddtc.state.gov}.}

\item \textbf{3\textsuperscript{rd}: Do Foreign Employees Need Authorization for Access?}

Foreign persons may have contact with USML and ITAR related items, if they follow proper licensing procedures. The DDTC authorizes access to technical data of foreigner through use of a DSP-5. DSP-5 authorizes Americans to transfer technical data
and perform defense services to employees regarding their products. It authorizes foreigners to perform defense services on behalf of the employing U.S. entity. A foreign individual is considered a regular employee of the U.S. entity if they are paid, insured, hired/fired and/or promoted exclusively by the entity. Corporate entities are liable for ensuring compliance with U.S. export laws by the foreign employee regardless of where the employee resides. If a foreign person requires access to ITAR-controlled defense articles and/or technical data in order to perform their job responsibilities, a foreign person employee access authorization must be obtained from DDTC.

Failure to obtain the necessary authorization is a violation and must be reported in accordance with 22 C.F.R. Section 127.12. When the transfer of classified technical data is required, instead of a DSP-5, a DSP-85 must be obtained from the DDTC. The corporate entity and foreign employee must execute the form. Additionally, the DDTC may require the foreign government to execute the DSP-85 on a case-by-case basis.

Authorization under the DSP-5 and DSP-85 systems is valid only for a period of 4 years or until the expiration of their authorization stay from the DHS, whichever is shorter. However, the license will remain valid if the foreign individual’s work visa has been renewed, or submitted for renewal without lapse in authorization.

- 4th:
  Is Individual or Company that Will Receive Exports Debarred?

Export of military articles to certain countries may be prohibited as part of U.S. foreign policy. The U.S. forbids arms exports to countries based either on unilateral or U.N.-backed arms embargoes. Also, parties convicted of AECA violations are subject to a “statutory debarment” under Section 38(g)(4) of AECA and Section 127:7 of ITAR. The DDTC publishes a list of parties and their ineligibility in the Federal Registrar, which is routinely updated. Parties are considered statutorily debarred until a notice of reinstatement is published in the Federal Registrar and their names are removed from the blacklist. Finally, individuals may be “administratively debarred” on a case-by-case basis as a result of individual enforcement proceedings for violating AECA and ITAR.

III. Case Law on Illegal Exports of Military Goods

- 2007 ITT Night Vision Equipment Case

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493 For specific details regarding the authorization process, see [http://pmddtc.state.gov/licensing/documents/WebNotice_LicensingForeign2.pdf](http://pmddtc.state.gov/licensing/documents/WebNotice_LicensingForeign2.pdf).
494 For a list of embargoed countries, see [http://pmddtc.state.gov/embargoed_countries/index.html](http://pmddtc.state.gov/embargoed_countries/index.html).
495 The list of statutorily debarred parties is [www.pmddtc.state.gov/compliance/debar.html](http://www.pmddtc.state.gov/compliance/debar.html).
496 The list of administratively debarred parties is at [www.pmddtc.state.gov/compliance/debar_admin.html](http://www.pmddtc.state.gov/compliance/debar_admin.html).
In March 2007, ITT Corporation became the first major U.S. defense contractor to be convicted of a criminal violation under the *Arms Export Control Act*. At the time, ITT was the leading manufacturer of military night vision equipment for the U.S. Armed Forces. Specifically, ITT Night Vision (ITT NV), a division of ITT, had produced night vision equipment for the military for over 30 years. ITT plead guilty to two counts of sending classified materials abroad, and paid $100 million in penalties, then the largest sum ever paid by a government contractor in a criminal case.

The Federal government began its criminal investigation on 1 August 2001, when special agents of the Defense Criminal Investigative Service of the DOD were alerted to the illegal transfer of a classified government document sent to an unauthorized facility in the U.K. by employees of ITT NV. The criminal investigation uncovered failure by ITT NV to establish a system for export regulation compliance. The investigation revealed multiple instances in which management directed employees to make illegal transfers, even though managers understood a license was required, and knew the Department of State had not granted one to ITT NV. Other discoveries included (1) making false and misleading statements about export consignments, (2) failure to obtain export licenses for transfers of technical data, (3) illegal export of classified information, (4) export violations relating to light interference filters and enhanced night vision goggle system. ITT was charged in the U.S. District Court for the Western District of Virginia on three criminal counts under 18 U.S.C. Section 2778(b)(2) and (c).

Count One concerned a violation of ITAR: between March and August 2001, ITT knowingly and willfully exported or caused to be exported defense-related technical data to the PRC, Singapore, and U.K., without having obtained a license from the Department of State. The information related to a laser counter measure for military night vision goggle systems, which were designated as defense articles on the USML.

Count Two charged ITT, on or between April 2000 and October 2004, knowingly and willfully omit material facts from reports required by the State Department about its shipments. ITT failed to state it was aware it violated the export licenses the State Department had granted it for the temporary export or consignment of night vision goggles and parts thereof to foreigners. ITT did not even bother to correct the violations until just before it finally informed the Department of State about them.

Count Three alleged that on or between January 1996 and May 2006, ITT knowingly and willfully exported or caused to be exported defense articles from the U.S. to the PRC, Singapore, and Japan, without a license from the State Department. These articles were technical data, including drawings and specifications. ITT also provided these countries with defense services related to military night vision goggle systems, including the Enhanced Night Vision Goggle System, which the USML had designated as defense articles.

In an agreement reached between ITT and Federal prosecutors on 26 March 2007, ITT pled guilty to Counts One and Two, subject to the maximum fine amount of $1,000,000 per count. In exchange, the prosecution of Count Three was deferred. The
overall criminal penalty ITT paid was $100 million, the components of which included: $2 million criminal fine, a $50 million deferred prosecution fine, forfeiture of the $28,000,000 proceeds from the illegal exports, and a $20 million fine paid to the Department of State. Payment of the $50 million deferred penalty was suspended for five years, as long as ITT invested that sum toward the acceleration, development, and fielding of advanced night vision technology for the U.S. military.

Before this landmark case, many individuals and smaller companies were charged under the AECA. The Justice Department hoped the ITT plea agreement would “send a clear message that any corporation who [sic] unlawfully sends classified or export-controlled material overseas will be prosecuted and punished.” 498 Not everyone got the message. Since then, many more have been prosecuted for violations of the Act. 499

2008 United States v. Roth 500

John Reece Roth was an emeritus Professor of Electrical Engineering at the University of Tennessee at Knoxville and a published author in the field of plasma technology. A former scientist at NASA, Professor Roth taught and researched at Tennessee for nearly 30 years. 501 During October 2003, the U.S. Air Force solicited contract proposals to develop plasma actuators that could be used to control the flight of small, subsonic, unmanned, military drone aircrafts. The project was to be split into two phases. Phase I called for designing the actuators, and Phase II would test the actuators in a wind tunnel and on non-military aircrafts.

Atmospheric Glow Technologies, Inc. (Atmospheric), a company in which Professor Roth was a minority owner, was awarded the contract for Phase I in May 2004. Professor Roth worked as a consultant for the project. He also assisted Atmospheric in drafting the winning contract proposal for Phase II, and signed a subcontract between him and Atmospheric acknowledging the Phase II contract was subject to American export controls. Pursuant to ITAR, technology related to the plasma actuators is controlled as technical data, and providing instructions on the use of plasma actuators is controlled as a defense service. So, for controlled items and services to be transferred to a foreign national or foreign country, an American government issued license is required.

499 In August 2010, Blackwater paid a fine of $42 million for multiple violations of U.S. export controls, including illegal weapons exports to Afghanistan to Iraq (which Blackwater hid, inter alia, in containers of dog food), providing sniper training to Taiwanese police officers, and offering to train South Sudanese troops. By paying this fine, rather than facing criminal charges of export control violations, Blackwater hoped to remain an authorized government contractor. Whether it is possible for a defendant to achieve that aim depends on the agreement to which it pleads.
500 See United States v. Roth, 628 F.3d 827 (2011).

Although both Phase I and II contracts incorporated Federal regulations prohibiting foreign nationals from working on the project, Professor Roth proposed that two of his graduate research assistants, Truman Bonds, an American, and Xin Dai, a Chinese national, work with him on the project. Part of the testing involved the use of a specifically designed device called the “Force Stand” to test the actuators and gather data prior to subjecting the actuators to wind tunnel tests. The technology being tested was for use on the wings of drones operating as weapons or surveillance systems. Dai and another graduate student, Sirous Nourgostar, an Iranian national, had access to this technology. Professor Roth met with various University officials who expressed concern regarding his research assistants, as the data involved were export controlled. In 2006, the University’s Export Control Officer warned Professor Roth of his duty to keep the data guarded. However, such warnings were ignored.

In preparation for an upcoming lecture in China, Professor Roth was warned not to take anything from Phase II, or any other data from the project, to China. On 16 May 2006, he traveled to China with a paper copy of a Phase II Weekly Report, and a flash drive with electronic copies of Phase II reports. He also carried his laptop computer, on which he stored a copy of an Agency Proposal that had been submitted to Defense Advance Research Project Agency, a division of the DOD, which contained export-controlled information from the weapons division of Boeing. No one accessed the electronic files during the trip. Professor Roth had Dai send him a copy of a paper containing Phase II data from the email address of a Chinese Professor, and Nourgostar was given access to that document during the fall of 2007.

On 20 May 2008, a grand jury in the U.S. District Court for the Eastern District of Tennessee indicted Professor Roth and Atmospheric for Roth’s transporting of Phase II data and the Agency Proposal to China, and his allowing foreign nationals access to the technical data and Force Stand without proper licensing. He was charged with conspiring with Atmospheric to export unlawfully 15 different “defense articles” in violation of the AECA, 22 U.S.C. § 2778. He also was charged with 1 count of wire fraud related to defrauding the University of Tennessee by concealing his actions from his employer.

In his defense, Professor Roth claimed he thought the AECA regulations applied only to finished projects. The jury rejected his defense, as much of the documentation for the project expressly referenced the AECA and Professor Roth had signed numerous documents acknowledging the project would be subject to export controls. On 3 September 2008, a jury found Professor Roth guilty on all counts, and on 1 July 2009 a Federal judge sentenced him to prison for four years. The Sixth Circuit Court of Appeals later affirmed the decision, and the Supreme Court denied certiorari. On 18 January 2012, Professor Roth began a 4-year prison sentence.


The story of Professor Roth seems unique, as it is outside the business realm. The stereotype about arms export control violations is they are of concern in the commercial world, to exporters. That stereotype is wrong. The AECA purview is all encompassing. The case showcases the expansive nature of export control compliance and type of activities within the reach of the regulations. After the case, universities and other research institutions were on notice of the need for internal export control compliance programs when dealing with military projects or foreign nationals. Some, including the University of Kansas (KU), hired lawyers specifically to spot export control issues.

IV. 1987 MTCR

MISSILE TECHNOLOGY CONTROL REGIME, FREQUENTLY ASKED QUESTIONS (FAQs) (DECEMBER 2019)

1. What is the MTCR?

The Missile Technology Control Regime (MTCR) is an informal political understanding among states that seek to limit the proliferation of missiles and missile technology.

2. When was the MTCR established?

The regime was formed in 1987 by the G-7 industrialized countries (Canada, France, Germany, Italy, Japan, the UK, and the United States).

3. Who belongs to the MTCR?

There are currently 35 countries that are members (Partners) of the MTCR: Argentina (1993); Australia (1990); Austria (1991); Belgium (1990); Brazil (1995); Bulgaria (2004); Canada (1987); Czech Republic (1998); Denmark (1990); Finland (1991); France (1987); Germany (1987); Greece 1992); Hungary (1993); Iceland (1993); India (2016); Ireland (1992); Italy (1987); Japan (1987); Luxemburg (1990); Netherlands (1990); New Zealand (1991); Norway (1990); Poland (1998); Portugal (1992); Republic of Korea (2001); Russian Federation (1995); South Africa (1995); Spain (1990); Sweden (1991); Switzerland (1992); Turkey (1997); Ukraine (1998); United Kingdom (1987); United States of America (1987). The date in brackets represents the initial year of membership.

4. What is the purpose of the MTCR?

The MTCR was initiated by like-minded countries to address the increasing proliferation of nuclear weapons by addressing the most destabilizing delivery system for such weapons. In 1992, the MTCR’s original focus on missiles for nuclear weapons delivery was extended to a focus on the proliferation of missiles.

504 https://mtcr.info/frequently-asked-questions-faqs/.
for the delivery of all types of weapons of mass destruction (WMD), i.e., nuclear, chemical and biological weapons. Such proliferation has been identified as a threat to international peace and security. One way to counter this threat is to maintain vigilance over the transfer of missile equipment, material, and related technologies usable for systems capable of delivering WMD.

5. **What is the relationship between the MTCR and the U.N.?**

While there is no formal linkage, the activities of the MTCR are consistent with the U.N.’s non-proliferation and export control efforts. For example, applying the MTCR Guidelines and Annex on a national basis helps countries to meet their export control obligations under U.N. Security Council Resolution 1540.

6. **Is the MTCR a treaty?**

No. The MTCR is not a treaty and does not impose any legally binding obligations on Partners (members). Rather, it is an informal political understanding among states that seek to limit the proliferation of missiles and missile technology.

7. **What are the main objectives of the MTCR?**

The MTCR seeks to limit the risks of proliferation of weapons of mass destruction (WMD) by controlling exports of goods and technologies that could make a contribution to delivery systems (other than manned aircraft) for such weapons. In this context, the Regime places particular focus on rockets and unmanned aerial vehicles capable of delivering a payload of at least 500 kg to a range of at least 300 km and on equipment, software, and technology for such systems.

8. **How does the MTCR achieve its objectives?**

*Export Controls*

The Regime rests on adherence to common export policy (the Guidelines) applied to an integral common list of items (the MTCR Equipment, Software, and Technology Annex.)

*Meetings*

MTCR Partners regularly exchange information about relevant missile non-proliferation issues in the context of the Regime’s overall aims.

*Dialogue and Outreach*

The MTCR Chair and MTCR Partners undertake outreach activities to non-Partners in order to keep them informed about the group’s activities and to provide practical assistance regarding efforts to prevent the proliferation of WMD delivery systems.

9. **What are the MTCR Guidelines?**
The MTCR Guidelines are the common export control policy adhered to by the MTCR Partners, and to which all countries are encouraged to adhere unilaterally. The Guidelines define the purpose of the MTCR and provide the overall structure and rules to guide the member countries and those adhering unilaterally to the Guidelines.

10. **What is the MTCR Annex?**

The MTCR Annex is the Regime’s list of controlled items including virtually all key equipment, materials, software, and technology needed for missile development, production, and operation – that are controlled by MTCR Partners and adherents. The Annex is divided into two parts: Category I and Category II items.

11. **How are Annex items controlled?**

Consistent with the MTCR Guidelines, MTCR Partners and adherents are to implement license authorization requirements prior to export of items listed in the MTCR Annex.

12. **Are there provisions to control non-Annex items?**

In 2003, MTCR Partners amended the Guidelines to require all Partners to have catch-all export controls. These controls form the basis for controlling the export of items not included on a control list when they may be intended for use in connection with delivery systems for WMD other than manned aircraft. Additionally, consistent with the Guidelines, Partners are to exercise particular restraint in consideration of any items on the Annex or of any missiles (whether or not on the Annex) if the exporting government judges that they are intended to be used for WMD delivery – and such exports are to be subject to a strong presumption of denial.

13. **What is the difference between MTCR Category I and Category II Items?**

**Category I** items include complete rocket and unmanned aerial vehicle systems (including ballistic missiles, space launch vehicles, sounding rockets, cruise missiles, target drones, and reconnaissance drones), capable of delivering a payload of at least 500 kg to a range of at least 300 km, their major complete subsystems (such as rocket stages, engines, guidance sets, and re-entry vehicles), and related software and technology, as well as specially designed production facilities for these items. Pursuant to the MTCR Guidelines, exports of Category I items are subject to an unconditional **strong presumption of denial** regardless of the purpose of the export and are licensed for export only on rare occasions. Additionally, exports of production facilities for Category I items are prohibited absolutely.
Category II items include other less-sensitive and dual-use missile related components, as well as other complete missile systems capable of a range of at least 300 km, regardless of payload. Their export is subject to licensing requirements taking into consideration the non-proliferation factors specified in the MTCR Guidelines. Exports judged by the exporting country to be intended for use in WMD delivery are to be subjected to a strong presumption of denial.

14. **Are exports to Partners treated differently than exports to non-Partners?**

The MTCR Guidelines do not distinguish between exports to Partners and exports to non-Partners. Moreover, the MTCR Partners have explicitly affirmed that membership in the Regime provides no entitlement to obtain technology from another Partner and no obligation to supply it. Partners are expected to exercise appropriate accountability and restraint in trade among Partners, just as they would in trade between Partners and non-Partners. Partners are bound by a “no-undercut” policy to consult each other before considering exporting an item on the list that has been notified as denied by another Partner pursuant to the MTCR Guidelines.

15. **Are the MTCR’s Guidelines binding?**

No – the MTCR is not a treaty and does not impose any legally binding obligations on Partners. The only activity prohibited absolutely by the Guidelines, to which all 34 Partner countries voluntarily subscribe, is the export of production facilities for Category I MTCR Annex items.

16. **What obligations do Partners have?**

There are no legally binding obligations imposed on MTCR Partners. However, Partners are expected to act responsibly and practice restraint with regard to exports of items that could contribute to the proliferation of missiles capable of delivering WMD and to abide by all consensus decisions of the Regime. They set the standard for responsible non-proliferation behaviour and help shape the international missile non-proliferation effort while conducting their missile non-proliferation policies in a manner consistent with the Regime’s overall goals and activities. Partners also are expected to control all exports of equipment and technology controlled on the MTCR Annex according to the stipulations of the MTCR Guidelines.

17. **How are export decisions taken?**

Export licensing decisions are made by individual countries according to their national export control laws and regulations, and not as group. However, Partners regularly exchange information on relevant licensing matters in order to ensure consistency with the Regime’s overall non-proliferation goals.

18. **How is compliance enforced?**
Each individual Partner implements the MTCR Guidelines and Annex in accordance with national legislation and practice and on the basis of sovereign national discretion. The MTCR has no regime-wide compliance or verification provisions. When questions arise, Partners consult bilaterally to promote a common understanding of the issue.

19. **What benefits do Partners get by becoming members of the MTCR?**

Partners can play an active role in curbing the global missile non-proliferation threat. MTCR Partners participate in decision-making on the orientation and future of the MTCR, thereby setting the international standard for responsible missile non-proliferation behaviour and helping to guide the international missile non-proliferation effort. Partners also benefit from discussions and exchanges of information on licensing, interdiction, best practices, and cooperate to impede specific shipments of concern with regards to missile proliferation.

20. **Can a country adhere to the Guidelines without joining the MTCR?**

The MTCR Partners encourage all countries to observe the Guidelines as a contribution to international peace and security. Countries can apply the Guidelines on a national basis without being obligated to join the Regime.

21. **Does the MTCR have an observer status?**

No. However, Regime members encourage all countries to adhere unilaterally to the MTCR Guidelines and Annex.

22. **When and how often do the MTCR Partners meet?**

The MTCR’s main meeting is the annual policy-level Plenary meeting, held to discuss and take decisions on all relevant Regime issues. Three Regime sub-groups hold meetings in conjunction with the annual Plenary – the Information Exchange (IE), the Licensing and Enforcement Experts Meeting (LEEM), and the Technical Experts Meetings (TEM). Additionally, there are periodic Reinforced Point of Contact (RPOC) and Monthly Point of Contact (POC) meetings.

23. **Is there a central administrative body for the MTCR?**

The MTCR has no formal secretariat. France serves as the Regime’s Point of Contact (POC). The POC receives and distributes all Regime documents. The POC also participates in outreach activities and hosts intersessional meetings.

24. **What is the Reinforced Point of Contact (RPOC) Meeting?**

The RPOC is the MTCR’s intersessional policy-level meeting. It is hosted by France and is normally held in Paris in April or May. RPOC meetings are used
primarily to follow up on issues from the previous Plenary and plan for the next Plenary.

25. **What is a Point of Contact (POC) Meeting?**

POC meetings facilitate the exchange of information among Partners. They are regularly held in Paris, hosted by the French MTCR POC, and include the participation of Embassy Representatives of MTCR countries.

26. **Who is the MTCR Chair? How are they chosen?**

The MTCR Chairmanship rotates on an *ad hoc* basis. Normally the country that hosts the Plenary then serves as Chair for the ensuing year.

27. **How are decisions made in the MTCR?**

All MTCR decisions including decisions on membership require a consensus decision by all current Regime members.

28. **How often does the MTCR meet with non-members?**

The MTCR Partners engage in a robust outreach program to promote the Regime’s goals and encourage broad support for its activities. The Regime also uses its outreach efforts to encourage countries to unilaterally adhere to the MTCR Guidelines. In 2009, following the MTCR RPOC meeting, the Partners held a Technical Outreach Meeting (TOM) for non-Partners to make them aware of the changes to the MTCR Annex that had taken place at the 2007 and 2008 plenaries and to explain how these changes would affect licensing reviews. Fifteen non-MTCR countries participated in that TOM. TOMs have since been held in 2014 (Paris), 2016 (Luxembourg) and 2018 (Iceland).
Chapter 14

DUAL USE ITEMS

I. Origins and History of 1979 Export Administration Act

To effect the three policy goals (discussed in a separate Chapter) for export controls, namely, protecting (1) commodities in short supply, (2) national security, and (3) foreign policy, Congress – beginning with the Export Control Act of 1949⁵⁰⁵ – set up and occasionally adjusts a statutory framework. The 1949 Act authorized controls of items in short supply, but with a view to advancing American foreign policy goals, particularly scrutinizing proposed exports to Communist countries that might have a military application. That Act remained in force for 20 years, and was renewed by Congress in 1951, 1953, 1956, 1958, 1960, 1962, and 1965. Subsequently Congress replaced it with the Export Administration Act of 1969,⁵⁰⁶ which was amended in 1972, 1974, and 1977. Later, the Export Administration Act of 1979 replaced the 1969 Act.⁵⁰⁷


Throughout the many legislative amendments and sagas involving Capitol Hill and the White House, the basic export control regime and its three policy rationales have been constant. However, Congress has added notable complementary and supplementary features to the regime, including:

(1) The 1969 Act countenanced removal of export controls on goods and technologies that were freely available and of marginal military value.

(2) The 1977 amendments to the 1969 Act expanded export controls extraterritorially, thereby authorizing the DOC to control foreign-origin goods and technical data re-exported by a U.S.-owned or controlled company overseas. In effect (as explained below), these amendments created downstream liability for an exporter of controlled goods, requiring

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⁵⁰⁵ See Public Law Number 81-11, 26 February 1949.
⁵⁰⁶ See Public Law Number 91-184, approved 30 December 1969.
⁵⁰⁷ See Public Law Number 96-72, 29 September 1979, codified at 50 U.S.C. App. §§ 2401 et seq.
⁵⁰⁸ See 50 U.S.C. §§ 1701 et seq.
⁵⁰⁹ See Executive Order Number 12470, 30 March 1984.
⁵¹⁰ See Public Law Number 99-64.
⁵¹¹ See Public Law Number 100-418, Title II, Subtitle D, approved 23 August 1988, codified at 50 U.S.C. §§ 2403 et seq.
that exporter to ensure that any subsequent shipments of the merchandise are not made to the “wrong hands.”

(3) The 1977 amendments also strengthened U.S. anti-boycott rules. These rules bar Americans from taking any action with the intent to comply with, or support, any foreign country boycott (e.g., that of the Arab League) aimed at a country (e.g., Israel) friendly to the U.S.

(3) The 1979 Act provided formal authorization for American participation in the Coordinating Committee on Multilateral Export Controls (COCOM) (discussed below).

(4) The 1979 Act also established, for the first time, separate and distinct criteria and procedures to impose export controls for two long-standing policy purposes – protecting American national security and furthering American foreign policy interests. The Act laid out time deadlines for processing export license applications, mandated creation of a Militarily Critical Technologies List (MCTL) to ensure the CCL of goods and technology maintained by the DOC is both adequate and focused narrowly on items most militarily important, and introduced foreign availability of a good controlled by the U.S. as a criterion in making a licensing decision.

(5) The 1985 Act expressly mentioned enhancement of American export competitiveness as a factor in export controls. The Act sought to reduce export disincentives, and ease the burden on American exporters imposed by total licensing.

Note the zero-sum game between purely commercial and strict military interests. From the perspective of export competitiveness, the fewer the number of goods that are controlled, and the easier it is to obtain a license to ship goods that are controlled, the better. From the perspective of national security, the longer the list of controlled items, and the tighter the export licensing requirements, the better.

To balance these competing concerns, the Act eliminated the need to obtain a license to export certain relatively low-technology articles, obligated the Secretary of Commerce to revise the CCL list at least annually, streamlined the license application and approval process, created a process to decontrol goods widely available (either per se or via competing products) in foreign countries and thus not susceptible to U.S. control, and required the President to consult with industry (as well as Congress) before imposing controls for foreign policy purposes. Interestingly, the Act also curtailed the ability of the President to impose a foreign policy control on goods or technology already subject to an existing export contract. Only if prohibiting performance on those contracts is instrumental to remedy a situation posing a direct threat to American strategic interests is a post-contract control
possible.

(6) The *1985 Act* also identified credible enforcement as a goal of the American export control regime. Toward that end, the *Act* clarified CBP – not DOC – has primary responsibility for enforcing export controls at all U.S. ports of entry and exit, and overseas. The *Act* also created new criminal offences against illegal diversions of controlled goods, and strengthened penalties on existing violations.

(7) Continuing a theme from the *1985 Act*, the *1988 Act* contained provisions to cut export disincentives. The *1988 Act* called for further cuts on the CCL, increased efficiency in both the license application procedures and determinations about foreign availability. This *Act* also authorized distribution licenses for multiple exports to China.

(8) The *1988 Act* also continued the theme of the *1985 Act* concerning enforcement. The *1988 Act* barred persons convicted of an export control or *IEEPA* violation – or anyone affiliated with such persons, whether by ownership, control, or position of responsibility – from applying for or using an export license. To use a baseball metaphor, the prohibition amounted to “one strike and out,” and extended to the dugout.


II. *Extensions and Possible Changes*

- **2001 Non-Renewal, But Extensions by Presidential Executive Order**

  Thereafter, in the early 1990s, Congress occasionally extended the *Act* (namely, in March and July 1994). It did so again in November 2000, effective until 21 August 2001, at which point it lapsed. Since then (*i.e.*, in every legislative session including and since the 104th Congress), there has been no agreement, either on Capitol Hill or between legislators and the White House, on a long-term extension, much less a modified one, which would give a sound statutory foundation for the American export control regime.

  Of course, that regime remains in place. The statutory basis cited by the Executive Branch to continue the regime is the *IEEPA*. Essentially, under the *IEEPA*, the President announces an emergency to continue the existing export control regime. The “emergency” is that there is a national emergency caused by the non-renewal of the *EAA*. Typically, the President also issues an *Executive Order*, which is published in the Federal Register, saying the national emergency continues, and thus so too must the regime.\(^{512}\)

to Section 202(d) of the *National Emergencies Act*. 513

The regime to regulate the exportation of dual use items thus takes the form of the *Export Administration Regulations (EAR)*, which are published in the Code of Federal Regulations. 514 Thus, for example, President Bill Clinton issued such *Executive Orders* in August 1995, August 1996, and August 1997. President George W. Bush (1946-, President, 2001-2009) did in August 2001 via *Executive Order* 13222, “Continuation of the National Emergency with Respect to Export Control Regulations,” the first such *Order* to declare an emergency after the Act lapsed. President Barack H. Obama (1961-, President, 2009-2017) did so in August 2012, by extending for one year that *Order*. Doubtless, such *Orders* will continue until Congress passes appropriate legislation.

- **Controversies, Reform Initiatives**

In respect of export control statutory reauthorization, over what issues have officials in the Legislative and Executive Branches battled? More generally, with what problems have these Branches grappled as they consider a new iteration of the *EAA*?

One illustration concerns high performance computers. Beginning in 1998 with the *National Defense Authorization Act*, 515 Congress mandated use of a benchmark for gauging computing ability of an HPC, namely, millions of theoretical operations per second. The DOC organized HPC destination countries into four tiers, and applied MTOPS thresholds.

An export license for an HPC is not necessary for a Tier 1 country, whereas a Tier 4 country is subject to an embargo. The key tier is the third. A dual-control system applies to Tier 3 countries, in which civilian versus military end users are distinguished. License applications for MEUs are more likely than not denied – a presumption of denial. 516 Note, then, that MEUs are not subject to an export prohibition; rather shipments to them requires a license, and DOC BIS operates on a rebuttable presumption against denying a license request.

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514 See 15 C.F.R. §§ 730 et seq.
515 See Public Law Number 105-85, § 1211 (approved 18 November 1997).

In April 2020, DOC expanded its list of “military end user” to cover “not only armed service and national police, but [also] any person or entity that supports or contributes to the maintenance or production of military items – even if their business is primarily non-military.” Karen Freifeld, *Exclusive: In Latest China Jab, U.S. Drafts List of 89 Firms with Military Ties*, REUTERS, 22 November 2020, www.reuters.com/article/us-usa-china-military-companies-exclusive/exclusive-in-latest-china-jab-u-s-drafts-list-of-89-firms-with-military-ties-idUSKBN28307P Exports to these users of a diverse array of items, including aircraft parts and components (e.g., brackets for flight control boxes and engines), computer software (e.g., for word processing), and scientific equipment (e.g., digital oscilloscopes), requires a license. In August, DOC identified 89 Chinese companies, including aerospace companies COMAC and 10 related entities, and AVIC, as “military end users.” *Id.*
An exporter is obligated to give the DOC notice before shipping an HPC above the MTOP threshold to a Tier 3 country. Further, export to a Tier 3 country of an above-threshold HPC is subject to approval from the Secretaries of Commerce, Defense, Energy, and State. If the exportation occurs, then post-shipment verification is needed. Congress also requires the President to notify it of any adjustment in MTOP thresholds. However, by 2001, and continuing at least through May 2003, Congress considered repealing the obligation to use MTOPS as a benchmark.

Aside from HPCs, which is a technical, product specific matter, there are controversies cutting across all forms of merchandise and that go to the operation of the export control regime. Consider various initiatives and directives implemented by Presidents in response to criticisms of the export system. In a scathing January 2007 GAO publication, the GAO reported unnecessary delays and inefficiencies in the license application process, and a lack of evaluative mechanisms to determine the effectiveness of amongst export controls in addition to other complaints.517

In response to complaints and backlogs of export licensing applications by the DDTC at the Department of State, President George W. Bush signed the National Security Presidential Directive (NSPD-56). It provided a 60-day timeline for to complete the review and adjudication process for defense trade licenses submitted under ITAR. That Directive reduced processing times from 112 days in 2002 to 18 days in FY 2011.518

In 2009, the Obama Administration launched the Export Control Reform Initiative.519 The Initiative would provide comprehensive overview and revision of the export control system in response to the criticisms by exporters, stakeholders, and advocates that the process was overly burdensome, inefficient, and cumbersome and had the effect of impeding American international competitiveness. An oft-repeated complaint was the poor coordination and lack of cohesiveness amongst federal agencies involved in export controls.

In April 2011, Secretary of Defense, Robert M. Gates (1943-), unveiled a four-pronged reform strategy to improve the export control system:

1. a single export control licensing agency for dual-use, munitions exports, and Treasury-administered embargoes;
2. a single, unified control list;
3. a single enforcement coordination agency; and

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519 See President’s Export Control Reform Initiative, http://export.gov/ecr/.
(4) a single integrated information technology system, which would include a single database of sanctioned and denied parties.\textsuperscript{520}

In the interests of efficiency, “single” is the common denominator for the reforms.

Methodologically, the Gates strategy would be implemented in three phases. In Phase I, consideration would be given as to how to harmonize the DOC’s CCL and DDTC’s USML. Also, a licensing processes used by the relevant agencies would be standardized, and an “Enforcement Fusion Center” to synchronize enforcement and set a single electronic method to gain access to the licensing system would be created.

In Phase II, a harmonized licensing system would be implemented with identical tiered control lists. Doing so would reduce the aggregate number of licenses required under law. Also in Phase II, certain items would be moved from the USML to the CCL, unilateral controls would be examined, and consultations with multilateral control regime partners to update multilateral controls on particular items would occur.\textsuperscript{521}

In Phase III, the new export control system would debut, subject to Congressional approval. There would be a single, cohesive licensing agency, a single, unified list of controlled items (albeit with a distinction between military and dual use goods, services, and technology – in effect, two tiers in a harmonized list), and a single information technology system for licensing and enforcement.

- **Supplementation with Outbound FDI Controls?**

Like many countries, the U.S. maintains a process for reviewing inbound FDI transactions, specifically proposed mergers or acquisitions in which the target is an American company that produces goods or services with national security linkages, and/or which engages in defense contracting. That process occurs in semi-secrecy through CFUIS, and has spawned a legal specialty unto itself. Amidst the Sino-American Trade War (discussed in a separate Chapter), a lively debate occurred within the Biden Administration, and across Corporate America, as to whether there ought to be a “reverse CFUIS” – that is, limitations on U.S. companies engaging in FDI overseas.

At issue were proposed outbound FDI transactions implicated dual-use goods or services, such as AI, bio-technology, quantum computing, and semi-conductors: restricting them could supplement U.S. export controls on those items. Throughout much of 2023, President Biden considered issuance of an *Executive Order*.\textsuperscript{522} The *Order*, for the first time in U.S. history (other than obvious instances of outright trade sanctions that covered FDI, such as those against Russia and Iran, discussed in separate Chapters) would screen


\textsuperscript{521} JANUARY 2013 CRS REPORT, 10.

sensitive investments – ones with potential military applications – proposed by U.S.-based companies. Its logic was straightforward: why allow a U.S. company to produce dual-use items or transfer technologies through an investment overseas when it could not export the same or similar items from the American homeland?

Businesses fought back. They alleged such an Order would handicap them against foreign competitors from friendly countries. Unless U.S. Allies implemented the same outbound FDI guardrails, then American companies would be denied de novo FDI, and foreign M&A opportunities, which Australian, British, Canadian, and other MNCs could gobble up. That response, however, presumed the foreign competitors were dealing in the same or like dual-use items. It also seemed to mask corporate greed.

III. BIS Entity List

Importantly, the DOC BIS uses the “Entity List” to restrict the export, reexport, and transfer (in-country) of items subject to the EAR (15 C.F.R. Sections 730-774) to entities believed to be participating in actions contrary to the interests of America’s national security or foreign policy interests. Additional licenses are required to export, re-export, or transfer (in-country) commodities, software, and technology to any listed entities. No license exceptions apply, and license applications are subject to a presumption of denial.

However, the Entity List BIS publishes is not exhaustive. American producer-exporters are expected to perform due diligence to ascertain whether a foreign importer is an MEU, even if it is not on the List. Unsurprisingly, BIS made considerable use of the Entity List during the Sino-American Trade War (as discussed in a separate Chapter). That War illustrates (inter alia) the point that targeted companies can be service providers, as when in June 2023) BIS put 31 Chinese, plus an additional 12 Emirati, Kenyan, Laotian, and South African, security and aviation companies. These 43 targets provided flight training to PLA pilots on U.S. and Allied air maneuvers, or helped China acquire U.S.-origin to model hypersonic flight or develop hypersonic weapons.

U.S. DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, ENTITY LIST (2020)

General Description

The Export Administration Regulations (EAR) contain a list of names of certain foreign persons including businesses, research institutions, government and private

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organizations, individuals, and other types of legal persons—that are subject to specific license requirements for the export, reexport and/or transfer (in-country) of specified items. These persons comprise the Entity List, which is found in Supplement No. 4 to Part 744 of the *EAR*. On an individual basis, the persons on the Entity List are subject to licensing requirements and policies supplemental to those found elsewhere in the *EAR*.

**License Requirements Imposed by the Entity List**

The Entity List specifies the license requirements that it imposes on each listed person. Those license requirements are independent of, and in addition to, license requirements imposed elsewhere in the EAR. For example, if you want to export, reexport or transfer (in-country) an *EAR* 99 item to a listed entity and the license requirements for that person as specified in the “License Requirement” column of the Entity List state “all items subject to the *EAR*,” you would have to obtain a license before exporting, reexporting or transferring (in-country) the item, even if the *EAR* 99 item could otherwise be sent to the country of destination without a license provided the proposed end-use does not trigger another license requirement under Part 744 of the *EAR*.

… [P]rovisions of the *EAR* other than the Commerce Control List (Supplement No. 1 to Part 774 of the *EAR*) (CCL) and the Entity List impose license requirements on exports, reexports and transfers (in-country) of items subject to the *EAR*. See, for example, the end-use requirements in Part 744 or the embargo and special destination requirements in Part 746, and note that if any of these parts impose a license requirement, you would have to obtain a license prior to the export, reexport or transfer (in-country) of the item.

**License Application Review Policy**

BIS evaluates license applications to any listed entity according to the policy stated in the “License Review Policy” column of the Entity List. If there is more than one license requirement for a particular transaction (e.g., if the export transaction contains both persons included on the Entity List and an item that requires a license based on reason for control and destination, as determined by the classification of the item on the CCL and the Country Chart), you should submit only one license application, which BIS will evaluate according to all applicable licensing policies. For such license applications, the applicant should indicate the involvement of a person listed on the Entity List. If any applicable policy requires denial, BIS will deny the application, even if another policy provides for approval. For example, if your proposed transaction requires a license based on the item’s reason for control and your proposed consignee is on the Entity List, BIS will evaluate your application on the basis of the CCL licensing policy in Part 742 of the *EAR* and the policy for the consignee stated on the Entity List. If either policy requires denial, BIS will deny your application.

**License Exceptions and the Entity List**

As stated in Section 744.11(a), license exceptions may not be used unless authorized in an entry on the Entity List.
Background and Purpose of the Entity List

BIS first published the Entity List in February 1997 as part of its efforts to inform the public of entities who have engaged in activities that could result in an increased risk of the diversion of exported, reexported and transferred (in-country) items to weapons of mass destruction (WMD) programs. Since its initial publication, grounds for inclusion on the Entity List have expanded to activities sanctioned by the State Department and activities contrary to U.S. national security and/or foreign policy interests.

IV. Export Controls and Human Rights

● October 2020 Cross-Over Rule

Significantly, in October 2020, BIS announced a major development regarding the criteria it uses to construct the Entity List. In its so called “Cross-Over Rule,” BIS announced its expansive view of human rights as a basis for licensing determinations, shifting from “crime control” controls to a broader conception of its role in support of American foreign policy:

BIS also is amending the *EAR* to provide that, except for items controlled for short supply reasons, it will consider human rights concerns when reviewing license applications for items controlled for reasons other than … crime control. This revision is necessary to clarify to the exporting community that licensing decisions are based in part upon U.S. Government assessments of whether items may be used to engage in, or enable violations or abuses of, human rights including those involving censorship, surveillance, detention, or excessive use of force.

… BIS is amending the … *EAR* by revising, in part, the licensing policy for items controlled for crime control … reasons, which is designed to promote respect for human rights throughout the world. BIS also is amending the *EAR* to provide that, except for items controlled for short supply reasons, it will consider human rights concerns when reviewing license applications for items controlled for reasons other than … [crime control]. *This revision is necessary to clarify to the exporting community that licensing decisions are based in part upon U.S. Government assessments of whether items may be used to engage in, or enable violations or abuses of, human rights including those involving censorship, surveillance, detention, or excessive use of force.*

[19 C.F.R.] § 742.7 Crime control and detection.

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(b) Licensing policy.
Applications for items controlled under this section will generally be considered favorably on a case-by-case basis, unless there is civil disorder in the country or region or unless there is a risk that the items will be used to violate or abuse human rights. The judicious use of export controls is intended to deter human rights violations and abuses, distance the United States from such violations and abuses, and avoid contributing to civil disorder in a country or region.

BIS will review license applications in accordance with the licensing policy in Paragraph (b)(1) of this section for items that are not controlled under this section but that require a license pursuant to another section for any reason other than short supply and could be used by the recipient Government or other end user specifically to violate or abuse human rights.\(^{526}\)

Here, then, is a clear link between export controls and human rights, one necessitating International Trade Lawyers to know about measures based on human rights, not just narrowly-construed conception of national security, or old-fashioned economic protectionism.

- **Human Rights as Basis for Addition to Entity List**

  There is no general GATT-WTO rule concerning human rights, only an exception in GATT Article XX(e) for prison labor (discussed in separate Chapters). Aside from certain contemporary FTAs, such as those of the EU, which contain democracy- and/or other human-rights related clauses, most such agreements do not cover the topic. So, human rights tend to be connected – if at all – to trade at the national level, *i.e.*, not at the multilateral or regional levels, but by individual countries through specific measures. Restrictions on forced labor imports, such as the U.S. *UFLPA* (discussed in a separate Chapter), are one example. Trade sanctions against human rights abusers are another illustration. The U.S. imposes SDN designations with respect to certain Iranian and Russian officials (also as discussed in a separate Chapter). Still a third example is in the context of export controls. For the first time, in March 2023, the U.S. expressly listed human rights as a basis for Entity List designation.

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Summary

In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) by adding eleven entities to the Entity List under the destinations of Burma, the People’s Republic of China (China), Nicaragua, and Russia. These eleven entities have been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States. [This portion of the Final Rule is omitted.] In this rule, BIS also amends the EAR to explicitly confirm that the foreign policy interest of protecting human rights worldwide is a basis for adding entities to the Entity List.

Background

The Entity List (supplement no. 4 to part 744 of the EAR (15 C.F.R. Parts 730 through 774)) identifies entities for which there is reasonable cause to believe, based on specific and articulable facts, that the entities have been involved, are involved, or pose a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United States, pursuant to § 744.11(b). The EAR impose additional license requirements on, and limit the availability of, most license exceptions for exports, reexports, and transfers (in-country) when a listed entity is a party to the transaction. The license review policy for each listed entity is identified in the “License Review Policy” column on the Entity List, and the impact on the availability of license exceptions is described in the relevant Federal Register document that added the entity to the Entity List. … BIS places entities on the Entity List pursuant to parts 744 (Control Policy: End-User and End-Use Based) and 746 (Embargoes and Other Special Controls) of the EAR.

The End-User Review Committee (ERC), composed of representatives of the Departments of Commerce (Chair), State, Defense, Energy and, where appropriate, the Treasury, makes all decisions regarding additions to, removals from, or other modifications to the Entity List. The ERC makes all decisions to add an entry to the Entity List by majority vote and makes all decisions to remove or modify an entry by unanimous vote.

B. Amendment to § 744.11 – License Requirements that Apply to Entities Acting or at Significant Risk of Acting Contrary to the National Security or Foreign Policy Interests of the United States: Explicit Inclusion of Protection of Human Rights to Further U.S. Foreign Policy Interests

As part of BIS’s ongoing review and update of the EAR to further the foreign policy interest of protecting human rights, consistent with the Export Control Reform Act of 2018 (ECRA), in this rule BIS amends the “Criteria for revising the Entity List” Paragraph (b) introductory text and the “is informed” provisions of paragraph (c)(3) (Additional
prohibition on persons informed by BIS) of § 744.11 to explicitly confirm a longstanding position that the protection of human rights throughout the world is a foreign policy interest considered in assessing whether the activities of an entity – and those acting on behalf of such entity are contrary to the national security or foreign policy of the United States. This amendment is consistent with the foreign policy objectives set forth at 50 U.S.C. 4811(2)(D), which include the protection of human rights and promotion of democracy.

BIS is amending this provision to confirm this foreign policy interest and its potential application to the Entity List, similar to the current illustrative list of examples of activities that could lead to an entity’s addition to the Entity List, as set forth in § 744.11(b)(1)-(5) of the EAR. This amendment is consistent with the recent decision by the United States Court of Appeals for the District of Columbia Circuit in Changji Esquel Textile Co. Ltd. v. Raimondo, 40 F.4th 716 (2022), which affirmed BIS’s authority to add parties to the Entity List for human rights-related reasons. In that case, the Court found that “[a]dding human-rights violators to the Entity List falls comfortably within” the scope of 50 U.S.C. 4813(a)(16), which authorizes the Secretary of Commerce to “undertake any other action as is necessary to carry out this subchapter that is not otherwise prohibited by law,” and that it did not “discern any clear and mandatory prohibition on adding entities to the [Entity] List for human-rights abuses, particular given the breadth of section 4813(a)(16) and the deference we owe to the Executive Branch in matters of foreign affairs.” Id. at 723, 725.

Further, and as noted by the Court in the Esquel decision (Id. at 720), years before the enactment of ECRA, BIS made explicit reference in its Entity List rules to the agency’s longstanding authority to take action under the Entity List to address human rights concerns. For example, the background sections of two Entity List rules published in November 2012 and April 2014, respectively, each cite a range of “grounds for inclusion,” among them “activities contrary to U.S. national security or foreign policy interests, including terrorism and export control violations involving abuse of human rights” (77 Fed. Reg. 71,097 (Nov. 29, 2012); 79 Fed. Reg. 21,394 (Apr. 16, 2014)). These rules relied upon authority set forth in the Export Administration Act of 1979, as amended, (50 U.S.C. 4601-4623 (Supp. III 2015)), specifically, Section 6 (Foreign Policy Controls). This provision’s Congressional supporters intended that foreign policy controls apply to human rights concerns, including “changing the human rights policy of another country.” H.R. Rep. No. 96-200, at 7 (1979) (Comm. Rep.).

**Savings Clause [Transition Rule]**

For the changes being made in this final rule, shipments of items removed from eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) [No License Required, which is the designation for the majority of U.S. commercial exports] as a result of this regulatory action that were en route aboard a carrier to a port of export, reexport, or transfer (in-country), on March 28, 2023, pursuant to actual orders for export, reexport, or transfer (in-country) to or within a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) before April 27, 2023. Any such
items not actually exported, reexported, or transferred (in-country) before midnight, on April 27, 2023, require a license in accordance with this final rule.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the *John S. McCain National Defense Authorization Act for Fiscal Year 2019*, which included the *Export Control Reform Act of 2018* (ECRA) (50 U.S.C. 4801-4852). ECRA provides the legal basis for BIS’s principal authorities and serves as the authority under which BIS issues this rule.

Accordingly, Part 744 of the *Export Administration Regulations* (15 CFR Parts 730 through 774) is amended as follows:

PART 744 – CONTROL POLICY: END-USER AND END-USE BASED

... 2. Section 744.11 is amended by revising the last sentence of Paragraph (b) introductory text and the first sentence of to read as follows:

§ 744.11 License Requirements that Apply to Entities Acting or at Significant Risk of Acting Contrary to The National Security or Foreign Policy Interests of the United States. ****

(b) ** * * Paragraphs (b)(1) through (5) of this Section provide an illustrative list of activities that could be or represent a significant risk of being contrary to the national security or foreign policy interests of the United States, including the foreign policy interest of the protection of human rights throughout the world. ****

(c) ** * * (3) The export, reexport, or transfer (in-country) of specified items to a certain party because there is reasonable cause to believe, based on specific and articulable facts, that the entity has been involved, is involved, or poses a significant risk of being or becoming involved in activities that are contrary to the national security or foreign policy interests of the United States, including the foreign policy interest of the protection of human rights throughout the world, and those acting on behalf of such entity. * * *

V. Section 233 of 1962 Trade Expansion Act

To enforce national security export controls, Section 233 of the 1962 *Trade Expansion Act* was added via Section 121 of the *Export Administration Amendments of 1985*. Section 233 was further amended by Section 2447 of the *Omnibus Trade and

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529 Public Law Number 99-64.
Competitiveness Act of 1988 to conform to the sanctions authority granted by the Export Administration Act.

Pursuant to Section 233 as amended, a violator of any national security export control under Section 5 of the Export Administration Act of 1979, or any regulation, order, or license issued under that section, may be subject to the controls imposed by the President on imports of goods or technology into the U.S.

VI. 10 Practical Issues and Rules on Exports of Dual Use Items

What rules does an International Trade Lawyer need to know to steer clear of violations of the EAA and EAR? As a practical matter, there are 10 issues to consider, and rules associated therewith:530

- 1st: Is an “Item” Being “Exported”?

The first issue to consider is whether a transaction involves “exportation.” The term “export” can refer to direct export, re-export, or deemed export of a subject “item.”

Assuming the “item” is dual use, what does “item” mean? The term “item” refers not only to commodities, but also to software or technology. Examples fitting within one or more of the “commodity,” “software,” or “technology” categories include building materials, circuit boards, automotive parts, blueprints, design plans, retail software packages, and technical information.

“Direct export” encompasses the sending of any “item” from the U.S. to a foreign destination. How an item is transported outside of the U.S. does not matter in determining the applicability of export license requirements. The transfer can be physical or electronic. Even an oral communication of information suffices. For example, software can be uploaded to the internet, or information can be exported via e-mail or via telephone conversation. Likewise, even a conversation in the U.S. between a Professor of Engineering and her foreign Research Assistant can constitute a “direct export,” because the transfer of knowledge occurred via the discussion. Moreover, even if an item is going to a wholly-owned U.S. subsidiary in a foreign country, or even if money is not changing hands for the item in a sale, the item is still considered to be “exported.”

The term “re-export” refers to an “item” that is exported from the U.S. to a location abroad, and thereafter “re-exported” – that is, transferred in some manner – to yet another destination. Generally speaking, items originating in the U.S. remain subject to the EAR, even if the export occurs later in the commercial chain between or among foreign nationals in a foreign country. However, many such re-exports may go to many destinations without a license or will qualify for an exception from licensing requirements.531 Depending on the


531 See 15 C.F.R. § 730.5(a)
item or the destination location, a subject item that is exported from the U.S. to Thailand, the subsequently re-exported from Thailand to China may still be governed by the EAR. Manifestly, when considering re-exports, it is critical to understand that U.S. jurisdiction and liability for EAR violations extends beyond American borders, continue to follow American goods around the globe. So, the extraterritorial reach of the EAR is essentially borderless.

The term “deemed exports” refers to technology or source code, subject to the EAR, that is released to a foreign national. The technology is “deemed” to be an export to the home country of the foreign national. So, even if the foreign national is within the borders of the U.S. at the time the item is received, release of the technology to that foreigner still is deemed to constitute exportation. The “release of technology” can occur orally, such as through business or academic meetings in which information is exchanged, or visually by reviewing technical specifications of an item or viewing demonstrations of a product or method, such as at a trade show. The deemed export rule is inapplicable to a foreign national holding U.S. Permanent Residency (i.e., a Green Card).

Note that under a classification known colloquially as “NoForn,” information may not be shared with any non-U.S. national. Some American Allies, such as Australia, find this category unnecessarily restrictive, and encouraged the U.S. to loosen it. Would easing the NoForn classification make sense among nationals of the “Five Eyes” countries – the intelligence alliance of Australia, Canada, New Zealand, U.S., and U.K.? Might the restriction hamper the operation of AUKUS?

- 2nd: Is the Item “Subject to the EAR?”

Logically, the next question in any export control matter is whether the item at issue is “subject to the EAR.” Generally, the EAR will apply to items described as “dual use.” A “dual use” item is one that has civil applications as well as terrorism and military or WMD-related applications. However, items “subject to the EAR” are not limited to solely “dual-use” items.

The scope of items potentially subject to the EAR is:

1. all items in the U.S., including those in FTZs or moving in transit through the U.S.;
2. all items originating from the U.S.;
3. foreign-made commodities that incorporate controlled U.S.-origin commodities beyond de minimis levels;
4. certain foreign-made direct products of American-origin technology or software; and

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533 See 15 C.F.R. § 743.3.
534 See 15 C.F.R. § 730:3.
certain commodities produced by any plant or major component of a plant located outside America that is a direct product of American-origin technology or software.\textsuperscript{535}

The expression “dual use” – referring to items that may be sued for civilian or military purposes – captures the majority of controlled items. But, it does not capture their entirety. An item may be single use, yet if that use is for military applications, but is not controlled under ITAR, then the item is subject to the EAR. In effect, the EAR encompasses both dual use items plus this gray-area or default category of items.

The \textit{de minimis} level is any amount in excess of 25\% of the value of the finished foreign-made product. The value is 10 for a country in Group E (explained below), which is one that supports terrorism.

For instance, consider motion sensors. They are dual use, in that they can be used to protect private homes or commercial stores from thieves, but also be used for military purposes, say to detect movements across boundaries. Suppose the sensors are made in France, but with 26\% value added inputs from the U.S. Those sensors are subject to the \textit{EAR}. The American company that produced and sold the inputs to the French manufacturer is responsible for policing the transfer of those inputs into the finished product and all transfers of the finished product. If the sensors wind up in Iran, then the American company – plus the French manufacturer – is liable under the \textit{EAR}.

In some cases, authorization to export technology from the U.S. is subject to assurances that items produced abroad that are the direct product of that technology will not be exported to certain destinations without authorization from BIS.\textsuperscript{536}

$\bullet$ \textbf{3rd: “Who?,” \textit{i.e., Who is Responsible for Compliance}?}\textsuperscript{537}

When considering exporting a “subject item,” what party is responsible for compliance. Section 758:3 of the \textit{EAR} explicitly and expansively delineates the addressees of dual use export control rules: “all parties that participate in transactions subject to the \textit{EAR} must comply with the \textit{EAR}.\textsuperscript{538} In a transaction, parties are free to structure their arrangements and delegate tasks. However, each aspect of their transaction must comply with the \textit{EAR}.

So, if the character of an item renders it subject to the \textit{EAR}, then any person or entity involved in any stage of the export transaction could be responsible for compliance. In an export transaction, the U.S. party in interest is the exporter and is responsible for determining licensing authority and obtaining appropriate authorization. Exporters can and do hire other agents to perform tasks. They may use freight forwarders or courier services.

\textsuperscript{535} Items subject to the exclusive control of another Federal agency are not subject to the \textit{EAR}. For example, items regulated by the Department of State under its ITAR are not subject to the \textit{EAR}.
\textsuperscript{536} \textit{See} 15 C.F.R. § 730:5(b).
\textsuperscript{537} \textit{See} 15 C.F.R. § 758:3.
\textsuperscript{538} 15 C.F.R. § 758:3.
But, the primary onus remains on the exporter to ensure all such downstream parties fulfill all *EAR* obligations.

- **4th:** *Is an Export License Required?*

  After establishing a transaction involves an item covered by the *EAR*, principally, dual use items, and determining the item is being “exported,” the next step is to consider whether an export license is required. A license may be needed if the transaction involves any one of the 10 General Prohibitions under the *EAR*:

  1. Export and Re-export of Controlled Items to Listed Countries (known as “Exports and Re-exports”);
  2. Re-export and Export from Abroad of Foreign-Made Items Incorporating More than a *de minimis* Amount of Controlled United States Content (known as “U.S. Content Re-exports”);
  3. Re-export and Export From Abroad of the Foreign-Produced Direct Product of United States Technology and Software (known as “Foreign-Produced Direct Product Re-exports”);
  4. Denial Orders;
  5. Export or Re-export to Prohibited End-Uses or End-Users;
  6. Export or Re-export to Embargoed Destinations;
  7. Support of Proliferation Activities;
  8. In Transit Shipments and Items to be Unladen from Vessels or Aircraft (known as “In-transit”);
  9. Violation of Any Order, Terms, and Conditions; and
  10. Proceeding with Transactions with Knowledge that a Violation has Occurred or is About to Occur.\(^{539}\)

  Note certain prohibitions (General Prohibitions 1-3) apply to items as indicated on the CCL. Others (General Prohibitions 4-10) prohibit certain activities and apply to all items subject to the *EAR* unless otherwise indicated.

  Whether any of the *EAR* Prohibitions is at issue in a particular context depends on the facts. So, practically speaking, four questions must be answered to determine if, indeed, a license is required on the grounds the transaction is otherwise prohibited:

  1. What is being exported?
  2. Where is the item being exported?
  3. Who is the recipient of the export?
  4. For what purpose will the export be used?

  These questions are discussed in turn below.

- **5th:** *What is Being Exported?\(^ {540}\)*
A preliminary determination as to whether an export license is required depends on classification of that the item at issue. The CCL classifies items “subject to the EAR” into relevant entries on the CCL.\textsuperscript{541} Accurately classifying the product of a company at the outset is critical for a company to comply with trade controls and reduce risk.

The CCL sorts specific items subject to the EAR into the following 10 broad categories:

1. nuclear materials, facilities, and equipment;
2. materials, organisms, microorganisms, and toxins;
3. materials processing;
4. electronics;
5. computers;
6. telecommunications and information security;
7. sensors and lasers;
8. navigation and avionics;
9. marine; and
10. propulsion systems, space vehicles, and related equipment.

Export items falling into these categories are then sub-classified into functional groups based on their equipment, assemblies, and components; test, inspection, and production equipment; materials; software; and technology.

Items subject to the EAR are identified on the CCL by an Export Control Classification Number. The ECCN consists of a letter and some digits that describe the item and underlying reason for the control.

For example, an ECCN may be 3A001.\textsuperscript{542} This listing is for “Electronic Components and Specially Designed Components Therefor.” The first digit relates to one of 10 CCL categories – the same aforementioned categories. The digits corresponding to these categories are:

<table>
<thead>
<tr>
<th>ECCN</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>Nuclear materials, facilities and equipment (and miscellaneous items)</td>
</tr>
<tr>
<td>1</td>
<td>Materials, chemicals, microorganisms and toxins</td>
</tr>
<tr>
<td>2</td>
<td>Materials processing</td>
</tr>
<tr>
<td>3</td>
<td>Electronics</td>
</tr>
</tbody>
</table>

\textsuperscript{541} The BIS designates an item that is subject to its jurisdiction, but not listed on the CCL, as “EAR 99.” That designation, which covers the majority of commercial products, means such an item is unlikely to require an export license, unless the exporter seeks to export it to an embargoed country, a prohibited end-user, or in support of a prohibited end use. \textsuperscript{542} 15 C.F.R. § 774, Supplement 1.

The ECCN may be loosely analogized to product classification in the HTSUS. To be sure, there is no correspondence between ECCN and HTS numbers, but the concept of organizing products into categories is similar. Moreover, just like HTS product classifications are at the 4-, 6-, and 8-digit level, thereby allowing for a product category to be divided into sub-categories, some item listings in the ECCN are broken down into sub-categories, for instance (hypothetically) 3A001a and 3A001b.
4 Computers
5 Telecommunications and information security
6 Sensors and lasers
7 Navigation and avionics
8 Marine
9 Propulsion systems, space vehicles, and related equipment

The letter refers to one of the five product groups that subdivide each of the 10 broad categories. The five product groups are as follows:

A. Systems, equipment and components
B. Test, inspection, and production equipment
C. Materials
D. Software
E. Technology

The second digit identifies the reason for the control associated with the item according to the following scheme:

0 National security (including Dual Use and Wassenaar Arrangement Munitions List) and Items on the Nuclear Suppliers Group Dual Use Annex and Trigger List
1 Missile technology
2 Nuclear nonproliferation
3 Chemical and biological weapons
4 Items warranting national security or foreign policy reasons as determined by the Department of Commerce
5 “600 series” controls items on the Wassenaar Arrangement Munitions List (WAML) or formerly on the United States Munitions List (USML)
6 Anti-terrorism, Crime Control, Regional Stability, Short Supply and United Nations Sanctions

The reasons for control are not mutually exclusive. Thus, the assigned numbers are listed in order of precedence.

For instance, an item restricted for reasons of U.N. sanctions and national security would receive the “0” digit, as the latter is higher priority than the former. Additionally, numbers in either the 2nd or 3rd digit differentiate between multilateral and unilateral entries. An entry with “9” as the 2nd digit identifies the entire entry as controlled for a unilateral concern (e.g., 2B991 for anti-terrorism reasons). However, if “9” appears as the 3rd digit, the item is controlled for unilateral purposes based on a proliferation concern (e.g., 2A292). The last digit is used to differentiate between entries on the CCL.

After the ECCN is a description of the product, and thereafter are sections on

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543 15 C.F.R. § 738:2(d).
544 15 C.F.R. § 738:2(d)(ii).
“License Requirements,” “License Exceptions,” and “List of Items Controlled.” To determine proper classification on the CCL, an exporter may classify the item on its own, check with the manufacturer, or submit a classification request for BIS to determine the proper ECCN. Once an item is properly positioned on the CCL based on its ECCN, the “License Requirements” section for that item should be checked.

Assuming the License Requirements indicate a license for the ECCN-listed item may be needed, those requirements give a 2-character reference as to the reason the item is controlled. The complete list of reasons for control of an item is:

- AT = Anti-Terrorism
- CB = Chemical and Biological weapons
- CC = Crime Control
- EI = Encryption Items
- FC = Firearms Convention
- MT = Missile Technology
- NS = National Security
- NP = Nuclear Non-Proliferation
- RS = Regional Stability
- SS = Short Supply
- XP = Computers
- SI = Significant Items

Once an item is classified on the CCL via its proper ECCN, and the reason for its control is ascertained, the next step is to ask whether a license actually is required based on the ultimate destination of that item. Not all products on the CCL are barred from exportation to every country. Whether they are barred, or whether an export license is required, depends in part on the country, and why the item is controlled in the first place.

- 6th: “Where?,” i.e., To What Country is the Merchandise Being Exported?

The Commerce Country Chart, published by the DOC, explains whether a license is required to export a controlled item to a particular country. The CCC is organized by rows and columns with each country listed and the reasons for control. That is, the rows list (alphabetically) all the countries in the world. The columns are differentiated according to the reason for which an item is controlled. The CCC has eight such designations, so

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545 Even if an item is not explicitly listed on the CCL, an item may still be subject to the EAR depending on whether it is being exported to an embargoed country, to an end-user of concern or in support of a prohibited end-use. An exporter with doubts should submit a classification inquiry to the DOC to confirm the status of the product and its own potential liability.

546 Conversely, products not specifically on the CCL still may require an application for a license to export owing to the foreign destination (or end-user) of that product.

547 Supplement 1 to Part 740 of the EAR.

548 Note the 8 CCC columns are divided into sub-columns, with the sub-columns delineated by control letters like “CB” followed by a number, e.g., “CB1,” “CB2,” and “CB3.” Those numbers and their sub-
there are eight columns corresponding to:

- CB = Chemical and Biological Weapons
- NS = National Security
- NP = Nuclear Proliferation
- MT = Missile Technology
- RS = Regional Stability
- FC = United Nations Fire Arms Convention
- CC = Crime Control
- AT = Anti-Terrorism

It is necessary to determine whether an item is controlled for one reason, or more than one reason. For each country, and for each of the one or more reasons for control, an export license may be required. For example, exportation to Spain may not require a license if the item is controlled for CB purposes. But, if the item is controlled for NP purposes, then a license may be required. An “X” in that column indicates a license is required for that particular country, item, and control reason unless the exporter can qualify for a License Exception discussed below.

Generally, countries listed on the CCC are divided into five groups:

- Group A: Regime Members
- Group B: Less Restricted
- Group C: (Reserved Category)
- Group D: Countries of Concern
- Group E: Terrorism Supporting Countries

Clearly, these groupings range from least restrictive to most restrictive levels of controls.

Group A consists of 44 countries, including Canada, Denmark, France, Germany, and Japan. Group A Members typically participate with the U.S. in cooperative export control groups that establish rules on proliferation of dangerous items.

Most countries fall in Group B. It includes 168 countries, but excludes embargoed countries and some current and former communist countries. The “countries of concern” under Group D are those that pose special national security problems for the U.S. They include China, Burma, Egypt, India, Israel, Russia, Taiwan, and Vietnam. India,

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549 On 23 December 2020, the DOC BIS eliminating Hong Kong as a special destination distinct from China. That change was one of several U.S. responses to China’s actions undermining the autonomy of Hong Kong amidst the Sino-American Trade War (discussed in a separate Chapter), including the overall elimination of Hong Kong’s special trade status. See U.S. Department of Commerce, Bureau of Industry and Security, Removal of Hong Kong as a Separate Destination Under the Export Administration Regulations, 85 Federal Register number 247 83765-83792 (23 December 2020), www.govinfo.gov/content/pkg/FR-2020-12-23/pdf/2020-30704.pdf.
however, was elevated to a “Special Status” country in August 2018, following the DOC’s designation of India as a “Major Defense Partner.”550 Under the EAR, that meant an array of dual-use, high-technology products could be exported to India from the U.S. without a license, as long as they were not considered among America’s prized military or intelligence products. Accordingly, vehicles and engine components, such as aircraft tires, parachutes, and wings, could be exported without a license, but not “ready-for-use military products like the F-15 aircraft, missile launchers, and bomb racks,” as they are considered critical military items on the USML.551

Finally, Group E encompasses Cuba, Iran, North Korea, Sudan, and Syria. This Group is the most restrictive, as the U.S. judges each country in it to support terrorism. (Following the December 2014 U.S. policy shift, Cuba’s status was re-considered, but then evaluated again by the Trump Administration.552) An important implication of designation by the U.S. as a state sponsor of terrorism is that any foreign product shipped to that target country must have 10% or less U.S. content for the U.S. to consider the product outside of its export control jurisdiction. The normal threshold for the U.S. to assert extraterritorial export control jurisdiction is 25 percent.

Applications for a license to export to countries subject to embargoes or strict economic sanctions by the U.S., i.e., Group E countries, are almost certainly to be denied. In contrast, whether a license is needed for exportation to Group A countries depends on the item and reason for its control. As for countries in Groups B, C, and D, a case-by-case assessment based on the facts determines whether a license is needed.

• Responding to China’s Civilian-Military Fusion Policy

Among the Group D countries, China attracted special attention from the Administration of President Donald J. Trump in April 2020. That was because of Chinese President Xi Jinping’s (1953-, President, 2013- ) “civil-military” fusion policy.553 The Administration considered three significant reforms to its dual use export control regime. At issue were items such as optical materials, radar equipment, and semiconductors (including field programmable gate array (FPGA) integrated circuits), which could be used

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550 See Department of Commerce, Bureau of Industry and Security, U.S.-India Major Defense Partners: Implementation Under the Export Administration Regulations of India’s Membership in the Wassenaar Arrangement and Addition of India to Country Group A:5, 83 Federal Register number 150, 38018-38021 (3 August 2018); David Sebastian, Expect Less Paperwork for Defense Exports to India, 35 International Trade Reporter (BNA) 1073 (9 August 2018) [hereinafter, Expect Less.]

551 Expect Less.


by China to strengthen its military and promote its advanced technological sector. (That was based in part on its *Made in China 2025* policy, discussed in a separate Chapter; likewise, Biden Administration October 2022 export controls on chips and chip-making equipment, in relation to industrial policy, are discussed in a separate Chapter).

One step proposed was to withdraw license exceptions (discussed below). That is, the Administration could “do away with the civilian or ‘civ’ exemption, which allows for the export of certain U.S. technology without a license, if it is for a non-military entity and use, …. for Chinese importers and Chinese nationals.” But, removing license exemptions that benefitted Chinese procurers might cause them to look to third countries. In turn, U.S. producer-exporters (such as Intel Corp. with respect to FPGA ICs) would lose business and market standing in China to third-country competitors.

A second debated change:

would stop China’s military from obtaining certain items without a license even if they were buying them for civilian use, such as scientific equipment like digital oscilloscopes, airplane engines and certain types of computers.

If implemented, the measure could block certain shipments to Chinese military importers like the People’s Liberation Army, even if they said the item would be used in a hospital, for example.

The third possible change was clearly extraterritorial, in terms of its reach to non-U.S. entities. The Administration “would force foreign companies shipping certain American goods to China to seek approval not only from their own governments but from the U.S. government as well.” That, of course, would not sit well with foreign companies, and might cause them to look to non-U.S. producer-exporters to source shipments to China.

● **7th:** “*To Whom?*, i.e., Who is the Recipient of the Merchandise?*

In addition to the ECCN criteria, the identity of an individual or organization that is receiving an item may affect whether a license is required. The ultimate end-user of an item cannot be a “bad” end-user.

Differentiating the “good” from the “bad guys” is an analysis separate from the CCL or CCC inquiry described above. Essentially, the analysis involves checking a “black list” of “bad guys.” Before exporting, an exporter should refer to one of the following lists, maintained by the various agencies of the Federal government, of prohibited individuals and organizations:

1. **Entity List: EAR Part 744, Supplement 4**

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554 Exclusive: U.S. Officials.
555 Exclusive: U.S. Officials.
556 Exclusive: U.S. Officials.
557 The lists have been consolidated in a searchable form and are [www.export.gov](http://www.export.gov).
This DOC list is of parties whose presence in a transaction can trigger a license requirement under \textit{EAR}.

(2) Treasury Department Specifically Designated Nationals and Blocked Persons List: \textit{EAR} Part 764, Supplement 3
This list, maintained by OFAC, covers individuals and organizations that are subject to economic and trade sanctions or involved in international drug trafficking or terrorist sponsoring organizations.

(3) The Unverified List
Entities on this list generate a “red flag,” as the BIS was unable to complete an end-use check. In other words, a firm on this list must prove that its products will not be put to a military end-use, otherwise BIS puts that firm on the Entity List.

(4) Denied Persons List
On this list are firms and individuals that the BIS stripped of their export privileges. To transact with a party on the list is unlawful, even if the party located within the U.S.

These lists specifically identify the names and addresses of the parties on them.

Finally, any party involved in the proliferation of WMDs may not be party to an export transaction, regardless of what item is to be exported, without prior authorization. (Such persons would be on one of those lists, depending on the item.) This aspect of licensing places an onus on exporters to inquire about the line of business of the purchasing importer – to “know its customer.” Due diligence, on behalf of the exporter, should be performed on each potential recipient to ensure the item is one typically used by the recipient in its ordinary course of business.

- \textbf{8th:} “Why?,” \textit{i.e., What Use will the Recipient Make of the Merchandise?}

The necessity of a license for an export item may be determined by the planned end-use the importer has for that item. Similar to the “To Whom?” inquiry, the answer to which cannot be a “bad” person, the ultimate end-use of an item cannot be a “bad” one. So, an exporter may not knowingly export or re-export without a license a subject item for an end-use that \textit{EAR} Section 744 forbids.

For example, Section 744 lists restrictions on certain nuclear, rocket systems, and unmanned air vehicles end-uses, as well as certain chemical and biological weapons end-uses. Section 744 has general prohibitions based on the anticipated end-use of the specific item, explains whether license exceptions apply, and contains the review standards to which a license application would be subject. Some criteria that point to a requiring license involving rocket systems and unmanned air vehicles are “the specific nature of the end use; the significance of the export, re-export or transfer in terms of its contribution to the design, development, production or use of certain rocket systems or unmanned air vehicles; the
capabilities and objectives of the rocket systems or unmanned air vehicles of the recipient country; the non-proliferation credentials of the importing country; and the existence of a pre-existing contract." These factors help an exporter in disclosing the minimum standard of evidence needed for a successful license application.

Certain end-uses always require a license. For instance, if an exporter knows, or has reason to know, an item is going to be used for chemical and biological weapons purposes, then it needs a license. Note the standard is actual or constructive knowledge. In applying the EAR, "knowledge" includes more than just:

positive knowledge that the circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its [the circumstance’s] existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person, and is also inferred from a person’s willful avoidance of the facts."

So, suppose an exporter of gas canisters from Kansas to a trading house in Singapore declines to check the website and business reports of that house, after reading journalistic accounts the house routinely ships merchandise to North Korea. If those gas canisters can be used not only for agricultural fertilizer, but also for delivering chemical or biological weapons, then they are dual use. The exporter – owing to self-imposed blindness (not following up on news reports) – is aware they may be used for bad purposes.

9th: License Exceptions

After determining an item requires an export license is required based on the criteria in the aforementioned Steps, it is possible a license exception may be available for the transaction. A license exception confers authorization to export or re-export, under stated conditions, an item that would normally require a license under the EAR. “Subject items” requiring a license under General Prohibition One, Two, Three, or Eight as indicated by the ECCN in the CCL or those items requiring a license because of embargo policies, could be eligible for a License Exception under Section 740. A brief eligibility statement in the License Exception Section following the ECCN indicates whether there is an exception to the transaction via the term “Yes” or “N/A.”

Section 746 specifically applies to exports or re-exports subject to General Prohibition Six for embargoed destinations. For subject items based on end-use or end-users, Section 744 lists exceptions. Exports or re-exports prohibited under General Prohibitions Four, Seven, Nine, and Ten are ineligible for license exceptions. Reviewing whether an item is eligible for a license exception can save an exporter from investing valuable time and money to get a license it does not need. That means the more the exporter knows about every detail of its product, use, and foreign customers, the better.

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558 15 C.F.R. § 744:3(d).
559 15 C.F.R. § 772.
560 See 15 C.F.R. § 740.
10th: Export License Criteria

For dual use items, an exporter may apply for either an individual validated license, which permits a single shipment, or a bulk license, which allows for multiple shipments. Applications for export licenses, or requests for ECCN classification, are submitted to the BIS via its on-line Simplified Network Application Process Redesign (SNAP-R).

For export transactions, only a party in the U.S. may apply for a license to export. The applicant must be the exporter, because the exporter is the principal party in interest.\footnote{15 C.F.R. § 748.4(a)(1).} For re-export transactions, a party in the U.S., the foreign principal party in interest, or an authorized U.S. agent of that foreign principal party in interest, may apply for an export license.\footnote{15 C.F.R. § 748.4(a)(3).} On the application, exporters must disclose the names and addresses of all parties to the entire transaction. Those parties include:

1. The applicant.
2. Other parties authorized to receive the license.
3. The purchaser, which typically is not a bank, forwarding agent, or intermediary.
4. Any intermediate consignee.
5. The ultimate consignee, which is the principal party in interest located abroad that receives the item.
6. The end-user, which may be the same as the purchaser and ultimate consignee.

In effect, the applicant must secure the entire downstream commercial chain. Note that a “principal party in interest” is “one that receives the primary benefit, monetary or otherwise, of the transaction” such as the buyer or seller.\footnote{15 C.F.R. § 772.}

Suppose an item is transferred to an ultimate consignee different from the one listed in the application, and that transferee is a “bad guy.” The applicant may be criminally liable for a false filing, if it knew or should have known of the unauthorized transfer. But, what if the ultimate consignee changes for innocent business purposes, such as cancellation of the contract by the first ultimate consignee, compelling the exporter to find a new buyer? Then, the exporter must inform BIS via a request to amend the license or license application (if it is pending).

Once an application and subsequent documentation are submitted, BIS reviews the materials. What criteria does BIS apply when considering license applications? Broadly speaking, there are two sets of criteria:

1. BIS examines the characteristics of the item, its destination and intended end-use, and the parties involved in the transaction.\footnote{Details on the license application process are available at \url{www.bis.doc.gov/licensing}.}
(2) BIS evaluates the probability and likely effect of diversion of the article or technology for military use.

Additional interagency reviews of the license application by the Departments of State, Energy, and Defense may be conducted, depending on the nature of the item or parties involved in the transaction. For example, the Secretary of Defense is authorized to review a license application if it evokes a national security concern, while the Secretary of State may check a particular application for foreign policy reasons.

Finally, it is vital to appreciate American export licensing rules apply extraterritorially beyond merely the first shipment out of America. Both exportation and re-exportation of a U.S.-origin commodity or technical data listed on the CCL, from one foreign country to another country, requires a license by the original American exporter. Indeed, a foreign-made product containing components or technology of U.S. origin that are on the CCL, needs a license before that product can be exported from a foreign country to another country. To put it clearly, suppose a Kansas company ships a controlled item to Italy, and that item will be exported out of Italy to one or more third countries. Shipments out of Italy, just like the shipment to it, may need a license. Whether one or multiple licenses is needed depends on the case. If the Kansas company knows a priori of the re-exportation possibilities from Italy, then it should disclose that knowledge in its application, with a view to a single license.

To emphasize their extraterritorial reach, in August 2016 (effective 15 November 2016), the BIS and DDTC issued new, harmonized language for a so-called “Destination Control Statement,” or “DCS.” Any exporter was well advised to include this language on shipment of any merchandise on the CCL or controlled under ITAR:

These items are controlled by the U.S. Government and authorized for export only to the country of ultimate destination for use by the ultimate consignee or end-user(s) herein identified. They may not be resold, transferred, or otherwise disposed of, to any other country or to any person other than the authorized ultimate consignee or end-user(s), either in their original form or after being incorporated into other items, without first obtaining approval from the U.S. government or as otherwise authorized by U.S. law and regulations.

What jurisdictional principles in Public International Law justify the long arm of American export controls on dual use items?

One answer could be the nationality principle. Extraterritorial application affects a company located overseas that is owned or controlled by a U.S. person. What constitutes ownership or control? Another justification for the long arm may be the subjective territorial principle: an act occurring outside American borders having effects inside the country. If “bad guys” get dual use items to launch attacks on the homeland, or on American nationals abroad, then the justification is an act outside the U.S. with effects.
inside. Compare the extraterritorial application of U.S. export controls with American Antitrust Law, Banking Law, and Securities Regulation. Are the same justifications used?

VII. September-December 2022 Biden Administration Restrictions on Semiconductor Transfers to China

- September-October 2022 Restrictions

One of the most dramatic examples of the use of export controls to advance industrial policy aims in the context of the Sino-American Trade War came in September-October 2022. (This policy and Trade War are discussed in separate Chapters.) The U.S. imposed an array of restrictions on transfers of semiconductors (i.e., ICs, also called chips) and semiconductor manufacturing equipment to China. As explained below, the new rules established (1) several new Export Control Classification Numbers (ECCNs), (2) additional end use controls, (3) three new Foreign Direct Product (FDP) rules to cover foreign products made with U.S. technology for certain end uses in China, (4) added 28 Chinese entities to the Entity List, and (4) added 31 entities, including Chinese semiconductor manufacturer Yangtze Memory Technologies Corporation (YMTC) to the Unverified List.565

Generally speaking, U.S. MNCs prefer not to be hampered by export controls in their sourcing, FDI, and marketing decisions: they prefer to get what they need from the most efficient (i.e., cheapest cost, highest quality) suppliers, and invest in and/or export to countries based on an amalgam of strategic and technical business considerations. But, the Trade War was well underway, and export control violations were potentially criminal matters. So, despite significant disruptions to their supply chains caused by the new rules on chips they had little choice but to comply.566 Indeed, with other countries joining the U.S. – such as Japan and the Netherlands, in December 2022 – in tightening restrictions on exports of chips and chip-making equipment, essentially no choice at all.567

JEFFREY L. SNYDER, ALAN W.H. GOURLEY, MARIA ALEJANDRA (JANA) DEL-CERRO, JEREMY ILLOULIAN, CHANDLER S. LEONARD & KELSEY CLINTON, CROWELL & MORING LLP, NEW U.S. RESTRICTIONS ON

565 In a rare bit of good news amidst the Sino-American Trade War, in December 2022, China’s MOFCOM announced it was “helping its domestic companies through end-use checks by the U.S.,” so that Chinese firms could be taken off the Unverified List, and avoid being placed on the Entity List. See Jenny Leonard & Debby Wu, China Helps With U.S. Tech Firm Scrutiny in Sign of Easing Tension, BLOOMBERG, 5 December 2022, www.bloomberg.com/news/articles/2022-12-05/china-helps-with-us-tech-firm-scrutiny-in-sign-of-easing-tension?ref=7sxw9Sxl. (Both Lists are discussed in a separate Chapter.)


TRANSFERS TO CHINA FOR SEMICONDUCTOR AND ADVANCED COMPUTING USES, ALL ALERTS & NEWSLETTERS (14 OCTOBER 2022)

Two new rules announced [in the Federal Register\textsuperscript{569}] by the U.S. Department of Commerce, Bureau of Industry and Security (BIS) strive to severely inhibit China’s progress in indigenously producing advanced semiconductors. Although advanced semiconductors are widely used for commercial applications, BIS cited serious concerns regarding China’s use of the technology for WMD and military applications, and enabling human rights violations or abuses. BIS’ announcement follows remarks in September by the U.S. National Security Advisor signaling a shift in the U.S. export control strategy from one of maintaining a “relative” advantage over competitors in certain key technologies, to maintaining “as large a lead as possible.” It remains to be seen if U.S. allies key to the semiconductor supply chain will impose similar export restrictions on transfers to China. Following the announcement of the rules, BIS officials have underscored the importance of multilateral adoption of the new currently unilateral controls, describing engagement with allies as a “priority” for BIS.

A summary of key provisions of the [30 pages of] new rules follows, along with the relevant implementation dates [is as follows]:

**Introduction of New Unilateral Controls on Certain Semiconductors and Advanced Computing Items**

1. **China-Specific Restrictions:** BIS imposed new controls on the export, reexport, and retransfer to/within China of certain semiconductor manufacturing equipment (effective as of Oct. 7 [, 2022]), semiconductors (effective Oct. 21), and other advanced computing items (effective Oct. 21) as well as related software and technology for each category of items. To impose these new restrictions, BIS created a new Regional Security control to limit transfers to China specifically, as opposed to entire groups of countries (though the items are also restricted to Russia, Belarus, and the U.S. embargoed territories).

2. **Other Controls:** Additionally, BIS imposed controls on a separate, but less advanced, group of semiconductors and other advanced computing items (effective Oct. 21) as well as related software and technology. However, these items are only controlled to Russia, Belarus, and the U.S. embargoed territories, and not for transfer to China.


Implementation of Supercomputer and Semiconductor Manufacturing End Uses and End Users

BIS also introduced a new end use control that, in addition to any existing controls under the Commerce Control List (CCL), prohibits the export, reexport, or retransfer to or within China without a license of specified items if there “is knowledge” that the items are destined for the following prohibited end uses:

(1) Semiconductor Fabrication: Effective October 7, the EAR requires a license for the export, reexport, or retransfer of:

(a) any item subject to the EAR (e.g., including EAR 99) when you know it will be for the development or production of integrated circuits (ICs) at a fabrication facility in China that fabricates:
   -- Logic ICs with a production node of 16/14 nm or less;
   -- Memory ICs with 128 layers or more; or,
   -- DRAM ICs using a production node of 18 nm or less.

(b) any commodity, software, or technology, except equipment, controlled on the CCL (i.e., not EAR 99), if you know it will be used for the development or production of ICs at a fabrication facility in China, but you do not know whether the facility fabricates ICs meeting the aforementioned requirements.

(c) any item subject to the EAR (e.g., including EAR 99) when you know it will be used for the development or production in China of any semiconductor manufacturing equipment parts, components, or equipment described on the CCL (even if not subject to the EAR).

(2) Supercomputers: Effective October 21, the EAR will require a license for the export, re-export, or retransfer to/within China of certain CCL-listed ICs as well as certain CCL-listed computers, electronic assemblies, or related components if you know it will be used for:

(a) Development, production, use, operation, installation, maintenance, repair, overhaul, or refurbishing of a supercomputer located in or destined to China; or

(b) Incorporation into, or the development or production of any component or equipment that be used in a supercomputer located in or destined to China.

Both sets of new end use controls are also subject to an “informed by” provision, whereby BIS may inform individuals or entities, either through amendment of the EAR or via specific notice (including by oral notice, followed by a writing) that a license is required for a specific export, reexport, or transfer to/within China because it poses an unacceptable
risk of use in, or diversion for, one of the prohibited end uses.

No license exception can overcome the end use restrictions. Additionally, BIS will apply a general policy of denial for license applications seeking authorization to conduct a transfer for one of the prohibited end uses, except it will consider on a case-by-case basis applications for IC production end uses in China by companies that are headquartered in the U.S. or a Country Group A:5 or A:6 country.

**Expansion of U.S. Jurisdiction Over Certain Non-U.S. Made Products Destined for China**

Building on its recent extensions of U.S. jurisdiction to capture non-U.S. made items destined for Huawei and its affiliates, and more recently to Russian and Belarusian end users, BIS has further expanded the *EAR*’s reach to capture non-U.S. made items that are the direct products of U.S. origin technology or software. These rules are distinct from the *de minimis* rules, which capture non-U.S. made items that incorporate U.S. origin commodities or software, or are comingled with U.S. origin technology. Effective October 21, the newest “Foreign Direct Product Rules” (FDP Rules) capture the following:

1. **Entity List FDP Rule**: Similar to the Huawei FDP Rule that BIS issued in 2020, this rule expands the *EAR* restrictions applicable to transactions with Chinese entities already on the Entity List by adding a footnote to their entry on the Entity List (the “Footnote 4” (“FN4”) entities). The *EAR* already prohibited the transfer of all items “subject to the *EAR*” to these FN4 entities. With this amendment, the *EAR* will also prohibit the transfer of non-U.S. made items that are: (i) the direct product of a range of CCL-listed U.S. technology or software related to microelectronics and computers, or direct products of equipment made from such U.S. technology or software; and (ii) there is knowledge the non-U.S. made item will be used in the production or development of any part, component, or equipment produced, purchased, or ordered by the FN4 entities, or a FN4 entity is a party to any transaction involving the non-U.S. item.

2. **Advanced Computing FDP Rule**: This amendment will capture non-U.S. made high-performance ICs, computers, electronic assembly or related technology meeting the technical parameters of the newly created ECCNs if: (1) the item is destined to China or will be incorporated into any CCL-listed item destined to China, or is technology developed by a China-headquartered company for the production of masks or an IC wafer or die; and (2) is the direct product of certain U.S. origin CCL-listed technology or software related to microelectronics and computers, or the direct product of equipment made from such U.S. technology or software; and (3) the non-U.S. made item meets the technical parameters of the newly established semiconductor and advanced computing items CCL entries. Given the substantial effect of the provision on parties outside the United States, BIS has provided a sample certification to assist transferors in conducting due diligence as to the permissibility of a proposed transaction, though BIS officials have since emphasized the certificate alone would not generally constitute
sufficient diligence.

(3) **Supercomputer FDP Rule:** This change will capture non-U.S. made items that are the direct products of certain U.S. origin CCL-listed technology or software related to microelectronics and computers, or the direct product of equipment made from such U.S. technology or software, if there is “knowledge” that the non-U.S. made item will be used for one of the restricted supercomputing end uses destined for China, discussed above.

**Restrictions on U.S. Person Services**

In another significant broadening of the *EAR*, effective October 12, the new rule follows earlier *EAR* amendments that captured “support” by U.S. persons for military intelligence end users, even with respect to items not subject to *EAR* jurisdiction. The concept is akin to the concept of “defense services” under the *International Traffic in Arms Regulations* (*ITAR*), which has long captured U.S. person activity related to items controlled on the U.S. Munitions List, regardless of the items’ country of origin. Under the new amendments, U.S. persons cannot ship, transfer, or service, or facilitate the shipment, transfer, or servicing of items not subject to the *EAR* but which would have required a license if they were subject to the *EAR* because they were being used in connection with semiconductor fabrication or supercomputers. The rule also prohibits the provision of such “support” by U.S. persons in relation to certain non-U.S. items if the items will be used in China in an IC fab, but the U.S. person is unable to confirm whether the fab produces advanced ICs meeting the end use restrictions.

**Temporary General License**

To avoid disruptions of the IC supply chain, BIS has also announced a temporary general license (TGL), effective October 21, 2022 through April 7, 2023, allowing exports, reexports, or retransfers from abroad to or within China by companies not headquartered in an U.S. arms embargoed or sanctioned cy to allow for activity in China involving advanced IC and computer parts now covered by the new controls. The TGL does not authorize transactions with end users or ultimate consignees in China, nor does it allow activities with Entity Listed parties.

**Unverified List Additions & Rule**

… [O]n October 7, BIS added 31 Chinese headquartered entities to the Unverified List (UVL) on the grounds that the Chinese government has not allowed the end user and pre-license checks that have long been standard for BIS. Notably, BIS added one of China’s fastest growing chip manufacturers, YMTC.

(1) **Unverified List Restrictions:** License exceptions may not be used to transfer items subject to the EAR to entities on this UVL, and in addition, exporters must file an Automated Export System (AES) record for all exports to parties listed on the UVL and obtain a UVL statement, meeting the elements set forth in the *EAR*, from such
parties prior to transferring any item subject to the *EAR* not subject to a license requirement.

(2) *60 Day Review Period:* Significantly, this move now also starts a 60-day clock for BIS to successfully conduct end-user checks without interference from China, or the entities may be added to the Entity List. The rule clarified criteria the End-User Review Committee (EUC) considers as justification for adding certain UVL entities to the Entity List. In tandem, BIS’s Office of Export Enforcement (OEE) issued a policy memo articulating criteria BIS will consider in determining a host government to be interfering so as to effectively prevent BIS from completing *bona fide* checks on foreign parties to an export transaction. The memo outlines an aggressive timeline in cases where BIS determines the host government causes the *bona fides* checks to be unsuccessful.

... BIS officials have ... noted their plans to issue Frequently Asked Questions on the BIS website, reflecting their consideration of industry questions, and likely requests for clarification from U.S. allies, on a rolling basis.

● **December 2022 Restrictions**

In December 2022, the U.S. tacked on an array of additional restrictions to inhibit the transfer of sensitive semiconductor technology to China. BIS added 36 firms – 35 Chinese and one Japanese subsidiary of a Chinese company – to its Entity List: 570

The dramatic action comes after Washington in October unveiled severe export controls designed to prevent China from developing high-end chips or producing the tools required to manufacture the chips domestically, as part of a growing effort to slow its military modernization.

“We are building on the actions we took in October to protect U.S. national security by severely restricting ... China’s ability to leverage artificial intelligence, advanced computing and other powerful, commercially available technologies for military modernization and human rights abuses,” said Alan Estevez, the top Commerce Department official for export controls. 571

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571 *U.S. Adds 36 Chinese Companies* (also reporting that Senate Majority Leader Charles Schumer (Democrat-New York) “has added an amendment to the 2023 defense spending bill that would ban the government from buying or using chips from China’s YMTC, Semiconductor Manufacturing International and ChangXin Memory Technologies. The Senate ... is expected to approve the massive $858 bn defense bill, which has already passed the House.”).
As intimated, all 36 additions to the Entity List were engaged in AI chip R&D, manufacturing, and sales, and the implicated technology supported Chinese military (including aerospace) modernization. Moreover:

Some of the entities were added due to their “demonstrable ties to activities of concern, including: hypersonic weapons development, design and modeling of vehicles in hypersonic flight; designing and producing ballistic missile radomes, using proprietary software to model weapons design and damage; and otherwise supporting military-civil fusion efforts tied to the People's Liberation Army Air Force and Navy,” the Commerce Department said….572

YMTC was one of the targets – indeed, the most prominent one, as it was China’s largest chip manufacturer:

YMTC already held roughly 5% of the global market share in NAND flash memory chips as of the end of last year [2021], and was viewed as the most successful example of China’s chip push to break foreign dominance in the semiconductor arena. However, as Apple previously considered using YMTC’s chips for its products, some serious regulatory scrutiny from the U.S. arose over national security concerns.573

BIS targeted YMTC because it had allegedly violated U.S. export controls by supplying Huawei with telecommunications equipment subject to those controls, and (along with YMTC’s Japanese subsidiary) posed a risk of diverting controlled technology. All targeted companies, then, would have a difficult time getting access to U.S. technology, as BIS would be ill-disposed to granting a license to export to them. In other words, BIS moved YMTC from the Unverified to the Entity List. Further, of those three dozen companies, to 21 of them the U.S. applied the FDP rule (albeit not to YMTC). Hence, non-U.S. companies were barred from exporting to those 21 entities merchandise that contained a specified amount of U.S. technology.

Manifestly, the use of export controls focusing on AI chips had become akin to a “smart sanction,” in that BIS identified and aimed its measures at key Chinese players, rather than shooting broadly at a wide range of Chinese companies not clearly involved in semiconductor work. Knowing which company did what in a supply chain, and with what merchandise, was crucial to the success of the Entity List and FDP Rule in advancing U.S. national security interests. Thus, for example:

One of the hardest hit groups was Cambricon, one of the leaders of a dynamic breed of chip design companies that has been driving the growth of China’s semiconductor and AI industries. The company and nine of its

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573 U.S. Blacklists Chinese Chipmaker.

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affiliates were placed on the Entity List, and also subjected to the Foreign Direct Product Rule.

Cambricon is a critical company in China’s domestic chip supply chain. One Cambricon engineer said the U.S. export controls introduced in October had not affected the group much because their chip designs did not meet the target threshold.

However, the entity listing will create a major problem because it sources chip intellectual property from U.K.-based Arm and chip design tools from U.S. makers Cadence and Synopsys. It also relies on Taiwan’s TSMC to produce the chips it designs.

The U.S. also listed Tiandy, a surveillance camera and facial recognition software company, for allegedly facilitating the repression of China’s Uyghur minority and helping Iran obtain U.S. technology.

Other companies added to the list include Chinese chip toolmaker Shanghai Micro Electronics Equipment Group and state-owned military suppliers such as AVIC Research Institute for Special Structures of Aeronautical Composites and affiliates of China Electronics Technology Group Corporation.

In addition, the U.S. hit Shanghai Integrated Circuit Research and Development Center, a company backed by the Shanghai government that is involved in efforts to build domestic chips without using American technology. The group is also working with Huawei, which is already on the entity list based on concerns that it could facilitate Chinese espionage around the world.574

However, these measures did not signal that export controls were a game of a sovereign entity (the U.S.) versus private companies (in China). To the contrary, as the Chinese government was “remov[ing] barriers between its military and civilian sectors,” obfuscating the public-private distinction in China.575 Indeed, in January 2023, BIS extended all of the chip and chip making export controls to Macau.576 That was because China sought to circumvent the measures by centering semiconductor research in Macau,

574 U.S. Adds 36 Chinese Companies.
and then divert products or technology to the Mainland. But, of course, Macau was under
the control of the CCP, notwithstanding its status as a separate customs territory.

The only bit of good news for China from the December 2022 measures was BIS
removed 25 Chinese companies from the Unverified List (of the 31 it had added to that list
in October), after it determined “they were not using U.S. technology inappropriately.”577
That news was not good enough to keep China from retaliating in both rhetoric and
practice. First, “[t]he Chinese Embassy in Washington said the United States was engaging
in ‘blatant economic coercion and bullying in the field of technology,’ undermining normal
business activities between Chinese and American companies and threatening the stability
of global supply chains,’” and that “‘China will resolutely safeguard the lawful rights and
interests of Chinese companies and institutions.’”578

Second, China filed suit against the U.S. at the WTO.579 China took aim at many
dimensions of the export control regime: the ECCN rules, Entity List FDP Rule, End
User/End Use Rules, and U.S. Persons Activities Rules. Among the key claims China made
were that the regime violated the:

-- GATT Article I:1 and XI:1 MFN and QR rules, because, respectively, it
  singled out China and entailed export licensing,
-- GATT Article X:1 and X:3 transparency rules, because it was not published
  promptly to allow China to be acquainted with it, and enforced in a non-
  uniform manner,
-- GATS Article VI rule, because it entailed trade-restrictive measures of
  general application that were not administered in a reasonable manner,
-- TRIPs Agreement Article 28 rule, because it failed to allow patent owners
  the right to assign their patents or conclude licensing contracts.

Almost certainly, assuming consultations failed to resolve the dispute, the U.S. would need
to defend the case under the national security exceptions in GATT Article XXI, GATS
Article XIV bis, and TRIPs Agreement Article 73. That defense – one which the U.S. would
not want to invoke in the first place, and viewed as self-judging – had failed in four Panel
cases published in December 2022 involving Section 232 measures on steel and aluminium
(discussed in a separate Chapter).

VIII. Case Law on Illegal Exports of Dual Items

● Consequences of Non-Compliance580

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577 U.S. Adds 36 Chinese Companies.
578 Quoted in Biden Blacklists China’s YMTC
579 World Trade Organization, China Initiates WTO Dispute Complaint Targeting U.S. Semiconductor
World Trade Organization, United States – Measures on Certain Semiconductor and Other Products, and
Related Services and Technologies, Request for Consultations by China, WT/DS615/1, G/L/1471 S/L/438,
580 See 15 C.F.R. Section 761.

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As the above discussion intimates, typical EAR violations are:

1. Exporting to a “denied person,”
2. Exporting for a known prohibited end-use without a license,
3. Exporting a controlled item to a country in which a license is required,
4. Causing, aiding, or abetting a violation, misrepresenting or concealing facts, and
5. Proceeding with a transaction knowing, or with reason to know, an EAR violation has occurred or may soon occur.

What are the penalties for violating the EAR (the implementing regulations for the EAA) or EAA (the statute itself)?

They are severe. Failure to comply with the EAA and EAR may result in criminal and civil administrative sanctions. It is not uncommon for a defendant to be charged both criminally and civilly, with alleged violations of other American regulations, to boot. Note that authority to impose penalties is under the IEEPA during periods when the EAA has lapsed. That is because the IEEPA (along with the EAA) provides statutory authority for the EAR, thus covering for EAA lapses.

On 16 October 2007, President George W. Bush signed the International Emergency Economic Powers Enhancement Act (IEEPA Enhancement Act), thereby amending IEEPA Section 206. The Enhancement Act boosted criminal and civil penalties available under the IEEPA for violations of economic sanctions implemented by OFAC and EAR. Criminal fines increased from $50,000 to up to $1,000,000 per violation, though the maximum imprisonment period of 20 years remained the same. Administrative penalties increased from $11,000 per violation, and $120,000 per violation in cases involving items controlled for national security reasons under the EAA, to $250,000 per violation, or (depending on the case) twice the amount of the value of the violating transaction.581 The jumps in monetary penalties underscore the importance of these offenses.

The Office of Export Enforcement at the BIS conducts domestic investigations, works with DHS, which conducts overseas investigations, and is responsible for enforcing sanctions.582 Supplements Numbers 1 and 2 to Part 766 of the EAR provide guidance on the settlement of administrative enforcement cases, and lists factors BIS uses to set penalties. Most importantly, voluntary self-disclosure of a violation by an offender can make the difference between a warning letter versus a fine. Conversely, attempting to conceal a violation signifies disregard for export compliance regulations and is likely to

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exacerbate any sanction. Anecdotally, about 90% of cases settle, which reflects the cost of defending such cases and desire of defendants to minimize damage and move on.

Failure to comply with export control regulations also can result in denial of export privileges for offenders, seizure and forfeiture of the subject items, and cross-debarment in the denial of licenses for items controlled under the AECA in conjunction with the State Department. Offenders could be prohibited from participating in any transaction subject to the EAR, and business and individuals from participating in export transactions with a denied individual. Such denial has the effect of blacklisting the violator from the industry by barring it from transactions subject to the EAR and making it unlawful for other businesses and individuals to participate with a denied person.

It is important not to be naïve about suspicious circumstances of a potential export transaction. Purchase of a product not typically within a buyer’s business area, or hesitancy by a customer to sign a warranty or representation to adhere to export control rules, are “red flags.” Evasiveness by a buyer about the destination or end-use of an item is another “red flag,” as is a difference between the country of destination and the money trail for the source of payment. Scrupulous due diligence before commencing an export transaction reduces risk of non-compliance, and help mitigate any penalty.

**Inter-agency 2013 Weatherford International Case**

That a company is alleged by the BIS to have committed an EAR violation often triggers investigations by other regulators. Because of the complex nature of export control regulations and anti-boycott sanctions, it is probable that actions by an alleged perpetrator fall under the jurisdiction of the DOC, DOJ, and Department of the Treasury, plus the SEC. If so, then penalties may be elevated, as each agency conducts its investigation and imposes criminal and/or civil penalties, and a global settlement (with all regulators simultaneously) may be elusive.

Charges levied in 2013 against Weatherford International Ltd., a Swiss-based oil equipment and services company, are a case in point. A giant oil field service company, Weatherford employs more than 65,000 employees in over 100 countries. It was headquartered in Houston until 2007, and thereafter shifted to Geneva, leaving some operations in Texas. The case ended with a combined $252 million settlement in penalties and fines of investigations by the Commerce, Treasury, and Justice Departments, and SEC. Weatherford and four of its subsidiaries pled guilty to export control violations administered under the IEEPA and TWEA, and to anti-bribery provisions of the FCPA. The

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Department of Justice, OFAC, and BIS conducted a joint criminal and administrative export controls investigation resulting in a combined $100 million penalty for violations. The case set two records: $50 million was the largest penalty imposed by the BIS; and $50 million in criminal fines and monetary penalties was the largest set by OFAC for non-banking offense.\(^{584}\)

The export control violations against Weatherford International and its subsidiaries stemmed from conduct between 2002 and 2007 in violation of the \textit{EAR} and Iranian Transactions and Sanctions Regulations. BIS charged the company with exporting and re-exporting $12 million worth of oil and gas drilling equipment to Iran via Weatherford’s Dubai-based subsidiary, between 2004 and 2007. Further, Weatherford transferred $20 million worth of oil and gas equipment (\textit{e.g.}, drill collars and stabilizers, measuring-while-drilling orientation modules, and mud motors) to Cuba, via Canada, between 2005 and 2007. Additionally, Weatherford exported pulse neutron decay tools, listed under the CCL for nuclear non-proliferation reasons, to Venezuela and Mexico without requesting the necessary licenses.

In addition to these violations based on the end destination of the exported merchandise, the Weatherford’s subsidiaries were charged with \textit{EAR} violations for concealing the ultimate end-destination of the exports. Weatherford Oil Tool Middle East Ltd. concealed its exports of oil and gas equipment between 2002 and 2008 were shipped to Iran and Syria. Weatherford Production Optimization (U.K.) Ltd. was charged with evasion of the \textit{EAR} by hiding its exports of oil well production optimization items to Iran during 2003 and 2006. Precision Energy Services ULC Canada transferred oil and gas equipment for export to Cuba between 2005 and 2006. Lastly, Precision Energy Services Colombia Ltd. was charged with export and re-export of essential oil and gas equipment to Cuba during 2006 and 2007. In respect of all charges, the company allegedly acted with knowledge that a violation of the \textit{EAR} would occur.

As part of the settlement agreement for export control violations, in addition to the $50 million penalty imposed by BIS, Weatherford was required to hire a third-party expert to audit the company’s compliance with American export control laws for 2012, 2013, and 2014. All export or re-exports to Cuba, Iran, North Korea, Sudan, and Syria were audited.

The inter-agency collaborative effort in this case was unsurprising, given the egregious and far-reaching violations by Weatherford and its efforts to cover them up. Its actions not only drew the ire of multiple agencies, resulting in large criminal and civil penalties, but also cost it $125 million in legal fees (as of 2012), $44 million in shuttering facilities (between 2007-2009) in sanctioned countries, and reputational damage. The long arm of American justice was on display: government agencies successfully pursued \textit{EAR} violations by Weatherford’s business operations in five different countries stemming from their exportation of controlled items, some of which originated in the U.S. The fact

\(^{584}\) In respect of the $50 million criminal sanctions, the Justice Department and Weatherford signed a DPA whereby Weatherford paid a $48 million monetary penalty, plus a $2 million in criminal fines for the guilty pleas by two of its subsidiaries.

\textit{International Trade Law E-Textbook} (Raj Bhala, 6\textsuperscript{th} Edition, 2025)  
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Weatherford retained operations in Texas even after moving headquarters to Switzerland only strengthened the American jurisdictional claim.

The *Weatherford International* case offers at least three lessons. First, every multinational corporation must be cognizant of the behavior of its subsidiaries, branches, agencies, and representative offices, wherever located. Second, it must secure its entire global supply chain. Third, to paraphrase an adage, “the cover up often is worse than the crime.” If a violation occurs, then immediate, voluntary disclosure to the relevant authorities is the loss-minimizing legal strategy. In fact, the above-mentioned $100 million in civil and criminal penalties do not include the sums Weatherford paid to resolve investigations by the Treasury Department and SEC. In the end, the total sum Weatherford paid to resolve all cases brought by the U.S. government was $253 million.

IX. **Post-Cold War Restrictions:**

1996 *Wassenaar Arrangement*

Since the end of the Cold War, there has been a major shift in the locus of decision-making as to what articles are, or ought to be, subject to export controls. Succinctly put, that shift is from multilateralism to unilateralism. During the Cold War Era, from the late 1940s until early 1990s, the U.S. made these determinations in partnership with its non-communist allies in Western Europe, Japan, and other parts of the world. An informal body, COCOM, served as a multilateral forum for cooperation on export control matters. The Cold War focused attention on the need for cooperation and coordination to prevent or restrict sensitive technology shipments to Communist countries. Thus, from 1950-1994, Japan, and all countries in NATO, save for Iceland, participated in COCOM, meeting periodically to set policy, publish lists of controlled items, and develop effective procedures. Notably, the 1979 Act directed the President to negotiate with COCOM partners on ways to cut the scope of export controls.

Few, if any, would doubt the end of the Cold War was a welcome development. But, it has created a void in which two tendencies are manifest. One is that individual governments, notably the U.S., can and do establish unilateral solutions to export issues. They do so because authority over export control regulation is devolved, both across countries and within the government of a particular country, over export controls. This trend may displease prospective exporters, insofar as it creates an “exporter beware scenario,” because it suggests all merchandise may be exported unless prohibited, but creates uncertainty as to what specific articles or technology may be prohibited. But, the rules are supposed to serve over-arching interests of the country imposing them.

The second post-Cold War Era tendency concerns the proliferation of bad actors, some of them non-state entities. Groups like *Al Qaeda* (which in Arabic means “the base”) seek to obtain WMDs and put them to wicked ends. Ironically, the second tendency may reinforce the first, yet the first tendency may be a less effective way of dealing with the second one than a rigorous multilateral export control regime. To be sure, the *Wassenaar Arrangement* of 1996 (formally known as *The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies*) established a new
international group to perform many of the same functions as COCOM.

This Arrangement is a 1996 deal establishing a new international group to perform many of the same export control functions as COCOM. At the end of the Cold War, members of Coordinating Committee for Multilateral Export Controls (COCOM) determined an East-West focus was no longer the best approach to international stability and security. On 16 November 1993, 17 COCOM members agreed to terminate COCOM and establish a new group. On 19 December 1995, the Agreement to Establish the “Wassenaar Arrangement” was reached in Wassenaar, The Netherlands. The Arrangement was operative in September 1996, with headquarters in Vienna. GATT Article XXI(b)(ii) provides the justification for this Arrangement, as it assures each WTO Member that GATT does not bar it from “taking any action … it considers necessary for the protection of its essential security interests … relating to the traffic in arms, ammunition, and implements of war, and to such traffic in other goods and materials … carried on directly or indirectly for the purpose of supplying a military establishment.…”

The principal aim of the Arrangement is to contribute to regional and international security and stability by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies. In addition, the Arrangement complements and reinforces exiting control regimes for weapons of mass destruction and their delivery systems. The decision to permit or deny transfer of any item is the sole responsibility of each participating state. Indeed, all measures with respect to the Arrangement are adopted and implemented based on national discretion. There are 40 states in the Arrangement:

- Argentina
- Australia
- Austria
- Belgium
- Bulgaria
- Canada
- Croatia
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Ireland
- Italy
- Japan
- Latvia
- Lithuania
- Luxembourg
- Malta
- Netherlands
- New Zealand
- Norway
- Poland
- Portugal
- Korea (Republic of)
- Romania
- Russian Federation
- Slovakia
- Slovenia
- South Africa
- Spain
- Sweden
- Switzerland
- Turkey
- Ukraine
- United Kingdom
- United States
Two principal bodies govern the *Arrangement*.

The decision-making body of the *Arrangement* is the *Wassenaar Arrangement* Plenary, which is comprised of representatives from each member states and meets annually. The *WA* Plenary also establishes several subsidiary bodies, such as the Licensing and Enforcement Officers Meeting, which prepare recommendations for Plenary decisions. The Plenary Chair rotates annually among member States. The other principal body, the Secretariat, is based in Vienna. It provides necessary support to *Arrangement* operations.

The *Arrangement* has adopted several control lists, each of which identifies military and dual-use goods and technologies. One such list, the Munitions List, contains 22 entries on items marked for military use. These goods include:

- (1) Small arms and light weapons (and related ammunition).
- (2) Tanks and other military armed vehicles.
- (3) Combat vessels (surface or underwater).
- (4) Armored and protective equipment.
- (5) Aircraft and unmanned airborne vehicles, aero engines, and related equipment.

The Official Website of the *Wassenaar Arrangement* sets out comprehensive details concerning the Munitions List.585

The List of Dual-Use Goods and Technologies is divided into nine primary categories, each of which corresponds to a particular dual-use good or technology, such as material processing, electronics, computers, navigations and avionics and propulsion, amongst others.

States participating in the *Arrangement* also agree to report the transfer of certain goods to non-*Arrangement* countries. In particular, each participating state must issue reports detailing any transfers of particular arms, such as battle tanks, warships and armored combat vehicles, outside of the Arrangement. The reporting requirements equally apply to sensitive dual-use goods and technologies, as determined by the *Arrangement*.

In late 2006, the *Arrangement* increased efforts to prevent the intangible transfer of dual-use and conventional weapons technology to non-states. Examples of technical data transferred by intangible means, include blueprints, plans, diagrams, models, formulae and tables for the development, production, or use of controlled products.586

What are the strengths and weaknesses of the *Arrangement*? Recall the erosion of multilateralism in the export control arena when studying post-9/11 U.S. border security measures. Has the same shift occurred with respect to importation?

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585 For further details regarding the *Wassenaar Arrangement*, see [www.wassenaar.org](http://www.wassenaar.org).
Finally, every export restriction, as well as every border security measure, potentially pits the government against the business community. Is tension between traders seeking efficiency and regulators seeking control an immutable feature of these kinds of trade restrictions? To what extent is the discourse characterized by the public sector arguing it knows best, based on secret intelligence, what to regulate and who to ostracize, and the private sector retorting that open trade (and investment) relations, which create interdependence, are the best long-term guarantee of peace and security?


- Background and Participants

The GATT Article XXI(b)(ii) national security exception does not prevent a WTO Member from implementing a trade measure “relating to the traffic in arms” that is “necessary” to “protect[] … its essential security interests.” This exception contemplates threats to the interests of a particular Member. It does not view cross-border arms trafficking as a globally systemic problem, nor does it link such trafficking to human rights violations. The U.N. Arms Trade Treaty (ATT), which entered into force on 24 December 2014, is a landmark accord filling this void. Signatory countries are called “States Parties,” and as of October 2017 there are 92 of them (i.e., that have signed and ratified or otherwise acceded to the ATT). Each State Party is obliged to “take appropriate measures” under its domestic law to implement the ATT. (Article 14)

Notably, the ATT cannot be used as a basis to void a defense cooperation agreement concluded by States Parties. (Article 26(2)) That is, if multiple Parties have a trade deal on conventional arms, ammunition, or components, then neither can cite the ATT to nullify their accord. The Treaty is no excuse to void their deal.

The U.N. General Assembly voted to adopt the ATT on 2 April 2013, and it was opened for signature (as per Article 21(1)) on 3 June 2013. The Treaty is of unlimited duration, but any State Party can withdraw from it following 90 days of giving notice to all other Parties. (Article 24(1)-(2)) Parties are free to take a reservation to the ATT that is not incompatible with its object or purpose. (Article 25) In the event of a dispute about the interpretation or application of the Treaty, Parties should resolve it through “negotiations, mediation, conciliation, judicial settlement, or other peaceful means [including, as per Article 19(2), arbitration].” (Article 19(1)) The ATT itself contains no dispute resolution mechanism.

For the ATT to enter into force, 50 States had to ratify it. (Article 22(1)) Including the U.S., 130 countries signed it. However, in May 2019, President Donald J. Trump (1946-587)

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Notable non-signatories are Afghanistan, Burma (Myanmar), China, Canada, Cuba, Egypt, India, Indonesia, Iran, Iraq, Jordan, Kenya, Kuwait, Laos, Morocco, Oman, North Korea, Pakistan, Qatar, Russia, Saudi Arabia, Sudan, Syria, Tunisia, Vietnam, and Yemen. American participation as a signatory matters, because the U.S. accounts “for about 80 percent of the world’s export in arms.” Yet, the U.S. never became a State Party.

Why, then, did America – the largest exporter of arms in the world – support the idea of an ATT (at least until it withdrew its signature)? Because a multilateral accord on cross-border arms trade, which is outside the ambit of the GATT-WTO regime, aligned with American foreign policy and national security goals. The ATT is a vehicle by which other countries raise their export control regulations to the “gold standard” level of those in the U.S. Put bluntly, the ATT multilateralizes America’s statutory position: it asks State Parties to establish export and import control systems akin to American ones. Further, the ATT helps other countries prevent transfer of conventional arms capabilities to rogue states, terrorist groups, and groups seeking to destabilize America’s friends and allies. So, for whatever externalities the ATT affords, in respect of curtailing trade in instruments used to perpetuate human rights violations, it is best not to be naïve about the pragmatic origins and goals of the bargain.

The 28 Articles of the ATT regulate cross-border trade in arms by establishing common international standards that reflect the American model. Recognizing the harmful effects of trade in arms, the ATT aims to block arms flows to conflict regions, and keep weapons from (or being trans-shipped or diverted to) human rights abusers, terrorists, pirates, and warlords. The ATT explicitly embodies the link between security, on the one hand, and socioeconomic and humanitarian conditions, on the other hand. Its existence bespeaks the adverse impact of trafficking on innocents caught up in violence, particularly women and children. The ATT also accepts “the legitimate political, security, economic and commercial interests” of a State Party in cross-border arms trade, including for “recreational, cultural, historical, and sporting activities,” and the “sovereign right” of each Party to regulate such trade within its territory. By no means, then, is the ATT an effort to shut down all cross-border arms trade. The Treaty is not about “zero tolerance,” but about differentiation of legitimate from illegitimate trade.

Indeed, recognizing protests of gun lobbying groups such as NRA, the ATT takes pains to stress it applies only to cross-border trade in arms. Its Preamble explicitly reaffirms the sovereign right of a State Parties to (1) regulate arms exclusively within their territory, and (2) individual and collective self-defense as indicated in Article 51 of the U.N. Charter. The ATT encapsulates growing international sentiment that moral standards need to be

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591 ATT, Preamble, ¶¶ 4-5, 13.
applied to the arms trade. But, it leaves actual enforcement of its obligations undetermined, as it says vaguely (in Article 14) that a State Party “shall take appropriate measures to enforce national laws and regulations that implement the provisions of this Treaty.” Of course, Parties are free to seek international assistance to implement aspects of the ATT, for example, in respect of disarmament, demobilization, and stockpile management. (Article 16(1))

- **Scope**

Specifically, the ATT (as per Article 2(1)) applies to trade in conventional arms, namely, eight itemized categories of conventional arms: (1) armored combat vehicles; (2) attack helicopters; (3) battle tanks; (4) combat aircraft; (5) large-caliber artillery systems; (6) missiles and missile launchers; (7) small arms and light weapons; and (8) warships. The Treaty does not define these categories, nor does it refer to HS product categories. Is a specially-equipped Humvee a “battle tank”? It is used to carry military personnel to and from battle. Would a plane used for espionage, or mid-air refueling, be considered “combat”? They facilitate it. Is a vessel that captures torpedoes a “warship”? Its defensive action is associated with war. The ATT leaves these and many other questions are open.

The ATT does not apply to any conventional weapons outside of these categories, nor to nuclear weapons. It also (as per Article 2(3)), is inapplicable to cross-border, intra-country transfers, that is, the international shipment of arms “by, or on behalf of” a country “for its use,” so long as the arms “remain under” the ownership of that country. For example, assuming America is a State Party, then a transfer by the DOD of small arms from Fort Riley, Kansas to Camp Arifjan (a U.S. Army installation) in Kuwait is not within the scope of the ATT. Arguably, the temporary possession of those arms by Kuwaiti forces, with title to the weapons remaining in American hands, would be excluded from the scope.

What about ammunitions and parts? They are within the scope of some, but not all, ATT provisions. It would make little sense to regulate trade in conventional arms, but not in munitions fired, launched, or delivered by those arms, and not components of arms that enable them to be exported in disassembled form, and easily reassembled by an importer. So, the ATT (in Articles 3-4) calls on each State Party, to establish and maintain a national export and import control system to regulate exports of ammunition (e.g., bullets, powder, and shells) and munitions (e.g., guns, missiles, revolvers, and rifles) that are fired, launched, or delivered by the covered types of arms (e.g., tanks), as well as exports of parts and components thereof.

Notably, the ATT does not ban trade in items used to commit human rights abuses. Though the U.S. occasionally imposes sanctions against certain countries with respect to such torture items (such as Iran, as discussed in a separate Chapter), world trade in such merchandise continues to flourish. That is ironic. As the U.N. Office of the High Commissioner for Human Rights pointed out in a 13-page, July 2022 Report, “while

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torture, and also cruel, inhuman or degrading treatment or punishment, is banned [as a preemptory norm] under International Law, there is a lack of global curbs on the trade in such equipment” as “prisoner-worn shock devices and spiked batons, [which are] … ‘inherently abusive,’ and on “police tools, like tear gas, that can be misused for torture or ill-treatment.”

Banning trade in such merchandise, however necessary and noble, would be dicey. As intimated, a clear delineation would have to be made, on a product-by-product basis, between military, security, or police equipment that is used for legitimate law enforcement purposes as distinct from outright torture. Almost certainly, a ban would be over-inclusive (covering, for example, essential riot-control items) and/or under-inclusive (as simple carpentry tools can be used for nefarious purposes). In drawing these lines, consider the interests of exporting and importing country governments – including, respectively, generating revenue and retaining political power.

- **Infrastructure**

  The ATT (Article 17(1)) sets up a provisional Secretariat (via Article 17(1)), the initial meeting of which was in August 2015 in Mexico City. The Treaty (Article 18) calls for establishment of a permanent Secretariat, which occurred at the Mexico City meeting, and which is housed in Geneva. The Secretariat assists the Parties in implementing the ATT. The Secretariat, under Article 17, convenes periodic meetings – called Conferences of States Parties – about the ATT. At the “CSPs,” Parties take decisions by consensus, and (under Article 20) consider possible amendments. Information is posted on the Treaty website, [http://thearmstradetreaty.org](http://thearmstradetreaty.org).

- **Three Basic Prohibitions**

  The ATT sets three basic prohibitions on conventional arms trade. All three prohibitions, which might be termed “hard” law obligations, as well as additional “soft” law duties, presume a State Party has a “National Control System,” that is, an export control regime, including a “National Control List,” to implement the ATT. Indeed, Article 5(2) mandates creation and maintenance of such a System. Parties must provide their Control Lists to the Treaty Secretariat and to each other, and designate a domestic point of content for ATT matters, but only “are encouraged” to make the Lists publicly available (Article 5(4)-(6)).

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First, a State Party is prohibited from transferring arms in violation of U.N. Security Council measures (arms embargoes in particular, under Article 6(1)). Second, a Party must not violate other international obligations under international agreements (under Article 6(2)). These obligations are sensible and unsurprising.

The third prohibition is innovative in its explicit links to Human Rights Law and International Humanitarian Law. The ATT puts the onus on States Parties to review cross-border contracts to ensure weapons are not used for human rights abuses, genocide, violations of humanitarian law, war crimes, or terrorism. Article 6(2) says:

A Party shall not authorize any transfer of conventional arms [as listed in Article 2(1), or ammunitions or parts, as listed in Articles 3-4, respectively] … if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreement to which it is a party.

For instance (again assuming the U.S. is a State Party), shipping missiles and launchers to Burma, knowing the Burmese military would fire them at Rohingya Muslims and their homes in Rakhine state, would violate this provision. Such use would be “directed against civilian objects or civilians,” and also (as per public statements in September 2017 by U.N. officials) may be “war crimes.” Whether the knowledge must be actual, or constructive suffices, is unclear.

● **Introspective Threat Assessment**

Suppose Articles 2(1) and 3-4 do not bar an international sales transaction in conventional arms. That does not mean a State Party is free to proceed with approval of an export deal under its National Control System. Rather, under Article 7(1), a State Party must self-evaluate, under that System, and “assess” possible deplorable consequences that could follow if it approves the deal. This assessment must consider whether the otherwise lawful deal might undermine peace and security, have adverse humanitarian or human rights effects, or boost the fortunes of terrorists or organized criminals. What is the “potential” that the conventional arms to be exported:

(1) “would contribute to or undermine peace and security”?

(2) “could be used to commit or facilitate” a “serious violation of international humanitarian law” or “human rights law”?

(3) with respect to international agreements relating to terrorism or organized crime to which the exporting State Party is a member, “could be used to commit or facilitate” an “act” that is a terrorist or criminal “offense” under those agreements?
In asking these questions, a State Party (under Article 7(4)) must take specific account of the “risk” of its conventional weapons “being used to commit or facilitate serious acts of gender-based violence, or serious acts of violence against women and children.” The exporting State Party also (under Article 7(2)) must “consider” whether it could undertake any “measures” to “mitigate risks,” such as “confidence building measures ... and programs” between it and the importing country.

To be sure, the Article 7 assessment scheme is soft law. States Parties are not all equally objective or non-discriminatory, and there is no formal sanction for a sub-par self-examination. Adjectives such as “serious,” and verbs like “facilitate,” are ambiguous. But, three features of this provision give it some potency.

First, the verb tenses are open ended. “Would,” and even more so, “could,” suggest a broad inquiry. They are not limited by language that the negative effects must be reasonably foreseeable. Put differently, a State Party is not free to turn a blind eye to damage that might come from its conventional arms exports.

Second, a vast body of Public International Law is incorporated by reference – humanitarian, human rights, anti-terrorism, and international criminal conventions and protocols. Hypothetically, then, a shipment of conventional arms to a foreign government infamous for repression of its own citizens, and wont to flex its muscle with neighbors, should flunk the Article 7(1)-(2) threat assessment.

Third, an exporting State Party “shall not authorize the export” if “there is an overriding risk of any of the [aforementioned] negative consequences.” That is, after its export and risk-mitigation assessment, the Party must weigh the dangers of approving of the proposed shipment. Is there an “overriding” risk of harm? Admittedly, this adjective is ambiguous, in that it is unclear what factors are possibly “overridden.” Is a Party supposed to balance harm against dollar revenues from the sale? Foreign policy goals? National security threats? Still, the context of the language – set in Article 7, which speaks of an assessment that is “objective and non-discriminatory,” along with the Article 5(1) mandate to implement the ATT “in a consistent, objective, and non-discriminatory manner” – indicates the balancing should be a rigorous one.

Indeed, Article 8 reinforces the sense that the overall self-exam should be done well. Article 8(1) obliges an importing State Party to provide “appropriate and relevant information” upon the request of the exporting Party to “assist” that Party in its Article 7 examination. The information may include documents about the end uses and users of the conventional arms at issue. Additionally, Article 8(2) obliges the importing Party, “where necessary,” to implement regulatory measures, such as an Import Control System. That means importing and exporting Parties must work together to prevent abuse of conventional arms. Declination by an importing Party to collaborate ought to be a telltale sign to the exporting Party of an “overriding risk” of negative consequences, and result in disapproval of a proposed export transaction.

### Trans-shipment, Brokerage, and Diversion

The ATT defines international trade in conventional arms to encompass not only export and import transactions, but effectively all transfer activities. So, it includes transit and trans-shipment (Article 9), brokering (Article 10), and diversion (Article 11). But, the ATT does not cover these activities in precisely the same manner, and thanks to ambiguous terms, a discretion is left to State Parties.

On transit and trans-shipment (under Article 9), a State Party “shall take appropriate measures to regulate, where necessary and feasible,” conventional arms trade. What measures are “appropriate”? What measures are “necessary”? In what circumstances would a measure not be “feasible”? These questions are left to the sovereign prerogative of each State Party. This provision also suffers from limited scope: it applies to the eight categories of conventional weapons listed under Article 2(1), but not to ammunitions under Article 3 or arms components under Article 4. This provision also is subject to “relevant international law.” Such law would include GATT Article V, which governs goods in transit, as well as Article XXI, the national security provision.

Article 10, on brokerage, has a similar injunction. Each State Party “shall take measures … to regulate brokering.” But, instead of stating the measures should be “appropriate,” this provision says the measures should be pursuant to the national laws of that Party. In other words, the provision leaves it up to each Party to regulate brokerage in conventional arms. Examples of such regulation include registration as a broker, and authorization before serving as a broker. Article 10 applies only to conventional arms (listed in Article 2(1), not ammunition (Article 3) or arms components (Article 4). That is, the ATT does not cover brokerage in ammunition or parts.

Article 11 governs diversion. Its provisions are substantively distinct from those concerning trans-shipment and brokerage. A State Party “shall take measures to prevent … diversion” of conventional arms (listed in Article 2(1)). Ammunition and parts are not covered. All Parties – whether involved in conventional arms trade as exporters or importers, or as transit or trans-shipment points – “shall cooperate” with each other in respect of sharing information, “to mitigate the risk of diversion.” (Article 11(3)) However, even this modest requirement is subject to each Party’s domestic laws, and the adjectival phrase “where appropriate and feasible.”

States Parties are encouraged to “share relevant information” on illicit activities, for instance, trafficking routes, unauthorized brokers, sources of illegally traded arms, and methods of concealment. (Article 11(5)) They also are encouraged to report on their anti-diversion measures to each other, and to the ATT Secretariat (Articles 11(6), 13(2)). Indeed, Parties are obliged (under Article 13(2)) to provide the Secretariat with an annual report on “authorized or actual exports and imports of conventional arms covered under Article 2(1)).” Parties can omit “commercially sensitive or national security information,” and their data may be the same as those they provide to the U.N. Register of Conventional Arms. (Article 13(3).)
Logically, as the point of origin, an exporting State Party has special anti-diversion obligations. The exporting Party (under Article 11(1)) “shall seek to prevent … diversion” through its domestic export control regulations, “assessing the risk of diversion,” and “considering the establishment of confidence-building measures” or joint programs with the importing State Party. Note the ambiguity of the verbs “see” and “considering,” and the lack of precision as to what such measures or programs ought to be. Illustrations of additional preventive measures are provided (in Article 11(2)), such as examining arms buyers and sellers, requiring additional documentation, or disallowing a particular deal.

What if a State Party detects conventional arms diversion? That Party (under Article 11(4)) “shall take appropriate measures,” in accordance with its laws and Public International Law, “to address” the diversion. Illustrative measures are alerting any “potentially affected State Parties,” examining the diverted shipments, and working with law enforcement authorities. Notably, there is no obligation to alert a non-State Party.

- Recordkeeping

As indicated earlier, each State Party must maintain a National Control List, as part of its National Control System, and submit it to the ATT Secretariat for distribution amongst fellow Parties. Each State Party also must keep records on its issuance of export authorizations, or actual exports of arms from its territory, along with the final destination of transferred arms. This mandate, which Article 12(1) establishes, is coupled with another one, in Article 12(2) – that records be kept for at least 10 years.

Of what should such records consist, and for how long? Article 12(3) answers that question. The ATT “encourages” State Parties to record the “quantity, value, model/type, authorized international transfers of conventional arms…, conventional arms actually transferred, details of exporting and importing State(s), transit and trans-shipment State(s), and end users as appropriate.” Whether the records should be electronic as well as paper-based, and whether they should be subject to internal or external auditing, is left up to each State Party. Via such record keeping, the ATT aims to shed light on arms trade sales conducted in the shadows by establishing an international forum of States that will review published reports of arms sales and publicly name violators.
Part Five

TRADE SANCTIONS: THEORY
Chapter 15

MORALITY OF TRADE SANCTIONS

I. Normative and Empirical Issues

“Trade sanctions” are intentionally-imposed burdens or restrictions by one or more countries on one or more other countries, and/or one or more goods, services, or investment transactions. “Export controls” are intentionally-imposed burdens or restrictions by one or more countries on the shipment of one or more goods and/or services, to one or more destinations. They are related: both involve limits and/or prohibitions on deals of certain kinds, and/or involving certain persons; criminal liability can attach to violations; the rules (and especially implementing regulations) are highly technical; both call for a rigorous compliance program; and both are distinct areas of specialty within International Trade Law. They are different in that trade sanctions are potentially broader than export controls, as they typically cover more than cross-border shipments. They also can differ in their underlying policy goals.

Trade sanctions, and the controversy surrounding them, have an ancient history. (So, too, do export controls.) In 432 B.C., the great statesman, orator, and general of the Athenian Empire during its Golden Age, Pericles (c. 495-425 B.C.), banned all trade with the city-state of Megara (strategically located in Attica, in the northern part of Isthmus of Corinth). The Megarian Decree specifically banned Megarians from all harbors and marketplaces in the Athenian Empire. Did Pericles support the Decree in an unsuccessful attempt to prevent conflict with Sparta, which ultimately occurred in the 5th century B.C. Peloponnesian War? Was the Decree simply an effort to punish Megara, because Megara supported Corinth (a rival of Athens), had engaged in treacherous behavior toward Athens many years earlier, and more recently trespassed on land the Athenians regarded as sacred to Demeter, the goddess of grain and fertility?

The debate among Classical scholars continues. No less than Thucydides (c. 460–395 B.C.) point out in History of the Peloponnesian War that Sparta insisted Athens revoke the Decree as a prerequisite to avoid war, and used the Decree as a pretext for war. But, Thucydides argues, the true cause of war was not the trade sanctions, but Spartan fear of growing Athenian power. Megara was dependent on Corinth, and an ally of Sparta in the war. The Decree adversely affected both Corinth and Sparta, and was viewed by them as an attempt by Athens to weaken them and project Athenian influence.

These intriguing controversies have continued since the Age of Pericles, down to the present day. Thus, it should come as no surprise that sanctions, and more generally International Trade Law, are a contentious subset of American foreign policy:

... As President [from 1801-1809], Thomas Jefferson [1743-1826] urged passage of the Embargo Act of 1807 to punish the United Kingdom and Napoleonic France for harassing U.S. ships. That effort at sanctions was
a disaster. … [T]he United States needed European markets far more than the United Kingdom, and France needed a fledgling country in the New World; the Embargo Act cost the United States far more than it did the European great powers. Even so the United States continued to use trade as its main foreign policy tool, focusing on prying open foreign markets for export and promoting foreign investment at home. This was only natural, given the paltry size of the U.S. military for most of the nineteenth century. The preeminence of the British pound in global finance also meant that the U.S. dollar was not an important currency. Trade was the primary way the United States conducted diplomacy.

At the end of World War I, the United States renewed its enthusiasm for trade sanctions as a means of regulating world politics. President Woodrow Wilson [1856-1924, President, 1913-1921] urged Americans to support the League of Nations by arguing that its power to sanction would act as a substitute for war. “A nation boycotted is a nation that is in sight of surrender,” he said in 1919. “Apply this economic, peaceful, silent, deadly remedy, and there will be no need for force. It is a terrible remedy.” Americans were unconvinced, and the United States never joined the League of Nations. In the end, sanctions imposed by the League failed to deter Italy from invading Ethiopia in 1935 or stop any other act of belligerence that led to World War II. To the contrary, the U.S. embargo on fuel and other war materials going to Japan helped participate he attack on Pearl Harbor.

The advent of the Cold War expanded the array of economic statecraft available to the United States. For the first time, the country supplied a significant amount of multilateral and bilateral foreign aid; stopping that aid was an easy way of applying economic pressure. The United States’ most successful use of sanctions in this period came during the 1956 Suez crisis. Outraged by the British-French-Israeli invasion of Egypt, Washington prevented the United Kingdom from drawing down its International Monetary Fund reserves to defend the currency. The subsequent run on the pound forced London to withdraw its troops.

Most of the time, however, U.S. sanctions failed. In the early years of the Cold War, the United States embargoed Soviet allies to deny them access to vital resources and technologies. That embargo succeeded as an act of containment. But sanctions designed to compel changes in behavior had little bit, since the Soviet Union simply stepped in to offer economic support to the targeted economies. In the early 1960s, … as the United States tightened its embargo on export to Cuba, the Soviets threw Fidel Castro’s regime an economic lifeline by channeling massive amounts of aid to Havana. Later in the Cold War, the United States used economic sanctions to pressure allies and adversaries alike to improve their human rights records. Beyond the rare success of sanctioning a close ally, economic
pressure worked only when it came from a broad multilateral coalition, such as the U.N. sanctions against apartheid-era South Africa.

The end of the Cold War brought an initial burst of hope about sanctions. With the Soviets no longer automatically vetoing U.N. Security Council resolutions, it seemed possible that multilateral trade sanctions could replace war, just as Wilson dreamed. Reality quickly proved otherwise. In 1990, after Iraq invaded Kuwait, the Security Council imposed a comprehensive trade embargo on Iraq. These crushing sanctions cut the country’s GDP in half. They were nonetheless unable to compel Saddam Hussein to withdraw from Kuwait; it took the [1991] Gulf War to accomplish that. Sanctions against Iraq continued after the war, but the humanitarian costs were staggering: infant mortality rates were widely viewed to have skyrocketed, and per capita income remained stagnant for 15 years. … Policymakers came to believe that trade sanctions were a blunt instrument that harmed ordinary civilians rather than the elites whose behavior they were intended to alter. So, they searched for smarter sanctions that could hit a regime’s ruling coalition.

The centrality of the U.S. dollar seemed to offer a way of doing just that. Beginning in the late 1990s, and accelerating after 9/11, the United States made it harder for any financial institution to engage in dollar transactions with sanctioned governments, companies, or people. U.S. and foreign banks need access to U.S. dollars in order to function; even the implicit threat of being denied such access has made most banks in the world reluctant to work with sanctioned entities, effectively expelling them from the global financial system.

These sanctions have proved more potent. Whereas restrictions on trade incentivize private-sector actors to resort to black-market operations, the opposite dynamic is at play with measures concerning dollar transactions. Because financial institutions care about their global reputation and wish to stay in the good graces of U.S. regulators, they tend to comply eagerly with sanctions and even preemptively dump clients seen as too risky. …

As U.S. sanctions grew more powerful, they scored some notable wins. The George W. Bush Administration [2001-2009] cracked down on terrorist financing and money laundering, as governments bent over backward to retain their access to the U.S. financial system. The Obama Administration [2009-2017] amped up sanctions against Iran, which drove the country to negotiate a deal [the JCPOA, discussed in a separate Chapter] restricting its nuclear program in return for lifting of some sanctions. …

Yet, for every success, there were more failures. The United States has imposed decades-long sanctions on Belarus, Cuba, Russia, Syria, and
Zimbabwe, with little to show in the way of tangible results. The Trump Administration ratcheted up U.S. economic pressure against Iran, North Korea, and Venezuela as part of its “maximum pressure” campaigns to block even minor evasions of economic restrictions. The efforts also relied on … “secondary sanctions,” whereby third-party countries and companies are threatened with economic coercion if they do not agree to participate in sanctioning the initial target. In every case, the target suffered severe economic costs, yet made no concessions.594

In brief, since America’s earliest days, sanctions have been one way in which the country interacts – or does not interact – with the rest of the world.

Ronald Steel argues in Temptations of a Superpower (1995) that the central unresolved problem in America’s post-Cold War foreign policy is translation of unparalleled military might that it built up during the Cold War into political influence.595 In May 1998, for example, America was embarrassingly unable to dissuade Pakistan from testing nuclear devices in response to Indian nuclear tests. This problem continues in the post-9-11 era. It is manifest whenever sanctions are used, particularly when deployed by the U.S. unilaterally. Through sanctions instead of military force, America is not simply expressing displeasure, but more importantly seeking to change the behavior of another country’s government, or even cause the downfall of that government.

Debate about sanctions is interdisciplinary. Lawyers, diplomats, economists, political scientists, historians, philosophers all offer perspectives, along with human rights activists, environmentalists, and other concerned lobbying groups and citizens. Despite this motley collection of voices, nearly all debaters focus on two issues.

• 1st: Is the Normative Purpose for Invoking Sanction Appropriate?

Is it, for example, a proper policy to use sanctions to pry open an overseas market on behalf of a domestic business? To combat human rights abuses? Genocide? Religious persecution? To confront or contain a stubborn dictator? To prevent nuclear proliferation? Perhaps these cases are easy. But, what about using sanctions to combat corruption, or discourage abortion? The normative issue is to draw lines, to delineate legitimate purposes without sliding down a slippery slope of indefensible sanctions.

• 2nd: Are Sanctions Efficacious, i.e., Do They Change Behavior?

Consider the following facts: “Despite crippling sanctions [designed to prevent North Korea from obtaining a WMD], Pyongyang has conducted six nuclear tests between 2006 and 2017,” and in September 2022, North Korea passed a law officially declaring

594 Daniel W. Drezner, The United States of Sanctions – The Use and Abuse of Economic Coercion, 100 FOREIGN AFFAIRS number 5, 142-154 at 143-143 (September/October 2021). [Hereinafter, Drezner.]

itself to be a nuclear weapons state. The country’s leader, Kim Jong Un (1983, Supreme Leader, 2011-), said the decision was “irreversible,” and “ruled out the possibility of any talks on denuclearization.” Thus it is argued:

The U.S. should admit defeat in its campaign to persuade North Korea to abandon its nuclear weapons and focus on risk reduction and arms control measures instead, experts have urged.

On … [4 October 2022], North Korea fired a ballistic missile over Japan for the first time since 2017, sparking renewed condemnation from Washington and its Allies.

The U.S. and South Korea responded by conducting joint military drills and firing missiles into the Sea of Japan, while the USS Ronald Reagan, an American nuclear-powered aircraft carrier, conducted a rare U-turn to return to waters east of the Korean peninsula after a recent visit. But analysts said the military gestures and combative words emanating from Washington, Seoul, and Tokyo belied the reality that they have run out of ideas and options for containing North Korea’s nuclear weapons program.

Experts argued that the U.S. and its allies should focus on agreeing with Pyongyang steps to reduce the risk of a conflict on the Korean peninsula, even if doing so amounted to a tacit acceptance that North Korea would continue to possess nuclear weapons.

“Insistence on denuclearization is not just a failure, it has turned into a farce,” said Ankit Panda, a nuclear weapons expert at the Carnegie Endowment for International Peace in Washington. “They test, we respond, we move on with our lives,” Panda added. “North Korea has already won. It’s a bitter pill, but at some point we’re going to have to swallow it.”

U.S. and Korean officials insisted that even a tacit acceptance of North Korea’s status as a nuclear-armed state would have dangerous consequences for global non-proliferation efforts.

… Kim Jong Un amended North Korea’s nuclear doctrine to allow for pre-emptive strikes. The previous policy only permitted the use of nuclear weapons in a second-strike scenario.

“There will never be any declaration of ‘giving up our nukes’ or ‘denuclearization’, nor any kind of negotiations or bargaining to meet the other side’s conditions,” Kim declared. “As long as nuclear weapons exist on earth and imperialism remains… our road towards strengthening
nuclear power won’t stop.”

... In January 2021, Kim outlined the capabilities he intended to obtain within five years, including tactical nuclear weapons, maneuverable missiles, solid fuel ICBMs and nuclear submarines.

Weapons experts said the North Korean regime has made considerable progress on multiple fronts, despite tough international sanctions and Kim sealing the country’s borders in 2020 in response to the coronavirus pandemic.\(^{598}\)

In brief, such facts prompt the question, do sanctions work? The same may be said of many sanctions regimes, such as those targeting China, Iran, and Russia (discussed in separate Chapters).

So, if their purpose is just, then do the sanctions change the behavior of the target in the way the sanctions intend? Even if so, then do sanctions work only after imposing an unacceptably large opportunity cost on domestic businesses (especially workers)? After all, these businesses would otherwise (1) offer goods and services to trade with the target country, (2) win lucrative procurement contracts from the target country’s government, and (3) engage in profitable FDI in the target country. Suppose the opportunity cost is not unacceptable. What about the strain on relations with trading partners?

Overall, the heart of this issue is whether the cost of sanctions exceeds their benefits based on historical experience. And, that experience (as intimated above) is mixed at best:

This \([i.e., \text{America’s}]\) reliance on economic sanctions would be natural if they were especially effective at getting other countries to do what Washington wants, but they’re not. The most generous academic estimate of sanctions’ efficacy – a 2014 study relying on a data set maintained by the University of North Carolina – found that, at best, sanctions lead to concessions between one-third and one-half the time. A 2019 Government Accountability Office study concluded that not even the federal government was necessarily aware when sanctions were working. Officials at the Treasury, State, and Commerce Departments, the report noted, “stated they do not conduct agency assessments of the effectiveness of sanctions in achieving broader U.S. policy goals.”\(^{599}\)

Both issues have a corollary: the danger of overuse.

Even if a proposed sanction rests on firm grounds, and is likely to achieve a desired outcome, the proposal needs to be examined in the context of extant and possible future


\(^{599}\) Drezner, 142-143.
sanctions. Too frequent deployment of the sanctions weapon renders it ineffective. Potential targets become nonplused by the threat of sanctions. They build that threat into their rational calculus when considering a course of conduct at which the sanction-imposing country is sure to look askance.

II. Three Philosophical Paradigms

Is the imposition of trade sanctions morally defensible? Is a decision not to impose trade sanctions morally defensible? If there is disagreement over economic analyses of sanctions, \textit{i.e.}, whether they work, \textit{a fortiori} there is disagreement over philosophical evaluations of sanctions, \textit{i.e.}, whether they are “good.” It is impossible to forge unanimity on these inherently normative questions. Why? Because they beg a question on which there is certain to be disagreement: what are the criteria for judging morality? Put differently, whether one views a sanctions regime, or a sanctions-free regime, as “just” hinges critically on one’s approach to the most fundamental question in all of jurisprudence: what is “justice”?

Yet, herein lays another example of why International Trade Law is such a fascinating subject: this fundamental question cannot be avoided. It exists in the sanctions context, and then crops up again in the contexts of the treatment of developing countries, workers’ rights, and environmental rights. It goes without saying that no book on jurisprudence, and certainly no reference on International Trade Law, can define “justice” satisfactorily for all times and places. However, it is possible to outline here three competing conceptions of justice that are manifest in the context of trade sanctions: Utilitarian (or more generally, “Consequentialist” or “Teleological”) Theory, Just War theory, and Kantian (or more generally, “Deontological”) Theory.\footnote{See Fernando R. Teson, \textit{A Philosophy of International Law} (1998); Geoffrey Thomas, \textit{An Introduction to Ethics} 71-74 (1993); Frank Garcia, \textit{A Philosophy of International Law}, 93 American Journal of International Law 746, 747-49 (1999) (reviewing Fernando R. Teson, \textit{A Philosophy of International Law} (1998)).}

III. Utilitarian Arguments

The Utilitarian Theory of sanctions focuses on whether sanctions produce their desired effect, and whether that effect is on balance positive. In contemplating the following questions, consider these realities from the Drexel University Global Sanctions Database, which “includes more than 1,100 cases,” that is, “instances when a sanction or a set of sanctions were ordered by a country or intergovernmental body against another country or organization,” making it “the most comprehensive tally of its kind,” and which is maintained by two international trade economists, Professors Constantinos Syropoulos and Yoto Yotov:

\textit{The United States is responsible for the most sanctions cases, accounting for 42 percent of those in place since 1950}, according to Drexel’s data. \textit{Next is the European Union, with 12 percent, and the United Nations, 7 percent.}
Sanctions have also become increasingly specific. The aim is often to directly punish responsible parties – without harming citizens of the target country, decimating its economy or jeopardizing valuable trade relationships with allied nations.

As their use has increased, so has the urgency of the question: Do sanctions work? “There is no doubt in our minds, sanctions are economically very, very painful,” said Mr. Yotov. But, he added, “this doesn’t imply necessarily that they’re going to reach their ultimate goals.”

These numbers include only sanctions that were imposed, but sometimes a threat alone is enough to achieve a specific goal. Estimates from another database [maintained at the University of North Carolina601] that contains instances of threatened and imposed sanctions [from 1945] through 2005 suggest that if cases when penalties were threatened are counted alongside cases when they are imposed, the success rate of sanctions overall is higher. And even when a goal is not achieved, enforcing sanctions can make future threats of sanctions more credible….602

Accordingly, the first question to ask is “what is the goal of the sanctions regime?” In the majority of cases, the goal is a change in the behavior of the target government. For example, America might seek to persuade Iran from arming Hezbollah guerrillas in southern Lebanon, or discourage China from handpicking a successor to the Dalai Lama.

Once the goal of a sanctions regime is ascertained, then the next step is to ask whether it was achieved. Did Iran stop shipping high-technology missiles to Hezbollah? Did the Tibetans pick their own Dali Lama? On this question, regarding the Drexel database:

To assess the success of sanctions in their database, the researchers compared stated policy goals for each case with determinations from government or official sources such as the United Nations on whether the goal was achieved. Using this framework, they found that about half of the stated goals in the sanctions cases were at least partly achieved, and about 35 percent were completely achieved. These estimates are roughly in line with previous research, though Mr. Yotov and Mr. Syropoulos cautioned that quantifying the objectives or the outcomes of sanctions inherently involved a degree of subjectivity and interpretation.603

The third and no less vital step is to consider the net effect of the sanctions regime. If it


603 Boycotts, Not Bombs. (Emphasis added.)
achieves its goal, then at what cost does it do so? If it is unsuccessful, then are the costs nonetheless worth incurring?

This last step can reveal heart-rending stories about innocent civilians within a country targeted by sanctions who do not necessarily support the behavior of their government, but are powerless in the face of that government’s authoritarian measures, to speak out. Consider the case of the sanctions regime imposed on Russia after it launched a brutal, unprovoked war on 24 February 2022 against Ukraine:

The U.S., U.K., and EU have put in place unprecedented financial penalties on Russia over its invasion of Ukraine, and hundreds of international companies have pulled out of the country.

The impact of these measures is just starting to be felt, with the cost of basic products rising, a looming risk of job losses, and for some, an increasing sense of isolation.

Here are some of the ways daily life has been changing.

*Cooking oil, sugar and blood pressure medication:*

- **Consumer prices jumped 2.2% in the first week of the invasion, with food among the biggest rises** • Some shops are restricting the sale of staples, after reports of hoarding • Sales of medicines are not subject to sanctions, but with major shipping companies suspending services, supplies could be hit.

The *rouble* has plummeted since Russia invaded Ukraine, leading many retailers to raise their prices. …

… The price of milk has almost doubled in the past two weeks….

Sugar and cereal prices were already about 20% higher this February [2022] than a year ago. …

*Last iPhones, and a last chance at “foreign bliss:”*

…

- **The price of some consumer goods has drastically increased** • The cost of smartphones and televisions has increased by more than 10% and an average vacation to Turkey has increased by 29% • Major brands like Apple, Ikea, and Nike no longer sell their products in Russia.

…

The symbolism of McDonald’s closing its 847 restaurants has not been lost on Russians – it was among the first Western firms to open in the Soviet Union 30 years ago. Within hours of the announcement, thousands of adverts appeared from Russians reselling food from its restaurants, at up to
10 times the usual price. …

*Losing customers and maybe online services:*

- Russian banks removed from Swift international payment system • Visa, Mastercard, American Express, Apple and Google Pay limit their services in Russia • Russian central bank says economy could shrink by up to 8%

…

*Media closures and Cold War memories:*

- New law threatens to jail anyone deemed to have spread "fake" news on the invasion • Independent and international media subject of severe restrictions • More than 13,000 people arrested in anti-war protests.

… [M]ost Russians get their news from state-run media, which carries the Kremlin’s anti-Ukraine propaganda. Many people support him [President Vladimir Putin (1952-, President, 2000-2008, 2012-)] and may end up blaming the West for sanctions.

Others don’t approve of the war, but stay silent – it’s risky for Russians to criticise their leader. Western governments hope the sanctions being piled on Russians will hurt enough to bring change at the top, but that could take time.

Today’s events bring back memories of the 1990s, when Russia’s economy collapsed after the Soviet Union fell apart.

The view that only better-off Russians will feel the pain of sanctions is debatable. …

As the sanctions became ever-more comprehensive, the sufferings of everyday Russians increased. Consider their predicament, given the draconian anti-protest laws imposed on them amidst a steady diet of state-controlled misinformation. Yet, consider the predicament of the U.S. and its Allies: short of escalation of violence, what practical policy tools, other than sanctions, did they have?

To return to the first step, it is an exercise in statutory analysis and legislative history. In most cases, the law itself, and the preparatory work in support of it, will reveal the purpose – or purposes – of a sanctions regime. However, it is important to appreciate the possibility of purposes other than, or in addition to, inducing or compelling a target country to alter its behavior or cast off its leaders. Sanctions may be designed to defend against or deter an illegal or aggressive action, to exact retribution from (i.e., simply punish) the target country, or to send a symbolic message to the target about international standards of conduct. Often, are designed very much with the soul of the country imposing

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them in mind, i.e., they are a device to renounce complicity with evil (e.g., the exploitation of child labor), regardless of whether the evil is legal in some technical sense.

Likewise, a healthy dose of cynicism is needed in this step. What legislators and politicians say about a regime is not always the real truth, the whole truth, or the lasting truth. Consider the American-led sanctions regime before the first Gulf War. Its stated purpose was to drive Saddam Hussein’s forces from Kuwait. The regime failed to end that occupation, so coalition forces drove out Iraqi troops. Having achieved that objective by force, why did sanctions become so important after cessation of hostilities?

The answer is the purpose of the sanctions regime changed, from the oft-repeated one of liberating Kuwait to the noble sounding one of protecting Kurds in northern Iraq and marsh Arabs in southern Iraq – hence the “no-fly zones.” Or, to be more cynical but perhaps more accurate, was their underlying purpose all along to “contain” Iraq by toppling Saddam and destroying its chemical, biological, and (purported) nuclear weapons capabilities? Clearly, any inquiry into the purpose of a sanctions regime can lead to some jarring contradictions that complicate a utilitarian cost-benefit analysis.

Empirical investigation is the second step. Economist Gary C. Hufbauer (1939-) argues sanctions achieve their goal in only about 34% of cases.605 Often sanctions produce a “rally-around-the-flag effect” in the target country. Civilians mobilize in support of their otherwise distasteful leadership, because they perceive themselves to be facing a common external threat. The final step, however, is where Utilitarian Theory is most poignant – as the above-quoted Russia case indicates.

The most famous Utilitarian principle, which is associated with the work of the 19th century philosopher Jeremy Bentham (1748-1832), is the “greatest good for greatest number” criterion. It is a principle of “act utilitarianism,” meaning an action is right if and only if it maximizes welfare. In other words, only if an action produces more welfare, in a net sense, than any other possible course of action, is that action “good” or “just.” Thus, in the present context, an act utilitarian analysis would hold that a sanctions regime is morally defensible if its benefits exceed its costs, and thus it maximizes welfare. But, this begs two questions: what is meant by “welfare” (i.e., how are “benefits” and “costs” defined and measured), and whose welfare is relevant?

On the first question, is “welfare” satisfaction of material wants? For example, a sanctions regime might be thought unjust because it leads to unspeakable deprivations among children and the elderly in a target country. Alternatively, is “welfare” happiness in a deep spiritual sense? A sanctions regime may be deemed just because consumers in the sanctioning country have “no blood on their hands,” because they are not buying toys for their children made by prison workers in China. On the second question, is the relevant focus the welfare of the country imposing the sanctions (e.g., all Americans), the target country (e.g., all Iraqis), or both? How are the welfare effects to be aggregated? Should the welfare of some sub-groups of people (e.g., women and disabled persons in the target country) be accorded greater weight than the welfare of other sub-groups (e.g., American

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companies that lose business opportunities in the target country)?

Another prominent 19th century English philosopher, John Stuart Mill (1806-1873), offers a different Utilitarian criterion – Rule Utilitarianism. Under a Rule Utilitarian analysis, an action is right only if it is in conformity with a rule, and by following that rule more welfare is produced than by following any other rule. The calculation of welfare on a particular occasion is not important. What matters is that across a large number of cases, a rule is followed, and following that rule in case after case leads to welfare maximization. The clear focus is on practices and behavior, and the moral requirement for a Rule Utilitarian is to follow the rule routinely, because by doing so ensures benefits exceed costs by the greatest possible amount. Observe why Rule Utilitarianism sometimes is called “indirect” Utilitarianism: because decision-making in an individual case is not governed by a cost-benefit calculation in that case.

Thus, Rule Utilitarianism would call for the establishment of sanctions policy that covers all instances of a defined type of egregious behavior by foreign governments. Once that behavior is manifest, the sanctions regime would be triggered automatically. There would be no calculation of the costs to businesses from the sanctioning country in terms of lost profitable opportunities, or of the costs to innocent civilians in the target country. Nor would the anticipated benefits in the particular case matter. Rather, at the time the policy was established, a determination would have been made that the automatic rule – imposing sanctions to combat the offensive behavior – is the welfare-maximizing one. To be sure, the same problems of definition, i.e., what is “welfare,” whose welfare matters, and how should the welfare of different sub-groups be aggregated, that plague an Act Utilitarian analysis are endemic here too.

There is the additional problem of calculating at the policy formation stage that the proposed rule indeed will maximize welfare. Rule Utilitarianism does not require that sanctions work in every instance. Maybe they work against South Africa and the former Rhodesia to bring down apartheid, but not against the Islamic State to protect equal treatment of women and religious minorities in the Levant. But, the criterion does demand that over the long-term, when the bulk of cases are considered, welfare is maximized. That is, Rule Utilitarianism demands more than Act Utilitarianism in a critical respect: it requires the <i>a priori</i> formulation of the ideal rule.

Forming an ideal rule is easier with knowledge of historical patterns. In this respect, some of Dr. Hufbauer’s empirical findings is noteworthy. In looking at a large number of sanctions regimes, he says sanctions tend to produce their desired result only if they lead to a fall in GNP of at least 2.5%. To cause that serious a recession indeed requires keeping the sanctions in place for at least about three years. Conversely, sanctions are almost certain to fail if all they do is cause a 1% contraction in GNP. Against which countries are sanctions most likely to produce the requisite GNP declines? Obviously, against countries with economies smaller than the sanctioning powers. In brief, these sorts of finding would be relevant in the rule formation stage when calculating the costs of an automatic sanctions rule.
A final concern about a Rule Utilitarian approach is whether all similarly situated parties must follow the rule in like cases. Must France, Japan, Russia, and the U.K. behave the same way with respect to an extremist Islamic state, and to the proliferation of nuclear, chemical, and biological weapons? Possibly, welfare – defined in a global sense – cannot be maximized unless the rule is the same for everyone. Thus, the U.S. might accomplish little in terms of welfare maximization if the other trading powers do not pursue the course of action. Why might there be this divergence in response to egregious behavior? Because some governments may follow Rule Utilitarianism, whereas others follow Act Utilitarianism.

IV. Kantian Arguments

It was that giant of Philosophy, Immanuel Kant (1724-1804), who counseled in his essay, Perpetual Peace, that the center of the International Law must be the normative status of the individual, that it is wrong to conceive of International Law as concerned only with the rights and duties of states as the fundamental unit of that Law without also examining each state’s domestic political system and its treatment of its citizens. Kant’s thesis is contrary to the traditional state centrism of International Law. Sovereign nation states are not the atoms on which the matter of International Law is constructed. What happens at the sub-atomic level – inside nation states – is important. To Kant, the business of International Law was inextricably linked to the question of domestic justice. International Law – and by extension International Trade Law – is legitimate only if it is founded on an alliance of separate, free nations united by their moral commitment to individual freedom, not merely by their allegiance to the international rule of law and the mutual benefits of peaceful intercourse.

In the Kantian paradigm, it will not do to care only about whether a government controls its people, or to say that so long as the government exercises control, it can participate as a sovereign entity in a “just” international legal system. How a government treats its own people matters in the evaluation of the “just-ness” of the international legal order. The International Law nation states create and practice cannot be considered morally defensible if those states fail to behave in a just manner with respect to the people living inside their boundaries. Thus, for Kant there is little if any room for the defense commonly offered for alleged human rights abuses: “back off, it is our own internal matter.” (China is known for this defense, but the U.S. offers an essentially similar response to criticism of use of the death penalty in some States.)

Put bluntly (as many did at the 1999 WTO Ministerial Meeting in Seattle), whether the GATT-WTO regime is “legitimate” (i.e., “just” or “morally acceptable”) depends on whether the WTO Members are committed to domestic justice in the realms of human, labor, and environmental rights. Why? Because for Kant – and Liberal IR Theorists generally – the purpose of a nation state is to protect and serve its people. Only to the extent a nation state serves this purpose is it morally acceptable. If the WTO consists of countries

that do not serve this purpose, then much of the Membership is illegitimate. Any trade rules they write or practice must also lack legitimacy. Justice in International Trade Law cannot be divorced from justice at the domestic level of WTO Members.

From a Kantian perspective, perhaps the “World Trade Organization” really is a “Sovereign State Trading Organization.” Perhaps it is right to attack it for producing decisions that, however persuasive in terms of GATT Article XX:(b) and (g), horrify environmentally-minded observers. After all, how is one to deal with the fears of labor and human rights activists, who see their interests as the next ones to be sacrificed at the altar of MFN, national treatment, tariff bindings, non-discriminatory application of quotas, or some other trade-liberalizing principle. However noble that principle may be on the blackboards of Neo-Classical economists, in the equations of game theorists, or in the theories of Positivist philosophers, it is not universally persuasive. How, then, to agree the DSU process is “legitimate,” if much of that process excludes important voices, if much of that process is hidden, if that process does not always call upon the best and brightest specialists to help resolve disputes?

This same sort of Kantian reasoning can be applied in the sanctions context. Sanctions are to be evaluated not on teleological grounds. Whether they are efficacious is irrelevant, because acting on the basis of a moral principle is what matters. Nor is it permissible for a nation state to hide behind the traditional Public International Law principle of non-intervention in order to rationalize infringements on justice within its territory. In other words, without going so far as to label Kant an interventionist (a point that is in dispute), a reasonable inference to draw from his anti-statist approach is that sanctions may well be appropriate in certain cases. Precisely which cases is a matter for judgment on a deontological ground, namely, to what extent do they place the normative status of the individual at the center of attention?

That question, which is premised on a view that people are moral rather than economic agents, begs another one: who ought that “individual” to be? A good guess is a person (or identifiable group of persons) oppressed in a country targeted for sanctions. In other words, the focus ought to be on anyone whose human, labor, or environmental rights are being violated systematically by the target country’s government. Any sanctions regime that takes aim at correcting the violation would be morally justifiable.

Kantian reasoning can be taken to a deeper level. The best-known of Kant’s many insights is his Categorical Imperative: one ought to act as if the principle on which one is acting would become a universal law. To decide whether a particular course of action is morally right, consider the principle underlying it. Would one wish all others to adhere to the same principle, and thereby pursue the same course of action in the same circumstances? If so, then the principle is morally defensible, and the action correct. This orientation is Humanitarian, not Utilitarian. It is an iteration of the Golden Rule.

In the sanctions context, the same question can be asked. What is the principle motivating a country to consider imposing sanctions? Is it a principle the country would want all other countries to adopt — including, of course, instances in which roles are
reversed and foreign countries debate sanctions against the first country? Suppose the principle is the protection of human rights. If that is the principle the sanctioning country thinks ought to be universalized, then it is morally correct to follow the principle by implementing sanctions. It does not matter whether other countries actually join in the sanctions regime in a particular case, or even whether their present governmental policies are in accord with the principle. What matters is whether the sanctioning country believes the principle ought to be a universal one. Clearly, under this logic, there is plenty of room for the U.S. (or any other sanctioning country) to be a lone voice.

There is at least one obvious danger with taking the Kantian thesis too far. It can become a fancy philosophical device to assert the superiority of western liberal values over all others. No universal conception of human nature is tolerated, except that articulated by Enlightenment philosophers and their intellectual progeny, like America’s founding fathers. The result, as Professor Garcia succinctly points out, is the central paradox vis-à-vis all countries not viewed as “liberal.” Is this not precisely the stance many Americans take toward, for example (ironically), Iran and Syria? In brief, the pure-hearted Kantian approach runs amuck and becomes an empty-headed fighting liberalism that succumbs readily to constant use of sanctions.

In a 1993 essay, American philosopher John Rawls (1921-2002) offers a way out of this problem. For him, the world is not “either-or,” “black or white.” He eschews condemnation of nation states that do not follow western-style values as “illiberal.” Rather, his work suggests a three-part classificatory system and a spectrum of legitimacy. At one end of the spectrum, there are some countries that adhere to Western liberal values. The U.S. is the quintessential example.

At the other end, there are truly tyrannical states that go about violating those human rights that all informed observers would agree are core rights. North Korea and any other outlaw country would be at this end. But herein lies a conundrum about blame. Critics of sanctions who (understandably) worry about the humanitarian costs of isolating a country with sanctions, that is, the possibility that sanctions are visited on the most vulnerable (whereas elites always find a way to thrive), consider this fact from June 2023:

People in North Korea have told the BBC food is so scarce their neighbors have starved to death.

Exclusive interviews gathered inside the world’s most isolated state suggest the situation is the worst it has been since the 1990s….

The government sealed its borders in 2020, cutting off vital supplies. It has also tightened control over people’s lives….

Even the North Korean leader Kim Jong Un has hinted at the seriousness of the situation – at one point referring openly to a “food crisis,” while making

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various attempts to boost agricultural production. Despite this, he has prioritized funding his nuclear weapons program, testing a record 63 ballistic missiles in 2022. One estimate puts the total cost of these tests at more than $500 m (£398 m) – more than the amount needed to make up for North Korea’s annual grain shortfall.\footnote{Jean Mackenzie, \textit{North Korea: Residents Tell BBC of Neighbours Starving to Death}, BBC NEWS, 14 June 2023, \url{www.bbc.com/news/world-asia-65881803}. (Emphasis added.)}

In other words, targeted countries, not the sanctions-imposing ones, may be to blame for the tragic human costs of the sanctions. To the extent they are, the argument favoring sanctions returns to their human rights motivations. So, what are core human rights? The right to life, personal property, equality before the law, and freedom from enslavement. Liberal democratic rights, such as freedom of worship or speech, are not included.

In between these extremes are “hierarchical/communal” states. These are “decent” states. To a significant degree, their governments represent the preferences of their citizens. The societies are premised on rational principles. To be sure, these countries are not American-style democracies, as they are not founded on Western liberal political values. Theocratic states are examples. But, the fact they embody the preferences of their people, coupled with the fact that there is a comprehensible logic to explain why they are structured in a certain way, gives hierarchical/communal states a certain degree of legitimacy. Possibly, Iran and Singapore would be examples.

What is the bottom-line implication? Sanctions against hierarchical/communal states are not morally justifiable. The Rawlsian critique helps avoid the danger of over-using sanctions that can occur when a Kantian position is taken too far.

\textbf{V. Just War Arguments}

In an already classic work, \textit{Just and Unjust Wars} (2nd ed. 1992), American philosopher Michael Walzer (1935-) formulates a conceptual framework to assess when it is morally defensible to go to war.\footnote{See \textit{Michael Walzer, Just and Unjust Wars} (2nd ed. 1992); \textit{Jack T. Patterson, The Political and Moral Appropriateness of Sanctions, in Economic Sanctions} 89-96 (David Cortright & George A. Lopez eds. 1995).} His framework, which rests on centuries of philosophical and religious inquiry, can be, and has been, applied to the use of sanctions. It is not necessarily a perfect fit, because Just War Theory is designed for analyses of wartime sieges and blockades, whereas sanctions are a lesser (and hopefully alternative) form of conflict. Still, six criteria can be drawn from the tradition of Just War Theory, which taken together provide a test for whether a sanctions regime is morally justified. (These criteria are not necessarily set forth in order of importance. Indeed, it may be queried whether there is – or should be – a hierarchy among the criteria.)

First, are sanctions being used as a penultimate measure? The ultimate measure is, of course, the use of force. Sanctions are more easily justified in a moral sense if they are taken after all less coercive measures have been tried and failed, and if they are the last...
step to avert armed conflict. President Woodrow Wilson (1856-1924, President, 1913-1921) made the point when he tried unsuccessfully to persuade the U.S. to join the League of Nations:

A nation 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 pressure upon the nation that, in my judgment, no modern nation could resist.610

Sanctions ought to be a more humane alternative to the certain death and destruction a downward spiral to “total war” would bring. At the same time, they ought to be sufficiently resolute so as to be something more than a pusillanimous consolation for inaction or indifference.

Interestingly, in The Economic Weapon: The Rise of Sanctions as a Tool of Modern War (2022), historian Nicholas Mulder argues sanctions represent a kind of “peacewar.”

The Economic Weapon punctures the myth that sanctions have been an alternative or antidote to war, while tracing their shifting purpose from preserving inter-state relations to toppling internal political regimes. … Despite the hopes pinned on them, sanctions typically don’t produce the regime change desired, and they take an enormous toll on those subjected to them. The very anticipation of sanctions triggers actions that preclude their effectiveness: aggressive states’ ambitions are stoked further by desire to secure additional resources to immunize against the deprivations of threatened sanctions. The premise of sanctions— that societies make political decisions based on economic rationalism like fear of falling living standards— is not borne out by history. People often prefer bad conditions to foreign rule.

This is precisely why so many anticolonial movements use tactics of boycott, depriving themselves of cheap goods and other forms of ease in the name of self-reliance. How do we differentiate between these kinds of economic pressure? Going by the indignant cries of hypocrisy that the sanctions punishing Russia for occupying Ukraine elicited among many of those calling for Boycott, Divestment, Sanctions (BDS) against Israeli occupation of Palestine, the question is urgent. Without a full grasp of evolving understandings of empire and war after 1918, the distinction between state-led sanctions and anti-state boycott movements remains elusive. …

Abuse of language was integral to sanctions’ ability to shift “the boundary between war and peace.” As George Orwell noted of his time, political

language allowed “defense of the indefensible,” consisting “largely of
euphemism […] Defenseless villages are bombarded from the air,” and
“this is called pacification.” Writing the history of this time requires
treading carefully through its verbal deceptions.

In 1920, the humanitarian E. D. Morel perceived that the Versailles Treaty
of 1919 had concluded a certain phase of armed conflict but not armed
conflict itself, creating a time of “peacewar.” More than a peace settlement,
the treaty was a set of great power agreements that extended war in many
parts of the world. The quick and illegal flow of arms as formal hostilities
ended fueled these struggles.

Britain faced uprisings across its Empire, wreaking military revenge on
etire villages. With a newly mass-democratic British citizenry desperate
demobilization and control of foreign policy, the government invented
ways to prosecute war with fewer boots on the ground and greater
discretion, drawing on the innovative tactics of its Great War campaigns in
the Middle East, especially aerial counterinsurgency. It and other powers
were also deeply involved in the Russian Civil War, which extended into
Persia and Central Asia. Winston Churchill, Secretary of State for Air and
War, executed a sustained chemical attack against Bolshevik-held villages.

In Somaliland and Iraq, the British bombed rebels from the air. In India,
they ordered a military assault on protestors in Amritsar and bombed
protestors against that assault. This activity deepened concern about India’s
frontier with Afghanistan, triggering the Third Anglo-Afghan War of 1919.
Iraq and the Indian frontier became spaces of permanent war under British
aerial policing, later extended to other colonies. When questions arose about
the system’s inhumanity, British officials responded that “all war is […]
indiscriminate in its brutality,” acknowledging they were at war in Iraq. The
Air Secretary knew that things happened there “which, if they had happened
before the world war, would have been undoubtedly acts of war.”

Continual contestation of the artificial borders that Versailles imposed on
the Middle East – giving Britain and France “mandates” (essentially,
colonies) in former Ottoman territories – prompted a series of conferences
that attempted, futilely, to “close” the war (1920 Treaty of Sèvres, which
drove the long Turkish War of Independence; 1921 Cairo Conference; 1923
Treaty of Lausanne; 1926 Frontier Treaty). Meanwhile, the Irish war for
independence prompted British recourse to the infamous “Black and Tans”
paramilitary force. It was followed by an Irish civil war. All this was in
addition to military activity in Europe (including French occupation of the
Ruhr) and beyond, such as U.S. occupation of Haiti, where marines staffed
the policing body, the Haitian Gendarmerie.

The peace of 1919 did not merely set the stage for World War II with its
war guilt clauses and demands for German reparations; it provoked continued conflict that bridged the two bouts of total war, including the internationalized Spanish Civil War. Today’s war on terror is continuous with this era.

For Mulder, in their abstraction of a wartime tactic into “peacetime,” post-1919 sanctions represented a dramatic break. … Once we accept the illusory nature of peacetime, however, it’s unclear how sanctions of this era were distinct from earlier wartime sanctions. Perhaps the real innovation was designation of an era of conflict as “peacetime”? Certainly, Britain’s and Napoleonic France’s economic war was not about starvation, given self-sufficiency in food in most places. But their aim to destroy the commerce on which their enemy’s war-making powers depended was a tactic of attrition not unlike the first actual implementation of League sanctions: the 1935 effort to undermine Italy’s war-making capacity by targeting its foreign exchange reserves. If the United States’ use of the “positive” economic weapon – the disbursement of inter-Allied funds in World War II (Lend-Lease) – recalls British funding of allies in World War I, it also recalls Britain’s provision of cash and arms to allies in the struggle against Napoleon. There’s a reason that conflict is sometimes called the “first total war.” Understanding how modern blockades were inspired by and found legitimacy in earlier uses might allow us to better understand how and when enemy starvation became normalized as a blockade objective alongside other tactics targeting civilians.

That process transpired in the realm of European Empire, such as the early-19th-century British blockades in the Persian Gulf and French blockade threats against Haiti that gave currency to the idea that sanctions protect “civilization” from “barbarism.” … The unrivaled naval power that Britain acquired from the Napoleonic Wars gave it the blockade power that 20th-century sanctions presumed. The dream of using blockade in an official peacetime recalls the declaration of a “Pax Britannica” in an era of constant aggression disguised as policing. War and policing existed on a continuum of imperial control.

Morel was far from alone in questioning the reality of the peace. The British state itself saw sanctions as “belligerent measures.” The Conservative Speaker of Parliament said that boycott of Germany was a way of carrying on the war with different weapons. A German politician affirmed that “so-called sanctions” were “nothing but acts of violence.” Herbert Hoover saw them as an aggressive act of war. They were recognized as a “practicable substitute for armed force.” (Indeed, the bulk of the manpower for fighting in World War II would come from the Red Army and Chinese Nationalists while the Allies coordinated massive economic warfare.)

Despite this awareness, the final draft of the League Covenant’s Article 16
didn’t specify that sanctions responding to an “act of war” took place in a “state of war.” …. This unintended rhetorical innovation yielded a means of prosecuting war while denying it formally. Europeans could now be aggressive in Europe without declaring war just as they had long been elsewhere. League sanctions were understood as “policing” — the established imperial model. Declarations of war actually became superfluous as war became a permanent condition.

The “interwar” period was thus an era of constant denial of violent reality — what Orwell would skewer with the slogans of 1984 (1949): “WAR IS PEACE.” The Great War had honed government propaganda skills, and the ensuing era saw myriad declarations disconnected from ground realities, such as the British declaration of Egyptian independence in 1922. (Egypt was occupied till 1956.)

… Sanctions, like air control, were seen as suitable to peripheral and “semi-civilized” countries, “less a new peacekeeping practice than the latest disciplinary mechanism of Western empire.” The notion that they upheld “civilization” against “barbarism” gave them a racial lens. Mulder notes that the British and French were willing to go further in pressuring Asian as opposed to European people – while also doubting whether “oriental” peoples would respond rationally to deprivation. Indeed, 1920s League blockade efforts in the Balkans, Turkey, and China possessed a “profoundly imperial dimension. The Economist’s concern that sanctions might drive Turkey to let Anatolia “sink to the economic level of Afghanistan or Abyssinia” was thus less about whether Turkey would “embrace liberalism” than whether it would emulate those two countries famous for holding out against conquest by Europe and its civilizing mission.

… The deterrence theory of sanctions anticipated the Cold War, … but even during the Industrial Revolution, Adam Smith, assuring that firearms favored the “extension of civilization,” looked forward to the world reaching “that equality of courage and force which, by inspiring mutual fear, can alone overawe the injustice of independent nations into some sort of respect for the rights of one another.” When the mass spread of ever deadlier firearms instead culminated in a horrific war of attrition, sanctions again strove to create a world held in thrall to the threat of annihilation and called this “peace.” Again, a system designed for deterrence triggered aggression. Perhaps Smith might hear Mulder’s coruscating conclusion, after two centuries of devastating mass violence, that “stitching animosity into the fabric of international affairs and human exchange is of limited use in changing the world.”

The normalization of sanctions as compatible with “peace” depended on conceiving and creating “the economy” as a self-contained domain of monetarized exchanges for rational and numerical study. The League’s
blockade committee claimed Article 16 was “essentially economic in nature,” abstracting that realm from the political and military, despite the recent total war and the long history of military-industrial economies. Economists were central to organizing the strategic bombing tied to sanctions. Their violence became the domain of bureaucrats – another way in which war was civilianized and thus sanitized and made more discreet.\(^{611}\)

Professor Mulder’s counter-intuitive argument – that there is no bright line distinction between sanctions and “covert militarism”\(^{612}\) – suggests Just War Theory is not followed in most cases of levying sanctions, is made more poignant by the reality that “a third of the world’s people live under some form of economic sanctions, some massively lethal,” and “United Nations sanctions against Iraq in the 1990s killed hundreds of thousands.”\(^{613}\) Those facts were as of 2015, before the reimposition of sanctions on Iran and the imposition of sanctions against Russia, both discussed in separate Chapters.) Yet, in reply, might it be said the problem is not whether sanctions are deployed as an alternative to war, but that they are disproportionate – that is, far too nasty and vengeful?

Following on the Mulder argument is the second criterion of Just War Theory: are sanctions a \textit{sincere} alternative to force? It may be that resort to sanctions is disingenuous, that in fact the country imposing sanctions intends all along to go to war. Sanctions thus become a prelude to war – a morally indefensible policy. This accusation is made of the U.S. in its pre-first Gulf War sanctions policy to Iraq. Sanctions take time to work, as Dr. Hufbauer’s research (mentioned above) suggests. Yet, the first Bush Administration (1989-1993) gave sanctions barely half a year to work (August 1990-January 1991), and spent those six months building up an overwhelming strike force in the Gulf area. Critics charge that Administration was bent on war soon after Iraq invaded Kuwait. Arguably, sanctions were less of a threshold for peace than a trap door for war. To be sure, the rebuttal in this instance is that every “extra” day given for sanctions was a day for Saddam Hussein to “dig in,” thus increasing the chance for a longer, bloodier battle, and also another day of hell for the Kuwaiti people.

One way to discern whether the second criterion is satisfied is to ask: are good faith negotiations underway during the period in which sanctions are imposed? If sanctions are the penultimate step to armed conflict, and if the country imposing them sincerely desires to avert death and destruction, then the sanctioning country will do its best to come to a deal with the target country. It will search for a compromise that resolves the pattern of behavior it is sanctioning in a fair manner. Again, the U.S. has been criticized for failing to negotiate in good faith with Saddam during the prelude to the first Gulf War.

The third criterion for evaluating sanctions drawn from Just War Theory is

\(^{611}\) Priya Satia, \textit{The \textquotesingle\textquotesingle Peacewar\textquotesingle\textquotesingle of Sanctions}, LARB – LOS ANGELES REVIEW OF BOOKS (19 August 2022), \url{https://lareviewofbooks.org/article/the-peacewar-of-sanctions/} (reviewing Nicholas Mulder, \textit{The Economic Weapon: The Rise of Sanctions as a Tool of Modern War} (New Haven, Connecticut: Yale University Press, 2022)). [Hereinafter, \textit{The \textquotesingle\textquotesingle Peacewar\textquotesingle\textquotesingle}].

\(^{612}\) The \textit{\textquotesingle\textquotesingle Peacewar\textquotesingle\textquotesingle}.

\(^{613}\) The \textit{\textquotesingle\textquotesingle Peacewar\textquotesingle\textquotesingle}.

proportionality. Are the sanctions imposed proportionate to the behavior of the target country? Clearly, the animating principle is fairness – a punishment should fit a crime. It exists in Articles 22:6-7 of the WTO DSU. A WTO Member that loses a case and is alleged not to comply with a Panel or Appellate Body recommendation or pay compensation to the winning Member can complain to an arbitrator that it is the victim of excessive retaliation by the winning Member.

In the sanctions context, there are likely to be heated debates about whether measures against a target are excessive. It is scarcely possible to change a persistent pattern of behavior of a foreign government – say, persecution of a religious group – with a limp-wristed sanction like suspending shipments of luxury cars. Only if the target feels, or feels threatened by, real pain might it reconsider its conduct. Thus, Professor F. Damrosch (1953-) argues sanctions-induced reductions in the standard of living of the target population are morally tolerable so long as they do not cause a significant segment of that population to fall below subsistence level. Yet, the pain of teetering around that level may be precisely the grounds for arguing sanctions are unjust because they are too sharp.

It may be ventured as a general proposition that no sanctions regime is morally defensible if it leads to the denial of fundamental human rights. Most importantly among such rights would be the right to life. The economic coercion deliberately wrought by sanctions should not to threaten or lead to the loss of life. Therefore, there must be a humanitarian exception to the sanctions. A blockage of food or medicines would be unconscionable, but an embargo that denies travel visas, freezes assets, ceases military cooperation, and causes job losses would not be. The Clinton Administration’s decision in 1999 to remove such items from the scope of some of its sanctions regimes can be justified in this light. Another way to put the general proposition is that sanctions are morally unjustifiable if they inflict irreversible and grievous harm to innocents, and such harm is best conceptualized in terms of core human rights.

Fourth, is the deployment of sanctions on a unilateral, plurilateral, or multilateral basis? Just War Theory suggests that the larger the number of countries imposing sanctions, the more likely the sanctions regime is morally defensible. There is strength in numbers, particularly when those numbers encompass a diverse array of cultures, religions, and philosophies that have come to an agreement voluntarily. In other words, the consensus should be both broad and deep so that the sanctions regime has credibility, and it should not be based on one or a few dominant players effectively bribing others to join in. Conversely, sanctions imposed by America alone, or imposed by several countries that have been promised economic and military aid by the U.S., is harder to justify on moral grounds against charges of self-serving, bully-like behavior.

Fifth, Just War Theory indicates it is appropriate to ask about the humanitarian cost of sanctions. It establishes a principle of civilian (i.e., non-combatant) immunity, namely, innocent civilians ought not to be victimized by sanctions. A sanctions regime hardly is moral if it afflicts a civilian population like a bombing campaign (be it one with precision-
guided weapons or not). After all, civilians – especially women, children, the elderly, the disabled, and the poor – are likely to be remote from the wrongdoing in the target country. Accordingly, President Dwight D. Eisenhower’s (1890-1969, President, 1953-1961) famous Secretary of State, John Foster Dulles (1888-1959), opposed boycotts other than arms embargoes and specific measures that would embarrass the government of the target country. Similarly, sanctions that deny basic medicines to children and the elderly cannot easily be defended. Sanctions must not only take aim at the individuals and institutions in a foreign country responsible for egregious behavior, but also they must hit those targets, without “collateral damage.” Such damage may reinforce the ruling elite of a country, if it leads to a rally-around-the-flag effect, or helps weaken or dispose of opponents of that elite.

As regards the fifth criterion, only in two instances does it become morally defensible to lift the immunity for civilians. First, civilians in the target country ask foreign powers to impose sanctions on their country. The head of Burma’s National League for Democracy, and winner of the 1991 Nobel Peace Prize, Aung Sung Suu Kyi (1945-), did precisely this – encourage the U.S. and other countries to isolate the ruling military junta in Rangoon. Thus, in this instance the civilians assent to the possibility that they, too, will feel the pain of sanctions.

There is, of course, a question whether civilians calling for sanctions are the ones whose counsel ought to be followed. The voice of a Mahatma Gandhi (1869-1948) or Nelson Mandela (1918-2013) is more credible than the voice of the president of a steel company or steel workers’ union. A Gandhi or Mandela has nothing to gain materially and everything to lose, from the imposition of sanctions. But, sanctions might be a windfall for the steel executive or union boss. Foreign steel competition is withdrawn from the market, thereby instating or re-instating a dominant market position for the domestic producers. Human rights advocates in the target country are more likely to be attuned to the effects of sanctions on the most vulnerable and least powerful segments of the civilian population. Because they are double victims (victims of their government and soon-to-be victims of the sanctions), their call for sanctions is a powerful one.

Second, if civilians in a target country are not “innocent,” then sanctions that adversely affect their lives may be judged as morally defensible. This instance occurs when civilians, as well as their leaders, are to blame for egregious behavior. Perhaps ordinary citizens willingly participate in acts of violence against a racial or ethnic minority. Or, perhaps they simply “rally around the flag,” and thus become collaborators with a heinous regime. Targeting civilians for sanctions as well as their leaders is particularly justified if the country has a reasonably well-functioning democracy (e.g., Israel). Because a large block of civilians voted in their rulers, they are liable for aiding and abetting heinous conduct against vulnerable populations (e.g., Palestinians).

The obvious problem with both exceptions to the principle of civilian immunity is to discern a clear message from the civilians in a target country. What if some civilian leaders call for sanctions, while others do not? What if some civilian leaders work hand-in-glove with an authoritarian or totalitarian government, while others form an underground resistance? In brief, what voices should be heard, and how much weight...
should be given to each voice? The dilemma of identifying legitimate, authoritative voices is particularly acute when, as is typically true in target countries, there is no democratic means of deciding who represents the population. Circumstances in the target country obviously will not permit a free and fair plebiscite on sanctions policy. Indeed, civilian groups may bicker— or worse— among themselves and show little interest in achieving a unified strategy. Kurdish and Palestinian leaders are cases in point.

The final criterion is the most important and elusive. The first word in “Just War Theory” is “just.” Any sanctions regime should be premised on a conception of justice. What is the vision of a rightly-ordered world that demands the imposition of sanctions? The question goes to the purpose of a sanctions regime. It is important, because if sanctions are a sincere alternative to war (the first two criteria), then they ought to be a morally superior alternative to war. Otherwise, why bother with the sanctions exercise?

An answer is hard. A general principle might be that Right Order is not one in which grave evils (e.g., tyrants like Adolf Hitler, genocides like Rwanda, or terrorists like Boko Ḥarām) are allowed to flourish. Hence, sanctions become a response to a grave injustice, a violation of a fundamental International Law or norm. But, that proffered answer is too easy. It defines things negatively, saying what Right Order is not, rather than what it is. Socrates devoted his life to learning about what is “right,” and his travails produced the greatest philosophical dialogues in history. That they continue to be a source of lively debate is proof that the lesser politicians who govern countries are quite unlikely to come to philosophical agreement on a global Right Order. But, they might reach a political compromise that, like watching an ancient Roman ruin come into focus in a desert as a sand storm abates, bears some semblance to a conception of what is Good.

Consider, for example, a political compromise that holds for sanctioning Iraq, Iran, or both in order to maintain western control over the flow of oil through the Straits of Hormuz. Is this really just another power play by hegemonic powers, another instance of big countries bullying small ones for self-interested ends. Or, might the compromise be justified on the ground that to surrender this control would be to risk catastrophic economic deprivation in the developed world, of which the oil crises of 1974 and 1979 were only a glimpse? In turn, a collapse of the western and Japanese economies would afflict the Third World, because developed countries no longer would be viable export markets for its goods. In brief, rich people would become poor, and poor people would become poorer. Whatever the Good life is, it is not economic chaos.

Among the many interesting features of Just War Theory is that it seems to be a hybrid. It combines elements of the teleological and deontological approaches. For instance, in asking about the proportionality of sanctions measures and articulating a principle of civilian immunity, it seems to take on the rule utilitarian concern of finding a strategy that across the broad spectrum of cases will maximize welfare. The proportionality principle itself can be conceived of in Act Utilitarian terms, insofar as it involves a weighing to the harm caused by sanctions against the good that might result from them.

Likewise, the interest in humanitarian costs, which is embedded in the civilian
immunity principle, would be an element in an act utilitarian calculation. On the other hand, that concern, and the principle itself, indicate a focus on the normative status of individuals in the target country. That suggests a distinctly deontological flair. Sanctions are demanded simply as a principle of natural justice raised by the abhorrent behavior of a target country in the case at hand.

V. Generic Analytical Framework

Helping clients understand and comply with American trade sanctions is an important part of International Trade Law. That is true regardless of where the client or its counsel are located, because U.S. sanctions purport to reach far outside American borders. But, there is a problem: studying every piece of actual or proposed sanctions legislation would consume multiple volumes. That would be inefficient, as well as pedagogically unhelpful. What matters in theory and practice is to identify patterns, and deviations therefrom, in trade sanctions – hence the generic analytical framework (below) and the case study of Iran (in separate Chapters).

So, setting aside the normative issue of purpose, empirical issue of efficacy, and arguments about the morality of sanctions, how might an International Trade Lawyer confront any existing or proposed sanctions legislation? Might it be possible to develop a conceptual framework – or put less pretentiously, an algorithm – that can be used generically? The short answer is “yes.”

Table 15-1 offers a seven-step model to help understand what any unfamiliar, complex sanctions legislation says, and what it purports to do. The model is positivist in nature: it reveals legal doctrine and consequences, and eschews the interesting but messy and over-played normative debate about the content of the law. All seven steps rely heavily on conventional legal reasoning, and in particular, endeavor to draw careful, critical distinctions. The steps can be remembered by the simple acronym, “MRS. WATU” (a common Indonesian surname).

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615 For a full treatment, see Raj Bhala, MRS. WATU and International Trade Sanctions, 33 THE INTERNATIONAL LAWYER 1-26 (Spring 1999).
Table 15-1:
Synopsis of MRS. WATU Model

<table>
<thead>
<tr>
<th>Acronym/Step</th>
<th>Issue for Examination</th>
<th>Possible <em>a priori</em> Expectation Regarding Controversy from Sanction</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>M –</strong></td>
<td>What method(s) of sanction(s) is used?</td>
<td>A larger number of methods affects more constituencies and suggests greater force, thus it is likely to cause greater controversy.</td>
</tr>
<tr>
<td><strong>Method(s) of</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Sanction(s)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>R –</strong></td>
<td>Is there a private right of action?</td>
<td>A private right of action is almost certain to cause controversy because it is private and extraterritorial.</td>
</tr>
<tr>
<td><strong>Right of Action</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>S –</strong></td>
<td>Is there a secondary boycott (<em>i.e.</em>, one against not only direct trade transactions with the target – the primary boycott – but also against third parties or countries trading with the target)?</td>
<td>A secondary boycott is almost certain to cause controversy because it is seen as bullying and an infringement on sovereignty, and it is likely to evoke blocking legislation.</td>
</tr>
<tr>
<td><strong>Secondary Boycott</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>W –</strong></td>
<td>Who (if anyone) has the authority to waive the sanction, and what are the waiver criteria?</td>
<td>Waiver decisions are inherently political, and the degree of controversy is likely to depend partly on the wording of the criteria.</td>
</tr>
<tr>
<td><strong>Waiver Authority</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>A –</strong></td>
<td>Is the sanction aimed at a regime or commodity, or possibly a production process?</td>
<td>A sanction aimed at a commodity or at a production process may be particularly controversial, because of substitution effects and perceived protectionism, respectively.</td>
</tr>
<tr>
<td><strong>Aim of Sanction</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>T –</strong></td>
<td>What criteria, if any, exist to terminate the sanction?</td>
<td>A lack of termination criteria will be controversial in the long term, and if they exist, then the degree of controversy is likely to depend partly on their wording.</td>
</tr>
<tr>
<td><strong>Termination</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Criteria</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>U –</strong></td>
<td>Is the sanction imposed unilaterally?</td>
<td>A <em>de jure</em> and <em>de facto</em> unilateral sanction is almost certain to be particularly controversial.</td>
</tr>
<tr>
<td><strong>Unilateral Nature</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The right-hand column indicates the MRS. WATU model is not limited to analyzing what a particular piece of sanctions legislation says and does. The model also reveals why one sanction regime could be more controversial than another. Typically, the explanation is cast in terms of normative purposes or empirical effects. It was said the 1996 *Helms-Burton Act* is controversial because sanctions were not the way to deal with the Castro
government.\textsuperscript{616} Or, sanctions formerly imposed against India and Pakistan under the Nuclear Proliferation Prevention Act of 1994 (Nuclear Proliferation Act) might have been pointless, as the “nuclear genie was out of the bottle,” and hypocritical because of a different standard set for Israel.\textsuperscript{617}

Notably, after the 9/11 terrorist attacks, on 22 September 2001, President George W. Bush (1946-, President, 2001-2009) issued a Presidential Determination in which he waived non-nuclear arms export control sanctions against both India and Pakistan. The President lifted nuclear sanctions against India following a nuclear energy deal, to which Congress agreed, in December 2006.\textsuperscript{618} Nuclear sanctions remain in force against Pakistan, which the U.S. justifies in part on the relatively poorer record of Pakistan (evidenced, for instance, by the A.Q. Khan scandal) than India in respect of non-proliferation. The deal with India, though, prompted outcries of a double standard for favored American allies in the War on Terror, and in respect of Israel, and accusations the U.S. was scuppering the July 1968 NPT.

In any event, \textit{MRS. WATU} provides an independent basis for understanding why a sanction regime is controversial, or relatively more controversial than another. This basis is neither normative nor empirical, but doctrinal. \textit{MRS. WATU} focuses on what the law says and does, not its underlying policy or economic efficacy. Hence, conclusions about controversies surrounding different sanctions schemes may be drawn without basing them on the purpose, economic effect, or policy success of those schemes.

\section*{VII. Sanctions and American Decline?}

The three philosophical paradigms – Utilitarian, Kantian, and Just War – address


With the normalization of Cuban-American diplomatic and economic relations, following the historic December 2014 historic reversal of U.S. policy, the guidelines and regulations ceased or were eliminated. However, the \textit{Helms-Burton Act} gave rise to a first-ever no-show by the U.S. in a DSU proceeding. The EU sued the U.S. over the legality of the secondary boycott the \textit{Act} created, which barred their firms, and firms from other countries (in addition to those from the U.S. – the primary boycott) from doing business with Cuba. The U.S. declined to appear for the 1997 WTO hearing, and resolved the case diplomatically, out-of-Court, as it were.


questions of whether, why, and how sanctions should be imposed. But as to the “why?” question, is there a fourth, uncomfortable reality, namely, that America uses sanctions because it is in decline?

The truth is that Washington’s fixation with sanctions has little to do with their efficacy and everything to do with something else: American decline. No longer an unchallenged superpower, the United States can’t throw its weight around the way it used to. In relative terms, its military power and diplomatic influences have declined. Two decades of war [in Afghanistan and Iraq], recession, polarization, and … a [COVID-19] pandemic have dented American power. Frustrated U.S. presidents are left with fewer arrows in their quiver, and they are quick to reach for the easy, available tool of sanctions.

… [S]anctions are hardly cost free. They strain relations with allies, antagonize adversaries, and impose economic hardship on innocent civilians. Thus, sanctions not only reveal American decline, but accelerate it, too.\textsuperscript{619}

Manifestly, this matter is part of a larger debate about declinism. Is America really in decline, or has it grown wiser with experience, and its quiver actually grown with a variety of measures, many of which rely on high technology (such as drones)?

\textsuperscript{619} Drezner, 143.
Part Six:

TRADE SANCTIONS: IRAN CASE STUDY
Chapter 16

IRAN SANCTIONS:
1979 HOSTAGE CRISIS-2011

I. Why Study Iran?

Among the myriad of trade sanctions led by America against other countries, why study those against Iran? A not-so-joking answer is that specializing in Iran sanctions has become a full-time practice for many International Trade lawyers around the world. A more scholarly answer is that sanctions against Iran provide a superb and enduring example of macro and micro level theoretical and practical questions. History has known no more complex sanctions regime than that against Iran. Those sanctions, which date to 1979, and evolved considerably in 1986 and the subsequent decades, also raise difficult moral issues about nuclear energy, weapons, proliferation, and (particularly given the status of Israel with respect to nuclear matters) policy hypocrisy.\footnote{For a concise review of Iran’s nuclear energy and weapons programs, see The Editorial Board, Why The Past Haunts Talks With Iran, THE NEW YORK TIMES, 23 April 2021, www.nytimes.com/2021/04/23/opinion/iran-nuclear-deal.html?referringSource=articleShare. Among the key events in the chronology are the following:}

Iran’s Bushehr reactor, the first nuclear power plant of its kind in the Middle East, began producing electricity in 2011 after years of struggle and Russian assistance. (The United Arab Emirates has also opened a nuclear power plant and Saudi Arabia says it plans to build 16 of them.)

Iranian diplomats say that longstanding American opposition to the completion of Bushehr—and nearly any technological advancement or investment in Iran over the past four decades—forced their civilian program to operate in shadows. Under the Iran Nuclear Deal struck in 2015 [i.e., as discussed in a separate Chapter, the July 2015 JCPOA, from which America withdrew in May 2018], Iran took steps to assure the world that it would not develop weapons, including pouring cement into the core of a heavy-water reactor.

But Iran has never come clean about the weapons-related nuclear work it undertook before 2003, the year the C.I.A. estimates its nuclear weapons program was largely halted. In recent years, international inspectors have found traces of processed uranium at two sites that Iran never declared as nuclear facilities, adding to the list of unanswered questions that the International Atomic Energy Agency has to answer before being able to state with confidence that Iran isn’t still harboring a secret weapons program. …

If Iran’s current nuclear program is truly aimed at civilian nuclear power, as its leaders claim, then Iran should answer the agency’s questions with candor. The Nuclear Deal gives international inspectors access to every inch of Iran’s nuclear fuel cycle. But it doesn’t give unfettered access to military areas that weren’t declared as nuclear sites.

The International Atomic Energy Agency knows what it looks like when a country renounces nuclear weapons. South Africa, which built at least six nuclear bombs despite heavy international sanctions, dismantled them quietly as international threats receded and leaders sought to shed their status as international pariahs. South Africa was given a clean bill of health only after inspectors verified that the program was in fact dismantled. Until
Iran goes through a similar process, its civilian reactor will always operate under a cloud of deep suspicion. Its scientists will live with the threat of assassination and its economy will remain at risk from sanctions.

The United States also needs to acknowledge history and the ways in which its own policies have contributed to the current crisis. Iran’s nuclear program dates back to the 1960s, when the United States supplied Iran with a nuclear research reactor. At the time, Iran was ruled by Shah Mohammed Reza Pahlavi [1919-1980, reigned 1941-1979], a pro-American monarch who saw himself as a great modernizer. The shah enthusiastically embraced the [1968] Nuclear Non-Proliferation Treaty, which rests on a bargain: Countries that want peaceful nuclear power plants will be given access to technology, in exchange for robust inspections to ensure they are not producing weapons. Countries that already possessed nuclear weapons, for their part, agreed to pursue disarmament and eventually eliminate their nuclear arsenals, lest they hold an indefinite monopoly on the world’s most powerful weapon. The Treaty undoubtedly slowed the spread of nuclear weapons. No signatory has ever managed to build a bomb under international inspections. But there is little to stop a country from building nuclear weapons after announcing a withdrawal from the treaty and kicking inspectors out, as North Korea appears to have done. [Conversely, the declared nuclear weapons states have not engaged in any serious reduction of their arsenals.]

In 1974, Iran unveiled an ambitious program to build 20 civilian nuclear reactors to prepare for the day when the country’s oil reserves ran out, a plan U.S. officials commended at the time. In 1975, the Shah struck a deal with the Massachusetts Institute of Technology to train the first cadre of Iranian nuclear scientists. Americans were supportive, but leery about letting Iran enrich uranium, a process that could be used to create fuel for a nuclear weapon. … [A] letter to President Gerald Ford [1913-2006, President, 1974-1977] begging for enrichment technology went unanswered.

The Shah lent the French government more than a billion dollars to build a commercial enrichment facility in France to supply nuclear fuel to power plants in Iran, France, Italy, Belgium and Spain. But that consortium, known as Eurodif, never gave Iran the nuclear fuel. In 1979, religious revolutionaries overthrew the Shah. At first, Supreme Leader Ayatollah Ruhollah Khomeini [1900-1989, Supreme Leader, 1979-1989] declared nuclear power to be “un-Islamic” and withdrew from the project. Later, clerics had a change of heart and sought the fuel, but Eurodif refused to provide it. Eventually, Iran built its own uranium enrichment facility in secret.

… Iran’s nuclear program was revived in 1984, after an invasion by Saddam Hussein [1937-2006, President, 1979-2003], the Iraqi leader who had a nuclear weapons program of his own. The bloody eight-year war with Iraq killed at least 300,000 Iranians, including many who died horrible deaths from chemical weapons. But the international community sided with Saddam Hussein – an outrage Iranians never forgot. …

After the Iran-Iraq War ended, a moderate president, Ali Akbar Hashemi Rafsanjani [1924-2017, President, 1989-1997], was elected on promises to boost the economy by repairing relations with the West. In 1995, Iran struck a deal with Conoco, a U.S. oil company, to develop one of its largest oil fields. But the Clinton Administration killed the deal by banning nearly all American trade and investment in Iran, and threatening sanctions against foreign companies that invested there.

Iran’s nuclear program inched forward anyway. In 2002, Iran’s clandestine enrichment facility became international news. The international blowback, and the U.S. invasion of Iraq the following year, shook the Iranian regime. In 2003, Iran agreed to freeze its enrichment work and halted most weapons-related development. An Iranian official also prepared a sweeping proposal for U.S.-Iranian talks over a wide range of issues.
committing a violation. Many major international banks have been fined billions of dollars for violating Iran sanctions rules.

II. Four Issues and Responses

How do American trade sanctions against Iran work? Have they worked? Championed by seven American Presidents and 21 Sessions of Congress, these sanctions against Iran have spanned 40 years. In that time, the bilateral relationship between the U.S. and Iran has been dreadful, with each side fixated on monstrosities perpetrated by the other: the November 1979 seizure of the American Embassy in Tehran by Iranian militants and subsequent state-sponsored terrorist atrocities; the 1953 coup d’état orchestrated by the U.S. of a democratically-elected Iranian leader, and subsequent American support for human rights abuses by the Peacock Throne.

To Iran, America became the “Great Satan” to be confronted wherever and whenever possible. To the U.S., Iran perpetrated “evil” and was to be targeted for sanctions. American trade sanctions against Iran thus became, and continue to be, an important part of international trade law. Around the globe, practice in this field is touched by the dysfunctional relationship between the “Great Satan” and “Evil Āyatollāhs.”

The practical significance does not mean the technical rules, or policy justifications for those rules, are easily or well understood. The rules have become more intricate as they have evolved over nearly 40 years. The policies for them have been subject to polarizing debates. Accordingly, four issues are crucial:

1. What transactions with Iran are prohibited?
2. What are the penalties for violating those prohibitions?
3. What is the logic for the regime of prohibitions and sanctions?
4. Have the sanctions worked?

including the nuclear program, Iran’s posture toward American troops in Iraq and Afghanistan, and support for Palestinian terrorist groups. But the Bush Administration scoffed at the idea of direct talks and signaled Iran might be next on its regime-change list. Two years later, Iranians elected a hard-liner, Mahmoud Ahmadinejad, as President who pressed ahead with Iran’s uranium enrichment program. By the end of Mr. [George W.] Bush’s second term in office [1946-, President, 2001-2009], Iran was on its way to mastering enrichment.

Id. 621 This and the subsequent Chapters concerning trade sanctions on Iran draw on Raj Bhala, Fighting Iran with Trade Sanctions, 31 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW issue 2, 251-356 (Spring 2014).

622 Both extreme metaphors, “Great Satan” and “Evil Āyatollāhs,” are used only to reflect what many in each country think of the other, but otherwise rejected. Accordingly, the metaphors are put in quotations throughout.


In addressing the first two issues, three points are clear.

First, as intimated, American trade rules against Iran are complex. Navigating them is not for the faint-hearted. Yet, doing so is essential in the everyday practice of international trade law around the globe. The sanctions cover not only trade in goods and services, but also FDI, transportation, banking, securities, and insurance.

Second, aside from their relevance, they are a technically fascinating case study. They were imposed against a country that accounts for 1% of the world’s population. Their imposition was despite the fact Iran has no misunderstanding about the objective power asymmetry, for as its Foreign Minister, Mohammad Javad Zarif (1960-) said in December 2013 to students at Tehran University: “Do you think the U.S., which can destroy all our military systems with one bomb, is scared of our military system?” They have had a considerable, but imperfect, extraterritorial reach, not only affecting third countries, but cajoling them (or trying to) into ostracizing Iran. And, for critics and champions of the use of trade sanctions to effect political and national security goals in foreign countries, the case study of Iran gives both comfort and concern.

Third, Iran and third countries made clever adjustments to minimize, as best they could, adverse effects of the regime on them. Given those adjustments, the regime had to evolve. At inception, and for most of its life, it was not a comprehensive set of sanctions designed to put Iran, metaphorically speaking, in solitary confinement. Rather, the types of transactions barred grew, and so also did the penalties for violating those bars.

The third issue admits an unequivocal answer: the purpose of the regime always was two-fold: deny Iran the ability to acquire a WMD, and stop it from supporting terrorist organizations. As a victim of chemical weapons in the 1980-1988 Iran-Iraq War, Iran swore it had no interest in acquiring them. Accordingly, the key concern of the U.S. was nuclear: Iran must not get a nuclear device, or the operational means to deliver that device. As for terrorist groups, the principal (but not only) one of interest was Hezbollah.

This answer begs two follow-on questions. First, given that the rules of the regime evolved, did the rationale for the regime ever change? While America never waivered in its two purposes – deterrence in respect of WMDs and terrorism – it did add a third logic. Following the June 2009-February 2010 Green Revolution, the U.S. viewed deterrence of human rights abuse as a third basis for the regime.

Second, why was acquisition by Iran of a nuclear weapon, or support for Hezbollah, America’s problem? Unlike North Korea, Iran did not threaten the U.S. with a nuclear attack, and while Hezbollah inflicted deadly blows to Americans, it did not do so on

624 Quoted in Najmeh Bozorgmehr, Zarif Pressed by Iran Hardliners, FINANCIAL TIMES, 10 December 2013, 2.
American soil. The response – as politically incorrect as it may be to state – is the primary threat was to Israel and Gulf Arab countries. Reasonable minds can and do differ as to whether such a threat is a problem of such great moment to the U.S. as to justify not only the regime, but also an American military strike against Iran.

A single, clear response to the fourth issue is difficult, perhaps even imprudent. The fourth issue is one of efficacy, and should be dissected into three questions:

1. Were American trade sanctions against Iran necessary and sufficient to wreck the economy of Iran?
2. Were they necessary and sufficient to compel Iran to sign the November 2013 preliminary nuclear agreement?
3. Were they necessary and sufficient to achieve the three American policy goals for those sanctions, namely, deny Iran a nuclear weapon, convince Iran to cease support for international terrorism, and promote human rights in Iran?

Here the answers are, respectively, “no,” “it depends,” and “uncertain.”

Until the November 2013 preliminary nuclear deal, sanctions looked set to be an epic failure. An ever more expansive and detailed array of American measures met with more centrifuges spinning to enrich Uranium in Iran. American rules failed to bring about their stated goals. The longer they dragged on, the more entrenched the two countries became. Between 1996 and 2012, the U.S. increased the severity of its sanctions regime, widening the range of forbidden transactions and boosting number of prohibited activities and penalties. Concomitantly, the number of centrifuges spinning in Iranian nuclear facilities, and stockpile of highly enriched Uranium, grew, terrorist acts continued, and the human rights environment changed minimally.

But, thanks to the November 2013 deal, sanctions one day may be viewed retrospectively as efficacious. That is, on the first question, with the deal, it appeared sanctions were necessary, but not sufficient, to wreck the economy of Iran and bring it to sign the November 2013 agreement. Sanctions could not have been sufficient, because they were not systematic or seamless from inception. They were a confusing array of haphazard measures, mostly targeted on the Iranian energy sector, but with plenty of gaps that later needed plugging. Moreover, inefficient economic management, and corruption, in Iran were causal factors, without which the ever-more expansive and tighter regime might not have produced change.

On the second question, American and Iranian officials disagree on the role sanctions played in yielding the November 2013 accord. That “it depends who is asked” is not surprising, as one side is eager to trumpet a foreign policy success, while the other seeks to show the world it was not cowed by foreign pressure.

As to the third question, whether the American measures were necessary and sufficient to achieve all three policy goals is not certain. Time will tell whether the net
result of the sanctions is one the U.S. sought and with which Iran can live. Here, then, is a case study with lessons about the future to be revealed in the future.

III. 444 Days

On 4 November 1979, Iranian protestors stormed the U.S. Embassy in Tehran, taking and holding hostage for 444 days 52 American citizens. Ten days after the Embassy seizure, President Jimmy Carter (1924, President, 1977-1981) imposed trade sanctions against Iran. Except for a six-year respite in the 1980s, America has had trade sanctions on Iran. That is true regardless of who was President, and which political party held power in Congress. Simply put, for the late 20th and early 21st centuries, America has had a sanctions-based trade policy toward Iran. The template, conscious or not, for this policy, may well have been Cuba: since 1961, American trade policy toward what President John F. Kennedy (1917-1963, President, 1961-1963) called “that imprisoned island” has been nothing but sanctions.

That policy looked unsuccessful, or (to use a contemporary youthful colloquialism) appeared to be an epic failure. American trade sanctions had not changed the behavior of Iran. Specifically, they had not achieved any of the goals embraced by six American


627 Hope springs eternal. The election in June 2013 of a relatively pragmatic, reform-minded President, Hassan Rohani (1948-, President, 2013-), offered the possibility Iran may be more transparent with the United States about the operation of its nuclear program. It was Mr. Rouhani, a former nuclear negotiator, who convinced his government to suspend uranium enrichment between 2003 and 2005. (He served as National Security Advisor to President Akbar Hashemi Rafsanjani, a pragmatist, and also to President Mohammad Khatami, a reformist. It was the latter capacity in which he agreed to suspend enrichment.)

President Rohani was well aware of the economic damage American sanctions have inflicted on Iran, and the desire of many Iranians to re-integrate into the global economy. But, he appreciated America would ease those sanctions only if what he seeks – constructive engagement and reconciliation with other countries – includes stringent limits on Iran’s nuclear program. Yet, his room for maneuver is limited, given the consistent hard line stance of Āyatollāh Ali Khamenei, the Supreme Leader of Iran. See Akbar Ganji, Who Is Khamenei? The Mind of Iran’s Supreme Leader, 92 FOREIGN AFFAIRS 24-48 (September/October 2013) (arguing Khamenei “is not a crazy, irrational, or reckless zealot searching for opportunities for aggression, but his intransigence is bound to make any negotiations with the West difficult”).

The Supreme Leader did not support the efforts of President Khatami to engage President Bill Clinton, and the next President Mahmoud Ahmadinejad spouted fiery, defiant, and sometimes objectionable rhetoric against America and her allies.

In effect, whether President Rohani can satisfy the United States by submitting to its demands to drop its alleged nuclear weapons ambitions, without losing the support of the Supreme Leader and the Revolutionary Guard Corps that backs the Āyatollāh is dubious. See Najmeh Bozorgmehr & Monavar Khalaj, Rohani Raises Hopes for Change with Pledges on Iran’s Nuclear Program, FINANCIAL TIMES, 18 June 2013, 1; Najmeh Bozorgmehr, Tehran Crowds Take to Streets to Cheer Reformist’s Triumph, FINANCIAL TIMES, 17 June 2013, 2; James Blitz, West Cautious as Cleric Unlikely to Soften Nuclear Stance Swiftly, FINANCIAL TIMES, 17 June 2013, 2; Martin Indyk, The West Must Temper Its Enthusiasm for Iran’s New President, 17 June 2013, 9.
Presidents, which were most clearly articulated by Bill Clinton (in 1996) (1946-, President, 1993-2001), and by every session of Congress from the 96th (1979-1980) to the 112th (2011-2012).\(^{628}\) Declaring sanctions to be a policy of containment to isolate Iran, the Clinton Administration claimed they were justified because of Iran’s (1) efforts to develop WMDs and (2) support for international terrorism. Additional rationales for isolating Iran were its (3) subversion of certain governments in the Middle East, (4) undermining of the Arab-Israeli peace process, and (5) poor human rights record.\(^{629}\) Of them, the first two have loomed the largest for the U.S., though human rights concerns resurfaced in 2012 as a pertinent rationale for an explicit prohibition. In no way that is publicly observable or material have the sanctions caused Iran to alter the impression of America on any of these five points

The reasons for that failure laid partly in inconsistencies in the sanctions themselves. Through successive legislation, they generally tightened the noose around Iran, with ever-tougher measures, but also with provisions allowing for flexibility or creating ambiguity. Taken individually, indubitably a cogent argument existed in defense of each twist or relaxation. Taken collectively, the pattern – especially from the Iranian perspective – was not a series of outright flip-flops, to be sure, but somewhat “on the one hand, … on the other hand, …,” and thus intimated occasional legislative tentativeness masked by bellicose rhetoric. In other words, it was not that each particular prohibition, sanction, exception, or waiver, in isolation, was indefensible. Rather, it was that viewed across almost four decades, the overall impression was the sanctions regime had become an evolving work in progress lacking from inception adamantine will and tenacious determination.

The reasons for the sanctions seemed unsuccessful also were in the limits of American sovereignty. Never has the long reach of American sanctions enforcement powers been endless, or the intelligence necessary to exercise that power flawless. The ability of third parties – whether allies, friends, or neutrals – to comply with American sanctions always has been limited. Wholly apart from their philosophical misgivings about those sanctions and the justification for them, they faced domestic and international political constraints they could not easily subordinate to American trade policy. In sum, external political and economic factors America could not control, and internal legislative and regulatory factors that it could, were to blame for the four decades of failure.

Both factors are ones America could have, and should have, foreseen. In their official postures, rarely did American policy makers respect Iran as an ancient and grand Persian civilization, understand the distinct nature of Shi‘ite (much less Twelver Shi‘ism) and empathize with the historical Shi‘ite sense of persecution by Sunnites, consider modern Iranian sensibilities about the 19 August 1953 coup d’etat engineered by the American CIA and the British MI6 of democratically elected Prime Minister Mohammad Mosaddegh


\(^{629}\) See OVERVIEW, Part I, 273.
and subsequent human rights offences committed by the American-backed Shah Mohammad Reza Pahlavi (1919-1980, Shah, 1941-1979), or address claims by Iran about its right under the 1968 Nuclear Non-Proliferation Treaty to develop peaceful nuclear technologies, much less Iranian allegations of American violations of the NPT. Instead, American officials tended to respond to the worst of Iranian rhetoric, especially hate speech by former President Mahmoud Ahmadinejad (1956-, President, 2005-2013) against Israel and his monstrous denials of the Holocaust. Rather than rising above the ugliness emanating from some quarters in Tehran and Qom, the officials forged a trade sanctions policy in response to it.

To be sure, that ugliness is utterly indefensible. Nothing justifies Iranian threats to the Jewish State or Jews, nor human rights violations committed by the Islamic Republic against its own people. Nothing justifies the ruthless suppression of the Green Revolution of 13 June 2009 - 11 February 2010, or prior and subsequent democratic movements, and their champions. Nothing justifies terrorism or support for Violent Extremist Organizations. And, whether Iran has a right to peaceful nuclear technologies, or even nuclear weaponry, under the NPT, is debatable, albeit a debate for another time. Likewise, whether Iran was truthful in its consistent contention that its nuclear program has been for peaceful purposes to help it generate electricity, not for construction of an atomic weapon, is debatable.

What is certain, indeed palpable, are misunderstandings, ignorance, and hardheartedness on both sides. One side spoke of the leaders of the other as “Evil Āyatollāhs.” Those leaders painted the other side as the “Great Satan.” Their metaphors bespoke a tragic mutual hatred.

IV. Epic Failure?

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630 See CIA Documents Acknowledge Its Role in Iran’s 1953 Coup, BBC NEWS, 20 August 2013, www.bbc.co.uk/news/world-middle-east-23762970. The United States and Britain were angered at the Prime Minister’s nationalization of Iran’s oil industry, which Britain effectively had controlled since 1913 through the Anglo-Persian Oil Company (APOC, sometimes called the Anglo-Iranian Oil Company, or AIOC). APOC later was renamed “British Petroleum” (BP). See Mohammad Mosaddegh, WIKIPEDIA, http://en.wikipedia.org/wiki/Mohammad_Mosaddegh.

631 The NPT was concluded in 1968 and entered into force in 1970. There are 190 Parties, including Iran. Three nuclear nations, India, Pakistan, and North Korea (which withdrew in 2003), are not Parties. See Treaty on the Non-Proliferation of Nuclear Weapons, WIKIPEDIA, http://en.wikipedia.org/wiki/Treaty_on_the_Non-Proliferation_of_Nuclear_Weapons.

Is it reasonable to consider American trade policy toward Iran as an “epic failure”? The answer depends on the characterization of that trade policy and benchmark for its success. What has been and is American trade policy toward Iran, and has it worked? The answers, respectively, are “sanctions” and “no.” Of course, the work generated for lawyers has been outstanding. But, surely the enrichment of the class of juridical service providers cannot be the sole cause to sustain any legal regime.

Stephen Kinzer, a Visiting Fellow at Brown University, former New York Times correspondent who has covered over 50 countries on five continents, and author of *Overthrow: America’s Century of Regime Change from Hawaii to Iraq*,633 summarized the reality:

> Years of sanctions and threats have produced only more spinning centrifuges in Iran. An earnest diplomatic effort to give Iran an honorable alternative is long overdue.634

Indeed, Mr. Kinzer argued that a different approach was the key not only to resolving America’s nuclear dispute with Iran, but also Middle East regional conflicts:

That refusal [of the U.S. to engage Iran diplomatically] is rooted largely in emotion stemming from the hostage crisis of 1979-80 and the following decades of semi-covert conflict between Washington and Tehran. Emotion has pushed Washington to adopt doctrine that posits Iran as a strategic enemy, meaning that any security gain for Iran implies an American loss. By that logic, allowing Iran a voice in shaping a peace settlement for Syria – or in any Middle East process – would enhance Iran’s legitimacy and therefore undermine U.S. interests.

…”

This approach [of isolating Iran as an enemy] is misguided…. … [T]he United States and Iran, though often rivals, have urgent security interests in common. Both want to calm Iraq and Afghanistan, deal with the Afghan drug trade and fight radical Sunni movements like the Taliban and al-Qaeda. Together they could do far more to achieve those goals than either can alone.

…”

…”[N]o long-term stability in the Middle East is possible without the cooperation of Iran. Look at a map of the region: Iran is the big country right in the middle. Its cultural and political influence has been a dominant

634 Stephen Kinzer, To Resolve the Syrian Crisis, the U.S. Must Negotiate with Iran, AL JAZEERA AMERICA, 4 September 2013, america.aljazeera.com/articles/2013/9/4/to-resolve-the-syriacrisistheusmustnegotiatewithiran.html. (Emphasis added.)

In this regard, the news that President Barack H. Obama and President Hassan Rouhani exchanged letters concerning Syria, and later spoke briefly by telephone, was welcome. See Roula Khalaf, Lionel Barber & Najmeh Bozorgmehr, Rouhani’s 100-Day Revolution, FINANCIAL TIMES, 30 November-1 December 2013, 6; Syria Hails U.S.-Russia Deal on Chemical Weapons, BBC NEWS, 15 September 2013, www.bbc.co.uk/news/world-middle-east-24100296.
fact of regional life for thousands of years. Freezing it out of peace
processes almost guarantees that those processes will fail.

… [There is] the larger truth that negotiating with enemies and rivals is a
way to promote national interest, not a concession or surrender. Hostility
between powers – like the United States and Iran – should be an incentive
to negotiate, not a barrier.635

America and American sanctions, it seemed, did not matter to the “Evil Āyatollāhāns” in
Tehran and Qom, yet reinforcing the metaphor from the Iranian perspective that the “Great
Satan” clung ever more tightly to his scepter.636

Indubitably, the sanctions do matter to everyday Iranians throughout their country
– from Tabriz, near Armenia, in the north to the Persian Gulf port of Bandar-e Abbās in
the south, and from the western boundaries with Turkey and Iraq to the eastern borders
with Turkmenistan, Afghanistan, and Pakistan, Have they inflicted economic pain on Iran?
Yes, though some of that pain has been self-inflicted (as discussed later). Have the
sanctions hurt innocents in Iran? Almost certainly, yes. Commodities and services enjoyed
by a healthy middle class are in short supply. Have these effects inspired greater affection
on the Iranian street, and in towns and villages across the Persian landscape, for either the
American or Iranian government? Probably, no. Have they at least provoked a “rally
around the flag” effect in Iran, i.e., a sense of love of country if not of its politics? Probably,
yes.

Have the sanctions helped America understand Iran or its special position in Islamic
history and religion any better?637 No. Few Americans could identify the first three Šī‘īte
Imāms, or the Twelfth one, who has remained in occultation since roughly 940 A.D. They
would be shocked to learn orthodox Twelver Šī‘īte belief holds that the Hidden Imām will
come out of occultation and, with Jesus Christ, return to the world to restore peace and
justice before a Day of Final Judgment. Have the sanctions altered the self-image of Iran?
No. It is keenly aware it is the only Šī‘īte nation in the world, and only the second one in
history (the first being Fatimid Egypt). Its Constitution, written and approved after the
1979 Islamic Revolution, bespeaks its self-proclaimed role of guardian of Šī‘īsm and
exporter of its sense of socially just revolution on behalf of the poor and oppressed.

Misunderstanding turned to hardheartedness, hardheartedness to prejudice, and
prejudice to hatred. Trade sanctions facilitated, if not contributed to, this tragic course. Of
as yet unclear effect at their stated aim of compelling Iran to abandon its suspected

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635 Stephen Kinzer, To Resolve the Syrian Crisis, the U.S. Must Negotiate with Iran, AL JAZEERA
AMERICA, 4 September 2013, http://america.aljazeera.com/articles/2013/9/4/to-resolve-the-
syriacrisisistheusmustnegotiatewithiran.html. (Emphasis added.)
636 Notably, in November 2013, the Foreign Minister of Iran, Mohammad Javad Zarif (1960-), said to
the BBC “we need to come to understand that a sectarian divide on the Islamic world is a threat to all of us.”
Quoted in David Gardner, Iran Can Be Made a Force for Middle East Peace, FINANCIAL TIMES, 23-24
November 2013, 7.
637 See RAJ BHALA, UNDERSTANDING ISLAMIC LAW (SHAR'I‘A) Chapters 8-9 (3rd ed., 2023) (concerning
the points about Šī‘īsm made herein). [Hereinafter, UNDERSTANDING ISLAMIC LAW.]
Volume Four Wheat Law Library
clandestine nuclear weapons program, they manifested one obvious result: a fat set of laws. American sanctions on Iran span no less than 62 single-spaced (depending on page, font size, and minor exclusions). That figure, which grew over time with each new try, covered only the statutory regime specifically targeting Iran. It excluded dozens of pages of regulations.

Was there, then, a justification for this regime? The conventional wisdom was “yes.” This wisdom said that without sanctions, Iran would have acquired nuclear weapons, and would have sponsored even more boldly terrorist organizations. The obvious rebuttal: that was not “wisdom,” but speculation about a historical counterfactual question: what would have happened had there been no sanctions regime?

A different kind of wisdom would have been to say that without the sanctions, Iran might not have been a pariah state, and might boast a burgeoning emerging market. It might have been more akin to Turkey than North Korea. It might even have become the first Islamic BRICS nation, and a new acronym – the I-BRICS – might be needed. After all, without sanctions, Iran could have earned and had full access to export revenues oil, petrochemical products, and precious metals, invested them wisely in long-term infrastructure and human capital development projects, and diversified its economy so that it was less reliant on petroleum. After all, Iran incurred an opportunity cost if it could not exploit its energy and natural resources sectors via foreign market sales: it could not use foreign earnings from those sectors to fund development and gain an international competitive advantage in non-energy sectors. And, without sanctions on imports of refined gasoline and against access to world financial markets and payments systems, Iran might not have felt, or reacted with, hostility.

So, again, was there a justification – one that did not rely on counterfactual speculation – for the sanctions? The answer is “yes.” The first lay in Just War Theory as developed (inter alia) by Catholic moral theologians. The use of force is unjust unless it comports with specific criteria, one of which is that it is truly the last resort to resolving a problem. All other efforts must be exhausted first. Such efforts may include sanctions. Accordingly, it may be argued that were armed conflict to occur between America and Iran, it could be rationalized – if at all – as the last resort under Just War Theory, because sanctions were tried and failed. Of course, this rationalization would be parlous on either of two grounds: the sanctions were merely a prelude to war; and another last resort – diplomacy – was tried in good faith and failed.

The second justification lay in deontology. Rather than utilitarianism, the better – perhaps only sure – argument for trade sanctions against Iran is that if, indeed, the behavior of Iran is sinful, even evil, then America ought not to sully itself dealing with that country. Whether sanctions effect a change in Iranian behavior then becomes a secondary matter. Of primary importance is the effect on the American soul of dealing with perpetrator of bad acts. Put in individual terms, the idea is that “I do not want to damage my soul by selling to or buying from Iran because of what I understand to be official Iranian behavior in respect of atomic weapons and terrorism.” However, a deontological justification never has been the official American one. Rather, consequentialism has been the cornerstone.
Even if in the unlikely event the rationale were to change, despite some evidence that utilitarian calculations across four decades appeared negative for the U.S., the sanctions regime would require modification. To focus on the effect of dealing with Iran on the American soul – that doing so is morally bad for Americans – is not a value judgment the U.S. ought to impose on other countries or peoples. Thus, the secondary boycott features of American sanctions against Iran, which target foreign entities, would need to be dropped. It would be up to foreign parties, based on the free exercise of their conscience, to decide whether and to what extent they feel morally concerned about working with Iran.

V. 1979-1996: First Three of 10 Phases

To ask whether American trade rules against Iran worked presumes an understanding of how they worked. That, in turn, requires appreciation of how and why they developed over time.

There have been 10 Phases to American trade sanctions against Iran (outlined below). Of course, it is possible to view them as a totality of rules as of the present day, but that static picture would veil an insight: since 1979, and especially since 1996, the U.S. has tightened sanctions progressively on Iran, but until the November 2013 interim nuclear deal, Iranian behavior changed little, if at all, toward the outcomes America sought from the sanctions.

America applied sanctions to a broader range of commercial and financial transactions, identifying an ever-larger number of prohibited forms of business conduct. America insisted on an extraterritorial scope to these prohibitions. America mandated and ever-increasing number of penalties for violating the prohibitions. Still, Iran does what it does. Metaphorically, the “Evil Āyatollāhs” did what they did in their neighborhood playground, the Near East, to the irritation of the “Great Satan.” The more they did in disregard of the “Great Satan,” the hotter the “Great Satan” got, but each new flame it sent up (or over) only emboldened them.

The first three Phases of American sanctions against Iran were:

- **Phase 1**: Carter Era
  - 14 November 1979 through 19 January 1981

- **Phase 2**: Respite Era
  - 19 January 1981 through 29 October 1987

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638 To be sure, this figure depends on how the legal history of the sanctions is organized.
639 For detailed discussions of the first three Phases, see Raj Bhala, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE Chapter 19 (Newark, New Jersey: LexisNexis, 3rd ed., 2008); Raj Bhala, Fighting Bad Guys with International Trade Law, 31 UNIVERSITY OF CALIFORNIA AT DAVIS LAW REVIEW 1-121 (Fall 1997) (lead article). [Hereinafter, INTERNATIONAL TRADE LAW, and Fighting Bad Guys, respectively.]
Phase 3: Reagan-Clinton Era  
29 October 1987 through 5 August 1996

Note the importance of not drawing an excessively positive inference from the rubric “Respite Era.” It was then, in January 1984, when the State Department designated Iran as a state sponsor of terrorism.

Subsequently, the sanctions evolved. That evolution was cumulative: one set of sanctions did not substitute for another, but rather supplemented all previous sanctions. Each of the 10 Phases, perhaps especially the last seven, might be described tellingly as a “try,” an effort to knock out the specter of Iran obtaining a WMD, particularly a nuclear weapon, along with deterring it from sponsoring terrorism and abusing the human rights of its citizens.  

VI. Phase 4:  
1996 ILSA Emphasis on Petroleum

● ILSA, Subsequent Strengthening, and Five Practical Questions

President Clinton signed the Iran and Libya Sanctions Act on 5 August 1996. ILSA – which in 2006 under the Iran Freedom Support Act was renamed the Iran Sanctions Act – became the most significant statutory enactment against Iran. It remained so until 2010, when Congress passed, and President Barack H. Obama (1961-., President, 2009-2017) signed, another key bill. Overall, Congress strengthened the baseline 1996 statute no fewer than six times via:

(2) Iran Freedom Support Act of 2006.

640 Starting in 2006, Iran was the target of four rounds of United Nations Security Council sanctions. See Iran Says Geneva Nuclear Deal Possible on Friday, BBC NEWS, 7 November 2013, www.bbc.co.uk/news/world-middle-east-24857981. Both the U.S. and EU implemented their own sanctions regime, to reinforce those of the U.N. GATT Article XXI(c) justifies the American and European sanctions: they concern atomic weapons proliferation (covered by Article XXI(b)(i)), and are taken pursuant to U.N. Security Council Resolutions (encompassed by Article XXI(c)). The U.S. sanctions are less comprehensive and aggressive than American trade sanctions.

For a brief summary of them, followed by an overview of European, Canadian, and Korean trade measures against Iran, see Edward J. Krauland & Anthony Rapa, Between Scylla and Charybdis: Identifying and Managing Secondary Sanctions Risks Arising from Commercial Relationships with Iran, 15 BUSINESS LAW INTERNATIONAL 3-17 (January 2014). Appendix A of that article provides a synopsis of non-United States persons on which sanctions were imposed between October 2010 and May 2013.


Not only did these six Acts amend ILSA, but also the fourth and fifth Acts changed the 2010 Act, which with ILSA had become the second of the two most important statues targeting Iran. In turn, the 2010 Act also altered the first one, ILSA. 648

Not surprisingly, for the practitioner and scholar alike, and a fortiori for a domestic or foreign commercial or financial enterprise seeking in good faith to stay on the right side of American justice, the accretion of legislative enactments is dizzying. It is necessary to study ILSA and CISADA, plus sections of those enactments codified in other Titles, especially 22, and thereafter consult pertinent provisions of the C.F.R.649

The features of this and successor legislation dealing with Libya are not discussed herein. See Fighting Bad Guys, 1-121 (assessing sanctions on both Iran and Libya). Likewise, aspects of the sanctions regime touching on Iraq – for example, the ILSA Extension Act mandate that the President report to Congress on the effect of sanctions on humanitarian interests in Iraq – are not discussed herein.

Herein, statutory references are to ILSA including amendments to it through successive legislation. The amendments, and when and why they occurred, are explained below, with appropriate citations to OVERVIEW, Part I, 273-275. 644


Public Law 112-158, 125 Stat. 1298, 1647-1650, Section 1245, as amended by Public Law 112-158 (Iran Threat Reduction and Syria Human Rights Act of 2012) and Public Law 112-239 (Iran Freedom and Counter-Proliferation Act of 2012, Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013), codified at 22 U.S.C. § 8513a. This Act did not amend either the 1996 or 2010 legislation, but rather supplemented them with an additional prohibition concerning Iranian financial institutions, including the Central Bank of Iran.


The 2012 legislation also supplemented Section 1245 of the National Defense Authorization Act of 2012, Public Law 112-81, 22 U.S.C. § 8513a, in respect of financial sanctions against Iran and the third country short supply exception. (These points are discussed below.) The National Defense Authorization Act was amended further by the Iran Freedom and Counter-Proliferation Act of 2012 (Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013), Public Law 112-239.


649 Additionally, recourse to legislative history and various issuances from pertinent United States authorities is helpful, and in specific client matters, likely to be essential. Research into these sources was beyond the present scope.
Perhaps the easiest path through the legal thicket is to keep five practical questions in mind:

1. **Prohibitions:** What transactions are prohibited?
2. **Penalties:** What are the possible sanctions for engaging in a prohibited transaction?
3. **Scope:** To what, or to whom, are the prohibitions and sanctions applicable?
4. **Exceptions:** What limitations on, or outright exemptions to, the prohibitions and sanctions exist?
5. **End Game:** What (if any) criteria exist for removing the prohibitions and terminating the sanctions?

The first two questions highlight the fact a punishment is imposed for committing a transgression. The third question identifies the breadth of application of the rules. The fourth and fifth questions search for flexibility in the rules.

**Crossing the Rubicon with ILSA**

(5 August 1996 through 30 September 2006)

*ILSA*, which dates from the 104th Congress, marked a significant legal and political shift in American sanctions policy against Iran. Until *ILSA*, the *IEEPA* and Presidential Executive Orders were the legal mechanisms to implement that policy. Using the broad discretion delegated by the Legislative to the Executive branch, the President, not Congress, principally determined what sanctions to put on Iran, and how. Yet, inside and outside the Senate and House, doubts arose as to whether this approach was effective in coaxing other countries to punish Iran. To shift international attitudes, in third countries as well as Iran, Congress passed *ILSA*.

Congress stated (in findings contained in *ILSA*) Iran behaved in two ways adverse to American national security: it sought to acquire WMDs; and it supported international terrorism. To further these pursuits, Iran used its governmental and quasi-governmental

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651 The statute defines “Iran” as “any agency or instrumentality of Iran.” See *Iran Sanctions Act of 1996*, as amended, Section 14(10), reprinted in OVERVIEW, Part II, 1148. Albeit circular, this definition suggests a distinction between the government and people.


facilities outside of its territory. Then-extant bilateral and multilateral efforts to deter it were ineffective. Sanctions with real “bite” – ones that cut into Iranian revenues – were needed. Iranian behavior threatened the national security (and foreign policy) interests of the U.S. and its allies and friends, hence Congress:

declare[d] that it is the policy of the United States to deny Iran the ability to support acts of international terrorism and to fund the development and acquisition of weapons of mass destruction and the means to deliver them by limiting the development of Iran’s ability to explore for, extract, refine, or transport by pipeline petroleum resources of Iran.

So, in ILSA, Congress mandated sanctions against two types of transactions: (1) foreign investment in the development of the petroleum sector of Iran; and (2) exportation of sensitive weaponry, both WMDs and advanced conventional ordnance, to Iran.

With its legal and political shift via ILSA, and its findings in ILSA, Congress crossed the Rubicon. Was there to be any more debate about whether Iran had the legal right under the NPT to develop peaceful atomic energy, or even perhaps acquire nuclear weapons? No. Was there to be any more debate about why Iran might be supporting terrorism, and what other measures might deter it from doing so? No. In 1996, six years before President George W. Bush (1946, President, 2001-2009) declared in his 2002 State of the Union Address that Iran is part of an “axis of evil” (along with Cuba and North Korea), Congress declared Iran so.

To be sure, Congress still encouraged the President to pursue multilateral channels. Indeed, ILSA obliged the President to report on his efforts:

to mount a multilateral campaign to persuade all countries to pressure Iran to cease its nuclear, chemical, biological, and missile weapons programs and its support of acts of international terrorism.

The President also had to report on his efforts to get other countries to reduce their diplomatic ties with Iran, and expel any Iranian representatives who participated in the 4 November 1979 takeover of the American Embassy in Tehran or holding of hostages during the 444 days thereafter, the use by Iran of diplomats to acquire WMDs or promote

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654 The statute speaks of “Iranian diplomats and representatives of other government and military or quasi-military institutions of Iran,” and lists such entities. They include the Foreign, Intelligence and Security, and Interior Ministries, Revolutionary Guards, and several Foundations. See Iran Sanctions Act of 1996, as amended, Section 14(11), reprinted in OVERVIEW, Part II, 1148.


656 Iran Sanctions Act of 1996, as amended, Section 3, reprinted in OVERVIEW, Part II, 1133. The statutory definition of “act of international terrorism” is discussed in a later footnote.

657 See Iran Sanctions Act of 1996, as amended, Section 5(a)(1) and 5(b), respectively, reprinted in OVERVIEW, Part II, 1136, 1138.

658 The pertinent excerpt from the 29 January 2002 speech may be viewed at “President Bush Axis of Evil Speech,” YouTube, www.youtube.com/watch?v=btkJhAM7hZw.


terrorism, and the inspection activities of the International Atomic Energy Agency of nuclear facilities (actual or under construction) in Iran.

But, the purpose of pursuing multilateral efforts is manifest from the nature of the reporting obligation about them: Congress did not seek to talk with Iran; rather, it wanted stringent sanctions on Iran to “limit[] the development of [Iran’s] petroleum resources … [so as to] inhibit Iran’s efforts to acquire WMDs or support terrorism.”

**Two Sanctions for Petroleum Resource Development and Sensitive Weaponry Export Prohibitions**

With ILSA, Congress aimed to strike Iran at its most significant revenue-generating sector: energy. Perhaps Iranian support for the likes of Hezbollah and its efforts to acquire nuclear arms technology would be thwarted if Iran did not have funds to cover those expenses. Where else did the bulk of that funding come from but oil exports? And, what else made oil exportation possible but foreign investment in exploration, drilling, and transportation of oil in Iran for onward shipment abroad?

Moreover, via ILSA Congress specifically targeted any “foreign person.” Therein lay a key shift in American strategy, and another feature of the Rubicon crossing. Sanctions were no longer just a primary boycott, barring Americans from dealing with Iran. With ILSA, they became a secondary boycott: no one else was supposed to deal with Iran, at least not in the petroleum sector, either. The definition of “foreign person” was broad, covering (1) an individual (regardless of citizenship), firm, be it a partnership, corporation, or other form of business association, and (3) government enterprise, thereby including a wholly or partly SOE or STE. The trigger for sanctions under ILSA (later revised, as discussed below) was U.S. $40 million.

So, as to the first transaction ILSA forbade, the *actus reus* (culpable act) was any “investment that directly and significantly contributes to the enhancement of Iran’s ability to develop petroleum resources.” “Petroleum resources” was defined broadly: it refers not only to “petroleum” (i.e., crude oil), “refined petroleum products,” “oil or liquefied natural gas,” and “natural gas resources,” but also to tankers and products used to build or maintain pipelines for transporting oil or natural gas. In turn, “refined petroleum

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663 *Iran Sanctions Act of 1996*, as amended, Section 4(a), *reprinted in OVERVIEW*, Part II, 1133. Section 4(b) mandated Presidential reports to the “appropriate Congressional committees” on countries that have, and have not, agreed to support America in its policy toward Iran. Those Committees were the Senate Committees on Banking, Housing, and Urban Affairs, and on Foreign Relations, and the House Committees on Foreign Affairs, Financial Services, and Ways and Means. See id., Section 14(2), 1147 (defining “appropriate Congressional committees”). The same Committees are referred to throughout the legislation as “appropriate Congressional committees. See, e.g., id., Section 4(d) at 1135 (concerning interim reports on multilateral sanctions and monitoring).
products” covers gasoline, diesel, and jet fuel. So, the term “petroleum resources” covered the entire sector pertaining to this form of energy.

Without clarification, the key terms “directly and significantly” could be read to ensnare virtually any economic transaction connected to that sector: providing buttons for uniforms of Iranian petroleum workers, and shoelaces for their shoes, distributing bottled water to them, or selling them goods such as prescription eyeglasses or pharmaceuticals like aspirin could be considered an “investment.” After all, clothes, shoes, water, glasses, and aspirin all are used by those workers, without which they could not easily perform their duties. Unfortunately, ILSA provided no guidance as to the meaning of “directly and significantly.”

What the statute did define was “investment” and “develop and development.” An “investment” was any agreement with the government or Iran, or a non-governmental entity in Iran, involving (1) a contract that includes responsibility for “the development of petroleum resources” in Iran (including supervising or guaranteeing that another person will perform such a contract), (2) taking a share ownership (such as an equity interest) in “that development,” or (3) a contract for participating in any form in the “royalties, earnings, or profits of that development.” To “develop” those Iranian petroleum resources was to explore for them, extract or refine them, or transport them by pipeline. Query, however, whether these definitions suggested a contract to provide Iranian workers with clothes, shoes, water, glasses, and aspirin was covered, if those workers engaged in petroleum exploration, extraction, refining, or pipeline transportation, and that work was judged direct and significant?

Not under prongs (2) or (3), because no share ownership or profit sharing redounds to the suppliers of clothes, shoes, water, glasses, or aspirin. But, perhaps under prong (1), insofar as these items help guarantee the workers can develop Iranian petroleum resources. Admittedly that would be a strained interpretation, but not one denied by the definitions if an aggressive approach is preferred.

ILSA did not establish a strict liability offense. Rather, it contained a mens rea (culpable intent) requirement: “knowingly.” ILSA defined the term broadly to include actual or constructive knowledge: if a foreign person actually knew, or should have known, of the conduct, circumstance, or result in respect of an investment in the Iranian petroleum resources sector, then that sufficed.

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667 See Iran Sanctions Act of 1996, as amended, Section 14(9), reprinted in OVERVIEW, Part II, 1148. The pertinent date at which such contracts became illegal was the date of enactment of ILSA, which was its effective date. See id., Section 13(a), 1147. Any amendment to a contract made on or after 13 June 2001 (a few weeks before the entry into force of the ILSA Extension Act) to a pre-existing contract is considered entry into a contract, and thus forbidden. See id.
668 See Iran Sanctions Act of 1996, as amended, Section 14(4), reprinted in OVERVIEW, Part II, 1147. Likewise, such activities would constitute “development.”
As to the second prohibited transaction, *ILSA* took aim at helping Iran develop WMDs or certain other military capabilities. It was illegal for any foreign person to export, transfer, or otherwise provide to Iran:

any goods, services, technology, or other items *knowing* that the provision of such goods, services, technologies, or other items *would contribute materially* to the ability of Iran too –

(A) acquire or develop *chemical*, *biological*, or *nuclear weapons* or related technologies; or

(B) acquire or develop *destabilizing* numbers and types of *advanced* conventional weapons.\(^{671}\)

The statute did not define “chemical” or “biological” weapons, nor identify what conventional weapons are “advanced,” or how many of them would be “destabilizing.” It offered precision only in respect of “nuclear” weapons, saying a “nuclear explosive device” was any item (assembled or disassembled) “designed to produce an instantaneous release of … nuclear energy from special nuclear material … greater than the … energy … from” detonating one pound of trinitrotoluene.\(^{672}\)

Like the first offence, this offense was not a strict liability one: the foreign person had to know the items shipped to Iran would help Iran in its weapons programs. Moreover, as the italicized terms indicate, the contribution had to be “material,” and as to conventional weapons, they had to be both “advanced” and in “destabilizing numbers.” Assuredly, a missile designed to carry a conventional weapon would qualify, all the more so if the item transferred to Iran would help it modify the missile to carry a nuclear payload. But, as to WMDs, “related technologies” were enough, and as to both categories of ordinance, the items shipped need not be weapons. Any item that helped Iran “develop” the forbidden weapons could not be sent to Iran. So, for example, information from research conducted in a laboratory at the University of Kansas (KU) School of Engineering was within the scope of banned material. That meant faculty had to take special care in sharing information with research assistants, particularly ones from overseas.

In sum, *ILSA* as originally conceived targeted the development of Iranian petroleum resources.\(^{674}\) (As explained below, later changes to *ILSA* added several more sectoral

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\(^{672}\) See *Iran Sanctions Act of 1996*, as amended, Section 14(8), reprinted in *OVERVIEW*, Part II, 1148.

\(^{673}\) See *Iran Sanctions Act of 1996*, as amended, Section 5(b)(2)(A), reprinted in *OVERVIEW*, Part II, 1138 (mentioning “missiles or advanced conventional weapons that are designed or modified to deliver a nuclear weapon”).

\(^{674}\) See *Iran Sanctions Act of 1996*, as amended, Section 5(a), reprinted in *OVERVIEW*, Part II, 1135-1136.
targets, plus individual ones, such as the production of refined petroleum products in Iran, and exportation of refined petroleum products to Iran). Any foreign person investing more than $40 million in any one year in the petroleum sector was liable. The period of measurement was one year, and multiple investments that summed to or exceeded the threshold were illegal. Thus, a foreign person could not lawfully structure a transaction into a series of smaller ones, and expect they be treated in isolation.

**ILSA** required the President to impose two of six sanctions on a foreign person that transgressed its prohibitions, referred to as the “sanctioned person” of “sanctioned entity:”

(1) Export Financing Sanction:

The U.S. Export-Import Bank had to refuse to grant any loan to finance exports of goods or services to a sanctioned person. Such financing otherwise included Ex-Im Bank issuance of a guarantee, insurance, extension of credit, or participation by the Bank in a credit syndicate.

(2) Export License Sanction:

A sanctioned person was prohibited from obtaining a specific license for exports of controlled items. Such items were controlled under the **Export Administration Act of 1979**, **Arms Export Control Act of 1976**, **Atomic Energy Act of 1954**, or any other legislation mandating prior review and approval as a condition for export or re-export of goods or services.

Note **ILSA** contained a second kind of Export License Sanction, which applied specifically in instances in which the prohibition against exportation of sensitive weaponry is violated. No license for the export, transfer, or re-transfer, direct or indirect, of nuclear material, facilities, components, or related goods, services, or technology, could be issued to the government of any country with primary jurisdiction over a person who violates that prohibition. This additional species of Export License Sanction was designed to coax foreign governments to police their citizens and residents against shipping WMDs or destabilizing numbers and types of advanced conventional weapons to Iran.

This second species was a qualified one. The President need not impose the sanction if (1) the government of the pertinent country neither knew nor had reason to know about its person is violating the prohibition, (2) that

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government had taken “all reasonable steps necessary” to prevent a
recurrence of the violation and penalize the person, or (3) approving, on a
case-by-case basis, an export license was “vital to the national security
interests of the United States.”

(3) American Bank Loans Sanction:681

Any American bank was obliged to deny to a sanctioned person any loan
over $10 million in one year. Any “United States financial institution”
defined the scope, and meant any depository institution, credit union,
securities firm (e.g., broker or dealer), insurance company, or other
financial services provider in the U.S., including a branch or agency in the
U.S. of a foreign bank.682 The financial institution was barred from
providing loans or credits totaling annually $10 million to a sanctioned
person, unless that person helped “relieve human suffering,”683 and the
financing was for that purpose.

(4) Primary Dealer and Repository Sanctions.684

Any sanctioned person that was an American or foreign “financial
institution” had to be disallowed from serving as a primary dealer of, or
repository for, of U.S. government funds. “Financial institution” meant any
depository institution, credit union, securities firm (e.g., broker or dealer),
insurance company, or other financial services provider based or operating
anywhere in the world. So, the sanctioned financial institution had to be
barred from serving as a primary dealer in U.S. government Treasury
securities for the Federal Reserve Bank of New York, or a repository for
U.S. government funds as agent for the U.S. government.685 Note that
primary dealer status was (and is) considered on Wall Street to be both
prestigious and potentially lucrative.

680 Iran Sanctions Act of 1996, as amended, Section 5(b)(2)(B)-(C), reprinted in OVERVIEW, Part II,
1138-1139. As to the first two grounds for exception for imposing the Sanction, the President had to give
notification to the appropriate Congressional committees. See id., Section 5(b)(2)(B)(i)-(ii). As to the third
ground, which resulted in issuance of a license despite a violation, the President had to justify doing so to the
Senate Committee on Foreign Affairs and House Committee on Foreign Relations. See id., Section
5(b)(2)(C)(ii).


ILSA incorporates by reference the definition of “financial institution” from Section 3(c)(1) of the Federal
Deposit Insurance Act of 1950, and the definition of a foreign bank “branch” or “agency” from Section


II, 1141.

685 This sanction is potentially two separate sanctions. If a financial institution is denied primary dealer
status, or its status as such is revoked, then that action is considered one sanction. If it also is barred from
serving as a repository, or its ability to serve as such is revoked, then that action is considered a second
Volume Four Wheat Law Library
(5) **Government Procurement Sanction.**

A sanctioned entity had to be excluded from any U.S. government procurement contracts. That is, the American government had to refuse to procure goods or services from that entity. Though not expressly mentioned, presumably coverage extended to intangible merchandise, such as software or databases, and to IP.

(6) **Additional Sanctions.**

Import sanctions declared by the President under the *IEEPA* had to be applied to imports from a sanctioned person. The point of such additional *IEEPA* sanctions was to prevent importation of goods (and, presumably, services) from the sanctioned entity into the U.S.

Sanctions (unless waived, as discussed below) had to remain in place for at least two years from the date of imposition, or until such time (not less than one year) the President receives “reliable assurances” the sanctioned person has ceased engagement in any prohibited activity, and will not do so knowingly again.

Sanctions decisions were not subject to judicial review. Presumably a court might decline jurisdiction under the political question doctrine, but the statute avoided that matter by making clear a Presidential decision to impose sanction is not reviewable by any court.

Waiver of sanctions was possible as a general matter, and via delay. *ILSA* authorized the President to waive imposition of any otherwise-mandatory sanction if the decides “it is necessary to the national interest” of the U.S. to do so. Obviously, the criterion is open-ended: any interest, be it national security or otherwise, may be a justification, and the President decides what is “necessary.” The President could delay for up to 90 days (renewable for a second 90-day period) imposition of sanctions if Congress urged him to do so, and in lieu of imposing a punishment, pursue a diplomatic course. In specific, Congress could call upon the President, and the President might determine, that

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688 See 50 U.S.C. § 1701 et seq.


693 The President must report to the appropriate Congressional committee his rationale for the waiver. His report must discuss the nature and significance for Iran’s acquisition of WMDs or destabilizing numbers and types of advanced conventional weapons of the prohibited conduct in which the sanctioned person engaged, the actions of the government holding primary jurisdiction over the person to end or penalize that conduct, and possible American responses if the person resumes the conduct. See id., Section 9(c)(2).

694 The President must report to Congress about the consultations and his decision in favor of delay. See id. at Section 9(4).
consultations with the government of the country that has primary jurisdiction over the sanctioned person “has taken specific and effective actions, including, as appropriate, the imposition of appropriate penalties” to end the illegal conduct with Iran.\footnote{Iran Sanctions Act of 1996, as amended, Section 9(a)(2), reprinted in OVERVIEW, Part II, 1144.}

So, for example, suppose the Malaysian energy company, Petronas, invests in the petroleum sector of Iran in an amount above the trigger threshold. The President could waive sanctions, if imposing them on Petronas would damage America’s national interests. Perhaps many American companies have energy contracts with Petronas, and an interest in bidding on energy projects in Malaysia. Petronas and the Malaysian government might retaliate against them if the President imposes sanctions. Or, at least, the President might turn to the Malaysian government for satisfaction that it is disciplining Petronas in some way. Here, then, would be grounds for waiver or delay, respectively.

Relatedly, ILSA created two incentives to join a multilateral sanctions regime led by America against Iran.\footnote{See also Iran Sanctions Act of 1996, as amended, Section 4(d), reprinted in OVERVIEW, Part II, 1135 (calling for an interim report from the President to the appropriate congressional committees on multilateral sanctions as to (1) whether Australia, European Union, Israel, or Japan have trade sanctions on persons or their affiliates from doing business with or investing in Iran, and if so, their duration and effect, and (2) any GATT-WTO decisions on sanctions against Iran).} As a positive incentive, the President could waive sanctions against any foreign person from a country that joined such a regime. As a negative incentive, ILSA dropped the trigger permissible investment threshold from $40 to $20 million for any person from a country that did not join.

All such sanctions, of course, fell into the category of “on the one hand …,” \textit{i.e.}, disciplines to enforce compliance. The legislation contained “… on the other hand” provisions, ones designed to balance disciplines with flexibilities. The President did not have to impose a sanction if:

\begin{enumerate}
  \item Doing so would inhibit procurement of defense articles or services under existing contracts or subcontracts (including option contracts “to satisfy requirements essential to the national security of the United States,” or co-production agreements for goods or services “essential to the national security”),\footnote{Iran Sanctions Act of 1996, as amended, Section 5(f)(1)(A), (C), reprinted in OVERVIEW, Part II, 1140.}
  \item The person to be sanctioned was “a sole source supplier” of those articles, and those articles were “essential” and no substitute was “readily or reasonably available;”\footnote{Iran Sanctions Act of 1996, as amended, Section 5(f)(1)(B), reprinted in OVERVIEW, Part II, 1140.} \\
  \item At issue were eligible countries and merchandise under the WTO GPA or a pertinent FTA.\footnote{See Iran Sanctions Act of 1996, as amended, Section 5(f)(2), reprinted in OVERVIEW, Part II, 1140.}
\end{enumerate}
(4) The items involved were (i) pipeline goods, services, or technology (i.e., items contracted for before the identity of the sanctioned person appeared in the Federal Register), 698 (ii) spare parts, components, or information technology “essential” to American production or products, or routine servicing and maintenance of products where no alternative arrangements were “readily or reasonably available,”699 or (iii) medicines, medical supplies, or other “humanitarian items.”700

The first two exceptions manifestly were self-interested – for defense items essential to national security and other items essential to American manufacturing. The third exception, for humanitarian reasons, comported with principles of human dignity and minimizing harm to innocent life.

How might Iran have escaped from ILSA sanctions? The 1996 legislation contained two termination criteria.701 They matched the purposes of the statute: Iran had to drop its WMD ambitions and stop supporting terrorism. Never mind the possibility Iran might have to prove the negative (e.g., that it did not actually pursue a WMD). The termination criteria were linked to American suspicions about Iranian behavior, and those suspicions underpinned the prohibitions and sanctions.

The first criterion was that Iran “has ceased its efforts to design, develop, manufacture, or acquire” a nuclear bomb, chemical or biological weapons, or ballistic missiles or ballistic missile launch technology.702 The second criterion was Iran “has been removed” from the list of countries that (under Section 6(j) of the 1979 Export Administration Act) “have been determined … to have repeatedly provided support for acts of international terrorism.”703 Both criteria required Presidential certification to the appropriate Congressional committees, and both had to be met for termination.

VII. Phases 5 and 6:
2001 ILSA Extension, 2006 IFSA, and Extraterritoriality

Phase 5:

701 See Iran Sanctions Act of 1996, as amended, Section 8(1)-(2), reprinted in OVERVIEW, Part II, 1143-1144.
702 Iran Sanctions Act of 1996, as amended, Section 8(1)(A)-(C), reprinted in OVERVIEW, Part II, 1143.
703 Iran Sanctions Act of 1996, as amended, Section 8(2), reprinted in OVERVIEW, Part II, 1144.
ILSA Extension
(29 September 2006 through 1 July 2010)


First, the 2006 legislation lowered from $40 to $20 million the threshold for investment in Iranian petroleum resources that triggered mandatory sanctions against any foreign person.\footnote{See Iran Sanctions Act of 1996, as amended, Section 5(a)(1)(A), reprinted in OVERVIEW, Part II, 1136; OVERVIEW, Part I, 274.} So, the disincentive of a differential trigger, designed under ILSA to discourage deviant behavior from a multilateral sanctions regime, was dropped. There never was such a regime, so why not tighten the noose around the Iran’s most strategic economic sector?

Second, via the Extension Act Congress took another significant step in managing closely American trade policy toward Iran. Congress required the President to report to it on three questions:

(1) Were the sanctions achieving their national security objectives?\footnote{See Iran Sanctions Act of 1996, as amended, Section 10(b)(1)(A), reprinted in OVERVIEW, Part II, 1146.}

(2) What effect did the sanctions have on humanitarian interests in Iran, a country in which a sanctioned person is located, or other countries?\footnote{See Iran Sanctions Act of 1996, as amended, Section 10(b)(1)(B), reprinted in OVERVIEW, Part II, 1146.}

(3) What impact did the sanctions have on other American security and economic interests, “including relations with countries friendly to the United States,” and on the American economy?\footnote{See Iran Sanctions Act of 1996, as amended, Section 10(b)(2), reprinted in OVERVIEW, Part II, 1146.} Each such matter was a sensible enough topic for which the President ought to report, but two points were critical.

First, the third matter easily allowed for sanctions to be evaluated according to Israeli and Gulf Arab interests. They are countries “friendly” to America. If these friends thought the sanctions useful – as they tended to – then so, too, would many in Congress. Second, predictably, the report largely supported the sanctions regime, with one branch of
government (the Executive) echoing what the other (the Legislature) wanted to hear. Yet, arguably a robust response to these questions would have been (1) “no, or at least, not clear,” (2) “possibly hurting innocents,” and (3) “annoying, if not alienating, certain friends and allies, including India and Japan.” Consider each suggestion in turn.

First, during that period, Iran had not abandoned its nuclear energy program, or forswn WMDs. Second, in contrast to Burmese opposition leader Aung San Suu Kyi (1945–), who called upon the world to boycott the regime of General Than Shwe (1933–), Iranian opposition figures had not clearly done so. In other words, Mrs. Suu Kyi and her National League for Democracy (NLD) were willing to accept the pain of sanctions. The situation in Iran was different: continued sanctions risked giving the Ayatollāh’s regime an argument to galvanize people against foreign interference, in effect, to rally around the flag. Third, the likes of India and Japan could not easily and quickly substitute Iran for other sources of energy. American sanctions inflicted difficulties on them, at a time when their support, respectively, for fighting Islamist extremism and ensuring the rise of China was peaceful was critical.

India is an important case in point of limits of American sanctioning power set by factors beyond American control. To meet its growing energy needs as an emerging country and member of the BRICS (Brazil, Russia, India, China, and South Africa), India must import up to 80% of its energy. Iran is an historical trading partner for India: Mughal emperors like Shah Jahan (1592-1666) brought architects from Persia to design grand buildings, including the Taj Mahal. Manifestly, with some of the largest oil and natural gas reserves of any country in the world, Iran has a comparative advantage over India in energy production, while India has a comparative advantage over Iran in agricultural goods like rice (a staple in Persian cuisine) and industrial products like generic pharmaceuticals.

As the value of the *rupee* depreciates against hard currencies like the U.S. dollar, energy prices in India rise, causing import-driven inflation. Poor people are particularly hard hit, and government funding to subsidize fuel for them is stretched. If India ceases all imports of Iranian energy, without adequate substitutes, then fuel prices rise. (In effect, the supply curve of energy available in the Indian domestic market shifts in, and if demand is steady or increases, then prices rise.)

Indeed, American sanctions themselves may contribute to higher fuel prices, insofar as they keep off of the world market Iranian oil, thus artificially constricting supply (again, in effect, causing an inward shift in the supply curve). In India and many other developing countries, fuel price hikes are a well-known cause of social and political unrest.

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709 The report was due between 24 and 30 months after the date of enactment of the *Extension Act, i.e.*, 24-30 months from 30 September 2006. See *Iran Sanctions Act of 1996*, as amended, Section 10(b), reprinted in OVERVIEW, Part II, 1146.

710 See generally Connie Ng, Comment, *Burma and the Road Forward: Lessons from Next Door and Possible Avenues Towards Constitutional and Democratic Development*, 53 SANTA CLARA LAW REVIEW 267-299 (2013) (discussing the transition to democracy in Burma).

and many of India’s poor also happen to be Muslim. Surely these factors weigh heavily in the calculations in South Block (the office of the Indian Prime Minister in New Delhi) when considering whether and how to accommodate pressure from the White House to “toe the line” on Iran.

- **Phase 6:**
  
  *IFSA*
  
  *(29 September 2006 through 1 July 2010)*

  But for the *Iran Freedom Support Act*, American trade sanctions against Iran dating from 1996 under *ILSA* and renewed under the *Extension Act* until 2006 would have lapsed on 29 September of that year. Via *IFSA*, the 109th Congress extended the regime for another five years, specifically until 31 December 2011. 712 Cancelling sanctions against Libya, *IFSA* also changed the rubric from “*ILSA*” to “*Iran Sanctions Act,*** or “*ISA.*” *IFSA* loosened sanctions in one respect, and tightened them in three others.

  As for relaxation, *IFSA* empowered the President to waive application of sanctions on the nation of any country, for up to six months, “on a case by case basis,” which otherwise would be imposed on that person for investing in the development of Iranian petroleum resources. 713 To exercise this authority, called a “General Waiver,” the President needed to certify to the appropriate Congressional Committees that waiver was “vital to the national security interests of the United States.” 714 The President could renew the waiver, if “appropriate,” for periods not to exceed six months. 715

  Similarly, *IFSA* allowed for a “Waiver with respect to Persons in Countries that Cooperate in Multilateral Efforts with Respect to Iran.” 716 In particular, on a case by case basis for up to 12 months, the President could waive imposition of sanctions on a person, if the government with primary jurisdiction over that person “is closely cooperating” with American in its efforts to keep Iran from acquiring WMDs or destabilizing numbers and types of advanced conventional weaponry, and such a waiver is “vital to the national

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On 23 April 2004, President George W. Bush waived application of sanctions on Libya because of the agreement of that country to abandon pursuit of WMDs and cooperate with the U.S. on counterterrorism. *See 69 Federal Register 24,907 (5 May 2004); Overview, Part I, 274.* Pursuant to the *Iran Freedom Support Act*, enacted 30 September 2006, Libya no longer was subject to *ILSA* sanctions. *See Overview, Part I, 274.* The *ISA* initially was known as the *Iran and Libya Sanctions Act*, under the 1996 legislation, and under the *ILSA Extension Act of 2001*. But, when sanctions were removed on Libya under the 2006 *Iran Freedom Support Act*, the nomenclature of “*Iran Sanctions Act,”* or “*ISA,”* was used. *See Iran Sanctions Act of 1996*, as amended, Section 1, reprinted in *Overview, Part II, 1133.*


714  *See Iran Sanctions Act of 1996*, as amended, Section 4(c)(1)(A), reprinted in *Overview, Part II, 1134.* The President must make this certification at least 30 days before the waiver takes effect. *See id.*


716  *See Iran Sanctions Act of 1996*, as amended, Section 4(c)(1)(B), reprinted in *Overview, Part II, 1134.* As with the General Waiver, with the Waiver for a person from a cooperating country, the President must make this certification at least 30 days before the waiver takes effect. *See id.*
security interests “of the U.S. The President could renew this waiver, if “appropriate,” for periods not to exceed 12 months.”

As for strengthening, first, IFSA created the possibility the President would launch an investigation into imposing sanctions against a person involved in petroleum investment activity in Iran. If he did so, which he would upon receipt of “credible information indicating” the person is engaged in a sanctionable activity, then the results of the investigation would be due in 180 days.

Second, IFSA made termination of sanctions more difficult: it added as a third criterion for termination of trade sanctions that (based on Presidential certification to the appropriate Congressional committees) Iran posed “no significant threat” to the national security or interests of the U.S. or its allies. Israel – though it is the only country in the Middle East not to be a signatory to the NPT, and reputed to be the only nuclear-armed power in that region – could claim both an alliance with America and a threat to its security or interests.

Indeed, it did so again after President Obama spoke by telephone with Iranian President Hassan Rouhani. Their 15-minute discussion on 27 September 2013 was the first direct communication between the leaders of the two countries since before the fall on 11 February 1979 of Iran’s last Shah, Mohammad Reza Pahlavi. Fearing a possible


For a discussion of the Shah’s fall, and also the Mosaddegh, see, e.g., Ray Takeyh, The Last Shah: America, Iran, and the Fall of the Pahlavi Dynasty (New Haven, Connecticut: Yale University Press, January 2021). Mr. Takeyh argues:

“Any history of the Pahlavi dynasty must take into account the outsized role that America played in Iran,” but “for all of America’s meddling, the revolution was truly a Persian affair…. To fully appreciate how a seemingly formidable monarchy collapsed so suddenly, one must trace its evolution from the time the Shah first came to power.”

… [T]he Revolution was not, as is widely believed, the popular overthrow of a powerful and ruthless puppet of the United States. Rather, it followed decades of corrosion of Iran’s political establishment by an autocratic ruler who demanded fealty but lacked the personal strength to make hard decisions, and ultimately lost the support of every sector of Iranian society. “The Shah was not the man to lead the nation through a crisis…. When the revolution came, the system he had been hollowing out for so long simply crumbled.”

…

For example, “Iran in the 1970s was a nation in discontent. Its political order was suffocating and its economy was cooling. Intelligence and Embassy reports documented the signs of distress and described how the monarchy lacked support in key sectors of society. They noted ferment among the young, gloom among the middle class, and
rapprochement between Washington and Tehran on issues of WMDs and terrorism that could involve loosening or eliminating sanctions, Israeli Prime Minister Benjamin Netanyahu (1949-, PM, 1996-1999, 2009-) flew to the American capital, meeting with President Obama just three days after his historic phone call with President Rouhani. That the Iranian President had the backing of the Iranian Supreme Leader, ʿĀyatollāh Alī Khamenei (1939-, Supreme Leader, 1989-), who authorized his team to show “heroic flexibility,” surely worried the Prime Minister.721 The Israeli leader dubbed stopping the Iranian nuclear program the “defining issue of his premiership,” and demanded Iran “stop all Uranium enrichment, close the enrichment facility at Qom, remove all enriched Uranium, and halt its development of Plutonium.”722

True enough, by the account of President Rouhani in his September 2013 address to the United Nations General Assembly, Iranian “nuclear technology has already reached industrial scale.”723 Its program included roughly 18,000 centrifuges across multiple

increasing unity between the religious and secular opposition movements” …. “The tragedy is that these warnings were ignored, and those who issued them were later blamed for the ‘intelligence failure’”…..

… “[T]he revolution would not have succeeded without a man of unusual determination who brooked no compromise…. The many strands of opposition submitted to Khomeini because he seemed the most capable of leading the revolution to success.”

“The Islamic Republic has now been in power slightly longer than the Shah’s monarchy. It is a different regime, existing in a different time, yet it is making many of the Shah’s mistakes… Like the monarchy in its later years, the Islamic Republic is at an impasse, having become a regime that cannot reform itself even when it senses an urgent need for change.”

“The theme of Iranian history is a populace seeking to emancipate itself from tyranny – first monarchical, now Islamist…. The Islamic Republic stands today as a regime without a real constituency, covering itself in an ideology that few believe in.”

“The only thing that can be said with certainty is that the Iranian masses’ search for freedom continues. Should it one day succeed, it will confound another generation of Americans who had assured themselves that, like the Shah, the Islamic Republic would endure” ….

Quoted in Council on Foreign Relations News Release, New Book Shows How the Shah’s Iran Collapsed From Within, 26 January 2021(contained in email from CFR), www.cfr.org/book/last-shah?utm_source=newsrelease&utm_medium=email&utm_campaign=last-shah&utm_term=PressCFR%20and%20Members%20-%20ALL. A problem with this analysis, however, is it suggests a false binary, i.e., that the fall of the Shah was caused by internal weakness, or by revulsion against America and its stooge. In fact, both causes are true, and to minimize the latter is to understimate the opposition of the Iranian people to decades of colonialism.  

721 Quoted in Najmeh Bozorgmehr, Rouhani Lifts Hope for Solutions, FINANCIAL TIMES, 30 September 2013, 4.
722 John Reed & Geoff Dyer, Netanyahu to Talk Tough on Iran to Obama, FINANCIAL TIMES, 30 September 2013, 4. [Hereinafter, Netanyahu to Talk Tough.]
723 Quoted in Richard Haas, A Diplomatic Dance Will Be No Waltz For Either Iran or America, FINANCIAL TIMES, 30 September 2013, 11. [Hereinafter, A Diplomatic Dance.]
Uranium enrichment sites, and stockpiles of enriched Uranium to various degrees.\textsuperscript{724} But, Israeli demands set a considerably higher threshold for termination of sanctions: without enriching Uranium at all, Iran could not have even a peaceful nuclear energy program, but denying Iran such a program never was the aim of the American sanctions.

Prime Minister Netanyahu continued his counter-offensive against what he sarcastically called “sweet talk and the onslaught of smiles” from Iran surrounding the September 2013 United Nations General Assembly meeting.\textsuperscript{725} The Israeli delegation at the United Nations walked out of President Rouhani’s September 2013 speech, making Israel – in the words of Yair Lapid (1963-), the Israeli Finance Minister – look like a “serial objector to negotiations.” And, so it was. The Israeli Prime Minister used his time at the General Assembly podium to launch an \textit{ad hominem} attack on the Iranian President, calling him a “wolf in sheep’s clothing.”\textsuperscript{726} Surely the charm offensive from Tehran was a devilishly clever plot to buy Iran time to enrich more Plutonium, over the 85\% threshold needed for a nuclear device. In sum, the third criterion for termination of sanctions added by \textit{IFSA} nearly sub-contracted American policy on Iran to Israel. As a practical matter, given the overwhelming influence of Israel through the American Israel Political Action Committee (AIPAC) in Congress, it would be difficult to get sanctions lifted without Israeli support – and that support looked well nigh impossible.\textsuperscript{727}

Third, and most importantly in respect of strengthening, \textit{IFSA} clarified the sanctions regime applies to any “person,” not just “foreign person.” By “person,” the legislation means:

(i) a natural person;

(ii) a corporation, business association, partnership, society, trust, financial institution, insurer, underwriter, guarantor, and any other business organization, any other non-governmental entity, organization, or group, and any governmental entity operating as a business enterprise; and

(iii) any successor to any entity described in clause (ii).\textsuperscript{728}

Crucially, the term included any kind of financial institution or provider of financial services. This inclusion facilitated yet tighter prohibitions and tougher sanctions ushered in 2010, 2012, and 2013 (discussed in a separate Chapter).

\textsuperscript{724} See \textit{A Diplomatic Dance}. In December 2013, Iran was estimated to have 19,000 centrifuges. See Geoff Dyer & John Reed, \textit{Israel Opt to Shift Tactics on Iran Talks}, \textit{FINANCIAL TIMES}, 7-8 December 2013, 4.

\textsuperscript{725} Netanyahu to Talk Tough.

\textsuperscript{726} Quoted in Geoff Dyer, \textit{Iran’s “Good Cop, Bad Cop” Breeds Divided Feelings in Washington}, \textit{FINANCIAL TIMES}, 12 December 2013, 12.

\textsuperscript{727} See Netanyahu to Talk Tough.

The only explicit exclusion from the term “person” was a government or governmental entity that did not operate as a business enterprise. So, to the extent the Iranian Revolutionary Guard Corps ran a business, they are within the scope of the sanctions – an understandable inclusion. So, too, was a Chinese SOE, or an Australian STE, or for that matter – and arguably less understandably – the Canadian Wheat Board, or the Indian Coffee Marketing Board.

So, IFSA expanded the universe of potential sanctions targets, and this expansion applied to both prohibitions. No longer were foreign persons investing in the Iranian petroleum sector the only targets. Now, any person materially contributing to the ability of Iran to develop a WMD, or even “advanced conventional weapons in destabilizing numbers and types,” was a target. Indeed, sanctions were mandatory against such a person.

As for the terms “United States person” and “foreign person,” they remained in the sanctions statute. This distinction was drawn in terms of nationality of an individual or place of organization of a business. A “United States person” was a (1) natural person who is an American citizen, or who owed “permanent allegiance to the United States” (presumably, a holder of a permanent residency (green) card, or (2) a legal person, that is, a corporation or other legal entity organized under Federal or State law, if over 50% of the capital stock or beneficial interest in the capital stock was owned (directly or indirectly) by an American citizen or green card holder. A “foreign person” was a foreign citizen who does not hold a U.S. green (i.e., permanent residency) card, or a corporation, partnership, or NGO that is not a “United States person.” So, for example, a subsidiary corporation incorporated in Missouri the majority of the shares of which were held by one or more foreign persons (such as an Indian parent company) was a foreign, not United States, person.

But, was there much practical difference in this distinction? No, because the sanctions apply equally to both types of person. Simply put, by switching to the term “person,” the U.S. made clear anyone anywhere was a potential target. Once sanctions were imposed, the person on whom or which they were imposed was dubbed – as before – a “sanctioned person” (sometimes called a “sanctioned entity”). The punishments applied to (1) any successor entity, (2) any person owning or controlling the sanctioned entity with “actual knowledge or [that] should have known” of the illegal activities of the sanctioned

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730 See OVERVIEW, Part I, 275.
733 See Iran Sanctions Act of 1996, as amended, Section 14(7), (18), reprinted in OVERVIEW, Part II, 1148 (defining “foreign person”).
734 Iran Sanctions Act of 1996, as amended, Section 5(c), reprinted in OVERVIEW, Part II, 1135. Such persons are identified in the Federal Register, as is a list of all significant oil and gas projects that Iran has put for public tender. See id., Section 5(d)-(e), 1139-1140.
person, and (3) any person owned or controlled by, or under common control with, the sanctioned person, if that person “knowingly engaged” in the illegal activities.\textsuperscript{735}

What principles of Public International Law jurisdiction justified the switch from “foreign person” to “person”? While the question is beyond the present scope, a brief digression is worthwhile. Manifestly, neither the nationality nor territoriality principles did: the sanctions did not apply only to “United States persons” or acts on American soil.

The rationale would have to lay in the “acts outside, effects inside” standard, whereby an action in support of Iran occurring outside American territory had effects inside America. What might those effects be? If Iran acquired a WMD, then it could threaten the national security of the U.S., or even launch an attack on it or its overseas posts (such as embassies and military bases) and nationals (both civilian and military).

VIII. Phase 7: 2010 \textit{CISADA} Emphasizes on Trade Embargo, Refined Gasoline, Asset Freezes, and Human Rights

\begin{itemize}
  \item Getting Tougher with Eight New Measures
    (1 July through 31 December 2016)
\end{itemize}

The 111\textsuperscript{th} Congress enacted the \textit{Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010}.\textsuperscript{736} The legislation extended sanctions through 31 December 2016.\textsuperscript{737} This six-year extension of the \textit{ISA} contrasted with the five-year extension by the \textit{Extension Act} (2001-2006), and the five-year extension by the \textit{IFSA} (2006-2011). \textit{CISADA} “expanded significantly” the original \textit{ILSA} sanctions.\textsuperscript{738} Having crossed the Rubicon with \textit{ILSA} in 1996, America in 2010 with \textit{CISADA} pushed more aggressively than ever before, broadening and deepening its unilateral prohibitions and punishments.

By no means did the U.S. abandon multilateral efforts. Indeed, \textit{CISADA} expressed a preference for multilateral over unilateral measures to compel behavioral change in Iran.\textsuperscript{739} The problem was multilateral sanctions were not causing that change. So, America had to lead a “get tougher” approach. Eight new measures defined its push, as follows.


\textsuperscript{737} See \textit{Iran Sanctions Act of 1996}, as amended, Section 13(b), reprinted in \textit{OVERVIEW}, Part II, 1147.

\textsuperscript{738} See \textit{OVERVIEW}, Part I, 275.

Notably, America reaffirmed its justifications for its rules against Iran through the termination criteria, or Sunset Rule, in *CISADA*. This Rule stated:

The provisions of this *Act* (other than sections 105 and 305 [22 U.S.C. §§ 8514 and 8544, concerning the human rights abuse prohibition, discussed below, and enforcement authority, respectively] and the amendments made by sections 102, 107, 109, and 205 [concerning expansion of *ISA* sanctions, harmonization of criminal penalties, capacity to combat terrorist financing, and technical corrections to sanctions rules against Sudan]) shall terminate, and section 80a-13(c)(1)(B) of title 15 [concerning changes in investment policy by registered investment companies], as added by section 203(a), shall cease to be effective, on the date that is 30 days after the date on which the President certifies to Congress that –

(1) the Government of Iran has *ceased providing support for acts of international terrorism* and no longer satisfies the requirements for designation as a state sponsor of terrorism (as defined in Section 301 [22 U.S.C. Section 8541] …

and

(2) Iran has *ceased the pursuit, acquisition, and development of, and verifiably dismantled its, nuclear, biological, and chemical weapons* and ballistic missiles and ballistic missile launch technology.740

Succinctly put, *CISADA* terminated when the long-standing goals of the U.S. to change Iranian behavior on WMDs and terrorism nuclear weaponry were met.

**Measures 1 and 2:**

**Import and Export Prohibitions**

The first two measures constituted a total trade embargo on Iran. First, the U.S. banned importation from Iran.741 That ban covered direct or indirect importation of goods or services.742 Consequently, buying saffron harvested in Iran, but sold in a market in

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740 *CISADA*, Section 401(a), codified at 22 U.S.C. § 8551(a). (Emphasis added.)
741 See *CISADA*, Section 103(a), (b)(1)(A), reprinted in 2013 *COMPILATION*, 708-709.
742 It appeared the addition of services to the import ban was the result of an amendment by the *Iran Threat Reduction and Syria Human Rights Act of 2012*, Public Law 112-81, as amended by Public Law 112-158 (*Iran Threat Reduction and Syria Human Rights Act of 2012*) and Public Law 112-239 (*Iran Freedom and Counter-Proliferation Act of 2012*, Sub-Title D of the *National Defense Authorization Act for Fiscal Year 2013*), codified at 22 U.S.C. § 8513a, *reprinted in 2013 COMPILATION*, 721-736. Note that unlike the export ban (discussed below), the import ban did not apply to technology, i.e., Iranian technology could be imported into the U.S., but American technology could not be exported to Iran.
Sharjah, and bringing it into the U.S., was illegal. There were precious few exceptions, namely, those allowed under the IEEPA, and for information or informational materials.\footnote{See CISADA, Section 103(b)(1)(B), reprinted in 2013 COMPILATION, 708-709; OVERVIEW, Part I, 275. The IEEPA exceptions are set out at 50 U.S.C. Section 1702(b).}

Note the import ban applied to products of “Iranian origin.” CISADA did not specify what ROO should be used to determine whether a product indeed came from Iran. The example of saffron is an easy case of the well-known grown and harvested ROO: a product grown and harvested in a particular country is the product of that country, even if the seeds planted or fertilizer used came from another country, or the water for the crop was irrigated from another country. A harder case could be woven from the famed Iranian carpet industry. Suppose silk for a carpet comes from India, the design is the lovely Qom style, weaving occurs in Iran, and brushing, cleaning, and finishing occurs in Turkey. Is the carpet “Iranian” based on the place in which it is woven?

The question may be even trickier with respect to services, for which there are no clear ROOs. Imagine a film crew consisting of Iranian and non-Iranian nationals, based in Tehran, seeking to make a movie about a family that migrated from Shiraz to Kansas City just before the fall of the Shah in 1979. The movie is a co-production with a Hollywood studio. Services are provided through various modes: via the internet (cross-border supply, i.e., Mode I), travel by Iranian-American actors portraying the family members from the U.S. to Iran (consumption abroad, i.e., Mode II), the JV with the Hollywood studio (foreign direct investment, i.e., Mode III). Are these services “from” Iran, and thus barred?

Relatedly, CISADA required the President to report annually to the appropriate Congressional committees on global trade relating to Iran.\footnote{See Iran Sanctions Act of 1996, as amended, Section 10(d), reprinted in OVERVIEW, Part II, 1146.} In particular, he was supposed to identify the dollar value amount of trade between Iran and each country holding membership in the G-20 Finance Ministers and Central Bank Governors. Plainly, the requirement was designed to give the U.S. data to use to pressure its G-20 partners not to export to or import from Iran. Such data, for instance, not only could identify the “outlaw” G-20 countries, but also highlight the relevant merchandise, for which (presumably) the U.S. could assist in finding alternative markets or sources. In turn, G-20 Finance Ministers and Central Bank officials could work to block trade financing and payments transactions.

Second, by closing various loopholes, CISADA barred essentially all exports from America to Iran. All exports from the U.S., whether goods, services, or technology, including those of or containing Iranian-originating merchandise, and including luxury items (e.g., Persian carpets, or processed pistachios), were illegal.\footnote{See CISADA, Section 103(a), (b)(2), reprinted in 2013 COMPILATION, 708-709.} Notably, the ban

\footnote{Note there had been a ban on exports, and CISADA introduced the exemption for Internet communications, or exports of goods or services, to help support democracy in Iran. See OVERVIEW, Part I, 275. It appeared the addition of services to the import ban was the result of an amendment by the Iran Threat Reduction and Syria Human Rights Act of 2012, Public Law 112-81, as amended by Public Law 112-158 (Iran Threat Reduction and Syria Human Rights Act of 2012) and Public Law 112-239 (Iran Freedom and Counter-Proliferation Act of 2012), Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013, codified at 22 U.S.C. § 8513a, reprinted in 2013 COMPILATION, 721-736.}
applied to exports from the U.S., or from a “United States person, wherever located.” In other words, a foreign citizen shipping to Iran from Kansas City, or a Missourian residing in Dubai shipping to Iran, would run afoul of the ban.

The only exceptions to the export ban were for (1) personal communications, (2) informational material, (3) transactions incident to travel (4) services for Internet communications, (5) agricultural commodities (i.e., food), (6) medicine or medical devices, (7) humanitarian assistance or and articles to relieve human suffering, (8) goods, services, or technology necessary to ensure the safe operation of commercial aircraft made in the U.S. (e.g., components for Boeing aircraft used by Iran Air), with the approval of the Treasury Secretary in consultation with the Commerce Secretary, (9) goods, services, or technology to support the IAEA for its work in Iran or NGOs in their efforts to build democracy in Iran, and (10) exports in the national interest of the U.S.

As the tenth category intimated, the exceptions advanced the goals underlying the sanctions by facilitating political change in Iran. Leaflets, Twitter and Facebook accounts, and NGOs all could help in this regard. So, for example, under exceptions (1) and (2), a law professor at the University of Kansas could respond to an email from a prospective law student in Iran about degree programs at the University, and also honor a request from that student, or a researcher, to email a PDF copy of a previously published, publicly available, law journal article. Arguably, educating Iranians in the American legal system also is in the national interest of the U.S. (item (10)).

* Measures 3, 4, and 5: 
  Refined Gasoline Prohibitions

The third, fourth, and fifth measures were mutually reinforcing, and reflected a broadening of the type of sanctionable activity. No longer was investment in the Iranian petroleum sector the only forbidden activity. With CISADA, the refined gasoline sector also was off limits. America sought to deny not only Iran the ability to find and extract crude oil, but also to refine that oil into gasoline, or import gasoline.

So, the third new measure made illegal any “knowing” transaction by any “person” that would assist Iran in producing refined petroleum products. Supplying equipment to, or helping to construct, oil refineries in Iran became forbidden. The sale, lease, or provision to Iran of “goods, services, technology, information, or support” that “could directly and significantly facilitate the maintenance or expansion of Iran’s domestic production of refined petroleum products, including any direct and significance assistance … [for] the construction, modernization, or repair of petroleum refineries…” was illegal. By barring

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747 See CISADA, Section 103(b)(2)(B)(i)-(vi), reprinted in 2013 COMPILATION, 709; OVERVIEW, Part I, 275.
Iran from expanding its refining capacity, another potential source of export revenues – and thus of funds for WMDs or terrorist activities – would be closed off.

Like the original 1996 *ILSA* bar on investment in the Iranian petroleum sector, which had a $40 million threshold that the 2001 *Extension Act* reduced to $20 million, the *CISADA* measure had a threshold: $1 million. Any sale, lease, or provision of a good, service, technology, information, or support with a fair market value of $1 million or more (or, to prevent structuring, multiple items aggregating to an FMV of $5 million or more in one year) was illegal.\(^{750}\) The market in which “fair value” was to be tested was unclear: Iran? America? A third country? The world market?

Interestingly, the problem of the relevant market is one that occurs in WTO subsidies jurisprudence, when a Panel or the Appellate Body needs to decide whether a challenged measure confers a benefit on a recipient. The test typically is to measure the support against a market-based benchmark, but deciding on the correct market can be controversial – as the arguments between the U.S. and Brazil in the famous 2005 *Cotton* case (discussed in separate Chapters) bespeak.

This *CISADA* change bore the same ambiguity as did the initial *ILSA* legislation in 1996 forbidding “direct and significant” investments to help Iranian with its petroleum resources: what kind of transaction “could directly and significantly” help it with gasoline refining? But, the change introduced a new strategic ambiguity by virtue of one word: “could.” The pertinent verb in the initial legislation was “directly and significantly contributes,” which demands proof an investment does, in fact, achieve the end of assisting Iran. In *CISADA*, the relevant verb was “could directly and significantly facilitate.” No proof was required; speculation as to what Iran might be able to do with the goods, services, technology, information, or support is enough.

That ambiguity surely allowed for aggressive American enforcement. Recall the above hypothetical about supplying Iran with buttons, shoelaces, bottled water, prescription eyeglasses, and aspirin. It remains apposite, indeed, even more so than before *CISADA*. That is because selling $20 million worth of such merchandise is a high value threshold to meet, but selling $1 million is not. It also is because any such items “could” constitute direct, significant, facilitation.

Foreseeably, if the third measure worked and Iran could not refine crude oil into gasoline, then it would look for a substitute: importation. The fourth new measure anticipated and sought to block this move: *CISADA* barred sale of refined gasoline to Iran.

With a view to constricting export revenues that Iran could use to acquire WMDs or support terrorism, *ILSA* had long made it illegal to buy petroleum from Iran. Now, it also was forbidden to sell gas to it. Iran (redolent of Nigeria) has substantial petroleum reserves, but with little refining capacity, it must import gas for domestic consumption. *CISADA* would choke off those imports, forcing up gas prices in Iran. In turn, Iranians might pressure their government to comply with American demands for international inspections of nuclear

facilities, and abjuring WMDs and terrorists. It might even lead to a change in the government of Iran.

So, in legal terms, CISADA forbade exportation of refined petroleum products to Iran. No person could sell or otherwise provide Iran with them. Likewise, helping Iran upgrade its capacity to import these products was illegal: no person could “sell[], lease[], or provide[] to Iran goods, services, technology, information, or support … that could directly and significantly contribute to the enhancement of Iran’s ability to import refined petroleum products.” Again, the valuation thresholds were $1 million in FMV terms (or $5 million in annual aggregate FMV), with no guidance on where or how to calculate FMV. Again, speculation was enough – what “could” happen is what mattered. And, again, the mens rea requirement, “knowingly,” could be met with actual or constructive knowledge. In brief, by expanding prohibited engagement from the export to the import sector, the rule deliberately sought to weaken, if not wreck, the Iranian economy.

As for the fifth measure, consider again the hypothetical example concerning buttons, shoelaces, bottled water, prescription eyeglasses, and aspirin, consider insurance, financial, and shipping services. Suppose a Russian trading house in Vladivostok brokers a transaction, denominated in Indian rupees, between a supplier and an importer in Iran. The deal is a contract for refined petroleum (or, alternatively, for the sale, lease, or provision of goods, services, technology, information, or support that could substantially help Iran import gasoline). Siam Bank in Bangkok issues a commercial letter of credit (L/C) on behalf of the importer. The importer pays the supplier via the L/C when appropriate and conforming documents, as called for under the terms of the L/C, are presented to its bank, the Bank of Baroda, in Bombay. The documents are couriered between the banks, from Bombay to Bangkok, by DHL. Lloyd’s of London underwrites an insurance or reinsurance contract for this transaction. Finally, suppose the Danish freight company, Maersk, provides a Liberian-flagged tanker to carry the refined oil from Pusan, Korea, via Singapore, to Bandar Abbas, Iran.

What parties in the above hypothetical transaction are potentially liable for violating the ban on exporting refined petroleum products to Iran? The answer is “everybody.” Brokering and financing a deal is a sanctionable act, rendering the Russian trading house and Siam Bank liable. Providing ships and shipping services are forbidden, rendering Maersk liable, and possibly also DHL, if “shipping services” includes air courier (thus making DHL, a “courier,” a “shipper”), and “support” covers transmission of L/C documents. Underwriting insurance or reinsurance contracts is forbidden, putting

Lloyd’s in legal peril. Simply put, the fifth CISADA measure created a new sanctionable prohibition: shipping and insurance services.

Consider an alteration to the hypothetical: instead of using the formal banking and payments system, the Russian trading house arranges a barter trade. Indian Oil will import crude oil from Iran, and pay Iran for it with Basmati rice. Refined petroleum is not involved in the transaction, nor is any merchandise, or any services, used to build a refinery. There is no liability under the original ILSA sanctionable act of investing $20 million in the Iranian petroleum sector. Indian Oil made no such investment, and the barter deal was not worth such a high figure. Is there liability under the CISADA measures – helping produce, or exporting to, Iran refined petroleum products?

Arguably, yes. Iranian workers whose job it is to build a refinery or upgrade seaport facilities might eat the Indian rice and thereby ingest the carbohydrates they need to work. Moreover, by paying for the rice with crude oil, Iran does not incur the opportunity cost of using precious hard currency. That saving “could directly and significantly contribute” to Iran’s ability to import gasoline. Iran could use that hard currency to import materials to build a new or repair an existing refinery, or for gasoline, which in both cases would be overt sanctions violations.

The hypothetical and its alteration manifest how broad ILSA became thanks to the fifth CISADA measure. CISADA barred shipping, insurance, and related services that might help Iran import gasoline: not only was it illegal to sell gasoline to Iran, but also it was unlawful to facilitate gasoline importation to Iran by insuring vessels or other transport modes for that gasoline.

“Ubiquitous” might be an overstatement, as the amended sanctions did not invariably apply to every transaction involving Iran. For example, CISADA offered a safe harbor for underwriters and insurers. If they:

exercise[,] due diligence in establishing and enforcing official policies, procedures, and controls to ensure that the person does not underwrite or enter into a contract to provide insurance or reinsurance for the sale, lease, or provision of goods, services, technology, or information [that could help Iran improve its ability to import refined petroleum products,]

then they were exempt from sanctions. Still, with CISADA, American trade sanctions against Iran rightly could be characterized as a “brooding global omnipresence,” casting a shadow of caution, if not doubt, on nearly all dealings with Iran.

In brief, by supplementing the trade embargo of the first two measures, the third, fourth, and fifth measures suggest “CISADA” might have been more succinctly and

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accurately labeled the “Trade Embargo and No Gasoline for Iran Act” (TENGIA). American rules denied it the ability to refine crude oil into petroleum products, or to import those products.

From an American perspective, a TENGIA seemed logical: Iran had plenty of petroleum (albeit unrefined), so why should it need nuclear power as an energy source? If Iran insisted on developing nuclear power, and concomitantly nuclear weapons, then surely America was right to choke off a potential source of support funds for that development, namely, refined gasoline. But, from an Iranian perspective, opportunity cost was the rationale for developing its petroleum and refined gasoline sectors, plus peaceful nuclear energy.

Suppose Iran consumed all its petroleum domestically, and shipped any surplus overseas. By the time it exhausts this natural resource, would it have diversified its economic and export base? Or, would peaceful nuclear energy have allowed allow Iran to stretch out the period before it exhausts its precious natural resource, and in that extra time allowed it to nurture broad-based industrial and service sector development? Put differently, might energy diversification help Iran avoid the resource curse afflicting so many other OPEC countries?

Such questions suggest the opportunity cost for Iran of not developing a nuclear energy program was time for prudent diversification beyond oil dependency. Pursuing that alternative energy source could avoid the opportunity cost of a faster run down of its petroleum reserves, giving it more time for a major, successful structural adjustment. All that could occur, of course, without pursuing a WMD or supporting terrorism. Indeed, diverting funds for those activities would inhibit Iran from avoiding this opportunity cost.

- **Measure 6: Asset Freeze Prohibition**

The sixth measure took the form of another prohibition, namely, violation of an asset freeze. Any funds or other assets belonging to a person in Iran that satisfied the criteria for sanctions under the JEEPA were blocked via Presidential Order. Those persons included governmental and quasi-governmental officials, and individuals connected with the Iranian military, Revolutionary Guard Corps, or their affiliates. Transfers of funds or assets to their family members were forbidden. Any American financial institution holding such funds or assets was required to report those holdings to the Office of Foreign Assets Control (OFAC) of the Department of the Treasury, and the President was obliged to report

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to appropriate Congressional committees on the persons subject to freeze orders.\textsuperscript{760} Penalties for violation of any asset freeze order were the same as those for the all others.\textsuperscript{761}

Why did the statute expressly mention the Revolutionary Guards? Congress explained its sense America should “persistently target” economic sanctions against the Guards because of “its support for terrorism, its role in proliferation, and its oppressive activities against the people of Iran.”\textsuperscript{762} That was because, said Congress, the Guards were the locus among hardliners pursuing the most vehemently anti-American policies, and the principal instrument for crushing the Green Revolution (as discussed below). Hence, Congress sought to force the hand of the President: he was to impose sanctions on individual Guard officials, such as travel restrictions or other punishments available to him via the 1996 \textit{Iran Sanctions Act}, as amended in 2010 \textit{CISADA}, and under the \textit{IEEPA}.\textsuperscript{763}

Most obviously, then, the asset freeze prevented Iranian officials from taking money out of American banks and it to assist their country in obtaining a WMD or supporting terrorism. A less obvious consequence was they could not as easily shop for designer brand items at luxury stores like Harrods in London or Chanel in Paris. That consequence may seem insignificant. Yet, as the examples of some North Korean and Syrian government officials indicate, elites enjoy shopping regardless of the plight of their country or fellow nationals. Circumscribing what they regard as a personal entitlement potentially “hits” them in a poignant manner.

- **Measure 7:**
  - **Human Rights Prohibition**

The seventh measure represented a policy addition to the American sanctions regime: two more types of behavior became illegal, but they did not involve the energy sector of Iran. For the first time, America took aim at human rights abuses and press censorship in Iran, declaring them to be punishable under the regime. The goal of the


regime thereby expanded from preventing Iran from acquiring WMDs and disrupting its support for terrorism to deterring it from committing human rights abuses or censorship.

Why bother to seek even more behavioral modification in Iran? The repression of pro-democracy by Iranian authorities and their thuggish proxies in the Green Revolution certainly was one reason. That violence, splashed across the world’s media, was too monstrous to ignore: if the Ā yatollāhs and their minions were “evil” for pursuing nuclear weapons and supporting terrorists, then indubitably they were condemnable for crushing street protests.

So, the President was obliged to identify, and keep updated, for the appropriate Congressional committees officials of the Iranian government, or their agents, including Hezbollah and the Basij-e militia, which were responsible for, or complicit in, “serious human rights abuses” against Iranians, wherever located. 764 (That Congress thought America should strike hard at these officials for their support of Hezbollah, which posed an overt threat to Israel, as well as Lebanon and America, was clear from its declared sense.765) “Credible evidence,” which could include announcements or information about the activities of a person by a “reputable” public or private sector entity, or by a foreign government (e.g., Israeli intelligence services) or non-governmental organization (e.g., Amnesty International), was needed to support this blacklisting.766

Because this prohibition targeted individuals, the sanctions the President was required to impose differed from the normal menu. They were targeted at the individuals, namely, denial of a visa to enter the U.S. (save for appearance at the U.N. Secretariat in New York), blocking personal property or its importation or exportation (assuming it was within reach of American authorities), and barring financial transactions (assuming American authorities could identify and stop them). Such punishments could be lifted only when Iran (1) unconditionally released “all political prisoners,” (2) ceased “violence, unlawful detention, torture, and abuse” of Iranians engaged in “peaceful political activity,” (3) did a “transparent investigation” of the repression of political activists following the

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Green Revolution, and (4) made “demonstrable progress” toward an “independent judiciary” and implementing the Universal Declaration of Human Rights.\textsuperscript{767}

- **Measure 8:**
  Expanded and Increased Sanctions

As for the eighth measure, the 2010 legislation expanded the ILSA list of sanctions from six to nine, and increased the number of sanctions the President had to impose from at least two to three.\textsuperscript{768} The new sanctions on the President’s menu, all prohibitions, were (numbering consecutively from ILSA):

(7) **Foreign Exchange Sanction:**\textsuperscript{769}

Any FX transaction with a sanctioned person was forbidden. That party could be barred from any foreign exchange transactions over which the U.S. claims jurisdiction and in which that entity has an interest.

That might mean America did not claim jurisdiction over all dollar transactions under a lex monetaire (i.e., a theory of the law of the currency), so the sanctioned entity might be able to enter into certain FX deals in offshore dollars not involving U.S. financial institutions. But, if the transaction cleared or settled through the U.S. payments system, such as Fedwire or CHIPS (the New York Clearing House Interbank Payments System), or involved an American financial institution, then it could be blocked.\textsuperscript{770}

An obvious example, coupled with the Property Transaction sanction (below) would be where a sanctioned entity from Yemen sought to sell financial assets or real property in the U.S., convert the proceeds from dollars to Yemeni rial, and repatriate those funds to Yemen. Both the sale and the FX conversion could be blocked.

\textsuperscript{767} See Comprehensive Iran Sanctions Accountability and Divestment Act of 2010, Section 105(c)-(d), Public Law 111-195 (1 July 2010), as amended by Public Law 112-158 (Iran Threat Reduction and Syria Human Rights Act of 2012) and Public Law 112-239 (Iran Freedom and Counter-Proliferation Act of 2012, Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013), codified at 22 U.S.C. §§ 8512, 8513a, 8514, 8514a, 8514b, reprinted in 2013 COMPILATION, 712-713.

\textsuperscript{768} See Iran Sanctions Act of 1996, as amended, Sections 5(a)(1)(A) (mandating the President impose three or more sanctions for a violation of the Petroleum Resource Development Prohibition), 5(a)(2)(A) (mandating the President impose three or more sanctions for violation of the Refined Petroleum Production Prohibition), 5(a)(3)(A) (mandating three or more sanctions for violations of the Refined Petroleum Export Sanction), 5(a)(b) (mandating the President impose three or more sanctions for the Sensitive Weapons Export Prohibition), reprinted in OVERVIEW, Part II, 1135-1138.

\textsuperscript{769} See Iran Sanctions Act of 1996, as amended, Section 6(a)(6), reprinted in OVERVIEW, Part II, 1141.

\textsuperscript{770} See Delphine Strauss, America’s “Exorbitant Privilege” Is Ebbing, FINANCIAL TIMES, 27 January 2014, 8 (correctly stating “because payment in dollars ultimately involves a transfer on the books of the Federal Reserve, the U.S. can enforce a financial blockade”) (reviewing Alan Wheatly ed., The Power of Currencies and Currencies of Power (2013)).
(8) Inter-bank Transactions Sanction:771

Any transfer of credit to, or payment transaction, with a sanctioned entity, by, through, or between any “financial institutions” was barred.772 That is, to the extent a transfer or payment was subject to the jurisdiction of the U.S. and involves any interest of a sanctioned person, it may be blocked.

As with the FX Sanction, the Inter-Bank Transactions Sanction could be interpreted broadly to cover any electronic funds transfer through Fedwire or CHIPS, insofar as movements of funds through these systems involve electronic debit and credit entries on banks located in or subject to the jurisdiction of the U.S., including, of course, the Federal Reserve Bank of New York. Unlike the FX Sanction, however, the Inter-Bank Transactions Sanction covered any “financial institution,” i.e., both American and foreign. Thus, for example, a foreign bank branch or agency in the U.S. was covered (because it operates on American territory), as well as a U.S. bank overseas (because it is subject to supervision by American bank regulators).

Arguably, so, too, was a foreign bank branch or agency located overseas, though exactly how far the reach could extend as a practical matter was unclear. It was not easy for American authorities to block dollar transfers through every office of every offshore foreign bank, and a fortiori for them to do so with respect to transfers in other currencies.

Not surprisingly, that is why Iran had little choice but to substitute out of dollars, and into other currencies, for payments purposes. This response, whereby Iranians reduced their legal risk of losing funds denominated in dollars, raised a general policy problem created by the purported long-arm reach of the Sanction: it injected legal risk into operating in U.S. dollars.

Parties, both Iranian and non-Iranian, preferred to transact in other currencies, so as to argue those transactions were not subject to the jurisdiction of the U.S. The dollar, then, became a less desirable currency to hold, because of the greater legal risk associated with it, than did (for instance) Japan’s yen or even India’s rupee. Similarly, this Sanction also created an incentive for barter trade (discussed below), as occurred between Iran and India in respect of petroleum products (from Iran to India) and rice (vice versa).

(9) Property Transaction Sanction:773

Again, the statute incorporates by reference the definition of “financial institution” from Section 3(c)(1) of the Federal Deposit Insurance Act of 1950, and the definition of a foreign bank “branch” or “agency” from Section 1(b)(7) of the International Banking Act of 1978. See id.
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Any transaction involving property of a sanctioned entity subject to American jurisdiction was prohibited. In effect, this Sanction tied up assets of the sanctioned person. Accordingly, the sanctioned person could be barred from “acquiring, holding, withholding, using, transferring, withdrawing, transporting, importing, or exporting any property,” or “conducting any transaction involving such property,” in or otherwise within the reach of the U.S. in which that person had an interest.774

For instance, a sanctioned entity owning an apartment on the Kansas City Country Club Plaza could be barred from staying in it or selling it to a non-sanctioned party. This Sanction extended to “dealing in or exercising any right, power, or privilege with respect to such property.”775 Thus, for example, a sanctioned entity could be prohibited from exercising voting rights associated with stock, or exercising rights on a call or put option on a financial instrument. The term “property” was not restricted to tangible items, so the stock or other financial instrument could be un-certificated (electronic book entry) securities.

To continue the hypothetical illustration with Lloyd’s, suppose it underwrites an insurance policy for a vessel owned by Maersk that shipped gasoline to Iran.

Suppose further the President chooses as the three sanctions on Lloyd’s (7), (8), and (9). It would be illegal to enter into a foreign exchange transaction, such as exchanging Iranian rial for Indian rupees, or to lend funds to Lloyd’s. If Lloyd’s held property in Kansas City, then it would be unlawful to buy that property, or (interpreting “any transaction” broadly) provide services (such as air conditioning or gardening) to that property. Furthermore, CISADA mandated sanctions for any financial institution that helped a sanctioned entity. So, if Bangkok Bank assists Lloyd’s by acting as a correspondent bank (e.g., holding an account of Lloyd’s through which Lloyd’s made or received payments to or from Maersk), then those banks would be sanctioned.

Two final aspects of CISADA buttressed its aggressive stance: any firm seeking a U.S. government contract had to certify it was in compliance with ILSA;776 and any country

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“Eligible products” from designated “eligible countries” are exempt from the certification requirement. See id., Section 6(b)(2)(B), Section 308(4) of the Trade Agreements Act of 1979, 19 U.S.C. § 2518(4) (defining “eligible products”), and Section 301(b) of the Trade Agreements Act of 1979, 19 U.S.C. § 2511(b) (defining “eligible countries”). Essentially, they are products originating in a country in the WTO GPA (or willing to assume GPA obligations) or NAFTA, an LDC, a country that will provide reciprocal procurement opportunities for American suppliers, or a country with which the U.S. has and FTA that took International Trade Law E-Textbook (Raj Bhala, 6th Edition, 2025) University of Kansas (KU) Volume Four Wheat Law Library
that the parent country of an entity sanctioned for providing Iran with WMD technology had to be refused a license of nuclear materials, facilities, or technology.\footnote{See Iran Sanctions Act of 1996, as amended, Section 5(b)(2)(A), reprinted in OVERVIEW, Part II, 1138.}

To be sure, CISADA was not all “on the one hand…,” \textit{i.e.}, not entirely aggressive. Its “… on the other hand, …” measures were a waiver from any sanctions on “vital national security interest grounds,”\footnote{See OVERVIEW, Part I, 275.} and a waiver from the government contract certification obligation on the basis of “the national interest of the United States.”\footnote{See Iran Sanctions Act of 1996, as amended, Section 6(b)(5), reprinted in OVERVIEW, Part II, 1143.} Note the ambiguity created by the lack of a uniform waiver standard: only the first waiver had the adjective “vital.”

Moreover, while CISADA amended IFSA to make mandatory a Presidential investigation, to be completed within 180 days total, of potentially sanctionable activity, it also contained a “Special Rule.”\footnote{See Iran Sanctions Act of 1996, as amended, Section 4(e), reprinted in OVERVIEW, Part II, 1135; OVERVIEW, Part I, 275.} So, on the one hand, the President had to initiate an investigation with a view to imposing sanctions against any person, if the U.S. received “creditable information” that the person had engaged in sanctionable activity. Such activity (as discussed earlier), concerns the (1) development of petroleum resources in Iran, (2) production of refined petroleum products in Iran, or (3) exportation of refined petroleum to Iran.\footnote{See Iran Sanctions Act of 1996, as amended, Section 4(e)(1) and 5(a), reprinted in OVERVIEW, Part II, 1135-1137.}

On the other hand, there was a Special Rule – literally dubbed that.\footnote{See Iran Sanctions Act of 1996, as amended, Section 4(e)(3) and 5(a), reprinted in OVERVIEW, Part II, 1135 -1137. The President invoked the Special Rule by written certification to the appropriate Congressional committees.} If a person ceased, or taken “significant verifiable steps” to cease, activity that was sanctionable, and if that person provided “reliable assurances” to the President that it “will not knowingly engage” in any such activity in the future, then no investigation ensued (or one that has commenced was terminated).\footnote{See Iran Sanctions Act of 1996, as amended, Section 4(e)(3), reprinted in OVERVIEW, Part II, 1135.}

There remained textual ambiguities. What information was “creditable”? What steps were “significant”? How was verification to occur? What assurances are “reliable”? There also remained interpretative problems relating to the scope of application of the sanctions. For example, suppose an air courier company, such as FedEx, transported a package from an exporter in North Korea to Iran. Did it have the same liability as the exporter, or was it an innocent transporter?
Chapter 17

IRAN TRADE SANCTIONS (CONTINUED):
2012-2013 INCREASED PRESSURE

I. Phase 8:
2012 Defense Act Tightening Financial Sanctions

- Targeting Iranian Financial Sector
  (1 January 2012 through 31 December 2016)\(^\text{784}\)

The 1996 and 2010 legislation (discussed in a separate Chapter) did not establish a comprehensive set of prohibitions and sanctions in respect of the Iranian financial sector. The 2010 changes included new measures against foreign exchange or inter-bank transactions involving a sanctioned person or entity, or dealings in property in the U.S. of a sanctioned person. But, they did not target the Central Bank of Iran, nor did they address specific concerns of Iranian banks in money laundering or financing WMD proliferation or terrorism.\(^\text{785}\) And, they did nothing to help third countries eschew purchases of Iranian crude oil so as to cut their dependence on it, and constrict sale proceeds flowing to Iran that it would use to fund WMD acquisitions or terrorist causes.

After the 2010 legislation, in November 2011, the Financial Crimes Enforcement Network (FINCEN) of U.S. Department of the Treasury found the CBI transferred billions of dollars to the Export Development Bank of Iran (EDBI),\(^\text{786}\) Bank Mellat (Bank of the Nation),\(^\text{787}\) Bank Melli (National Bank of Iran),\(^\text{788}\) Bank Sadrat Iran (The Export Bank of

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\(^\text{784}\) The implementation dates of certain provisions discussed below varied. For example, the payments system prohibition took effect 60 days after the legislation entered into force, i.e., 29 February 2012, while the provision on applicability of sanctions to foreign central banks other than that of Iran took effect 180 days thereafter, i.e., 28 June 2012. See National Defense Authorization Act of 2012, Section 1245(d)(1), (3), Public Law 112-81, 125 Stat. 1298, 1647-1650, Section 1245, codified at 22 U.S.C. § 8513a(d)(1), (3), as amended by Iran Threat Reduction and Syria Human Rights Act of 2012, Public Law 112-158, codified at 22 U.S.C. §§ 8711, 8721-8724, 8741-8744, 8781, and by Iran Freedom and Counter-Proliferation Act of 2012 (Subtitle D of the National Defense Authorization Act for Fiscal Year 2013), Public Law 112-239, reprinted in Committee on Ways and Means, U.S. House of Representatives, Compilation of U.S. Trade Statutes, 113th Congress, 1st Session, Committee Print (January 2013), 718. [Hereinafter, 2013 Compilation.]


\(^\text{786}\) See Export Development Bank of Iran, \url{http://en.wikipedia.org/wiki/Export_Development_Bank_of_Iran}.

\(^\text{787}\) See Bank Mellat, \url{http://en.wikipedia.org/wiki/Bank_Mellat}.

\(^\text{788}\) See Bank Melli Iran, \url{http://en.wikipedia.org/wiki/Bank_Melli_Iran}.
Iran,\textsuperscript{789} and other Iranian banks that the CBI is supposed to regulate.\textsuperscript{790} Doing so facilitated evasion of sanctions by reducing the involvement of American and other non-Iranian banks, which were trying to comply with the prohibitions set out in the 1996 and 2010 legislation, with the CBI and Iranian banks. In effect, via schemes to funnel payments to Iranian banks, the CBI covered for the loss of banking relationships they incurred thanks to the pressure of sanctions on American and other international banks to eschew dealings with them.

Thus, in the defense budget bill for FY 2012, namely, Section 1245 of the \textit{National Defense Authorization Act of 2012 (Defense Act)}, Congress took aim at the financial sector of Iran.\textsuperscript{791} This new legislation contained three key measures, as follows.

\begin{itemize}
  \item \textbf{Measure 1: Primary Money Laundering Concern Designation}
  
  First, Congress expressly designated the entire Iranian financial sector, including the CBI, to be of "primary money laundering concern."\textsuperscript{792} This sector posed a threat to the American government and banks because it laundered proceeds from illicit activities in pursuit of WMDs and terrorist causes, evaded sanctions, and deceived the government and banks about its operations. Such designations are made pursuant to Section 311 of the \textit{USA PATRIOT Act}, which Congress passed in 2001, and which is codified at 31 U.S.C. § 5318A. That Act has 10 Titles, the third of which is called the \textit{International Money Laundering Abatement and Financial Anti-Terrorism Act}. This name bespeaks the purpose of Title III: to bolster the ability of American authorities to detect, deter, and prosecute money laundering and terrorist financing.

  Under Section 5318A, the Secretary of the Treasury could order, on a temporary basis, that financial institutions implement special measures for any transaction outside America in an area of primary money laundering concern. Those measures pertained to detailed record keeping, for example, the identities, addresses, and roles of all participants in a transaction, including a wire transfer, and the identity of any foreigner authorized to use or route a transaction through a payable-through account (discussed below). In short,

\end{itemize}$^{$789}\textit{See Bank Saderat Iran, WIKIPEDIA, http://en.wikipedia.org/wiki/Bank_Saderat_Iran.}$


designation as a primary money laundering concern opened the possibility of obtaining more and better information about proliferation and terrorist financing.793

● **Measure 2:**
  **Iranian Bank Asset Freeze**

Second, Section 1245 of the 2012 *Defense Act* established a freeze on all assets of Iranian financial institutions within reach of American authorities.794 In particular, Congress ordered the President to block all transactions in any property or property interests of any Iranian financial institution, if that property or interests were in, or came within, the U.S., or within the possession of a United States Person.795 Here, then, was an extension of the Property Transaction sanction from the 1996 and 2010 from dealings in assets of a sanctioned entity to those of Iranian banks, including Iran’s Central Bank. Likewise, the new measure went beyond the 2010 *CISADA* freeze of assets belonging to individual Iranian government officials.

For example, suppose the CBI held funds in the Kansas City, Missouri branch of a foreign bank. Those funds would be frozen in that branch. Notwithstanding the fact the branch was of a non-American bank, it was located in America, and hence subject to the freeze order.

Likewise, consider a wire transfer of U.S. dollars from the account of an Iranian bank held at an Australian bank in Singapore to a Korean bank in Seoul. Insofar as the wire transfer is routed through the U.S., via Fedwire, or clears and settles on the books of an institution in the U.S., such as the Federal Reserve Bank of New York, it comes within the U.S., and thus could be frozen – even though the originator, originator’s bank, beneficiary’s bank, and beneficiary are all non-United States Persons. Still another example, hypothetically, would be bonds owned by an Iranian bank for investment purposes, and held at the New Delhi branch of Citibank. The Iranian investor could not move them. While

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793 Section 5318A also contained the criteria by which a jurisdiction is designated to be of “primary money laundering concern.” Those criteria included evidence of organized crime, terrorism or corruption, pervasive bank secrecy, and a high ratio of the volume of financial transactions to the size of the economy of the jurisdiction.


795 On 6 February 2012, President Barack H. Obama signed Executive Order 13599 implementing the financial sanctions in the 2012 *Defense Act*, particularly the freezing of assets and other property held by Iranian banks, including the CBI, in the U.S. or by United States Persons. *See Executive Order 13599 – Blocking Property of the Government of Iran and Iranian Financial Institutions, 77 Federal Register 66599 (8 February 2012).* The 2012 *Iran Threat Reduction and Syria Human Rights Act of 2012* (discussed below) answered a question the *Defense Act* failed to address: under what conditions would the assets be unfrozen? The second *Act* said the blocking would continue until the President certified to the appropriate Congressional committees in a written report (which could contain classified Annex) that the CBI no longer provided financial services to help Iran acquire a WMD, or help or facilitate transactions for the Revolutionary Guard Corps. *See Iran Threat Reduction and Syria Human Rights Act of 2012*, Section 217(a), (c)-(d)(1)-(2), codified at 22 U.S.C. §§ 8711, 8721-8724, 8741-8744, 8781, reprinted in 2013 COMPILATION, 727-728.
the investment account was in an overseas branch, the branch was that of a United States Person, namely, an American bank.796

Curiously, the asset freeze did not specify a punishment. In one sense, the prohibition was its own punishment: Iranian banks could not get their property if American officials got to it first, which was likely assuming holders of the property alerted the officials to what was in their possession. But, what if a foreign bank in the U.S., or a United States Person abroad, violated the asset freeze by relinquishing funds or other property or property interests to their Iranian orders? Possibly, IEEPA sanctions would apply, because the basic statutory authority for the asset freeze was the IEEPA.797

A dramatic instance of the effect of the prohibition on transactions involving Iranian bank assets came on 18 September 2013. The case involved Bank Melli.798 U.S. District Judge Katherine Forrest approved the seizure by federal law enforcement authorities of the entire office block building at 650 Fifth Avenue in Manhattan. Led by the U.S. Attorney for the Southern District of New York, Preet Bharara, prosecutors explained a non-profit organization operated by the Shah of Iran built the 36-storey structure in the 1970s. A loan from Bank Melli funded the construction.

Following the Islamic Revolution, the new government expropriated the building in 1979, and re-named the non-profit organization the “Alavi Foundation.” Alavi then co-owned the building with Assa Corporation, and the owners transferred rental income to Bank Melli. Those co-owners acted as “fronts” for Bank Melli, and their transfers to it violated both the American sanctions prohibition and money laundering laws. The forfeiture of the building was the largest-ever related to terrorism, and Mr. Bharara said proceeds from its sale would be used to compensate victims of terrorism sponsored by Iran.

● **Measure 3: Payments System Prohibition**

To be engaged in international banking is to work with foreign banks. Even the largest of multinational banking organizations do not have subsidiaries, branches, agencies,

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Note the expansion of the menu of mandatory sanctions from three to five out of nine occurred via the other bill Congress passed against Iran in 2012, the Iran Threat Reduction and Syria Human Rights Act of 2012 (discussed below).

or representative offices in all the countries of the world. Only in the minority of cases can they make and receive payments, and move assets, from one owner to another, and from one jurisdiction to another, as an “in house transfer.” Frequently, they must work with one or more other banks with which they hold an account, and which the ultimate transferee, or beneficiary, also has an account.

Technically, those “accounts” are known as a “correspondent” ones, i.e., as defined in Section 311(e)(1)(B) of the USA PATRIOT Act, a “correspondent account” is:

an account established to receive deposits from, make payments on behalf of a foreign financial institution, or handle other financial transactions related to such institution.799

Logically, a bank holding a “correspondent account” is called a “correspondent bank.”

For example, consider a transfer of funds from the Indonesian rupiah-denominated account of a Jakarta-based importer of Persian carpets held at Hong Kong Shanghai Banking Corporation in Jakarta. The transfer is to pay for carpets shipped by an Iranian exporter in Tabriz, but the exporter seeks payment in Indian rupees, not Indonesian rupiah. (The payment could be pursuant to a commercial letter of credit issued by HSBC for the benefit of the Tabriz exporter.) Could the rupee transfer be in house? That could happen only if HSBC holds a rupee-denominated account for both the importer-originator-payor and exporter-beneficiary-payee.

Assume HSBC does not hold both accounts. But, suppose the exporter has a rupee-denominated account at an account of Bank Melli that is held at Karnataka Bank (KB), which is a private sector entity, in Bangalore.800 (That is, KB holds a rupee account for Bank Melli, which in turn holds a rupee account for the exporter.) Also assume HSBC also has a rupee account at KB.801 Then, HSBC in Jakarta can (1) debit the rupiah account of the importer for the rupee-equivalent of the price of the carpets, (2) transfer electronically the rupees to its account at KB, and (3) instruct KB to debit its account with KB and credit the account of Bank Melli at KB for onward payment to the exporter at KB.

In this instance, KB serves as a correspondent bank, with the HSBC account at KB being the correspondent account. KB links the Jakarta importer with the Tabriz exporter because it (KB) holds the accounts of both the importer’s bank and the exporter. As this hypothetical example suggests, correspondent banking is essential to the smooth flow of international trade transactions. The example also intimates there are foreign banks, like

801 A correspondent account may be classified as “nostro” or vostro.” from the perspective of HSBC, its account with SBI is a “nostro” account, meaning “our account with you.” Conversely, from the perspective of SBI, the account is a “vostro” one – “your account with us.”
KB, that maintain correspondent accounts and that conduct financial transactions with Iranian banks, like Melli.

Accordingly, via the third key measure in the 2012 Defense Act, Congress sought to cut off Iranian financial institutions from correspondent banking, with limited exceptions. Congress prohibited the opening or maintaining of a correspondent account (or the imposition of strict conditions on any extant such account) by a “foreign financial institution” that the President decides “has knowingly conducted or facilitated any significant financial transaction” with the CBI or any Iranian bank the Secretary of the Treasury designated for imposition of IEEPA sanctions.

The same ban applied to payable-through accounts at a foreign financial institution: they were forbidden (or strictures could be imposed on them) if that institution knowingly did big business with the CBI or sanctioned Iranian banks. Under Section 311(e)(1)(C) of the USA PATRIOT Act, a:

“payable-through account” means an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution [in the United States] by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a subaccount, in banking activities usual in connection with the business of banking in the United States.\(^{802}\)

Essentially, a Payable Through Account, or “PTA,” is a demand deposit (i.e., checking) account at a U.S. bank whereby a customer of a foreign bank can write checks. Such a customer – the end user – may not be subject to the same scrutiny by the American bank as is a regular customer of that bank, meaning an Iranian customer could use the account to launder funds from, or make payments for, unlawful purposes.

Accordingly, to alter the above hypothetical, suppose KB holds a rupee-denominated PTA for HSBC. That would mean customers of HSBC, such as the Jakarta importer, could make payments via checks, money orders, other instruments from that PTA. The Jakarta exporter then could draw such an instrument, in rupees, on that PTA for the order of the Tabriz exporter.

So, in the original and modified version of the above hypothetical, suppose the President determines KB has knowingly engaged in significant financial dealings with CBI or an Iranian bank to which American sanctions apply. Then, the President could forbid KB from maintaining the correspondent account or PTA of HSBC (or impose strict conditions on either).

As with the Iranian bank asset freeze, with the payments system prohibition Congress did not mandate a sanction. That is, Congress authorized (but did not require) the President to impose IEEPA sanctions on the CBI. As for other Iranian banks, there was no need for Congress to specify a penalty: the Treasury Secretary already had designated them for IEEPA sanctions under the existing 1996 and 2010 Act regime, or did so contemporaneously with application of the prohibition.

Manifestly, the prohibition was designed to ostracize Iranian banks from the international banking network, making payments to or for them all but impossible. Of significance was the prohibition vastly expanded the architecture of measures against Iran from the energy sector to all sectors. Whether payments were made in connection with petroleum or petroleum products did not matter: Iran was to be denied the use of correspondent banking facilities and PTAs for all purposes. So, even if (as in the hypothetical) Iran could sell Persian carpets (or for that matter, pistachios) to a non-U.S. buyer, it could not get paid for them – and, therefore, would have to resort to barter trade, if not subterfuge.

- Payments System Prohibition Definitional Issues

Taking specific aim at Iran’s Central Bank was a key to ostracizing the entire Iranian financial sector. As in any country, Iranian banks rely on their Central Bank for a variety of foreign exchange, clearing and settlement, and payments functions in transactions with the rest of the world. Yet, as its language and the hypothetical suggest, that objective was not easy to enforce.

There were definitional issues. First, a “foreign financial institution” under Section 104(i) of CISADA actually was not defined at all: it depended on what the Treasury Secretary thought. Though not a major difficulty, recourse to Treasury regulations was necessary.

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The sanctions potentially applied to an individual, as well as the CBI, who violated, attempted to violate, conspired to violate, or caused a violation of the payments system prohibition. See id., Section 1245(g)(2), 22 U.S.C. § 8513(g)(2).


The sanctions potentially applied to an individual, as well as a foreign financial institution, who violated, attempted to violate, conspired to violate, or caused a violation of the payments system prohibition. See id., Section 1245(g)(2), 22 U.S.C. § 8513a(g)(2).

Second, exactly what did Congress mean by “significant” financial transactions between a foreign financial institution and the CBI or a sanctioned Iranian bank? Was the President to look at the volume or value of transactions, or both? How would a single $100 million event occurring six years ago rate in comparison to three $25 million events occurring three years ago? Similarly, how would the President determine the foreign financial institution intentionally engaged in the deal, thus meeting the “knowingly” requirement? Third, precisely how was the President to go about convincing a foreign financial institution like SBI to close a correspondent account in furtherance of America’s sanctions policy goal of ostracizing Iran from the world of international banking?

- **Third Country Central Bank Exception to Payments System Prohibition**

  More serious than definitional issues surrounding enforcement of the payments system prohibition was navigating its exceptions. The 2012 *Defense Act* contained an obvious exception for sales of food and medicine to Iran. A person supplying agricultural commodities, medicines, or medical devices could do so under the 1996 and 2010 sanctions rules, so it would be illogical to forbid a foreign financial institution from opening or maintaining a correspondent account or PTA used by or for the benefit of the CBI for these essentially humanitarian transactions.

  A greater controversy concerned potential application of the prohibition and sanctions to a foreign central bank other than the CBI. In the above hypothetical, could the Reserve Bank of India, or a state-owned bank like Punjab National Bank, be in trouble? Surely Congress did not mean to threaten the RBI – or, for that matter, the likes of the Bank of England and Bank of Japan – and all nationalized, public sector banks in India? Indeed, to avoid ensnaring all non-Iranian foreign central banks, Congress deemed that sanctions would apply to them only if they engaged in a financial transaction for the sale or purchase of petroleum or petroleum products to or from Iran. In doing so, Congress both created the necessary exemption and tightened the prohibitions on Iran’s energy sector.

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*University of Kansas (KU)*

*Wheat Law Library*
To illustrate, suppose Iran sold crude oil to, or purchased refined gasoline from, the Indian Oil Corporation, the state-owned oil and gas firm headquartered in New Delhi, and India’s largest commercial enterprise.\textsuperscript{808} Indian Oil seeks to pay for the crude, or receive payment for the gasoline, via its account held with SBI, which in turn holds an account at the RBI. If RBI conducts the payment transaction for Indian Oil, then the President must apply sanctions to the RBI. Obviously, then, Congress sought to knock out any central bank from assisting Iran in receiving or transferring funds in connection with its energy resources.

It is difficult, if not impossible, to find a precedent for this kind of measure. It is unilateral, undertaken by the U.S., against sovereign foreign central banks of third countries not accused directly of wrongdoing. Denying access to the payments system itself was an aggressive move against foreign financial institutions. Threatening foreign central banks, too, albeit in respect of energy dealings with Iran, was all the more dramatic. Traditionally, the world of central banks is a collegial, if not clubby, one. For America to take a potentially adversarial approach to foreign central banks, essentially declaring it would not tolerate them as accomplices of Iran, was incongruous with the trusting, diplomatic culture central banks enjoyed.

- Third Country Short Supply Exception to Payments System Prohibition

Still another exception to imposition of sanctions was for short supplies of crude oil to third countries.\textsuperscript{809} Congress mandated bi-monthly reporting on non-Iranian petroleum and petroleum product prices and availability.\textsuperscript{810} It did so in connection with a mandate to the President that he determine whether non-Iranian crude oil sources were sufficient to allow buyers in third countries around the world to “reduce significantly” the volume of their purchases from Iran.\textsuperscript{811} By that Congress meant cutting dependence (as shown by

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paying lower prices or buying less quantities) on Iranian energy, specifically crude oil, with a view toward complete cessation of dependence on Iran.812

The link to sanctions was this: suppose a foreign financial institution, such as KB in the above hypothetical, engaged in a financial transaction via a correspondent account or PTA, where the underlying commercial deal involved Iranian petroleum or petroleum products and a third country. For instance, assume that deal entailed an Indian oil importer, like Indian Oil Corporation, buying Iranian crude. Suppose Iran is paid via funds credited to the correspondent account or PTA held by KB.

Without the third country short supply exception a foreign bank like KB was vulnerable to sanctions, because of the correspondent account or PTA used to conduct payment from the third country, India, to Iran for the oil. With this exception, however, sanctions would apply only if the supply of crude oil from non-Iranian sources was sufficient to permit a significant reduction in sourcing crude oil from Iran. After all, it would be unfair to India or other third countries to penalize their banks if they had no choice but to buy oil from Iran to meet their energy needs.

Yet, administering the third country short supply exception was fraught with economic and political difficulties. The President had to ascertain the energy demand and supply situation in every country, and compare and contrast Iranian and non-Iranian sources. In evaluating what third countries could or should have done, the President risked looking like he was dictating to them what their energy policies ought to be. India, China, and other energy-hungry emerging countries were unhappy with that scenario, one in which they might wind up dependent on sources controlled, directly or indirectly, by the U.S.

In fact, third countries persisted in buying Iranian crude, evidenced by Iranian oil revenues:

Astonishingly, Iran earned $600 bn [billion] in oil revenues over the past eight years [2006-2013] in oil revenues over the past eight years, more than its total accumulation since oil was discovered more than a century ago.813

Of course, owing to American financial sanctions, between $50 and $100 billion of Iran’s holdings of foreign exchange were in frozen bank accounts.814 Thus, “[o]ne of Mr.

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813 Roula Khalaf, Lionel Barber & Najmeh Bozorgmehr, Rouhani’s 100-Day Revolution, FINANCIAL TIMES, 30 November-1 December 2013, 6. [Hereinafter, Rouhani’s 100-Day Revolution.]

814 Rouhani’s 100-Day Revolution. As to where some oil revenues not in frozen accounts may have gone, the Financial Times reported the previous Administration of President Mahmoud Ahmadinejad “used International Trade Law E-Textbook (Raj Bhala, 6th Edition, 2025) University of Kansas (KU) Volume Four Wheat Law Library
“Hassan” Rouhani’s most troubling discoveries upon taking office [as President in August 2013] was to find the treasury empty.”

Moreover, pressure from America on India (or other third countries) created an internal political dynamic within India. Sanctions relief would be for a foreign financial institution (e.g., an Indian bank like KB) based on the country with primary jurisdiction (India) over that institution cutting its dependence on Iranian oil. 816 A foreign bank then had the choice of pleasing the U.S. by lobbying its government to push its oil importers to eschew Iranian crude, or pleasing its government by rejecting the role of American agent. Being in this position hardly would endear the foreign bank, its government, or its oil importers to the American sanctions regime.

Perhaps in anticipation of this dynamic, Congress obligated the President to “carry out an initiative of multilateral diplomacy to persuade [third] countries purchasing oil from Iran…” that they should limit the use by Iran of revenues Iran earned from oil sales to those third countries to buy non-luxury consumer goods from those countries. 817 For example, if India buys oil from Iran, then it should try to cut sales of consumer items to Iran. In effect, the initiative was designed to weaken bilateral trade ties between Iran and third countries. (It also aimed to prohibit Iran from buying military or dual use items, or any other material that could enhance its WMD capabilities.818)

That this initiative was multilateral hardly changed the optics of the sanctions regime. From the perspective of third countries like India, the initiative was impelled by an American statute, led by an American President, and designed to suit American foreign policy and national security goals. Indeed, the unilateralism-cloaked-in-multilateralism affected not only third country oil consumers like India, but also non-Iranian oil sources, like Iran’s partners in OPEC. Congress instructed the President to “conduct outreach” to the likes of Saudi Arabia and Indonesia to encourage them “to increase their output of crude oil to ensure there is a sufficient supply of crude oil from countries other than Iran, and to minimize any impact on the [world market] price of oil resulting from the imposition of

815 Rouhani’s 100-Day Revolution.
[the asset freeze and payments system] sanctions under this section [1245 of the 2012 Defense Act].”

Simply put, America was to lead a multi-country charge at third country suppliers to cajole them into boosting production to fill the diminution in Iranian oil caused by third country purchasers, under pressure, looking elsewhere than Iran.

The overall goal of these provisions was breathtaking: the U.S. aimed to change the pattern of world trade in crude oil by knocking Iran out of that pattern. That is why the President had to monitor the supply-demand picture in third countries, and sign on as many countries as possible to a coalition of the willing.

That America was one potential supplier also cannot go unmentioned. Thanks to new drilling technologies (including the controversial hydraulic fracturing, or “fracking”) the Energy Information Administration forecast the U.S. by 2016 would produce more crude oil than at any time since the banner year of 1970 (9.6 million bpd). Yet, because of an export ban on oil implemented in 1975, following the 1973 Arab oil embargo, the U.S. could not ship crude abroad. Why not remove the statutory ban and thereby not only help third countries forego Iranian oil, but also hand over to American producers the market share in those countries held by Iran? (The ban later was lifted.)

The third country short supply exception also was problematic from a practical legal perspective. The kind of financial transaction for with a foreign bank could be penalized had to be one involving (1) “trade in goods or services between the country with primary jurisdiction [e.g., India] over the foreign financial institution [e.g., KB] and Iran,” and (2) “any funds owned to Iran as a result of such trade are credited to an account located in the country with primary jurisdiction over the foreign financial institution.”

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821 See Ari Natter, Wyden “Hopes” to Hold Hearing on Crude Oil Exports Soon; Spokesman Cites Concerns, 31 International Trade Reporter (BNA) 103 (16 January 2014); Ari Natter, Chamber of Commerce President Predicts End of 40-Year Ban on Crude Oil Exports, 31 International Trade Reporter (BNA) 103 (16 January 2014).

822 See generally Ajay Makan & Neil Hume, The Cartel’s Challenge, FINANCIAL TIMES, 2 December 2013, 10 (discussing the shale gas revolution and prospects for the United States to become the largest oil producer in the world); Ed Crooks & Geoff Dyer, Strength in Reserve, FINANCIAL TIMES, 6 September 2013, 5 (discussing how the shale boom, while not likely to allow the U.S. to disengage from the Middle East, will enhance its international diplomatic authority).

hypothesized easily meets both prongs. But, what if Indian Oil Corporation was a middle party, brokering an oil sale by Iran to Bhutan? Would a payment routed from the Bhutanese capital, Thimpu, to Tehran via KB render KB liable? Or, what if the underlying transaction was not for “goods,” that is, crude oil, but for consulting provided by Iranian petroleum engineers to the Bhutanese government? Would KB be liable on the rationale that consulting is a “service” within the first prong?

**Sanctions Waiver Criteria Ambiguities**

Congress granted the President discretion to waive sanctions on a foreign financial institution for violations of the payments system prohibition. To qualify, the President had to apply four criteria. First, it had to be in the “national security interest of the United States” not to impose on that institution.824 Second, the President had to justify to Congress the waiver.825 Third, there had to be “exceptional circumstances” preventing the country with primary jurisdiction over the foreign financial institution from reducing significantly its purchases of Iranian petroleum and petroleum products.826 Fourth, the President had to explain the “concrete cooperation” he received, or would receive, thanks to the waiver.827 Even if all four criteria were met, the President could waive sanctions for only up to 120 days, with additional 120 day renewals possible under those same criteria.

The language of the first criterion was commonplace among sanctions waiver provisions, and the second criterion was unsurprising. The third and fourth were ambiguous. “Exceptional circumstances” were undefined, as was “concrete cooperation.” Suppose in the above hypothetical India argued to the President that a surge in energy consumption in India, thanks to strong growth in the manufacturing sector, caused India to

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import more oil than expected from Iran. Was this scenario be exceptional, or one to be expected given India’s efforts at industrialization? To take another example, suppose China outmaneuvered India in trying to obtain sources of oil in Africa to substitute for Iran. That is, China was able to secure FDI and energy supply contracts in Sub-Saharan Africa for which India had also competed, but lost. In consequence, India could not lessen its dependence on Iranian crude oil. Would these circumstances be “exceptional”? Even what might be traditionally thought of as “exceptional” – war or other violent conflict – arguably could be regarded as expected. For example, if India urged that it could not lessen its dependence on oil from Iran because of unrest in three substitute countries – Iraq, Nigeria, and Venezuela – would that be “exceptional”?

Likewise, hypothetical illustrations point out the difficulty in ascertaining what kind of cooperation from India would be “concrete.” Would the cooperation need to be related directly to Iran? Or, would help on other matters – such as stepped up patrols against piracy in the Straits of Malacca by Indian Naval vessels, or increased FDI in Afghanistan to help it repair its infrastructure – suffice?

II. Phase 9:  
2012 Iran-Syria Act New Expansive Constrictions

● 10 Further Measures  
(10 August 2012 through 31 December 2016)

With the Iran Threat Reduction and Syria Human Rights Act of 2012 (Iran-Syria Act), the U.S. continued its traverse far across the Rubicon, as it were, tightening the 1996 Iran Sanctions Act, as amended in 2010 by CISADA, and tightening CISADA, yet again. It did so in 10 principal manners: six concerning illegal business conduct with Iran; one dealing with human rights; one pertaining to punishments for engaging in prohibited conduct; and one affecting criteria for waiving those punishments. Succinctly put,

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To be clear, some of the changes ushered by the Iran-Syria Act were to the 1996 Iran Sanctions Act (as amended in 2010 by CISADA), while other changes made by the Iran-Syria Act were to the 2010 CISADA. That is evident from the 2013 COMPILATION, 685, 708, which indicates the 1996 and 2010 legislation were amended by Public Law 112-158 (Iran Threat Reduction and Syria Human Rights Act of 2012), which is, of course, the 2012 Act. It also is clear simply by comparing the OVERVIEW, which includes the 1996 and 2010 Acts before the 2012 Act, with the 2013 COMPILATION, which includes the 2012 Act amendments.

Also, the changes discussed above occurred via the 2012 Iran-Syria Act, as well as via Sub Title D of the 2012 Iran Freedom and Counter-Proliferation Act (Sub Title D of the National Defense Authorization Act for Fiscal Year 2013), Public Law 112-239, reprinted in 2013 COMPILATION, 736-748. But, they applied retroactively to 90 days after enactment of the original CISADA. See, e.g., Section 103(a), 105(b)(1).

829 Various features of the sanctions regime did not need amendment, and thus remained unchanged. These included provisions on publication in the Federal Register and publication of projects. Compare Iran Sanctions Act of 1996, as amended by CISADA, Section 5(d)-(e), reprinted in OVERVIEW, Part II, 1139-1140 with Iran Sanctions Act of 1996, as further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, Section 5(d)-(e), reprinted in 2013 COMPILATION, 696.

No substantive changes (only minor renumbering) were made under the 2012 Act to the list of exceptions under which the President was not mandated to apply sanctions. Compare Iran Sanctions Act of International Trade Law E-Textbook (Raj Bhala, 6th Edition, 2025) University of Kansas (KU) Volume Four Wheat Law Library
America dubbed illegal more activities with Iran, closed loopholes to behavior it previously identified as unlawful, set additional sanctions for transgressions, and increased the difficulty of obtaining a waiver of penalties.830 All in all, the new constrictions were expansive.

As with ILSA in 1996 and CISADA in 2010, with the Iran-Syria Act in 2012, the 112th Congress professed not to abandon multilateralism.831 The problem with a team

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830 Among the loopholes closed was clarification sanctions could be imposed on foreign persons who assisted in the evasion of American sanctions. The clarification came, however, not via the 2012 Iran-Syria Act statutory language, but via Executive Order Number 13608. President Barack H. Obama signed this Order on 1 May 2012, invoking the authority (inter alia) of the IEEPA. See Executive Order – Prohibiting Certain Transactions with and Suspending Entry into the United States of Foreign Sanctions Evaders with Respect to Iran and Syria, 77 Federal Register number 86, 26409-26411 (3 May 2012), www.whitehouse.gov/the-press-office/2012/05/01/executive-order-prohibiting-certain-transactions-and-suspending-entry-un, www.govinfo.gov/content/pkg/FR-2012-05-03/pdf/2012-10884.pdf#page=3. Sanctions on evaders could be lifted only if the criteria for the CISADA Sunset Rule (discussed earlier) were met, namely, Iran changed its behavior with respect to WMDs and terrorism. See Iran Threat Reduction and Syria Human Rights Act of 2012, Section 217(b), codified at 22 U.S.C. §§ 8711, 8721-8724, 8741-8744, 8781, reprinted in 2013 COMPILATION, 727; CISADA, Section 401(a), 22 U.S.C. § 8551(a).

approach, however, was that even after – or maybe because of – decades of sanctions, not everyone was playing on the American team against Iran by the rules America set.

So, Congress called for “prompt enforcement of the current multilateral sanctions regime with respect to Iran,” and “expanded cooperation with international sanctions enforcement,” thereby intimating its displeasure that third countries were not adhering to U.N. or U.S. rules.832 Congress indicated its view sanctions imposed by the Security Council and allies did not go far enough by urging the President to “intensify diplomatic efforts” at the U.N. and with individual allies to expand prohibitions and penalties sanctions to include a bar on (1) issuing visas to Iranian officials involved in WMD development, terrorist support, or human rights abuses and (2) landing at seaports by vessels of the Islamic Republic of Iran Shipping Lines and at air ports of cargo flights of Iran Air, because of their “role … in proliferation and illegal arms sales,” and to limit the (3) development of petroleum resources in Iran, and (4) importation of refined petroleum by Iran.833

In keeping with the 2012 Budget Act, Congress instructed the President to coax out increased crude oil production in third country suppliers to help third country buyers wean themselves off of Iranian energy, and thereby reduce to zero revenues Iran could generate from sales to those buyers.834 To be sure the rest of the world was clear about what Congress wanted, and perhaps to jawbone compliance, Congress told the President he had to report biannually on third countries that were not imposing measures against Iran.835 Interestingly, Congress had a word about the WTO, and its predecessor, GATT. If either body adjudicated a decision about sanctions on Iran, then Congress wanted to know, perhaps as an a priori admonition against an adverse outcome or notification it would take countermeasures against such an outcome.836

● 1st:
  Expanded Prohibitions against Iranian Energy Sector

The 2012 Iran-Syria Act clarified – in effect, expanded – the list of prohibited transactions. The two broad sanctionable behaviors remained the same: (1) economic transactions in the energy (meaning petroleum or refined gasoline) sector of Iran, and (2) dealings relating to WMDs or advanced conventional weaponry. But, comparing the lists of prohibited transactions under the (1) 1996 Iran Sanctions Act, as amended in 2010 by CISADA, and (2) 2012 legislation showed how Congress plugged gaps, sometimes with expansive language, and other times with precise terms.


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Its main target again was the sector in which Iran traditionally held an international comparative advantage: energy. In both the 1996-2010 and 2012 iterations of the legislation, the prohibition against investing more than $20 million in a 12-month period in the petroleum sector of Iran remained the same. But the new legislation effectively lowered the threshold to $1 million per transaction, or $5 million annually. That was because it barred provision of goods, services, technology, or support to Iran that “could” help it develop its petroleum resources. In other words, not only was FDI in that sector illegal, but so, too, was nearly any transaction.

Moreover, the 2012 Iran-Syria Act tightened other economic prohibitions against dealing with Iran’s most important sector, energy, as follows:

1. Prohibition against helping Iran produce refined petroleum products

In the 2012 legislation, Congress clarified this prohibition applied not just to providing Iran with goods, services, technology, information, or support for it to construct, modernize, or repair petroleum refineries (as under the 1996 and 2010 legislation). It also covered any “direct and significant assistance … directly associated with infrastructure, including construction of port facilities, railways, and roads, the primary use of which is to support the delivery of refined petroleum products.” This expansive language essentially barred any trade or investment in the infrastructure of Iran, as long as such transactions were entered into “knowingly” (meaning actual or constructive knowledge), exceeded a U.S. $1 million threshold (or $5 million in 12 months), and “could” possibly help Iran.

Exactly how America would determine whether a particular Iranian port, railway, or road was “primarily used” by petroleum refiners was unclear. Did “primary use” mean 51% of the traffic? Over what period? By what measure (value or volume)? Who would obtain the data and check the figures? Would a telecommunications facility, or a petroleum engineering school, be considered “infrastructure” (given that the new language was non-exclusive by virtue of the preposition “including”). Perhaps these questions were what Congress intended, namely, to deter traders and investors by injecting uncertainty into their dealings with Iran.

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(2) Prohibition against exportation of refined petroleum products to Iran\textsuperscript{842} –

It remained illegal to sell refined petroleum to Iran, and to provide it with goods, services, technology, information, or support that might help it import refined petroleum. But, the 2012 language closed a loophole and broadened the meaning of what “could directly and significantly contribute” to Iran’s ability to import gasoline. The loophole concerned barter trade.

Suppose a country, such as China or India, shipped gasoline it refined (possibly from Iranian crude oil) to Iran, in exchange for pistachios. Such bartering, and any insurance for it, was illegal under the new language.\textsuperscript{843} After all, barter trade easily “could” be a “significant contribution” to Iran’s ability to import refined petroleum – indeed, it was.

(3) Prohibition against JVs for Iranian petroleum resource development\textsuperscript{844} –

American sanctions under the 1996 legislation, as amended in 2010, barred investments above $20 million in petroleum resource development in Iran. They did not expressly forbid investments in petroleum resources outside of Iran that may redound to the benefit of Iran. For instance, a person could enter into a JV agreement in petroleum resources in Venezuela, and that deal might help Iran develop its petroleum resources within Iran. It could do so if Iran was a JV partner, or otherwise obtained goods, services, or know-how from the Venezuelan project that Iran could transfer and apply to its own sector.

Once again, Congress moved to close the loophole, and in so doing, unilaterally expanded the extraterritorial reach of the sanctions. Via the 2012 amendments, Congress forbade any JV in petroleum resources anywhere in the world outside of Iran if the Iranian government was a “substantial partner or investor,” or Iran “could, through a direct operational role … or by other means, receive technological knowledge or equipment not previously available to Iran that could directly and significantly contribute to the enhancement of Iran’s ability to develop petroleum resources in Iran.”\textsuperscript{845} The italicized terms gave wide latitude for


\textsuperscript{845} See \textit{Iran Sanctions Act of 1996}, as further amended by \textit{Iran Threat Reduction and Syria Human Rights Act of 2012}, Section 5(a)(4)(A)(ii), \textit{reprinted in 2013 COMPILATION, 690. The mens rea requirement again was “knowingly.” See id., Section 14(13), 706.}
interpretation. In turn, prospective JV partners would be uncertain as to whether a project might run afoul of the prohibition, and likely eschew the project – an effect Congress no doubt sought.

Two points about this amendment were remarkable. First, the fact the JV might help a developing or least developed country, such as in West Africa, was irrelevant. If a deal had the potential to help Iran, then never mind it might also help a poor country seeking to grow, alleviate internal poverty, or combat Islamist extremism.

Second, the amendment applied retroactively to all JVs on or after 1 January 2002 through enactment of the 2012 Iran-Syria Act. That is, any JVs in the last decade were sanctionable. The only way to avoid sanctions was to terminate the JV within 180 days of enactment of the 2012 Act. Bluntly put, this sanction barred not only future investments in all third countries, but also demanded disinvestment around the world. That such retroactivity might be an unconstitutional taking, or at least an unfair one, seemed not to matter.

(4) Prohibition against buying Iranian petrochemical products

So eager was Congress in 2012 to impede Iran from developing its petroleum resources that it expanded the sanctions regime to cover “petrochemical products.” These downstream articles included “any aromatic, olefin, or synthesis gas, and any derivative of such a gas, including ethylene, propylene, butadiene, benzene, toluene, xylene, ammonia, methanol, and urea.”

Suppose Iran produced ammonia for use in household cleaning solutions, or urea as a component in agricultural fertilizer. Suppose, further, a British firm making such solutions, or a Swiss company producing fertilizer, bought the component petrochemicals from Iran. If the fair market value of their purchases exceeded U.S. $250,000 (or $1 million annually), then Congress forbade them.

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As this hypothetical example illustrates, this prohibition meant persons in third countries could not source petrochemical inputs – sometimes called “feedstock” – from Iran. In turn, Iran, even if it could develop the feedstock, would have a difficult time finding foreign markets for it if persons in those markets complied with the sanctions.

(5) Prohibition against transporting crude oil from Iran

Shipping crude oil out of Iran certainly could help Iran develop both its petroleum resources and ability obtain gasoline. Presumably, Congress meant to bar such shipments under its 1996 and 2010 legislation, but with major oil importers like China, India, and Japan dependent on foreign – including Iranian – crude, ferrying oil out of Iran persisted. With its 2012 changes, Congress made clear it wanted them to cease by targeting not just persons in the importing countries, but also the shippers themselves.

Carriage companies thus found themselves in the sight line of Congress: anyone who was a “controlling beneficial owner,” or who otherwise owned, operated, controlled, or insured a vessel used to transport crude oil from Iran to any other country in the world, was liable. Congress allowed a small safe harbor for underwriters or insurers that “exercised due diligence” to ensure the persons for which they were providing protective policies were not shipping from Iran.

Interestingly, for this particular prohibition, Congress limited in three ways the circumstances in which sanctions could be imposed. First, Congress bifurcated the mens rea requirement: a “controlling beneficial owner” had to have “actual knowledge” of the use of their vessel, whereas for all other owners, operators, controllers, or insurers, actual or constructive knowledge (“knew or should have known”) was sufficient. This adjustment made it more difficult to impose sanctions on controlling beneficial owners, but easier on all others involved in shipping crude oil from Iran. Why Congress chose to do so is unclear, if its goal was to tighten sanctions unreservedly.

Second, sanctions were inapplicable if the President determined that a third country to which Iranian crude oil was shipped had a “sufficient supply or


petroleum and petroleum products” of non-Iranian origin. Congress apparently appreciated some third countries could not easily or swiftly substitute their supply sources away from Iran, so it did not want to impose sanctions on transporting Iranian crude to them unless they could “reduce significantly their purchases from Iran.”

Third, sanctions also were inapplicable to a foreign financial institution from a country that “has significantly reduced its volume of crude oil purchases from Iran.” This limitation, linked to the 2012 National Defense Authorization Act (discussed below), referred to successive 180-day periods in which the President must report on the extent to which third countries are complying with sanctions against transactions with the CBI and Iranian financial institutions. Essentially, a country had six months to reduce its dependence on Iranian crude, otherwise its banks could be targeted for sanctions.

Prohibition against concealing Iranian origin of crude oil or refined petroleum products

Smuggling was an obvious, albeit wicked, response of a person determined to ship crude oil, or refined petroleum products, from Iran to a third country to skirt the American prohibition against doing so. Setting moral or reputational concerns aside, a prospective smuggler might balance reward against risk to calculate whether concealing the true origin of energy resources it transports is worthwhile. As sanctions tightened around Iran, the price of those resources would rise. Depending on how high the price rose, the potential reward from shipping Iranian crude oil or refined petroleum products, disguised as originating elsewhere, could offset the expected value (i.e., probability of imposition multiplied by dollar value of penalty) of any sanction.

To deter smuggling, Congress made concealment itself a sanctionable offense. In doing so, it was not breaking new legal ground in that accurate country of origin reporting is required under U.S. Customs Law. But, what was novel was – again – the extraterritorial reach of the sanction. It now

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was illegal to report falsely the true Iranian origin of crude oil or refined petroleum products, regardless of the recipient of the report. Whether American or foreign was irrelevant; it was the act of concealment that mattered.

Congress applied the prohibition against concealing Iran as the country of origin of crude oil or refined petroleum products coextensively with the prohibition against transporting crude oil: any person that was “a controlling beneficial owner” of, or that “otherwise owns, operates, or controls,” a vessel used to transport Iranian energy resources.\(^\text{860}\) It used the same bifurcated \textit{mens rea} requirement – “actual knowledge” to the first group, and “knowingly” (\textit{i.e.}, actual or constructive knowledge) for the second group – as before. And, as before, it granted a small safe harbor to underwriters or insurers if they “exercised due diligence” to ensure the persons for which they were providing protective policies were transporting energy products out of Iran.\(^\text{861}\)

Two points are noteworthy. First, lest prospective smugglers have any doubt as to whether American legislators were aware of how they might conceal what they were transporting, Congress listed two non-exclusive examples of sanctionable behavior: allowing the vessel operator to disable the satellite tracking device on the vessel, or obscuring the fact the vessel is owned, operated, or controlled by the Iranian government, National Iranian Tanker Company, or Islamic Republic of Iran Shipping Lines (or by entities controlled by them).\(^\text{862}\) Moreover, a prospective smuggler was deemed to have “actual knowledge” that Iran, the NITC, or IRISL had an interest in a vessel if OFAC listed the International Maritime Organization of that vessel.\(^\text{863}\) In effect, if OFAC published the IMO number of the vessel, then every person regardless of where located was deemed to know that the vessel was Iranian, and use of it to ship crude oil or petroleum products out of Iran was barred.

Second, lest prospective smugglers have any doubt as to how serious Congress was in its intention to ensure countries of origin of crude oil and refined petroleum products were reported accurately and transparently, it empowered the President to impose a supplemental sanction on them.\(^\text{864}\) In addition to choosing and applying five of nine sanctions from the standard

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menu, the President could impose a sixth punishment, namely, on the vessel used to ship Iranian energy resources a ban. The President could bar that vessel from landing at any American port for up to two years.

The prohibition against smuggling adduced two other dimensions of the sanctions amendments wrought by the 2012 Iran-Syria Act. First, Congress effectively widened the ban on FDI in the Iranian energy sector and trade in Iranian energy products to a ban on cargo ships in which Iran had an interest. Doing so was consistent with the 2010 CISADA expansion of sanctions from the petroleum sector per se to downstream products, namely, refined petroleum. (That same kind of expansion is seen below, in respect to allied services such as financing and insurance.)

Second, Congress anticipated how particular prohibitions might be violated, and tried to block such moves. Doing so was consistent with the 2010 CISADA expansion of sanctions from FDI to exportation and importation, and with the 2012 Iran-Syria Act further expansion no JVs. In brief, the unmistakable trend was one from an initial narrow definition, targeting one product category and behavior, to downstream products, supporting services, and anticipated reactions by would-be wrongdoers.

In sum, the 2012 Iran-Syria Act amendments to the 1996 sanctions regime, as amended by the 2010 legislation, were breathtaking. America closed loopholes quite literally to strangle the Iranian energy sector, and did so in the most extraterritorial of manners.

● 2nd:

Barring Transshipment of Military Items

The 2012 Iran-Syria Act rewrote the prohibition in the 1996 Iran Sanctions Act aimed at preventing Iran from obtaining a WMD. The 1996 Act, coupled with the 2010 CISADA amendments, barred knowing exportation of goods, services, or technology that would contribute materially to the ability of Iran to obtain a WMD or destabilizing numbers of advanced conventional weaponry. That prohibition left open three loopholes: transshipment, constructive knowledge, and JVs in uranium mining. Congress closed them with the 2012 Act. 865

First, any “person” that “exported or transferred, or permitted or otherwise facilitated the transshipment of, any goods, services, technology, or other items to any other person” now was liable. 866 Second, actual knowledge was not necessary; constructive knowledge – that a person “should have known” – was enough. 867 Of what did a person

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need actual or constructive knowledge? Two points: first, that the export, transfer, or transshipment to another person “would likely result” in that other person exporting, transferring, or transshipping prohibited items to Iran, and second, that the result “would contribute materially to the ability of Iran” to develop WMDs or destabilizing numbers of advanced conventional weapons.

To be clear, closing the first two loopholes meant:

(1) A person need not ship forbidden items directly to Iran. Shipping them through one or more intermediaries was enough. For example, a person in Belarus could export such items to another person Singapore. If that other person in Singapore subsequently transferred the items to Iran, directly or through another stage of transshipment, for example, through Yemen, then liability could attach to the first person, and indeed every person in the transactional chain.

(2) The first person in the chain need not know for sure that the second or a subsequent person is sending the forbidden items onward to Iran. If that person ought to have known the next or a follow-on person likely would send the items to Iran, then that rather speculative anticipation was enough. Presumably, constructive knowledge would exist if the first person should have known the goods, services, technology, or other items at issue were headed to Dubai, and that Dubai was a prominent location for smuggling items in small vessels across the Gulf to Iran.

(3) As for the second of the two mens rea elements – actual or constructive knowledge that the items “would contribute materially” to Iran’s weapons programs, there was no need for a person to have detailed knowledge of those programs. Rather, that knowledge presumably could be inferred from the nature of the goods, services, technology, or items that were exported, transferred, or trans-shipped. For example, if the goods were centrifuges for enriching uranium, or the technology was used for drones, then could there be doubt that the contribution would be material?

Yet, even with these changes, arguably a rather large and threatening loophole remained: a person might not ship or trans-ship anything to Iran, but might engage in a JV that involves mining, producing, or transporting uranium. Would that participation be sanctionable?

Even reading the amended statutory language broadly, with the closure of the first two loopholes, the answer was “no.” Uranium is a “good,” but helping to mine or produce it is not the same as “exporting,” “transferring,” or trans-shipping it.” For example, a person could simply assist in removal of uranium from Russia, even in partnership with an Iranian government entity or person connected to that entity. If the first person did no more, then it did not engage in a prohibited transaction. (Note the person did not invest in Iran, much
less in the petroleum resources sector of Iran.) Yet, if the uranium mined in Russia found its way to Iran, then surely Iran’s ability to construct a nuclear weapon would be enhanced.

So, with the 2012 Iran-Syria Act, Congress closed this loophole. Any person, anywhere in the world, was barred from participating in a JV “that involves any activity relating to the mining, production, or transportation of uranium” with (1) the government of Iran,” (2) an entity incorporated in or subject to the jurisdiction of Iran, or (3) a person acting on behalf, at the direction of, or owned or controlled by that government or such an entity. The mens rea requirement, “knowingly,” covered actual or constructive knowledge. So, for example, Rio Tinto Zinc, the Australian mining multinational corporation, could not participate in a JV with Tata Mining, the Indian natural resources company, if Tata had an understanding with a business association located in Tehran, if that JV engaged in manufacturing apparel to protect mining workers against radiation. After all, tracking the statutory language, making such apparel is an “activity” that “relate[s] to” uranium mining.

Here again, it is worth reminding that in closing all three loopholes, Congress again asserted its extraterritorial reach. None of the persons in the transactional chain, or a JV, needed to be American or anywhere close to the homeland.

● 3rd:
Government Procurement Certification against Revolutionary Guards

Government contracting certifications were another notable change ushered by the 2012 Iran-Syria Act. Any prospective contractor for the U.S. government was obligated

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Note this proscription applied on or after 2 February 2012. Before that date, an additional set of criteria applied: the uranium had to be transferred directly or indirectly to Iran, the Iranian government had to receive “significant revenue,” or Iran could have obtained technology or equipment it did not previously have that could have contributed materially to it developing nuclear weapons. See id., Section 5(b)(2)(A)(ii). This prohibition and attendant sanctions thus applied retroactively, unless a person agreed to terminate its JV participation within 180 days of enactment of the Iran-Syria Act. See id., Section 5(b)(2)(B).

The other aspects of the prohibition against helping Iran obtain WMDs or destabilizing numbers of advanced conventional weapons remained the same, namely, the statutory provisions concerning the additional mandatory sanction, and the exception thereto, about export licensing. Compare Iran Sanctions Act of 1996, as amended by CISADA, Section 5(b)(2), reprinted in OVERVIEW, Part II, 1138-1139 with Iran Sanctions Act of 1996, as further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, Section 5(b)(3) reprinted in 2013 COMPILATION, 694-695.

869 Iran Sanctions Act of 1996, as further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, Sections 5(b)(2)(A) and 14(13), reprinted in 2013 COMPILATION, 693.


The basic requirement concerning Iran certifications relating to Section 5 prohibitions remained the same, but with minor renumbering. Compare Iran Sanctions Act of 1996, as amended by CISADA, Section 6(b)(1), reprinted in OVERVIEW, Part II, 1142 with Iran Sanctions Act of 1996, as further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, Section 6(b)(1)(A), reprinted in 2013 COMPILATION, 698-699.
not only to certify it was not engaging in a prohibited activity (as before), but also it was not “knowingly” involved in a “significant transaction” with Iran’s Revolutionary Guard Corps. 871 This certification extended to any officials, agents, or affiliates of the Guard, the property or interest in property of which were blocked by the U.S. under the IEEPA. False certification was punishable by exclusion from the list of approved government contractors (again, as before) for at least two years (a curious decrease from three years). 872

The additional certification rule, while seemingly minor, reflected a continuation of the earlier shift in American sanctions policy. Up until the 2010 CISADA, and aside from IEEPA asset freezes, the U.S. had not focused on targeting the Guards. Prohibited transactions took aim at economic sectors of Iran, especially petroleum and refined gasoline, not necessarily at economic agents within Iran. From an American perspective, the problem with looking at transactions, not transactors, was that the Guard actually controlled (directly or indirectly) businesses in Iran. Moreover, the Guards were politically powerful, and close to the Supreme Leader. So, the 2012 Iran-Syria Act certification requirement was a step toward weakening the Guards as an anti-American economic and political force.

4th:

Diversion Prohibition

Pursuant to CISADA, America had a trade embargo against Iran, and a humanitarian exception thereto. 873 Unscrupulous individuals, in public and private areas, sometimes exploited such an exception for their own benefit. They diverted goods, such as food and medicine, or they misappropriated the proceeds from the sale or resale of the excepted goods. The embargo did not expressly prohibit these corrupt behaviors. The 2012 Iran-Syria Act closed this loophole.

The Act directed the President to submit to the appropriate Congressional committees a list of persons he determined had channeled goods (be they food, medicine,
or other humanitarian items) intended for the Iranian people away from them, or made off
with funds from their sale or resale. Here, too, there was no intent requirement – the
offense was a strict liability one. He then was required to impose sanctions targeted against
those persons, namely, the same punishments as applicable to human rights abusers
(except, logically, for the sanction of forbidding importation of goods, as that would be
counter-productive to the aim of humanitarian goods reaching needy Iranians). That it
was a strict liability offense made sense, because at issue was corruption interfering with
aid reaching the Iranian people, and thus undermining any pretense that the punishments
targeted bad actors, not innocent civilians.

- 5th:

**Shipping and Insurance Prohibition**

None of the aforementioned constrictions affected carriage of goods to or from Iran
if those goods were unrelated to the energy sector. But, what if a shipping company
provided a vessel on which goods Iran could use to acquire WMDs or support terrorists
were transported to Iran? Centrifuges and RPGs would be quintessential examples, and
perhaps a state-owned Chinese freight company, such as the Chinese Ocean Shipping
Company or China Shipping Container Lines, might carry them from their port of origin
to Bandar Abbas. Similarly, suppose P&I Clubs or Munich Re provided marine cargo
insurance or reinsurance for the transportation of these items.

To discourage the likes of COSCO and CSCL, and non-SOE carriage companies,
from shipping goods to Iran, the 2012 *Iran-Syria Act* rendered them liable for any
“knowing” (that is, actual or constructive knowledge of a) sale, lease, or provision of a
vessel used to carry “or from Iran … goods that could materially contribute to” the WMD
or terrorist activities of Iran. Likewise, the Act sought to bar financial institutions,
indeed, any person, from providing marine cargo insurance for Iranian transport of the
forbidden merchandise. So expansive was the prohibition that it covered “any other

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874 See Comprehensive Iran Sanctions Accountability and Divestment Act of 2010, Section 105C(b)(1),
Public Law 111-195 (1 July 2010), as amended by Public Law 112-158 (Iran Threat Reduction and Syria
Human Rights Act of 2012) and Section 1249 of Public Law 112-239 (Iran Freedom and Counter-
Proliferation Act of 2012, Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013),
codified at 22 U.S.C. §§ 8512, 8513a, 8514, 8514a, 8514b, reprinted in 2013 COMPILATION, 715, 748.
875 See Comprehensive Iran Sanctions Accountability and Divestment Act of 2010, Section 105C(a)(1),
Public Law 111-195 (1 July 2010), as amended by Public Law 112-158 (Iran Threat Reduction and Syria
Human Rights Act of 2012) and Section 1249 of Public Law 112-239 (Iran Freedom and Counter-
Proliferation Act of 2012, Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013),
codified at 22 U.S.C. §§ 8512, 8513a, 8514, 8514a, 8514b, reprinted in 2013 COMPILATION, 715, 748.
877 These companies are among the top insurers in the world. See www.lloydslist.com/l/news/top100/insurance/.
878 See Iran Threat Reduction and Syria Human Rights Act of 2012, Section 211(a), codified at 22
definition of “knowing,” see Iran Sanctions Act of 1996, as further amended by Iran Threat Reduction and
Syria Human Rights Act of 2012, Sections 5(b)(2)(A) and 14(13), reprinted in 2013 COMPILATION, 693.
879 See Iran Threat Reduction and Syria Human Rights Act of 2012, Section 211(a), codified at 22
shipping service.”880 Hence, supplying merchant marine crews, catering, or sanitation, or possibly even tugboat assistance, was barred. Ironically, pre-shipment inspection (PSI) services might even be ensnared in this phraseology.

Any “person,” American or otherwise, legal or natural, was potentially liable, as was any person in a position of ownership, control, or common ownership control.881 The sanction was a blocking one: the U.S. would forbid any transaction in the property or interests of that person on which it could lay hands. So, for instance, a COSCO or CSCL vessel in the port of Baltimore might be seized, or accounts of P&I Clubs or Munich Re in New York might be frozen. Even the assets of companies that hired workers from impoverished towns and villages in developing countries, such as Magsaysay, a Philippine provider of (inter alia) shipping personnel from captains to bakers, were at risk.882 A Presidential waiver was possible, but only it was “vital to the national interests” of the U.S., and the President explained his decision to Congress.883

Notably, however, the sanction was different if the National Iranian Oil Company or National Iranian Tanker Company were involved. Suppose P&I Clubs or Munich Re underwrote insurance (or reinsurance) for the NIOC or NITC. Then, the insurer would be subject to five of the nine sanctions (discussed below).884 The tough insured parties apparently were premised on the view NIOC and NITC were directly engaged in helping Iran obtain revenues for its petroleum and petroleum resources that Iran funneled to WMD and terrorist activities. Only if P&I Clubs or Munich Re exercised due diligence to avoid underwriting policies for NIOC or NITC, or if their policies were for shipments of food, medicine, or humanitarian assistance, could they escape sanctions.885

881 See Iran Threat Reduction and Syria Human Rights Act of 2012, Section 211(b)(1), (2)(B)-(C), codified at 22 U.S.C. §§ 8711, 8721-8724, 8741-8744, 8781, reprinted in 2013 Compilation, 724. See also Section 211(e) (containing a rule of construction to ensure Section 211 does not restrict the authority of the President under the IEEPA to sanction a person).
882 The mens rea requirement were for owners or controllers was “actual knowledge or should have known,” and for a one owned, controlled by, or under common ownership of the primary person was “knowing[ ] engage[ment]” in the provision of a vessel, marine insurance, or other shipping service. Id.
883 See also Section 211(e) (containing a rule of construction to ensure Section 211 does not restrict the authority of the President under the IEEPA to sanction a person).
885 Also subject to reporting, in this instance every 90 days, were vessel operators or others conducting or facilitating “significant financial transactions with persons managing ports in Iran.” Id., Section 211(d)(1). Such reports could contain a classified Annex. See id., Section 211(d)(2).
887 See Iran Threat Reduction and Syria Human Rights Act of 2012, Section 212(b)(1)-(2), codified at 22 U.S.C. §§ 8711, 8721-8724, 8741-8744, 8781, reprinted in 2013 Compilation, 725. If an insurer (or reinsurer) already had been underwriting policies for the NIOC or NITC, then it could escape sanctions by terminating its provision of those services to them. See id., Section 212(b)(3). See also Section 212(e) (containing a rule of construction to ensure Section 211 does not restrict the authority of the President under the IEEPA to sanction a person).
To be sure, it remained lawful to carry or insure goods, or give shipping services for, transportation between Iran and third countries not related to these activities. But, doing so meant freight companies had to ascertain what truly was inside the containers on vessels they provided. That meant more rigorous inspections, which drove up shipping costs to Iran. The possibility of mishaps, coupled with the threat of American penalties, pressed up insurance premiums. Why bother with the headaches, transactions costs, and risks associated with compliance? Perhaps it was better not to carry or insure, or give attendant shipping services for, goods to or from Iran. That would be an outcome Congress would improve, as it would turn the de jure American trade embargo against Iran into a de facto global trade ban.

6th:
Sovereign Debt Prohibition

Continuing its efforts to ostracize Iran from the world of international finance, Congress moved to deny Iran access to sovereign debt markets. Congress identified sovereign debt as potential assistance to the energy sector of Iran. Central and sub-central governments around the world issue debt to finance infrastructure development projects. In the case of Iran, FDI projects, valued above a defined threshold, in that sector had been illegal since 1996, but Iran could finance them by tapping financial markets outside of the U.S. Simply put, Iran could substitute portfolio for direct investment. To the extent Iran did so, it could funnel the consequent revenues from successful energy projects toward production of a nuclear bomb or support for Hezbollah.

Congress endeavored to choke off this source of funds by making it illegal to buy, subscribe to, or otherwise facilitate in the issuance by the Iranian government bonds or other debt instruments. This move was a bold extraterritorial one over world financial markets: no person, wherever located, could purchase, or even clear or settle trades, in Iranian sovereign debt. Where that potential investor was located, the financial market or markets on which Iran attempted to float its bonds, or the place at which its debt instruments were cleared and settled, did not matter. Of moment was whether the person acted “knowingly,” i.e., with active or constructive knowledge that the debt was that of the Iranian government or any entity, such as an SOE, owned or controlled by it. If the President found a person to violated this prohibition, then he had to impose five of nine sanctions (discussed below) on that violator.

So, for instance, suppose a prominent hedge fund, such as Apollo Management Asia Pacific Limited, based in Hong Kong, invested in an OTC issuance or private placement of convertible bonds by the NIOC. The bonds are denominated in euro. The

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Spanish bank, Santander, underwrites the offering. Would the fact Apollo and Santander are not United States Persons immunize them from liability? Would the fact the bonds are not denominated in dollars, or that they may be converted to equity, matter? Would the fact the transaction is not conducted on an organized exchange, and performed entirely overseas, matter?

The answer to these questions is “no:” nothing on the face of the pertinent statute circumscribed the prohibition and attendant sanctions in accordance with these facts. Similarly, whether the investors in Apollo were high net worth Americans or not would be immaterial. To the contrary, the reality that Apollo and Santander have offices in New York, and Apollo surely has American investors, renders them and their assets vulnerable.

7th:

Affiliates Prohibition

Thanks to CISADA, assets of Iran’s Revolutionary Guard Corps over which the U.S. could obtain jurisdiction were frozen. But, what about foreigners, especially non-Iranians, who operated as agents for the IRG? What if they entered into energy or financial transactions with the Corps, or bartered deals for the Corps that did not involve a monetary payment? CISADA did not directly target these aiders and abettors, nor put their assets at risk, and did not cover counter-trade. The 2012 Iran-Syria Act addressed these questions, while maintaining the extant primary sanctions on the Corps.

First, the Act closed the loophole by which a foreigner could help the Corps with impunity. Congress directed the President to identify and designate for sanctions any foreign person who was an “official[, agent[, or affiliate[]” of the Corps, and to “block and prohibit all transactions in all property and interests in property of that foreign person” that were in America or in the possession or control of a United States Person. Likewise, the President was to deny entry to the U.S. of a Corps agent (unless that agent was coming to speak at the U.N., or it was “vital to … [American] national security interests” to permit him entry).

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889 See generally Santander Bank, www.santanderbank.com (discussing the activities and locations of the bank).
893 See Iran Threat Reduction and Syria Human Rights Act of 2012, Section 301(d)-(e), codified at 22 U.S.C. §§ 8711, 8721-8724, 8741-8744, 8781, reprinted in 2013 Compilation, 728-729. The first exception was needed if the United States was to comply with its United National treaty obligation, namely, the 26 June 1947 Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, which entered into force on 21 November 1947. See id., Section 301(d)(2). Invocation of the second exception required a Presidential report to the appropriate Congressional committees, which could contain a classified Annex. See id., Section 301(e)(1)-(2).
Read literally, this language could apply to a salesperson for Nestlé who sold baby formula to the spouse of an official in the Corps. To screen out inconsequential agency relationships, Congress conveyed to the President the agents in which it had special interest: the President was to give priority in investigation those persons who conducted, or tried to conduct, a “sensitive transaction” with the Corps.894 “Sensitive transactions” meant (exclusively) any (1) financial deal involving a non-Iranian bank in excess of U.S. $1 million (or summing above that threshold in a 12-month period), (2) manufacture, importation, or exportation of items Iran needed to develop a WMD, (3) production, purchase, or sale of any goods, services, or technology relating to the Iranian energy or petrochemical sector, or (4) procurement of restricted technology that would aid Iran in restricting the flow of news or expression of free speech.895 Thus, respectively, an bank account manager in a Malaysian bank who provided investment advice, a mine director in Russia who supervised the extraction of uranium, a port official in Rotterdam who oversaw shipments of crude oil, or an engineering Professor at Dartmouth College who conducted research into plastics—all were potentially liable for violations of the agency prohibition if their dealings involved the Corps and the President identifies them as “officials, agents, or affiliates” of the Corps.896

Significantly, Congress wrote the prohibition expansively to include another step downstream in the chain of a financial or commercial transaction. Suppose a foreign person “knowingly materially assist[s]” the Corps, or an agent or affiliate thereof who has been sanctioned, by providing funds, goods, services, or technology to Corps officials or agents?897 For example, suppose a Dutch commodities trader at ABN AMRO in Amsterdam brokers a sale of LPG by NatGaz, which is headquartered in Beirut, to the Bangkok office of the United Kingdom-based ITS Trading Company.898 If the President has sanctioned ITS Bangkok as a Corps agent, then the broker potentially is liable for having materially assisted the agent by arranging the sale of goods (LPG) and concomitant payment of funds.899

Likewise, suppose a foreign person enters into a “significant transaction” with the Corps or one of its affiliates.900 For instance, suppose a Singaporean businessman brokers an exchange of basmati rice from India for Iranian crude oil. The businessman is potentially

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895 See Iran Threat Reduction and Syria Human Rights Act of 2012, Section 301(c)(1)-(5), codified at 22 U.S.C. §§ 8711, 8721-8724, 8741-8744, 8781, reprinted in 2013 Compilation, 729. See also CISADA Section 106(c), codified at 22 U.S.C. § 8515(c), concerning the last defined type of “sensitive transaction.”
liable, because “significant transaction” includes barter trade involving the Corps or its network, assuming the President designated and sanctioned him as an affiliate.  

In sum, the affiliate prohibition was up to two steps removed from the Corps: it extended not only to (1) the agent, but also (2) any foreign person who supports that agent. In both hypothetical transactions, the statutory language did not require that the Corps itself bought the LPG or sold the crude oil. And, in both cases, the mandatory penalty was imposition of five from the standard menu of nine sanctions (discussed below). Sanctions on the foreign person-supporter could not be waived unless that person had ceased the forbidden behavior, or a waiver was “essential” to American national security interests, and would not terminate until the person stopped the behavior and gave assurances against re-engagement.

In this two-step chain, foreign agents or supporters of the Corps the President had to identify and punish were not limited to private natural or legal persons. Public sector bodies were included, too. Congress made sure in the 2012 Iran-Syria Act to forbid any foreign government agency of any country in the world aside from transacting with the Corps or its agents. That is, suppose the President determined a third-country government entity:

knowingly and materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, or knowingly and materially engaged in a significant financial transaction with a foreign person, and that this person was an “official, agent, or affiliate” of the Corps. Then, the entity was potentially liable.

To illustrate via modest modifications to the above hypotheticals, suppose the Dutch Ministry of Finance renders advisory services to the ABN AMRO trader on the application of bank secrecy laws to commodity brokerage, or the Ministry of Commerce in India lends support in the form of material and technology on the proper conduct of barter trade to the Singaporean businessman broker. Assuming the trader or broker qualify

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903 Iran Threat Reduction and Syria Human Rights Act of 2012, Section 302(b)-(c), codified at 22 U.S.C. §§ 8711, 8721-8724, 8741-8744, 8781, reprinted in 2013 COMPILATION, 731. See also id., Section 302(e), at 732 (concerning waiver of Presidential identifications and designations of foreign person-supporters on the ground of “damage” to national security).

as Corps agents or affiliates, then the Dutch and Indian government bodies could be held to account.\footnote{905}

Sanctions on those sovereign bodies were not mandatory, but Congress clearly nudged the President to do so by listing the possible punishments: denial of foreign aid, defense assistance, and financial or credit support; rejection of export licenses for controlled (in particular, weapons) items; opposition to official international financial institution lending and technical assistance; and \textit{IEEPA} penalties.\footnote{906} Once imposed, sanctions could be terminated only if doing so was “essential” to U.S. national security, the foreign government entity ceased its behavior, or the foreign person with whom or which it dealt no longer acted for Iran’s Revolutionary Guards.\footnote{907} Congress further indicated its preference for sanctions against foreign government agencies that transacted with the Corps or its supporters by obliging the President to explain to it why he opted (if he did) for clemency.\footnote{908} Manifestly, then, Congress sought to isolate as far as possible the Corps by telling the private and public sectors around the world not to deal with them or their affiliates.

8th: \textbf{Tightening Human Rights and Censorship Prohibitions}

The 2012 \textit{Iran-Syria Act} amended the 2010 \textit{CISADA} rules on human rights abuses. Those rules directed sanctions against individual Iranian officials for disrespecting the human rights of Iranians during and after the Green Revolution. But, specifically who were those officials? Moreover, should not the supply to Iran of the physical instruments of torture and devices for censorship be forbidden? Finally, ought not the faceless transferors, sometimes white-collar professionals, who gave torturers and censors their tools, be held accountable?

\textit{CISADA} did not answer these three questions. The \textit{Act} did, essentially closing the loopholes by naming names and establishing as prohibited behaviors the shipment of those heinous tools.\footnote{909} First, Congress stated its sense that:

\footnotetext[906]{See \textit{Iran Threat Reduction and Syria Human Rights Act of 2012}, Section 303(b)(1)(A)-(G), codified at 22 U.S.C. §§ 8711, 8721-8724, 8741-8744, 8781, \textit{reprinted in} 2013 \textit{COMPILATION}, 733-734. See also Section 304 (containing a rule of construction against limiting Presidential authority to impose sanctions under the \textit{IEEPA}).}
\footnotetext[908]{See \textit{Iran Threat Reduction and Syria Human Rights Act of 2012}, Section 303(d), codified at 22 U.S.C. §§ 8711, 8721-8724, 8741-8744, 8781, \textit{reprinted in} 2013 \textit{COMPILATION}, 734. Reporting was to be to all House and Senate Committees with jurisdiction over foreign relations, appropriations, financial institutions, armed services, and intelligence. See \textit{id.}, Section 303(e)(1)-(2), at 734-735.}
the Supreme Leader of Iran, the President of Iran, senior members of the Intelligence Ministry of Iran, senior members of Iran’s Revolutionary Guard Corps, Ansar-e-Hezbollah and Basij-e-Mostaz’aafin, and the Ministries of Defense, Interior, Justice, and Telecommunications are ultimately responsible for ordering, controlling, or otherwise directing a pattern and practice of serious human rights abuses against the Iranian people.\footnote{Iran Threat Reduction and Syria Human Rights Act of 2012, Section 401(a), codified at 22 U.S.C. §§ 8711, 8721-8724, 8741-8744, 8781, reprinted in 2013 COMPILATION, 735.}

Thus, the President “should” include those people on the CISADA list of human rights violators.\footnote{Iran Threat Reduction and Syria Human Rights Act of 2012, Section 401(a), codified at 22 U.S.C. §§ 8711, 8721-8724, 8741-8744, 8781, reprinted in 2013 COMPILATION, 735.} To be sure the President understood what “should” meant, Congress ordered a “detailed report” to the appropriate committees on whether each named person was on the blacklist, and if not, why not.\footnote{Iran Threat Reduction and Syria Human Rights Act of 2012, Section 401(b)(1), codified at 22 U.S.C. §§ 8711, 8721-8724, 8741-8744, 8781, reprinted in 2013 COMPILATION, 735. Those committees were the Senate Foreign Relations and Banking, and House Foreign Affairs and Financial Services, Committees. See \textit{id.}, Section 401(b)(3)(A)-(B), 735-736.}

Second, the amended statute directed the President to name to (and regularly update) the appropriate Congressional committees any person the President thinks “knowingly engaged” in transferring (or facilitating the transfer) to Iran, or any Iranian, of “goods or technologies he decides are likely to be used by Iran to commit serious human rights abuses against the people of Iran.”\footnote{Comprehensive Iran Sanctions Accountability and Divestment Act of 2010, Section 105A(b)(1), (2)(A)(i), (2)(B), (4), Public Law 111-195 (1 July 2010), as amended by Public Law 112-158 (Iran Threat Reduction and Syria Human Rights Act of 2012) and Public Law 112-239 (Iran Freedom and Counter-Proliferation Act of 2012), Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013, codified at 22 U.S.C. §§ 8512, 8513a, 8514, 8514a, 8514b, reprinted in 2013 COMPILATION, 713.} Whether it was “likely” an item would be put to abusive use, or whether an abuse was “serious,” might be unclear.

But, lest the President doubt what Congress intended in respect of “goods or technologies,” the legislature gave him with a non-exclusive list of examples: ammunition, batons, electroshock weapons, firearms, rubber bullets, spray (chemical or pepper), stun grenades, surveillance technology, tear gas, water cannons.\footnote{Comprehensive Iran Sanctions Accountability and Divestment Act of 2010, Section 105A(b)(C), Public Law 111-195 (1 July 2010), as amended by Public Law 112-158 (Iran Threat Reduction and Syria Human Rights Act of 2012) and Public Law 112-239 (Iran Freedom and Counter-Proliferation Act of 2012), Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013,, codified at 22 U.S.C. §§ 8512, 8513a, 8514, 8514a, 8514b, reprinted in 2013 COMPILATION, 713.} So, for instance, dual use items such as pepper spray, which some American runners carry while training for protection, was off limits. The list was non-exclusive, as it had to be: an evil mind can turn everyday items like cigarettes or pliers into an instrument of repression, so better to be potentially over- than under-inclusive, if the human rights facilitation prohibition is not to be easily circumvented. The prohibition applied regardless of whether the engagement
involved a formal contract, and its scope included services (e.g., consulting, engineering, hardware, or software) to support forbidden goods or technologies.915

Third, the amended statute directed the President to provide the appropriate Congressional committees with a list (and updates to it) of persons he thinks “engaged in censorship.”916 By that Congress meant they barred, restricted, or punished the freedom of expression, or limited access to the media (including, for instance, by jamming or manipulating international frequency signals).917 Note Congress did not preface the forbidden behavior with the adverb “knowingly.” But, that preface was implicit. Censors surely know what they are doing, i.e., why interfere with freedom of expression unless suppression of thought, word, and picture is the intended consequence?

The 2012 Act relied on the same individually-targeted sanctions CISADA specified for human rights abusers, with one exception.918 Hence, officials transferring goods, services, or technologies used for serious human rights abusers, or censoring the press, were subject to restrictions on their bank accounts and other property. The exception concerned a particularly infamous recipient of torture instruments: Iran’s Revolutionary Guard Corps. If it was the transferee of a banned item, then any other sanction from the standard 12-item menu (discussed below) under the 1996 Iran Sanctions Act (i.e., ILSA, as amended) as supplemented in 2010 by CISADA, also could be imposed on the transferor.919


Five of 12 Sanctions

The aforementioned amendments to the 1996 *Iran Sanctions Act* and 2010 *CISADA* concerned forbidden transactions with Iran. Beyond tightening the sanctions regime by making more transactions unlawful, the 2012 *Iran-Syria Act* heightened penalties for illegal conduct. Instead of requiring the President to impose just 3 of 9 sanctions on any person that knowingly engaged in a prohibited transaction, the 2012 *Iran-Syria Act* mandated imposition of five of 12 punishments. In upping the penalties, Congress also restricted further the discretion of the President, thereby asserting more control over American trade policy toward Iran.

That is, Congress compelled the President to impose five, not just three, sanctions. But, it gave the President three more sanctions options overall from which to choose. Accordingly, the sanctions menu under the 2012 *Iran-Syria Act* contained the same nine items as those under the 1996 *ILSA* and 2010 *CISADA* scheme:

1. Export Financing Sanction
2. Export License Sanction
3. American Bank Loans Sanction
4. Primary Dealer and Repository Sanctions

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920 *See Iran Sanctions Act of 1996*, sanctions relating to the energy sector of Iran set out in Sections 5(a)(1)(A) (concerning development of petroleum resources), 5(a)(2)(A) (concerning production of refined petroleum products), 5(a)(3)(A) (concerning exportation of refined petroleum products to Iran), 5(a)(4)(A) (concerning joint ventures with Iran relating to developing petroleum resources), 5(a)(5)(A) (concerning support for the development of petroleum resources and petroleum products in Iran), 5(a)(6)(A) (concerning development of petrochemical products from Iran), 5(a)(7)(A) (concerning transportation of crude oil from Iran), 5(a)(8)(A) (concerning concealment of Iranian origin of crude oil and refined petroleum products), and sanctions relating to the development of WMDs or other military capabilities by Iran as set out in Section 5(b)(1) (concerning exports, transfers, or transshipments of goods, services, or technology relating to WMD or advanced conventional weapons), 5(b)(2)(A) (concerning joint ventures relating to mining, production, or transportation of uranium), as amended by *Iran Threat Reduction and Syria Human Rights Act of 2012*, reprinted in 2013 *COMPILATION*, 688-694.

That the changes discussed were made by the 2012 *Iran-Syria Act* may be inferred from the facts that mandating imposition of five of nine sanctions was not in the 2010 *CISADA*, and such a mandate would have been unlikely to be included in Section 1245 or Sub-Title D, as those 2012 laws both were simply National Defense Authorizations.


(5) Government Procurement Sanction,925
(6) Foreign Exchange Sanction,926
(7) Inter-bank Transactions Sanction,927
(8) Property Transaction Sanction, and928
(9) Additional Sanctions.929

Plus, the 2012 legislation added the following three new punishment choices.

The three new options were as follows:

(10) Equity or Debt Investment Sanction:930

First, the President could bar any United States Person (natural or legal) from buying “significant amounts” of the equity or debt of a sanctioned person. So, hypothetically, if the Japanese multinational electronics corporation, Panasonic, were a sanctioned person, then the President could prohibit American individuals or firms from investing in Panasonic stock or bonds. (Whether he could compel divestment was uncertain, but not an option expressly listed in the menu.)

(11) Corporate Officer Exclusion Sanction:931

Second, the President could exclude corporate officers. In particular, he could order the Department of Homeland Security to deny issuance of a visa to visit America to any officer, principal, or shareholder with a controlling interest in a sanctioned person.

To illustrate, consider a modified version of the facts in *U.S. v. Kaiga*, a 2013 criminal case involving export control violations. Suppose the allegations in the *Kaiga* criminal complaint by the U.S. Attorney’s Office for the Northern District of Illinois are true: a Belgian businessman living in Brussels and affiliated with the Belgian company Industrial Metal and Commodities shipped 7075 T6 aluminum tubes with an outside diameter of 4.125 inches and an ultimate tensile strength of 572 megapascals. These tubes are used in aerospace products, and are controlled items for nuclear non-proliferation purposes under the *Export Administration Act* and *International Emergency Economic Powers Act*. The Belgian businessman did not obtain an export license as the shipment was from the tube supplier in Schaumburg, Illinois, to IMC in Brussels. None was needed for shipments to Brussels. In fact, the tubes were shipped from Schaumburg to a front company in Malaysia that was operated by a party with ties to Iran. This shipment violated American export control regulations, because a license is needed for shipments to Malaysia.

Suppose the party with ties to Iran arranged for the tubes to be sent from Malaysia to Iran. In consequence, the Belgian businessman also violated American trade prohibitions against Iran. Assume IMC and the Malaysian intermediary also are found liable. Under the corporate officer exclusion sanction, any officer, principal, or controlling shareholder in IMC or the Malaysian intermediary – the sanctioned persons – could be barred from obtaining a visa to the U.S. The 2012 legislation did not define “controlling” in a rigid fashion. So, a 51% shareholding might be required to control IMC, but – given a more diffuse pattern of shareholding in the intermediary – perhaps a 15% stake would suffice.

(12) **Principal Executive Officer Sanction:**

Third, the President could impose any of the aforementioned 11 sanctions on high-ranking officials working for a sanctioned person. Such officials included “the principal executive officer or officer, or ... persons performing similar functions and with similar authorities as such officer or officer.” This sanction was not tied to formal business titles, but rather targeted individuals with decision-making authority. The idea was that none of them should feel safe with the thought that they, personally, did not engage in prohibited conduct with Iran. All that mattered is they held an important post with an entity that did.

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932 See United States District Court for the Northern District of Illinois, Number 13 CR 00531, plea, 31 October 2013.

933 See Michael Bologna, *Importer Charged in Scheme to Ship Controlled Aluminum Sources to Iran*, 30 International Trade Reporter (BNA) 1731 (7 November 2013).

So, for example, in the above hypothetical based on the *Kaiga* case, consider the predicament of colleagues of the Belgian businessman working for IMC. They could be sanctioned, as could senior officers in the Malaysian intermediary.

Collectively, then, the three new sanctions pertained to corporate finance and officials. Their thrust was to strangle the Iranian economy by scaring individuals who might invest in or work for companies that did business with Iran. Put differently, they were an extension of the American strategy of imposing a secondary boycott on Iran, with this extension addressing private parties.

- **10th:**
  
  **Arguably Tougher Waiver Criteria**

  The 2012 Act altered the criteria under which the President could waive imposition sanctions. Up to that Act, the President could do so for any illegal transaction with Iran if he determined it was “necessary to the national interest” to do so.935 Prior law did not clarify how long the waiver would last, and did not have explicit authority to renew the waiver. The 2012 Act explicitly limited any waiver to one-year waiver, and concomitantly allowed for renewals of up to one year on a case-by-case basis.

  The Act also bifurcated the substantive waiver criteria according to the type of prohibited conduct that occurred. Suppose that conduct concerned the energy sector of Iran. Then, the President could waive sanctions if it was “essential to the national security interests of the United States” to do so.937 But, suppose the transgression was helping Iran develop WMDs or advanced military capabilities by Iran. Then, the President could waive sanctions if it was “vital to the national security interests” of America.938

  What is the difference between “essential” and “vital”? The Act did not answer that question. Arguably, helping Iran acquire a WMD was an even more serious violation than investing in its energy sector, or trading in its energy products, making “vital” a higher standard than “essential” to meet for a waiver.

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- Novel Link between Iranian Human Rights Abuses and American National Security
  (2 January 2013 through 31 December 2016)

The Iran Freedom and Counter-Proliferation Act of 2012 was the final legislation against Iran before the November 2013-January 2014 preliminary nuclear agreement Congress passed and the President signed. This legislation was Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013 (2013 Budget Act). Thus, like the 2012 Budget Act, it tackled on sanctions against Iran to a defense appropriation bill, as doing so minimizes difficulties with Congressional passage vis-à-vis a stand-alone measure concerning Iran. In the 2013 Act, the 113th Congress stressed the newest and third of its three rationales for the sanctions regime: fighting human rights abuses.

Congress expressly linked “the interests of the United States and international peace” to the “threat[]” of “ongoing and destabilizing actions of the Government of Iran, including its massive, systematic, and extraordinary violations of the human rights of its own citizens.” That linkage was novel: Congress had not tied those violations to American national security in prior sanctions legislation. Why exactly those violations might undermine that security, any more than say, human rights abuses in China, was not entirely certain. But, constructing a cogent argument was not difficult. Assume Iranian liberals and reformists are less interested in developing a WMD or sponsoring terrorists than their opponents, yet suppose the opponents crush their democratic movement. The

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**Note:**


940 IEEPA penalties applied to actual or attempted conspiracies to violate the 2013 Defense Act, and the Act did not limit the authority of the President to apply yet more sanctions on Iran. See Iran Freedom and Counter-Proliferation Act of 2012, Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013, Sections 1253(a)-(b), 1255, codified at 22 U.S.C. §§ 8809(a)-(b), 8811 reprinted in 2013 Compilation, 748. But, sanctions under Section 1254 of the 2013 Act, 22 U.S.C. § 8810, do not apply to:

(i) the Shah Deniz natural gas field in Azerbaijan’s sector of the Caspian Sea and related pipeline projects, (ii) projects that provide Turkey and European countries energy security and independence from Russia and Iran, or (iii) projects initiated before August 10, 2012, pursuant to a production-sharing agreement entered into with, or a license granted by, a government other than Iran’s before August 10, 2012. This is the same exception for natural gas projects found in ITRA [the 2012 Iran-Syria Act] Section 603(a).


victorious hardliners may have free rein to threaten America and its allies with a nuclear weapon or by funding terrorist causes.

Thus, via 2013 Budget Act, Congress sought to impede the ability of the Iranian government to “oppress the people of Iran and to use violence and executions against pro-democracy protestors and regime opponents” and “jam or otherwise obstruct international satellite broadcast signals,” and bolster the ability of those people to secure “basic freedoms that build the foundation for the emergence of a freely elected, open, and democratic political system.”

- **Energy, Shipping, Shipbuilding, and Port Prohibition**

Congress ordered the President to block all transactions in property or property interests located in, or coming into, the U.S., or under the control of a United States Person, of any person connected to the Iranian energy, shipping, or shipbuilding sectors, or to any Iranian port, or of any Iranian or sanctioned person knowingly helping such a person. Further, the President had to impose five sanctions from the standard menu (discussed above) on such a person. Congress also designated any entity that operated a port in Iran, including the NIOC, NITC, and IRISL, as “entities of proliferation concern.” Finally, Congress instructed the President to bar (or impose strict conditions on) any correspondent account or PTA in the U.S. of any foreign financial institution that conducts “significant financial transaction” for the sale, supply, or transfer of energy, shipping, or shipbuilding goods or services in Iran, including for ultimate use by the NIOC, NITC, and IRISL. Congress allowed a limited exception to the prohibition for humanitarian aid (food, pharmaceuticals, or medical devices) to Iran and a waiver of sanctions if “vital to …

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944 See Iran Freedom and Counter-Proliferation Act of 2012, Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013, Section 1244(c)(1)(A), (c)(2)(A)-(B), codified at 22 U.S.C. § 8803(c)(1)(A), (c)(2)(A)-(B), reprinted in 2013 COMPILATION, 738-739. Such “help” could take the form of material, financial, technological, or other goods, services, or support to such a person. See id. Iranian or other blocked persons did not include Iranian banks that had not already been designated for the imposition of sanctions. See id., Section 1244(c)(2)(iii)-(3), 22 U.S.C. § 8803(c)(2)(iii)-(3), at 739. Importation of goods was not sanctionable under this measure. See id., Section 1244(c)(1)(B), 22 U.S.C. § 8803(c)(1)(B), at 739.

The 2013 Defense Act also provided an exception linked to Section 1245 of the 2013 Defense Act, namely, the new prohibition and attendant penalties applied to buying petroleum and petroleum products from Iran if the President determined that third country sources of these items were in sufficient quantities at reasonable prices so as to permit third country buyers to “reduce significantly” sourcing them from Iran. Id., Section 1244(g)(1), codified at 22 U.S.C. § 8803(g)(1), reprinted in 2013 COMPILATION, 740. This exception "International Trade Law E-Textbook (Raj Bhala, 6th Edition, 2025) University of Kansas (KU) Volume Four Wheat Law Library"
[American] national security” and justified in a report to the appropriate Congressional committees.948

Simply put, Congress yet again tightened the noose around Iranian energy, shipping, and banking, and created a new noose around Iranian shipbuilding and ports. Why did it do so? The answer is that notwithstanding its aforementioned re-affirmation of support for human rights causes in Iran, Congress stuck to its two long-standing policy justifications for the sanctions: deterrence with respect to a WMD and terrorism. In the 2013 Act, Congress explicitly found:

(1) Iran’s energy, shipping, and shipbuilding sectors and Iran’s ports are facilitating the Government of Iran’s nuclear proliferation activities by providing revenue to support proliferation activities.

(5) United Nations Security Council Resolution 1929 (2010) recognizes the “potential connection between Iran’s revenues derived from its energy sector and the funding of Iran’s proliferation sensitive nuclear activities.”

(6) The National Iranian Tanker Company is the main carrier for the Iranian Revolutionary Guard Corps-designated National Iranian Oil Company and a key element in the petroleum supply chain responsible for generating energy revenues that support the illicit nuclear proliferation activities of the Government of Iran.949

These findings helped shape the new prohibitions and attendant penalties it established.

Despite sanctions from the 1996 ILSA, 2010 CISADA, and amendments wrought by the 2012 Iran-Syria Act and 2012 Defense Act, support for the energy and shipping sectors was getting through to Iran. Some of that assistance came from Iran’s own shipbuilding and port facilities, which thanks to repairs and upgrades could be used by the likes of the NITC to transport NIOC crude oil, the sale proceeds could be used for a nuclear bomb or diverted to Hezbollah? Put simply, Congress moved to plug holes in the vertical supply chain, which started with its ban on FDI in energy exploration in 1996, expanded to downstream petroleum products in 2010, and to financing and insurance for energy transactions in 2012.

● Precious Metals Prohibition

meant the President had to monitor global petroleum and petroleum product market conditions, in addition to global crude oil supply and demand conditions thanks to the 2012 Defense Act.


Energy, shipping, shipbuilding, were not the only sectors, nor were ports the routes, though which Iran and its Revolutionary Guard Corps obtained funds, goods, or services for possible use to acquire a WMD, sponsor terrorists, abuse human rights, or censor the press. Global commodities markets (other than energy) afforded another opportunity. Iran or the Corps could barter or swap gold, silver, or other precious metals for such purposes. For instance, it could exchange aluminum with a dealer in Johannesburg, South Africa, to acquire gold, which it then could list as an asset in its national balance sheet, and possibly use that gold as payment for guidance systems for ballistic missiles.

Indeed, holding 7% of total global mineral reserves, Iran had an incentive to do so: skirt the American sanctions against the Iranian financial sector, which made electronic transfers of funds illegal. That Iran did so may be inferred from Congress opting to identify in the 2013 Defense Act a new kind of forbidden transaction with Iran: selling, supplying, or transferring, directly or indirectly, a commodity in any one of three broad categories:

1. Any “precious metal.”

2. Certain raw or semi-finished metals, specifically, “graphite, raw or semi-finished metals such as aluminum and steel, coal (including coking, fuel, or metallurgical coal),” and software for integrating industrial processes,

3. “Any other material” in the second category that Iran uses for its energy, shipping, or shipbuilding sectors, for any economic sector controlled by the Corps, or for its “nuclear, military, or ballistic missile programs.”

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950 See Iran Freedom and Counter-Proliferation Act of 2012, Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013, Section 1245(e)(1)(B), (h), codified at 22 U.S.C. § 8804(e)(1)(B), (h), reprinted in 2013 COMPILATION, 743 (concerning the definition of “national balance sheet of Iran” as the ratio of government assets to liabilities, and its listing of precious metals and other minerals as assets).


Any person that knowingly (i.e., that knew or should have known about their conduct)\(^9\) transacted in these commodities with Iran was subject to five sanctions from the standard menu.\(^9\)

Likewise, Congress forbade any foreign financial institution from opening a correspondent account or PTA that the institution knew was used to facilitate a “significant financial transaction” associated with a sanctionable sale, supply, or transfer of precious metals or other listed commodities.\(^9\) What Congress barred were underlying transactions in those items, and payments for such deals. Only if a person or financial institution “exercised due diligence” to eschew commodity transactions and payments therefor could the President except them from otherwise mandatory penalties.\(^9\) And, only if it were “vital” to American national security could the President waive these prohibitions.\(^9\)

**Three Reinforcements of Existing Prohibitions**

In the 2013 *Defense Act*, Congress buttressed three existing prohibitions and attendant sanctions. First, to strengthen the precious metals prohibition, and the prohibition concerning the Iranian energy, shipping, shipbuilding sectors, and its ports, Congress supplemented rules from the 2012 *Iran-Syria Act* against providing underwriting, insurance, or reinsurance services to Iran. Congress expressly banned provision of those services in any way that might benefit those sectors or ports, or help Iran transact in precious metals. Any person knowingly doing so was liable for five or more penalties from the sanctions menu.\(^9\) This expanded denial of access for Iran to shipping insurance posed yet another challenge for the Islamic Republic to arrange for carriage of goods to its shores.


\(^{957}\) See *Iran Freedom and Counter-Proliferation Act of 2012, Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013*, Section 1245(a), codified at 22 U.S.C. § 8804(a)(1), reprinted in 2013 COMPILATION, 741-742. The prohibited conduct covered re-sales, re-supplies, or re-transfers, for example, through an intermediary that is a sanctioned person to an end user in Iran, like the Corps. See id., Section 1245(a)(1)(C)(ii), codified at 22 U.S.C. § 8804(a)(1)(C)(ii), reprinted in 2013 COMPILATION, 742.


\(^{960}\) *Iran Freedom and Counter-Proliferation Act of 2012, Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013*, Section 1245(g)(1)(A), codified at 22 U.S.C. § 8804(g)(1)(A), reprinted in 2013 COMPILATION, 743. If the President chose to exercise this waive discretion, then – as with other provisions in the sanctions regime – he was obliged to provide a written justification to the appropriate Congressional committees, possibly with a classified Annex. See id., Section 1245(g)(1)(B), codified at 22 U.S.C. § 8804(g)(1)(B), reprinted in 2013 COMPILATION, 743.

\(^{961}\) See *Iran Freedom and Counter-Proliferation Act of 2012, Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013*, Section 1246(a)(1)(A)-(B)(i)-(ii), codified at 22 U.S.C. § 8805(a)(1), reprinted in 2013 COMPILATION, 743-744. The prohibition also applied to underwriting or reinsurance services for any person sanctioned under the IEEPA that helped Iran acquire WMDs or support terrorism, or any other Iranian or blocked person listed by OFAC (excluding Iranian financial institutions not sanctioned). See id., Section 1246(a)(1)(B)(iii)-(C), (a)(2), (b), codified at 22 U.S.C. § 8805(a)(1)(B)(iii)-(C), (a)(2), (b).
Second, to ostracize Iran further from global financial services, Congress clarified that it was illegal for a foreign financial institution to open a correspondent account or PTA in the U.S., if that institution “knowingly facilitated a significant financial transaction” for any proscribed Iranian person or sanctioned entity. The mandatory penalty for running afoul of this bar was the familiar five-of-nine punishments selected by the President. Here again, along with a humanitarian assistance exception, a third country short supply exception existed for financial transactions associated with petroleum or petroleum products, if the President determined the price and supply conditions did not allow for such countries to eschew significant sourcing from Iran.

Though technically convoluted, a noteworthy exception existed for a foreign financial institution that facilitated:

1. financial transactions pertaining to goods and services, or natural gas exports to or imports from Iran, which were
2. not subject to American sanctions, and were
3. conducted directly between Iran and a third country with primary regulatory authority over the foreign financial institution, as long as

Here, too, exceptions existed for (1) humanitarian exports to Iran, and (2) any person exercising due diligence to avoid the forbidden behavior, and there was Presidential waiver authority on the ground of “vital … national security” interest if justified to appropriate Congressional committees. See id. Section 1246(c)-(e), codified at 22 U.S.C. § 8805(c)-(d), reprinted in 2013 COMPILATION, 744. An exception also existed with respect to the bar, under Section 6(a)(8) of the 1996 ISA, against any person from importing property within the jurisdiction of the United States in which a sanctioned person had an interest: such importation was not subject to the revised underwriting and insurance measure. See id., Section 1246(a)(2), codified at 22 U.S.C. § 8805(a)(2).

See Iran Freedom and Counter-Proliferation Act of 2012, Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013, Section 1247(a)-(b), codified at 22 U.S.C. § 8806(a)-(b), reprinted in 2013 COMPILATION, 745. OFAC maintained the list of proscribed persons, which as per the Section title were called “Specially Designated Nationals,” or “SDNs.” See id.


If the underlying commercial transaction involved goods or services other than natural gas, then to qualify for the exception, a foreign financial institution also had to be from a country holding primary regulatory authority over it that the President had certified, under the 2012 Defense Act, had significantly reduced or stopped crude oil purchases from Iran. See Iran Freedom and Counter-Proliferation Act of 2012, Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013, Section 1247(d)(2)(A), codified at 22 U.S.C. § 8806(d)(2)(A), reprinted in 2013 COMPILATION, 746 (containing the additional qualification); National Defense Authorization Act of 2012, Public Law 112-81, Section 1245(d)(4)(D)(i), as amended by Public Law 112-158 (Iran Threat Reduction and Syria Human Rights Act of 2012) and Public Law 112-239 (Iran Freedom and Counter-Proliferation Act of 2012), Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013, codified at 22 U.S.C. § 8513a(d)(4)(D)(i), reprinted in 2013 COMPILATION, 719.

In other words, to avoid sanctions on their banks, third countries had to prove to the American President they tried to, or did, get oil from anywhere but Iran.
(4) that institution credited any funds owed to Iran to an account in the third country.\textsuperscript{966}

This intriguing exception presumably preserved both a modicum of bilateral trade between third countries and Iran, and denial of access by Iran to any cash from such trade.

For instance, the San Francisco, California branch of Hanmi Bank (HB) could open or maintain a correspondent account or PTA for the benefit of Iran, under the aforementioned conditions.\textsuperscript{967} But, to avoid American sanctions, HB would have to credit funds to the Iranian beneficiary to an account in Korea, because Korea is the country holding primary regulatory authority over HB. In effect, the exception forces a change in the location of the beneficiary’s bank from any country in the world to the foreign bank primary regulatory jurisdiction.

Third, Congress reinforced sanctions motivated by its human rights concerns. It ordered the President to penalize the Islamic Republic of Iran Broadcasting, including specifically its President, Ezzatollah Zargami. It did so because IRIB and its President had “contributed to the infringement of individuals’ human rights by broadcasting forced television confession and show trials,” thus “clear[ly] violate[ng] … international law with respect to the right to a fair trial and due process.”\textsuperscript{968} The mandatory penalties were those set forth in \textit{CISADA} for human rights abuses, including \textit{IEEPA} penalties, visa denials, and asset freezes, as well as OFAC blacklisting.\textsuperscript{969}


\textsuperscript{967} \textit{See Hanmi Bank, www.hanmi.com/ and www.hanmi.com/about/branches/northern-california/san-francisco.}

\textsuperscript{968} \textit{Iran Freedom and Counter-Proliferation Act of 2012, Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013, Section 1248(a)(1), codified at 22 U.S.C. § 8807(a)(1), reprinted in 2013 COMPILATION, 747.}

Chapter 18

IRAN TRADE SANCTIONS (CONTINUED):
JULY 2015 IRAN NUCLEAR DEAL (JCPOA)

I. Necessary, But Not Sufficient:
November 2013 Joint Plan of Action

Seven American Presidents and 21 Sessions of Congress, spanning 40 years, pursued a sanctions-based policy toward Iran. For most of that period, the results were plain enough: no change in behavior, and deepened distrust, even hatred. The “Great Satan” piled on sanctions. The “Evil Āyatollāhs” kept the centrifuges spinning, and even managed to procure more of them.

Then, on 24 November 2013, in Geneva, Switzerland, Iran agreed to an historic preliminary accord with the U.S. and five other signatories (collectively called the “P-5+1”), the five permanent U.N. Security Council members (China, France, Russia, United Kingdom, and U.S.), plus an additional European country (Germany). Israel dubbed the accord an “historic mistake.” Nonetheless, subsequently, these countries elaborated on this “Joint Plan of Action,” which also is called the “Geneva Interim Agreement,” or simply the “Iran Nuclear Deal,” and began its implementation on 20 January 2014.

The Deal had an initial lifespan of 6 months. It was extended on 18 July 2014 for another six months, until 24 November 2014, as negotiations toward a permanent solution continued. That meant the bulk of American sanctions stayed on. To the irritation and sometimes outrage of the Iranians, President Barak H. Obama designated via Executive Orders in the summer and fall 2014 new individuals, companies, and shipping vessels as subject to sanctions.

Table 18-1 summarizes the key points of the Plan, listing what Iran “gave” and what it “got.” Can it be inferred from the agreement that the sanctions worked? Was it both necessary and sufficient, first, in wrecking the economy of Iran, and second, in leaving Iran no choice but to agree to the Plan?

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972 The timetable for implementation was set in a January 2014 accord, which was not been publicly released, and reportedly contains an informal addendum that is secret. See Paul Richter, New Iran Agreement Includes Secret Side Deal, Tehran Official Says, LOS ANGELES TIMES, 13 January 2014, www.latimes.com/world/worldnow/la-fi-wn-iran-nuclear-side-deal-20140113.0.4116168.story#axzz2rLwaPbUK.
If statements of the players are to be believed, then the answer is “it depends who is asked.” The American President said, “unprecedented sanctions and tough diplomacy helped to bring Iran to the negotiating table.”973 The Iranian narrative was different: diplomacy mattered more than sanctions.974 Both sides can point to facts supporting their opposing views that sanctions were necessary and sufficient, or not, to pressure Iran economically so as to force it to bargain. A fair assessment is the midpoint between the two perspectives: sanctions were a necessary, but not sufficient, cause to pressure Iran economically to sign a nuclear accord.

Table 18-1:
Synopsis of November 2013 Joint Plan of Action

<table>
<thead>
<tr>
<th>What Iran “Gave” (Conversely, what the U.S “Got”)</th>
<th>What Iran “Got” (Conversely, what the U.S. “Gave”)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Conversion of Existing Stockpile of Highly Enriched Uranium</strong></td>
<td></td>
</tr>
<tr>
<td>From its existing Uranium enriched to 20% (that is, 20% Uranium Hexafluoride, UF$_6$), Iran dilutes (blends down) half the to no more than 5% purity. There is no line for reconversion.</td>
<td>From its existing Uranium enriched to 20%, Iran retains the other half as working stock of 20% oxide for fabrication of fuel for the Tehran Research Reactor (TRR).</td>
</tr>
<tr>
<td>Once the line for conversion of UF$_6$ enriched up to 5% purity to Uranium Dioxide (UO$_2$) is ready, Iran converts to oxide UF$_6$ newly enriched up to 5%, in accordance with a schedule of the conversion plant declared to the International Atomic Energy Agency (IAEA).</td>
<td></td>
</tr>
<tr>
<td><strong>Further Enrichment</strong></td>
<td></td>
</tr>
<tr>
<td>Iran does not enrich Uranium over 5% purity.</td>
<td>Iran continues its safeguarded research and development (R&amp;D), including enrichment R&amp;D practices that are not designed to accumulate enriched Uranium.</td>
</tr>
</tbody>
</table>

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976 See *Joint Plan of Action*, bullet point 1 at 1, bullet point 4 at 2.

977 At the 5% purity level, uranium can be enriched for nuclear fuel, but not weapons, purposes. See Hossein Mousavian, *It Was Not Sanctions that Brought Tehran to the Table*, FINANCIAL TIMES, 20 November 2013, 11. The concentration of 5% is suitable for operating a nuclear power station. At higher degrees of refinement, uranium serves in the core of a nuclear warhead. See Parisa Hafezi & Justyna Pawlak, *Breakthrough Deal Curbs Iran’s Nuclear Activity*, REUTERS, 24 November 2013, [www.reuters.com/article/2013/11/24/us-iran-nuclear-idUSBRE9AI0CV20131124](http://www.reuters.com/article/2013/11/24/us-iran-nuclear-idUSBRE9AI0CV20131124).

978 See *Joint Plan of Action*, bullet point 2 at 1.
Iran also does not add any Uranium at the 3.5% enrichment level or higher to its current stock.\textsuperscript{979}

<table>
<thead>
<tr>
<th>Enrichment Capacity\textsuperscript{980}</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iran does not make any further advances of activities at its:</td>
</tr>
<tr>
<td>(1) Natanz Fuel Enrichment Plant,</td>
</tr>
<tr>
<td>(2) Fordow Enrichment Facility, or</td>
</tr>
<tr>
<td>(3) Arak reactor (which the IAEA designated as IR-40).\textsuperscript{981}</td>
</tr>
</tbody>
</table>

In particular, with respect to Natanz and Fordow, Iran:
(1) Leaves inoperable 50% of the centrifuges at Natanz, |
(2) Leaves inoperable 50% of the centrifuges at Fordow, |
(3) Does not install any centrifuges at Natanz or Fordow to replace inoperable centrifuges.\textsuperscript{984}

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\textsuperscript{979} Uranium purified to 3.5% or below is considered low enriched. \textit{There's a Chink of Hope}, \textbf{THE ECONOMIST}, 19 October 2013, at 51-52.

\textsuperscript{980} \textit{See Joint Plan of Action}, bullet point 3 at 2, bullet points 5, 7 at 2.

\textsuperscript{981} Natanz and Fordow are underground Uranium enrichment facilities, with Fordow beneath a mountain. Geoff Dyer & John Reed, \textit{Iran’s Arak Plant Reveals Depth of Distrust}, \textbf{FINANCIAL TIMES}, 13 November 2013, 6; Roula Khalaf, Lionel Barber, Najmeh Bozorgmehr & Geoff Dyer, \textit{Rouhani Takes Tough Nuclear Line}, \textbf{FINANCIAL TIMES}, 30 November-1 December 2013, 1. Natanz and Fordow are Iran’s two uranium enrichment facilities. In them, “uranium hexafluoride [UF₆] gas is fed into centrifuges to separate out the most fissile isotope U-235. Low-enriched uranium, which has a 3%-4% concentration of U-235, can be used to produce fuel for nuclear power plants. But it can also be enriched to the 90% needed to produce nuclear weapons.” \textit{See Iran Nuclear Deal: Key Deals}, BBC NEWS, 14 July 2015, \texttt{www.bbc.com/news/world-middle-east-33521655}. [Hereinafter, \textit{Iran Nuclear Deal: Key Details}]

At Natanz and Fordow, Iran may replace existing centrifuges with centrifuges of the same type.\textsuperscript{984}

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\textsuperscript{984} \textit{See Joint Plan of Action}, footnotes 1-2 at 4.
(2) Does not install, or prepare for installation, any new centrifuges for Uranium enrichment at Natanz.\footnote{See Joint Plan of Action, footnote 1 at 2.}
(3) Leaves inoperable 75% of the centrifuges a Fordow,\footnote{This provision is set out in the Joint Plan of Action, footnote 2 at 2, which states that at Fordow, Iran will not further enrich over 5% at 4 cascades currently enriching Uranium, but not increase their enrichment capacity, and not feed UF₆ into the other 12 cascades, which are to remain non-operative.} and
(4) Does not use its more sophisticated IR-2 centrifuges for Uranium enrichment.

With respect to Arak, Iran does not:
(1) Commission this reactor.
(2) Make or transfer fuel or heavy water to the site of the reactor.
(3) Test additional fuel, or produce more fuel, for the reactor.
(4) Install remaining components in the reactor.

Iran does not add any new facilities for enrichment.

Iran does not reprocess Uranium, or construct a facility capable of reprocessing.

\textit{Enhanced Monitoring (International Inspections)}\footnote{See Joint Plan of Action, bullet points 6, 8 at 2.}

| Iran provides (within 3 months of the January 2014 implementation) specific information to the IAEA, including: |
| (1) its plans for nuclear facilities, |
| (2) descriptions of each building on each nuclear site, including the design details of the Arak reactor, and of the scale of operations for each location engaged in specified nuclear activities, and |
| (3) data on uranium mines and mills, and source material. |
| Consistent with Iran’s plans, it may produce centrifuges for the purpose of replacing damaged machines.\footnote{See Joint Plan of Action, footnote 4 at 2.} |
Iran submits to the IAEA an updated DIQ for the Arak reactor.

Iran agrees with the IAEA on steps on a “Safeguards Approach” for the Arak reactor.

At Natanz and Fordow, Iran grants daily access to IAEA inspectors when inspectors are not present for the purpose of Design Information Verification, Interim Inventory Verification, Physical Inventory Verification, or unannounced inspections, so that inspectors may obtain offline surveillance records.

Also, at certain sites at Natanz and Fordow, Iran permits 24-hour surveillance cameras.

Iran grants managed access to IAEA inspectors to:
1. centrifuge assembly workshops,
2. centrifuge rotor production workshops and storage facilities, and,
3. Uranium mines and mills.

Iran responds to IAEA questions about possible military aspects of its nuclear program, and gives the IAEA data as part of the Additional Protocol (the model for which the IAEA established in 1997) that Iran is expected to sign with the IAEA. (Under an Additional Protocol to the Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, or NPT), the IAEA receives more information from the signatory country about its nuclear activities, including imports and exports, has enhanced inspection access rights including to suspected locations on short
notice, and greater administrative flexibilities, including automatic visa renewals for its inspectors.)

<table>
<thead>
<tr>
<th>Sanctions Relief: Crude Oil and Related Insurance and Shipping[^987]</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall, all forms of sanctions relief amount to roughly $7 billion. Of that, $4.2 billion are revenues from crude oil sales that are transferred to Iran in installments as Iran complies with its obligations under the <em>Plan</em>.[^988] The U.S. (and EU) pauses efforts to cajole third countries to significantly reduce, and ultimately cease, buying crude oil from Iran, and agrees those countries may maintain their current average amounts of Iranian oil. In essence, the U.S. suspends its third country short supply measures. Iran could revive its sagging crude oil industry. As of January 2014, Chinese state oil companies dominated the Iranian crude oil industry, and President Hassan Rouhani sought to attract large western energy multinationals to revive that industry, starting with a major address at the World Economic Forum in Davos, the first there by an Iranian President in 10 years.[^989] To facilitate third country oil sales, the U.S. (and EU) also suspends sanctions on insurance and transportation for crude oil shipments. The U.S. (and EU) also permits repatriation of an agreed amount of crude oil revenue of Iran frozen in bank accounts overseas.</td>
</tr>
</tbody>
</table>

[^987]: See *Joint Plan of Action*, bullet point 1 at 3.
[^989]: See Gideon Rachman & Ajay Makan, *Rouhani Tries to Lure Western Oil Majors to Iran*, FINANCIAL TIMES, 24 January 2014, 3.
Iran has access to $1.5 billion of revenues from gold and precious metal trade.\(^993\)

<table>
<thead>
<tr>
<th>Sanctions Relief: Autos and Aircraft(^994)</th>
<th>The U.S. (and EU) suspends sanctions on precious metals (including gold), and on services related to transactions in precious metals involving Iran, namely, financial, insurance, and transportation sanctions.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The U.S. suspends sanctions against Iran with respect to auto and auto parts, and related financial, insurance, and transportation sanctions.</td>
</tr>
<tr>
<td></td>
<td>The U.S. permits licensing for (1) export licensing of spare parts for safety of flight of Iranian civil aircraft (including, but not limited to, Iran Air),(^995) (2) installation services for these parts, and (3) repair and safety inspections services for those aircraft, and (4) suspends related financial, insurance, and transportation sanctions.</td>
</tr>
</tbody>
</table>

### Possible New Sanctions\(^996\)

| | The American President will not impose any new nuclear-related sanctions, and will discourage Congress from imposing any such sanctions.\(^997\) |


\(^994\) See Joint Plan of Action, bullet points 3-4 at 3.

\(^995\) See Joint Plan of Action, footnote 6 at 3.

Implementing this part of the *Deal*, in April 2014, the United States Department of the Treasury licensed Boeing to sell certain commercial aircraft spare parts to Iran — the first dealing Boeing had with Iran since 1979. Iran Air still flew aircraft sold to it by Boeing from that era. General Electric received a similar license. The BBC reported “[t]here have been more than 200 accidents involving Iranian planes in the past 25 years, leading to more than 2,000 deaths.” *U.S. Allows Boeing Air Component Sales to Iran*, BBC News, 4 April 2014, [www.bbc.com/news/world-us-canada-26896983](http://www.bbc.com/news/world-us-canada-26896983).

\(^996\) See Joint Plan of Action, bullet points 5-7 at 3.

\(^997\) That there was considerable pressure from Congress for new sanctions legislation, and pushback from the Administration of President Barack H. Obama, in the weeks and months following the Iran Nuclear Deal was clear. The legislation was “pushed strongly” (*inter alia*) by “pro-Israel lobby groups such as the...
The EU and U.N. Security Council also will refrain from imposing any new nuclear-related sanctions.

### Humanitarian Issues

| **Via the humanitarian financial channel, Iran can use its oil revenues frozen in overseas to acquire food and other agricultural products, medicine, medical devices, and to pay for medical expenses incurred outside Iran, and thereby fulfill some of its domestic needs.**
| **The U.S. establishes a financial channel to facilitate trade with Iran for humanitarian purposes. Only designated foreign banks, or non-sanctioned Iranian banks, may participate in the channel. (Similarly, the EU increases its thresholds to an agreed level for which it authorizes non-sanctioned trade with Iran (so called “authorization thresholds”).**

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998 See Joint Plan of Action, bullet points 8-9 at 3.
For the U.S., it is true sanctions helped wreck the Iranian economy. The ever-growing number of transactions it forbade, and the ever-larger number of attendant sanctions it created, hurt Iran. Before the tightening of sanctions in 2012, the Iranian economy was “fragile.”999 Following their tightening, the challenges worsened. Numerous realities evinced the parlous state of Iran’s economy, including:

(1) The GDP of Iran shrank by 6% in 2012, and another 5% in 2013.1000 In the year up to October 2013, GDP declined by 6%.1001

(2) The value of the Iranian rial relative to the dollar tumbled by over 50% between January 2012 and October 2013.1002

(3) In October 2013, Iran’s unemployment and inflation rates, respectively, were a 30 and 40%, respectively1003 – in effect, a monstrous combination of joblessness and price hikes called “stagflation.” In January 2014, inflation had eased only to 36%,1004 but as of September 2014 it was over 50%.1005

(4) In 2011 and 2012, Iran’s revenues from daily crude oil sales fell 60%.1006

(5) In 2011, Iran produced 3.5 million barrels of oil per day.1007 In September 2013, that figure fell to the lowest level since 1989, just after the September 1980-August 1988 Iran-Iraq War: 2.58 million bpd. In 2012 alone, and through January 2014, Iran’s production of crude oil dropped from 3.7 to 2.7 million bpd.1008 These drops were harbingers of a further fall in sales receipts.

(6) Between 2011 and 2013, Iranian oil export sales revenues tumbled from $100 to $35 billion. That was because its oil exports dropped 60%, from 2.5

1000 See Gideon Rachman & Ajay Makan, Rouhani Tries to Lure Western Oil Majors to Iran, FINANCIAL TIMES, 24 January 2014, 3; The Best v. The Not-Too-Bad, THE ECONOMIST, 19 October 2013, 16-17.
1001 See The Best.
1002 See The Best.
1004 See Nothing Idyllic, THE ECONOMIST, 11 January 2013, 42.
1007 See Najmeh Bozorgmehr, Iran Poised to Offer Lucrative Oil Deals, FINANCIAL TIMES, 29 October 2013, 1.
1008 See Gideon Rachman & Ajay Makan, Rouhani Tries to Lure Western Oil Majors to Iran, FINANCIAL TIMES, 24 January 2014, 3.
to 1 million bpd. The fall in revenues hurt government expenditures, because they finance about half of Iran’s public spending.1009

(6) For decades, roughly U.S. $50 billion in Iranian funds have been frozen outside of Iran as a result of sanctions, i.e., Iran has not had access to a large sum of funds.1010

(7) The Iranian travel and tourism market was “stagnant” between 2006 and 2013, despite the country being “home to a treasure trove of antiquities and world class archaeological sites.”1011

Still, in evaluating whether sanctions were truly caused the damage, it is important not to confuse correlation and causation, or over-attribute causation to one independent variable amidst others.

On the one hand, other intervening domestic and foreign variables may have contributed to Iran’s woes. For example, there likely was self-inflicted damage caused by internal political upheaval and mass street protests (or the prospects thereof), which exacerbated an unpredictable, uncertain climate for business. Assuredly, the global economic recession commencing in 2008 dampened demand for Iran’s energy products and interest in investing in its energy sector.

On the other hand, the vicissitudes appear to follow the tightening of sanctions, and tend to mount with the 2012 legislative changes. It strains credibility to assert the long, strong arm of American justice had no effect in deterring prospective investors and traders from dealing with Iran. Surely among the many that dearly wanted to, at least some calculated the risk of detection and punishment offset any anticipated returns.

Conversely, for Iran, internal economic mismanagement and corruption also helped wreck the economy, along with a “suffocating security atmosphere.”1012 That is, the sanctions hardly were the sole cause of Iranian woes. Even climate change played a role. Global warming (along with neglectful government) helped diminish water supplies from in qanats – trenches created 3,000 years ago to irrigate Ancient Persia whereby water from aquifers beneath mountains flows across hundreds of miles.1013 So, Iranian pistachio output has fallen.

Amidst self-inflicted wounds and shifts in Mother Nature was prideful determination:

1010 See Kerry Meets Iran Foreign Minister.
1011 See Monavar Khalaj, Iranian Tourism Rises from the Ruins as Thaw in Relations Entices Foreigners, FINANCIAL TIMES, 16-17 November 2013, posted as Hope glimmers for Iran’s Tourism Industry, 15 November 2013, www.ft.com/cms/s/0/7be25910-40a4-11e3-8775-00144feabc0.html#slide0.
1012 Nothing Idyllic, THE ECONOMIST, 11 January 2013, 42. [Hereinafter, Nothing Idyllic.]
1013 See Nothing Idyllic.
Contrary to the claims of some U.S. lawmakers and Israeli officials, sanctions only caused a dramatic rise in nuclear capability, as Tehran sought to show it would not respond to pressure. Before, Iran was enriching uranium to below 5 percent at one site with 3,000 centrifuges and possessed a minute stockpile of enriched uranium. Today [i.e., four days before signing the Joint Action Plan], it is enriching to 20 percent at two sites with 19,000 centrifuges. It has a stockpile of 8,000 kg of enriched uranium and more sophisticated centrifuges.1014

Moreover, of enormous significance to Iran’s participation in the Joint Action Plan were two points.

First, the U.S. “red line … changed from ‘no enrichment of uranium’ to ‘no nuclear bomb.’”1015 That is, America ceased to insist Iran could not enrich uranium at all, which it had done up through 2005, when negotiations with Iran failed:

In past negotiations, the U.S. demanded that some Iranian nuclear facilities should be closed in exchange for a modest reversal of sanctions. But, this dialogue failed, partly because it was never made clear to Iran what kind of nuclear program it would retain in the long run.1016

The Joint Action Plan committed the U.S. to recognizing the right of Iran to enrich uranium for peaceful purposes. Whether such a “right” exists in International Law itself may be a question. Still, the accord “gave Iran de facto, if not explicit, recognition” to do so.1017 So, in signing the deal, America pivoted to the narrower goal of denying Iran a nuclear weapon. To be sure, the latter goal was the explicit one in American sanctions rules, so whether there was a change in substance or rhetoric is unclear. But, at least from the perspective of Iran, there was a meaningful shift whereby it could enrich Uranium for peaceful nuclear energy purposes and maintain its long-standing disinterest in a nuclear weapon.

Second, the election of Hassan Rouhani as President of Iran mattered. He sought “rapprochement” with America, Europe, and other countries.1018 Generally, perhaps the new President, like an earlier predecessor, Mohamed Khatami (1943-, who was President from 1997-2005), understood the importance of Iran not being a pariah state in a globalized world, and sought to avoid a clash of civilizations. Specifically, perhaps he embodied changes in style and substance in part to help bring about relief from the suffering inflicted on his people by the sanctions. Softening Iran’s position in nuclear negotiations was necessary if America was to loosen the sanctions, which in turn was needed if the people

1014  Hossein Mousavian, It Was Not Sanctions that Brought Tehran to the Table, FINANCIAL TIMES, 20 November 2013, 11. [Hereinafter, It Was Not Sanctions.]
1015  It Was Not Sanctions.
1016  Give Iran a Limited Right to Enrich, FINANCIAL TIMES, 21 October 2013, 12.
1017  See Roula Khalaf, Lionel Barber & Najmeh Bozorgmehr, Rouhani Celebrates Triumph of His First 100 Days, FINANCIAL TIMES, 25 November 2013, 2.
1018  See It Was Not Sanctions.
who voted him to office in a “landslide” were not to be disappointed. That is, the causal chain may have been from (1) sanctions to (2) economic pressure to (3) the election of a moderate to (4) agreement from Iran’s Supreme Leader, Āyatollāh Ali Khamenei to sign a deal. But, that chain was by no means assured, and the 2005 election of a hardliner before Mr. Rouhani, that is, of Mahmoud Ahmedinejad, who was President until 2013, suggests a “rally around the flag” effect may have occurred amidst sanctions.

In sum, have American sanctions against Iran worked? Have they caused economic pain to Iran that, in turn, caused a change in the behavior of the Iranian government in respect of its nuclear ambitions? A resolute “no” is implausible. Iranians suffered economically. But, an unqualified “yes” gives the Americans more credit than they deserve. The sanction regime was a work in progress, evolving into a tight noose, not a carefully designed and comprehensive regime from inception.

If the question of efficacy is about achieving policy goals, then the sure answer is indeterminate. Whether the deal becomes a permanent one, and sees Iran without WMDs in the long run, is uncertain. Moreover, nothing in the terms of the agreement address two of the three American justifications for sanctions: deterring Iran from sponsoring cross-border terrorism, and promoting human rights, including press freedom, in Iran. In the context of entry into this agreement, the U.S. made a strategic decision to champion one policy goal, and set aside two others – at least for an indeterminate period.

Time will tell whether a sanctions regime that the most powerful nation in human history designed, and that evolved into the most comprehensive set of economic strictures on a foreign country in human history, was necessary and sufficient to achieve all of its purposes. Until then, what is certain for as long as the prohibitions and penalties remain in place is that their sheer technical intricacy creates plenty of work for international trade lawyers.

As for America and Iran, if the two countries were individuals, then a psychologist surely would label their relationship dysfunctional, and recommend therapy. Perhaps the sanctions-induced Joint Action Plan is the start of that therapy towards a modality other than confrontation.

II. April 2015 Framework Agreement

In April 2015 in Lausanne, Switzerland, the P5+1 issued a 4-page joint statement, commonly known as the “Framework Agreement” or “Lausanne Accord.” (The P5+1 consists of the five permanent members of the U.N. Security Council – China, France, Russia, U.K., and U.S., plus Germany. The EU is not in in the P5+1, but was poised to act

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1019 See The Best.
1020 See The Best.
as the guarantor of the *Framework Agreement*, and was the guarantor of the *JCPOA* (discussed below). The EU functions are carried out by the High Representative for Foreign Affairs and National Security.) It was the product of negotiations that carried over under the November 2013 *Joint Plan of Action*, which after its extension until 24 November 2014 was extended again until 30 June 2015. The June deadline passed, but the P5+1 and Iran sensed they were sufficiently close to reaching a final accord that they extended the deadline once again, until 7 July 2015.

During the protracted negotiations, in May 2015, the 114th Congress passed the *Iran Nuclear Agreement Review Act of 2015* (Senate Bill 615, House Resolution 1191, Public Law 114-17, 22 May 2015, amending the *Atomic Energy Act of 1954*, 42 U.S.C. Sections 2011 et seq.), which mandated it review any final deal before President Barack H. Obama (1961-, President, 2009-2017) signed it. Under the Act, Congress had 30 days for review of a deal completed by 10 July, but 60 days for a deal thereafter. Fearing a deal would be picked apart by legislators ideologically intransigent in their approach to about Iran, and thus unravel, the P5+1 and Iran endeavored to finish the deal in the first week of July.

The April 2015 *Framework Agreement* provided broad outlines of a final deal, leaving the parties until the end of June to agree on key technical details. This *Agreement* created no binding obligations; the legal *status quo* remained that under the *Joint Plan of Action*. In effect, the *Agreement* both laid out a path forward for a final agreement by highlighting the remaining details in need of resolution, and thus was a face-saving way for all parties to keep talking.

The April 2015 *Framework Agreement* addressed four major issues in broad terms:

1. **Enrichment**

   Iran would limit its capacity for Uranium enrichment, the levels of that enrichment, and the stockpiles of enriched Uranium, for periods of time to be agreed on. Iran could have no enrichment facility other than Natanz, and it would convert its underground enrichment center at Fordow to a “nuclear physics and technology center.” Iran could continue its program of R&D on centrifuges, with a scope and schedule to be agreed on. But, it could have

2. **Reprocessing**

   With international assistance, Iran would redesign its Heavy Water facility at Arak to a “Heavy Water Research Reactor” that would not yield any weapons-grade plutonium byproducts. Iran would not reprocess any spent fuel, but instead would export it.

3. **Monitoring**
Iran would implement the *Additional Protocol*, and thus follow IAEA procedures concerning enhanced access to its modern technologies so the IAEA could ascertain Iran’s prior and current activities.

(4) Sanctions

Once the IAEA verified Iran had implemented its key obligations, then the U.S. would drop all nuclear-related secondary economic and financial sanctions. The EU would end all nuclear-related economic sanctions, and the U.N. Security Council would pass a resolution terminating all of its previous nuclear sanctions.

Yet, disputes broke out immediately after the *Lausanne Accord*.

The U.S., EU, and Iran issued statements about what they thought they had agreed to.\(^{1022}\) For example, the P5+1 said Iran had promised to accept the *Additional Protocol* of the *NPT* to allow for IAEA inspectors to access military as well as civilian installations. Iran said the P5+1 had pledged to eliminate all economic sanctions. Thus, the narratives about the *Accord* conflicted on key points of verification and sanctions relief. That is why negotiations dragged on past their 30 June 2015 deadline.

Table 18-2 summarizes the points of the *Framework Agreement*, including the perspectives from the narratives in the American, European, and Iranian statements.

Despite optimism on both sides following that *Agreement*, they failed to meet the June deadline, for which each blamed the other. The P5+1 accused Iran of backsliding on its *Framework Agreement* pledge to allow inspectors access to all its nuclear sites, civilian and military, so as to ensure any final deal was verifiable. Iran accused the P5+1 of backsliding on its position that the P5+1 did not need Iran to produce a comprehensive historical account of its civilian or military nuclear activities, because western intelligence agencies already knew what had happened. Iran also called for sanctions relief before implementing any final deal. The P5+1 retorted that demand was wrongly sequenced, and sought a procedural mechanism to bypass the Security Council so that sanctions could be re-imposed without the threat of a Chinese or Russian veto, if the P5+1 though Iran breached a final agreement.

\(^{1022}\) For the American narrative, see United States Department of State, *Fact Sheet: Parameters for a Joint Comprehensive Plan of Action regarding the Islamic Republic of Iran's Nuclear Program* (2 April 2015), [www.state.gov/e/eb/tfs/spi/iran/fs/240539.htm](http://www.state.gov/e/eb/tfs/spi/iran/fs/240539.htm).

The European view was conveyed in *Joint Statement by EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif* Switzerland, [http://eeas.europa.eu/statements-eas/2015/150402_03_en.htm](http://eeas.europa.eu/statements-eas/2015/150402_03_en.htm).

Table 18-2:
Synopsis of April 2015 Framework Agreement (Lausanne Accord)\textsuperscript{1023}

<table>
<thead>
<tr>
<th>What Iran “Gave”</th>
<th>What Iran “Got”</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Conversely, what the U.S. “Got”)</td>
<td>(Conversely, what the U.S. “Gave”)</td>
</tr>
<tr>
<td><strong>Enrichment Generally</strong></td>
<td><strong>Under the Agreement, the P5+1 pledged:</strong></td>
</tr>
<tr>
<td>Under the <em>Agreement</em>, Iran committed to: \textsuperscript{1024}</td>
<td>(1) Iran may continue to enrich Uranium within Iran, and to produce nuclear fuel for the purpose of providing nuclear energy.</td>
</tr>
<tr>
<td>(1) Reduce by about two-thirds the total number of its installed centrifuges, namely, from about 19,000 to 6,104.</td>
<td>(2) Iran may use its current stockpile of enriched Uranium to produce nuclear fuel, or may trade it for Uranium on international markets.</td>
</tr>
<tr>
<td>(2) Restrict all 6,104 centrifuges to Iran’s first generation centrifuges, IR-1.</td>
<td></td>
</tr>
<tr>
<td>(3) Of the remaining 6,104 installed centrifuges, to use no more than 5,060 for enriching uranium for 10 years.</td>
<td></td>
</tr>
<tr>
<td>(4) Restrict for at least 15 years Uranium enrichment at 3.67% or less.</td>
<td></td>
</tr>
<tr>
<td>(5) Reduce its current stockpile of low enriched Uranium (LEU) from 10,000 to no more than 300 kilograms (all at 3.67%) for 15 years.</td>
<td></td>
</tr>
<tr>
<td>(6) Place all excess centrifuges and enrichment infrastructure in storage monitored by the IAEA, and use that surplus only to replace operating centrifuges and equipment.</td>
<td></td>
</tr>
<tr>
<td>(7) For 15 years, build no new facilities for Uranium enrichment and limit its stockpile of enriched Uranium.</td>
<td></td>
</tr>
<tr>
<td>(8) For 10 years, extend its “break out time” (<em>i.e.</em>, the time Iran needs to obtain enough fissile material to make one nuclear weapon) from two-three months to at least one year, by limiting its domestic</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{1023} See April 2015 Framework Agreement; the sources for the American, European, and Iranian narratives (cited above); and Negotiations on Iran Nuclear Framework, WIKIPEDIA, https://en.wikipedia.org/wiki/Negotiations_on_Iran_nuclear_deal_framework.

\textsuperscript{1024} See Framework Agreement, pages 1, 4 (6 bullet points concerning “Enrichment,” 4 bullet points concerning “Phasing”).
enrichment capacity and R&D, and after 10 years complying with a plan on enrichment and enrichment R&D shared with the P5+1.

In addition, the American narrative stressed that Iran agreed:

1. Not to build any new enrichment facility.
2. Reduce its current stockpile of enriched Uranium to 300 kg of 3.67% low-enriched Uranium across 15 years.
3. Limit its enriched Uranium to 3.67% for at least those 15 years, a threshold sufficient for peaceful civilian energy uses, but insufficient for a nuclear weapon.
4. Cap the total number of installed centrifuges at 6,104.
5. Restrict the number of those 6,104 installed centrifuges used it uses to enrich Uranium to 5,060 for 10 years.

**Fordow Underground Enrichment Facility**

According to the Agreement, Iran committed to:

1. Enrich no Uranium at Fordow for at least 15 years.
2. Convert the Fordow facility for use for peaceful purposes only, namely, into a center for research on nuclear science and physics.
3. Conduct no R&D on Uranium enrichment at Fordow for 15 years.
4. Have no fissile material at Fordow for 15 years.
5. Of the 6,104 centrifuges it kept (reduced from the total of 19,000), 1,044 would be at Fordow and 5,060 would be at Natanz, all of which would be IR-1 models for 10 years.
6. Remove almost two-thirds of the centrifuges and infrastructure at Fordow, and place them under IAEA monitoring.

According to the Iranian (and European) narrative, Iran could:

1. Dedicate roughly half of the Fordow facility to advanced nuclear research and the production of stable isotopes for application in agriculture, industry, and medicine.
2. Keep over 1,000 centrifuges for the purpose in item (1).

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1025 See Framework Agreement, pages 1-2 (5 bullet points concerning Fordow).
(7) Using the remaining roughly 13,000 centrifuges (the difference between about 19,000 and the 1,044 at Fordow and 5,060 at Natanz) only for spare, as needed.

In addition, the American narrative stressed that Iran agreed to:

(1) Convert the Fordow facility into a center for nuclear physics and technology research, and not engage in any Uranium enrichment R&D at Fordow for 15 years.

<table>
<thead>
<tr>
<th>Natanz Enrichment Facility</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under the <em>Agreement</em>, Iran committed to: 1026</td>
</tr>
<tr>
<td>(1) Enrich Uranium with only 5,060 IR-1 model centrifuges for 10 years.</td>
</tr>
<tr>
<td>(2) Remove more advanced centrifuges (e.g., IR-2, IR-4, IR-5, IR-6, and IR-8 models), and not use those centrifuges for at least 10 years to enrich Uranium.</td>
</tr>
<tr>
<td>(3) Remove the 1,000 IR-2M centrifuges currently installed at the Natanz facility and place them in storage monitored by the IAEA for 10 years.</td>
</tr>
<tr>
<td>(4) For 10 years, limit Uranium enrichment, and R&amp;D relating to that enrichment, to ensure a break out time of at least 1 year.</td>
</tr>
<tr>
<td>(5) After 10 years, follow a plan for enrichment and enrichment R&amp;D submitted to the IAEA, complying with limitations in the <em>Additional Protocol</em> on enrichment capacity.</td>
</tr>
</tbody>
</table>

| Reactors, Reprocessing, and Arak Heavy Water Facility |

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1026 *See Framework Agreement*, p. 2-3 (4 bullet points concerning Natanz).
Under the *Agreement*, Iran committed to:  

1. Redesign and rebuild its Arak heavy water research reactor according to plans the P5+1 approves to ensure no weapons-grade plutonium is produced.
2. Destroy or remove from Iran the original core of the Arak reactor (because it would allow for the production of significant quantities of weapons-grade plutonium).
3. Ship out of Iran all of the spent fuel from the reactor.
4. For an indefinite period, engage in no reprocessing or R&D on spent nuclear fuel.
5. For 15 years, accumulate no heavy water beyond the needs of the Arak facility, and sell any excess amounts on the international market.
6. For 15 years, not build any additional heavy water reactor.

Under the *Agreement*, the P5+1 committed to:  

1. Allow Arak to remain a heavy water reactor so as to produce a minimal amount of non-weapons grade plutonium.
2. Permit Iran to engage in peaceful nuclear research and radioisotope production in the redesigned, rebuilt Arak facility.

### Inspections and Transparency (Monitoring)

According to the *Agreement*, Iran committed to:  

1. Grant the IAEA access to all of its nuclear facilities, including Natanz and Fordow, and allow the IAEA to use its most up-to-date monitoring technologies.
2. Allow the IAEA to inspect the supply chain that supports Iran’s nuclear program, and ensure materials and components are not diverted to a secret program.
3. For 25 years, permit IAEA inspectors to visit Uranium mines, and put under continuous surveillance Uranium mills (where Iran produces “yellowcake”).

According to the Iranian narrative, Iran:  

1. Did not agree to allow for IAEA inspection of military sites.
2. Agreed to implement the *Additional Protocol* only on a temporary and voluntary basis, as a confidence building measure.
3. After the temporary period referred to in (2), agreed its Parliament (*Majlis*) would ratify the Additional Protocol in a time frame it sets.

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1027 See *Framework Agreement*, pages 3–4 (6 bullet points concerning “Reactors and Reprocessing,” and 4 bullet points concerning “Phasing”).

1028 See *Framework Agreement*, page 3 (6 bullet points concerning “Reactors and Reprocessing”).

1029 See *Framework Agreement*, pages 2–4 (10 bullet points concerning “Inspections and Transparency,” and 4 bullet points concerning “Phasing”).
(4) For 20 years, permit IAEA inspectors to put under continuous surveillance centrifuge rotors and bellows production and storage facilities, thus freezing Iran’s centrifuge manufacturing base.

(5) Place under continuous IAEA monitoring all centrifuges and enrichment infrastructure removed from Fordow and Natanz.

(6) Grant the IAEA access anywhere in Iran to investigate any suspicious site or allegation of a covert facility for enrichment, conversion, yellowcake, or centrifuge production.

(7) Implement the Additional Protocol of the IAEA to give the IAEA greater access to declared and undeclared facilities, and to provide early notification of construction of any new facility under Modified Code 3:1.

(8) Follow an agreed upon mechanism for monitoring and approval of procurement (that is, the supply, sale, or transfer to Iran) of nuclear-related and dual-use materials and technology.

(9) Follow an agreed upon set of procedures to address IAEA concerns about the Possible Military Dimensions (PMD) of its nuclear program.

(10) For 25 years, permit inspections of its Uranium supply chain, and adhere to the Additional Protocol of the IAEA permanently.

(11) Remain a party to the NPT, even after the end of the “most stringent limitation on Iran’s nuclear program.”

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**Sanctions Relief**

According to the Agreement:

1. Iran must follow its commitments in a verifiable manner to receive relief from sanctions.

According to the Agreement:

1. Iran will receive sanctions relief from the P5+1, if it follows its commitments in a verifiable manner.

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1030 See Framework Agreement, pages 3-4 (8 bullet points concerning “Sanctions”).
(2) Sanctions will snap back in place if, at any time, Iran fails to fulfill its commitments.
(3) Likewise, the “architecture” of American nuclear-related sanctions will remain in place for “much of the duration” of a final deal and snap back in place “in the event of significant non-performance.”
(4) A dispute settlement process will be created and open to all parties to resolve issues of “non-performance,” and if that process does not achieve a resolution, then all U.N. sanctions can be re-imposed.
(5) The U.N Security Council will enact a new resolution concerning the channel by which Iran procures nuclear-related and dual use materials and technology, incorporating restrictions on ballistic missiles and conventional arms, and allowing for cargo inspections and asset freezes.
(6) American sanctions on Iran concerning ballistic missiles (which can be used to deliver WMDs), terrorism, or human rights abuses will remain in place under a final deal.

In addition, the American stressed:
(1) American and European nuclear-related sanctions will be suspended only after the IAEA verified implementation of the key nuclear-related steps by Iran.
(2) A mechanism to restore the sanctions if Iran failed to comply with IAEA reports and inspections was essential.

(2) The U.S. and EU will suspend their nuclear-related sanctions “after the IAEA has verified that Iran has taken all of its key nuclear-related steps,” meaning (inter alia) the U.S. will remove sanctions against foreign and domestic companies that do business with Iran, and the EU will remove energy and banking sanctions against Iran.
(3) The U.N. Security Council will remove all of its resolutions concerning the Iran nuclear issue “simultaneously with the completion by Iran of” its obligations on “all key concerns (enrichment, Fordow, PMDs, and transparency”).

In addition, according to the Iranian narrative, Iran emphasized:
(1) Sanctions would be lifted in respect of all sanctions under U.N. Security Council resolutions.
(2) Sanctions also would be lifted with respect to the economic and financial embargoes by the U.S. and EU against Iran’s banks, insurance, investment, and all other related services in different fields, including petrochemical, oil, gas and automobile industries.
(3) The sanctions measured referred to in items (1) and (2) will be lifted immediately, all at once.
III. Historic July 2015 Joint Comprehensive Plan of Action

In retrospect, sanctions were necessary to persuade Iran to sign the November 2013 Joint Plan of Action and April 2015 Framework Agreement. However, they were not sufficient to compel Iran to sign a final nuclear agreement, at least not quickly thereafter. After all, Iran stayed at the negotiating table, but resolutely defended what it perceived to be its interests, for nearly two years after the November 2013. It might even be vouched that obstinacy by the P5+1 about sanctions relief served only to harden Iran in its positions. Why compromise further if the nature and timing of that relief is a promise that cannot be trusted? For both sides, no deal was better than a bad deal.

What else was needed to move from “necessary” to “sufficient”? First, and foremost, diplomacy. Negotiators from the P5+1 and Iran labored long and hard across 20 months to strike a final deal, which they announced on 14 July 2015. All parties wanted a deal, and had the political will to reach one. In respect of the necessity-versus-sufficiency of sanctions, Iranian President Hassan Rouhani said it best in announcing the deal to his people in a televised address: “The sanctions regime was never successful, but at the same time it affected people’s lives.”

Put differently, the regime on its own was unsuccessful in bringing about the final deal, but its adverse effects on everyday people were enough to cause negotiations.

A second reason moving the parties from “necessary” to “sufficiency” surely was Islamic State in the Levant (ISIL, also known as Islamic State in Shams (ISIS), or simply Islamic State). Its horrific methods and monstrous goals were anything but authentically “Islamic,” and the P5+1 and Iran had a shared goal of defeating it before it created yet more chaos and inflicted more human suffering and cultural damage in the Middle East and beyond. Solving the nuclear problem and moving onto the immediate and potentially existential threat was essential.

The July 2015 Joint Comprehensive Plan of Action (JCPOA) spans roughly 160 pages, with five technical annexes. It draws heavily on the 2013 Joint Plan of Action and April 2015 Framework Agreement. That makes sense, because there was no need to re-visit points settled from those accords. Table 18-3 summarizes the key points of the JCPOA. Arguably the most notable ones – which took the greatest time and effort to resolve – concern access of IAEA inspectors to PMDs, and phased removal of sanctions. The JCPOA entered into force on 16 January 2016, at which time the P5+1 began to lift sanctions, and companies from those and many other countries began to enter import-export and FDI transactions with Iran.

1032 The full JCPOA text and five Annexes are published by the U.S. State Department, www.state.gov/e/eb/tf/spi/iran/jcpoa/, and by the EU at www.europarl.europa.eu/cmsdata/122460/full-text-of-the-iran-nuclear-deal.pdf. [Hereinafter, JCPOA Text.] Of the 159 pages, 20 are the terms, and the remainder are the Annexes.

Table 18-3:
Key Details of July 2015 Joint Comprehensive Plan of Action

<table>
<thead>
<tr>
<th>What Iran “Gave”</th>
<th>What Iran “Got”</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Conversely, what the U.S. “Got”)</td>
<td>(Conversely, what the United States “Gave”)</td>
</tr>
<tr>
<td><strong>Uranium Enrichment, Natanz, and Fordow</strong></td>
<td></td>
</tr>
<tr>
<td>(1) Iran must reduce its Uranium stockpile of about 10,000 kg of low-enriched UF₆ by 98%, to 300 kg (660 lbs.), of up to 3.67% enriched UF₆, and respect those thresholds for 15 years. (That is, Iran may produce up to 300 kg of low-enriched UF₆, which is the equivalent of 202.8 kg of Uranium. “Low-enriched” means 3%-5% of U-235 isotopes, whereas “weapons grade” Uranium is enriched to 90% or greater levels.) The stockpile reduction is down from enough Uranium to produce 10 nuclear devices to less than the amount needed to produce one bomb. (Note that “[a]bout 630 kilograms of low-enriched uranium must be purified to 90% to yield the 15 to 22 kilograms of weapons-grade uranium needed by an expert bomb-maker to craft a weapon.” And, the 3.67% limit is a decrease from the November 2013 Joint Plan of Action, under which Iran enriched uranium to nearly 20%. Previously with respect to Iran’s stockpile of Uranium, Iran may conduct limited, specific R&amp;D activities in respect of uranium enrichment during the first 8 years of the JCPOA. After the first 8 years of the JCPOA, Iran’s uranium enrichment activities may evolve gradually, at a reasonable pace, solely for peaceful purposes, such as the production of stable isotopes. (3) At Fordow, Iran will be permitted to keep 1,044 IR-1 centrifuges in 6 cascades, on 1 wing of the Fordow facility, and employ</td>
<td></td>
</tr>
</tbody>
</table>

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enriched Uranium, it either exported its surplus in return for natural Uranium, or blended it down to the level of natural Uranium.

(2) Iran cannot install more than 5,060 centrifuges at Natanz for 10 years.

(3) Those centrifuges must be the oldest and least efficient models, *i.e.*, IR-1 centrifuges.

(4) Because Iran has roughly 19,000 IR-1 and IR-2M centrifuges installed at Natanz, it must remove the excess centrifuges and enrichment-related infrastructure, and put these items in storage under continuous IAEA monitoring.

(5) Any R&D activities Iran conducts must be done at Natanz.

(6) Iran is not permitted to conduct any uranium enrichment, or uranium enrichment R&D, at Fordow for 15 years.

(7) Iran must convert Fordow to a “nuclear, physics, and technology center,” which means Iran must dismantle some of the 2,700 IR-1 centrifuges installed at Fordow (of which 700 are enriching uranium). (As per the next column, Iran is permitted to keep 1,044 centrifuges, and thus must dismantle 1,656 of them.)

### Plutonium and Arak Facility

(1) With an international partnership that will certify the final design, Iran will re-design and re-build its heavy water reprocessing facility at Arak to “minimize the production of plutonium and not to produce weapon-grade plutonium in normal operation,” that is, to ensure the new facility cannot produce any weapons-grade plutonium. This conversion requires removing the core of the reactor and filling the void with concrete.

(2) Iran may not use its Arak facility to produce weapons grade plutonium.

(3) Iran will build no new heavy water reactors, or accumulate heavy water, nor will it engage in any reprocessing or reprocessing research activities, for 15 years.

(4) Iran will export 97% of its spent fuel from its present and future research and power nuclear reactors.

(1) Iran may use its redesigned Arak facility for peaceful nuclear research and radioisotope production for medical and teaching purposes.

(2) Iran may produce heavy water for peaceful purposes, such as a moderator in reactors such as Arak, up to 130 tons, for 15 years.

(3) Iran may keep pace with international technological advancements in using light

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A nuclear device can be produced with Uranium or Plutonium, hence the need for restrictions on the Arak facility, which produced spent fuel from which Plutonium can be extracted. See *Fact Box: The Atomic Restrictions*. 

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water for research and power, in cooperation with international partners.
(4) Those partners will assure Iran a supply of necessary fuel.

<table>
<thead>
<tr>
<th>Transparency and Inspections&lt;sup&gt;1039&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(1)</strong> Iran will allow the IAEA to continuously monitor its declared nuclear sites, including daily access to Natanz and Fordow, for 15 years.</td>
</tr>
<tr>
<td><strong>(2)</strong> Iran will provisionally adhere to the <em>Additional Protocol</em> to its IAEA <em>Comprehensive Safeguards Agreement</em> (as per Article 17(b) of the <em>Additional Protocol</em>). Under this <em>Additional Protocol</em>, Iran must allow IAEA inspectors to access any site they deem suspicious.</td>
</tr>
<tr>
<td><strong>(3)</strong> With respect to Possible Military Dimensions (PMDs) of Iran’s nuclear program, Iran will allow the IAEA to prevent it from developing a nuclear program in secret by verifying that Iran has not covertly moved fissile material to a secret location to build a bomb.</td>
</tr>
<tr>
<td><strong>(4)</strong> Also, with respect to PMDs, Iran will allow IAEA inspectors to request visits to military sites.</td>
</tr>
<tr>
<td><strong>(5)</strong> Iran will implement fully its agreement with the IAEA to resolve all past and present issues in respect of its nuclear program.</td>
</tr>
<tr>
<td><strong>(6)</strong> Iran will allow the IAEA a long-term presence in Iran.</td>
</tr>
<tr>
<td><strong>(7)</strong> For 25 years, Iran will allow the IAEA to monitor its production of uranium ore concentrate.</td>
</tr>
<tr>
<td><strong>(8)</strong> For 20 years, Iran will allow the IAEA to contain and monitor centrifuge rotors and bellows.</td>
</tr>
<tr>
<td><strong>(9)</strong> Purchases by Iran of any nuclear or dual-use technology must be approved by the Parties, and Iran will use only IAEA approved and technologies, including online enrichment measures and electronic seals.</td>
</tr>
</tbody>
</table>

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<sup>1039</sup> See *JCPOA Excerpts*, pages 2-3 (5 bullet points concerning “Transparency and Confidence Building Measures”).
(10) For 15 years, Iran will follow a reliable mechanism to ensure speedy resolution of concerns about IAEA access.

### Break Out Time 1040

1. By implementing the JCPOA, Iran will remove the dimensions of its nuclear program it would need to create a nuclear weapon, and increase its break out time to at least 1 year.
2. Iran will not engage in any activities, including R&D, uranium, or plutonium metallurgy activities, computer simulations of nuclear explosion, or designing multi-point detonation systems, which could contribute to building a nuclear weapon.
3. Iran will adhere to a procurement channel (set out in Annex IV of the JCPOA) endorsed by the U.N. Security Council.

### Sanctions Removal 1041

1. Under a U.N. Security Council resolution, all previous Security Council resolutions on the Iranian nuclear issue will be terminated.
2. The termination in point (1) will be simultaneous with IAEA verification that Iran is implementing the terms of the JCPOA, specifically the items in Annex V. That is, sanctions are lifted only upon IAEA confirmation that Iran has complied with its obligations under the JCPOA.
3. The U.S. will cease application of all sanctions listed in Annex II of the JCPOA, simultaneously with the IAEA certification in point (2).
4. The American sanctions to be lifted are those relating to Iran’s nuclear program. However, American sanctions targeting Iran’s support for terrorism, missile activities, and human rights abuses will remain in effect.

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(5) 8 years after the JCPOA has entered into force, or when the IAEA concludes all nuclear material in Iran is for peaceful purposes, whichever is earlier, the U.S. will repeal its Iran nuclear sanctions statutes.
(6) The EU will terminate all of its nuclear related economic and financial sanctions, simultaneously with the IAEA certification in point (2).
(7) If Iran violates the JCPOA, then sanctions will snap back automatically for 10 years, with the possibility of a further 5-year extension.

### Arms Embargo and Ballistic Missile Sanctions Removal

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<tr>
<td>(1)</td>
<td>The U.N. arms embargo on Iran will continue for up to 5 years, but could end earlier if the IAEA certifies that Iran’s nuclear program is entirely peaceful.</td>
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<td>(2)</td>
<td>The U.N. ban on Iran importing ballistic missile technology will remain in place for up to 8 years.</td>
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### Dispute Resolution Mechanism (DRM)

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<td>(1)</td>
<td>An 8-member Joint Commission is established consisting of representatives from each P5+1 country, the EU, and Iran. The Commission meets on a quarterly basis, or at the request of any Party.</td>
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<td>(2)</td>
<td>The P5+1 may refer to the Joint Commission any claim against Iran that Iran is failing to meet a commitment under the JCPOA. (If a claim is brought by a subset of the P5+1, as occurred in January 2020 when Britain, France, and Germany did so against Iran (discussed in a separate Chapter), then the claimant should notify the other Parties to the JCPOA. They did so by notifying the EU, which acts as guarantor of the JCPOA, which, in turn, notified China, Russia, and Iran.)</td>
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<td>(3)</td>
<td>The Joint Commission must resolve the claim within 15 days, unless a longer period is agreed by consensus. (No limit on the number or duration of extensions is indicated in the JCPOA.)</td>
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1042 See JCPOA Text, Article 36-37; JCPOA Excerpt, p. 3 (4 bullet points concerning “Sanctions”).
(4) If Iran or any other Party believes the Joint Commission has failed to resolve the dispute, then the complaining Party can refer the matter to the Foreign Ministers of the Parties. The Ministers have 15 days to reach an outcome.

(5) Alternatively, or as a contemporaneous complement, to point (4), the complainant can refer the dispute to a three-member Advisory Board. Each side (complainant and respondent) would pick one member, and the third member would be an independent person. The Advisory Board has 15 days to issue a non-binding opinion. The Joint Commission has 5 days to consider any Advisory Board opinion (which, in effect, is the second chance for the Commission to resolve the dispute). Note that because the Joint Commission consists of Parties to the JCPOA, the Advisory Board possibly introduces some measure of neutral, independent decision-making to the DRM.

(6) If the claim remains unresolved after the period in points (3)-(5), and if the P5+1 deems the claim involves “significant non-performance” by Iran, then the P5+1 may “treat the unresolved issue as grounds to cease performing” its obligations under the JCPOA, “in whole or in part,” and/or notify the U.N. Security Council of its view of significant non-performance by Iran.

(7) The U.N. Security Council, having been notified by the Joint Council that its good-faith efforts to resolve the dispute failed, must vote on a resolution within 30 days as to whether to continue to grant Iran sanctions relief. If the Security Council decides to re-impose sanctions (which, of course, presumes nine votes and no vetoes), then all sanctions called for under prior relevant U.N. Security Council Resolutions are put back on Iran, that is, “snap back.” Those Resolutions, which had been terminated with the JCPOA, are 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1929 (2010), and 2224 (2015).

(8) The snapped-back sanctions would apply prospectively, and not retrospectively to contracts into which Iran entered during the sanctions-relief period. They would apply as of the end of the 30th day after the Security Council adopts a Resolution calling for their re-imposition.

(9) If the U.N. Security Council does not, within 30 days, adopt a resolution, then all previous U.N. sanctions against Iran “snap back” automatically, i.e., they are re-imposed, by the P5+1, then Iran may treat the unresolved claim as grounds for it to cease performing all or some of its obligations under the JCPOA, and/or notify the U.N. Security Council of its view of significant non-performance by the P5+1.
unless the Security Council decides otherwise. Re-imposed sanctions would not apply retroactively to contracts that Iran had signed. (For the Security Council to decide against a sanctions snap back, nine votes and no vetoes would be needed).

(10) Thus, the dispute resolution mechanism consists of 7 Steps:

Step 1:
Referral of dispute to Joint Commission, which has 15 days to act (unless extended by consensus).

Step 2:
Referral of dispute to Foreign Ministers, which have 15 days to act (unless extended by consensus).

Step 3:
Possible referral to Advisory Board, which has 15 days to act, in parallel with, or in lieu of, consideration by the Foreign Ministers, and which may issue a non-binding opinion. (The Joint Commission has 5 days to consider any Advisory Board opinion.)

Step 4:
Cessation of performance of obligations, i.e., if the complaining Party remains unsatisfied, and views the matter as constituting “significant non-performance,” then that Party may treat such non-performance as grounds for ceasing to perform, in whole or in part, its obligations.

Step 5:
The unsatisfied complaining Party (in addition to, or in lieu of, Step 4), may notify the U.N. Security Council that issue involves “significant non-performance,” and good-faith efforts through existing dispute resolution mechanism failed.

Step 6:
United Nations Security Council debate about sanctions snap back, which has 30 days to act. A resolution to continue sanctions relief must be adopted by nine “yes” votes, and no vetoes. If the Council fails to adopt such a resolution, then sanctions snap back automatically, unless the Council decides otherwise – which also would require nine “yes” votes and no vetoes.

Step 7:
Possible prospective snap back of sanctions.

(11) Overall, the dispute resolution mechanism should take up to 65 days to run its course, unless the Parties decide by consensus to extend that period.
On 8 May 2018, President Donald J. Trump (1946-, President, 2017-2021) withdrew America from the July 2015 JCPOA, notwithstanding there was not a shred of evidence that Iran had ever violated the Iran Nuclear Deal, or that the Middle East would be safer without the Deal.\footnote{See Executive Order 13846 of 6 August 2018, Reimposing Certain Sanctions With Respect to Iran, 83 Federal Register number 152, 38939-38949 (7 August 2018); The White House, Presidential Memoranda, Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran’s Malign Influence and Deny Iran All Paths to a Nuclear Weapon, 8 May 2018, www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/#_blank [hereinafter, May 2018 Presidential Memoranda]; U.S. Department of the Treasury, Office of Foreign Assets Control, Frequently Asked Questions Regarding Executive Order of August 6, 2018, “Reimposing Certain Sanctions With Respect to Iran,” August 2018, www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx#eo_reimposing.} To the contrary, IAEA inspectors had certified its compliance (and even senior American officials had grudgingly acknowledged that inconvenient truth), and the Deal had accomplished its fundamental goal of extending the breakout time for Iran to amass a sufficient amount of highly-enriched Uranium to build a nuclear bomb from a few months to over one year. Iran’s response, per Āyatollāh Ali Khamenei (1939-, Supreme Leader, 1989-), struck at the heart of America’s credibility: “The Islamic Republic cannot deal with a government that easily violates an international treaty, withdraws its signature and in a theatrical show brags about its withdrawal on television.”\footnote{Quoted in Iran Nuclear Deal: Khamenei Lists Demands for European Powers, BBC News, 23 May 2018, www.bbc.com/news/world-middle-east-44230983. [Hereinafter, Khamenei Lists.]} The Trump Administration decision to withdraw from the JCPOA was, arguably if not indubitably, one of the top three worst post-9/11 American foreign policy decisions, the other two being the March 2003 invasion of Iraq and the January 2017 quitting from TPP. Almost certainly, Mr. Trump withdrew from the Deal simply because his predecessor had forged it. Leaked documents from Sir Kim Darroch (1954-), the former United Kingdom Ambassador to the U.S., showed the U.K. appealed to the President not to quit the Deal, but that he did so for “personality reasons,” namely, “to spite Obama,” which the
Ambassador dubbed an act of “diplomatic vandalism.” Sir Kim might have added that systemic decisions based on personal animosity (or, dare it be said, egoistic insecurity) make for bad policy, to the detriment of the common good – and the Trans-Atlantic Alliance.

Well beyond this Alliance – save for predictable (and, arguably, not particularly persuasive) support from Israel and Saudi Arabia (along with a few other Sunni Arab countries) – the Trump Administration decision provoked world-wide condemnation. For instance, German Chancellor Angela Merkel (1954, Chancellor, 2005-2021) said: “Everybody in the EU shares the opinion that the Iran agreement is not perfect, but that we should still remain in this agreement and that we should do further negotiations with Iran on the basis of this agreement....” Even Saudi-Israeli support was dubious: the House of Saud saw Iran as a regional rival, and underlying this rivalry was a Sunni-Shī’a split dating back to the years following the death of the Prophet Muhammad (PBUH) in 632 A.D.; as for Israel, its government was led by an extreme right-wing coalition, but mainstream defense and security experts conceded it was better to have Iran constrained by the Deal than left to its own (literally) devices.

Ironically, the U.S. subsequently investigated Saudi Arabia to discern whether it was seeking, in collaboration with China, a nuclear weapon, as to Israel, that it had done so had long been an open secret. The American move also sent businesses and their lawyers scrambling to determine what exposure they had to Iran, if any, following over two years (since the JCPOA implementation date of 16 January 2016) of planning for, or actually engaging in, imports, exports, FDI, and financial transactions with Iran. That was because the decision included the re-imposition of all nuclear-related sanctions that America had imposed – both primary and secondary – on Iran, up to July 2015. The Trump Administration was betting the P5+1, along with India and most of the rest of the world, would once again go along with the sanctions and isolate Iran. It bet wrong.

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1047 Quoted in Ian Wishart & Gregory Viscusi, EU Hardens Against Trump with United Stand on Trade and Iran, 35 International Trade Reporter 693 (BNA) (24 May 2018). [Hereinafter, EU Hardens.]

1048 See Mark Mazzetti, David E. Sanger & William J. Broad, U.S. Examines Whether Saudi Nuclear Program Could Lead to Bomb Effort, THE NEW YORK TIMES, 5 August 2020, www.nytimes.com/2020/08/05/us/politics/us-examines-saudi-nuclear-program.html?referringSource=articleShare (reporting “American intelligence agencies are scrutinizing efforts by Saudi Arabia to build up its ability to produce nuclear fuel that could put the kingdom on a path to developing nuclear weapons”).


1050 See U.S. Department of the Treasury, Resource Center, Iran Sanctions, 8 May 2018, www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx. Businesses were given (through OFAC-issued GLs) 90- or 180-day “wind down” periods, to wind down their dealings with Iran, after which the U.S. pledged to “to make aggressive use of its authorities to target Iran’s malign behavior.” Id. The wind down periods elapsed on 6 August and 4 November 2018, hence sanctions were re-imposed as of those dates.

And, the American withdrawal caused Āyatollāh Khamenei to call for “a pivot to a ‘resistance economy’”\textsuperscript{1051} That meant Iran “would depend less on imported goods while relying on China and Russia for investment and technology transfers.”\textsuperscript{1052} Thus, for instance, the IRGC “already a major contractor and builder … [was] likely to be awarded further domestic infrastructure projects,” and Iran could “steer away from Europe entirely,” and make a “more concerted effort to broaden and deepen trade ties with China and Russia could follow.”\textsuperscript{1053} Consider this August 2020 assessment of Sino-Iranian ties:

Since its Islamic revolution in 1979, Iran’s foreign policy motto has been “neither East nor West,” based on first Supreme Leader Āyatollāh Ruhollah Khomeini’s warning to avoid dependence on outsiders. Under the pressure of U.S. measures aimed at crippling its economy, however, Iran has grown ever closer to America’s principal rival, China, and \textit{vice versa}. The two are said to be contemplating a 25-year strategic partnership.

... The roots of a stronger alliance were planted in 2016, when Chinese leader Xi Jinping visited Iran a year after it agreed to limits on its nuclear program in exchange for a lifting of related sanctions by world powers including China. In [May] 2018, President Donald Trump withdrew the U.S. from the agreement \textit[i.e., the JCPOA], arguing he could get a better deal out of Iran. The U.S. began reimposing old sanctions and adding new ones, contributing to an economic contraction in Iran…. Iranian officials initially looked to Europe to deliver the trade and investment benefits they’d expected from the nuclear deal, but European entities for the most part have balked, unwilling to risk violating U.S. secondary sanctions. China, on the other hand, is the only country that’s continued to purchase Iranian crude, and it is dangling the prospect of investments across Iran’s economy.

... With the world’s second largest economy, China is keen to ensure steady supplies of oil. China’s biggest supplier is Saudi Arabia, but Iranian crude diversifies China’s sources. … … China will be able to buy Iranian oil, gas and petrochemical products at considerable discounts, with payments delayed by as long as two years, using currencies other than U.S. dollars, which helps get around U.S. sanctions.

... China became a major buyer of Iranian crude oil in the 1990s. As its economy grew in the 2000s, China’s investment in and broader commercial ties with Iran expanded, too. When the European Union sanctioned Iran’s oil industry in 2012, China replaced the EU as the largest buyer of Iranian crude. By 2018, Iran-China trade had more than doubled from its 2006 level. Iranian President Hassan Rouhani’s government has often professed a


\textsuperscript{1052} \textit{Iran’s Election Turns}.

\textsuperscript{1053} \textit{Iran’s Election Turns}.
desire to attract European expertise, but since the U.S. quit the nuclear deal, Iran’s hard-line politicians have become increasingly hostile to the idea of closer ties with European countries and have often called for expanded relations with China and Russia instead. For its part, China, driven in part by its trade war with the U.S. [under Section 301 of the Trade Act of 1974, as amended, discussed in separate Chapters], has become more vocal in its criticisms of U.S. policy toward Iran and more defensive of the nuclear deal. 

... The alliance is in part a result of the weakening of U.S. influence around the world, especially the Middle East, and could accelerate that trend. It supports China’s massive Belt and Road Initiative, aimed at reviving and extending the ancient Silk Road trading routes via networks of upgraded or new railways, ports, pipelines, power grids and highways. A broader Chinese footprint in Iran may make it harder for European companies to regain their share of markets there in a future less restricted by U.S. sanctions.1054

Of course, successful ties with Iran depended on China, Russia, and other countries resisting the re-imposition of U.S. sanctions. On that, did the Supreme Leader bet wrong? Many countries, while supportive of the JCPOA and unwilling to join America’s so-called “maximum pressure” campaign,1055 could not risk losing their business interests in America to preserve their far less lucrative ones in Iran.


1055 As of May 2020, two years into this maximum pressure campaign, the U.S. had won few converts. See Bobby Ghosh, Empty Chest-Thumping Won’t Win U.S. Allies on Iran, BLOOMBERG, 12 May 2020, www.bloomberg.com/opinion/articles/2020-05-13/pompeo-s-promise-to-lead-the-world-against-iran-is-hollow?refer=7sx9x9x1. [Hereinafter, Empty Chest-Thumping.] U.S. Secretary of State Mike Pompeo boasted:

Two years ago, President Trump announced the bold decision to protect the world from Iran’s violence and the nuclear threats it poses by exiting from the flawed Iran Deal and its façade of security. Since that time, we have built the strongest sanctions in history and prevented Iran from funding and equipping terrorists with many billions of dollars. Today, the American people are safer and the Middle East is more peaceful than if we had stayed in the JCPOA.

Seventy-five years ago, the United States and our allies stood together to rid the world of the Nazis and their hateful ideology. Today, we face a grave challenge to regional peace from another rogue regime, and we again call on the international community to join us to stop the world’s leading state sponsor of anti-Semitism.

The United States will exercise all diplomatic options to ensure the U.N. arms embargo is extended. We will not accept their status quo level of violence and terror. And we will never allow Iran to have a nuclear weapon.

U.S. Department of State, Press Statement, Leading the World Against Iran’s Threats, 9 May 2020, www.state.gov/leading-the-world-against-irans-threats/. The analogy of Iran and its Islamic Republic to Germany and Nazism was striking. It also was unconvincing:
Chapter 19

INTERNATIONAL TRADE LAW E-TEXTBOOK (CONTINUED): WITHDRAWAL AFTERMATH

I. American Demands, Iranian Counter-Demands

The U.S. vowed to impose on Iran the “strongest sanctions in history,” with “unprecedented financial pressure on the Iranian regime,” so that Iran “would be ‘battling to keep its economy alive,’” and “never again have carte blanche to dominate the Middle

Even by the standards of hyperbole set by the administration of President Donald Trump, Secretary of State Michael Pompeo’s contention that the U.S. is “Leading the World Against Iran’s Threats” is a doozy. That chest-thumper is the title of a statement issued on the second anniversary of the American withdrawal from the Iran Nuclear Deal. As an accounting of the Administration’s strategy to contain the Islamic Republic since then, the statement completely disregards the cost to relations with U.S. allies.

There is no gainsaying the claim that Trump’s tough economic sanctions have “prevented Iran from funding and equipping terrorists with many billions of dollars.” The region would have been even more unstable if the regime in Tehran was unhindered by the sanctions. The recent belligerence by Iran and its proxies can be attributed to their growing frustration at being shackled. So, the contention that “the Middle East is more peaceful than if we had stayed [in the deal]” just about passes muster.

But Pompeo can hardly boast of “leading the world” against the Iran when few other nations are inclined to follow. That the U.S. finds itself standing all but alone against a blood-soaked regime, a menace to its neighbors and a threat to the world, must rank as one of the Administration’s – and the Secretary’s – greatest failures.

Two years after Trump’s withdrawal from the Joint Comprehensive Plan of Action, none of the other signatories – China, Russia, Germany, France, Britain and the European Unions – has joined the American “maximum-pressure” campaign against Iran. On the contrary, they maintain the fiction that the deal is alive, even though the regime in Tehran is now in breach of its restrictions on uranium enrichment.

Worse, Pompeo can’t count on their support for his next task: making sure the Iranians don’t get their hands on sophisticated new weapons systems. The other JCPOA signatories are resisting the Trump administration’s plan to extend a United Nations embargo on arms sales to Iran, which is due to expire this fall, by triggering a “snapback” of pre-deal U.N. sanctions.

Perhaps the other signatories’ lingering resentment over the peremptory manner in which Trump treated them was inevitable. The President, plainly obsessed with dismantling the legacy of his predecessor, tore up the deal with scant consideration for their objections.

Empty Chest-Thumping.
American made a 12-point demand of Iran for a new nuclear deal, including “tangible, demonstrated, and sustained shifts” in the following areas:

1. Providing to the IAEA a full account of its former nuclear military program, and pledging never to engage in such work again.
2. Forswearing all Uranium enrichment.
3. Ending all “threatening behavior” toward its neighbors, including “its threats to destroy Israel, and its firing of missiles into Saudi Arabia and the UAE.”
4. Withdrawal of all Iranian forces from Syria.
5. Ceasing all Iranian support for Houthi rebels in Yemen
6. Releasing all citizens of the U.S. and U.S. allies who were “detained on spurious charges or missing in Iran.”

Of these points, Iran already had complied with the first. The second was a non-starter; America had tried and failed to persuade Iran of it during the JCPOA negotiations, and Iran had a right to such enrichment for peaceful purposes, namely, energy. The third through sixth points were reasonable, but far beyond the scope of a nuclear arms control agreement. Rather, they were the types of issues that could be agreed after trust had been developed through reciprocal compliance with the existing Deal. America’s withdrawal from it cut off the opportunity to engage in a positive course of dealing, turning the clock back to before July 2015.

Iran countered with a list of its own, calling on European powers to fulfill three conditions if Iran was to remain faithful to the JCPOA.

1. Protect its oil sales by continuing to purchase Iranian crude oil and NG. Second, Iran needed them to safeguard its trade payments through European banking system. Third, Iran did not want Britain, France, or Germany to try to negotiate with it on the non-nuclear matters demanded by America, namely, its ballistic missile program, or its military activities in the Middle East. Iran was thought to have the largest stockpile of short-range ballistic missiles in the Middle East. It would not give them up easily, especially not if it committed to foreswearing nuclear weapons. It also had a long list of proxies in the region upon whom it relied to advance its, and more generally, Shi‘ite, interests.

Iran’s list of negotiating points was far shorter, and appeared far more reasonable, than America’s list. Without the first and second points met, Iran saw no positive economic incentive not to resume high-grade Uranium enrichment. The third point perhaps was a
negotiable one: Iran, Britain, France, and Germany could agree on the first two, and commit to avoid discussions about ballistic missiles or regional military activities for a designated period, after which they could build on the success of the Deal toward an agreement on these matters.

So, the message from the Trump Administration to EU (and indeed all foreign) business was a zero-sum one: “If you do business with Iran, then don’t do business with America, and consider yourself liable to American sanctions.” In legal terms, the President issued the following directive:

The Secretary of State and the Secretary of the Treasury shall immediately begin taking steps to re-impose all United States sanctions lifted or waived in connection with the JCPOA, including those under the National Defense Authorization Act for Fiscal Year 2012, the Iran Sanctions Act of 1996, the Iran Threat Reduction and Syria Human Rights Act of 2012, and the Iran Freedom and Counter-proliferation Act of 2012. These steps shall be accomplished as expeditiously as possible, and in no case later than 180 days from the date of this memorandum. The Secretary of State and the Secretary of the Treasury shall coordinate, as appropriate, on steps needed to achieve this aim. They shall, for example, coordinate with respect to preparing any recommended executive actions, including appropriate documents to re-impose sanctions lifted by Executive Order 13716 of January 16, 2016; preparing to re-list persons removed, in connection with the JCPOA, from any relevant sanctions lists, as appropriate; revising relevant sanctions regulations; issuing limited waivers during the wind-down period, as appropriate; and preparing guidance necessary to educate United States and non-United States business communities on the scope of prohibited and sanctionable activity and the need to unwind any such dealings with Iranian persons. Those steps should be accomplished in a manner that, to the extent reasonably practicable, shifts the financial burden of unwinding any transaction or course of dealing primarily onto Iran or the Iranian counterparty.1061

In practice, the re-imposition of “all” sanctions obviously encompassed both:

1. Primary sanctions, those affecting any United States Person, American-owned or -controlled foreign entity, any person (regardless of citizenship or residency), and any property within the U.S.; and

2. Secondary sanctions, those affecting any non-United States Person who accesses the American market for goods, services, payments, investments, or other commercial transactions.

The U.S. clearly rejected the request of the EU (which was conveyed in a 4 June 2018 joint letter from the Foreign and Economic Affairs Ministers of France, Germany, the U.K., and

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1061 May 2018 Presidential Memoranda, Section 3. (Emphasis added.)
the High Representative of the EU, to the U.S. Secretaries of State and the Treasury) that the U.S. not enforce secondary sanctions against EU persons, and thus limit the extraterritorial effects of those sanctions.\footnote{1062} The U.S. also rejected EU requests (set out in the same letter) that the U.S. grant waivers to allow EU entities to maintain their automotive, banking and finance, civil aviation, energy, infrastructure, and other commercial relationships in and with Iran. Thus, re-imposition of “all” sanctions set the clock back to before July 2015, when the JCPOA was agreed.

To turn the clock back, that is, to implement the President’s 8 May 2018 decision to withdraw from the JCPOA and “snap back” the sanctions, on 27 June, OFAC took the following steps:\footnote{1063}

(1) Cancelled General License H (“GL H”), which OFAC had issued under the Iranian Transactions and Sanctions Regulations, and which allowed an American-owned or controlled foreign entity, such as a foreign subsidiary, to engage in limited commercial business in Iran (with the government of Iran, or any person subject to the jurisdiction of that government).\footnote{1064} OFAC revoked GL H, replacing it with an amendment to the ITSR requiring a wind down of transactions (which ended at 11:59 PM on 4 November 2018). So, the formal denial by the U.S. of the EU exemption request came on 14 July. See Iran Nuclear Deal: U.S. Rejects EU Plea for Sanctions Exemption, BBC News, 16 July 2018, www.bbc.co.uk/news/world-us-canada-44842723. See also U.S. Rejects Iran Request for French Exemptions as Reinsurer Scor Pulls Out, REUTERS, 13 July 2018, www.reuters.com/article/us-iran-nuclear-france/u-s-rejects-french-request-for-iran-exemptions-le-maire-tells-le-figaro-idUSKBN1K30TE (reporting that “Paris had singled out key areas where it expected either exemptions or extended wind-down periods for French companies, including energy, banking, pharmaceuticals and automotive,” but “[t]he United States ... rejected a French request for waivers for its companies operating in Iran that Paris sought after President Donald Trump imposed sanctions on the Islamic Republic”).

for example, if a non-U.S. entity owned by a U.S. parent knowingly engages in a forbidden transaction with Iran, the parent is subject to punishment.

(2) Cancelled “GL I,” which OFAC also had issued under the ITSR, and which was the exception to U.S. sanctions for civil aviation transactions, related parts, and servicing. Hence, U.S. persons (e.g., Boeing) no longer could engage in transactions relating to the export or re-export to Iran of commercial passenger aircraft, or enter into contingent contracts concerning the provision of parts and servicing to Iran Air.\(^{1065}\) Again, OFAC revoked GL I, replacing it with an ITSR amendment calling for a 90-day wind down period (which ended on 6 August).\(^{1066}\)

(3) Cancelled exceptions, with respect to the primary boycott, under which United States Persons could engage in transactions that are ordinarily incident to negotiations for a contract authorized by the *Iran Nuclear Deal*.

(4) Cancelled exceptions allowing for imports of carpets and foodstuffs from Iran, and exceptions that had allowed for provision of L/Cs and brokering services associated with imports of this merchandise (with a 90-day wind down period).\(^{1067}\) That is, in respect of the primary boycott, Persian carpets of Iranian-origin, and food (e.g., pistachios) from Iran, and related financial transactions (such as paying for those items), no longer could be imported into the U.S.

(5) Generally enjoined any “significant transaction” with Iran (explained below), with the possibility of imposing penalties on the owner of a subsidiary entity, regardless of the location of that owner. That is, for instance, an Indian owner of a Malaysian subsidiary engaged in a “significant transaction” is liable, under the secondary boycott.

(6) Forbade any “significant transaction” in and related to Iran’s energy sector. For example, all petroleum-related transactions with the NIOC, NICO, and NITC, such as buying petroleum, petroleum products, or petrochemical products from Iran were barred.

(7) Forbade any “significant transaction” in Iran’s automotive sector.

\(^{1065}\) *See 31 C.F.R. § 560.536.* OFAC had also issued Specific Licenses for aircraft transactions, and provided a “Statement of Licensing Policy for Activities Related to the Export or Re-export to Iran of Commercial Passenger Aircraft and Related Parts and Services” (JCPOA SLP), which it revoked.

\(^{1066}\) The distinction between the 90- and 180-day wind-down periods created confusion for some businesses. Whether a particular transaction had to be completed by 6 August or 6 November 2018 depended on the nature of the transaction, which in turn sometimes depended on distinctions such as whether a product to be exported to Iran was “semi-finished” or “finished.”

\(^{1067}\) *See 31 C.F.R. § 560.534-535.*
(8) Banned the direct or indirect sale, supply, or transfer to or from Iran of aluminum, steel, and other raw or semi-finished metals, plus coal and graphite.

(9) Banned non-financial service transactions with Iran, such as the provision of software for integrating industrial processes

(10) Prohibited shipping transactions, including with Iran’s port operators, shipping and shipbuilding sectors, and any dealings with IRISL, South Shipping Line Iran, or their affiliates;

(11) Barred financial service transactions involving Iran. For example, the government of Iran could not buy or acquire U.S. dollar banknotes, and buying, subscribing to, or facilitating the issuance of Iranian sovereign debt was illegal. Iran could not trade in gold and precious metals. No underwriting, insurance, or re-insurance services could be provided to Iran (for instance, for shipping vessels with goods destined to or coming from Iran). Also illegal were any “significant transactions” relating to buying or selling Iranian rials. Likewise, maintaining a significant rial-denominated account or funds outside Iran (such as in a bank in Dubai or Hong Kong) was illegal.

(12) Denied access to the international financial system, including through the Brussels, Belgium-based SWIFT payment messaging system. In respect of the secondary boycott, no foreign financial institution could deal with the Central Bank of Iran or any other Iranian bank identified in Section 1245 of the National Defense Authorization Act for Fiscal Year 2012 (NDAA). And, U.S. banks and other financial institutions, and foreign financial institutions, could not provide in the U.S. a correspondent account (e.g., nostro or vostro accounts) or a payable through account (i.e., granting a customer of a foreign financial institution payment privileges) for Iranian SDNs (discussed below).

(13) Blocked all interests in property in the U.S., or under the control of a U.S. person, of any person who has materially assisted Iran in buying or acquiring currency or precious metals (on or after 7 August 2018) or materially assisted NIOC, NICO, or CBI (on or after 5 November). Recall that a “blocking” sanction freezes all property and property interests subject to U.S. jurisdiction of the blocked person, as well as the property interests of any company in which the blocked person owns 50% or more (individually or in aggregate with another blocked person). They are distinct

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1068 This ITSR amendment is at 31 C.F.R. § 560.211(c). Conversely, with respect to the sale of real estate in Iran, OFAC amended the general license under 31 C.F.R. § 560.543, which permits sale of such real estate, to allow any individual who acquired that property before becoming a U.S. Person, or who inherited that property from a person in Iran, to engage in any transaction necessary and ordinarily incident to selling personal property in Iran, and to transfer the proceeds from that sale to the U.S.
from, and more restrictive than, menu-based sanctions, where the U.S. chooses one or more measures to impose on the target that significantly restrict the access of that target to the U.S. market.\(^{1069}\)

(14) Re-listed persons on the SDN List.\(^{1070}\) That is, over 700 persons (individuals, aircraft and other vessels, banks, oil exporters, shipping companies, and other entities) were re-designated (by 5 November 2018) as

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\(^{1069}\) The two types of sanctions are not mutually exclusive. For example:

On March 18, 2020, the State Department imposed menu-based sanctions on seven entities for “knowingly engaging in a significant transaction for the purchase, acquisition, sale, transport, or marketing of petrochemical products from Iran.” [See U.S. Department of State, Sanctions on Entities Trading in or Transporting Iranian Petrochemicals (Fact Sheet), 18 March 2020, www.state.gov/sanctions-on-entities-trading-in-or-transporting-iranian-petrochemicals/] That same day Treasury’s … OFAC also imposed a mix of menu-based sanctions and blocking sanctions on these same entities. [See U.S. Department of the Treasury, Office of Foreign Assets Controls, Counter Terrorism Designation; Iran-Related Designations, 18 March 2020, www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20200318.aspx.] The sanctioned entities include one South African company, SPI International Proprietary Limited …, three Hong Kong-based companies; and three Chinese companies. State and Treasury also sanctioned two other companies that “own or control SPI” and had knowledge of its activities, as well as three individuals who serve as executives for the sanctioned companies. While less restrictive than blocking sanctions, menu-based sanctions significantly limit a person’s U.S. market access. Blocking sanctions freeze all property and interests of property subject to U.S. jurisdiction of blocked persons, as well as the property interests of companies in which blocked persons own 50% or more, individually or in the aggregate with other blocked persons.

…

- These actions show an increasing willingness by State and Treasury to impose secondary sanctions on companies outside of Iran that aid Iran’s sales of petroleum and petrochemicals, including Chinese companies and companies based in the jurisdiction of U.S. allies.
- They also represent a continuation of the U.S. government’s focus on the maritime sector. Over the last 18 months, the U.S. government has steadily increased pressure on all maritime actors, with a series of designations, advisories, enforcement actions, and public statements all targeting the sector. …
- These designations highlight the potential risks even for those companies with no exposure to Iran. As the United States continues to designate vessels, owners, and managers, it is having an increasing effect on non-Iran related trade, particularly in Asia. Companies that are transacting with these counterparties (e.g., as ship manager for a vessel trading in Southeast Asia) must now evaluate whether a continued relationship is permissible.


\(^{1070}\) This ITSR amendment removed what was called the non-SDN List (of blocked persons who qualified as “Government of Iran” or “Iranian financial institution,” and had been removed from the SDN List) under Executive Order 13599. The SDN List for Iran is published at U.S. Department of the Treasury, Resource Center, Counter Terrorism Designations; Iran Designations, 10 May 2018, www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20180510.aspx. It also is contained in JCPOA, Annex 2, Attachment 3.
SDNs, including NITC, IRISL, South Shipping Line Iran, and Bank Melli Iran.

Succinctly put, the primary boycott meant any U.S. Person, and any non-U.S. Person owned or controlled by a U.S. Person, was “prohibited from conducting virtually all Iran-related activity without a license.”\(^{1071}\) And, absent a waiver (discussed below) the secondary boycott applied to any non-U.S. Person conducting any one or more of a vast array of transactions “with sanctioned persons (e.g., Iranian persons on the SDN list) and Iranian industries (e.g., petroleum, petrochemicals, energy, shipping, shipbuilding, precious metals, etc.).”\(^{1072}\) The full force of the sanctions – a complete primary and near-total secondary boycott of Iran, and re-imposition of all sanctions that had been suspended or waived since the JCPOA was implemented in January 2016 – took effect on 5 November 2018.

The sanctions (as discussed in separate Chapters) included more than doing business in the U.S. (e.g., importing goods into America). They were menu-based, and included a sanctioned entity from obtaining any U.S. government procurement contracts or Export-Import Bank funding, transferring funds among financial institutions subject to U.S. jurisdiction (e.g., making a payment through the offshore branches of two American banks, or getting an L/C from such a branch), getting a license required for a transaction (e.g., shipping an item subject to U.S. export controls). They also included the denial of visas to officials of the sanctioned entity to enter the U.S. and, of course, the freezing of assets in the U.S. of that entity. And, U.S. persons could be barred from investing in or lending in that entity, thus denying it a vital source of funding. Note again the scope of these sanctions. They applied both directly through the primary boycott, and indirectly through the secondary boycott.

The Trump Administration appeared to opt not to impose sanctions on EAR 99 items, that is, exports to Iran of certain items “intended to benefit the Iranian people,” such as telecommunications items, food, medical devices, and medicines. But, the message sent and the message heard were not the same. The message the EU heard was one of power:

“Trump despises weaklings,” EU Budget Commissioner Guenther Oettinger said on Germany’s Deutschlandfunk radio. “If we back down step by step, if we acquiesce, if we become a kind of junior partner of the U.S., then we will be lost.”\(^{1073}\)

British Foreign Secretary Boris Johnson nailed his American counterpart’s ideas, particularly “a new jumbo Iran negotiation,” as utterly unrealistic.\(^{1074}\)

\(^{1071}\) United States Reinstates.

\(^{1072}\) United States Reinstates.

\(^{1073}\) Quoted in EU Hardens.

If you try now to fold all those issues – the ballistic missiles, Iran’s misbehavior, Iran’s disruptive activity in the region, and the nuclear question – if you try to fold all those into a giant negotiation, I don’t see that being very easy to achieve, in anything like a reasonable timetable.1075

Moreover, if the EU could not protect its commercial interests, which included transactions with Iran, against what it perceived as American bullying, then all its claims to multipolarity, i.e., that the world no longer was unipolar, was empty rhetoric.

Nevertheless, America vowed “relentless” pressure on Iran until it changed its behavior.1076 With his State Department calculating that Iran had spent $16 billion to support its terrorist proxies and Syrian President Bashar Hafez Al Assad (1965-, President, 2000-), Secretary Pompeo intoned: “The Iranian regime has a choice: it can either do a 180-degree turn from its outlaw course of action and act like a normal country, or it can see its economy crumble.”1077 However, the U.S. said it was not seeking regime change in Tehran or Qom.1078 Was that assurance disingenuous, in that America called on Iran to alter its “revolutionary course,” knowing full well Islamic revolutionary principles and the Islamic Revolutionary Guard Corps-Quds Force were the distinctive features of the regime?

For Iran, the message showed America was “regressing to old habits,” and “a prisoner of its ‘failed policies,’” and “would suffer the consequences.”1079 Iranian President Hassan Rouhani (1948-, President, 2013-) asked rhetorically:

Who are you to decide for the world?” … Last year, we promised that we wouldn’t return back to the way things were and we didn’t. But today, a government is in office in the United States that returned their country fifteen years back overnight and is repeating the same words of 2003 and 2004….1080

Iran realized America’s withdrawal from the July 2015 JCPOA and re-imposition of the pre-Deal sanctions essentially drove the P5+1, along with India, into the arms of Iran, and

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1075 Quoted in U.K. Slams.
1077 Quoted in U.S. Vows “Relentless” Pressure.
1078 For an argument that the U.S. indeed should seek regime change in Iran, albeit not by an outright military invasion of Iran, but rather by “contrib[ing] to conditions that make … [its] demise possible,” see, e.g., Eric Edelman & Ray Takeyh, The Next Iranian Revolution – Why Washington Should Seek Regime Change in Tehran, 99 FOREIGN AFFAIRS number 3, 131-145 (May/June 2020) (stating that because Iran’s theocrats never will change their behavior, as their regime is “a revolutionary movement that will never accommodate the U.S.,” “regime change is not a radical or reckless idea, but the most pragmatic and effective goal for U.S. policy toward Iran – indeed, it is the only objective that has any chance of meaningfully reducing the Iranian threat.”).
1079 U.S. Vows (quoting Iranian Foreign Minister Javad Zarif).
cast doubt on whether the secondary boycott would be comprehensive and, therefore, effective. President Rouhani promised Iran “will proudly break the sanctions” and “continue selling oil.” With over 20 countries slashing their oil purchases (as of November 2018), and more than 100 MNCs pulling out of Iran, he faced long odds to keep that promise.\footnote{1081}

Notably, Iran sued the U.S. in the ICJ, claiming America’s withdrawal breached the 1955 Treaty of Amity, Economic Relations and Consular Rights between the two countries.\footnote{1082}

II. Illustrative Transactions in Jeopardy

- **Energy**

  The cross-border commercial transactions been struck after the removal of sanctions under the JCPOA, but jeopardized by the Trump Administration’s moves, were significant.\footnote{1083} Some deals already were suspended, for instance, the largest Polish gas firm, shelved its gas project in Iran. Many other transactions were in peril, including in the

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\footnote{1081} See U.S. Vows “Relentless” Pressure.

\footnote{1082} See Toby Sterling, Iran Files Suit in International Court Against U.S. Over Sanctions, REUTERS, 17 July 2018, www.reuters.com/article/us-iran-nuclear-usa-sanctions/iran-files-suit-against-u-s-sanctions-at-world-court-idUSKBN1K71WU. Even if the ICJ had jurisdiction, and the U.S. lost the case, the fact the ICJ has no ability to enforce its decisions (unlike the DSB) suggested the U.S. would ignore such an outcome.

The U.S. indeed did lose the case, Alleged Violations of 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States), the first one in the history of the ICJ concerning so-called “economic warfare.” Iran successfully argued to the 15-judge ICJ that America’s re-imposition of sanctions violated their bilateral 1955 Treaty (3 October 2018), plus was unjustified because the IAEA repeatedly certified Iran’s compliance with the July 2015 Nuclear Deal. (The 33-page Treaty is posted at www.state.gov/documents/organization/275251.pdf, and the 29-page decision at www.icj-cij.org/files/case-related/175/175-20181003-ORD-01-00-EN.pdf.) Though the ICJ rejected Iran’s calls for America to terminate all sanctions compensate Iran for revenues lost owing to the sanctions, the Court ordered the U.S. to “remove, by means of its choosing, any impediments arising from the measures on 8 May [2018] to the free exportation to the territory of the Islamic Republic of Iran” of humanitarian goods (e.g., agricultural commodities and food, civil aviation safety equipment, including spare parts and services, and medicine and medical devices. Though the Treaty grants the ICJ jurisdiction in the event of disputes, the U.S. argued Iran’s claims were outside the purview of the Treaty, and in any event the U.S. withdrew in 1986 in connection with Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (27 June 1986)) its recognition dating from 1946 of the ICJ’s compulsory jurisdiction. The U.S. responded to the decision by withdrawing from the Treaty. The U.S. also cast the decision as a loss for Iran, because the U.S. already allowed exceptions, and issued authorizations and licenses, for humanitarian purposes. See U.S. to End Treaty of Amity with Iran After ICJ Ruling, BBC NEWS, 4 October 2018, www.bbc.com/news/world-middle-east-45741270. See International Court of Justice Orders U.S. to Ease Iran Sanctions, BBC NEWS, 3 October 2018, www.bbc.com/news/world-middle-east-45729397.

\footnote{1083} See U.S. Vows; Factbox: Company Deals at Risk from U.S. Sanctions on Iran, REUTERS, 18 May 2018, www.reuters.com/article/us-iran-nuclear-economy-deals/factbox-company-deals-at-risk-from-u-s-sanctions-on-iran-idUSKCN1I1J2HS. Even if transactions might go forward, their value and volume likely would diminish. For example, Outotec, a Finnish mining technology company, said it expected orders from Iran to diminish thanks to the American sanctions against Iran. See id.
sector most vital to Iran’s economic growth and development – energy, as oil exports alone accounted for 60% of Iran’s national income.\footnote{Parisa Hafezi, Iran’s Rulers Face Discontent as U.S. Pressure Mounts, REUTERS, 29 June 2018, www.reuters.com/article/us-iran-politics-protests-analysis/irans-rulers-face-discontent-as-u-s-pressure-mounts-idUSKBN1JP20H. [Hereinafter, Iran’s Rulers Face.] A separate estimate put the contribution of oil exports to Iran’s revenues at 70%. See Jonathan Saul & Parisa Hafezi, Iran’s Oil Tanker Fleet Being Squeezed as Sanctions Bite, REUTERS, 13 March 2019, www.reuters.com/article/us-iran-sanctions-tankers-insight/iran-hunts-for-more-ships-to-keep-its-oil-flowing-idUSKBN1QU0KM. [Hereinafter, Iran’s Oil Tanker.]}   

(1) In November 2016, the France’s Total, became the first major energy company to sign a significant deal in Iran, agreeing to a majority stake in a JV with China’s largest oil and gas company, the SOE, CNPC, to develop the largest NG field in the world – South Pars. The deal was worth up to $5 billion, but absent grant by the U.S. of a waiver from sanctions, Total said it would leave the project. Another French energy company, the gas and power group, Engie, said it would terminate its engineering contracts in Iran.  

(2) Also, in November 2016, Norway’s DNO, an oil and gas company, became the second major Western energy firm to sign a prominent deal with Iran. DNO agreed to study the development of the Changle oilfield in western Iran. In October 2017, Norway’s Saga Energy had a $3 billion deal to construct solar power plants in Iran.  

(3) In June 2017, Italy’s Eni signed an agreement with Iran to study the feasibility of developing an oil and gas field in Iran.  

(4) In February 2018, India’s Oil and Natural Gas Corp. Ltd. signed an initial non-binding agreement with an Iranian firm to develop Susangerd, an oilfield in southern Iran.  

(5) Several companies had MOUs with Iran in the energy sector, all of which were at risk from the renewal of sanctions. Examples included: (1) Austria’s OMV, which in May 2016 signed an MOU for energy projects in Zagros (western Iran) and Fars (southern Iran), and in June 2017 joined Russia’s Gazprom Neft in an MOU on oil sector development; (2) Germany’s BASF (specifically, its Wintershall unit), in April 2016, signed an MOU with the National Iranian Oil Company, for oil and gas exploration (3) Italy’s Saipem, which in 2016 signed MOUs with Iran to develop pipelines, modernize refineries, and develop the Tous NG field (in Korasan Razavi, in northeast Iran); and (4) Korea’s Daewoo Engineering and Construction, which in 2015 signed an MOU to build an oil refinery in Bandar Jask (the southern coast of Iran); (3) Norway’s Aker Solutions, which in May 2016 signed an MOU to upgrade Iran’s oil industry.  

Energy was not the only sector in which post-July 2015 transactions were in peril.
Shipping

In shipping, Denmark’s Maersk, the largest container shipping firm in the world, responded to the Trump Administration moves by declaring it would wind down its dealings with Iran. Likewise, France’s CMA CGM, which boasts the world’s third largest shipping container fleet accounting for over 11% of global capacity, said it no longer would carry cargo to or from Iran.\textsuperscript{1085} Both giants had significant exposure to the U.S. and did not want their American carriage operations affected by sanctions. Korea’s Daewoo Shipbuilding and Marine Engineering Co. signed in December 2016 a preliminary agreement with Iran for a JV to build a shipyard in Iran, but thereafter the deal went nowhere.\textsuperscript{1086}

Predictably, following America’s re-imposition of sanctions in November 2018, Iran relied on its own tankers to transport oil. But, Iran needed to use about 12 (as of March 2019) of its more-than-50 oil tankers for floating storage, that is, for storing within Iranian waters unsold crude oil, because of its limited onshore storage capacity.\textsuperscript{1087} Moreover, Iran’s entire fleet was aging (thanks in part to decades of sanctions), with 16 of its tankers at least 19 years old, and three in service since 1996.\textsuperscript{1088} Potential sellers of new vessels, as well as potential flag registry countries, were wary of doing business with Iran for fear of violating the American sanctions. Iran tried but failed to buy 10 new supertankers (each of which could carry up to two million barrels of oil) from South Korea; networks (e.g., in Greece, a center for second-hand ship transactions) that had helped Iran buy vessels in the past (when sanctions applied between 2012 and 2016) had been blacklisted by the U.S. for sanctions violations, and no seller wanted to bring scrutiny onto itself.\textsuperscript{1089}

Panama, the leading commercial ship flag country in the world, removed 21 Iranian vessels from its registry, thus compelling Iran to flag those ships with Iran’s flag. Between January-July 2019, Panama delisted another 55 Iranian-owned tankers.\textsuperscript{1089} Along with three de-listings by Togo and one by Sierra Leone, the cumulative effect was that most of Iran’s operational fleet of oil cargo vessels had been de-flagged from traditional registries. That, in turn, caused shipping insurance companies to avoid writing policies – insurers


\textsuperscript{1086} See Iran’s Oil Tanker.

\textsuperscript{1087} See Iran’s Oil Tanker.

\textsuperscript{1088} For a review of Iran’s fleet “going dark” (that is, turning off transponders) so as to minimize detection in carrying and off-loading Iranian-origin oil, and varying estimates as to how much oil Iran is able to export given the “maximum pressure” American campaign, see Grant Smith, Iran’s Dark Fleet of Tankers Poses Oil Market’s Biggest Mystery, BLOOMBERG, 8 September 2019, \url{www.bloomberg.com/news/articles/2019-09-07/iran-s-dark-fleet-of-tankers-poses-oil-market-s-biggest-mystery}.

\textsuperscript{1089} See Jonathan Saul, Parisa Hafezi & Marianna Parraga, Flags of Inconvenience: Noose Tightens Around Iranian Shipping, REUTERS, 26 July 2019, \url{www.reuters.com/article/us-mideast-iran-tanker-flags-insight/flags-of-inconvenience-noose-tightens-around-iranian-shipping-idUSKCN1UL0M8}. [Hereinafter, Flags of Inconvenience.]
would violate the sanctions if they insured Iranian-flagged vessels. So, Iran had to self-insure its flagged vessels, and flag them itself, or find alternatives to the likes of Panama to do so. Moreover, banks refused to handle payments for Iranian crude oil, again because of the sanctions, and their refusal was another impediment to obtaining insurance.

- **Illegally Evading Shipping Sanctions?**

Iran allegedly made dubious adjustments to prevent its shipping operations from being asphyxiated. Reportedly, tankers secretly took on Iranian oil. This subterfuge involved turning off the Automatic Identification System (AIS, i.e., the location transponder on a ship that allows for a ship’s location and course to be charted), engaging in ship-to-ship transfers, falsifying shipping documents, and changing the name of a ship. In early 2019, Grace 1 (a 300,000 ton, Panamanian-flagged supertanker, managed by a Singapore-based shipping services firm, I Ships Management Pte Ltd), appeared to have used such techniques to transport oil from Iran to Asia.

Those ships were said to contain Iraqi oil loaded at Iraq’s port of Basra, but the pertinent documents, namely, the Certificate of Origin (COO), apparently were forged. Grace 1 supposedly took on fuel oil (which, unlike crude oil for eight Asian countries, below, was not subject to a temporary waiver of U.S. sanctions, discussed below) between 10-12 December 2018. The loading schedules for the Basra Port do not list the Grace 1 as being at that Port on those dates.

Apparently, Grace 1 turned off its AIS between 30 November and 14 December 2018, hence its location could not be tracked, and thereafter re-surfaced 500 kilometers south of Iraq, near the Iranian Port of Bandar Assaluyeh with a fully-loaded cargo of fuel oil (evident because its draught indicated it was sitting deeply in the water). Possibly, Grace 1 had stopped in Iranian waters off this port for repairs to damaged diesel generators. But, between 16-22 January 2019, Grace 1 transferred its cargo – roughly 284,261 tons of fuel oil allegedly from Iraq – to two smaller vessels off the coast of Fujairah (one of the Emirates of the UAE): the 130,000-ton Kriti Island (managed by Greece’s Avin International SA, and chartered by Singapore-based Blutide Pte Ltd for a Fujairah-to-Singapore voyage), and the 130,000-ton Marshall Z (the owner and charterer of which were indeterminate). Those vessels sailed to Asia.

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1090 See *Flags of Inconvenience* (reporting: “When a vessel loses its flag, it typically loses insurance cover if it does not immediately find an alternative, and may be barred from calling at ports. Flags of convenience also provide a layer of cover for a vessel’s ultimate owner.”).

1091 See *Iran’s Oil Tanker*.


1093 See *How Iranian Fuel Oil*.

The Kriti Island offloaded its cargo between 5-7 February 2019 in Singapore. The COO supposedly had been certified by Iraq (and Avin believed it to be authentic). Iraqi authorities said it was false: it had contradictory dates (a 10-12 December 2018 loading period but a 12 January 2019 transactional sign-off date), and was signed by an official who did not work at the Port of Basra. The Marshall Z sailed for Singapore, but on 15 February changed course and headed to West Malaysia, where it stopped offshore and on 25 February transferred its cargo to another vessel, Libya (owned and managed by the Tripoli-based General National Maritime Transport Company of Tripoli, Libya, and chartered by Blutide). The COO for fuel oil transported by the Marshall Z showed the cargo came from Iraq, and was loaded in UAE waters on 23 January via a ship-to-ship transfer, but this Certificate, too, appeared to be forged.

**Aviation**

In aviation (wholly apart from deals America’s Boeing had struck in December 2016 to sell 80 aircraft, including 15 777 long-range jets to Iran Air, and in April 2017 to sell 30 737 jets to Iran’s Aseman Airlines), the EU’s Airbus had in December 2016 agreed to sell 100 jets to Iran Air. It had delivered three by May 2018, but delivery of the remaining 97 were in doubt. Germany’s Lufthansa put off further negotiations with Iran Air, which dated from April 2017, to provide catering, maintenance, and pilot training services. Airbus also had a June 2017 MOUs with Iran’s Airtour to sell it 45 A320 aircraft, and with Iran’s Zagros Airlines to sell it 20 A320 and eight A330 aircraft. And, Airbus (in a 50-50 JV with Leonardo owning a European turboprop manufacturer, ATR) had an April 2017 deal to sell 20 turboprop aircraft to Iran.

**Railways**

In railways, there were several significant 2016-2017 deals: in October 2016, Germany’s Siemens signed a contract to modernize Iran’s railway network, including to supply components for 50 diesel-electric locomotives; in May 2017, China’s National Machinery and Export Corporation agreed to electrify a high-speed line between Tehran and Mashhad (a deal worth € 2.2 billion); in July 2017, Italy’s Ferrovie dello Stato agreed to construct a high-speed line between Qom and Arak (worth € 1.2 billion); and in July 2017, France’s Alstom agreed to a JV to build metro and suburban rail carriages in Iran.

**Automotive**

Likewise, in the automotive sector, in May 2017, France’s PSA (Peugeot) entered into a contract (worth $768 million) to produce vehicles in Iran (and already in 2016 had sold 444,600 units). In June 2018, it said it was exiting Iran. Another major French auto deal was in peril: Renault in August 2017 had entered into a JV to establish an engineering and purchasing center to help local suppliers, and to expand its existing Iran-based production capacity of 200,000 vehicles annually with a new factory with an annual
150,000-unit production capacity; in July 2017. But, in August 2018, Renault suspended its plans to invest in Iran.\footnote{1095}

Transactions with non-French auto companies were at risk, too. Germany’s Volkswagen had agreed to re-enter the Iranian market, via exports, after an absence of 17 years, and Mercedes-Benz in September 2017 signed a contract to resume distribution of trucks in Iran. Daimler (parent to Mercedes) declared in August it “ceased our already restricted activities in Iran in accordance with the applicable \textit{[i.e., American] sanctions}.”\footnote{1096} Switzerland’s Autoneum, which makes heat and sound shields for cars, had agreed in December 2017, to license production to an Iranian auto parts supplier (Ayegh Khodro Toos) of carpets, floor insulators, and inner dashes, for sale to car manufacturers in Iran (IranKhodro and France’s PSA). This deal, too, seemed unlikely to proceed.

\begin{itemize}
  \item \textbf{Services}

  Transactions with Iran in services, as well as goods were in peril. The banking sector illustrate the threats of America re-imposing the secondary boycott. Germany’s Oberbank had a September 2017 deal to finance new businesses in Iran, but generally banks (including global giants like HSBC) said they would avoid any new business with Iran, and some (such as Germany’s DZ bank) said they would suspend all financial transactions with Iran. Likewise, in health care, Denmark’s Novo Nordisk agreed in September 2015 to a 70 million factory investment in Iran to make insulin, and to boost its Iran-based staff from 130 to 290, thanks to the exception from sanctions for medicines. Whether it could continue to do business, much less export drugs in light of restrictions on technology transfer and payments, was uncertain.

  \item \textbf{Sports}

  Even sports were not immune. Iran’s football team qualified for the World Cup 2020, hosted in Moscow. Nike informed the team it no longer could provide shoes for the team, owing to the sanctions.\footnote{1097} (The team did not advance to the round of 16.)
\end{itemize}

\section*{III. EU Counters American Sanctions, Model for India?}

What could the EU do to protect its companies from the long-arm of America’s extraterritorial sanctions? Blocking legislation (discussed below), ironically akin to the U.S. law that forbids American businesses from complying with the Arab boycott of Israel, was an option for the EU. The EU also encouraged its businesses to avoid the U.S. payments system by invoicing transactions in non-dollar currencies, such as the Euro. India had similar – indeed, strong – incentives to find legal ways to escape the American sanctions.\footnote{1098}

\begin{footnotesize}
\footnote{1096 \textit{Quoted in Trump Says Firms}.}
\end{footnotesize}
secondary boycott of Iran. After China, India was the largest importer of oil from Iran in Asia (with about 700,000 bpd and 550,000 bpd, respectively, between November 2017-April 2018). That is, of the approximately 2.2 million bpd total oil exports from Iran, about 50% go to China and India combined.\footnote{See Lesley Wroughton, Mnuchin Says U.S. to Consider Waivers on Iran Sanctions, REUTERS, 16 July 2018, www.reuters.com/article/us-usa-iran-mnuchin/mnuchin-says-u-s-to-consider-waivers-on-iran-sanctions-idUSKBN1K61HT.} Interestingly, unlike India, China has never faced an oil crisis. During the 1973 and 1979 Arab Oil Embargos, China was self-sufficient in oil, but with its tremendous economic growth thereafter, it became reliant on oil imports.

The EU vowed its businesses should not be penalized for the petulant, pugilistic behavior – or, as European Council President Donald Tusk (1957-, President, 2014-) put it, “capricious assertiveness”\footnote{Quoted in EU Hardens.} – of the Trump Administration that appeared designed not for nuclear arms control, but rather to settle old scores with Iran and bring about regime change in Tehran and Qom.\footnote{See Jonathan Marcus, Iran Sanctions: Does U.S. “Plan B” on Iran Risk War?, BBC NEWS, 21 May 2018, www.bbc.com/news/world-us-canada-44202587 (reporting the possibility that “the Trump Administration is more eager to follow National Security Adviser John Bolton’s line, which has long been to foment regime change in Tehran” than to pursue a new nuclear agreement with Iran; note Mr. Bolton, a self-described conservative in the tradition of Barry Goldwater (1909-1998), served as an Under Secretary of State from 2001-2005, and U.N. Ambassador from 2005-2006, for President George W. Bush).} The EU had witnessed such inside-the-Washington, D.C. irrationality before, following the 9-11 terrorist attacks, when the Administration of George W. Bush (1946, President, 2001-2009) falsely accused Iraq’s Saddam Hussein (1937-2006, President, 1979-2003) of harboring WMDs. The March 2003 American-led invasion did change the regime in Baghdad. But, it wrecked Iraq, unsettled the Middle East, inflicted an unimaginable and unnecessary human cost (to military and civilians alike), and – by wiping out the main counterbalance to Iran, namely, Mr. Hussein, ironically left a vacuum the Iranians filled. The influence of Iraqi Shi‘ite cleric Muqtada al Sadr (1974-) was one example of that influence. This time, said the EU, there was simply “no alternative” to the \textit{JCPOA}.\footnote{EU Hardens.}

So, while the P5+1 had complied with the pre-\textit{Deal} secondary boycott, and understood that sanctions pressure pushed Iran to the bargaining table to agree to the \textit{Deal}, they were unwilling to go along with a renewal of the boycott.\footnote{U.S. Vows (quoting EU Foreign Minister Federica Mogherini).} As Bloomberg reported, “Europe’s mood is shifting from shock at Trump’s ‘America First’ agenda to a resolve to close ranks and assert its own position.”\footnote{EU Hardens.} The EU considered what practical, lawful measures it could take to shield EU businesses from the extraterritorial reach of America’s secondary boycott of Iran, and adopted them.
In particular, the EU adopted five measures, thus setting an example for all countries outside the P5+1, including India, which disagreed with American policy toward Iran.1104

(1) Measures to ensure Iran’s energy industry remains viable

The EU promoted sectoral cooperation, particularly with respect to energy. For example, the EU supported companies that preserve existing, and/or entered into new, MOUs and contracts with Iranian counterparts, for investment to modernize Iran’s oil and gas industries, and purchase petroleum and NG products. EU backing included possibilities such as providing lines of credit to companies that transact with Iran, and/or insuring them against losses, and assisting SMEs. Another option was the promotion of Special Purpose Vehicles (SPVs) through which to engage in transactions with Iran, i.e., entities that would have a special ring-fenced legal status and/or enjoy unique privileges and immunities, and insulate EU companies from liability for breach of American sanctions.

(2) Facilitating EIB Financing

The EU removed obstacles from EIB operation in Iran. Specifically, the EU authorized the EIB to decide whether to finance activities beyond the EU. That way, the EIB could support FDI in Iran, which might be especially helpful for SMEs.

(3) Payments System

The EU promoted one-off bank transfers to the CBI that would allow Iran to receive proceeds from its sales of oil and NG. The specific payments mechanism was a direct link between EU companies and the CBI, with transactions settled in euros, thus avoiding the Fedwire – the wire transfer network of the Federal Reserve System, whereby dollar-denominated transactions ultimately clear and settle on the electronic books of the Federal Reserve Bank of New York.

(4) Special Purpose Vehicle

The EU sought to establish a SPV as an alternative – legal – mechanism to make payments for purchases (in non-dollar currencies, and by barter, and not using U.S. banks) of goods from Iran, and thus a means to avoid the

secondary boycott. However, EU countries were hesitant to host the SPV, for fear the U.S. would sanction it, and them. Thus, the EU failed to get the SPV up and running by 5 November 2018, when the U.S. completed re-imposition of all sanctions, and pushed out the start date into to 2019.

Set up by France, Germany, and the U.K., and known as “Instex,” the SPV finally came into being in January 2019. The SPV was registered in France, run by Germany, and designed to satisfy the standards of the Paris-based Financial Action Task Force (FATF) concerning legitimate financing. Belgium, Denmark, Finland, Netherlands, Norway, and Sweden later joined Instex. But, Instex took months thereafter to become operational (and was not so until 29 June 2019). Instex focused on “‘legitimate trade’ in goods ‘where the immediate need of the Iranian people is greatest,’ for example food, pharmaceutical products and consumer goods not subject to sanctions.” But, Instex did not clear and settle transactions in the main source of FX revenues for Iran, oil, hence it did little to blunt the impact of U.S. sanctions. Thus, Instex, which never was registered as a bank, did not even develop into a payments netting mechanism for broad-based imports and exports involving Iran. It was little else than a database to match proposed importers and exporters.

Moreover, the U.S Treasury Department threatened Instex and its sponsors with sanctions, namely, the SPV and any party (e.g., a government or government official or staff, or business or business person or staff)

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1106 See Sabine Siebold & Francois Murphy, Iran Has Accelerated Enrichment of Uranium, IAEA Says, REUTERS, 10 June 2019, www.reuters.com/article/us-iran-nuclear-eu/german-minister-upbeat-on-iran-trade-vehicle-before-rouhani-talks-idUSKCN1TB0IT [hereinafter, Iran Has Accelerated.]


1109 Iran Oil.

1110 See Golnar Motevalli & Josh Wingrove, Trump Warns Iran After Rouhani Threat to Enrich More Uranium, Bloomberg, 3 July 2019, www.bloomberg.com/news/articles/2019-07-03/iran-tells-eu-comply-with-deal-or-nuclear-reactor-is-restored (reporting “Iranian officials say that to be effective it needs to be accompanied by a mechanism to skirt American sanctions on purchases of Iranian oil,” whereas “Instex is intended mainly to facilitate trade of basic goods such as food and medical products, but not the oil sales that are Iran’s lifeline and a main target of the sanctions”).

1111 See Affaki.
associated with it might lose access to the American financial system. The U.S. was concerned that shareholders of the Iranian institution – the Special Trade and Finance Instrument – that France, Germany, and U.K. designated to work with Instex were associated with entities already subject to U.S. sanctions. This attenuated “guilt by association” apparently was enough grounds for the Treasury Department to justify extending sanctions to Instex and its promoters. Besides, the U.S. argued, there was no need for Instex with respect to humanitarian and medical products, as these items were exempt from sanctions. Undeterred, seven other EU nations countered (on 29 June) with pledges of support to France, Germany, and the U.K. to make Instex work and thereby keep Iran in the JCPOA notwithstanding America’s May 2018 withdrawal from the Nuclear Deal.(5)

(5) Blocking Statute

Via a Blocking Statute, protecting EU companies that transact with Iran through three specific legal devices: (a) making it illegal for them to comply (directly, or indirectly through a subsidiary or intermediary) with the American secondary boycott of Iran, (b) not recognizing or enforcing in EU courts any foreign court judgment or administrative decision that gives effect to the American sanctions, and (c) giving EU companies the right to recover damages they suffer from the sanctions from any person (natural or legal), or other entity, or any intermediary, causing those damages, possibly via the seizure and sale of assets of that person, entity, or intermediary (including, for instance, shares held in a company incorporated in the EU).

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1113 With respect to the U.S.-approved mechanism for humanitarian assistance to Iran, see U.S. Department of the Treasury, Press Release, Treasury and State Announce New Humanitarian Mechanism to Increase Transparency of Permissible Trade Supporting the Iranian People, 25 October 2019, https://home.treasury.gov/news/press-releases/sm804. The mechanism is “designed solely for the purpose of commercial exports of humanitarian goods to Iran, can be used by U.S. persons and U.S.-owned or -controlled foreign entities, as well as non-U.S. entities,” and “require[s] foreign governments and financial institutions … to conduct enhanced due diligence and provide to [the Department of the] Treasury a substantial and unprecedented amount of information, with appropriate disclosure and use restrictions, on a monthly basis, as described in guidance provided by OFAC outlining specific requirements.” Id. Further, the mechanism “includes a number of safeguards to prevent any sanctionable dealings with persons on OFAC’s” SDN list who “have been designated in connection with Iran’s support for terrorism or WMD proliferation,” and “[i]f foreign governments or financial institutions detect potential abuse of this mechanism, … they must immediately restrict any suspicious transactions and provide relevant information to Treasury.” Id. Assuming “financial institutions commit to implement these stringent requirements,” then the Departments of the Treasury and/or State will certify in writing their compliance.

1114 See Iran Risks Rift.
That is, to minimize the damaging extraterritorial effects of certain U.S. sanctions, the EU’s *Blocking Statute* essentially prohibits EU companies from complying (directly or indirectly via subsidiaries or intermediary persons) with the laws listed in the statutory Annex. Compliance with those U.S. sanctions is subject to a notification and approval process involving the Commission and the national authorities of the member states.

The EU had not used its *Blocking Statute* since 1996, in response to U.S. secondary boycotts against Cuba under the *Helms-Burton Act*, as well as Iran and Libya. The Clinton Administration waived sanctions, rendering enforcement of the *Blocking Statute* unnecessary. On 6 June 2018 (two days after the U.S. received the joint letter, referenced above, requesting the U.S. not to enforce the secondary boycott against the EU), the EU resurrected this Statute, and updated the list of sanctions (naming the specific American laws) the U.S. imposed on Iran that the EU blocked (in effect, matching each such sanction with a blockage).

Obviously, the EU sought to minimize the extent of damage to its companies caused by the extraterritorial application of American sanctions.

Alas, the EU did not revise its *Blocking Statute* to include an enforcement mechanism. To be sure, a company complying with American sanctions against Iran could face fines and criminal liability under that Statute. But, the EU left it to individual EU member states to decide whether to put the screws, as it were, to businesses facing the devil’s choice of compliance with U.S. sanctions and defiance of the Statute, or vice versa. Individual member states might be more or less vulnerable to pressure from the U.S. government and/or MNCs as to how rigorously they enforce the Statute in defiance of American policy toward Iran.

Might private parties “enforce” the EU *Blocking Statute*? One law firm raised this prospect:

what could give the situation an interesting twist is if “enforcement” initiatives come from private parties, that is, if business partners of companies that abide by the U.S. Iran Sanctions were to start damages actions across the EU. Imagine a service or parts provider that has entered into a contract with a multinational concerning an oil and gas business project in Iran. Assume further the multinational now pulls out of the Iran project because of the U.S. sanctions and voids the contract with the service or parts provider. Under the *Blocking Statute*, the latter could claim damages.

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against the multinational. Similarly, banks could be subject to damages actions in the EU, for example, if they refuse to do business in the EU with (legal) persons that are denied parties under the U.S. Iran Sanctions, but not under the EU’s Sanctions Regime. In particular, EU subsidiaries of U.S. companies may be the target of such damages actions.\footnote{International Firms Caught.}

The possibility of such enforcement, through private sector damage claims, certainly added to the uncertainty surrounding re-imposition of sanctions.

That said, EU-style blockage was a possible strategy for other countries that disagreed with the U.S. JCPOA withdrawal. India could adopt all such measures. For example, the RBI could construct a similar rupee-denominated payments system for all Indo-Iranian transactions. Companies would pay in rupees to an RBI account, which would wire funds to the CBI, or pay directly to the CBI through an account they maintain with the CBI. Indeed, in December 2018, India did so.\footnote{India Inks Pact With Iran to Pay For Crude Imports In Rupee, BLOOMBERG QUINT, 6 December 2018, www.bloombergquint.com/global-economics/india-inks-pact-with-iran-to-pay-crude-bill-in-rupee#gs.9fLYcWA. India had used a similar mechanism between 2013-2015: India initially used a Turkish bank to pay Iran for the oil it bought. Beginning February 2013, India paid 45 percent of the oil import bill in rupees, while keeping the remainder pending till the opening of payment routes. It began clearing the dues in 2015 when the restrictions were eased. Id.} India signed an MOU with Iran to allow Indian refiners to pay Iran for crude oil they buy from Iran in rupees. Thus, refineries such as Indian Oil Corp. and Mangalore Refinery and Petrochemicals could make rupee payments into an account maintained by the UCO Bank (a commercial bank headquartered in Kolkata and owned by the government of India) at the NIOC.\footnote{UCO was chosen precisely because it is a small, state-owned bank with limited international exposure (and thus limited assets outside of India vulnerable to being targeted by American authorities in pursuit of sanctions violations). Ironically, its business with Iran boosted UCO’s fortunes. UCO “was struggling under the weight of a mountain of bad loans,” but thanks to “its privileged status processing [Indian] refiners payments for Iranian oil shipments,” it expected over 8 billion rupees ($110 million) in additional revenue. UCO benefited from “float.” Indian refiners deposited funds destined for Iran with UCO but, because of the sanctions, did not receive interest from UCO on those funds. With this pool of zero-interest funds placed by the refiner-depositors, UCO’s net interest income and operating profit improved. See Pradipta Mukerjee, Renewed U.S. Sanctions on Iran Revive Fortunes of an Indian Bank, BLOOMBERGQUINT, 21 February 2019, www.bloombergquint.com/global-economics/renewed-u-s-sanctions-on-iran-revive-fortunes-of-an-indian-bank?utm_campaign=website&utm_source=sendgrid&utm_medium=newsletter#gs.YaPJDDur.} Half of the funds would be set aside to settle payments Iran needed to make to Indian exporters for purchases of Indian food grains, medicines, and medical devices (which India could export to Iran under exemptions to the U.S. sanctions). To avoid U.S. sanctions on shipping and insurance, Iran agreed to use its own oil tankers, and provide insurance through its own companies, on shipments to India.
Whatever the combination of measures, Iran was looking for reliable guarantees if it was to continue respect the JCPOA. Alī Akbar Velayati, a senior advisor to Āyatollāh Alī Khamenei, intoned:

The contradictions in the words of European authorities are suspicious. We hope that our government officials will be able to secure the necessary guarantees in their negotiations, as one cannot rely on those who vacillate and speak contradictory words….1119

Iran realized the choice for foreign companies was between a vast, lucrative American market and a smaller but growing Iranian one. Iran had its doubts as to whether such companies would or could resist the combination of American political pressure and economic opportunity.

But, what Iran needed to realize was it was partly at its own mercy. Iran’s economic destiny was not entirely in foreign hands. Iran needed to reform its economy. It needed to privatize SOEs and lessen the grip of the Republican Guards over them and their revenue streams.1120 It needed to lessen its dependence on oil and NG by diversifying into sectors such as tourism. It needed to complete its accession to the WTO, and enter into commercially meaningful FTAs. And, it needed to re-direct any foreign military

1119 Quoted in Iran Says.
1120 In April 2019, the U.S. designated the IRGC an FTO, the first time ever it had stigmatized a foreign country’s military as a terrorist organization. Iran replied with a designation of its own, labeling as terrorists American forces in the Middle East. See Revolutionary Guard Corps: U.S. Labels Iran Force as Terrorists, BBC NEWS, 8 April 2019, www.bbc.com/news/world-us-canada-47857140; Phil Stewart, Lesley Wroughton & Steve Holland, U.S. to Designate Elite Iranian Force as Terrorist Organization, REUTERS, 5 April 2019, www.reuters.com/article/us-usa-iran/u-s-to-designate-elite-iranian-force-as-terrorist-organization-idUSKCN1RX0ME. The practical impact of the designation was to expand sanctions against the IRGC, particularly in business transactions, given its involvement in Iran’s economy. Doing business with IRGC rendered transactors potentially liable to U.S. sanctions. The theory behind the designation was that the IRGC uses terrorism as an instrument of statecraft, and earns funds to support its activities, so to do business with it was to bankroll terrorism. Despite denials, it was difficult to imagine the Trump Administration was not seeking regime change in Iran, as (for example) Secretary of State Mike Pompeo intoned: “The leaders of Iran are not revolutionaries and people deserve better;” “They are opportunists;” and “We must help the people of Iran get back their freedom.” Quoted in id.

Subsequent to the 15 April designation, Secretary Pompeo granted two group exemptions from the secondary boycott of the IRGC. See Lesley Wroughton, Arshad Mohammed, Jonathan Landay & Phil Stewart, Exclusive: U.S. Carves Out Exceptions for Foreigners Dealing with Revolutionary Guards, Reuters, 21 April 2019, www.reuters.com/article/us-usa-iran-irgc-exclusive/exclusive-u-s-carves-out-exceptions-for-foreigners-dealing-with-irgc-idUSKCN1RX0ME. The first category ensured foreign governments and businesses were not automatically liable under the sanctions, for example, for speaking with IRGC members (which officials from friendly governments such as Oman do) or humanitarian matters, as long as they did not provide material support (e.g., “providing funds, transportation or counterfeit documents to giving food, helping to set up tents or distributing literature”) to the IRGC. Id. Without this exemption, such persons could be deemed to have engaged in a “terrorist activity,” and thus be designated a “Tier III terrorist organization” (i.e., one that is not itself an FTO, but which has engaged in a “terrorist activity,” hence its members are barred from entry into the U.S.) The second group exemption covered NGOs and businesses that provided material support to a foreign government sub-entity that has been designated as an FTO. Those entities will not be designated as a Tier III terrorist group. This exemption ensured diplomacy with Iran undertaken by U.S. allies could continue.
expenditures not truly justified as self-defense or as humanitarian intervention to protect persecuted Shi’a minority toward its own domestic population. That meant it needed to think about engaging with Israel, the most successful economy in the Middle East, as neither “Death to Israel” nor “Death to America” were intelligent economic policies.

For India and its companies, however, the calculus was a bit different. The last hegemonic power that told Indians with whom and what they could trade was Imperial Britain. India had become the world’s largest free market democracy. Yet, it remained home to the world’s largest number of poor people. Iran’s fuel helped fuel India’s industrialization and poverty alleviation aspirations, before America’s secondary boycott. Now they – India’s poor and aspiring middle classes – were being asked to bend to the dubious policy preferences of an idiosyncratic American President. Was India, then, an emerging non-aligned power to complement America, or a stay-at-home suck up to America? That request suggested another possible legal mechanism, idiosyncratic to India, to counter the American secondary boycott: SDS designations to offset SDNs, with the second “S” standing for the Hindi word “samrajyavadee” – imperialist.

IV. Problems and Options

To some degree, the initial efforts of the EU and third countries to preserve the Iran Nuclear Deal and avoid re-imposition of American sanctions appeared effective. For example, Iran said in June 2018 that even if Total withdrew from the project of developing the South Pars NG field, the project would continue. CNPC, which already held a 30% stake in the project, would take over Total’s interests. And, if both Total and CNPC exited the project, Iran’s PetroPars (a subsidiary of its national oil company) could step in. Moreover, Russia’s Gazprom pledged to help develop two other prominent NG fields (Azar and Changuleh). Certainly, the EU encouraged its companies to continue business with Iran. In August 2018, its High Representative for Foreign Affairs and Security Policy, Federica Mogherini (1973-), said:

We are doing our best to keep Iran in the deal, to keep Iran benefiting from the economic benefits that the agreement brings to the people of Iran, because we believe this is in the security interests of not only our region but also of the world.

If there is one piece of international agreements on nuclear non-proliferation that is delivering, it has to be maintained. We are encouraging small and medium enterprises in particular to increase business with and in Iran as part of something [that] for us is a security priority.

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1122 Quoted in Daniel Boffey & Saeed Kamali Dehghan, EU Foreign Policy Chief Calls on Firms to Defy Trump Over Iran, The Guardian, 7 August 2018, www.theguardian.com/world/2018/aug/07/eu-foreign-policy-chief-calls-on-firms-to-defy-trump-over-iran. [Hereinafter, EU Foreign Policy Chief]
But, such encouragement was viewed with hostility from the American President, who said: “We urge all nations to take such steps to make clear that the Iranian regime faces a choice: either change its threatening, destabilising behaviour and reintegrate with the global economy, or continue down a path of economic isolation.”

In the end, major foreign businesses could not easily skirt the re-imposed American measures. The prominence of the dollar, and the importance of the American market to those businesses, was too great. They had import-export, FDI, and finance dollar-denominated deals with the U.S., which were far larger and more lucrative than any foreseeable deals with Iran. There was little choice between losing access to the American or Iranian market. Moreover, access to the U.S. financial system – particularly for payments of dollar-denominated transactions, even ones that did not involve U.S. parties, or to raise capital – was practically indispensable. Their best options were to seek a waiver from the DOC, which given the Administration’s hostility to Iran, was loath to grant. Airbus and Total were cases in point.

Moreover, the U.S. launched a two-pronged, world-wide energy campaign: it warned other countries not to purchase Iranian oil, while persuading Saudi Arabia to increase its oil output. As to the first prong, countries were warned to cut Iranian oil imports to zero or face American sanctions. As one senior State Department official bluntly stated:

“Over the past few weeks, I’ve been in Europe and Asia garnering support for our Iran strategy. … We’re gonna isolate streams of Iranian funding.”

… “We view this as one of our top national security priorities. I would be hesitant to say zero waivers [i.e., allowances for importation of Iranian oil that would not trigger imposition of sanctions] ever. I think the predisposition would be to say we’re not granting waivers.”

… [T]he bigger question for Tehran, and the one to which it needs a positive answer if it is to stay in the deal, is whether Iran is able to preserve its oil exports. The State Department seems keen to make sure it can’t.

That doesn’t go only for [the] U.S.’s European allies, but [also] for India and China, the main importers of Iranian oil. “We are asking them to go to zero,” said the official, who added that their companies will be subject to sanctions if they don’t.

The response from India – the largest buyer of Iranian crude oil after China (which is the world’s largest oil importer, and which buys 7% of its oil from Iran) – took the form of a

\[\text{Quoted in EU Foreign Policy Chief.}\]
\[\text{Quoted in The U.S. is Warning.}\]
request from its Ministry of Oil to Indian refineries that they brace for a “drastic reduction or zero” of Iranian oil, effective November when the secondary boycott took full effect. Accordingly, India’s “Reliance Industries Ltd. …, the operator of the world’s biggest refining complex, … decided to halt imports,” and “Nayara Energy, an Indian company promoted by Russian oil major Rosneft …, also prepar[ed] to halt Iranian oil imports.” Iran tried to counter the move, but with no success: Iran “virtually free shipping and an extended credit period of 60 days,” but India noted it could easily find replacement barrels, such as from Iraq, Kuwait, or Saudi Arabia. To be sure, India supported U.N., but not unilateral U.S., sanctions. It was the American payments system that gave India the incentive to find those barrels “India could not afford risking the loss of access to the payments system, on which it relied in import, export, FDI, and portfolio investment transactions.

Other countries dependent on oil imports, and Iranian oil in particular, were Japan and Korea. “Both countries won waivers that allowed them to buy limited amounts of oil from Iran during the previous round of sanctions that ended in 2016, but Washington has this time adopted a more aggressive stance.” That meant the U.S. seemed likely to rebuff their diplomatic efforts to obtain waivers from America’s reapplication of sanctions. However, the Department of State agreed to temporary (six-month) so-called “Significant Reduction Exemption Waivers” from the American secondary boycott on Iranian crude oil for eight countries: China, India, Italy, Greece, Japan, Korea, Taiwan, and Turkey. The State Department determined these countries had taken steps to lessen their reliance on Iranian oil, and were cooperating with the U.S. toward zero imports of that oil. Any payment by these countries for the oil were put into foreign accounts that Iran could access only for humanitarian, non-sanctioned goods.


1127 India Preparing.

1128 India Preparing.


1130 See U.S. Department of State, Press Availability With Secretary of Treasury Steven T. Mnuchin and Secretary of State Michael R. Pompeo, 5 November 2018, www.state.gov/secretary/remarks/2018/11/287132.htm. This waiver applied to crude oil, but not refined oil, such as fuel oil used to power ship engines. See How Iranian Fuel Oil.

In addition to the Significant Reduction Exemption Waivers, the State Department issued a second category of waivers from the secondary boycott, “Civil Nuclear Energy Waivers,” whereby it did not impose sanctions with respect to existing non-proliferation activities at Iran’s Arak, Bushehr, and Fordow facilities. The Civil Nuclear Energy Waivers ensured continued oversight of Iran’s civil nuclear program, but did not extend to any new projects.
These Waivers expired on 1 May 2019, and – explicitly seeking to “fully sever Tehran’s financial lifeline” that brought Iran its largest source of export revenues, $50 billion annually – the Trump Administration refused to extend them for any of the eight countries. Thanks to high American oil production, and help from Saudi Arabia and the UAE to plug the gap of Iranian oil that the Administration removed from the world market, crude oil supplies were robust and prices stable, hence protests from the eight countries were muted. Here, then, was an unprecedented tightening of the Iran sanctions regime to curb what the Administration dubbed Iran’s “malign behavior” across the Middle East, notably, its support for Islamist extremism in Iraq, Lebanon, Syria, and Yemen, its ballistic missile tests, and its dubious nuclear program. When the Administration of President Barack H. Obama (1961-, President, 2009-2017) imposed sanctions in 2012, it kept the waivers in place, i.e., from 2012 until the July 2015 JCPOA, when it gradually loosened sanctions; now, the U.S. expressly aimed to drive Iranian oil exports to zero.

Indeed, the U.S. allowed no wind-down period following the 1 May waiver expiry during which the eight countries could bring their Iranian oil purchases to zero. And, on 8 May, the one-year anniversary of his announcement pulling America out of the JCPOA, President Trump issued an Executive Order banning the purchase of Iranian aluminum, copper, iron, and steel. With Iran the world’s 18th largest steel exporter, the Order aimed to cut off Iran’s third largest source of export revenues, industrial metals,


1132 Indeed, given that shipments of Iranian oil take over 20 days to reach East Asia (whereas they take roughly a week to reach India), China, Japan, and Korea, no less than five refiners from those countries stopped sourcing from Iran in time so that they would not take delivery after 1 May, in anticipation of the lapse of the waiver. See Iran Oil Buyers Stay on Sidelines as Waiver Decision Looms, BLOOMBERG, 15 April 2019, www.bloomberg.com/news/articles/2019-04-16/u-s-waiver-concern-sees-iranian-oil-buyers-put-imports-on-hold.


1134 See Nick Wadhams, Glen Carey & Margaret Taley, Trump to Escalate Iran Feud by Ending Waivers; Oil Prices Climb, BLOOMBERG, 21 April 2019, www.bloomberg.com/news/articles/2019-04-22/u-s-said-to-eliminate-iran-oil-waivers-after-may-2-expiration (quoting White House Press Secretary Sarah Sanders: “This decision is intended to bring Iran’s oil exports to zero, denying the regime its principal source of revenue”).


which account for about 10% of Iranian exports. Iran’s second largest source – petrochemicals – was in America’s target sight.

As to the second prong, increased Saudi output would assure that the supply curve for oil would not shift inward, leaving to price raises, with the effective embargo of Iranian oil. Conceptually, in demand curve – supply curve terms, there would be no inward shift of the world demand curve for oil (ceteris paribus) once sanctions were re-imposed. But, the world supply curve would shift in thanks to the elimination of oil from Iran, which is the third largest OPEC exporter – hence the need for the Saudis to step up production to fill the gap caused by that removal, and thereby keep the supply curve in position. The Saudis, along with Russia and other OPEC countries, agreed to raise output by about 1 million bpd, effective July 2018. Their maximum sustainable capacity was 12 million bpd. They agreed to increase output to 11 million bpd, though they had never produced more than about 10.8 million bpd (in June 2018). An interesting secondary effect of this output hike was to exacerbate Saudi-Iranian tensions in OPEC over appropriate price-volume levels.

There seemed little doubt that the two-pronged strategy was aimed at more than precluding Iran and the P5+1 countries (other than the U.S.) from preserving the Nuclear Deal through continuation of business transactions that would give Iran an economic incentive to stay faithful to it. Though perhaps thinly veiled, the American efforts were oriented to regime change:

“We’re going to isolate streams of Iranian funding and looking to highlight the totality of Iran’s malign behavior across the region,” … [said a senior State Department] official…

… Iranian President Hassan Rouhani … promised Iranians the government would be able to handle the economic pressure of new U.S. sanctions amid reports of a second day of demonstrations in protest at financial hardship and a weakening rial.

… [P]arts of Tehran’s Grand Bazaar were on strike for a second straight day. …

Washington has sought to emphasize that the protests are part of rising economic discontent in Iran hoping it will force the government to negotiate a new nuclear deal to avoid sanctions.

“There is a level of frustration that people have with regard to the regime activity and behavior, the enrichment of the military and clerical elite and the squeezing out of the life of the economy,” the senior State Department official said.

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Iranians are tired of this situation” ….1138

Indeed, they were:

Three days of protests broke out on Sunday in Tehran’s Grand Bazaar, with hundreds of angry shopkeepers denouncing a sharp fall in the value of the Iranian currency.

…[T]he weekend protests quickly acquired a political edge, with people shouting slogans against Iran’s ultimate authority, Supreme leader to Ayatollāh Alī Khamenei, and other top officials, calling them thieves who should step down.

Bazaar merchants, mostly loyal to the leadership since the 1979 Islamic Revolution, are angry at what they see as the government’s muddled response to the crisis, which they said had sent prices soaring and made trading almost impossible.

The rial has lost 40 per cent of its value since last month [May 2018], when President Donald Trump pulled out of Iran’s 2015 nuclear accord and announced draconian sanctions on Tehran.

These include an attempt to shut down the international sale of Iranian oil, Tehran’s main source of revenue, a threat that has cast a chill over the economy. 1139

1138 Lesley Wroughton & Doina Chiacu, U.S. Pushes Allies to Halt Iran Oil Imports, Waivers Unlikely, REUTERS, 26 June 2018, www.reuters.com/article/us-usa-iran/u-s-pushes-allies-to-halt-iran-oil-imports-waivers-unlikely-idUSKBN1JM26Q. Buttressing the perception the Trump Administration sought regime change in Iran was a close associate of the President, former New York Mayor Rudolph Giuliani, who intoned on 30 June 2018 at the Paris-based National Council of Resistance of Iran (NCRI), or Mujahideen-e-Khalq as it is known in Farsi:

I can’t speak for the President, but it sure sounds like he doesn’t think there is much of a chance of a change in behavior unless there is a change in people and philosophy....

We are the strongest economy in the world ... and if we cut you off then you collapse....

Quoted in John Irish, Trump Ally Giuliani Says End is Near for Iran’s Rulers, REUTERS, 30 June 2018, www.reuters.com/article/us-iran-nuclear-opposition-giuliani/trump-ally-giuliani-says-end-is-near-for-iran-rulers-idUSKBN1JQ0PA. Ironically, at one time, the U.S. and EU designated the NCRI as a terrorist organization. See id. See also Afshin Shahi & Ehsan Abdoh-Tabrizi, Iran’s 2019-2020 Demonstrations: The Changing Dynamics of Political Protests in Iran, LI ASIAN AFFAIRS – JOURNAL OF THE ROYAL SOCIETY FOR ASIAN AFFAIRS number I, 1-41 (March 2020), https://rsaa.org.uk/journal/ (providing an overview of protests in post-Revolutionary Iran, the causes of “the current political cul-de-sac,” and the “changing dynamics of the protests [that] are the result of the existing political gridlock and the economic crisis,” which signal “the radicalization of the political climate in Iran”).

1139 Iran’s Rulers Face.
Still, whether the U.S. would orchestrate regime change was unclear: chants of “Death to the Dictator” in Tehran’s Grand Bazaar were redolent of “Death to the Shah” in the run-up to the Islamic Revolution in the late 1970s, but the broad public was not necessarily eager for the uncertainty, even chaos, of a new regime change.1140

Accordingly, the regime remained sufficiently confident of its domestic power base to respond to the U.S. with defiance:

Speaking after three days of those [Tehran Grand Bazaar] protests, supreme leader to Āyatollāh Ālī Khamenei said the U.S. sanctions were aimed at turning Iranians against their government.

…

“They bring to bear economic pressure to separate the nation from the system ... but six U.S. presidents before him tried this and had to give up.” Khamenei … [said], referring to U.S. President Donald Trump.1141

Iran proceeded to re-open the Isfahan uranium conversion facility that it had idled for nine years. That facility produced UF₆, which Iran would use as feedstock for its centrifuges to enrich, should the Nuclear Deal ultimately fall apart thanks to the economic pressure of American sanctions that the other P5+1 countries could not counteract.1142

To be sure, reopening the facility did not breach the July 2015 Nuclear Deal. Iran could, under the Deal, enrich up to 300 kg of UF₆ to 3.67% fissile purity, which is suitable to generate civilian nuclear power, and which is well below the 90% level that is weapons-grade.1143 (Specifically, enrichment of Uranium occurs by “feeding” UF₆ “gas into

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1140 Iran’s Rulers Face.
For an explanation, from an Iranian perspective, of mistrust of the U.S. account of American meddling in Iranian politics, including the August 1953 coup (called “Operation Ajax,” orchestrated by British hand American intelligence agencies, and depicted in the November 2019 movie, Coup 53) of secularist Mohamed Mosaddegh (1882-1967, PM, 1951-1953, following his appointment as PM in April 1951 by the Shah of Iran and May 1951 nationalization of the Anglo-Persian (Iranian) Oil Company, which dated to 1913, and later was renamed British Petroleum), the re-assertion of control by Mohammad Reza Pahлавi as Shah (1919-1980, leading to a 38-year reign, 1941-1979, marked (inter alia) by the re-entry of foreign oil companies, and serious human rights violations), see Scheherazade Daneshkhu, Iranians Are Naive to Think They Can Rely on Fair-Weather Friends, FINANCIAL TIMES, 13 February 2020, www.ft.com/content/56a01698-4cbd-11ea-95a0-43d18ec715f5?shareType=nongift (stating “[w]hatever hopes Iranians have for their country, they would do well to remember that, as in 1953, the US administration has its own, not their, interests at heart,” “‘America First’ is a pretty clear mantra,” and “[i]f Mr Trump cared about Iran and its people, he would not be threatening to bomb the country’s rich cultural heritage, as he did last month.”).


1142 See Iran Reopens Uranium Feedstock Plant in Preparation to Boost Enrichment, REUTERS, 27 June 2018, www.reuters.com/article/us-iran-nuclear/iran-reopens-uranium-feedstock-plant-in-preparation-to-boost-enrichment-idUSKBN1JN2NN. Specifically, the facility took Uranium ore, also called “yellow cake,” and converted into a gas, UF₆, before enrichment. Id.

centrifuges to separate out the most fissile isotope, U-235” [i.e., the isotope most suitable for nuclear fission]; and the Deal limits the concentration of the U-235 isotope to 3.67%, whereas “weapons grade” Uranium contains at least 90% U-235. However, “the technical leap required to get to 90% concentration from 20% is relatively straightforward, because it becomes easier at higher levels,” whereas “[g]oing from the natural state of 0.7% concentration to 20% takes 90% of the total energy required.”

Iran’s decision was indicative of its intentions if the Nuclear Deal could not be preserved, plus Iran (according to IAEA estimates) was headed to two explicit breaches of the Deal. First, the Deal had cut Iran’s stockpile of low-enriched Uranium by 97%, down to 300 kg, but by March 2019, Iran had built that stockpile to 203 kg. Second, the Deal capped Iran’s heavy water at 130 metric tons, but by May 2019 Iran had reached 124.8-129.8 metric tons.

V. May 2019 Waiver Expiry and JCPOA Suspension

The 1 May 2019 U.S. oil sanctions waiver expiry put significant pressure on Iran’s economy. In all sectors, including the vital ones of energy, finance, and shipping, U.S. sanctions applied, and not only were American firms barred from trade and investment with Iran (the primary boycott), but also they were barred from dealing with any third countries or third-country businesses that transacted with Iran (thanks to the secondary boycott). The rial plummeted to record low levels against major foreign currencies. The

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Specifically, UF₆ gas is entered into a centrifuge, and the spinning centrifugal force within the centrifuge separates heavier U-238 isotopes from lighter U-235 isotopes. The U-238 falls to the bottom of the centrifuge and is removed, while the U-235 floats to the top and is collected. A motor powers the centrifuge, generating the centrifugal force. The more powerful the motor, the faster the centrifuge spins, and thus the greater the amount of U-235 that is separated in a shorter period of time. See Iran Nuclear Deal: Tehran to Develop Centrifuges for Uranium Enrichment, BBC NEWS, 5 September 2019, www.bbc.com/news/world-middle-east-49586508 (depicting clearly a centrifuge and its operation). [Hereinafter, Iran Nuclear Deal: Tehran to Develop.]

1145 Iran Nuclear Deal: Enriched Uranium. See also Farnaz Fassihi & David E. Sanger, Iran Moves to Increase Uranium Enrichment and Bar Nuclear Inspectors, THE NEW YORK TIMES, 2 December 2020, www.nytimes.com/2020/12/02/world/middleeast/iran-nuclear-enrichment-inspectors.html?referringSource=articleShare (noting “Uranium enriched to 20 percent purity is a quick hop to bomb-grade uranium, which is roughly 90 percent pure,” “[b]ut getting from the current levels of 4 or 5 percent enrichment to 20 percent is a far bigger leap than the final move to bomb-grade fuel”). [Hereinafter, Iran Moves to Increase Uranium Enrichment.]


1147 See Iran Oil.

annualized inflation rate quadrupled (approaching 50%, the highest since 1980). Food and medicines were in short supply. Foreign investment stayed away. GDP shrank (by -4% in 2018 and was forecast by the IMF to shrink by -6% in 2019). The price per barrel of oil Iran needed to balance its budget rose from $64.80 in 2017 to $113.80 in 2018 to (a forecast of) $125.60 in 2019, yet in actuality traded in April 2019 around $70.


On the first anniversary of America’s withdrawal from the JCPOA, 8 May 2019, Iran announced it was suspending its commitments under the July 2015 Nuclear Deal. Iran said it would (1) cease overseas sales of surplus enriched Uranium and heavy water, (2) suspend redesign of the Arak heavy water facility, and (3) resume Uranium enrichment in 60 days if the signatories to the Deal other than the U.S., i.e., China, France, Germany, Russia, and the U.K., failed to help Iran cope with American sanctions. Iran also said (4) it would not be bound by the Nuclear Deal limits of 300 kg and 130 tons on low-enriched UF₆ and heavy water, respectively.

Iran’s announcements were calculated: Iran did not say it was withdrawing from the Deal, which would have alienated it from the signatories whose help it sought. The first statement was a nearly ineluctable result of the U.S. decision to impose a near-total boycott on Iran’s exports: under the Nuclear Deal, Iran had exported enriched Uranium and heavy water to third countries (particularly Oman) in exchange for natural Uranium (so-called “yellow cake”). America’s refusal to extend waivers for such exports put Iran in a corner: either stop all Uranium enrichments and stay under the 300-kg and 130-ton caps, or continue processing and breach the caps. Iran chose the latter course. Hence, the world

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1150 See Iran Facing.

1151 See As Bad As War?

1152 See As Bad As War? President Rouhani himself admitted the “unprecedented pressure” on Iran from the sanctions. See Iran Facing (quoting Mr. Rouhani: “During the [Iran-Iraq] War we did not have a problem with our banks, oil sales or imports and exports, and there were only sanctions on arms purchases”).


was on notice (especially with IAEA inspectors “on the ground daily in Iran”) that, as of 17 June 2019, Iran might breach the first limit by 27 June, and the second limit about two and one-half months later.\textsuperscript{1156}

Export sales of surplus Uranium and heavy water, both by-products of Iran’s civilian nuclear power program, were a minor bargain in the \textit{JCPOA} by which the signatories could check Iran does not store these ingredients to make a nuclear weapon, while Iran could use non-surplus quantities to generate nuclear power. Iran’s stockpiles remained below the thresholds the \textit{Deal} set, and ironically U.S. sanctions impeded Iran’s exportation of UF\textsubscript{6} and heavy water.\textsuperscript{1157} However, resuming enrichment beyond the 3.67\% level needed for reactor fuel, which is the \textit{JCPOA} limit, possibly with a view to the 90\% purity weapons-grade level, would be a serious breach.\textsuperscript{1158} So, too, would be cessation of Iran’s conversion of its Arak installation from a heavy-water nuclear reactor, the spent fuel from which contains plutonium Iran could use for a nuclear bomb, to a peaceful R&D facility.

\section*{VI. May-December 2019: 30 Reciprocal Provocations}

Giving the five remaining signatories 60 days to meet their commitments, particularly with respect to financial and oil sanctions relief, was a chance for them to salvage the July 2015 \textit{Nuclear Deal}. Ominously, though they reaffirmed their commitment to the \textit{Deal}, they rejected Iran’s ultimatum.\textsuperscript{1159} In a span of just eight months, May through December 2019, military tensions increased in the Gulf with 30 significant developments. Each side blamed the other for provocative behavior.

\begin{enumerate}
\item Accelerated deployments (in May 2019) of U.S. bombers, Navy assets (including an aircraft carrier, the U.S.S. \textit{Abraham Lincoln}) and Patriot missile defense systems, amidst accusations Iran, its paramilitary forces, and their proxies, threatened American personnel in Iraq and allies in Syria and Yemen (for example, by loading missiles onto boats In Iranian ports, and positioning rockets near U.S. military facilities in Iraq).\textsuperscript{1160}
\item Attacks (on 12 May) on four oil cargo vessels (two Saudi, the \textit{Amjad} and \textit{Al Marzoqah}, one Emirati, the \textit{A. Michel}, and one Norwegian, \textit{Andrea Victory}), with underwater explosive devices – limpet mines (\textit{i.e.}, mines that attach to their targets magnetically)– causing large holes in each of them.\textsuperscript{1161}
\end{enumerate}

\begin{footnotes}
\item[1156]\textit{Iran Warns Europe.}
\item[1157]\textit{See Iran Rolls Back.}
\item[1159]\textit{See European Powers.}
\end{footnotes}
(3) Seven aerial drone attacks (on 14 May) on a Saudi oil pipeline (for which the Iranian-backed Houthi rebels in Yemen claimed responsibility, though some reports suggested the missiles were launched by Iranian-backed forces in southern Iraq, which would mean the opening of a potential new front by Iran).

(4) Owing to (2) and (3,) fears of disruption of oil flows through the Strait of Hormuz – a choke point, “21 miles (33 km) wide at its narrowest point, with the shipping lane just two miles (three km) wide in either direction,” and “the single most important waterway for global oil shipments,” through which 40% of the world’s crude oil is shipped daily, including all oil exports from Bahrain, Iran, Kuwait, and...
Qatar, over 90% from Iraq and Saudi Arabia, and 75% from the UAE.\(^{1163}\) Passage through the Strait takes 6-8 hours.\(^{1164}\)

(5) Adding to those tensions was a *Katyusha* rocket fired (on 19 May) – allegedly by Iran or its agents – at Baghdad’s Green Zone diplomatic imperilling U.S. forces.

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\(^{1163}\) *Saudi Arabia Says*.

There have been few such disruptions following the 1980-1988 Iran-Iraq War, even despite the First and Second Gulf Wars, with a 2010 attack on a Japanese vessel, the *M. Star* claimed by the militant group “Brigades of Abdullah Azzam” a rare exception. *See Saudi Arabia Says. See also U.S. “Blames Iran” for Damage to Tankers in Gulf of Oman*, BBC NEWS, 14 May 2019, [www.bbc.com/news/world-middle-east-48264499](http://www.bbc.com/news/world-middle-east-48264499) (reporting “U.S. investigators believe Iran or groups it supports used explosives to damage four ships off the” UAE Port of Fujairah, but also that “[n]o evidence has emerged to show that Iran was involved”).

The evidence picture changed quickly, with a prominent Norwegian shipping insurer – the Norwegian Shipowners’ Mutual War Risks Insurance Association – concluding the IRGC was “highly likely” to be behind the ship attacks, which happened just 6-10 nautical miles off Fujairah, near the Straits of Hormuz, and which were “carried out by a surface vessel operating close by that dispatched underwater drones carrying 30-50 kg (65-110 lb) of high-grade explosives to detonate on impact.” Three factors, said the Association, pointed to the IRGC:

1. A high likelihood that the IRGC had previously supplied its allies, the *Houthi* militia fighting a Saudi-backed government in Yemen, with explosive-laden surface drone boats capable of homing in on GPS navigational positions for accuracy.
2. The similarity of shrapnel found on the Norwegian tanker to shrapnel from drone boats used off Yemen by *Houthis*, even though the craft previously used by the *Houthis* were surface boats rather than the underwater drones likely to have been deployed in Fujairah.
3. The fact that Iran and particularly the IRGC had recently threatened to use military force and that, against a militarily stronger foe, they were highly likely to choose “asymmetric measures with plausible deniability.” …

Jonathan Saul & Gwladys Fouche, *Exclusive: Insurer Says Iran’s Guards Likely to Have Organized Tanker Attacks*, REUTERS, 17 May 2019, [www.reuters.com/article/us-usa-iran-oil-tankers-exclusive/exclusive-insurer-says-irans-guards-likely-to-have-organized-tanker-attacks-idUSKCN1SN1P7](http://www.reuters.com/article/us-usa-iran-oil-tankers-exclusive/exclusive-insurer-says-irans-guards-likely-to-have-organized-tanker-attacks-idUSKCN1SN1P7). The engine rooms of the *Amjad* and *A. Michel*, aft of the *Al Marzoqah*, and stern of the *Andreas Victory*, were damaged. *See id.* Though no one was killed and an environmental catastrophe did not occur, the hull of at least three of the vessels was breached, and satellite imagery from Finland’s IcEye, validated by Norway’s Kongsberg Satellite Services, showed the *Amjad* leaked engine fuel and/or oil, causing a large slick. Iran, meanwhile, continued to threaten to close the Straits of Hormuz. *See id.; “Sabotaged” Tanker in Gulf of Oman Leaked Oil*, BBC NEWS, 24 May 2019, [www.bbc.com/news/science-environment-48387033](http://www.bbc.com/news/science-environment-48387033).

As for the aerial drone attacks, they came two days after the attacks on the tankers, and temporarily forced a shutdown in Saudi Aramco’s East-West pipeline, Petroline, which runs from the eastern part of the Kingdom westward, to the Red Sea Port at Yanbu, just north of Bab Al-Mandeb, and of pumping stations 200 miles west of Riyadh. This Port is vital in the event oil exports through the Straits of Hormuz are impeded. *See Stephen Kailin & Rania El Gamal, Saudi Oil Facilities Attacked, U.S. Sees Threat in Iraq from Iran-Backed Forces*, BBC NEWS, 14 May 2019, [www.reuters.com/article/us-saudi-oil-usa-iran/saudi-arabia-oil-facilities-attacked-u-s-iran-tensions-flare-idUSKCN1SK0YM](http://www.reuters.com/article/us-saudi-oil-usa-iran/saudi-arabia-oil-facilities-attacked-u-s-iran-tensions-flare-idUSKCN1SK0YM); Vivian Yee, *Saudi Arabia Says Drones Hit Oil Pipeline, After Reports of Tanker Attacks*, NEW YORK TIMES, 14 May 2019, [www.nytimes.com/2019/05/14/world/middleeast/saudi-oil-attack.html](http://www.nytimes.com/2019/05/14/world/middleeast/saudi-oil-attack.html).

personnel. Tweeted (on that same day) President Trump: “If Iran wants to fight, that will be the official end of Iran.”

(6) The U.S. sent (on 24 May) a further 1,500 military personnel to the Persian Gulf (possibly to existing U.S. bases in Bahrain, Iraq, and Qatar), attributing the aforementioned attacks (points (3)–(5)) to the IRGC and its proxies (with a “high degree of confidence,” said Vice Admiral Michael Gilday, the DOD’s Director of the Joint Staff), indeed, to leaders “at the highest levels” of the Iranian government. The bolstered force, which included a fighter squadron and spy planes, was for aerial defense, missile defense, engineering fortifications, and to keep open the Gulf shipping lanes, and thus, as the President put it, was “mostly in a protective capacity.” Before this additional 1,500 deployment, the U.S. had 70,000 troops in the Middle East, stationed as far east as Afghanistan, and as far west as Egypt. Nevertheless, the President menacingly added, “We’ll see what happens,” leaving open the possibility of 120,000 more boots on the ground.

(7) The Trump Administration (also on 24 May) bypassed Congress, and invoked an exception for an “emergency” under the Arms Export Control Act (AECA, discussed in a separate Chapter) to approve 22 arms contracts totalling $8 billion (including offensive military equipment) to Saudi Arabia, UAE, and Jordan. Questioning whether an “emergency” existed, Congress disapproved of the sale, Senator Robert Menendez (1954-, Democrat - New Jersey) intoned “the Trump Administration has failed once again to prioritize our long-term national security interests or stand up for human rights, and instead is granting favors to authoritarian countries like Saudi Arabia.”

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1165 See Trump: U.S. Will.
1166 Quoted in Iranian Threats.
1168 Quoted in Anthony Capaccio & Margaret Talev, U.S. Sends 1,500 Troops to Mideast After Blaming Attacks on Iran, BLOOMBERG, 24 May 2019, www.bloomberg.com/news/articles/2019-05-24/trump-to-send-1-500-more-troops-to-mideast-as-iran-tensions-rise. [Hereinafter U.S. Sends.] See also U.S. Deploys (reporting on the additional deployment, and noting 600 of the 1,500 personnel already were in the Middle East working on Patriot missile defense and, therefore, technically were extended, not new deployments).

1169 See U.S. Deploys.
1170 Quoted in U.S. Sends.
1172 Quoted in Defying Congress.
Two further attacks (on 13 June) on oil tankers, the Japanese-owned, Panamanian-flagged *Kokuka Courageous*, and Norwegian-owned *Front Altair*, both in international waters in the Gulf of Oman, between Oman and Iran, which the Trump Administration blamed on Iran.\(^{1173}\)

*Kokuka Courageous* was transporting 225,000 tons of methanol from Saudi Arabia to Singapore, and its 21 crew members had to abandon ship after two attacks that were three hours apart. A Dutch vessel (the tug *Coastal Ace*) picked them up and transferred them to the U.S.S. *Bainbridge*.\(^{1174}\) Chartered by the Taiwanese oil refiner CPC Corp and carrying 75,000 tons of naphtha from Abu Dhabi to Taiwan, *Front Altair* was struck with three blasts, allegedly caused by a torpedo, and its crew also had to be rescued.\(^{1175}\) An IRGC vessel picked up these sailors, transferring them from *Hyundai Dubai*, which initially rescued them.\(^{1176}\)

Said Secretary of State Mike Pompeo:

> It is the assessment of the United States that the Islamic Republic of Iran is responsible for the attacks. This assessment is based on intelligence, the weapons used, the level of expertise needed to execute the operation, recent similar Iranian attacks on shipping, and the fact that no proxy group operating in the area has the resources and proficiency to act with such a high degree of sophistication. This is only the latest in the series of attacks instigated by the Islamic Republic of Iran and its surrogates against American and allied interests. Taken as a whole, these unprovoked attacks present a clear threat to international peace and security, a blatant assault on the freedom of navigation, and an unacceptable campaign of escalating tension by Iran.\(^{1177}\)

President Trump conclusively declared: “Iran did do it and you know they did it. You saw the boat at night.”\(^{1178}\) He also said: “I guess one of the mines didn’t explode and it’s probably got essentially Iran written all over it. And you saw the


\(^{1177}\) *See Pentagon Shares.*

boat at night trying to take the mine off and successfully took the mine off the boat, and that was exposed.”\footnote{Gulf of Oman Tanker Attacks: Trump Dismisses Iran Denials, BBC NEWS, 14 June 2019, \url{www.bbc.com/news/world-middle-east-48643313}.}

“Guess.” “Probably.” But, did “they” really “do it”? Iran’s Foreign Minister, Mohammad Javad Zarif (1960-), tweeted his country was being framed: “Unilateral US actions – incl. its #EconomicTerrorism on Iran – are solely responsible for insecurity & renewed tension in our region.”\footnote{Quoted in Pentagon Shares.}

The “boat” to which the President referred was allegedly a small IRGC patrol boat removing an unexploded limpet mine from Kokuka Courageous, filmed by U.S. aerial reconnaissance.\footnote{The footage was taken by a “Navy MH-60R surveillance helicopter,” which “can fly and hover as it gathers imagery at lower altitudes than drones or P-8 maritime patrol craft.”} (CENTCOM took the unusual step of releasing the blurry, black-and-white video.\footnote{See Jon Gambrell, U.S. Says Video Shows Iran Removing Mine from Stricken Tanker, ABC NEWS, 14 June 2019, \url{https://abcnews.go.com/International/wireStory/us-iran-removed-unexploded-mine-oil-tanker-63704196} (reporting: “In the video, the boat from Iran’s paramilitary Revolutionary Guard pulls alongside Kokuka Courageous at 4:10 p.m. Thursday [13 June 2019]. The Iranians reach up and grab along where the limpet mine could be seen in the photo. They then sail away.”).} The U.S. drew the inference Iran was trying to cover its tracks by recoupng the unexploded device Iran had planted, following the detonation of another weapon Iran also had planted, and thereby prevent investigators (e.g., from the U.S.) from obtaining the undetonated mine and tracing it back to Iran through its serial numbers and other features. The U.S. argued – plausibly – that “Iran is responsible for the attack based on video evidence and the resources and proficiency needed to quickly remove the unexploded limpet mine.”\footnote{Pentagon Shares (quoting a U.S. Navy explosives expert).} And, fragments from the blast were consistent with the type of ordnance Iran had displayed publicly in military parades.\footnote{See Aziz El Yaakoubi, U.S. Navy Says Mine Fragments Suggest Iran behind Gulf Tanker Attack, REUTERS, 19 June 2019, \url{www.reuters.com/article/us-mideast-attacks-navy/u-s-navy-says-mine-fragments-suggest-iran-behind-gulf-tanker-attack-idUSKCN1TK1DX} [U.S. Navy Says Mine.]}

But (as any student of Evidence knows), a second inference was equally plausible: Iran was trying to save the ship and its crew from further peril. Indeed, both Iran and the U.S. rescued the crews after they were forced to abandon their vessels. Moreover, Yutaka Katada, the President of Kokuka Sangyo, the company that owns and operated Kokuka Courageous, said his vessel was not damaged by a mine, but rather an aerial weapon: “A mine doesn’t damage a ship above sea level. [The hole was above the water line.] We aren’t sure exactly what hit, but it was something flying towards the ship.”\footnote{Quoted in Gulf on Edge. Mr. Katada added that the crew reported “that the ship was attacked by a flying object.” Quoted in Gulf of Oman Tanker Attacks.} The U.S. surmised the intention of an above-water blast was to damage, not sink, the vessel.\footnote{See U.S. Navy Says Mine.}
So, the proposition that Iran might have launched was a strong suspicion, but not one proven – yet – beyond a reasonable doubt.

In response to the attacks on *Front Altair* and *Kokuka Courageous*, America announced (on 17 June) deployment of a further 1,000 troops (supplementing the 1,500 sent in May) to the Gulf, which would bolster U.S. readiness for air and maritime battles with Iran, though still far short of the numbers required for a full-scale land war.\(^{1187}\) Iran’s President Rouhani noted “Iran has been loyal to its signature [on the *JCPOA*], and that “Iran has been loyal to international agreements, and the one standing against us today [the U.S.] is the one that has trampled all pacts, agreements and international accords.”\(^{1188}\)

A direct engagement between the U.S. and Iranian militaries occurred (on June 19) when, using an Iranian-made 3 Khordad surface-to-air missile, Iran shot down an American military drone that Iran said had breached Iranian airspace and was flying near Kuhmobarak, in the southern Iranian province of Hormozgan, and over Iran’s territorial waters.\(^{1189}\) (The drone was a U.S. Navy Broad Area Maritime Surveillance (BAMS-D) aircraft, specifically, an RQ-4A Global Hawk High-Altitude, Long, Endurance (HALE) Unmanned Aircraft System that can fly at 60,000 feet, and Iran said it gave two warnings 10 minutes before shooting it down.\(^{1190}\)) The U.S. said the drone was hit in international airspace over the Straits of Hormuz, 20 miles away from Iranian territory.\(^{1191}\) The U.S. called the incident an “unprovoked attack.”\(^{1192}\) The IRGC said it was defending itself against a “spy” drone, and “[o]ur borders are our red line.”\(^{1193}\) The IRGC also said it opted not to...

\(^{1188}\) Quoted in *Gulf Crisis: U.S. Sends*.  

\(^{1192}\) Quoted in *Trump Says Iran*.  
\(^{1193}\) Quoted in *Trump Says Iran; Straits of Hormuz: U.S. Confirms*.  

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shoot down an aircraft on which 38 people were aboard.\footnote{See Margaret Talev & Ros Krasny, Trump Says Major Sanctions on Iran Monday After Drone Downed, BLOOMBERG, 22 June 2019, www.bloomberg.com/news/articles/2019-06-22/trump-says-u-s-will-put-additional-sanctions-on-iran-on-monday. [Hereinafter, Trump Says Major Sanctions.]} The U.S. nearly retaliated with three airstrikes on Iranian missile batteries and radar installations, with President Trump calling them off 10 minutes before they were set to commence, because he said they would entail 150 Iranian deaths and thus would be disproportionate.\footnote{See Trump Says Major Sanctions; U.S.-Iran: Trump Says Military; Jeff Mason & Susan Heavey, Trump Says He Aborted Retaliatory Strike to Spare Iranian Lives, REUTERS, 19 June 2019, www.reuters.com/article/us-mideast-iran-usa/trump-says-he-aborted-retaliatory-strike-to-spare-iranian-lives-idUSKCN1TL07P.}


Already, the U.S. had subjected over 80% of Iran’s economy to sanctions, covering almost 1,000 Iranian entities (\textit{e.g.}, individuals, aircraft, banks, and ships, plus transactions in aluminum, copper, iron, and steel, and in oil and NG) and the U.S. Embassy in Baghdad noted that the “possessions of the Āyatollāh were worth roughly $200 billion, and Secretary Pompeo estimated his personal fortune as high as $95 billion (which, said initially, the American-educated Foreign Minister narrowly escaped being sanctioned: the State Department sought to preserve the path of diplomacy, and decided sanctioning him would not be helpful (after all, it needed to grant him visas to come to the U.N. and U.S.), and in any event, Mr. Zarif said he had no assets outside of Iran. See Jonathan Landay, Lesley Wroughton & Arshad Mohammed, Exclusive: \textit{U.S. Will Not Blacklist Iran’s Foreign Minister, For Now}, REUTERS, 11 July 2019. But, “U.S. Treasury Secretary Steven Mnuchin said Zarif ‘implements the reckless agenda of Iran’s Supreme Leader, and is the regime’s primary spokesperson around the world .... [so, the U.S. is] sending a clear message to the Iranian regime that its recent behaviour is completely unacceptable,’” hence the choice – which Iran’s President Rouhani called “childish behavior” – to sanction Mr. Zarif personally. \textit{Quoted in Parisa Hafezi, Iran Says Ready for Worst in Battle to Save Nuclear Deal}, REUTERS, 1 August 2019, www.reuters.com/article/us-mideast-iran/iran-says-u-s-sanctioning-of-top-diplomat-childish-as-tensions-rise-idUSKCN1U4R4F; Jeff Mason, \textit{U.S. Puts Sanctions on Iranian Foreign Minister, Who They Won’t Affect Him}, REUTERS, 31 July 2019, www.reuters.com/article/us-usa-iran-zarif/u-s-imposes-sanctions-on-iran's-foreign-minister-zarif-idUSKCN1UQ2O1.}
the Secretary, was “used as a slush fund for the IRGC”).\(^{1197}\) That was false, said President Rouhani: the Supreme Leader owns only a “ḥosayniya [prayer venue] and a simple house,”\(^{1198}\) and would have no practical effect as he had no assets overseas.\(^{1199}\) Iran’s Foreign Ministry asked rhetorically: “Are there any other sanctions left for the U.S. to impose on Iran?”\(^{1200}\)

(12) Escalating the war of words President Rouhani (on 25 June) called the White House “mentally retarded,” to which President Trump replied that Iran’s leaders “do not understand reality.”\(^{1201}\)

(13) Iran announced (on 1 July) it had crossed the 300 kg limit on its stockpile of UF\(_6\) enriched to 3.67% U-235 purity.\(^{1202}\) To make one nuclear bomb, a stockpile of 1,050 kg of this low-enriched Uranium would be necessary, and would need to be enriched further to the 90% purity level. Iran insisted it had not breached the JCPOA, thanks to Article 36.\(^{1203}\)

Iran said its move was a justified response to the U.S. withdrawal from the Nuclear Deal, and that the Deal guarantees access for Iran to world trade and financial system. In other words, from Iran’s perspective, the American withdrawal constituted, to use the language of the Deal, “significant non-performance.”\(^{1204}\)

Russia agreed, stating at an emergency meeting (on 10 July) at the IAEA headquarters in Vienna:

Iran’s low-enriched uranium “does not create risks in terms of proliferation of nuclear weapons.”

\(^{1197}\) For the $200 billion figure, see Trump Sanctions Iran’s Supreme Leader (citing an April 2019 Facebook post by the U.S. Embassy in Baghdad); for the $95 billion figure, see Iran: New U.S. Sanctions, and Michael R. Pompeo, Secretary of State, Foreign Affairs, Op-ed, Confronting Iran: The Trump Administration's Strategy, U.S. Embassy & Consulates in the United Kingdom, 15 October 2018, https://uk.usembassy.gov/confronting-iran-the-trump-administrations-strategy/.


\(^{1200}\) Trump Sanctions Iran’s Supreme Leader (quoting Abbas Mousavi, Spokesman, Ministry of Foreign Affairs, Iran).

\(^{1201}\) Quoted in U.S.-Iran Crisis: Trump Lashes.

\(^{1202}\) See Iran Nuclear Deal: Enriched Uranium Limit Breached.

\(^{1203}\) See Parisa Hafezi & Francois Murphy, Trump Says Iran “Playing with Fire” with Uranium Enrichment, REUTERS, 1 July 2019, www.reuters.com/article/us-mideast-iran-usa/iran-amasses-more-enriched-uranium-than-allowed-under-pact-denies-breach-idUSKCN1TW1ML.

“The root cause of [Iran’s] countermeasures are obvious to us. The terms of the deal were violated long ago,” Russia said of the U.S. decision to withdraw. “And it was not Iran who did this.”1205

The failure of the remaining Parties to resolve the matter of sanctions relief was a ground for Iran to suspend or cease performance of its obligations under the Deal. Iran pointed to a provision of the Deal that allow it to “treat such a re-introduction or re-imposition of the sanctions … or such an imposition of new nuclear-related sanctions, as grounds to cease performing its commitments under this JCPOA in whole or in part.”1206 The Article of the Deal Iran invoked concerns the procedural mechanism for countries in the Deal to deal with compliance disputes.

In effect, Iran argued it was induced, indeed compelled out of self-defense, to breach the Deal by sanctions imposed by America after it withdrew, and the failure of the remaining Parties to offset those sanctions: “Iran says it can’t be expected to abide by the accord while the U.S. penalties rob it of the economic benefits it was promised in exchange for curbing what it says is a nuclear program intended for peaceful purposes.”1207 Indeed, America had no standing to complaint about Iran’s compliance, or lack thereof, with the Deal:

> “On one side, Americans described the JCPOA as the worst possible deal and withdrew from it,” [President Hassan] Rouhani said at a Cabinet meeting [on 10 July].…. “On the other side, when Iran reduces its commitments to the deal, everyone expresses concern, while they should be concerned about the United States, which violated the entire agreement.”1208

Unwisely, however, and apparently against Russia’s wishes, Iran intimated it might out of the 1968 NPT (to which it has been a non-nuclear weapon state party since 1970).1209

President Rouhani also said (on 3 July) Iran might cross the 3.67% purity level, to any level it desired, and restart construction of its Arak heavy water facility (e.g., removing the concrete it had poured into the heavy water reactor in 2015 in compliance with the JCPOA, cease conversion of that reactor into a modern facility incapable of Plutonium production and thus unable to provide a pathway to a

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1206 Quoted in Fact Box – Iran Nuclear Row.
1207 Trump Warns Iran After Rouhani Threat.
1208 Quoted in U.S. Accuses Iran.
1209 See Iran Risks Rift.
nuclear weapon, and instead build the central component necessary for atomic reactions). 1210

(14) Thirty British Royal Marines from 42 Commando (on 4 July) seized in Gibraltar, in Spanish waters, the Panamanian-flagged, Singaporean-manged, and Iranian-owned 300,000-ton oil super tanker, Grace 1, alleging it was carrying crude oil from Iran to the Baniyas Refinery in the Syrian Mediterranean city of Tartous, thereby breaching EU sanctions on Syria, as well as U.S. sanctions on Iran. 1211 This seizure – which the Indian Captain criticized as involving “brute force” 1212 – was the first since the EU placed sanctions on Syria in 2011, when the hellacious Syrian Civil War started. Though designed to enforce them, not the American sanctions, the seizure occurred at the behest of the U.S., and almost surely was coordinated with the U.S. (because NATO forces were involved).

Carrying 2.1 million barrels of oil, Grace 1 sailed an odd course, namely, the long route, namely, loading oil off the coast of Iran, moving through the Straits of Hormuz, journey around the around the Cape of Good Hope, passing Cape Town, South Africa in mid-June 2019 – rather than take the direct route via the Red Sea and through the Suez Canal – and entered the Mediterranean. 1213 “The [voyage] from Iran to Syria sailing round Africa is about 23,300 kilometers (14,500 miles),

1210 See Trump Warns Iran After Rouhani Threat.

Grace 1 “was intercepted by detachments of Royal Marines and Gibraltarian police, who boarded the tanker from a helicopter and speed boat.” U.K. Marines Seize. The British Special Forces comprised roughly 30 Royal Marines from 42 Commando. See Oil Tanker Bound. Singapore’s IShips Management Pte. Ltd. is the Grace 1 manager, and (as discussed earlier) in December 2018-January 2019 “Grace 1 was one of four tankers involved in shipping Iranian fuel oil to Singapore and China, violating U.S. sanctions.” Tehran Fumes. The Baniyas Refinery was subject to EU sanctions as of 2014, specifically, EU Syrian Sanctions (Council Regulation (EU) No. 36/2012), which was supplemented on 3 July 2019 (the day before the seizure) by the Gibraltar Sanctions Regulation 2019, which authorized the Chief Minister of Gibraltar to designate a vessel a “Specified Ship” if he “has reasonable grounds to suspect that the ship … has been, or is likely to be, involved in a breach of the EU Regulation. The Refinery was subject to the EU sanctions, because it “is a subsidiary of the General Corporation for Refining and Distribution of Petroleum Products, a section of the Syrian ministry of petroleum,” and “the facility therefore provides financial support to the Syrian government, which is subject to sanctions because of its repression of civilians since the start of the uprising against President Bashar al-Assad in 2011.” Oil Tanker Bound.

1212 Quoted in Royal Marines Use (also reporting the Marines made “his unarmed crew kneel on the deck at gunpoint”).
compared with just 6,600 kilometers via the Red Sea and Suez Canal.” The reason to “avoid the Suez Canal” would be that “such a large super-tanker would have had to unload its cargo and refill after passing through, exposing it to potential seizure.” In particular:

A ship the size of the Grace 1, known as a Very Large Crude Carrier, or VLCC, can’t pass through the canal fully loaded.

VLCCs have the option of transiting the canal by discharging half their cargo, sending the oil through the Sumed Pipeline, and pick it up again in the Mediterranean, but the pipeline’s owners have refused to accept Iranian crude since 2012.

Shipping documents, which may have been falsified, showed the oil came from the Iraqi Port of Basra in December 2018, but the Port documents showed no record of Grace 1 being at the Port. The tracking system of Grace 1 was turned off, but satellite tracking maps show it reappeared near Iran’s port of Bandar Assalyeh, apparently having been fully loaded in mid-April 2019 at Iran’s oil terminal on Kharg Island.

Iran called the ship’s arrest illegal, but did not expressly disavow the origin of the cargo. Possibly, Iran sought both to bolster its oil exports and revenues therefrom in the face of the U.S. sanctions, and support its allies – the Syrian government of President Bashar Al Assad, and Shi‘ite forces – against the EU sanctions. After Iran guaranteed Grace 1 would not sail for Syria, nor any country subject to EU sanctions, a Gibraltar court ordered (on 15 August) that the ship be released. U.S. authorities intervened, asking it be held because it was linked to the IRGC, which the U.S. had designated an FTO. Though the U.S. issued an arrest warrant for the ship, the Gibraltar court said the EU did not recognize the IRGC as a terrorist organization, noted it was bound by EU law, and rejected the American attempt to restrain the vessel. Meanwhile, Iran reflagged the vessel under its own flag (which Panama de-flagged on 29 May), and renamed it Adrian Darya 1, and it sailed with roughly two million barrels of oil to Kalamata, Greece. However, located (on 24-25 August) in the Mediterranean passing below Sicily, Adrian Darya 1 changed course, first to Mersin, (a Turkish port 150 kilometers from the Turkish-Syrian border), later towards Iskenderun (another Turkish Port in the Eastern Mediterranean, 124 miles north of Syria’s Baniyas refinery, its suspected

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1214 U.K. Marines Seize.
1215 Tehran Fumes.
1216 U.K. Marines Seize.
destination all along), and subsequently to an undisclosed “For Order” target (meaning it was available for charter).1219 The vessel was too large to pass through the Suez Canal without off-loading some cargo, and indeed too large for the port at Kalamata, yet the U.S. warned Greece, Turkey, and other potential ports of retribution for accepting the it and its cargo. The U.S. Department of the Treasury (on 31 August) blacklisted Adrian Darya 1, and said the vessel was headed to Syria to offload oil for the benefit of the IRGC and its proxies in the Syrian civil war.1220

Indeed, it was. Satellite imagery showed the ship (on 6-7 September) just two nautical miles off the Syrian coast, near the Syrian port of Tartus.1221 America unsuccessfully offered its captain millions of dollars to sail the Adrian Darya 1 to a location where the U.S. could seize the vessel. Iran claimed it successfully sold the oil in the vessel.1222

(15) Iran confirmed (on 5-6 July) it would enrich Uranium to 4.5%-5% for fuel in its Bushehr facility.1223 It also (on 28 July) said it would recommence activities at its Arak facility – raising the spectre that heavy water from this facility could be used to produce Plutonium, which in turn could fuel a nuclear warhead.1224 Iran’s terms to reverse course were relief from sanctions, threatening in response to the American “maximum pressure” campaign graduated responses, namely, crossing a Nuclear Deal line every 60 days, but in a reversible manner.1225

France and the remaining Parties to the JCPOA, though condemning Iran’s move as a “violation” of the Deal, declined to trigger its dispute resolution mechanism,

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hoping to negotiate a settlement. Failing that, and pending the outcome of recourse to \textit{JCPOA} dispute resolution, the Parties could “snap back” U.N. sanctions – that is, restrictions imposed by the U.N. under all previous pertinent U.N. resolutions. Iran, however, may have calculated that there was little more under those resolutions that could harm it than what the U.S. already done to the country under its sanctions.

(16) H.M.S. \textit{Montrose}, a Type 23 frigate of the Royal Navy escorted a British Petroleum-operated oil tanker, \textit{British Heritage}, through the Straits of Hormuz after Iranian boats – five small IRGC craft – tried (on 10 July) to seize the tanker at the northern entrance to the Straits. The IRGC attempt was almost certainly in retaliation for the prior week’s boarding by Royal Marines of \textit{Grace 1}. The \textit{Montrose} issued verbal radio warnings, pointed its guns at the craft, and positioned itself in between \textit{British Heritage} and the Iranian craft, at which point they dispersed, and the tanker proceeded to leave the Gulf through the Straits along the coast of Oman.

Notably, BP originally had planned for \textit{British Heritage}, which is capable of carrying up to one million barrels of oil, to load oil in Iraq, sail through the Straits, and offload the cargo in Europe. Instead, the tanker was empty when it was intercepted by the IRGC craft. BP opted against lifting cargo in Iraq, because it did not want to risk Iran seizing oil.

Amidst this incident and the backdrop of considerable disruption in trade through the Gulf, the Chairman of the U.S. Joint Chiefs of Staff (Marine Corps General Joseph Dunford (1955-)) announced plans to assemble a “multinational military coalition” to protect freedom of navigation and merchant shipping through the Gulf at the Straits of Hormuz, and at the Bab Al Mandeb (which literally means “Gate of Tears”), the choke point between Yemen (on the Arabian Peninsula) and Djibouti and Eritrea (at the Horn of Africa) that is the entry and exit point to the Red Sea and, therefore, to the Suez Canal. Though the U.K. agreed to join, its naval assets were limited to a two principle ships, the HMS \textit{Montrose} (mentioned above), and

\begin{footnotesize}
\begin{itemize}
\item 1226 \textit{Iran Ratchets Up} (quoting French President Emmanuel Macron); \textit{France Says It Will Not Launch Dispute Resolution for Iran Nuclear Deal}, Reuters, 7 July 2019, \url{www.reuters.com/article/us-mideast-iran-france/france-says-it-will-not-launch-dispute-resolution-for-iran-nuclear-deal-idUSKCN1U20BB}.
\item 1228 See \textit{U.S. to Enlist Military Allies in Gulf and Yemen Waters}, BBC News, 10 July 2019, \url{www.bbc.com/news/world-us-canada-48932015}. The U.S. would exercise “command and control,” and lead surveillance, while each country would provide naval vessels to patrol and escort commercial ships flying its flag. That plan presumably would help prevent the U.S. Navy from being thinly stretched across the globe.
\end{itemize}
\end{footnotesize}
HMS Duncan, a Type 45 Destroyer.\textsuperscript{1229} Germany outright refused to join an American-led maritime mission, arguing there was no military solution to de-escalating tensions in the Gulf.\textsuperscript{1230}

(17) The response of the remaining Parties to the Deal was restrained.\textsuperscript{1231} The EU declared (on 15 July) that the signatories would not invoke the Article 36 dispute resolution mechanism. Tellingly, they said the breaches by Iran – crossing the 300 kg limit, and purifying Uranium above 3.67% – were not significant, and were reversible.

(18) Iran announced (on 18 July) IRGC vessels had seized an oil tanker that it accused of smuggling oil out of Iran.\textsuperscript{1232} Iran subsidizes fuel (and, indeed, has some of the cheapest fuel prices in the world), and those subsidies, along with the depreciated value of its currency, the rial, were an incentive to smuggle fuel to surrounding countries by land and Gulf Arab states by sea.\textsuperscript{1233} Iran alleged the tanker had loaded 1 million tons of that fuel at Iran’s Larak Island, in the northern part of the Straits of Hormuz, and was headed toward Oman. The container appeared to be the Panamanian-flagged MT Riah, initially registered with Prime Tankers in the UAE, which apparently had sold it to another UAE company, Mouj Al-Bahar, which in turn had sold it to an entity named KRB Petrochem. The IRGC seized an Iraqi vessel (on 4 August), near Iran’s Farsi Island, on which Iran maintains a naval base, citing the same reason, \textit{i.e.}, the ship was smuggling 700,000 liters of fuel subsidized by Iran to Arab countries.\textsuperscript{1234} As of December 2019, Iran had detained on six occasions vessels it suspected of smuggled fuel.\textsuperscript{1235}

\begin{itemize}
\item \textsuperscript{1229} See Henry Mance, Aime Williams & Najmeh Bozorgmehr, \textit{Britain Joins U.S. Effort to Protect Tankers in Gulf}, \textit{FINANCIAL TIMES}, 5 August 2019, \url{www.ft.com/content/a5b5ba7e-b796-11e9-8a88-aa6628a896e?shareType=nongift}.
\item \textsuperscript{1231} Iran Nuclear Deal Breaches Not Yet Significant, EU Says, BBC NEWS, 15 July 2019, \url{www.bbc.com/news/world-middle-east-48995866}.
\item \textsuperscript{1233} See \textit{U.S. Demands Iran}.
\item \textsuperscript{1235} In the sixth instance, the detention occurred around Abu Musa island, which is near the entrance of the Strait of Hormuz, and the vessel carried a small cargo, 1.3 million liters (8,000 barrels), of allegedly smuggled fuel. See Yasna Haghdoost, \textit{Iran Says It Detained Fuel Ship Near Strait of Hormuz}, \textit{BLOOMBERG}, 30 December 2019, \url{www.bloomberg.com/news/articles/2019-12-30/iran-says-it-detained-fuel-ship-near-strait-of-hormuz}. 
\end{itemize}
(19) Tensions rose again when the amphibious assault U.S. Navy ship, U.S.S. *Boxer* downed (on 18 July) an Iranian drone it said came within 914 meters of the ship. The U.S. said coming so close was a “provocative and hostile action justifying defensive action,” namely, jamming electronically the ability of Iran to control the drone after Iran ignored multiple warnings. Iran denied this claim, saying its video surveillance from the pilotless aircraft showed it still operated after the alleged incident, and had returned safely to Iran.

(20) The next day (19 July), the IRGC seized two tankers, the British flagged and registered *Stena Impero*, owned by Sweden’s Stena Belk and managed by Northern Marine Management (based at Clydebank), and the British owned, Liberian-flagged and registered *Mesdar*. Saying *Stena Impero* had violated maritime protocols (specifically, turning off its GPS, entering the Strait through the exit, not the entrance, and failing to heed warnings), and accidentally collided with an Iranian fishing boat and ignored that boat’s distress calls, Iran apparently seized this tanker in international waters in the Strait off Oman while it was *en route* to Saudi Arabia (to the Jubail refinery, to load petrochemical products), and guided it to toward its port at Bandar Abbas. The Royal Navy’s H.M.S. *Montrose* arrived too late to help *Stena Impero*. Iran apparently seized *Mesdar* in disputed waters north of Abu Musa, in the Gulf, west of the Strait, but after issuing it a warning about environmental and safety regulations, allowed it to proceed. After 10 weeks in Iranian detention, *Stena Impero* was allowed to dock at Port Rashid in Dubai.

(21) Amidst the drone and seizure incidents, Iran’s Foreign Minister, Mohammed Javad Zarif, offered a diplomatic concession, saying Iran would agree to a protocol that


1237 Quoted in “No Doubt About It.”


1241 See British Tanker Docks in Dubai After Detention by Iran, REUTERS, 28 September 2019, www.reuters.com/article/us-mideast-iran-tanker/british-tanker-docks-in-dubai-after-detention-by-iran-idUSKBN1WD0AZ.
would allow for more intrusive international inspections of its nuclear facilities.\footnote{The U.S. dismissed the offer, saying the Foreign Minister lacked the gravitas within the Iranian government to make credible offers – they would need to come from the Supreme Leader or President. In any event, the U.S. – though saying it would talk with Iran without pre-conditions – demanded Iran agree to limits on its ballistic missile program and cease its hostile foreign adventures. Iran dismissed these demands, insisting its missile program is for self-defense, its behavior is not malign, and that if sanctions choked its economy, it would disrupt shipping in the Gulf.} With the CENTCOM citing “emergent credible threats,” America bolstered its military presence in the Gulf. It deployed an additional 500 troops to the Kingdom, with the express approval of King Salman – the first time since the 2003 Iraq invasion, and the third time overall (the first time being in the 1991 Operation Desert Storm).\footnote{See Steve Holland & Idrees Ali, U.S. Navy Ship “Destroyed” Iranian Drone in Gulf, Reuters, 18 July 2019, \url{www.reuters.com/article/us-mideast-iran-tanker/u-s-says-navy-ship-destroyed-iranian-drone-in-gulf-idUSKCN1UD1XS}.} Their purpose was to man and protect Patriot air defense missile batteries at Prince Sultan Air Base (which is in Al Kharg, approximately 77 kilometers south of Riyadh). The U.S. also sent F-22 Stealth fighter jets to that Base.

Meanwhile, some oil container ships (indeed, over 20 in July 2019, 12 of which had loaded oil in Saudi Arabia, eight of which had loaded oil in Iraq and Kuwait, and one of which had loaded oil in the UAE) opted to turn off their transponders in the Strait of Hormuz, and to steer closer to the Saudi-Oman-UAE Omani coastlines, to reduce the likelihood of harassment or seizure by Iran.\footnote{See Oil Tankers’ Tracking. Turning off a transponder means no signal is broadcast via the AIS, but a vessel that does so still may be detected by satellite imagery.} Norway warned its flagged vessels to proceed quickly through the Gulf, while BP stopped sending its tankers through the Strait. Conversely, the U.S. alleged China was breaching the sanctions against Iran.\footnote{See China Continued Iran Oil Imports in July in Teeth of U.S. Sanctions: Analysts, Reuters, 8 August 2019, \url{www.reuters.com/article/us-china-iran-oil/china-continued-iran-oil-imports-in-july-in-teeth-of-u-s-sanctions-analysts-idUSKCN1UY11S}, ; David Sheppard, Demetri Sevastopulo & Lucy Hornby, U.S. Identifies Chinese Tankers Carrying Iranian Oil, Financial Times, 4 August 2019, \url{www.ft.com/content/62220484-b37c-11e9-8cb2-799a3a8c5e7b?shareType=nongift}.} Indeed, “Senior Trump administration officials estimate that 50-70% of Iran’s oil exports are flowing to China, while roughly 30% go to Syria.”\footnote{See China Continued (reporting “between 4.4 million and 11 million barrels of Iranian crude were discharged into China” in July 2019, “or 142,000 to 360,000 barrels per day (bpd),” and that “[t]he upper end of that range would mean July imports still added up to close to half of their year-earlier [July 2018] level despite sanctions”). China appeared to hold much of that oil in pre-customs clearance bonded oil storage tank warehouses (as discussed in a separate Chapter).} Citing satellite tracking data, the U.S. said vessels linked to CNPC (China’s largest state-owned oil company) were carrying oil from Iran, sometimes via ship-to-ship...
transfers (i.e., where a NITC vessel would load oil in Iran, sail to a predesignated position, such as off the coast of Penang, Malaysia, or in the Strait of Malacca, align itself in parallel with the Chinese vessel, transfer its cargo to that vessel, for onward voyage and offloading in China, with both vessels turning off their transponders at crucial points). Because CNPC has U.S.-based operations and secondary shares listed on the NYSE, it was vulnerable to America’s sanctions.

Another cloak-and-dagger instance suggested China sought to obtain Iranian oil. *Pacific Bravo*, a VLCC owned by Kunlun Holdings in Shanghai, turned off its transponder between 5 June and 18 July 2019. The U.S. warned Asian ports not to let the vessel offload its 2.1 million barrels of oil, as that cargo was of Iranian origin. The vessel renamed itself *Latin Venture*, but when it turned its transponder back on, it broadcast from the same last position (near Port Dickson, Malaysia, in the Strait of Malacca), with the same identification number (IMO9206035), as *Pacific Bravo*. Because “IMO numbers remain with a ship for life, this indicated the *Latin Venture* and the *Pacific Bravo* were the same vessel and suggested the owner was trying to evade Iranian oil sanctions.”

By June 2020, there was no doubt China and Iran had moved closer to each other, not only economically, but also militarily. China needed Iranian oil, Iran needed infrastructural development assistance and military ordnance, and both hardly could turn to the U.S. for help. So, following a suggestion from Chinese

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1248 *Exclusive: China-Owned Oil Tanker*.


Regarding the 25-year Sino-Iranian agreement, which was valued in total at $400 billion but which neither side published initially, it called for the following:

The partnership, detailed in an 18-page proposed agreement obtained by *The New York Times*, would vastly expand Chinese presence in banking, telecommunications, ports, railways and dozens of other projects. In exchange, China would receive a regular – and … heavily discounted – supply of Iranian oil over the next 25 years.

The document also describes deepening military cooperation, potentially giving China a foothold in a region that has been a strategic preoccupation of the United States for decades. It calls for joint training and exercises, joint research and weapons development and intelligence sharing – all to fight “the lopsided battle with terrorism, drug and human trafficking and cross-border crimes.”

The partnership – first proposed by China’s leader, Xi Jinping, during a visit to Iran in 2016 – was approved by President Hassan Rouhani’s cabinet in June [2020]…

…Renewed American sanctions, including the threat to cut off access to the international banking system for any company that does business in Iran, have succeeded in suffocating the Iranian economy by scaring away badly needed foreign trade and investment.
But Tehran’s desperation has pushed it into the arms of China, which has the technology and appetite for oil that Iran needs. Iran has been one of the world’s largest oil producers, but its exports, Tehran’s largest source of revenue, have plunged since the Trump administration began imposing sanctions in 2018; China gets about 75 percent of its oil from abroad and is the world’s largest importer, at more than 10 million barrels a day last year.

The projects – nearly 100 are cited in the draft agreement – are very much in keeping with Mr. Xi’s ambitions to extend its economic and strategic influence across Eurasia through the “Belt and Road Initiative,” a vast aid and investment program.

The projects, including airports, high-speed railways and subways, would touch the lives of millions of Iranians. China would develop free-trade zones in Maku, in northwestern Iran; in Abadan, where the Shatt al-Arab river flows into the Persian Gulf; and on the Gulf island Qeshm.

The agreement also includes proposals for China to build the infrastructure for a 5G telecommunications network, to offer the new Chinese Global Positioning System, Beidou, and to help Iranian authorities assert greater control over what circulates in cyberspace, presumably as China’s Great Firewall does.

Iranian supporters of the strategic partnership say that given the country’s limited economic options, the free-falling currency and the dim prospect of U.S. sanctions being lifted, the deal with China could provide a lifeline.

“Every road is closed to Iran,” said Fereydoun Majlesi, a former diplomat and a columnist for several Iranian newspapers on diplomacy. “The only path open is China. Whatever it is, until sanctions are lifted, this deal is the best option.”

Defying U.S., China, and Iran. Thus, the essence of the deal was Iran would help meet China’s demand for hydrocarbons to fuel its manufacturing industries, while China would help meet Iran’s need for infrastructure construction and repair through approximately 100 projects. In so doing, both openly would defy U.S. secondary boycott sanctions.

Of course, Iran might get the benefit of the bargain it hoped. China had ambitious plans to reduce dependence on hydrocarbons, casting doubt on whether it would need Iranian oil in large volumes in future years. Complaints about the quality of Chinese construction in several BRI countries, and the failure of Chinese companies to generate local employment, meant Iran might be settling for second-best solutions. And, if Iran fell short on its payment obligations, then China might take control of the projects – as it had done with respect to a port it built in Hambantota, Sri Lanka:

…[C]ritics across the political spectrum in Iran have raised concerns that the government is secretly “selling off” the country to China in a moment of economic weakness and international isolation. In a speech in late June [2020], a former President, Mahmoud Ahmadinejad, called it a suspicious secret deal that the people of Iran would never approve.

The critics have cited previous Chinese investment projects that have left countries in Africa and Asia indebted and ultimately beholden to the authorities in Beijing. A particular concern has been the proposed port facilities in Iran, including two along the coast of the Sea of Oman.

Id. China, too, might not achieve the results it expected. The U.S. might broaden and deepen its sanctions against Chinese companies engaged in import, export, FDI, or financial transactions with Iran.
President Xi Jinping (1953-, President, 2013-) during his 2016 trip to Iran, the two countries had “quietly drafted a sweeping economic and security partnership that would clear the way for billions of dollars of Chinese investments in energy and other sectors, undercutting the Trump administration’s efforts to isolate the Iranian government because of its nuclear and military ambitions.” The deal was valued in total at $400 billion. Under this 18-page agreement, formally called the “Comprehensive Strategic Partnership,” which the Cabinet of Iran’s President Hassan Rouhani (1948-, President, 2013-) approved in June (but which had yet to be approved by the Majlis (Parliament)), their partnership “would vastly expand Chinese presence in banking, telecommunications, ports, railways and dozens of other projects,” in return for which China would receive a regular – and, according to an Iranian official and an oil trader, heavily discounted – supply of Iranian oil over the next 25 years.” Moreover, the Chinese and Iranian militaries would engage in “joint training and exercises, joint research and weapons development and intelligence sharing – all to fight ‘the lopsided battle with terrorism, drug and human trafficking and cross-border crimes.’”

Manifestly, the Sino-Iranian partnership was “a major blow to the Trump Administration’s aggressive policy toward Iran since abandoning the Nuclear Deal reached in 2015 by President Barack Obama and the leaders of six other nations after two years of grueling negotiations.” True, “[r]enewed American sanctions, including the threat to cut off access to the international banking system for any company that does business in Iran, have succeeded in suffocating the Iranian economy by scaring away badly needed foreign trade and investment.” But, “Tehran’s desperation has pushed it into the arms of China, which has the technology and appetite for oil that Iran needs.” Thus, the first sentence of their agreement cited their ancient commonalities: “Two ancient Asian cultures, two partners in the sectors of trade, economy, politics, culture and security with a similar outlook and many mutual bilateral and multilateral interests will consider one another strategic partners.”

1250 Defying U.S., China, and Iran.
1253 Quoted in Defying U.S., China, and Iran.
1254 Defying U.S., China, and Iran.
1255 Defying U.S., China, and Iran.
1256 Defying U.S., China, and Iran.
1257 Quoted in Defying U.S., China, and Iran.

Overall, the Sino-Iranian accord smelled of “the enemy of my enemy is my friend logic.” Iran understood prior Sino-American cooperation with respect to the JCPOA, China and the U.S. were engaged in great superpower competition. Would it, however, stimulate the Biden Administration (discussed below) to renew negotiations with Iran?
The steady unravelling of the JCPOA continued when (effective 6 September) Iran announced (on 4 September) it would breach another obligations set in the Nuclear Deal. President Rouhani said Iran would manufacture high-quality centrifuges to enrich Uranium, lifting “all limitations” on research and development of centrifuge technology. The President called for new and different kinds of centrifuges to accelerate the enrichment process, but insisted the end-goal was nuclear energy for peaceful purposes. Nonetheless, Iran’s decision violated the JCPOA limitation that it have no more than 5,060 centrifuges at its Natanz facility, which must be the IR-1 model (the oldest and least efficient type), until 2026, and not to engage in any enrichment at its Fordow facility (i.e., the 1,044 centrifuges at Fordow were to spin without any injection of UF6 gas). The Deal permitted Iran to engage in centrifuge R&D and test IR-6 and IR-8 centrifuges (including, after 2024, testing as many as 30 IR-6 centrifuges), which spin faster and thus are more efficient at purifying Uranium than the most basic IR-1 model, but not to

The deal presented a strategic challenge to the U.S. For example:

One [of the proposed port facilities China would building Iran] at Jask [along the coast of the Sea of Oman], just outside of the Strait of Hormuz, the entrance to the Persian Gulf, would give the Chinese a strategic vantage point on the waters through which much of the world’s oil transits. The passage is of critical strategic importance to the United States, whose Navy’s Fifth Fleet is headquartered in Bahrain, in the Gulf.

China has already constructed a series of ports along the Indian Ocean, creating a necklace of refueling and resupply stations from the South China Sea to the Suez Canal. Ostensibly commercial in nature, the ports potentially have military value, too, allowing China’s rapidly growing navy to expand its reach.

Those include ports at Hambantota in Sri Lanka and Gwadar in Pakistan, which are widely criticized as footholds for a potential military presence, though no Chinese forces have officially been deployed at them.

China opened its first overseas military base in Djibouti in 2015, ostensibly to support its forces participating in international antipiracy operations off the coast of Somalia. The outpost, which began as a logistics base but is now more heavily fortified, is within miles of the American base in that country.

China has also stepped-up military cooperation with Iran. The People’s Liberation Army Navy has visited and participated in military exercises at least three times, beginning in 2014.

Id. 

See Iran Nuclear Deal: Tehran to Develop.

Quoted in Iran Nuclear Deal: Tehran to Develop.

accumulate enriched Uranium. Iran said (on 7 September) that it activated 40 advanced centrifuges, 20 IR-4 and 20 IR-8 devices, which potentially shortened its break-out time to produce sufficient fissile material for a nuclear weapon.  

Clearly, Iran was frustrated that during the previous year when it adhered to the JCPOA following America’s withdrawal from it, the EU had not fulfilled Iran’s expectation that the EU blunt the impact of American sanctions in return for Iran’s continued compliance. Iran’s decision about centrifuges – its third breach following the first two (in July), i.e., going over the 300 kg stockpile limit on UF6, and going above the 3.67%, to 4.5%, enrichment purity for UF6 to fuel the Bushehr power plant) – was its way of upping the pressure on the EU to preserve the Deal. Yet, as the BBC succinctly put it:

Iran’s latest decision to breach the limits on its development and production of advanced centrifuges raises one inevitable question. Just how far can it go in abandoning elements of the deal before it is rendered worthless?  

France tried to improve matters by offering Iran a U.S. $15 billion line of credit in exchange for Iran reversing its three breaches and complying fully with the JCPOA. Iran would secure the credit line with oil, and through it would obtain precious foreign currency. The U.S. expressed scepticism, but notably did not immediately declare its implacable opposition to France’s proposal.  

Saudi Aramco’s most important oil facilities in the Kingdom were attacked (on 14 September), allegedly by Houthi rebels backed by Iran. Saudi Aramco is the largest oil producer in the world, and – pumping about 9.8 million bpd, and shipping over 7 million bpd of oil around the world – Saudi Arabia accounts for 10% of the world’s crude oil. The attacks knocked out half of Aramco’s production, i.e., 5.7 million bpd, equivalent to more than 5% of global supply, as well as about half of its NG output. The adverse supply effects continued downstream, because oil

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1262 Iran Nuclear Deal: Tehran to Develop.
1263 Iran Nuclear Deal: Tehran to Develop Speedier.
1266 See Saudi Arabia Faces Weeks Without Full Oil Production After Attack, FINANCIAL TIMES, 15 September 2019, www.ft.com/content/c76c2c6a-d79f-11e9-8f9b-77216ebe1f17?shareType=nongift.
and NG are feedstock into petrochemical products made by companies like the Saudi Basic Industries Corporation (SABIC). And, they damaged the prospects for an IPO of up to 5% of Aramco stock, a long-time aim of the Kingdom to raise funds to help diversify its economy away from hydrocarbons. After all, “[s]ecurity of supplies and management of Saudi barrels by the company are of utmost concern to potential investors.”

What happened? Initial reports indicated 10 UAVs (drones) struck the Khurais oil field (250 kilometers southwest of Dharan, towards Riyadh, near the Empty Quarter), which is the Kingdom’s second largest oilfield, and which accounts for 1% of world oil output, and Abqaiq (in the Eastern Province, 60 kilometers southwest of Dharan), Aramco’s largest facility, which can process up to 7% of the world’s oil. Subsequently, it became clear there were 18 drones and 7 cruise missiles (four of which hit Khurais, and the other three of which fell short of Abqaiq), and the attack lasted 17 minutes.

Abqaiq is the most critical oil processing plant in the world, because it “handles crude [oil and natural gas] from the world’s largest conventional oilfield, the supergiant Ghawar [which was not attacked], and for export to terminals Ras Tanura – the world’s biggest offshore oil loading facility – and Juaymah,” and because it “also pumps westwards across the Kingdom to Red Sea export terminals,” which can offset disruptions to supplies through the Persian Gulf. NASA real-time satellite images showed a smoke plume 50 miles over Abqaiq.

No casualties occurred. (Ironically, on 17 September, a U.S. drone strike targeting ISIS positions in Afghanistan killed 30 pine nut farmers in Wazir Tangi, in the eastern province of Nangarhar.) However, the drones set Khurais and Abqaiq ablaze, a scene striking grave consternation in global oil markets. Long regarded as the supplier of last resort, the Kingdom said Aramco would draw on existing stocks to plug the gap (188 million barrels as of June 2019, held in storage tanks in Saudi Arabia, plus in Sidi Kerir, Egypt (on its Mediterranean coast), Okinawa, Japan, and Rotterdam, Netherlands), and estimated it would have the facilities repaired within

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1268 Quoted in Attacks on Saudi Oil.


days. However, Aramco quickly backed away from any timeline, acknowledging the extent of the damage suggested it would take weeks, maybe months, to repair.

The spectre of legal risk through exercise by Aramco of force majeure clause in its contracts loomed. That is, “Aramco could consider declaring itself unable to fulfill contracts on some international shipments – known as force majeure – if the resumption of full capacity at Abqaiq takes weeks.” Indeed, the U.S. declared (on 18 September) the attack an “act of war,” and (on 22 September) an “attack by Iran on the world” and “state-on-state act of war.”

Another option would be for Aramco to offer buyers Arab Medium or Heavy crude oil, as a replacement for the usual Arab Light or Extra Light grades it supplies. Still another option would be for the Kingdom to call an emergency meeting of OPEC, and ask other OPEC members (one of which, ironically, is Iran) to boost output. The U.S., however, has become an increasingly prominent supplier, following its 1977-2015 self-imposed ban on crude oil exports. The President authorized the DOE to release oil from America’s Strategic Petroleum Reserve to help stabilize world oil supply. Predictably, oil prices (in spot and futures markets) jumped by the highest amounts on record, before settling back. Note that higher prices helped the Kingdom shore up its deficit-laden, debt-ridden economy – but not, of course, in this dramatic, volatile, and violent manner.

America immediately blamed Iran, and President Trump tweeted the U.S. “locked and loaded,” awaiting to see what the Kingdom thought:

> There is reason to believe that we know the culprit, are locked and loaded depending on verification, but are waiting to hear from the Kingdom as to who they believe was the cause of this attack, and under what terms we would proceed!

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1274 See Saudi Arabia Oil Attacks (quoting Secretary of State Mike Pompeo).


1276 See Saudi Arabia Faces Weeks.

1277 See Oil Prices Jump (reporting “Brent futures in London leaped almost $12 in the seconds after the open, the most in dollar terms since their advent in 1988. Prices have since pulled back some of that initial gain, but with Saudi officials downplaying prospects for a rapid recovery, crude is heading for the biggest advance in almost three years,” and that “[f]or oil markets, it’s the worst sudden disruption ever”).

1278 Quoted in U.S. Blames Iran.
He quickly backed off, saying he did not seek war: “I’m somebody that would like not to have war.”\footnote{Quoted in Steve Holland & Rania El Gamal, Trump Says He Does Not Want War After Attack on Saudi Oil Facilities, REUTERS, 16 September 2019, www.reuters.com/article/us-saudi-aramco/trump-says-he-does-not-want-war-after-attack-on-saudi-oil-facilities-idUSKBN1W10X8. [Hereinafter, Trump Says He Does Not.]}

He denied he had committed America to defending the Kingdom:

No, I haven’t promised Saudis that. We have to sit down with the Saudis and work something out…. That was an attack on Saudi Arabia, and that wasn’t an attack on us. But we would certainly help them.\footnote{Quoted in Trump Says He Does Not.}

That was for good reason. An American invasion of Iran would be even more doomed to difficulty than was its March 2003 of Iraq. Iran is far larger, with a better equipped and more dedicated military, and a more supportive population, than was Iraq. And, Iran itself said an attack – by the U.S. or Saudi Arabia – on Iran would cause “all-out war.”\footnote{Shaji Mathew, Zarif Warns of “All-Out War if U.S. or Saudis Strike Iran, BLOOMBERG, 19 September 2019, www.bloomberg.com/news/articles/2019-09-19/zarif-warns-of-all-out-war-if-u-s-or-saudis-strike-iran (quoting Mohammed Javad Zarif, Foreign Minister, Iran).}

It was in neither side’s interest to destabilize the Persian Gulf region to the point of destruction.

Indeed, Saudis had to fight their conflicts for themselves. There was no appetite in the U.S. to take military action on behalf of a third country – let alone an unpopular one whose Crown Prince had been squarely implicated in the October 2018 murder in the Saudi Consulate in Istanbul of Saudi journalist and U.S. permanent resident Jamal Khashoggi (1958-2018), and who prosecuted his Kingdom’s quagmire-like conflict in Yemen – with which it had no defense treaty in an instance in which no Americans or American assets were targeted or hurt.\footnote{See Josh Wingrove & Daniel Flatley, Trump’s Suggestion of Iran Strike Raises Bipartisan Alarm, BLOOMBERG, 16 September 2019, www.bloomberg.com/news/articles/2019-09-16/trump-s-suggestion-of-iran-strike-raises-bipartisan-alarm.}

And, the attacks did not directly affect America’s energy security: the U.S. imports (as of September 2019) only 500,000 bpd of crude oil from Saudi Arabia.\footnote{See Patti Domm, Oil Prices Could Go Much Higher if There is a Military Escalation After Saudi Attack, CNBC, 17 September 2019, www.cnbc.com/2019/09/16/oil-prices-could-go-higher-if-theres-a-military-escalation.html.}

Initially, little evidence accompanied the allegation. However, circumstantial evidence, concerning distance and direction, to support that claim mounted.\footnote{See Saudi Oil Attacks: U.S. Says Intelligence Shows Iran Involved, BBC NEWS, 16 September 2019, www.bbc.com/news/world-middle-east-49712417.}

First, as to distance, the Houthis were not known to have drone technology that could traverse the distance from the closest point in the northern Yemeni border to
the closest Aramco facility (Khurais), 770 kilometers. Both Khurais and Abqaiq were over 1,000 kilometers from Yemen’s capital, Sanaa. In March 2018:

a U.N. expert panel pointed to the remarkable similarity between the Houthi Qasef-1 UAV and the Iranian Ababil-T … [and, in its study, asserted] that Iran had broken the arms embargo against Yemen and supplied the Houthis with a variety of weapons systems.

… However, the Qasef-1/Ababil-T only has a range of about 100-150 km.1285

Possibly, the Houthis might have advanced rapidly in weaponizing civilian drone technology. Or, they might have acquired a more advanced drone than previously believed. Such technology was at the disposal of Iran, but also of China, Iran, and Israel, as well as Hezbollah. Indeed, before the attack, “U.N. investigators” had “highlighted the existence of a new Houthi drone, the UAV-X, which could reach up to 1,500km.”1286 The Houthis themselves proclaimed they had new drones capable of reaching targets 1,700 kilometers away, and used three different launch points in Yemen.1287 Yet, wreckage from the targeted sites suggested the UAVs were Iranian-origin Delta Wing drones.1288

Likewise, the Houthis did not have precision cruise missiles. Wreckage from the attack sites indicated the missiles were Ya-Alī, which are Iranian origin.1289 Yet, Iran rejected the allegation, pointing out how easy it was to blame Iran, because: “All American bases and their aircraft carriers in a distance of up to 2,000 kilometers around Iran are within the range of our [Iran’s] missiles.”1290

1287 See Vivian Nereim & Anthony Dipaola, Saudi Arabia Still Doesn’t Know Launch Site for Oil Attacks, BLOOMBERG, 18 September 2019, www.bloomberg.com/news/articles/2019-09-18/iran-says-it-s-not-looking-for-war-warns-u-s-against-action (quoting Yehya Saree, Military Spokesperson, Houthi forces in Yemen). [Hereinafter, Saudi Arabia Still.] For a recount of the increased military capabilities of the Houthis, including the ability to strike Abu Dhabi and Dubai with new drones obtained, plus “anti-ship cruise missiles, waterborne improvised explosive devices, ballistic and cruise missiles and rockets,” see Lisa Barrington & Aziz El Yaakoubi, Yemen Houthi Drones, Missiles, Defy Years of Saudi Air Strikes, REUTERS, 17 September 2019, www.reuters.com/article/us-saudi-aramco-houthis/yemen-houthi-drones-missiles-defy-years-of-saudi-air-strikes-idUSKBN1W22F4. Some of the upgraded weaponry was home-grown, while the rest came from foreign sources. See id. (quoting the U.N. report: “They [the Houthis] now increasingly rely on imports of high-value components, which are then integrated into locally assembled weapons systems, such as the extended-range unmanned aerial vehicles”).
1289 See Saudi Arabia Oil Attacks.
1290 U.S. Blames Iran (quoting Amirali Alī Hajizadeh, Commander of the IRGC Aerospace Force).
Second, as to direction, the 19 points of impact causing damage to the Aramco facilities appeared to come from the west-northwest, not the south.\textsuperscript{1291} Iran is to the north and west, whereas Yemeni territory the \textit{Houthis} control is to the south and east, hence launch sites in a northerly direction vis-à-vis those facilities would exclude Yemen as a possibility. Iraq, too, is to the north and west, but the U.S. agreed with the Iraqi assessment that the attack did not come from Iraqi soil. That said, Saudi officials were careful in their wording about Iran’s involvement: they declared the evidence proved the launch sites for the attack were inside Iranian territory (probably southwest Iran, said their American counterparts) but they stopped short of saying the Iranian government or IRGC ordered the attack.\textsuperscript{1292}

And, Iran itself denied involvement: Foreign Minister Zarif declared: “I know that we didn’t do it. I know that the \textit{Houthis} made a statement that they did it.”\textsuperscript{1293} They did. \textit{Houthi} spokesman, Yahya Sarea essentially said his movement did not need Iran’s help for this attack; rather, he announced that this operation was one of the biggest ever undertaken inside Saudi Arabia, and “was carried out in ‘co-operation with the honourable people inside the Kingdom.'”\textsuperscript{1294} That ominous statement suggested the Kingdom faced more internal dissent than it liked to admit, and some such dissidents may serve as informants, providing intelligence to the \textit{Houthis} and/or Iran. Iran’s denial, however, proved unconvincing amidst reports the attacks were planned as early as May 2019 by security officials, including from the IRGC, meeting secretly in Tehran, with the blessing of \textit{Āyatollāh} Alī Khamenei:

The main topic that day in May: How to punish the United States for pulling out of a landmark nuclear treaty [\textit{i.e., the JCPOA}] and re-imposing economic sanctions on Iran, moves that have hit the Islamic Republic hard.

With Major General Hossein Salami, leader of the Revolutionary Guards, looking on, a senior commander took the floor.

“It is time to take out our swords and teach them a lesson,” the commander said….

\textsuperscript{1291} \textit{See} Saudi Arabia Oil Attacks.


At least one American official speculated the \textit{Āyatollāh} Alī “may” have authorized the attacks. See Phil Stewart & Idrees Ali, \textit{United States Sending Troops to Bolster Saudi Defenses After Attack}, Reuters, 20 September 2019, \url{www.reuters.com/article/us-saudi-aramco-usa-pentagon/united-states-sending-troops-to-bolster-saudi-defenses-after-attack-idUSKBN1W52K3}. [Hereinafter, \textit{United States Sending Troops}.]

\textsuperscript{1293} \textit{Zarif Warns}.

\textsuperscript{1294} \textit{Quoted in Saudi Arabia Oil and Gas}. Indeed, the attack was far more serious than the drone attack against Saudi Aramco’s Shaybah oil field and natural gas liquefaction facility in August 2019. \textit{See id.; Attacks on Saudi Oil}. 

\textit{International Trade Law E-Textbook} (Raj Bhala, 6\textsuperscript{th} Edition, 2025) 
Volume Four 
University of Kansas (KU) 
Wheat Law Library
Hard-liners in the meeting talked of attacking high-value targets, including American military bases.

Yet, what ultimately emerged was a plan that stopped short of direct confrontation that could trigger a devastating U.S. response. Iran opted instead to target oil installations of America’s ally, Saudi Arabia, a proposal discussed by top Iranian military officials in that May meeting and at least four that followed.

This account, described to Reuters by three officials familiar with the meetings and a fourth close to Iran’s decision making, is the first to describe the role of Iran’s leaders in plotting the Sept. 14 attack on Saudi Aramco, Saudi Arabia’s state-controlled oil company.

These people said Iran’s Supreme Leader Āyatollāh Alī Khamenei approved the operation, but with strict conditions: Iranian forces must avoid hitting any civilians or Americans.

Reuters was unable to confirm their version of events with Iran’s leadership.

A Revolutionary Guards spokesman declined to comment. Tehran has steadfastly denied involvement.¹²⁹⁵

Moreover, in December 2019, America presented evidence to the U.N. Security Council. The interim report prepared by the U.S. Intelligence Community, while not “definitely reveal[ing] the origin of the strike that initially knocked out half of Saudi Arabia’s oil production” pointed strongly to the conclusion the attacks came from the north, i.e., Iran, with the specific launch site being the “Ahvaz Air Base in southwest Iran, which is about 650 km north of Abqaiq.”¹²⁹⁶

Washington assessed that before hitting its targets, one of the drones traversed a location approximately 200 km (124 miles) to the northwest of the attack site.

“This, in combination with the assessed 900-kilometer maximum range of the … UAV, indicates with high likelihood that the attack originated north of Abqaiq,” ….

… [The report] added the United States had identified several similarities between the drones used in the raid and an Iranian


¹²⁹⁶ Exclusive: U.S. Probe.
designed and produced unmanned aircraft known as the IRN-05 UAV.

…

Some of the craft flew over Iraq and Kuwait en route to the attack, … giving Iran plausible deniability.

…

Washington’s interim assessment also included several pictures of drone components \([i.e.,\text{ weapons debris}]\) including the engine identified by the United States as “closely resembling” or “nearly identical” to those that have been observed on other Iranian unmanned aerial vehicles.

It also provided pictures of a compass circuit board that was recovered from the attack with a marking that is likely indicating a potential manufacturing date written in the Persian calendar year….

The name of a company believed to be associated with Iran, SADRA, was also identified on a wiring harness label from the Sept. 14 wreckage….

Whoever ultimately was responsible, the attack burst the myth of Saudi prowess. It and its flagship company, Aramco, and their infrastructure, were vulnerable to attack:

“Abqaiq is the nerve center of the Saudi energy system. Even if exports resume in the next 24 to 48 hours, the image of invulnerability has been altered,” Helima Croft, [said] global head of commodity strategy at RBC Capital Markets….

Indeed, the 5.7 million bpd drop in oil production had been the largest ever: during the 1979 Iranian Revolution, fell by 5.6 million bpd, and during the 1973 Yom Kippur War and 1990 Iraqi invasion of Kuwait, it fell by 4.3 million bpd. To its credit, about two days after the attack, Aramco was able to increase production by half, \(i.e.,\) Abqaiq was processing (on 17 September) two million bpd, and expected to process its pre-attack level of 4.9 million bpd by the end of September, and overall, the Kingdom would reach its full production capacity of 12 million bpd by the end of November.

MBS had been in control of the military since his ascendency to the position of Crown Prince in January 2015, and since September 2019, when he replaced Khalid

\[1297\] Exclusive: U.S. Probe.
\[1298\] Quoted in U.S. Blames Iran.
\[1299\] See Saudi Oil Attacks: U.S. Says.
Al Falih (sometimes called “KAF,” who had been tapped in May 2016) as Minister of Oil with his relative, his half-brother (and thus son of King Salman), Prince Abdulaziz bin Salman bin Abdulaziz al-Saud. But, the Crown Prince seemed in over his head – he could not use his guns to protect the money:

“This is a relatively new situation for the Saudis. For the longest time they have never had any real fears that their oil facilities would be struck from the air,” Kamran Bokhari, founding director of the Washington-based Center for Global Policy….\textsuperscript{1301}

His government had poured billions into air defenses and other ordnance, yet could not cope with asymmetric warfare.\textsuperscript{1302} To be sure, defending against a large number of simultaneously invading drones was not easy – some were bound to penetrate the defenses. Yet, Saudi Arabia had pointed its defenses to the south, towards Yemen, not north, towards Iran.\textsuperscript{1303}

More generally, MBS could not match Iran’s clever preparedness: even though Iran has 500,000 active duty military personnel, of whom 125,000 are in the elite IRGC,

\begin{itemize}
  \item \textsuperscript{1301} Quoted in \textit{Attacks on Saudi Oil}.
  \item \textsuperscript{1302} See \textit{Trump Sees Many Options}.
  \item \textsuperscript{1303} See \textit{Saudi Oil Attacks: Drones and Missiles Launched from Iran – U.S.}, BBC NEWS, 17 September 2019, \url{www.bbc.com/news/world-middle-east-49733558}. The mismatch was lethal and laughable:
\end{itemize}

Billions of dollars spent by Saudi Arabia on cutting edge Western military hardware mainly designed to deter high altitude attacks has proved no match for low-cost drones and cruise missiles used in a strike that crippled its giant oil industry.

…”The attack is like Sept. 11\textsuperscript{th} for Saudi Arabia, it is a game changer,” said a Saudi security analyst who declined to be named.

“Where are the air defense systems and the U.S. weaponry for which we spent billions of dollars to protect the kingdom and its oil facilities? If they did this with such precision, they can also hit the desalination plants and more targets.”

The main Saudi air defense system, positioned mainly to defend major cities and installations, has long been the U.S.-made long-range Patriot system.

It has successfully intercepted high-altitude ballistic missiles fired by the Houthis at Saudi cities, including the capital Riyadh, since a Saudi-led coalition intervened in Yemen against the group in March 2015.

But since drones and cruise missiles fly more slowly and at lower altitudes, they are difficult for Patriots to detect with adequate time to intercept.

“Drones are a huge challenge for Saudi Arabia because they often fly under the radar and given long borders with Yemen and Iraq, the kingdom is very vulnerable,” said a senior Gulf official.

\begin{itemize}
\end{itemize}
Iran knew it was outmanned and outgunned by the superpower and its Saudi and Israeli allies, hence Iran indirectly challenged them through asymmetric capabilities – “ballistic missiles, deadly drones and a web of militia allies in Iraq, Syria, Lebanon and Yemen, …” “with the aim of being able to inflict pain while avoiding the traditional battlefield.”

Given the structural disparities, asymmetric warfare made sense for Iran:

Iran resorts to asymmetric warfare – the use of unconventional weapons and tactics to take on a far greater military might – because it cannot afford to provoke a conventional conflict it would lose.

Weaknesses in Iran’s regular air, land and sea forces are the result of decades of economic sanctions and constrained budgets, as the U.S., its Sunni Gulf allies and Israel sought to isolate and weaken the \textit{Shi'ite} Islamist regime from its revolutionary birth in 1979.

Those shortcomings help account for the prominence achieved by [General Qassem] Soleimani’s \textit{Al Quds} force [discussed below], a unit of the elite Islamic Revolutionary Guard Corps that works with a stable of mainly fellow \textit{Shi'ite} proxy militias across the region to challenge the U.S. and its allies.


Indeed:

“From a conventional military perspective they would get absolutely hammered,” said a British former military commander…. “Their conventional military is very, very sparse and quite old and quite out of date. They’ve spent all their money on asymmetric attack capabilities. In that regard they’re very well prepared.”

Iran has built the largest stockpile of ballistic missiles in the Middle East. Some are based on the older, widely used “Scud” designs, with a range of at least 750km (466 miles). Others, based on the North Korean No Dong, can reach up to 2,000km, within reach of Israel or southeast Europe….

The Revolutionary Guards fields a fleet of missile-armed speedboats and midget submarines it can deploy against U.S. military ships or commercial tankers to disrupt the flow of oil in Gulf waters.…

Iran’s fleet of … UAVs can be used for surveillance or armed with explosives.…

“Iran in the Persian Gulf doesn’t really need to have big ships, not necessarily frigates and destroyers. Speedboats, gun boats, missile boats can do the job,” said Hossein Aryan, a military analyst who served 18 years in Iran’s navy before and after the 1979 Islamic Revolution.
Speaking at Friday [10 January 2020] prayers in Tehran, Supreme Leader Āyatollāh Alī Khamenei said the Al Quds force were “combatants without borders who go wherever they are needed to protect the dignity of the oppressed.” He said they had “lofty, human goals.”

Iran’s relative poverty in conventional military terms helps explain, too, the decision of Iran’s leaders to invest in ballistic missiles, submarines and – most controversially – a nuclear fuel program that could enable Tehran to build atomic weapons and has propelled the West’s confrontation with the Islamic Republic for much of the past two decades.1305


As to that poverty in conventional military assets:

For Western militaries, air forces provide a first line of defense and attack. Not so Iran, where decades of sanctions and limited spending power have restricted the purchase of new planes, as well as of spare parts, modern electronics and weaponry.

Iran on paper has 300-plus combat aircraft – more than the U.K. – but the vast majority were bought before the 1979 fall of the Shah [of Iran] and are obsolete, if not grounded. Most, such as Vietnam-era F-4 Phantom IIs and Soviet MiG-29s, couldn’t compete in any contest with the U.S., its Gulf allies, or Israel.

Iran’s regular army, at 350,000, is considerable, especially once you add the IRGC’s 100,000 ground troops. Yet it has been starved of investment, especially since the U.S. toppled Saddam Hussein in Iraq in 2003, removing the only credible threat of a ground invasion across Iran’s expansive and difficult terrain. …

After more than a decade of trying to buy highly capable S-300 anti-aircraft systems from Russia, Iran received its first shipments in 2016 and now has 32 launchers, organized in groups of eight around four 300-kilometer radars. Yet this number falls far short of the blanket protection Iran would want.

While the Iranian military also deploys an impressive array of other surface-to-air systems, many are old and pose little threat to new generation aircraft. The capabilities of domestically made or upgraded systems are largely unknown. Adding to this patchwork effect is that air defense networks are complex, combining layers of systems to defend against anything from high-altitude bombers to low-flying cruise missiles and helicopters. These need to be fully integrated to work efficiently, but in Iran responsibility is split between the regular armed forces and the IRGC.

Iran’s Navy is similarly split between the regular armed forces and the IRGC, with the latter having full control of assets in the Gulf. Unable to buy or build cruisers and destroyers to compete with U.S. 5th Fleet, Iran has again looked for low-cost ways of leveling the battlefield. It has invested in underwater mines, submarines, and about 200 small speed boats armed with missiles and designed to swarm a potential enemy. That might be enough to close the Strait of Hormuz, the world’s foremost chokepoint for oil shipping, for a time but doing so would represent a nuclear option for Iran.

Id.
So, from Iran’s perspective, and based also on bitter experience, Iran’s decades-long investments in its asymmetric combat capabilities made sense:

Iran has been funding and arming militant groups abroad since soon after the 1979 Islamic Revolution as the nation’s new fundamentalist Shi’ite Muslim leaders sought to spread their mission to the rest of the region. The limits of their ability to prevail in open conflict became apparent during the 1980-1988 war that quickly followed with Iraq, from which Qassem Soleimani’s Al Quds unit emerged from Iran’s premier military force, the Revolutionary Guard Corp. Though Iran fought Iraq’s better armed, Western-backed forces to a standstill, the economic and human cost was devastating. Iran’s leaders have avoided open warfare since, preferring the deniability and lower casualty rates offered by the use of covert operations and proxy forces.1306

Since the Yemeni Civil War began in March 2015, a Saudi-led military coalition had bombed almost daily the positions of its proxy in Yemen, the Houthis, and blockaded Yemen’s ports, received back missile and drone attacks, and thus won no significant strategic victory. The Houthis drove the internationally-recognized President Abdrabbuh Mansour Hadi (1945-, President, 2012-), a Sunnite, from the Yemeni capital, Sanaa, saying his government was corrupt, and took control of most of the western part of Yemen. Saudi Arabia backed President Hadi. The decision to intervene fell squarely on MBS:

Soon after he [MBS] was first named defense minister, in 2015, he plunged the kingdom into a military campaign in neighboring Yemen to drive from power a faction backed by Iran. Saudi media outlets proclaimed that the prince was asserting the kingdom’s power and leading a new drive to roll back Iranian influence.

“The Iranians, they’re the cause of problems in the Middle East, but they are not a big threat to Saudi Arabia,” the Prince boasted confidently to Time magazine in 2018. “Saudi Arabia’s economy is double the size of the Iranian economy,” he said, adding that Iran’s army was “not among the top five” in the Middle East.1307

His boast glossed over an underlying violent schism afflicting the Muslim world since the death of the Prophet Muhammad (PBUH) in 632 A.D. (or, no later than

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the Battle of Karbala in 680 A.D.). The Houthis and their Iranian patrons are Shī'īte, whereas the Saudis, of course, officially patronize the Ḥanbalī School of Sunnīte Islam. Tens if not hundreds of thousands of people had lost their lives in Yemen, and millions were at risk of starvation.

As to the money, the long-awaited partial privatization of Saudi Aramco, part of MBS’s ballyhooed Vision 2030 to modernize the Kingdom by diversifying it away from hydrocarbons, was in jeopardy. The Financial Times boldly reported that the Saudi Royal Family was pressuring wealthy individuals in the Kingdom – including many of the approximately 300 business magnates and Royals who had been detained in the Ritz Carlton Riyadh in 2017-2018, such as Prince Al Waleed bin Talal – to invest in Aramco.1308 “The aim was to ‘strong-arm,’ ‘coerce,’ or ‘bully’ some of the wealthiest families in the Kingdom to become cornerstone investors in what has been billed as the world’s biggest IPO.”1309 With their money committed, investment banks such as Credit Suisse, Goldman Sachs, JP Morgan, and Morgan Stanley might agree to value Aramco at U.S. $2 trillion, the figure MBS “coveted,” and thereby raise roughly $100 billion from an IPO of up to 5% of the shares of Aramco.1310 Their inclination was toward a $1-$1.5 trillion valuation, partly because of the political risk associated with investments in Saudi Arabia – a risk magnified by the attacks on Aramco.

Surely aware of the problems it faced with guns and money, Saudi Arabia constructed a narrative: the attacks were one on the entire international community, and the Crown Prince called it “a ‘real test of the global will’ to confront subversion of the international order.”1311

In response to the Abqaiq and Khurais attacks, and notwithstanding possible covert operations, the U.S. opted (on 18 September) for a three-pronged response.1312

First, President Trump declared a substantial increase its sanctions on Iran. The new sanctions targets included CBI, the National Development Fund of Iran (the country’s SWF, which the U.S. accused of supporting the IRGC Quds Force), and the ḥawāla banking network.1313 OFAC found:

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1309 Saudi Arabia “Bullies.”

1310 Saudi Arabia “Bullies.”

1311 See Saudi Arabia Oil Attacks; Trump Sees Many Options.


1313 See Demetri Sevastopulo, Najmeh Bozorgmehr & Michael Peel, America to Send Weapons and Troops to Saudi Arabia, FINANCIAL TIMES, 21 September 2019, www.ft.com/content/06081bc4-dbb4-11e9-
that the Central Bank of Iran provided material support, specifically facilitating financial transfers for the Iranian Revolutionary Guard’s Quds Forces (IRGC-QF) and Hezbollah. The material financial support included providing the IRGC-QF extensive access to foreign currency in the amount of several billions of U.S. dollars and euros, and facilitation of IRGC-QF transfers to Hezbollah.

… [T]he Central Bank of Iran’s designation as this is the most commercially significant. While the Central Bank of Iran is already blocked under U.S. sanctions as it is a part of the Government of Iran, that did not subject transactions with it to U.S. secondary sanctions but the September 20th 2019 counter terrorism designation does. Now, non-U.S. persons are subject to designation risk if their transactions with the Central Bank of Iran are deemed a “knowingly significant transaction” involving the Central Bank of Iran. For non-U.S. banks providing significant financial services for entities designated under E.O. 13244, this can also potentially subject that bank to U.S. correspondent account or payable-through account sanctions.

OFAC Frequently Asked Question (FAQ) 636 provides insight on just how broad OFAC interprets the world of potentially significant transactions noting that the mere involvement of a designated bank, other than banks only blocked because of their Government of Iran status, may lead OFAC to determine a transaction is significant. With such a broad interpretation of a signification transaction, if banks were already somewhat apprehensive to assist with receipt of payments for business activity with Iran, this is only going to make this challenge greater as the Central Bank of Iran often plays a less obvious role in many of those transactions.

For example, in the humanitarian trade context [agricultural, medicine, and medical device sales] the Central Bank of Iran might

8f9b-77216ebe1f17?shareType=nongift [Hereinafter, America to Send Weapons.] The new sanctions were issued pursuant to Executive Order 13224 and the counter-terrorism authority of OFAC thereunder. Signed by President George W. Bush on 23 September 2001, that Order responded to the 9/11 terrorist attacks. See U.S. Department of State, Bureau of Counterterrorism, Executive Order 13224, www.state.gov/executive-order-13224/. Subsequently, President Trump subsequently “modernized it. See The White House, Executive Order on Modernizing Sanctions to Combat Terrorism (10 September 2019), www.whitehouse.gov/presidential-actions/executive-order-modernizing-sanctions-combat-terrorism/. President Trump used the updated version on 26 October to impose additional sanctions on Iran’s oil sector, including the Minister of Petroleum, NIOC, NITC, and NPC freezing their assets subject to U.S. jurisdiction and barring Americans from transactions with them, arguing they were supporting the IRGC-QF. See U.S. Issues Fresh Iran-Related Sanctions Targeting State Oil Sector, REUTERS, 26 October 2020, www.reuters.com/article/iran-nuclear-usa-sanctions/u-s-issues-fresh-iran-related-sanctions-targeting-state-oil-sector-idUSKBN27C069.
take a financing or foreign currency provision role. Now such a Central Bank of Iran role might be enough of a hook to expose the whole transaction to U.S. secondary sanctions risk. [Indeed, U.S. entities had sold food and medicines to Iran under an OFAC General License, and received payment through the CBI. The new sanctions made such dealings with the CBI illegal.] While the September 20, 2019 designation came with a press release statement noting that the U.S. “has a long standing policy of allowing for the sale of [humanitarian trade] and OFAC will continue to consider [such] requests related to humanitarian trade with Iran as appropriate,” practically banks may still not be willing to service humanitarian trade transactions, or generally any other transactions that the Central Bank of Iran might “touch,” directly or indirectly without additional OFAC guidance, or potentially an OFAC license. The ability to get paid for business activity with Iran just starkly increased in difficulty.1314

Via Executive Order, America tightened the sanctions further (on 11 December) on the IRISL plus its Shanghai-based subsidiary, E-Sail Shipping, and Iran’s largest domestic airline firm, Mahan Air.1315 Still, those sanctions already were so tight (for example, on the CBI, IRISL, and Mahan Air) there was little more that could be done, insofar as secondary (non-U.S.) entities already had been opting not to deal with Iran’s Central Bank.1316

1315 See Demetri Sevastopulo & Najmeh Bozorgmehr, U.S. Hits Iran’s Biggest Airline and Shipping Group with Sanctions, FINANCIAL TIMES, 11 December 2019, www.ft.com/content/2edd6d6-1c0f-f1ea-9186-7348c2f183af?shareType=nongift. The U.S. contended “IRISL falsified documents and used deceptive schemes to mask the shipment of ballistic missile-related items for Iran’s Aerospace Industries Organization (AIO) and Shahid Hemmat Industries Group (SHIG), which runs Iran’s liquid-fuelled ballistic missile program,” and that “E-Sail, a Shanghai-based subsidiary of IRISL, has been helping AIO and SHIG.” Id. As for Mahan Air, the U.S. alleged it “helped transport missile-related graphite and high-grade carbon fibre in violation of U.N. sanctions.” Id. Further, the U.S. Departments of State and Treasury admonished “ship insurers, banks, charter companies, port owners, crews and captains that they all face sanctions exposure if they can’t account for the legitimacy of the cargoes they carry,” to focus on the “automatic identification system used by ships,” “demand[ed] that insurers and ship owners pay closer attention to when ship transponders are turned on and off, and steer clear of doing business with vessels with questionable histories,” but also assure “shippers … won’t be at risk [of violating U.S. sanctions] if they avoid Iran-related business.” Nick Wadhams, U.S. Seeks to Squeeze Shipping, Metals in Iran Sanctions Bid, BLOOMBERG, 17 December 2019, www.bloomberg.com/news/articles/2019-12-17/u-s-seeks-to-squeeze-shipping-metals-in-new-iran-sanctions-bid. This “enforcement effort amount[ed] to a renewed bid to overhaul the often shadowy world of global shipping, in which the true owners of ships are easily disguised, vessels fly under the flags of countries that rarely punish them for wrongdoing and insurers and banks turn a blind eye to illicit behavior,” and “aim[ed] to close one of the most common means of avoiding sanctions: the ship-to-ship transfers at sea of crude oil, refined petroleum products and bulk goods.” Id.
1316 The U.S. continued to add to its list of SDNs targeted under the sanctions. See, e.g., Josh Wingrove, U.S. Sanctions Key Iranian Officials Reporting to Supreme Leader, BLOOMBERG, 4 November 2019, www.bloomberg.com/news/articles/2019-11-04/u-s-sanctions-key-iranian-officials-reporting-to-supreme-
From Iran’s perspective, the re-imposition of sanctions following America’s JCPOA withdrawal exacerbated tensions. Moreover:

U.S. sanctions have cratered the Iranian economy. Yet administration hopes that this would lead to a popular backlash against the government in Tehran, forcing it to cave to American demands, have yet to bear fruit.

Instead, the regime has relied on responses honed over 40 years of international isolation, upping the ante to show that if the U.S. continues forcing Iranian oil exports to zero in an attempt to bankrupt its government, Iran has the power to halt the oil exports of U.S. ally Saudi Arabia, too.

“We are caught in this vicious circle,” said Ali Vaez, Iran Project Director at the Brussels-based International Crisis Group. “The U.S. has to realize that Iran is part of this region. Iran cannot be excised.”

Simply asked, was U.S. sanctions policy failing? Indeed, the boast by U.S. Treasury Secretary Steve Mnuchin – that America had “now cut off all sources of funds to Iran” – was technically incorrect. True, Iran was barred from conducting financial transactions through the formal banking networks, such as the SWIFT payments messaging system. But, “Iranian businessmen mostly rely on their western and eastern neighbours, Iraq and Afghanistan, to bring in hard currency while they use the ḥawāla system – an informal money arrangement system – in Turkey and, to some extent, in the UAE.”

Second, American officials sought to build a coalition of partner countries to isolate Iran further from the international community. Yet, many candidates –

leader (adding to the U.S. Treasury Department list “Ebrahim Raisi, the head of the country’s judiciary, for involvement in cracking down on public protests in 2009, … Mohammad Mohammadi Golpayegani, the Supreme Leader’s chief of staff, and Ali Akbar Velayati, a senior adviser to the Supreme Leader who Treasury said helped the Iranian regime extend credit lines to Syrian President Bashar al-Assad’s regime,” and “Mojtaba Khamenei, a son of the leader, … targeted “for representing the Supreme Leader in an official capacity despite never being elected or appointed to a government position aside from work in the office of his father”).


including the EU and Iraq – were reluctant to get dragged into another Middle
Eastern conflict. China and Russia inclined to favor Iran’s narrative, and could be
expected to wield their veto power in the U.N. Security Council against any
resolution condemning Iran or threatening action against it. As for the UAE, it
was scaling back its four-year long participation with Saudi Arabia in the Yemeni
Civil War. The Emirates seemed to sense fighting with the Saudis was antithetical
to its long-term interests – a point the Houthis made in threatening it with drone
attacks.

Third, America announced it would send a small group (numbering in the hundreds,
not thousands) of troops to Saudi Arabia to bolster the Kingdom’s air defences (but,
with other deployments, aggregating to 3,000 personnel). The U.S. stressed their
presence was purely defensive to the Kingdom and the UAE. It was difficult to
imagine what they could do against a swarm of drones or bevy of cruise missiles,
hence their presence seemed largely symbolic. The U.S. also said it would
accelerate deployments of weapon systems to the Kingdom and the UAE, namely,
an air expeditionary wing and fighter jet squadron, one Terminal High Altitude
Area Defense system (THAAD) and two anti-missile Patriot batteries, and –
ironically – drones. What the U.S. did not announce was its secret cyberattack
against Iran in late September, targeting its computer hardware that allowed it to
spread propaganda.

Iran alleged (on 11 October) that one of its oil cargo vessels, Sabiti, had been struck
in the Red Sea, off the coast of Jeddah, Saudi Arabia by missiles. However, the
NITC withdrew its initial contention that the missiles likely came from Saudi
Arabia. Sabiti was fully loaded to its capacity of one million barrels, and the attack
caus ed damage to two of its tanks, causing an oil spill that it was able to contain.
The vessel had been heading to the Mediterranean Sea via the Suez Canal.

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1321 See Trump Sees Many Options.
1322 See Saudi Arabia Still.
1323 See Saudi King Approves U.S. Military Deployment: SPA, REUTERS, 17 October 2019,
www.reuters.com/article/us-saudi-usa-troops/saudi-king-approves-u-s-military-deployment-spa-
idUSKBN1WR0LH; Phil Stewart & Idrees Ali, U.S. to Deploy Large Number of Forces to Saudi Arabia,
large-number-of-forces-to-saudi-arabia-idUSKBN1WQ21Z; United States Sending Troops.
1324 See Idrees Ali & Phil Stewart, Exclusive, U.S. Carried Out Secret Cyber Strike on Iran in Wake of
Saudi Oil Attack: Officials, REUTERS, 16 October 2019, www.reuters.com/article/us-usa-iran-military-cyber-
exclusive/exclusive-u-s-carried-out-secret-cyber-strike-on-iran-in-wake-of-saudi-oil-attack-officials-say-
idUSKBN1WVOEK (also reporting that “[l]ast year [2018,] a Reuters investigation found more than 70
websites that push Iranian propaganda to 15 countries, in an operation that cybersecurity experts, social media
firms and journalists are only starting to uncover).
1325 See Golnar Motevalli, Arsalan Shahla & Yasna Haghdoost, Iranian Oil Tanker Attacked as Middle
Iran announced (on 5 November) that it would commit its fourth breach namely, injecting UF₆ gas into centrifuges. Those centrifuges had spun empty, so injecting gas into them was a key step to separate by the spinning centrifugal force the most fissile isotope, U-235, from the heavier isotope, U-238, and thereby producing enriched Uranium.

That Iran said it would do so at its second largest nuclear facility, Fordow, was concerning in two respects: first, the JCPOA permitted enrichment only at Natanz, and second, Fordow lies “90 meters … under a mountain south of Tehran “to shield it from airstrikes, and the existence of which Iran had not disclosed to IAEA inspectors until 2009.” Iran hoped its calibrated move might push the EU to relax its adherence to U.S. sanctions, which had resulted in a drop of Iranian oil exports from 2.8 million bpd (in May 2018) to 500,000 bpd (in November 2019).

Worryingly, Iran also said it doubled to 60 the number of its advanced IR-6 centrifuges installed at Natanz, meaning it could enrich Uranium to 20% “within four minutes.” Additionally, Iran had installed [at Fordow and/or Natanz] “two large, 164-machine cascades – which were removed under the [July 2015 Nuclear Deal] – of the more advanced IR-2m and IR-4 centrifuges,” and planned another IR-6 cascade.Using these more powerful, faster-spinning centrifuges than the IR-1 model mandated by the JCPOA meant Iran “[t]he rate at which Iran is producing enriched uranium .. also increased, from 70-80 kg a month to around 100 kg a month currently [i.e., as of November 2019] and still accelerating,” and that “Iran’s stock of enriched uranium was 372.3 kg, well above the Deal’s 202.8-kg cap.”

With the increase in number and sophistication of its centrifuges, Iran was able to increase its stockpile of enriched Uranium. IAEA inspectors reported (in November 2019) that “Iran’s stockpile of low-enriched uranium swelled almost two-thirds during the last quarter to more than 372 kilograms (820 pounds),” so Iran was “now enriching about 100 kilograms of the metal a month compared to just 4 kilograms back when it was observing the 2015 agreement’s JCPOA’s conditions in June,

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1328 Iran Nuclear Deal: Fordo Uranium (quoting Ali Akbar Salehi, Head, Atomic Energy Organization of Iran (AEOI)).

1329 See Iran Adds.

1330 Iran Adds.
and purifying the metal to 4.5%.” (Recall that to make one nuclear weapon, 630 kg of low-enriched Uranium are needed for 15-22 kg of Uranium purified to 90%.)

(29) Iran appeared to commit a fifth breach (in November 2019). IAEA inspectors reported “Iran has … installed small numbers of centrifuges not even mentioned in the accord [i.e., the JCPOA], including single models of the IR-8s, IR-8B, IR-9 and IR-s……” Precisely what this and the previous confessed breaches meant, in terms of a basic purpose of the July 2015 Iran Nuclear Deal, namely, “to keep Iran a year away from producing enough fissile material for a bomb if it chose to,” was unclear. How much of that break out time had Iran reduced?

(30) On New Year’s Eve 2019, the de facto proxy war between America and Iran spilled openly over to Iraq. Iraqi protestors attacked the U.S. Embassy in Baghdad (which, covering 104 acres, is almost as big as Vatican City, and thus is the largest Embassy in the world), following five U.S. airstrikes (on 29 December) in Iraq and Syria against a pro-Iranian militia in Iraq, Kata’ib Hezbollah (Hezbollah Brigades), which killed at least 25 of its fighters and wounded 55 others, and which the U.S. designated as an FTO. Those strikes were in retaliation for a missile attack on (27 December) on an Iraqi military base, in Kirkuk, the U.S. alleged KH orchestrated, and for which President Trump held Iran accountable. That attack caused the death of an American contractor and injuries to U.S. and Iraqi military personnel. (KH denied the allegation.)

Regardless of blame, any one of these provocations, let alone all of them combined, was dangerous hubbub – brinkmanship, really. They were unaccompanied by efforts to


1332 Iran Adds.

1333 Iran Adds.

1334 See Falih Hassan, Ben Hubbard & Alissa J. Rubin, Protesters Attack U.S. Embassy in Iraq, Chanting “Death to America,” NEW YORK TIMES, 31 December 2019, www.nytimes.com/2019/12/31/world/middleeast/baghdad-protesters-us-embassy.html (also reporting “Kata’ib Hezbollah and other fighting groups … are technically overseen by the Iraqi military,” Kata’ib Hezbollah is separate from the Hezbollah movement in Lebanon, although both groups are backed by Iran and oppose the United States,” and “[m]ass protests in recent months against poor governance have weakened the [Iraqi] government and underscored the criticism of Iraqis who feel that Iran has too much sway over the country’s politics”). The American Embassy, costing $736 million, opened in 2009 in Baghdad’s heavily fortified Green Zone, and at its peak in 2012 hosted 16,000 workers. See id. See also Ahmed Rasheed & Idrees Ali, Protesters Burn Security Post at U.S. Embassy in Iraq; Pentagon Sending More Troops to Region, REUTERS, 31 December 2019, www.reuters.com/article/us-iraq-security-usa/protesters-burn-security-post-at-u-s-embassy-in-iraq-pentagon-sending-more-troops-to-region-idUSKBN1YZ1D7 (reporting casualty figures); Missy Ryan & Dan Lamothe, Airstrike at Baghdad Airport Kills Iran’s Most Revered Military Leader, Qassem Soleimani, Iraqi State Television Reports, THE WASHINGTON POST, 3 January 2020, www.msn.com/en-zanews/world/airstrike-at-baghdad-airport-kills-iran-s-most-revered-military-leader-qassem-soleimani-iraqi-state-television-reports/ar-BBYzcJ6 (also reporting casualties; note the characterization of Mr. Soleimani as “most revered” in the eyes of many Iranians, a point discussed below).

empathize with the other side or introspection about the vulnerabilities of one’s own side. Lacking in such efforts, they increased the risk either side would lethally miscalculate.

The American President called Iran “a nation of terror,” though offered negotiations toward a deal that would move expand upon the JCPOA and cover Iran’s ballistic missile program and malign behavior in the Middle East (“Let’s Make Iran Great Again,” he said). Iran accused America of waging an “Iranophobic campaign,” and the Supreme Leader, Āyatollāh Alī Khamenei, rejected talks as pointless, given that America had abandoned the Nuclear Deal, adding that rather than relaxing sanctions in exchange for Iran’s agreement to bargain with America, as Iran requested, America’s additional sanctions meant America had permanently closed the path of diplomacy.

America’s concern about Iran’s ballistic missile program was not unfounded. Iran appeared to be developing nuclear-capable ballistic missiles. In a December 2019 letter to the U.N., France, Germany, and the U.K. informed the U.N. that “Iran tested a Shahab-3 missile variant ‘equipped with a manoeuvrable re-entry vehicle’ that could deliver a nuclear weapon, and that “[s]uch activity is ‘inconsistent’” with a 2015 U.N. Security Council Resolution (2231), which “‘calls upon’ Iran not to ‘undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons, including launches using such ballistic missile technology.’” The Shahab-3, which Iran tested in April and July 2019, was a Category I missile under the MTCR (discussed in a separate Chapter), meaning it was of the most powerful type (capable of carrying a payload of at least 500 kg at least 300 km), and thus subject to the most stringent export controls. As such, the EU pointed out Shahab-3 was “technically capable of delivering a nuclear weapon.”

Iran denied all allegations of violating the U.N. Security Council Resolution. Iran had argued it needed to test ballistic missiles for their accuracy, because non-nuclear warheads need to be carried on more accurate missiles than nuclear warheads (given the mass destructive force of nuclear warheads). Yet, if the allegations were true, i.e., if Iran was testing an MTCR Category I missile, then perhaps Iran was interested in both WMDs and a vehicle to deliver them with precision.

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1337 Quoted in U.S. Says Video; see also Trump Threatens “Obliteration,” Trump Warned Iran (concerning possible diplomacy).


Chapter 20  IRAN SANCTIONS (CONTINUED):
ASSASSINATIONS AND MORE SANCTIONS

I. January 2020 Soleimani Assassination and Aftermath

● Targeted Killing

A watershed development in modern U.S.-Iranian relations occurred on 3 January 2020.\(^{1340}\) Using a Reaper drone (capable of being laser-guided) and multiple missiles, the U.S. – on orders from President Trump – assassinated Brigadier General Qassem Soleimani (1957-2020), the second most powerful figure in Iran, Commander of the IRGC Al Quds Force – and (ironically, like the U.S.) an implacable opponent of ISIS. The assassination was “an unexpected and unprecedented escalation” in “brinkmanship” between the two countries.\(^{1341}\) America’s two previous Presidents had ruled such an act “due to risks that it could spark a regional war.”\(^{1342}\) It occurred after Mr. Soleimani had landed at Baghdad International Airport on a Cham Wings Airbus 320 flight from Damascus (on which he was not registered as a passenger), while he was in a convoy of two armored vehicles (one for him, and one for his security team) travelling on the main exit road from Baghdad Airport. His killing was made possible by U.S. intelligence assets at both the Damascus and Baghdad Airports:

[S]uspected informants inside the Damascus and Baghdad airports collaborated with the U.S. military to help track and pinpoint Soleimani’s position….  

\(^{1340}\) See Iran Attack: U.S. Troops Targeted with Ballistic Missiles, BBC NEWS, 7 January 2020, [hereinafter, Iran Attack]; Najmeh Bozorgmehr, Iran Considers Options for Retribution Over Soleimani Killing, FINANCIAL TIMES, 6 January 2020, [hereinafter, Iran Considers Options]; Donna Abu-Nasr, Iran's Quest to Dominate the Mideast Loses Its Hero, BLOOMBERG, 6 January 2019, [hereinafter, Iran’s Quest]; Katrina Manson, Najmeh Bozorgmeh & David Sheppard, Iran's Top Military Leader Qassem Soleimani Killed in U.S. Air Strike, FINANCIAL TIMES, 3 January 2020, [hereinafter, Iran's Top Military Leader Qassem]; Jennifer Jacobs, Nick Wadhams & Anthony Capaccio, Trump Boosts U.S. Forces in Mideast as Iran Vows Retaliation, BLOOMBERG, 2 January 2020, [hereinafter, Trump Boosts U.S. Forces].

For an excellent synopsis of the Iranian-American relations dating to the 1953 coup of Mohammad Mosaddegh (1882-1967), see David Wainer & Glen Carey, What To Know About the Escalating U.S.-Iran Conflict, BLOOMBERGQUINT, 31 December 2019, [hereinafter, What To Know About the Escalating U.S.-Iran Conflict].

\(^{1341}\) Iran Considers Options.

The suspects include two security staffers at the Baghdad airport and two Cham Wings employees.\textsuperscript{1343}

Mr. Soleimani deplaned directly to the Baghdad Airport tarmac, bypassed customs, and entered an SUV.

Seven persons total were killed in the attack,\textsuperscript{1344} including Abu Mahdi Al Muhandis (1954-2020), Deputy Chairman of Iraq’s PMC (the umbrella group in Iraq for militias that are associated with Iran), who greeted Mr. Soleimani at Baghdad Airport and road with him in the same SUV. Informants in Damascus appear to have confirmed Mr. Soleimani’s presence on board the aircraft when it departed, and those in Baghdad confirmed his arrival there, plus his position in the convoy. One of several ironies surrounding the assassination was that apparently, Iraq’s Prime Minister, Adil Abdul Mahdi (1942-, PM. 2018-2020), had invited him to discuss Iran’s response to a message from Saudi Arabia; the PM was attempting to broker a peace agreement between the two hostile Gulf powers.\textsuperscript{1345}

To many, particularly in Iran and its Shī‘īte friends in the Gulf, Mr. Soleimani was a legend in life and a martyr in death.\textsuperscript{1346}

The 2003 U.S. invasion of Iraq that led to the fall of Saddam Hussein, a Sunni Muslim who persecuted Shī‘ītes and Kurds, removed a big hurdle that constrained Iran’s outreach efforts.

Soleimani’s role grew as Iran became more entrenched in the Arab world. He cultivated militias in Iraq and sent Shī‘īte fighters to beef up government troops in Syria. In 2006, he helped Hezbollah recover from the war to dominate politics and effectively hand pick a Lebanese president.


\textsuperscript{1345} See Ahmed Rasheed, Ahmed Aboulenein & Jeff Mason, Iraq Wants Foreign Troops Out After Air Strike; Trump Threatens Sanctions, REUTERS, 5 January 2020, \url{www.reuters.com/article/us-iraq-security/iraq-wants-foreign-troops-out-after-air-strike-trump-threatens-sanctions-idUSKBN1Z409A} (reporting Iraqi PM Abdul Mahdi “said he had been scheduled to meet Soleimani the day he was killed, and that the general had been due to deliver an Iranian response to a message from Saudi Arabia that Abdul Mahdi had earlier passed to Tehran,” and also that Sunni Muslim Saudi Arabia and Shī‘īte Iran had been about to “reach a breakthrough over the situation in Iraq and the region”).

\textsuperscript{1346} For an excellently written obituary, see Najmeh Bozorgmehr, Qassem Soleimani, Iranian Military Commander, 1957-2020, FINANCIAL TIMES, 3 January 2020, \url{www.ft.com/content/b80b9a52-2dfe-11ea-a126-99756bd8f45e?shareType=nongift}. 
In Yemen, *Houthi* rebels still prevailed despite a sustained Saudi-led campaign to defeat them, one that gained increasing international scrutiny and put pressure on Crown Prince Mohammed bin Salman.

In recent years, news, pictures and videos of Soleimani emerged. He met Nasrallah [the head of *Hezbollah*] in Lebanon, was seen at the front checking on allied militias in Iraq, and shared in celebrations following the defeat of Islamic State in a Syrian city as fighters jostled to take selfies with him.

…

Iran’s biggest success then and now has been *Hezbollah*, which the Islamic Republic established in the 1980s. 1347

Indeed, the role Mr. Soleimani played in developing and strengthening Iran’s proxies so as to expand his country’s influence across the Near East was unique:

For more than 15 years, Western diplomatic tussles with Iran focused on its nuclear program and the ballistic missiles that could carry nuclear warheads it might one day produce. Yet by far the most powerful weapon that leaders in Tehran had at their disposal as they extended their influence across the Middle East was a network of foreign militias, built by Major General Qassem Soleimani, the iconic commander killed in Iraq by a U.S. drone strike Jan. 2. Soleimani’s proxy fighters -- from Afghanistan to Yemen -- are likely to remain Iran’s main weapon in an asymmetric fight against the vastly superior conventional weaponry and forces of the U.S. and its allies.

…

The initial focus of Iran’s militia strategy was in Lebanon, where it backed the *Shi‘i* *Hezbollah* group, formed in 1982 in reaction to Israel’s occupation of the country’s south. Soleimani’s *Al Quds* unit was designed, Khamenei said in 1990, to “establish popular *Hezbollah* cells all over the world.” That policy expanded dramatically after the U.S.-led invasion of Iraq in 2003, which brought about 150,000 American troops to Iran’s border, as well as a long-sought opportunity to dominate Iraq – once part of the Persian Empire based in what is modern-day Iran – through the country’s newly empowered Shiite majority. Under Soleimani’s direction, the Revolutionary Guards began organizing and arming Shiite militias with roadside bombs and other equipment to attack U.S. forces in Iraq, with the goal of driving them out. 1348

Mr. Soleimani saw positive (though, from the U.S. and most other perspectives, horrific) results from Iran’s proxy fights against America and its allies:

Iran’s backing of *Shi‘i* militias in Iraq has moved into the open since 2014, when the Iraqi government formally endorsed them as a means to fight

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1347 *Iran’s Quest.*
1348 *How Iran Pursues.*
Islamic State, under the umbrella designation of Popular Mobilization Forces. Their firepower and prominence have given Iran leverage to shape Iraqi governments. Soleimani himself moved from the shadows to appear in images posted on social media on the front lines with the units, as Iran claimed success for defeating Islamic State. In Syria, Iran intervened to preserve its only state ally, Bashir Al-Assad, against what began in 2011 as a popular rebellion, mainly among his country’s majority Sunni population. Unwilling to commit large numbers of its own troops, Iran enlisted Hezbollah and militias from Iraq, as well as Shi’ites from Afghanistan and Pakistan to fight in Syria. Though it took Russia’s help, the policy succeeded in saving Assad and securing a land route for Iranian military supplies, from Tehran to Lebanon. In Yemen, meanwhile, Iran backed Shi’ite Houthi rebels against forces supported by Saudi Arabia and the United Arab Emirates in a war that broke out in 2015. … Iran’s influence in Iraq, Lebanon, Syria and Yemen is now “a new normal,” a concept once unthinkable even for leaders in Tehran.1349

By no means was Mr. Soleimani a sympathetic figure, from either an American or Iraqi perspective:

It was Soleimani’s presence – on the fronts in Lebanon, Syria and Iraq – that helped the seemingly unchecked rise of Iran’s loyalists in the region since Saddam Hussein’s ouster in 2003. At the time of his death, though, things had changed and he was dealing with one crisis after the other in those countries.

This time last year [January 2019], Hezbollah dominated politics and a lot of society in Lebanon despite mounting U.S. sanctions. Syrian President Bashar al-Assad, Iran’s closest Arab ally, had regained control of most of his country. Iraq had declared a major victory against Islamic State with the help of Iran-backed Shi’ite militias.

Now there are protests in Iraq that have called for an end to Iranian intervention, demonstrations in Lebanon that have challenged Hezbollah’s dominance in the country and a dire economic situation in Syria, where Russia is asserting itself as the main power. A series of attacks on oil tankers in the Gulf and a brazen assault on an oil facility in Saudi Arabia stood out as minor victories.1350

U.S. intelligence fingered Mr. Soleimani for involvement in killing hundreds of U.S. military personnel and civilian officials. They pointed to Iran, operating through proxies such as Hezbollah that he cultivated, in attacks dating as far back as the October 1983 suicide truck bombing of the U.S. and French barracks in Lebanon (killing 307 persons

1349 How Iran Pursues
1350 Iran’s Quest.
total) and June 1996 attack on Khobar Towers in Saudi Arabia (killing 19 U.S. Air Force personnel). Not surprisingly, he had been subject to U.S. sanctions since 2007.

Manifestly, he had long been the driving force behind Iran’s expansionist policy throughout the Middle East, and thus forged stronger ties to groups, such as Hezbollah and KH, which the U.S. dubbed terrorist. Indeed, Mr. Soleimani thought no peace could occur between Iran and the U.S., that the interests of the two countries were inherently and implacably inimical. With the blessing of ʿĀyatollāh Khameini, who regarded him as a son, the General was willing to divert significant resources – which Iran’s economy, long-suffering under American sanctions could have used for the benefit of everyday Iranians – to foreign military adventures. The price tag was high, according to U.S. estimates:

Nathan Sales, the U.S. State Department’s top counter-terrorism official, said in 2018 that Iran funds Hezbollah to the tune of $700 million annually and gives a further $100 million to Palestinian organizations the U.S. designates as terrorist, including Hamas and Palestinian Islamic Jihād, both of which are Sunni. There is no way to independently verify those figures or Sales’ statement that Iran spends “billions” of dollars each year on its entire portfolio of foreign proxies. Given that academic estimates for Iran’s spending on the war in Syria alone range from $30 billion to more than $100 billion to date, the costs are significant, although relative to conventional warfare – a U.S. Congressional Budget Office report estimated the cost to the U.S. of its wars in Afghanistan and Iraq to 2017 at $2.4 trillion – this [for Iran] is war on the cheap.

Thus, Iranians who were not fans of their country’s theocracy did not share his world view and the opportunity costs it imposed on them. They understood Ambassador Sales’ point, namely:

And who ultimately pays the price of this support? The Iranian people. The resources Iran uses to fund its global terrorist campaign come directly out of the pockets of ordinary Iranians. The regime robs its own citizens to pay its proxies abroad.

Tehran’s priorities are clear. It doesn’t seek to boost economic growth at home, or to improve Iranian living standards. It doesn’t seek to reduce Iran’s growing unemployment. What the regime prioritizes, despite the country’s


increasing economic distress, is buying guns and bombs for foreign
terrorists.1353

Nevertheless, most Iranians regarded Soleimani in death as a martyr. He and his life were
a story, soaked in blood, of defending Iran. Indeed, Iran called its operations to avenge
the killing (discussed below) “Martyr Soleimani.”1354

Whether the targeted killing was lawful under Public International Law was

dubious.1355 Iran called it an act of war. The U.S. took the position that the General

Abd al-Malik al-Houthi and the Houthi rebels were engaged in hostilities with
Yemeni government forces, and, therefore, the U.S. killed Houthi
commanders in a 2018 strike that was lawful under Public International Law.1356

The President claimed legality under the 2002 AUMF, which Congress passed in the wake of 9/11 to deal
with an ostensible threat of WMDs from Saddam Hussein’s Iraq. See Paul Mcleod & Kadia Goba,
The White House’s Iran Briefing W

oted Most Republicans, But Rand Paul And Mike Lee Are Calling It A Disgrace,
BUZZFEED NEWS, 8 January 2020, www.buzzfeednews.com/article/paulmcleod/donald-trump-iran-strike-
congress-briefing-republicans. Yet, Members of Congress, particularly House Democrats, pointed out
the President had no authorization to attack Iran – certainly not under any extant AUMF, which
applied to Afghanistan and Iraq. They also noted he was restrained by the 1973 War Powers
Resolution (also called the War Powers Act), 50 U.S.C. §§ 1541-1548, in committing U.S. combat troops overseas. This legislation
“requires the President to consult with Congress before introducing U.S. armed forces into hostilities or
situations where hostilities are imminent, and to continue such consultations as long as U.S. armed forces
remain in such situations.” Library of Congress, War Powers, www.loc.gov/law/help/usconlaw/war-
powers.php.

On 10 January 2020, the Democratic-controlled House voted 224-194 to mandate Congressional
approval of any attack on Iran by the U.S., save for an instance of an imminent attack by Iran on America. See U.S. House Votes to Limit Trump War Powers On Iran, BBC NEWS, 10 January 2020. The bill directed
President Trump, absent Congressional authorization, to “terminate the use of United States Armed Forces”
against Iran, except to “defend against an imminent armed attack.” Id. The Republican-controlled Senate (a
53-47 majority) passed a different version of the bill on 13 February by a 55-45 margin, with eight
Republicans joining Democrats to do so. The Senate version of the bill, which Senator Tim Kaine (Democrat-
Virginia) introduced (and which was co-sponsored by Republican Senators Mike Lee (Utah) and Ran Paul
(Kentucky)) under the War Powers Act, required (as Senator Kaine put it) “that the U.S. “should not enter a
new war without the Congressional debate and vote our Constitution requires.” Quoted in Daniel Flatley,
Trump Vetoes Bill That Would Limit His War Powers Against Iran, BLOOMBERG, 6 May 2020,
www.bloomberg.com/news/articles/2020-05-06/trump-vetoes-bill-that-would-limit-his-war-powers-
against-iran?ref=7sxw9xgl [hereinafter, Trump Vetoes Bill]; Patricia Zengerle, U.S. Senate Rebukses Trump,
Votes to Limit Warming Ability in Iran, REUTERS, 13 February 2020, www.reuters.com/article/us-mideast-
crisis-congress/u-s-senate-rebukes-trump-votes-to-limit-warming-ability-in-iran-idUSKBN22072NX. The
House and Senate bills were in response to the President’s declaration, in late 2019, of a national emergency
in relation to Iran. He did so to “clear the way for $8 billion in military sales, mostly to Saudi Arabia.” Patricia
Zengerle, Trump Fired Watchdog Who Was Probing Saudi Arms Sales: Lawmakers, REUTERS, 18 May 2020,
www.reuters.com/article/us-usa-trump-inspectorgeneral/u-s-house-panel-leader-links-state-dept-inspector-
general-firing-to-saudi-arms-sale-idUSKBN222U269.

The President vetoed the legislation, calling it “insulting,” said it was “based on misunderstandings
of facts and law,” and “introduced by Democrats as part of a strategy to win an election on November 3
[2020] by dividing the Republican Party.” Quoted in Trump Vetoes Bill; Trump Vetoes Iran War Powers
war-powers-resolution-idUSKBN22136O. The margin of passage in the Senate was insufficient to over-ride
his veto; the resolution to over-ride passed by 47-44, far short of the 67 votes needed to annull the veto. See Patricia Zengerle, U.S. Senate Upholds Trump Veto of “Insulting” Iran War Powers Resolution, REUTERS,
Soleimani was an enemy combatant in an undeclared conflict with America, and thus was a legitimate target. Moreover, the U.S. argued it had actionable intelligence that Soleimani was plotting to kill Americans, and that the threat his plots posed was imminent. On a 3 January 2020, a Reuters story testified to that argument, and chronicled Iran’s motive and means:

In mid-October [2019], Iranian Major-General Qassem Soleimani met with his Iraqi Shī‘īte militia allies at a villa on the banks of the Tigris River, looking across at the U.S. Embassy complex in Baghdad.

The Revolutionary Guards commander instructed his top ally in Iraq, Abu Mahdi Al Muhandis, and other powerful militia leaders to step up attacks on U.S. targets in the country using sophisticated new weapons provided by Iran …

The strategy session … came as mass protests against Iran’s growing influence in Iraq were gaining momentum, putting the Islamic Republic in an unwelcome spotlight. Soleimani’s plans to attack U.S. forces aimed to provoke a military response that would redirect that rising anger toward the United States….

Soleimani’s efforts ended up provoking the U.S. attack on Friday that killed him and Muhandis, marking a major escalation of tensions between the United States and Iran. …

Two weeks before the October meeting, Soleimani ordered Iranian Revolutionary Guards to move more sophisticated weapons – such as Katyusha rockets and shoulder-fired missiles that could bring down helicopters – to Iraq through two border crossings….

At the Baghdad villa, Soleimani told the assembled commanders to form a new militia group of low-profile paramilitaries – unknown to the United States – who could carry out rocket attacks on Americans housed at Iraqi military bases. He ordered Kata‘ib Hezbollah - a force founded by Muhandis and trained in Iran – to direct the new plan…. Soleimani told them such a group “would be difficult to detect by the Americans”….

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1356 See Trump Boosts U.S. Forces (reporting “President Trump said he approved the strike because Soleimani was plotting ‘imminent and sinister attacks’ against American diplomats and military personnel”).
Before the attacks, the U.S. intelligence community had reason to believe that Soleimani was involved in “late stage” planning to strike Americans in multiple countries, including Iraq, Syria and Lebanon…. … Soleimani had supplied advanced weaponry to Kata’ib Hezbollah.

White House national security adviser Robert O’Brien … [said] Soleimani had just come from Damascus, “where he was planning attacks on American soldiers, airmen, Marines, sailors and against our diplomats.”

… Soleimani picked Kata’ib Hezbollah to lead the attacks on U.S. forces in the region because it had the capability to use drones to scout targets for Katyusha rocket attacks…. Among the weapons that Soleimani’s forces supplied to its Iraqi militia allies last fall was a drone Iran had developed that could elude radar systems, the militia commanders said.

Kata’ib Hezbollah used the drones to gather aerial footage of locations where U.S. troops were deployed, according to two Iraqi security officials who monitor the movements of militias.1357

On the day before he was assassinated, Mr. Soleimani intoned: “We are not leading the country to war, but we are not afraid of any war.”1358

Such plotting, said the U.S., justified the assassination as an act of self-defense under Article 51 of the U.N. Charter. Indeed, “decisive defensive action” was needed to “prevent an ‘imminent attack’ on American lives in the region.1359 Subsequently, President Trump said the General planned to destroy four U.S. Embassies.1360 Yet, Bloomberg rightly noted:

The President’s justifications for killing Soleimani have shifted. He has said the Iranian general was planning unspecified “imminent” attacks against U.S. forces. He has also blamed Soleimani’s history of helping to foment unrest in the Middle East and provide weapons to Iraqi militia that were used to kill American troops in the Iraq War.1361

1359 Iran’s Top Military Leader Qassem (quoting, respectively, a Pentagon statement and Secretary of State Mike Pompeo).
1360 See Justin Sink, Trump Says Iran Had Planned to Attack Four U.S. Embassies, BLOOMBERG, 10 January 2020, www.bloomberg.com/news/articles/2020-01-10/trump-says-iran-had-planned-to-attack-four-u-s-embassies?ref=7sxw9Sx1 (quoting the President that “Iran was ‘looking to blow up’ the U.S. Embassy in Baghdad,” plus three other Embassies he did not identify).
1361 Trump Says Iran Had Planned.
Moreover, the President intoned U.S. action might be disproportionate, whereas International Law mandates that any self-defense action be necessary and proportionate.1362

Most problematically, however, in the days following its attack, the U.S. failed to present evidence publicly to of a clear, present danger to American lives and interests.1363 Indeed, U.S. Defense Secretary Mark Esper admitted:

“What the President said was that there probably could be additional attacks against embassies. I shared that view” …. “The President didn’t cite a specific piece of evidence.”1364

And, “[w]hen pressed on whether intelligence officers offered concrete evidence on that point, Esper said: ‘I didn’t see one with regards to four embassies.’”1365

Worse yet, the two-page White House memo on the Soleimani attack – disclosed to the House Foreign Affairs Committee on 14 February 2020 – said nothing about an “imminent” threat.1366 Thus:

Some analysts say that, even accepting the White House contention that there was an imminent attack, it doesn’t automatically translate that Soleimani needed to be killed. After all, Soleimani was the one who made decisions, not the one who carried out the actual plots. Instead, some in the White House pushed the stance that failing to send a message would mean Tehran would think that it could get away with anything without the United States retaliating.1367

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1365 Quoted in Trump: Timing. (Emphasis added.)


1367 Claim Soleimani Targeted. (Emphasis added.)
The White House memo said as much: “Although the threat of further attack existed, recourse to the inherent right of self-defense was justified sufficiently by the series of attacks that preceded the January 2 [ET] strike.”

The U.N. Special Rapporteur on Extrajudicial Killings was not convinced. On 29 June 2020, Agnes Callamard, concluded the assassination violated Public International Law, because the U.S. had failed to adduce sufficient evidence that the target posed an imminent threat to life – specifically, that he was planning an imminent attack against U.S. interests – to justify immediate action, namely, his killing. The U.S. action, then, was “an ‘arbitrary killing’ for which the U.S. is responsible under International Human Rights Law.” However, the Special Rapporteur also judged Iran’s retaliatory missile strikes to be unlawful. The State Department response was ad hominem: it accused her of “giving a pass to terrorists,” yet came up with nothing substantive that might change her conclusion.

Perhaps President Trump may have regretted his decision not to bomb Iran in July 2019, following the June 2019 Iranian drone attack and seizure of a British vessel, and not to strike at Iran after the September air attacks on Aramco. Allegedly, Mr. Trump knew of Mr. Soleimani’s whereabouts at Baghdad Airport, and seized what he regarded as an opportune moment. In that respect, senior Iranian officials also misjudged the American President. They:

miscalculated, believing that after a series of escalatory military operations – the tanker attacks, the shooting down of an American drone, the Saudi oil strikes, rocket attacks on bases in Iraq by Iranian-backed militias – Mr. Trump would refrain from responding consequentially. Instead, he made the startling decision to authorize the killing of General Suleimani.

The Āyatollāh himself was especially off-base when he taunted Mr. Trump just two days before the killing:

“You can’t do anything,” Āyatollāh Alī Khamenei wrote on his English-language Twitter account. He added: “If you were logical – which you’re not – you’d see that your crimes in Iraq, Afghanistan … have made nations hate you.”

1368 Quoted in White House Memo.
1370 Quoted in Qasem Soleimani: U.S. Strike.
1371 Quoted in Qasem Soleimani: U.S. Strike.
1373 Quoted in How Months of Miscalculation.
Quite obviously, neither side knew much about, much less could empathize, with the other.1374

Yet, subsequently, the President undermined the case of an “imminent” threat requiring self-defensive action. On 14 January, he tweeted:

The Fake News Media and their Democrat Partners are working hard to determine whether or not the future attack by terrorist Soleimani was ‘imminent’ or not, & was my team in agreement. The answer to both is a strong YES., but it doesn’t really matter because of his horrible past!1375

The Trump Administration thus shifted its rational for the targeted killing from imminent threat to specific (and presumably) general deterrence. Said Secretary of State Mike Pompeo:

I want to lay this [assassination] out in context of what we’ve been trying to do. There’s a bigger strategy to this. President Trump and those of us in his national security team are re-establishing deterrence – real deterrence – against the Islamic Republic of Iran.1376

The Secretary did not indicate whether he meant specific or general deterrence, or both, and his use of the indefinite article (“this”) with no subsequent noun rendered his statement vague.

1374 Indeed:

Even some former Trump administration officials said that the White House’s position betrayed a misunderstanding of Iran’s leadership – born born from a paucity of intelligence and direct contact with Tehran.

“We don’t have a lot of knowledge of Iran’s decision-making,” said Kirsten Fontenrose, who worked on Middle East policy at the National Security Council at the beginning of the Trump administration. “The expectation that they would come to the table was not what people who actually talk to Iranians were saying.”

How Months of Miscalculation.
1375 Quoted in Trump: Timing.
1376 Quoted in Zachary Cohen, Barr and Pompeo Shift Justification for Iran Strike from “Imminent” Threat to Deterrence, CNN, 13 January 2020, www.cnn.com/2020/01/13/politics/pompeo-barr-soleimani-strike-iran-rationale/index.html. The question of “imminence” of a foreign threat also is relevant to justification under Article II of the U.S. Constitution, which vests in the President as Commander in Chief the authority to use military force, and whether Congressional consent is a requisite for such use. See id. The 9/11-era 2002 AUMF, which the Bush Administration invoked to justify its March 2003 invasion of Iraq, and which the Obama Administration used to justify force against ISIS, speaks of a “continuing threat posed by Iraq.” Quoted in id. Whether Soleimani met that language – a threat posed by Iraq, in contrast to a threat posed from Iraq to justify attacking Iran in 2019-2020 – is debatable. See Paul McLeod & Kadja Goba, The White House’s Iran Briefing Won Over Most Republicans, But Rand Paul And Mike Lee Are Calling It A Disgrace, BUZZFEEDNEWS, 8 January 2020, www.buzzfeednews.com/article/paulmcleod/donald-trump-iran-strike-congress-briefing-republicans. }
Nonetheless, aside from its legal (and moral) dubiousness, for one nation to kill a national of another, extraterritorially, and without due process, simply because it perceives that person to be a bad guy, or has a bad history, is counter-productive. Rather than deter the malfeasant, it may engender opposition to that nation, thereby defeating the end it seeks to promote – enhancing its security.

- **Tragic Funeral and Calls to Quit Iraq**

The assassination triggered three days of official mourning in Iran, and a funeral for the slain General that saw millions turn out (many chanting “Death to America” and “Death to Trump”) – at which a tragic stampede occurred in his hometown, Kerman, Southeast Iran, in which at least 60 mourners were killed and over 210 injured. It also triggered vows of “severe revenge” by Iran. Iran demanded the withdrawal of all U.S. forces from Iraq, and indeed the Middle East.

On 5 January 2019, Iraq’s Parliament passed a non-binding resolution calling for U.S. troops to leave Iraq. (The U.S. rejected the idea, perhaps for good reason. Though roughly 170 MPs voted for the resolution, Kurdish and Sunni MPs boycotted the vote.) The Prime Minister, Adil Abdul-Mahdi al-Muntafiki (1942-, PM, 2018-2020), called the assassination a “brazen violation of Iraq’s sovereignty and a blatant attack on the nation’s dignity.” Similarly, Chaldean Catholic Patriarch Louis Sako, said on 4 January that “[i]t is unfortunate that our country turns into an arena for settling scores, rather than being a sovereign homeland, capable of protecting its land, wealth and citizens,” and, at a 6 January Epiphany Mass at Saint Joseph Cathedral in Baghdad, decried the “upsetting escalation, as well as the emotional and impulsive decisions taken which lacked wisdom and the sense of responsibility.”

Nevertheless, President Trump responded by sending 3,500 Army 82nd Airborne division to Kuwait, and 2,200 Marines and a helicopter unit to the Gulf, and demanded

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1378 *Iran Attack*.


1381 Quoted in *Iran Attack*.

1382 Quoted in *Iraqi Cardinal*.

any departure of American forces would have to be met with payment by Iraq for the billions the U.S. had spent in that country since invading it in March 2003. (These additional deployments joined the roughly 60,000 U.S. military personnel already in the Middle East. 1384) Ironically, as a Presidential candidate, Mr. Trump pledged to end America’s endless wars, but since May 2019, he had sent an additional 17,000 troops to the Gulf. 1385 Over 5,000 soldiers were in Iraq when Soleimani was killed. 1386 Iran also threatened to attack U.S. interests throughout the Middle East, and launch cyberattacks.

- More Sanctions and Aluminum Power as Ballistic Missile Propellant

On the one hand, President Trump’s response to these threats escalated tensions further. 1387 To “crack[] down on Iran’s “few remaining sources of export revenues and squeeze[e] the nation’s economy to force its leaders back into negotiations for a new nuclear agreement,” the Trump Administration issued on 10 January 2020 Executive Order 13902, thereby imposing additional sanctions on Iran. 1388 This Order 13902 allowed the U.S. Treasury Department to target entire sectors of Iran’s economy – but exempts humanitarian trade, that is “transactions for the provision of agricultural commodities, food, medicine or medical devices to Iran.” 1389

So, one targeted sector was mining, i.e., new measures took aim at Iran’s exports of metals (aluminum, copper, iron, and steel), and on specific leaders (with OFAC listing eight senior officials, including the Secretary of Iran’s Supreme National Security Council, the Deputy Chief of Staff of Iran’s Armed Forces, and the head of the IRGC’s Basij militia, and over 20 entities, covering economic sectors such as construction, manufacturing, mining, and textiles, as SDNs). 1390 These measures “target[ed] the 13 largest steel and iron

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1384 See Trump Boosts U.S. Forces.
1386 See Iran Fires Missiles.
1387 To be sure, on 8 January 2020, after Iran’s counter-retaliatory missile attacks (discussed below), the President said there was no need for the U.S. to take further action, because “Iran appears to be standing down.” Quoted in Jeff Mason, Ahmed Abouleinen & Parisa Hafezi, U.S., Iran Both Appear to Signal Desire to Avoid Further Conflict, REUTERS, 7 January 2020, www.reuters.com/article/us-iraq-security/trump-avoids-escalating-crisis-says-iran-is-standing-down-idUSKBN1Z60NL. But, he also said – wrongly – no Americans were hurt in those attacks, and publicly declaring Iran seemed to be “standing down” itself was (from Iran’s standpoint) humiliating if not provocative.
manufacturers in Iran [e.g., Mobarakhe Steel Company, the biggest steel company in the Middle East], and top copper and aluminum producers [e.g., National Iranian Copper Industries, Al-Mahdi Aluminum Corporation, and Iran Aluminum Company].”  

The Administration also “sanctioned foreign purchasers and transporters of Iranian steel [including trading companies based in China and the Seychelles], saying they were providing ‘critical materials for Iranian metal production.’”

On the other hand, there was good reason to be concerned about Iran’s mining sector, because of its link to Iran’s ballistic missile program, which the IRGC supervises. Iran’s largest deposit of bauxite was in North Khorasan province, in the northeast of the country, and near it (10 kilometers northeast of Jajarm) was a large aluminum production facility. The Iran Alumina Company maintained a complex, near the city of Jajarm, as well as a secret facility the IRGC set up in 2011, and which IAC operated. IAC was a subsidiary of the Iranian Mines and Mining Industries Development and Renovation Organisation (IMIDRO), which was an SOE, i.e., a “state-owned mines and metal holding company.”

Iran sought to boost output of aluminum, specifically, of aluminum powder, which is derived from bauxite, specifically, “[b]auxite is processed into alumina, which is used to produce aluminium metal,” and “[a]luminium powder is made from the metal.” In turn, “[a]luminium powder is used in products ranging from paints and electronics to solar panels and fireworks,” but it also is “a key ingredient in solid-fuel propellants used to launch missiles.” “Due to its explosive qualities, aluminium powder is also a key ingredient in solid-fuel propellants used to launch rockets and missiles,” and “[w]hen mixed with material containing oxygen, a vast amount of energy is released.” Iran commenced aluminum powder for military use at least as early as 2015, notwithstanding American sanctions in the run-up to the July 2015 JCPOA, and after its May 2018 withdrawal from the Nuclear Deal, to block Iran’s efforts to develop advanced weaponry.

To be sure, that Deal did not cover ballistic missiles – a fatal flaw, according to critics of the accord. But, Iran refused to extend coverage to them, (concomitantly) sought self-sufficiency in missile fuel (i.e., it wanted to control its own sourcing and supply chain), and insisted its missiles were defensive and designed for non-nuclear warheads. The

1391 U.S. to Impose Sanctions.
1392 U.S. to Impose Sanctions.
1394 Special Report: Inside Iran’s Secret.
1395 Special Report: Inside Iran’s Secret.
1396 Special Report: Inside Iran’s Secret.
1397 Special Report: Inside Iran’s Secret.
1398 Iran’s experience with dependence on foreign sources of aluminum powder may have catalyzed its interest in establishing its own supply chain:

In September 2010, Singaporean authorities intercepted a shipment of 302 drums of aluminium powder en route to Iran and originating from China, according to a U.N. Panel
U.S. view, however, was that the missiles could carry WMDs, and threatened America’s allies across the Middle East, hence it was necessary to sanction Iran’s metals sector, block transactions relating to the aluminum sector, and target IRGC officials and third parties “that provide material support to or conduct certain transactions with the Guards.”

Moreover, the U.N. had “placed restrictions on Iran’s activity related to ballistic missile activity capable of delivering nuclear weapons.” Arguably, Iran’s actions violated two Security Council Resolutions: Number 1929 (June 2010), which “restricted Tehran’s production of ballistic missiles capable of delivering nuclear weapons and prohibited other states supplying Iran with related technology or technical assistance,” and Number 2231 (July 2015), which endorsed the JCPOA and called “for Iran to refrain from activity related to ballistic missiles designed to deliver nuclear weapons.” Yet, neither the Security Council nor the U.N. Secretariat had opined as to whether Resolution 1929 covered aluminum powder for military use, or whether Resolution 2231 covered propellants, such as aluminum powder, for missiles that are not engineered to deliver nuclear weapons.

Pursuant to President Trump’s January 2020 Executive Order, under the U.S. blocking mechanism, the expanded sanctions, consistent with extant ones, carried secondary as well as primarily liability. Under Section 1(a)(ii) of the Order, any entity, including a financial institution, that “knowingly engaged” in a “significant transaction for the sale, supply, or transfer to or from Iran of significant goods or services used in connection with construction, mining, manufacturing, or textiles sectors (or other designated sectors)” could be liable. (Of course, entities that “operate in” such sectors were blocked, too.) OFAC judges “significance” on a case-by-case basis, examining:

- The totality of the facts and circumstances, as well as a) the size, number, and frequency of transactions or financial services performed; b) the nature of the transaction or financial service; c) the pattern of conduct; d) the nexus between the financial institution and a blocked person; e) the impact of the transaction or financial services on the objectives of the U.S. sanctions regime; and f) whether the transaction or services provided involved deceptive practices.

monitoring compliance with the resolution. A ballistic missiles expert told the Panel that the high aluminum content of the powder was “an indication that the most likely end-use is solid propellant for missiles,” the Panel said in a 2011 Report.

Special Report: Inside Iran’s Secret.

1399 Special Report: Inside Iran’s Secret.

1400 Special Report: Inside Iran’s Secret (quoting Jose Luis Diaz, Spokesman, U.N. Department of Political and Peacebuilding Affairs).


1402 See www.un.org/securitycouncil/content/2231/background.

1403 Special Report: Inside Iran’s Secret.

1404 Special Report: Inside Iran’s Secret.

1405 Lindsay B. Meyer, Ashley W. Craig, Jeffrey G. Weiss, Elizabeth K. Lowe & Manuel Levitt, Trump Administration Expands the Iranian Sectors Subject to Sanctions and Designates Additional Entities and Officials for Sanctions, Venable LLP, International Trade Alert, 16 January 2020,
And, under Section 1(a)(iii) and 2(a), any entity that “materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any person whose property and interests in property” likewise was subject to blocking sanctions.\(^{1406}\)

Accordingly, in addition to the mining sector, another targeted sector was finance. On 8 October 2020, under the authority of Executive Order 13902, the Treasury Department imposed additional financial sanctions, this time on 18 major Iranian banks, “in an effort to further shut Iran out of the global banking system.”\(^{1407}\) In other words, OFAC targeted the entire Iranian financial sector and identified it as a potential target for secondary sanctions – hence, foreign financial institutions needed to be even more wary of dealing with any Iranian bank, for fear of violating U.S. rules if they “knowingly conduct or facilitate any significant financial transaction” that involved the sale of goods or services used by Iran’s financial sector, or for any of the designated banks. In effect, this round of sanctions-tightening barred nearly all non-humanitarian financial flows to or from Iran.\(^{1408}\) That is because the 18 banks had been the only lawful conduits for funds to move in and out of Iran. Assuredly, any non-U.S. banks still dealing with Iran’s financial sector would be inclined to cease doing so.

Perhaps the need for all such additional measures seemed odd, after the many layers of U.S. sanctions following the Trump Administration’s withdrawal from the JCPOA. However:

While long-standing tensions and a comprehensive sanctions regime have led U.S. businesses and many foreign companies with large U.S. interests to exit the Iranian market, major global businesses still have a presence in Iran. According to Japan's Ministry of Foreign Affairs, as of October 1, 2018, Japanese companies, including Japan's three largest banks, have 30 operational bases in Iran. The biggest players in Iran's textile sector include

\(^{1406}\) Under Section 1(a)(iv) of the Executive Order, entities owned or controlled by, or acting directly or indirectly on behalf of a blocked person, also are blocked.

\(^{1407}\) U.S. Hits Iran's Financial Sector (also identifying the banks as “Amin Investment Bank, Bank Keshavarzi Iran, Bank Maskan, Bank Refah Kargaran, Bank-e Shahr, Eghtesad Novin Bank, Gharzolhasaneh Resalat Bank, Hekmat Iranian Bank, Iran Zamin Bank, Karafarin Bank, Khavarmianeh Bank, Mehr Iran Credit Union Bank, Pasargad Bank, Saman Bank, Sarmayeh Bank, Tosee Taavon Bank, Tourism Bank and Islamic Regional Cooperation Bank,” and noting that notwithstanding the humanitarian trade exception, the sanctions “could erode Iran’s ability to secure humanitarian goods by making foreign banks even more reluctant to facilitate such transactions”).

\(^{1408}\) Technically, of the 18 Iranian banks OFAC named, 16 were designated under the authority of Executive Order 13902, and one was owned or controlled by a bank that had been designated under that Order. The last bank was used by Iran’s military, so the authority was Executive Order 13382, concerning non-proliferation.
both Iranian businesses and several large Japanese and European companies with which U.S. companies conduct business outside of Iran. In addition, a French car manufacturer has remained a major player in Iran's automotive sector, despite the exit of many similarly situated foreign car makers and the growing threat of sanctions. And while many foreign firms have recently pulled staff from their Tehran offices in response to Iran's missile attacks against U.S. bases in Iraq, this appears to have been only a temporary measure. The continued operations of foreign businesses in Iran should raise concerns among U.S. and non-U.S. businesses with a U.S. nexus if their business partners are still active in these newly sanctioned sectors.\footnote{Trump Administration Expands.}

Likewise, the Administration admonished “ship insurers, banks, charter companies, port owners, crews and captains that they all face sanctions exposure if they can’t account for the legitimacy of the cargoes they carry.”\footnote{U.S. to Impose Sanctions.} Liability also attached to any entity that was “owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property.”\footnote{U.S. to Impose Sanctions.}

Soon thereafter, the Administration also targeted six specific companies and two persons for sanctions.\footnote{See U.S. Imposes Fresh Iran-related Sanctions on Two People, Six Companies, Reuters, 23 January 2020, www.reuters.com/article/us-iran-usa-sanctions/u-s-imposes-fresh-iran-related-sanctions-on-two-people-six-companies-idUSKBN1ZM2Q8.} The targets include two companies Hong Kong-based companies (Triliance Petrochemical Co. Ltd., and Sage Energy HK Limited), one Shanghai-based company (Peakview Industry Co Ltd), and one Dubai-based company (Beneathco DMCC). These companies, said the Administration, assisted the NIOC export from Iran millions of dollars’ worth of goods, contrary to U.S. sanctions. All of the assets held by the companies under U.S. jurisdiction were frozen, U.S. entities were barred from dealing with these companies, and non-U.S. financial institutions were potentially liable for knowingly facilitating “significant transactions” for them.\footnote{The Trump Administration granted six-month waivers for Chinese, EU, and Russian companies to continue their work with AEOI on Iran’s non-proliferation projects, that is, its civilian nuclear program, at the Arak heavy-water research reactor, Bushehr nuclear power plant, and Tehran Research Reactor. The U.S. argued such work impeded Iran’s development of a WMD, because of the presence of these non-U.S. entities (which otherwise would have been subject to secondary boycott sanctions) at these facilities. However, the Administration placed the AEOI and its head, Ali Akbar Saleh, on its list of SDNs. See Humeyra Pamuk & John Irish, U.S. Renews Waivers on Iran Nuclear Work, but Sanctions Top Iran Nuclear Official, Reuters, 30 January 2020, www.reuters.com/article/us-iran-nuclear-usa/u-s-renews-waivers-on-iran-nuclear-work-sanctions-iran’s-top-nuclear-official-idUSKBN1ZT1PW.}

II. Illicit Shipping and Sanctions Evasion

Notably, in May 2020, OFAC issued a Sanctions Advisory to address illicit shipping and sanctions evasion practices. The Advisory was aimed at entities engaged or involved in trade in the maritime industry and energy and metals sectors, not only with respect to
Iran, but also North Korea and Syria. Those entities, of course, included direct maritime industry participants (e.g., brokers, classification service providers, commodity traders, financial institutions, flag registries, freight forwarders, insurance companies, managers, port operators, ship chandlers, ship owners, and shipping companies). They also included participants in the supply chains of the energy industry (i.e., crude oil, refined petroleum, and petrochemicals) and metal sectors (i.e., aluminum, coal, copper, iron, sand, and steel).

Apparently, not everyone paid heed to the Advisory. In June 2020, the tanker Golsan, having left the Iranian Port of Bandar Abbas in May and sailed through the Suez Canal, arrived off the coast of Caracas and delivered a cargo of food and fuel to Venezuela, which itself was subject to U.S. sanctions, and which the International Crisis Group said had collapsed economically and threatened by famine. Overall, five Iranian tankers reached Venezuela between May and July 2020, without incident, to provide 1.5 million barrels of gasoline to fuel-starved Venezuela.

The U.S. could not tolerate such brazen defiance of its sanctions regime. So, in August 2020, the U.S. – working with unnamed “foreign partners” – seized four Iranian tankers carrying 1.116 million barrels of petroleum bound for Venezuela, and steered them to the Port of Houston. All four ships had turned off their satellite tracking system between May and July. That was the largest seizure of fuel ever from Iran. The U.S. accused the IRGC of orchestrating the exportation attempt, though there was no military confrontation, as the Iranian tankers were not escorted by the Iranian Navy.

Unfazed by the setback, in October 2020, Iran sent three more shipments of fuel. Then, in November-December, Iran sent another flotilla of ships – its largest ever to

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1415 See Jonathan Gilbert & Fabiola Zerpak, Iranian Food Is Set to Arrive in Struggling Venezuela, BLOOMBERG, 21 June 2020, www.bloomberg.com/news/articles/2020-06-21/cargo-of-iranian-food-is-set-to-arrive-in-struggling-venezuela?ref=7sxw95xJ [also noting “Iran has recently been shipping fuel to Venezuela, whose Socialist government has squandered some of the world’s biggest oil reserves and is now rationing gasoline,” and “[p]ayments for the fuel shipments have been made to Iran’s Oil Ministry and are being held in the country’s Treasury….”). See also Gideon Long & Aime Williams, Iranian Petrol Tanker Arrives in Venezuela in Defiance of U.S., FINANCIAL TIMES, 24 May 2020, www.ft.com/content/3ddf13bc-313f-4ba2-b8da-9ccfc2a0452e?shareType=nongift (reporting that “[t]he first of five ships laden with Iranian petrol [specifically, five medium-sized tankers containing a total of 1.25-1.5 million barrels of petrol] crossed in to Venezuelan waters on Sunday [24 May 2020] in defiance of U.S. sanctions, after Tehran and Caracas warned Washington over any attempt to intercept them,” “[t]he ships set off from the Middle East in March and April,” “Venezuela is desperately short of petrol despite sitting on the world’s biggest oil reserves,” because “[t]he refineries have largely collapsed after years of mismanagement [as well as mechanical failures] and it is struggling to import petrol due to U.S. sanctions designed to push Socialist President Nicolás Maduro from power,” and that Venezuela paid Iran for the petrol with nine tons of gold bars, thus avoiding the banking system). As to the nexus between Iran and Venezuela: “‘You have to ask yourself what interest Iran has in Venezuela,” said Admiral Craig Faller, head of U.S. Southern Command…. It is to gain a positional advantage in our neighbourhood as a way to counter U.S. interests.’” Quoted in id.

Venezuela: 10 vessels (including the *Fortune* and *Horse*) loaded with fuel, plus Iranian technicians to help repair the Cardon refinery, with plans for some of those vessels to export Venezuelan crude oil once they discharged their cargo (so that Venezuela could free up storage space and avoid stoppage of field production). Sailing through the Caribbean Sea, which the U.S. Navy patrolled, the defiance of U.S. sanctions was brazen. As before, the Iranian ships turned off their transponders in an effort to avoid detection.

III. Reimposition of U.N. Sanctions?

With such developments in mind, the U.S. sponsored a U.N. Security Council Resolution to make permanent a 13-year-old international moratorium on arms (conventional weapons) dealing with Iran, which was set to expire in October, and which would include a snap back of sanctions under the July 2015 JCPOA. The sanctions that would be re-imposed would be those of the U.N.; they had been relaxed under the Iran Nuclear Deal in return for Iran accepting constraints on its nuclear program. However, the irony of America invoking a provision in the Deal that calls for a snapback of sanctions, when the U.S. withdrew from the Deal in May 2018, was palpable.

Unsurprisingly, the remaining Parties to the Deal, namely, China, Russia, Britain, France, and Germany, did not agree to that invocation (because the U.S. presumably gave up its right to trigger any provision of the Deal once it withdrew, plus they were not in accord as to America’s maximum pressure campaign on Iran), nor would they invoke the snapback provision themselves (as remaining Parties). The U.S. failed to muster the requisite nine votes (among the 15-member Security Council) and no vetoes for such a resolution, getting only one vote in support (from the Dominican Republic); China and Russia voted against the American resolution (thus vetoing it), and the other 11 members abstained. Manifestly, if the U.S. persisted in efforts to re-impose sanctions, then it risked undermining further the parlous status of the JCPOA, because Iran would have almost no incentive to circumscribe its nuclear activities and commit only technical, reversible breaches.

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1419 See Katrina Manson, *U.S. Fails in Bid to Extend U.N. Arms Embargo on Iran*, FINANCIAL TIMES, 14 August 2020, <www.ft.com/content/b4f0a527-799d-474a-881f-905f25d422e0?shareType=nongift> (reporting: the U.S. “claimed ‘an explicit right’ to initiate the snapback sanctions under the U.N. Resolution that endorsed the Nuclear Deal, and that any argument to the contrary would ‘create a perilous precedent that could threaten the force of virtually any Security Council decision,’” but that “China … argued the U.S. was no longer a participant in the Deal and therefore ‘ineligible’ to reimpose sanctions,” [and that China’s] view [was] shared by several Council members.”). The U.S. vowed it would “stop at nothing to extend the arms embargo.” Id. (quoting Kelly Craft, U.S. Ambassador to the U.N.).


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Opposition to its position from fellow Security Council members did not inhibit the Trump Administration from claiming the U.N. embargo on conventional arms transfers to against Iran had been extended (i.e., it did not expire on 18 October 2020), nor from imposing new sanctions on Iran, specifically on two dozen entities and individuals alleged to support Iran’s weapons development programs and destabilizing regional activities.\footnote{See The White House, Statement by the President Regarding New Restrictions on Iran’s Nuclear, Ballistic Missile, and Conventional Weapons Pursuits (21 September 2020), www.whitehouse.gov/briefings-statements/statement-president-regarding-new-restrictions-iran-nuclear-ballistic-missile-conventional-weapons-pursuits/; The White House, Executive Order on Blocking Property of Certain Persons with Respect to the Conventional Arms Activities of Iran (21 September 2020), www.whitehouse.gov/presidential-actions/executive-order-blocking-property-certain-persons-respect-conventional-arms-activities-iran/ (authorizing the imposition of sanctions on any person or entity that assists in the transfer of conventional weapons to or from Iran); U.S. Department of State, Fact Sheet: Sweeping U.S. Measures to Support Return of UN Sanctions Relating to Iran’s Nuclear, Missile, and Conventional Arms Programs (21 September 2020), www.state.gov/sweeping-u-s-measures-to-support-return-of-un-sanctions-relating-to-iran-nuclear-missile-and-conventional-arms-programs/; Katrina Manson & Najmeh Bozorgmehr, Trump Hits Iran with New Sanctions and Says U.N. Arms Embargo is Back, FINANCIAL TIMES, 21 September 2020, www.ft.com/content/1477df60-de9c-418f-a5a9-ca70c2e6e988?shareType=nongift, [Hereinafter, Trump Hits Iran with New Sanctions.]} France, Germany, and the U.K. all countered that the President’s actions were “incapable of having legal effect,” because the U.S. had withdrawn in May 2018 from the June 2015 \textit{JCPOA} under which certain sanctions had been waived.\footnote{Trump Hits Iran with New Sanctions.} Indeed, “13 of the 15 Security Council members [said] Washington’s move is void because [U.S. Secretary of State Mike] Pompeo used a mechanism agreed under” the \textit{JCPOA}, namely, the snapback triggering “a 30-day process at the [Security] Council leading to the return of U.N. sanctions on Iran,” but the U.S. already had quit the \textit{Nuclear Deal}.\footnote{U.N. Chief Says No.} Simply put, the U.S. did not have the international legal right to use provisions of a multilateral agreement that it had abrogated.

So, the U.N. Secretary-General, Antonio Guterres, declared he could not take any action on the Administration’s pronouncements, because “[t]here would appear to be uncertainty whether or not the process … was indeed initiated and concomitantly whether or not the (sanctions) terminations … continue in effect.”\footnote{Quoted in U.N. Chief Says No.} Iran claimed victory, saying 

the escapade showed the extent to which America had isolated itself from the rest of the world.1426

● Trump’s Potential War Crime, Memories of Iran Air Flight 655

Even more ominously, President Trump declared America would attack 52 targets in Iran, including cultural sites:

He said the U.S. had identified 52 Iranian sites, some “at a very high level & important to Iran & the Iranian culture,” and warned they would be “HIT VERY FAST AND HARD” if Tehran struck at the U.S.1427

(Iran is home to two dozen UNESCO World Heritage Sites.) The number “52” represented each of the 52 hostages Iran had held for 444 days in 1979-1981, for which Iran never had apologized.1428 President Hassan Rouhani shot back with a number – “#IR655” – of its

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1426 See Trump Hits Iran with New Sanctions. See also The Arms Embargo on Iran is Coming to an End, THE ECONOMIST, 13 October 2020, www.economist.com/middle-east-and-africa/2020/10/13/the-arms-embargo-on-iran-is-coming-to-an-end (reporting “Iran’s armed forces have long had to make do with junk,” and “the expiration of a United Nations arms embargo on October 18th [2020] allows the country’s generals to dream of shinier weapons,” so that “[i]n theory, it will be legal for Iran to buy and sell weapons to and from whomever it chooses,” but “a full-blown arms spree is unlikely for several reasons,” such as (1) “Russia and China both want to keep good relations with Iran’s deeper-pocketed Arab rivals” like Saudi Arabia and the Gulf Emirates, (2) “America’s Treasury Department continues to hound anyone doing business with Iran,” and (3) “[m]ost importantly, Iran’s military strategy does not depend on traditional weapons, but on a mix of ballistic missiles to deter attacks and a sprawling network of friendly militia groups – from Hizbullah in Syria to the Houthis in Yemen – to project power,” thus “Iran’s Islamic Revolutionary Guard Corps, which controls the missiles and works with the militias, is politically and militarily more powerful than the regular armed forces” meaning Iran “may prioritize better cruise missiles and modernisation of its diesel submarines … and [to the concern of Iran’s adversaries] may “pass on imported weapons or technology to its proxies abroad.”

For a commentary (by President Trump’s former U.S. National Security Advisor) that the Trump Administration’s U.N. maneuvers ironically were helping to resurrect the Nuclear Deal, see John Bolton, Trump Is Bringing the Iran Nuclear Deal Back to Life, BLOOMBERG, 26 August 2020, www.bloomberg.com/opinion/articles/2020-08-26/trump-helps-biden-by-bringing-the-iran-nuclear-deal-back-to-life?srhgf=7sxw9Sx (observing “[t]he White House asserted on Aug. 20 that the U.S. was still a “JCPOA participant state” under [U.N. Security Council] Resolution 2231, and thus had standing to invoke snapback [sanctions against Iran, yet] when Trump left the Deal, he directed the State Department to ‘take all appropriate steps to cease the participation of the United States in the JCPOA,’” and that “State Department lawyers, in an opinion not available publicly, apparently argue that, having been once defined as a ‘JCPOA participant state,’ the U.S. is still one for snapback purposes,” [but that] “[t]his is not only incorrect legally and not the intention of the nuclear pact’s drafters but, ironically, could backfire on the U.S. if Biden wins the election.”). Notwithstanding the implacable opposition of the commentator to the JCPOA, his conclusion is correct, namely, “America is either in the deal or out of it,” “[t]his reasoning is simple, straightforward and, most important, reflects reality,” and “[t]he argument that we are ‘participants’ for some purposes but not others should worry U.S. policy makers; it is far more likely to be used against the U.S. by foreign nations when it tries to extricate itself from other international agreements that no longer advance national interests.” Id.

own to evoke memories of an event that is “nearly forgotten in the United States.” On 3 July 1988, the U.S.S. Vincennes shot down Iran Air Flight 655, en route from Iran’s Gulf port city of Bandar Abbas to Dubai, killing all 290 civilians (including 66 children) and crew. The American Naval vessel “mistook the civilian aircraft for a hostile intruder following a skirmish with Iranian boats.”

In 1988, the long war between Iraq and Iran was close to ending. At the time, the United States supported Iraq and its leader Saddam Hussein in their fight against Iran. U.S. Navy ships patrolled the Persian Gulf to protect shipping routes.

On the morning of July 3, the cruiser U.S.S. Vincennes was engaged in a skirmish with Iranian gunboats in the Strait of Hormuz.

This flight [Iran Air 655] was frequently packed with weekend shoppers going to Dubai for jewelry and electronics.

The Vincennes’s radar detected the nearby aircraft, and crew members mistook it for an Iranian F-14 fighter jet. After sending warnings with no response, the ship fired two surface-to-air missiles, destroying the aircraft.

…the plane’s wreckage fell into Iranian waters. Iranian rescue crews found no survivors, and Iranian television showed footage of bodies floating in the water among the debris.

Iran called the incident a “barbaric massacre” and accused the United States of deliberately shooting down a civilian aircraft. At first, Pentagon officials denied any role in the incident until more detailed intelligence revealed their mistake.

“The U.S. government deeply regrets this incident,” Adm. William J. Crowe Jr., then chairman of the Joint Chiefs of Staff, said in a hastily called news conference soon afterward.

President Ronald Reagan, who was at Camp David for the Fourth of July holiday, said: “This is a terrible human tragedy. Our sympathy and condolences go out to the passengers, crew and their families.” He also said

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1429 Gillian Brockell, *Iran’s President Reminded the World that the U.S. Mistakenly Shot Down an Airliner. Now, Iran is Suspected of Doing the Same*, THE WASHINGTON POST, 9 January 2020, www.washingtonpost.com/history/2020/01/06/iran-air-flight-irans-president-invokes-tragedy-many-americans-have-forgotten/. [Hereinafter, *Iran’s President Reminded*.]

1430 See *Iran’s President Reminded*.

that the airliner had “failed to heed repeated warnings” and that the Vincennes took “a proper defensive action.”

A month later, a Defense Department investigation concluded that “Iran must share the responsibility for the tragedy” for allowing a civilian aircraft to fly near ongoing hostilities, and that it was “not the result of any negligent or culpable conduct by any U.S. Naval personnel associated with the incident.”

But in December of that year, a United Nations agency, the International Civil Aviation Organization, came to a different conclusion. It faulted the United States because none of its ships in the area had the equipment necessary to listen in on civilian air traffic control frequencies, which would have identified the passenger jet.

“Seven of [the ICAO’s] eight recommendations were directed at the Navy shortcomings it had identified,” the New York Times reported.

In May 1989, Iran sued the United States in the International Court of Justice for compensation for the victims and the destruction of the plane. The two governments reached a settlement in 1996; the United States did not accept liability but “expressed deep regret over the loss of lives” and agreed to pay $61.8 million to the victims’ families.1432

Not surprisingly, given the tragic nature of the incident, America’s failure to apologize for any fault, and the passage of eight years before reaching a settlement, the tragedy “is etched deeply in memory in Iran.”1433 Indeed, Iran harbors suspicions the attack had been intentional.

The President’s counter-threat to attack Iranian cultural sites went beyond any pretense of legitimate self-defense, and was redolent the “many cultural attacks carried out by the Islamic State group, which targeted mosques, shrines, churches and famous sites such as Palmyra in Syria,” and of “[t]he Taliban in Afghanistan [, which] destroyed the world's tallest Buddha statues, in Bamiyan province.”1434 Indeed, his threat was one to commit a war crime. The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, a 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (which the U.S. signed, though in 2018 the U.S. withdrew from UNESCO, perceiving it was biased against Israel), and a 2017 U.N. Security Council Resolution 2347,1435 for which the U.S. voted), make intentional targeting of such sites a war crime, unless those sites are shown to have become used for military

1432  Iran’s President Reminded.
1433  Iran’s President Reminded.
1434  Trump Under Fire.
purposes. Not surprisingly, the Pentagon declared any U.S. military action would “follow the laws of armed conflict,” intimating that targeting cultural sites would be a war crime under those laws.

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1436 See Pentagon Says; Trump Under Fire.


Article 1 of the Convention defines “cultural property” broadly to include “moveable and immovable property of great importance to the cultural heritage of every people,” “buildings” to preserve or exhibit this property, and “centers” containing a “large amount of cultural property.” See U.S. Committee of the Blue Shield, The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, https://uscbs.org/1954-hague-convention.html. [Hereinafter, U.S. Blue Shield Committee.]

Of relevance to Mr. Trump’s threat is Article 4:1, which obligates the “High Contracting Parties” to the Convention to “refrain[] from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict,” and “refrain[] from any act of hostility, directed against such property.” Likewise, Article 4:4 forbids “any act directed by way of reprisals against cultural property.” Id. Article 4:2 states that Parties to the Convention:

must avoid acts of hostility against another state’s cultural property except when “military necessity imperatively requires such a waiver” .... The only circumstance in which “imperative military necessity” can be claimed is when the enemy uses cultural property for military purposes. This exception has a long history, beginning with the 1863 Lieber Code (Article 14) and continuing in the 1907 Hague Convention (Article 23g) where the destruction or seizure of an enemy’s property was limited to that which was demanded by the necessities of war. (The 1935 Roerich Pact, on the other hand, makes no mention of military necessity.)

U.S. Blue Shield Committee. However, “[d]espite these restrictions, the destruction” during the Second World War “on cultural property, and even on entire cities, provided insufficient support to those who desired to eliminate the doctrine of “imperative military necessity” from the 1954 Hague Convention.” U.S. Blue Shield Committee. Thus, Article 6 of the Second Protocol to the Convention was added, whereby “imperative military necessity was limited to an attack on cultural property that has been converted to a military objective, ‘by its function.’” Id. Succinctly put, a U.S. attack on Iranian cultural targets would violate Article 4 of the Convention and Article 6 of the Second Protocol, unless Iran had converted those sites to function for military purposes, which would be highly unlikely, given Iran’s pride in its ancient, rich civilization. See Trump Under Fire (observing “[s]ome of the sites are religious and some are not, but secular and religious Iranians are proud of their heritage and came together to denounce the president's threats,” thus “[n]othing could better unite divided Iranians at home and in the diaspora than a hit on their beloved past”).


Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention.

Id.

1437 Pentagon Says [quoting U.S. Defense Secretary Mark Esper].
IV. Iran’s Initial Counter-Retaliation, and JCPOA DRM Triggers

Iran’s threats to retaliate for the assassination of General Soleimani were predictable. The legitimacy of the Islamic Republic was at stake. Failure to respond would only encourage President Trump to encroach further on its interests, but provoking a war also would not be in its interests.1438 Iran appointed a successor to lead the Al Quds force, Brigadier General Esmail Ghaani, and avowed it would not rely on proxies to strike back at America.1439 Iran thus said it was considering 13 possible responses to “inflict a ‘historic nightmare’ on the U.S,” and “that U.S. forces in the region will be targets,” and its Majlis (Parliament) on 7 January 2020 “designated the Pentagon and affiliated companies as terrorists.”1440 Included among the response targets was Israel. The IRGC “warned that U.S. allies that allow America to use their bases will be targeted and that ‘by no means’ is Israel considered separate from U.S.”1441

Notably, Iran did not threaten to abandon entirely the JCPOA. Rather, on 5 January, following a Cabinet meeting in Tehran, Iran declared it no longer considered itself bound by the July 2015 Nuclear Deal,1442 and thus would not adhere to the limits in the Deal on the amount (stock) or purity of Uranium it could enrich, the number or nature of centrifuges it could use for enrichment (which, of course, determine its capacity for enrichment), or the nature of its nuclear research program.1443 But, Iran said its actions, which were reversible, would be based on its technical needs (i.e., not necessarily in pursuit of a nuclear weapon), and pledged to continue cooperation with IAEA weapons inspectors.1444 During the three months ending March 2020, Iran had tripled its Uranium stockpile, from 648.6 kg to 1020.9 kg (nearly 3.5 times above the 300 kg limit in the JCPOA) at a 4.5 percent purity level (well above the 3.67% limit in the Deal, though far below the 90% needed for a nuclear bomb).1445 Iran also had cast doubt on its pledge to cooperate: the IAEA said Iran failed to grant its inspectors access to two undeclared sites.1446

1438 See Najmeh Bozorgmehr, Iran Considers Options for Retribution Over Soleimani Killing, Financial Times, 6 January 2020, www.ft.com/content/d74a76c6-308e-11ea-9703-eea0cae3f0de?shareType=nongift.
1439 See Iran Considers Options (quoting Hamid-Reza Taraghi, a “hardline” Iranian politician, saying “Their [i.e., Iranian proxies in Lebanon, Iraq, Syria, and Yemen] decision to retaliate is theirs. We will need to act ourselves, separate from them.”).
1440 Iran General’s Wake.
1441 Iran Missile Attack Against.
1442 See Iran Abandons Nuclear Deal.
1445 See Katrina Manson, Andrew England & Najmeh Bozorgmehr, Iran Has Tripled Enriched Uranium Stockpile, Says U.N. Watchdog, FINANCIAL TIMES, 3 March 2020, www.ft.com/content/747bd3c2-5d8f-11ea-b0ab-339c2307bcd4?shareType=nongift. [Hereinafter, Iran Has Tripled.]
1446 See Tobin Harshaw, The Big Iran Threat Is Nukes, Not Coronavirus, BLOOMBERG, 8 March 2020, www.bloomberg.com/opinion/articles/2020-03-08/iran-and-coronavirus-nuclear-weapons-are-the-bigger-threat?srft=7sxx9s8x1 (reporting Iran’s “regime has been stonewalling International Atomic Energy Agency inspectors from sites to which they were guaranteed access under the deal, and where they suspect nuclear-
related activities took place in the mid-2000s, thus raising concerns “Tehran had never come clean on the history of its weapons program”) [hereinafter, The Big Iran.; Iran Has Tripled. Moreover:

One of the biggest concerns critics of the Joint Comprehensive Plan of Action had was about whether Iran really came clean with regard to the so-called possible military dimensions of its nuclear program. These were chronicled in an Annex to an IAEA Report [quoted below] in November 2011 and listed all the concerns about Iranian nuclear activities that did not fit with a civilian energy program. These included such things as detonator development, mathematical modeling and neutron initiators. While it can be hard to hide uranium enrichment facilities because they are so large (although Iran succeeded in doing so previously), a lot of the weapons-related work can occur in relatively small areas and would likely be at military bases. If inspectors showed up at an enrichment facility and were denied, there could still be trace evidence weeks later. If they are denied at other facilities working on possible military dimensions, however, the facilities could be completely cleaned before the standoff is diplomatically resolved.


27. The Agency [i.e., IAEA] is still awaiting a substantive response from Iran to Agency requests for further information in relation to announcements made by Iran concerning the construction of ten new uranium enrichment facilities, the sites for five of which, according to Iran, have been decided, and the construction of one of which was to have begun by the end of the last Iranian year (20 March 2011) or the start of this Iranian year. … Iran has not provided information, as requested by the Agency in its letter of 18 August 2010, in connection with its announcement on 7 February 2010 that it possessed laser enrichment technology. As a result of Iran’s lack of cooperation on those issues, the Agency is unable to verify and report fully on these matters.

…

39. The [IAEA] Board of Governors has called on Iran on a number of occasions to engage with the Agency on the resolution of all outstanding issues in order to exclude the existence of possible military dimensions to Iran’s nuclear programme. In resolution 1929 (2010), the Security Council reaffirmed Iran’s obligations to take the steps required by the Board of Governors in its resolutions GOV/2006/14 and GOV/2009/82, and to cooperate fully with the Agency on all outstanding issues, particularly those which give rise to concerns about the possible military dimensions to Iran’s nuclear programme, including by providing access without delay to all sites, equipment, persons and documents requested by the Agency. Since August 2008, Iran has not engaged with the Agency in any substantive way on this matter.

42. The information which serves as the basis for the Agency’s analysis and concerns, as identified in the Annex [to the Report], is assessed by the Agency to be, overall, credible. The information comes from a wide variety of independent sources, including from a number of Member States, from the Agency’s own efforts and from information provided by Iran itself. It is consistent in terms of technical content, individuals and organizations involved, and time frames.

43. The information indicates that Iran has carried out the following activities that are relevant to the development of a nuclear explosive device:

● Efforts, some successful, to procure nuclear related and dual use equipment and materials by military related individuals and entities (Annex, Sections C.1 and C.2);
Led by France, the EU explored ways to keep the *Deal* alive, and to avoid all-out war between the U.S. and Iran – a conflict into which Europe inevitably would be dragged, and which would have unforeseeable consequences in the various EU countries, many of which had sizeable Muslim populations. Iran’s Foreign Minister, Javad Zarif, also pledged that: “We will respond proportionately – not disproportionately…. We are not lawless like President Trump.”

Interestingly, France, along with Britain and Germany, thought one way to keep alive the *JCPOA* would be to sue Iran under the *Dispute Resolution Mechanism* laid out in the Articles 36-37 of the *Deal* (discussed in a separate Chapter). And, so they did, on 14 January 2020. These three countries formally accused Iran of breaching various *JCPOA* terms, none of which should have surprised Iran – though Iran called their triggering of the

- Efforts to develop undeclared pathways for the production of nuclear material (Annex, Section C.3);
- The acquisition of nuclear weapons development information and documentation from a clandestine nuclear supply network (Annex, Section C.4); and
- Work on the development of an indigenous design of a nuclear weapon including the testing of components (Annex, Sections C.5-C.12).

44. While some of the activities identified in the Annex have civilian as well as military applications, *others are specific to nuclear weapons*.

45. The information indicates that prior to the end of 2003 the above activities took place under a structured programme. There are also indications that *some activities relevant to the development of a nuclear explosive device continued after 2003, and that some may still be ongoing*.

52. … [Because] Iran is not providing the necessary cooperation, … the Agency is unable to provide credible assurance about the absence of undeclared nuclear material and activities in Iran, and therefore to conclude that all nuclear material in Iran is in peaceful activities.

53. The Agency has serious concerns regarding possible military dimensions to Iran’s nuclear programme. After assessing carefully and critically the extensive information available to it, the Agency finds the information to be, overall, credible. The information indicates that *Iran has carried out activities relevant to the development of a nuclear explosive device*. The information also indicates that *prior to the end of 2003, these activities took place under a structured programme, and that some activities may still be ongoing*.

54. Given the concerns identified above, Iran is requested to engage substantively with the Agency without delay for the purpose of providing clarifications regarding possible military dimensions to Iran’s nuclear programme as identified in the Annex to this *Report*.

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1447 Quoted in *Iran Considers Options*.

DRM a “legally baseless and a strategic mistake from a political standpoint.” The complainants rejected Iran’s argument that Iran is entitled to reduce in a calibrated manner its fulfilment of its JCPOA commitments, on account of America’s “maximum pressure” (i.e., draconian primary and secondary sanctions) campaign against Iran. That is, Iran pointed to Article 36, which, it said, allowed a Party to “cease performing its commitments … in whole or in part” in the event of “significant non-performance” by other Parties. Iran said the U.S. was supposed to provide it with sanctions relief, in exchange for Iranian compliance, and whereas Iran complied following the entry into force of the Deal until May 2019, the U.S. failed to deliver on sanctions relief starting in 2018. Iran might have added (but did not) that the U.S. had frustrated the purposes of the JCPOA, not only by its “maximum pressure” campaign, but also by its withdrawal from the Deal.

The risky calculation, then, was that triggering the DRM would keep Iran engaged in the Deal. Britain, France, and Germany felt “Iran’s decision on 5 January to suspend the last key commitment on uranium enrichment – the limit on the number of uranium centrifuges – had left them with no choice but to take action.” But, they avowed:

We do this in good faith with the overarching objective of preserving the JCPOA and in the sincere hope of finding a way forward to resolve the impasse through constructive diplomatic dialogue, while preserving the agreement and remaining within its framework,” they added.

In doing so, our three countries are not joining a [i.e., the U.S.] campaign to implement maximum pressure against Iran. Nevertheless, the BBC cast doubt on the calculation, opining that “[i]n invoking the dispute mechanism, the Europeans are taking the first formal step towards writing its obituary.”

Yet on 3 July 2020, Iran itself triggered the Article 36 DRM. Though it provided few details about its claims, Iran appeared to be concerned about implementation of the Nuclear Deal by France, Germany, and the U.K., arguing it was no longer receiving the benefits it reasonably expected from the Deal. With the European and Iranian filings, every Party to the JCPOA either had withdrawn from it (U.S.) or accused the other Party (France, Germany, U.K., and Iran) – except for China and Russia.

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1449 Britain, France, Germany (quoting Iranian Foreign Minister Mohammad Javad Zarif).
1450 The full JCPOA text and five Annexes are published by the U.S. State Department, www.state.gov/e/eb/tfs/spi/iran/jcpoa/, and by the EU at www.europarl.europa.eu/cmsdata/122460/full-text-of-the-iran-nuclear-deal.pdf. [Hereinafter, JCPOA Text.]
Assuredly, Iran sensed it could not possibly compete with America’s military might: as the *Financial Times* put it: “Āyatollāh Ali Khamenei, faced a difficult question: how to satisfy the Islamic regime’s desire for revenge for the U.S. killing, while avoiding a war.”

Breaching the *JCPOA* was one response – but not enough. The Supreme Leader vowed “severe retaliation,” yet did not want to risk a full-scale war. Conversely, perhaps some Trump Administration officials realized that not only was America at best divided about a third Middle East War since 2001 (with Afghanistan that year and Iraq in 2003), neither of which had been resolved, but also that America could not possibly succeed in a long-term occupation of Iran.

Iran’s retaliation was swift. On 8 January 2020, the day after the Soleimani funeral, Iran fired 22 ballistic short- and medium-range *Fateh 110* and *Shahab* missiles from three different locations in Iran at two military installations in Iraq. first at Ain Al-Asad Air Base (northwest of Baghdad, in Anbar Province), which housed roughly 1,000 U.S. troops, and which was struck by 11 of the missiles; and, then at the headquarters of the U.S.-led coalition in Erbil (the Iraqi Kurdish capital, north of Baghdad), “a Special Operations hub for hundreds of American and other Allied troops, logistics personnel and intelligence specialists throughout the fight against the Islamic State,” and which was struck by at least one missile. As Commander in Chief of Iran’s armed forces, the Āyatollāh ordered the retaliation, which he called both “a slap in the face” and a “crushing response,” and demanded an end to America’s corrupting presence in the Middle East. The *Financial Times* characterized as “the first-ever direct missile attack on U.S. troops,” and the BBC

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1455 *Iran Considers Options* (also reporting “[t]he outpouring of emotion [at Soleimani’s funeral] – the biggest since the death of Āyatollāh Ruhollah Khomeini, leader of the Iran revolution, in 1989 – has increased the pressure on the country’s leaders to retaliate”).


1458 *3 Hours From Alert.*

1459 *Quoted in Iran Attack: U.S. Troops Targeted.*

1460 *See Najmeh Bozorgmehr, Iran: The Unspoken Battle to Succeed Ayatollah Khamenei, FINANCIAL TIMES, 22 January 2020, www.ft.com/content/8d1d19ea-3c3d-11ea-b232-000f4477fbc8, [Hereinafter, *Iran: The Unspoken Battle.*]
said it was “the most direct assault by Iran on the US since the seizing of the U.S. Embassy in Tehran in 1979.”

Iran claimed 80 Americans were killed. That was fake news to show local Iranians it would not be bullied by the U.S. Iran forewarned the U.S., through the Swiss Embassy in Tehran (which handles America’s interests in Iran), explaining “it would be the first and last strike if the U.S. Administration refrained from hitting back,” and “apparently intend[ing] to avoid U.S. casualties.” Iran also forewarned Iraq. So, too, was President Trump’s minimization of casualties – there were some. Not only was there damage to U.S. ordnance, but also 34 U.S. troops at the Ain Al-Asad base suffered traumatic brain injury. That figure soon rose to 50 troops, then 64, amidst the 200 who were in the blast zone, and then up to 109 troops – though the long-term physical and mental effects of the injury needed monitoring and remained uncertain.

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1461 Iran Attack: U.S. Troops Targeted.
1463 See Karen Leigh, Iain Marlow & Michael Arnold, Iran’s Forewarned Strikes Give Trump a Path to Avert All-Out War, BLOOMBERG, 8 January 2020, www.bloomberg.com/news/articles/2020-01-08/iran-s-retaliation-offers-room-for-trump-to-calm-tensions (reporting “[t]hat fact [Iran’s prior notice, discussed above] suggests the Islamic Republic’s dramatic retaliation was carefully calibrated to satisfy the outrage at home and provide an off-ramp to the crisis….”).
1464 Iran: The Unspoken Battle.
1465 U.S. Suspects Iran Reprisal. See also Iran Missile Attack: Did Tehran Intentionally Avoid U.S. Casualties?, BBC NEWS, 8 January 2020 www.bbc.com/news/world-middle-east-51042156 (quoting an unnamed “Pentagon official as saying that Iran “deliberately chose targets that would not result in loss of life””).
1466 See Hours of Forewarning.
1467 See Alexandra Alper & Idrees Ali, More U.S. Troops Leave Iraq Over Potential Injuries as Trump Downplays Brain Risk, REUTERS, 22 January 2020, www.reuters.com/article/us-iraq-security-usa-casualties/more-u-s-troops-leave-iraq-over-potential-injuries-as-trump-downplays-brain-risk-idUSKBN1ZL239 (reporting “Trump and other top officials initially said Iran’s attack had not killed or injured any U.S. service members,” and that the President said on 22 January 2020 “I heard that they had headaches and a couple of other things, but I would say and I can report it is not very serious.”)
Just as America invoked Article 51 of the U.N. Charter to justify the assassination, Iran invoked Article 51 to justify the retaliation. The competing claims of self-defense bespoke the radically different narrative about “who did what to whom,” and “who caused what,” of the two sides.

V. Ukraine Airlines Flight 752 and Aftermath

● Another Tragedy

Iran’s retaliation also was tragic: on 8 January 2020, Iran shot down a Ukraine International Airlines Flight (PS 752) roughly two minutes after a pre-dawn take-off from Tehran’s Imam Khomeini International Airport. All 176 passengers – including 82 Iranians, 63 Canadians, 11 Ukrainians, plus Afghan, British, German, and Swedish nationals – were killed. The flight originated in Tehran, was headed to Kyiv and ultimately bound for Toronto, which was the final destination for 138 of the passengers. There were “no obvious military sites visible on satellite photos of the plane’s flight path.” Intelligence (including detection by spy satellites of launches from an Iranian missile battery near the Airport after take-off) from Canada, U.K. and U.S., and other sources showed the plane was struck by two surface-to-air missiles (specifically, Russian-made SA-15 (Tor-M1), missiles, launched from the north) and indicated its downing might have been unintentional.

Initially, Iran denied its missile was the cause, saying instead the Boeing 737-800 aircraft suffered “mechanical failure” to an engine. Yet, the Iranian government refused to release the “black box” flight recorder, and denied access to U.S. officials to investigate the crash scene. Though it said it wanted to decode the black boxes, it lacked the

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1471 See Iran Crisis: U.S.
1476 Iran Admits Downing.
1477 See Arsalan Shahla, Iran Says Ukrainian Jet Was Downed by Two Short-Range Missiles, BLOOMBERG, 20 January 2019, www.bloomberg.com/news/articles/2020-01-20/iran-says-ukrainian-jet-was-downed-by-two-short-range-missiles?ref=7sxx9x5x [hereinafter, Iran Says Ukrainian Jet]; Missile Strike Emerges. The SA-15 is a short-range weapon, also called a “Gauntlet” or “Tor,” its purpose is “to attack planes, helicopters and other airborne targets.” Id.
1478 See Missile Strike Emerges (reporting “Ali Abedzadeh, head of Iran’s Civil Aviation Organization, said ‘it’s not possible’ for an Iranian rocket to have hit the plane,” and that he explained, ‘There’s a very defined relationship in Iran between military and civilian structures and it’s based on the regulations of the international civil aviation authority to which we comply, like all other countries.’”); Iran’s President Reminded (quoting Iran state media).
1479 Under ICAO Annex 13, the country (here, Iran) in which a crash occurs leads the investigation of that crash, and other countries – such as the country (here, the U.S.) in which the aircraft was made – are
technology to do so. The irony of Iran having just resurrected memories of the 1988 U.S.S. Vincennes incident could not have been more poignant.

What made the irony yet more horrific was Iran’s admission, on 10 January 2020 (three days after the incident) that it shot the Ukrainian plane by accident. Iran’s official statement noted Flight 752, “had turned towards a ‘sensitive military center’” of the IRGC, and had a “‘flying posture and altitude of an enemy target.’” Iranian officials said the following: 

- Iran’s President:
  
  Hassan Rohani “admitted Iranian military had ‘unintentionally’ shot down the passenger plane after mistaking it for a cruise missile when it turned towards a sensitive military site. President Rouhani said the missile strike was an “unforgivable mistake.” He said, “Iran deeply regrets this disastrous mistake,” and “vowed to prosecute those responsible.”

- Iran’s Foreign Minister:
  
  “Javad Zarif apologized to the families of the victims but laid part of the blame on the U.S., saying ‘[h]uman error at a time of crisis caused by U.S. adventurism led to [this] disaster.’” Subsequently, he admitted (in a secret recording) that the truth as to the cause of the aircraft downing may never be revealed.
IRGC:

The senior-most Commander of the IRGC, Hossein Salami, intoned that “we are more upset than anyone over the incident.”

“Brig-Gen Amir Ali Hajizadeh, the Revolutionary Guards’ Aerospace Commander, said a missile operator had acted independently and alone, mistaking the plane for a ‘cruise missile,’ as there had been reports that such missiles had been fired at Iran.

“He had 10 seconds to decide. He could have decided to strike or not to strike and under such circumstances he took the wrong decision”....

“He was obliged to make contact and get verification. But apparently, his communications system had some disruptions.”

“Gen. Hajizadeh said the military would upgrade its systems to prevent such ‘mistakes’ in the future.

“He said he had ‘wished he was dead’ after being told of the missile strike.

Gen Hajizadeh also said a request had been made for a no-fly zone in the area before the incident but, for reasons that are unclear, this was rejected. Additionally, “[h]e said he had informed the authorities about what had happened ... [on 8 January], raising questions about why Iran had denied involvement for so long.”

One among many Iranian commentators:

“Sadegh Zibakalam, a political scientist and former university professor based in Tehran, said it was difficult to see how officials

on the recording that there are a ‘thousand possibilities’ to explain the downing of the jet, including a deliberate attack involving two or three ‘infiltrators’ – a scenario he said was ‘not at all unlikely.’ He is also heard saying the truth will never be revealed by the highest levels of Iran’s government and military. ‘There are reasons that they will never be revealed,’ he says in Farsi. ‘They won’t tell us, nor anyone else, because if they do it will open some doors into the defence systems of the country that will not be in the interest of the nation to publicly say.’”.


1488 Quoted in Iran Plane Crash: Demands for Justice.

1489 Quoted in Iran Plane Crash: Demands for Justice.
could escape from this as ‘just about everyone has lied during the past three days.’”

- Iran’s Supreme Leader:

Perhaps the coldest of all responses came from the Āyatollāh himself. While offering condolences, he said “there was ‘proof of human error’ and that he had asked ‘relevant authorities to take necessary measures to prevent’ such an incident happening again.”

The Supreme Leader praised the IRGC for having “maintained the security” of his country, called for “national unity,” and opined that “[o]ur enemies were as happy about the plane crash as we were sad,” and that [they were] happy that they had found something to question the [Revolutionary] Guard and the armed forces.” Whereas the Trump Administration was “evil,” and Mr. Trump himself was a “clown,” the Āyatollāh said the Al Quds force, which reports directly to him, was a “humanitarian organisation with human values.” Likewise, the representative of the Supreme Leader to the Al Quds force, Alī Shirazi, argued “Iran’s enemies want to take revenge on the Guards for a military mistake.”

Not surprisingly, calls emerged on social media for Mr. Khameini to resign, and crowds in street protests (discussed below) shouted “Death to the dictator,” and “resignation is not enough, a trial is needed!”

- Iran’s Civil Aviation Organization:

Six months after the 8 January 2020 tragedy, on 11 July, CAOI issued a report “blam[ing] ‘human error’ and poor military communication,” saying an “air
defense unit that “forgot” to adjust its radar system triggered a chain of communication and human errors that led to the deadly downing of a Ukrainian passenger jet.” Specifically, “[t]he plane was downed by two missiles, fired 30 seconds apart, from an air defense unit that mistook the jet for a cruise missile,” and “[a]n operator had forgotten to re-adjust the north direction on the radar system after moving to a new position, an error that contributed to misreading the radar’s data.”

Amidst these not entirely Iranian consistent responses, speculation raged about Iran’s next move. Was its ballistic missile attack on the air bases in Iraq the end? On the one hand, that attack arguably gave Iran a measured, face-saving response to the Soleimani assassination without escalating matters further. On the other hand, certain Iranian officials suggested more was to come, including possibly from Iran’s proxies.

The U.S. expressed its preference to renegotiate the JCPOA, but refused to a core Iranian demand before any talks began: the lifting of sanctions. Unsurprisingly, America toed the Saudi line that the Nuclear Deal and sanctions relief thereunder had emboldened Iran. Iran’s President Hassan Rouhani pointed out all of its nuclear communicate with their command centre, and fired on the plane without receiving official approval”). Canadian observers questioned Iran’s explanation:

Iran has repeatedly delayed releasing the plane’s “black box,” which holds key data and communications from the cockpit. It is expected to send the box to France for examination on 20 July. 

There has been much speculation about why Iran did not clear the skies during the attack. A recent audio recording obtained by Canada’s CBC News suggests that the airspace remained open to avoid giving away Iran’s intention to attack the US air base in Iraq. The recording is allegedly a conversation between the family of one of the accident victims and Hassan Rezaeifar, who at the time was leading Iran’s investigation into the incident.

Iran’s Deputy Foreign Minister Mohsen Baharvand dismissed the recording, saying it could not be used as evidence.

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activities remained under the watch of the IAEA, and that it would reverse its technical breaches in exchange for sanctions relief.\textsuperscript{1504} Foreign Minister Mohammad Javad Zarif added an understandable rhetorical question: I had a U.S. deal and the U.S. broke it. If I have a Trump deal, how long will it last?\textsuperscript{1505}

In the meantime, Canada’s PM, Justin Trudeau (1971-, PM, 2015-), faulted both Iran and the U.S. for the downing of Ukraine Flight 752: “those Canadians would be, right now, home with their families,’ if not for “escalation recently in the region.”\textsuperscript{1506} Justifiably, Canada led the international charge to persuade Iran to submit to international arbitration to settle issues surrounding the causes, conduct, and consequences of the downing of the Flight.\textsuperscript{1507} Iran resisted, so along with Sweden, Ukraine, and the U.K., Canada applied to the ICJ for relief.\textsuperscript{1508} However, in January 2024, the ICJ “declined to rule on allegations brought by Kyiv that Moscow was responsible for the shooting down of Malaysia Airlines flight MH17 over eastern Ukraine in 2014.”\textsuperscript{1509} The ICJ reasoned that “violations of terrorism only applied to monetary and financial support, not to supplying weapons or training as alleged by Ukraine, and “Ukraine had argued that Russia supplied the missile system that shot down the aircraft, but it had not alleged financial support in that instance.”\textsuperscript{1510}

Lebanon and \textit{Houthis} in Yemen, and his point that “[t]here were way more ballistic missiles launched at the Kingdom after the nuclear deal than before”).\textsuperscript{1504} *\textit{Quoted in Parisa Hafezi, Iran Rejects Idea of a New “Trump Deal” in Nuclear Row, Reuters, 15 January 2020, www.reuters.com/article/us-iran-nuclear-rouhani/iran-rejects-idea-of-a-new-trump-deal-in-nuclear-row-idUSKBN1ZE0RG.} [Hereinafter, Iran Rejects Idea.]

\textsuperscript{1505} *\textit{Quoted in Jason Kirby, Canada’s Justin Trudeau Partly Blames U.S. for Deadly Iran Plane Crash, Financial Times, 14 January 2020, www.ft.com/content/bf0752ee-3685-11ea-a6d3-9a26f8e3cbe4?shareType=nongift. See also Steve Scherer, Canada’s Trudeau: Iran Plane Victims Would Be Alive Had There Been No Regional Tensions, Reuters, 13 January 2020 (quoting PM Trudeau, “I think if there were no tensions, if there was no escalation recently in the region, those Canadians would be right now home with their families,” and also disclosing that “Canada did not receive a heads up before the United States killed Soleimani, and that” the PM said “he ‘obviously’ would have preferred one.”)

*\textsuperscript{1506} See Alys Davies, Flight PS752: Calls on Iran to Settle Dispute over Downing of Ukraine Jet, BBC News, 29 December 2022, www.reuters.com/investigates/special-report/china-lawyers-crackdown-exodus/ (reporting: “In a joint statement …, the four countries [Canada, Sweden, Ukraine, and U.K.] ‘requested that Iran submits to binding arbitration of the dispute related to the downing of Flight PS752’ under a 1971 multilateral treaty on threats to civil aviation.”)

\textsuperscript{1507} See Emma Harrison, Ukraine Plane: Iran Facing Legal Action Over Downing of Flight PS 752, BBC News, 5 July 2023, www.bbc.com/news/world-middle-east-66110345 (reporting the complaining countries (1) alleged “Iran ‘violated a series of obligations’ under a convention on civil aviation by shooting down the jet … and failing to take all practicable measures to prevent the downing of the plane …, and then fail[ing] to conduct an impartial, transparent and fair criminal investigation and prosecution…,” (2) asked the ICJ “to order that Iran publicly acknowledges its ‘internationally wrongful acts,’ apologize to the families, and provide assurances that it will not happen again,” and (3) also petitioned the Court “to ‘order full reparation for all injury caused,’” and order Iran “to return the missing belongings of the victims and to provide ‘full compensation’ to the families.”).

\textsuperscript{1508} Stephanie van den Berg, World Court Dismisses Much of Ukraine’s Case against Russia, Reuters, 31 January 2024, www.reuters.com/world/europe/world-court-rule-whether-russia-violated-international-treaties-ukraine-2024-01-31/. [Hereinafter, World Court Dismisses.]

\textsuperscript{1510} \textit{World Court Dismisses} (also noting that “[i]n November 2022, a Dutch Court sentenced two Russians and a Ukrainian in absentia to life imprisonment for their role in the disaster.”).
Iranian Public Sentiment Turns

The calls for the Āyatollāh to quit erupted into days of street protests (some of which turned violent) across Iran, including Tehran’s Azadi (Freedom) Square and its central Valiasr Square, and around Tehran University, Amir Kabir University of Technology, Shahid Beheshtri University, and Sharif University.1511 The “rally around the flag” effect in Iran immediately following the targeted killing gave way to expressions that the IRGC, not America or Israel, was the real enemy of the Islamic Republic. Some protestors chanted, “They [Iran’s leaders] are lying that our enemy is America, our enemy is right here,” “Down with the dictator [Mr. Khomeini],” and studiously avoided trampling on the U.S. or Israeli flags chalked into the streets on which they marched.1512 Thus:

In little over a week, public feeling in Iran has swung from fervent support for the regime in the face of American aggression, to anger and distrust after the country’s military leaders lied over the downing of a commercial passenger jet that killed all on board.

After the U.S. assassination of the military commander Qassem Soleimani in neighboring Iraq on January 3 [2020], millions of Iranians across the country came together to pay tribute to the fallen soldier. The huge funeral turnout amazed political and military leaders, who just two months earlier had faced the most violent anti-government protests since the revolution.

Iranian politicians interpreted the nationalism evoked by Soleimani’s death as a sign of continued public support for their controversial regional and defence policies, despite the debilitating impact of U.S. sanctions.

But then on Saturday [11 January] Iran admitted the Ukraine International Airlines passenger jet that came down last Wednesday shortly after take-off from Tehran had not crashed as previously stated, but had been mistakenly shot down by Iran’s air defence system.

Overnight public attitudes changed as Iranians poured on to the streets in Tehran and other cities to mourn the dead and challenge the Islamic regime over its devastating mistake. Gone were the slogans heard during Soleimani’s funeral of “Death to the U.S.” and “Death to Israel.” Instead protestors chanted “Guards [i.e., IRGC]; you are the dictator; you are our Isis” and “Shame on you, [G]uards; leave the country alone.”

1511 See Iran Protests Turn Violent; Fury at Air Crash.
1512 Quoted in “Our Enemy is Here.” See also Iran Plane Downing Second Day of Protests Turns Up Heat on Leaders, BBC NEWS, 13 January 2020, www.bbc.com/news/world-middle-east-51081833 (reporting that (1) “[i]n one apparently symbolic act rejecting state propaganda, video showed students taking care not to walk over U.S. and Israeli flags painted on the ground at Shahid Beheshti University in Tehran,” (2) “[i]n some social media clips, protesters can be heard chanting anti-government slogans, including: ‘They are lying that our enemy is America, our enemy is right here,’ and (3) “[m]any of the protesters are women”).
“We don’t want the Islamic Republic,” chanted protesters in Tehran …, as they called for the resignation of top politicians including [S]upreme [L]eader Āyatollāh Alī Khamenei.

Having promised to take revenge for Soleimani’s death on American soldiers, none were killed in Iran’s air strikes on Iraqi bases. Instead it is the second time in a week that dozens of Iranians have lost their lives, after at least 60 people were crushed to death on Tuesday [7 January] in a stampede at Soleimani’s burial. Many in Iran feel that incompetent officials, with little respect for the lives of ordinary people, are responsible. One bitter joke that is being widely shared on Iranian social media reads: “The Revolutionary Guards have sent a message to the U.S. that, if you attack us once again, we will level Iran to the ground.”1513

Succinctly put, the senseless killing of innocent passengers, including so many Iranians, which triggered the protests laid bare in the worst of ways that Iran’s theocracy suffered from three fundamental weaknesses: a lack of transparency, corrupt economic management, and systematic incompetence.

The shifting explanations and vital technical details of the incident exemplified each weakness. The IRGC failed to distinguish the trajectory of a commercial airliner from a missile, and failed to have the combination of technology and procedures to do so:

Ukrainian International Airlines Flight 752 was flying in a very different manner than the cruise missile it was supposedly mistaken for. It was following the normal departure path from Tehran’s airport and was clearly transmitting its identity when it was taken down.

While a highly effective weapon against short-range threats, the SA-15 Tor missiles used in the strike [on 8 January 2020] have a guidance system that’s designed for use in war zones and can’t by itself easily distinguish between airliners, cruise missiles and other military aircraft.

As a result, nations that deploy the Tor typically link them into a broader air-defense command system capable of tracking civilian planes…. In those circumstances, soldiers operating missile batteries aren’t supposed to fire them without approval from higher authorities.

Flight 752 … was transmitting its position for civilian radars and the newest flight tracking system that uses global-positioning data, according to data posted by FlightRadar24.

While the Tor’s radars might not have been able to discern between civilian and military targets, other systems in Iran were tracking the plane and that information should be available to missile battery commanders….  

1513 Lies Over Downing.
Iran … offered changing explanations for why it shot down the jet in the pre-dawn darkness.

A statement released early Saturday [11 January] said that the plane had turned toward a military base.

FlightRadar24’s track for the Boeing 737-800 showed it flying a normal profile. About two minutes after becoming airborne, it made a slight turn to the right, which is typical for departures from that runway. When it climbed to about 7,900 feet (2,408 meters) altitude, it suddenly stopped transmitting its position, most likely as it suffered damage from the missile.

At least two other planes that departed that morning followed nearly identical paths and several others flew nearby, according to … [FlightRadar24] data.

“Even without having been made directly aware of this flight, a SAM operator crew should have easily been able to identify that this flight pattern and radar profile was completely at odds with any suspected U.S. missile or combat aircraft strike package,” Justin Bronk, a specialist in military technology at Britain’s Royal United Services Institute, wrote….

A later statement by Amir Ali Hajizadeh, [C]ommander of Iran’s Aerospace Force, said the jet was identified as a cruise missile.

The U.S. versions of those self-guided drones are designed to hug the ground to avoid detection, often flying within 100 feet of the surface, Zaloga said. The Ukrainian plane was rapidly climbing and was several thousand feet higher.

The U.S. versions of those self-guided drones are designed to hug the ground to avoid detection, often flying within 100 feet of the surface…. The Ukrainian plane was rapidly climbing and was several thousand feet higher.

The missile operator was supposed to obtain approval before commanding a strike, but communications were disrupted and he only had 10 seconds to decide, Hajizadeh said.1514

However, how convincing was Iran’s official account?

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In November 2021, a report drafted by the families of victims on Flight 752 was issued, and – not surprisingly – came to a starkly different conclusion than that (or those) Iran offered:

A new report on the destruction of Flight PS752 drafted by the victims’ families claims the government of Iran deliberately kept its airspace open to use civilian air passengers as human shields against a possible American attack.

Iran’s … IRGC shot down the Ukraine International Airlines flight shortly after take-off in Tehran on Jan. 8, 2020. Two surface-to-air missiles hit the plane, killing all 176 passengers onboard – including 55 Canadian citizens, 30 permanent residents and others with ties to Canada.

 Unsatisfied with the lack of answers from the various governments involved, including Canada’s, families of the victims said they spent 17 months doing their own detective work. They say they conducted their own fact-finding mission – obtaining audio recordings of top Iranian officials, testing victims’ phones from the crash site and consulting with military and air defence experts.

 In their 200-page report, the families say they believe the plane was shot down intentionally and that high-ranking Iranian officials were responsible – not just a handful of low-ranking IRGC members, as Iran has claimed.

 “Association of Families of Flight PS752 Victims believes that Flight PS752 was not shot down as a result of a human error of one operator, nor was it a consequence of multiple errors in the defence system as claimed by Iran,” says the report.

 The report points to Iran’s decision to keep the airspace open on Jan. 8 after Iran’s forces had fired missiles at Iraqi bases where U.S. troops were stationed. The attack was in retaliation for an American drone strike that killed a high-ranking Iranian military general in Iraq.

 “At the highest levels of military alertness, the government of Iran used passenger flights as human shield against possible American attacks by deliberately not closing the airspace to civilian flights,” says the report.

 The report also cites multiple experts who have said the missile system and defence network used by the IRGC couldn’t have mistaken the passenger plane for a hostile target, and that it wasn't possible for the missile system to have been left facing the wrong way, as Iran has claimed. “…the destruction of existing evidence, and Iran’s misleading reports, all indicate that the Downing of Ukraine International Airlines flight 752 was deliberate,” the report says.
Canada’s official forensic examination of the crash, meanwhile, concluded that the government did not have evidence of its own proving the catastrophe was “premeditated.” Transport Minister Omar Alghabra … [said] the families’ report seems to agree with many of the facts in the forensic report but arrives at a “different interpretation.” …

The families report claims that a private investigator found that victims’ cell devices retrieved from the scene and returned to families appeared to have been tampered with.

…

The families’ report also found that the Islamic Revolutionary Guard Corp. operator of the missile system that shot down the plane had “vast experience and expertise,” including service in Syria.

That conclusion is based on comments made by authorities at Tehran’s military court and comments an Iranian prosecutor made during meetings with victims’ families.

The report says military experts provided the families with data that suggest it’s “highly unlikely” the operator misidentified the passenger plane as a cruise missile, as Iran has claimed. Cruise missiles and Boeing 737-800 passenger aircraft have major differences in length, speed, altitude, and motion profiles which make them easy to distinguish from each other on a missile system operator’s display, the report said.

“IT IS IMPLAUSIBLE THAT THE MISSILE SYSTEM OPERATOR SIMPLY CONFUSED A MUCH LARGER CIVILIAN AIRCRAFT, MOVING IN MORE GRADUAL PATTERNS AND AT A SLOWER SPEED, FOR A CRUISE MISSILE,” THE REPORT SAID.

The report also claims that human error can’t account for the missile being aimed at a passenger aircraft.

“Our thorough analysis suggests that the alleged 105-degree error was an act of falsification carried out by Iran to convince the world that ‘human error’ in re-alignment of the Tor-M1 unit was the cause of the downing,” the report said.

The report says that some of the passengers on Flight PS752 were asked by Iranian officials at a security checkpoint prior to departure if they had American passports or were headed to the U.S.

The report said another flight by Atlas Global Airlines that shared a scheduled time of departure from Tehran with Flight PS752 was not delayed and was given a different flight path – one that took it away from the missile installation.
Iran’s final report on the crash claimed that its airspace in the western part of the country was closed to passenger planes as a preventative measure during a time of intense military activity. But the families’ report said that, based on data from FlightRadar24, a global tracking service, Iran’s airspace was not evacuated until 20 minutes prior to the downing of Flight PS742.1515

Two months later, in January 2022, the Superior Court of Justice of Ontario awarded C $107 million (U.S. $84 million), plus interest, to families of six persons who died on that Flight.1516 They were among the 55 Canadian citizens and 35 Canadian Permanent Residents who perished. The plaintiffs had filed a civil action against Iran, which did not defend itself. It was the first such judgment to compensate any of the next of kin of the victims.

How they would collect on the judgment was unclear, though seizure of Iran’s assets, including oil tankers, in Canada and overseas, were possible sources. The IRGC showed no sign of backing down to mollify the country’s citizens, nor of altering its strategic goal of ridding the Middle East of the American military presence.

After all, the IRGC had the power to crush protests, and it did so again in January 2020, using batons, teargas, and allegedly live ammunition.1517 And, it felt its foreign policy reaped successes:

- It has saved President Bashar al-Assad’s regime in Syria and enabled it to open up a new front against Israel. It has a significant influence in Iraq.
- Because of the contradictions in President Trump’s policy, U.S. allies in the region feel increasingly on their own. The Saudis have been exploring a low-level dialogue with Tehran; Turkey is going its own way and establishing a new relationship with Russia.1518

Yet another such contradiction concerned the JCPOA.

Before this July 2015 agreement “there was a very real risk of war – with Israel (or perhaps the U.S. and Israel in tandem) likely to attack Iran’s nuclear infrastructure.” The Nuclear Deal extended Iran’s break out time to develop a WMD. Following both the U.S. withdrawal from the Deal and the chain of events its targeted killing of Suleimani catalyzed, war again loomed. Those events dramatized the precarious position Iran’s theocratic leaders: they needed to reinforce the justification for their regime.

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1517 See “Our Enemy is Here.”
Further doubt was cast on that justification in May 2020. In another tragic “friendly fire” incident, Iran’s Navy killed at least 19 of its own sailors in the Strait of Hormuz, off the coast of Oman, near Iran’s port city of Jask. They were on a support ship, Konarak, which was struck by a new anti-ship missile test fired from the frigate, Jamaran. Konarak was a 47 meter-long “Hendijan-class logistical support vessel that was made in the Netherlands and bought by Iran before the 1979 Islamic Revolution. Jamaran, part of a new class of vessels, is “considered one of the prides of Iran’s fleet” and “a triumph of Iran’s homegrown naval technology,” and Āyatollāh Ali Khamenei himself “inaugurated it in 2010 in an unusual appearance onboard the ship.” Konarak was laying practice targets in the Gulf waters, but was too close to one and thus hit. In a properly planned and executed naval exercise, with professional control systems, such an accident would not have occurred. “Firing at your own targets, whether military or civil, in such a short space of time is not human error,” Maziar Khosravi, a journalist aligned with opposition politicians, wrote on Twitter … ‘It’s a catastrophic failure of management and command.’

VI. Violence Continues

As the COVID-19 (coronavirus) pandemic spread across Iran, America, and the world, KH fighters and the U.S. military continued to exchange blows. On 11 March 2020, a rocket attack in Iraq on the Camp Taji base (15 km north of Baghdad) occurred: KH launched it from the back of a truck approximately 30 107-mm Katyusha rockets, 18 of which hit the base, killing two American and one British soldier. The U.S. countered with what the DOD dubbed “defensive precision strikes” by manned aircraft (jets) against

1520 Iran Navy “Friendly Fire.”
1521 Iranian Friendly Fire.
1522 Quoted in Iranian Friendly Fire.

five facilities across Iraq containing suspected Iranian-supplied weapons (including in Babil and an airport under construction in Karbala).1525

The retaliation, which the Pentagon avowed was “defensive, proportional, and in direct response to the threat posed by Iranian-backed Shī’a militia groups,”1526 killed at least five KH members, but also three Iraqi military soldiers, one policeman, and a civilian. The retaliation was “significant” in a geographic sense, too, because it “targeted … areas that even during the fight against the Islamic State (IS) group were considered a no-fly zone for coalition drones and planes.”1527 Iraq condemned the retaliation as a “violation of national sovereignty.”1528

On 14 March, Iran announced COVID-19 had killed 113 people in the previous 24 hours, “raising the country’s death toll to 724,” and that the virus had infected a staggering number of Iranians – 13,938.1529 (Subsequently, the BBC reported Iran grossly underestimated the numbers of infections and deaths, and covered up the true figures.1530) Yet, as if to prove the points that (1) violence begets violence, and (2) terrorists are so filled with fear and hate they cannot see a common enemy that knows no geopolitical or socioreligious boundaries – the corona virus – KH counter-retaliated against the U.S. on 14 March.1531 KH fired 33 Katyusha rockets at Camp Taji, wounding three coalition forces and three Iraqi Air Force members.1532 The launch site, a transport base about three miles from the base in Abu Izam, included “seven launchpads hidden in cinder-block

1525 Quoted in Iraq Base Attack.
1526 Quoted in Iraq Base Attack.
1527 Iraq Base Attack.
1528 U.S. Strikes.
1529 Iran’s Death Toll From Coronavirus Reaches 724, Says Health Official, REUTERS, 15 March 2020, www.reuters.com/article/us-health-coronavirus-iran/iran’s-death-toll-from-coronavirus-reaches-724-says-health-official-idUSKBN2120G0 (stating the first recorded death in Iran from COVID-19 occurred on 22 January 2020, one month before the first case was officially disclosed in Iran, “[t]he number of deaths from coronavirus in Iran is nearly triple what Iran’s government claims,” “[t]he government’s own records appear to show almost 42,000 people died with Covid-19 symptoms up to 20 July, versus 14,405 reported by its Health Ministry,” and “[t]he number of people known to be infected is also almost double official figures: 451,024 as opposed to 278,827,” that “Iranian authorities have reported significantly lower daily numbers despite having a record of all deaths – suggesting they were deliberately suppressed,” and that Iran was the worst-hit country in the Middle East). As to why a cover-up may have occurred, the BBC speculated that “[t]he start of outbreak coincided both with the anniversary of the 1979 Islamic Revolution and with parliamentary elections,” and “[t]he number of deaths from coronavirus in Iran is nearly triple what Iran’s government claims,” “[t]he government’s own records appear to show almost 42,000 people died with Covid-19 symptoms up to 20 July, versus 14,405 reported by its Health Ministry,” and “[t]he number of people known to be infected is also almost double official figures: 451,024 as opposed to 278,827,” that “Iranian authorities have reported significantly lower daily numbers despite having a record of all deaths – suggesting they were deliberately suppressed,” and that Iran was the worst-hit country in the Middle East). 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shelters.”1533 Twenty-four additional unused rockets were discovered at the site.1534 Notably, “[t]he Iraqi military said … neither the United States nor other foreign forces should use the latest attack as a pretext to take military action without Iraq’s approval, and should instead hasten to implement a Parliamentary resolution [discussed above] expelling them.”1535 That, however, seemed a remote prospect.

Less remote a prospect was the peaking of Iranian influence in Iran. In May 2020, Āyatollāh ’Alī Khameini railed against U.S. forces in the Middle East, avowing “[t]he Americans won’t stay in Iraq and Syria and will be expelled.1536 The reality was different from his rhetoric. Thanks in part to a tougher stance by Iraq’s new PM, Mustafa Al-Kadhimi (1967-, PM, 2020-), who took office in May 2020, Iraq spoke out against Iranian influence, and shelved the idea of a U.S. force withdrawal:

Consider that Kataʾib Hezbollah, the militia largely responsible for attacks on U.S. positions in Iraq, openly accused the new Prime Minister of participating in the U.S. plot to kill the Iranian leaders…. The militia opposed Kadhimi and threatened violence if he became Prime Minister. The Iraqi Parliament ignored it.

Normally, the opposition of a militia supported and directed by Iran would be a clear sign that Iran sees Kadhimi as an unacceptable choice for prime minister. …

This time around, the Iranians have indicated that they will live with him.

Why? Kadhimi was able to take advantage of schisms within Iran’s own power centers, says Nibras Kazimi, the founder of Talisman Gate, a website that follows Iraqi politics. A turf battle among Iranian factions in Iraq has “opened up space in Baghdad for previously unexpected outcomes,” he says. Kadhimi “slipped through the inter-Iranian melee, but his ascendance is not a reflection of American influence.”

Those schisms in Iran could nonetheless be good for U.S. interests. Kadhimi’s platform explicitly calls for reform of the Interior Ministry, whose forces coordinated with Iranian-backed militias to violently disperse recent peaceful protests against Iranian influence. The new chief of that Ministry will be General Othman Ghanimi, an American-trained officer who is currently the Chief of Staff of Iraq’s military. His new Ministry was once infiltrated by militia leaders who showed more loyalty to Soleimani

1533 Iraq Base Housing.
1534 See Three U.S. Troops.
1535 Three U.S. Troops.
and Iran than to Iraq. He now has an opportunity to clean house, a long-time U.S. objective.

Kadhimi has also pledged to take on corruption, which is the primary issue for the national protest movement – and a primary reason that Iran is able to exert influence in Iraq.

Kadhimi’s platform is not as pointed in its criticism of U.S. actions as his predecessor’s was. It says Iraq will not allow “its territories to be used as a base for launching aggression against any of its neighbors and will not become a battlefield for regional and international conflicts.” At the same time, it indirectly says it will not allow Iran to manage its relationship with Iraq the way it did in the Soleimani years: “As far as foreign relations are concerned, the state shall communicate with official institutions only, and according to the international diplomatic norms, and not with individuals or non-official entities.”

In essence, “[w]hen Soleimani was killed, Iran had already overplayed its hand…”

Notwithstanding the public health crisis, Iran’s military kept U.S. forces in its cross hairs. On 15 April 2020, 11 boats from the IRGC Navy harassed U.S. Naval and Coast Guard vessels in the Gulf. Their “dangerous and provocative” behavior, said the U.S., entailed “approach[ing] six U.S. military ships while they were conducting integration operations with Army helicopters in international waters,” and “[a]t one point, the Iranian vessels came within 10 yards of the U.S. Coast Guard cutter Maui.” They IRGCN craft persisted for roughly one hour, notwithstanding U.S. issuance of “several warnings through bridge-to-bridge radio, blasts from the ships’ horns and long-range acoustic noise maker devices.” The U.S. pointed out such incidents “increased the risk of miscalculation and collision, (and) were not in accordance with the internationally recognized Convention on the International Regulations for Preventing Collisions at Sea.”

That Iran was suffering through 79,494 confirmed coronavirus cases, and 4,958 deaths, and the infection had far from reached peak levels, made the IRGCN action almost surreal. That is, Iran persisted in “business-as-usual” hatred of America, when in fact the “Great Satan” afflicting its people was COVID-19. And, America reacted predictably: President Trump tweeted “that

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1538 Iran is Losing (quoting Michael Knights, Senior Fellow at the Washington Institute for Near East Policy).


1540 Iranian Vessels Come.

1541 Iranian Vessels Come.

he had instructed the U.S. Navy to “shoot down and destroy any and all Iranian gunboats if they harass our ships at sea.”

Sadly, Iran both rejected a U.S. offer of a humanitarian exemption to sanctions, and sought an IMF bailout loan (which the U.S. opposed, concerned that Iran would divert funds to nefarious purposes). Instead, the IRGC launched from its Central Desert into orbit Iran’s first military satellite. “The satellite, named Nur (Light), reached an orbit of 425km (264 miles) after being carried by a three-stage Qased launcher.” In an admixture of religion and politics characteristic of Iran’s regime, “the Qased carrier [was] inscribed with a verse from the Koran that Muslims often recite when going on a journey: “Glory be to Him, who has subjected this to us, and we ourselves were not equal to it.” Then:

IRGC’s Commander-in-Chief, Maj-Gen Hossein Salami, said the force had taken “a major step in promoting the scope of [its] strategic information capabilities.”

“Today, we are looking at the Earth from the sky, and it is the beginning of the formation of a world power ….”

IRGC Aerospace Force commander Brig-Gen Amir-Ali Hajizadeh said the Qased “used a compound of liquid and solid propellants” and declared: “Only superpowers have such capability.”

Iran’s military satellite launch appeared to violate a U.N. Security Council Resolution that both endorsed the July 2015 JCPOA and barred Iran from “undertak[ing] any activity related to ballistic missiles designed to be capable of delivering nuclear weapons.” Iran could use the technology it used for the satellite to develop ICBMs (which, by definition, have a minimum range of 3,400 miles (5,500 km) and are designed primarily to deliver more thermonuclear warheads.

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1544 See Iran’s Revolutionary Guards Successfully. 

1545 Iran’s Revolutionary Guards Successfully. In February 2020, Iran “Iran failed to put into orbit the Zafar communications satellite,” and “[t]here were two other failed satellite launches last year, as well as a mysterious explosion that destroyed a satellite launch vehicle.” Id.

1546 Iran’s Revolutionary Guards Successfully.
VII. **JCPOA Violations Continue**

Despite whatever attachment to the **JCPOA** might have been associated with the respective **DRM** triggers (discussed above) might have signalled, Iran’s own actions bespoke continued calibrated violations of the **Nuclear Deal**. In June 2020, the IAEA issued two reports to this effect. One study confirmed Iran held a stockpile of 1,571.6 kg (3,464.7 lbs) of low-enriched uranium (as of 20 May).\(^{1547}\) That was far in excess of the 300 kg limit mandated by the **Deal**. The highest level of enrichment in that stockpile was 4.5%, which breached the 3.67% cap in the **Deal** (though well beneath the threshold needed for fissile material for a nuclear bomb). The rate of enrichment by Iran had remained stable between March and May.

In the context of the second study, the IAEA noted “exceptional co-operation” (despite logistical issues caused by the COVID-19 pandemic) by Iranian authorities to access all of its nuclear sites – except for two.\(^{1548}\) Yet, for over four months, Iran had blocked IAEA inspectors from visiting two locations that they believed had hosted suspicious activity before July 2015, when the **JCPOA** was agreed.\(^{1549}\) In particular:

[T]he IAEA expressed concern about:

1. The possible presence between 2002 and 2003 at one site of natural uranium in the form of a metal disc. In 2003 and 2004, the location underwent extensive sanitization and levelling.
2. The possible use or storage of nuclear material and/or conducting of nuclear-related activities at a second location, which may have been used for the processing and conversion of uranium ore in 2003. The site underwent significant changes in 2004, including the demolition of most buildings.
3. The possible use and storage of nuclear material at a third location where outdoor, conventional explosive testing may have taken place in 2003, including in relation to testing of shielding in preparation for the use of neutron detectors. From 2019 onwards, the IAEA observed activities consistent with efforts to sanitise part of the site.

At the start of this year [2020], the IAEA asked Iran to provide access to the second and third locations so that inspectors could carry out environmental sampling. The Agency believed there would be no value in obtaining access to the first location. The [June] report said Iran had responded by saying it

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\(^{1548}\) *Iran Blocking Sites*.

was unable to provide access to the sites and that it would “not recognise any allegation on past activities.”\footnote{Iran to Grant IAEA Inspectors Access to Suspected Ex-Nuclear Sites, BBC NEWS, 26 August 2020, www.bbc.com/news/world-middle-east-53922717.}

Fortunately, in August 2020, Iran agreed to grant inspectors access to those two suspected former nuclear facilities.\footnote{Iran to Grant.} The IAEA commended Iran for acting in “good faith” in “voluntarily providing” this access for its verification activities on agreed-upon dates.\footnote{International Atomic Energy Agency, Joint Statement by the Director General of the IAEA and the Vice-President of the Islamic Republic of Iran and Head of the AEOI, 26 August 2020, www.iaea.org/newscenter/pressreleases/joint-statement-by-the-director-general-of-the-iaea-and-the-vice-president-of-the-islamic-republic-of-iran-and-head-of-the-aeo.}

Unfortunately, by then, Iran had exceeded the \textit{JCPOA} limits on Uranium enrichment by 10 times.\footnote{Iran’s Enriched Uranium Stockpile “10 Times Limit,” BBC NEWS, 4 September 2020, www.bbc.com/news/world-middle-east-54033441.} The IAEA announced Iran’s stockpile of low-enriched Uranium (\textit{i.e.}, that with a concentration of the U-235 fissile isotope of 3\%-5\%) had reached 2,105 kg (4,640 lbs), which far exceeded the 300 kg limit. Iran, then, was cutting its breakout time (the time it needed to make a nuclear bomb). Iran needed at least 1,050 kg of 3.67\% Uranium, which it had twice over, and then (as noted earlier) needed to enrich it to the weapons-great purity level of at least the 90\% purity level.

These figures worsened in November 2020, when the IAEA said Iran exceeded its LEU limits by 12 times. The IAEA Report said “Iran’s stockpile of low-enriched uranium had reached 2,442.9 kg. (5,385.6 lbs.) – far above the 202.8 kg limit [\textit{i.e.}, 300 kg of low-enriched UF$_6$, which equals 202.8 kg of Uranium] for set under the nuclear deal and theoretically enough to produce two nuclear weapons.”\footnote{Trump “Asker for Options on Strike on Iran Nuclear Site,” BBC NEWS, 17 November 2020, www.bbc.com/news/world-middle-east-54972269. [Hereinafter, Trump “Asker for Options on Strike on Iran Nuclear Site.”]} Moreover, the IAEA said “Iran had finished moving a first cascade of advanced centrifuges, which are used to enrich uranium, from an above-ground plant at its Natanz enrichment facility to an underground plant,” which presumably could withstand an aerial bombardment,\footnote{Iran Finishes Moving First Batch of Advanced Centrifuges Underground, REUTERS, 11 November 2020, https://uk.reuters.com/article/uk-iran-nuclear-iaea/iran-finishes-moving-first-batch-of-advanced-centrifuges-underground-idUKKBN27R2GX.} whereas the \textit{JCPOA} “says the underground plant cannot be used for advanced centrifuges.”\footnote{Trump “Asker for Options on Strike on Iran Nuclear Site.”} And, the IAEA said Iran again was blocking “access to another suspected site where there was evidence of past nuclear activity.”\footnote{Eric Schmitt, Maggie Haberman, David E. Sanger, Helene Cooper & Lara Jakes, Trump Sought Options for Attacking Iran to Stop Its Growing Nuclear Program, THE NEW YORK TIMES, 16 November 2020, www.nytimes.com/2020/11/16/us/politics/trump-iran-nuclear.html?referringSource=articleShare. [Hereinafter, Trump Sought Options for Attacking Iran.]}
Only because of the admonition of his advisers, that a U.S. attack would lead to broader Middle East conflict, did the President select a different course. On 18 November 2020, his Administration announced new sanctions on “Bonyad Mostazafan, or the Foundation of the Oppressed,” which Āyatollāh Khamenei controlled, plus on “10 individuals and 50 subsidiaries of the foundation in sectors including energy, mining and financial services.”

Apparently, “[t]he charitable foundation – an economic, cultural and social-welfare institution – hâ[d] amassed vast amounts of wealth to the detriment of the rest of the Iranian economy and controls hundreds of companies and properties confiscated since the 1979 Islamic Revolution.” The U.S. Treasury singled out specifically accused the Āyatollāh “of using the foundation’s holdings to “enrich his office, reward his political allies, and persecute the regime’s enemies.” As with other similar moves, this round of sanctions froze any assets subject to U.S. jurisdiction of the blacklisted foundation, forbade Americans from transacting in those assets or the targeted individuals and entities, and barred the SDNs from entry into the U.S.

VIII. November 2020 Fakhrizadeh Assassination

Another Targeted Killing

Undoubtedly, the aforementioned breaches of the JCPOA by Iran, however technical and reversible they might have been, shaved the time it needed to make a WMD. An Institute for Science and International Security analysis stated “’Iran’s estimated breakout time as of early November 2020 is as short as 3.5 months’ and the country ‘would require, in total, as little as 5.5 to 6 months to produce enough weapon-grade uranium for two nuclear weapons.’” Likewise, the IAEA agreed Iran’s breakout time was “considerably shorter than a year.” The next development, therefore, was unsurprising.

On 27 November 2020, Iran’s chief nuclear scientist, Dr. Mohsen Fakhrizadeh, was killed while traveling in an SUV to the home of his in-laws in the mountain town of Absard.

\[1558\] Trump Sought Options for Attacking Iran. 
\[1559\] Trump Sought Options for Attacking Iran.

\[1560\] U.S. Imposes Sweeping Sanctions on Iran. 
\[1561\] Quoted in U.S. Imposes Sweeping Sanctions on Iran.

\[1562\] Quoted in Najmeh Bozorgmehr, Iran Parliament Backs Nuclear Enrichment, FINANCIAL TIMES, 1 December 2020, www.ft.com/content/531353ae-35a7-4aa4-bb33-ba23606572d0?shareType=nongift. [Hereinafter, Iran Parliament Backs.] 

near the Damavand campus of Islamic Azad University, 37 miles east of central Tehran.\textsuperscript{1564} Iran said the killing was a targeted assassination orchestrated by Israel, specifically, Mossad, and a banned exiled Iranian opposition group, \textit{Mojahedin-e Khalq (MEK)}.\textsuperscript{1565} No attackers were present at the scene.

Rather, the perpetrators used a sophisticated electronic remote-controlled device, a killer robot, \textit{i.e.}, a fully-automated, remote controlled machine gun – or so said official Iranian accounts on which doubt was cast.\textsuperscript{1566} His was another assassination of an Iranian

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\textsuperscript{1565} See generally Jonathan Masters, Council on Foreign Relations, \textit{Backgrounder, Mujahadeen-e-Khalq}, 28 July 2014, \url{www.cfr.org/backgrounder/mujahadeen-e-khalq-mek} (tracing MEK’s routes and explaining it continues to so controversy despite the State Department removing it in 2014 from the U.S. list of FTOs).

\textsuperscript{1566} See \textit{Mohsen Fakhrizadeh: “Machine-gun with AI” Used to Kill Iran Scientist}, BBC NEWS, 7 December 2020, \url{www.bbc.com/news/world-middle-east-55143359} (reporting IRGC Deputy Commander Brigadier-General Ali Fadavi “told local media that the weapon, mounted in a pick-up truck, was able to fire at Fakhrizadeh without hitting his wife beside him,” “a machine-gun mounted on the Nissan pick-up was ‘equipped with an intelligent satellite system which zoomed in on martyr Fakhrizadeh’ and ‘was using artificial intelligence.’”), \textit{Mohsen Fakhrizadeh: Iran Scientist “Killed by Remote-Controlled Weapon,”} BBC NEWS, 30 November 2020, \url{www.bbc.com/news/world-middle-east-55128970}. [Hereinafter, \textit{Mohsen Fakhrizadeh: Iran Scientist}].

However, the initial and lingering alternative account as to the assassination was that it involved in-country operatives, \textit{i.e.}, an in-person gunfight occurred between assailants and Fakhrizadeh’s bodyguards. The \textit{Financial Times} reported:

As nuclear scientist Mohsen Fakhrizadeh’s black Nissan sedan car approached a boulevard in the Damavand region, about 60 km from the capital Tehran, an automatic machine gun, installed inside a blue pick-up truck parked under an electric transmitter, began firing.

The pick-up truck, packed with explosives, was then detonated by remote control. Assailants then opened fire, according to Fereydoon Abbasi-Davani, a nuclear scientist who survived an attempt on his life in 2010, and domestic media. Javad Mogouei, a documentary maker close to hardliners, said there were as many as 12 attackers, including those on motorbikes, in a Hyundai SUV as well as hidden snipers.

\end{footnotesize}
nuclear scientist; at least four other Iranian nuclear scientists were killed between 2010-2012, allegedly by Israel, though Iran had failed to “detain[] anyone linked to Israeli intelligence services for these attacks.”

The Fakhrizadeh assassination followed a mysterious June 2020 explosion, likely a clandestine strike “apparently engineered by Israel,” at Iran’s Natanz nuclear facility that left its centrifuges in “charred ruins,” and which in consequence “could take the Iranians up to two years to return their nuclear program to the place it was just before the explosion.” Complementing the assassinations and explosion were cyberattacks on Iran state media, in descriptions of the attack on Mr. Fakhrizadeh, said it happened on the main tree-lined boulevard in Absard, a countryside escape with majestic mountains, outside the capital, Tehran.

Pictures posted by state and social media of the attack aftermath showed the scientist’s vehicle, a black S.U.V., with its windshield shattered from bullets and the side windows blown out. Blood streaks and shards of glass and metal are scattered on the road.

Residents told state television that they heard the sound of a big explosion followed by intense machine gun fire. A Nissan truck was parked on the opposite side of the road [roughly 15-20 meters away from Fakhrizadeh’s vehicle], carrying explosives hidden in wood, state television reported. The truck exploded ahead of Mr. Fakhrizadeh’s car and then a group of five or six gunmen sitting in another car on the same side as Mr. Fakhrizadeh’s vehicle emerged and opened fire on his car, the report said.

An intense gun battle followed between the assassins and bodyguards trying to protect Mr. Fakhrizadeh, according to Sepah Cybery, a social media channel affiliated with the Islamic Revolutionary Guards Corps.

The truck bomb explosion damaged electricity poles and transmitters, according to a state TV report from the area on Friday night. The force of the explosion from the bomb hurled debris at least 300 meters, according to state television.

A police helicopter landed in the area to transport Mr. Fakhrizadeh and others to the hospital, according to a video posted by a resident who narrates the video saying “several people are dead.”


Najmeh Bozorgmehr, Iran’s Nuclear Mastermind “Assassinated,” FINANCIAL TIMES, 28 November 2020, www.ft.com/content/e1bf7e03-b760-4494-b7b2-4e26514a83cd?shareType=nongift. [Hereinafter, Iran’s Nuclear Mastermind.]

See David E. Sanger, Eric Schmitt & Ronen Bergman, Long-Planned and Bigger Than Thought: Strike on Iran’s Nuclear Program, THE NEW YORK TIMES, 10 July 2020, www.nytimes.com/2020/07/10/world/middleeast/iran-nuclear-trump.html. For a fuller account than previously disclosed of how the assassination occurred, as well as other targeted killings of Iran’s nuclear scientists, see Ronen Bergman & Farnaz Fassihi, The Scientist and the A.I.-

Arguably, the version of a person-less, high-technology attack fit with an official Iranian narrative to address domestic cynicism:

Many [Iranians] have voiced horror and anger at Israel’s apparent ability to act so freely inside Iran.

“If 12 assailants were present at the scene, how many others were involved in the operation? They have not come from the moon. They must be part of the system with huge access to the most sensitive information,” said Ali, a 62-year-old artist. “Where were our intelligence agents? Why was Fakhrizadeh not in a bulletproof car?”

Machine Guns and a Hit Squad. As The New York Times wrote:

Humiliated by the killing of a top nuclear scientist, Iranian officials sought this week to rewrite the attack as an episode of science fiction: Israel had executed him entirely by remote control, spraying bullets from an automated machine gun propped up in a parked Nissan without a single assassin on the scene.

Even hard-liners mocked the new spin.

“Why don’t you just say Tesla built the Nissan? It drove by itself, parked by itself, fired the shots and blew up by itself?” one hard-line social media account said. “Are you, like us, doubting this narrative?”

Since the killing of the scientist…, contradictory reports in the official news media about the escape or even existence of a hit team – along with assertions of prior warnings from the Interior Ministry about the attack – revealed tensions between competing Iranian intelligence agencies as each sought to dodge blame for an egregious security lapse.

The failure to apprehend Mr. Fakhrizadeh’s killers has compounded a scandal over the government’s failure to prevent the assassination itself. Iranians on social media mocked the new accounts of a fully automated execution as an attempt to minimize the embarrassment of the killers’ clean getaway.

The use of a remote-controlled machine gun was not out of the question. Israel’s military has such weapons and has deployed them elsewhere. Some Iranian reports said as early as Saturday [28 November] that such a weapon was used in the attack on Friday [27 November], an afternoon ambush on a country road east of Tehran.

But early official Iranian reports and witness accounts reported a gun battle between Mr. Fakhrizadeh’s bodyguards and as many as a dozen attackers. And current and former Israeli officials have boasted that Israeli intelligence agencies have a track record of safely extricating assassins from hostile territories, including Iran.

Israel is thought to have killed at least five Iranian scientists between 2007 and 2012 as part of an effort to derail Iran’s nuclear program, which Israeli officials consider an existential threat. Tehran has credibly claimed to have caught only one of the perpetrators, an Iranian who confessed on television in 2010 that he had received training in Israel to plant a motorcycle bomb that killed a scientist as he was leaving his garage.

The agents behind the other assassination attempts and some larger operations are all believed to have escaped.
Iran, with Israel and the U.S. reportedly collaborating to deploy Stuxnet malware in 2010 to sabotage Iran’s centrifuges.\textsuperscript{1570}

- **Why Fakhrizadeh?**

  A Physics Professor working for Iran’s Ministry of Defense as head of its Physics Research Center,\textsuperscript{1571} and a senior IRGC officer,\textsuperscript{1572} Dr. Fakhrizadeh established in 2011 Iran’s Organization of Defensive Innovation and Research (in Farsi, Sazman-e Pazhouheshhaye Novin-e Defa’i, or SPND) (the successor to Iran’s AMAD Project, or AMAD Plan, which operated from 1989 until at least 2003 with a view to developing a nuclear device).\textsuperscript{1573} As one Western diplomat said in 2014, “[[i]f Iran ever chose to

  An autonomous machine gun that appears to match that description has been employed by the Israeli military since 2010. Developed by Rafael Advanced Defense Systems, the weapon includes a built-in optical system for aiming and photographs. Its name, which rhymes in Hebrew, means “you see-you shoot.”

  Israeli news reports citing a top intelligence official have said the military has used the weapon to kill Palestinians trying to cross into Israel from Gaza.

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1571 See *Iran’s Nuclear Mastermind.*

1572 Whether his academic position was a cover for his role as the driving force behind Iran’s nuclear weapons program was unclear:

  Iran never agreed to demands from the International Atomic Energy Agency … to let U.N. inspectors question Mr. Fakhrizadeh, saying he was an academic who lectured at the Imam Hussein University in Tehran.

  Mr. Fakhrizadeh was an academic, but a series of classified reports, notably a lengthy 2007 assessment done by the C.I.A. for the George W. Bush Administration, said the academic role was a cover story. In 2008, his name was added to a list of Iranian officials whose assets were ordered frozen by the United States.

  That same year, his activities were disclosed in an unclassified briefing by the I.A.E.A.’s chief inspector. Later, it became clear that he ran what the Iranians called Projects 110 and 111 – an effort to tackle the most difficult problems bomb designers face in creating a warhead small enough to fit atop a missile and make it survive the rigors of re-entry into the atmosphere.

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1573 See *Iran’s Top Nuclear Scientist Killed.*

1574 See *Mohsen Fakhrizadeh: Iran Scientist.*
weaponize (enrichment), Fakhrizadeh would be known as the father of the Iranian bomb.\footnote{1574} Also in 2014, \textit{The New York Times} compared him to J. Robert Oppenheimer, the physicist who directed the Manhattan Project that during World War Two produced the first atomic weapons.\footnote{1575} Fakhrizadeh led Iran’s nuclear program since the early 2000s, including its surreptitious efforts to develop a bomb. The IAEA named him in its 2015 “final assessment” report concerning open questions about that program, saying he “oversaw activities ‘in support of a possible military dimension to (Iran’s) nuclear program.’”\footnote{1576} In March 2007, “Fakhrizadeh was … named in U.N. Security Council Resolution as having been involved in Iran’s ‘nuclear or ballistic missile activities.’”\footnote{1577} And, admitted Iran’s Minister of Defense, Amir Hatami, he “was involved in an air-defense project for detecting spy aircraft without using radar systems and that ‘Israel was well aware of his role in affairs that could confound’ Israel.”\footnote{1578} Āyatollāh Alī Khamenei hailed him as an “oppressed martyr.”\footnote{1579}

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\footnote{1574} \textit{Quoted in Mohsen Fakhrizadeh, Iran’s Top Nuclear Scientist, Assassinated Near Tehran, BBC News, 27 November 2020, www.bbc.com/news/world-middle-east-55105934. [Hereinafter, \textit{Mohsen Fakhrizadeh, Iran’s Top Nuclear Scientist}.]}

\footnote{1575} \textit{Mohsen Fakhrizadeh, Iran’s Top Nuclear Scientist. The New York Times reported:}

Mohsen Fakhrizadeh is considered by Western intelligence officials to be the closest thing Iran has to J. Robert Oppenheimer, who guided the Manhattan Project to develop the world’s first nuclear weapon. For more than a decade, he has been identified as the relentless force behind on-again, off-again programs to design a nuclear warhead that could fit atop one of Iran’s long-range missiles — a complex set of technologies that are a critical factor in how long it would take for Iran to build a weapon. As the keeper of Iran’s greatest nuclear secrets, he looms over the talks that he never attends.

“He’s dodging assassins,” one member of the Iranian team [negotiating the JCPOA] said, referring to the “sticky bomb” attacks, widely believed to be the work of Israel, that killed important members of Mr. Fakhrizadeh’s staff as they drove to work. “Wouldn’t you?”

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\footnote{1576} \textit{Quoted in Parisa Hafezi, Iran’s Leader Promises Retaliation for Nuclear Scientist’s Killing, Reuters, 28 November 2020, www.reuters.com/article/uk-iran-nuclear-scientist-rouhani/irans-leader-promises-retaliation-for-nuclear-scientists-killing-idUSKBN28807J.}

\footnote{1577} \textit{Iran Accuses Israel, U.S.}

\footnote{1578} \textit{Iran Accuses Israel, U.S.}


By no means was the Fakhrizadeh the last assassination, nor the last instance of Iran pointing the finger at Israel’s Mossad for orchestrating a targeted killing on Iranian soil. \textit{See, e.g.}, David Gritten, \textit{Iran Vows Revenge After Revolutionary Guards Colonel is Assassinated}, BBC News, 23 May 2022, www.bbc.com/news/world-middle-east-61546145 (reporting: “Iran’s President has promised to take revenge after a Colonel in the powerful … IRGC was shot dead in Tehran on … [22 May 2022]. Two gunmen on a motorbike opened fire at Sayad Khodai as he sat in a car outside his home…. Col. Khodai was a member of the elite Quds Force, the IRGC’s shadowy overseas operations arm…. President Ebrahim Raisi blamed ‘the hands of global arrogance’ – a reference to the U.S. and its allies. … No group or country has claimed it was behind the killing, which was the most high-profile in Iran since the top nuclear scientist Mohsen Fakhrizadeh was shot dead in an attack on his convoy out Tehran in November 2020 [as discussed earlier]…. Iran’s state news agency, IRNA, reported that Col. Khodai was shot with five bullets as he was getting out of his...}

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**Iran’s Majlis Responds**

The Fakhrizadeh assassination spotlighted the fact Iran had “never taken direct action against Israel,” thus raising the question how long it might exercise such restraint, or whether it might step up its indirect operations through IRGC proxies.\(^{1580}\) After all, Iran’s theocratic leaders faced popular pressure to, in effect, do something.

And so they did, on 1 December 2020. The *Majlis* (Parliament) adopted a legislative response:

A part of the plan put forward in parliament, the Islamic Republic is to enrich uranium up to 20 per cent purity [at both Natanz and Fordow], higher than the current purity of up to 4.5 per cent and in violation of the 3.67 per cent level permitted under the nuclear accord [i.e., the July 2015 *JCPOA*]. The plan also says Iran should keep 120 kg of it at home for “the country’s needs for peaceful purposes.”

That level of enrichment would accelerate the country’s ability to produce weapons-grade uranium of 90 per cent, a development the nuclear accord … aimed to prevent. The Parliament’s new measures, if implemented, will largely put Iran back to where it was before the deal.

If restrictions on Iran’s banking transactions and crude sales are not lifted [within two months,] by early January [2020, before President-Elect Joe Biden took office] … [then] Iran will also decrease the access it has given to International Atomic Energy Agency inspectors, according to the plan approved by Parliament.\(^{1581}\)

In effect, “the new law order[ed] Iran’s Atomic Energy Agency to resume enriching uranium to a level of 20 percent immediately, returning Iran’s program to the maximum level that existed before the 2015 nuclear agreement reached with the Obama car in eastern Tehran…. The *Quds* Force oversees the *Shi’a* Muslim militias that have fought alongside President Bashar al-Assad’s troops in Syria’s civil war. It is also believed to direct several *Shi’a* militias in Iraq which have developed significant power since helping defeat the Islamic State group. … The U.S. accuses the *Quds* Force of arming, financing, and training terrorist groups across the Middle East, being responsible the deaths of hundreds of American troops in the region, and of plotting many attacks elsewhere. It has designated both the IRGC and the *Quds* Force as terrorist organisations. In January 2020, the U.S. assassinated the *Quds* Force’s top Commander, Gen. Qasem Soleimani, in a drone strike in Iraq’s capital, Baghdad [as discussed above]. Israeli media reported … Col. Khodai was involved in planning attacks on Israeli and Jewish targets worldwide. … Ram Ben-Barak, a former Deputy Mossad Chief who is now Chairman of the Israeli Parliament’s Foreign Affairs and Defense Committee, … said he was ‘familiar’ with Khodai’s name. ‘I don’t want to get into the details of what happened or who did what. An assassination happened,’ he … [said]. ‘Should I say I’m sorry he’s no longer with us? I’m not sorry.’”\(^{1580}\)

\(^{1581}\) *Machine Guns and a Hit Squad.*

\(^{1580}\) *Iran Parliament Backs.*
Administration,” thus enriching Uranium to a purity degree that would allow Iran “to convert its entire stockpile to bomb-grade levels within six months.”[^1582]

In turn, the incoming Biden-Harris Administration would be under pressure to negotiate with Iran on reengagement with the JCPOA. As Mohammad Baqer Qalibaf, Speaker of the Majlis and former IRGC Commander put it, “the measure was meant to send the West a message in the aftermath of the assassination that the ‘one-way game is over.”[^1583] Further, Iran made clear it would not accept pre-conditions from the U.S. for a renewal of talks on the JCPOA, especially given that it was the U.S. that failed to adhere to the Nuclear Deal by quitting it and reimposing sanctions, without justification, targeting Iran’s energy and financial sectors.[^1584]

The legislation exposed bitter divisions among Iran’s leaders between hardliners and moderates, who respectively, favored and opposed any dramatic increases in uranium enrichment. The centrist government of President Hasan Rouhani was against the legislation, calling it unnecessary and “harmful to diplomatic efforts.”[^1585] Moreover:

> [I]t was the responsibility of the Supreme National Security Council, the top security body, to make nuclear decisions not parliament. “The revolutionary Parliament … can pass any law it wishes even in nuclear issues, but it cannot implement whatever it wants,” said Hamid Aboutalebi, a former adviser to Mr. Rouhani for political affairs.[^1586]

Not so, said the hardliners. Iran had no choice in the wake of the Fakhrizadeh assassination. They made sure the new legislation stated that “if the concerned authorities did not carry out the plan, they would face punishment of up to 25 years in prison.”[^1587]

The next day (2 December), the Guardian Council, which is Iran’s authority for ensuring all Parliamentary enactments are consistent with Shi‘ite Islamic Law (Sharī‘a), approved the legislation.[^1588]

Predictably, 81-year-old Āyatollāh Khameini saw no reason to trust America. He felt betrayed by the U.S. when it withdrew from the JCPOA after being promised substantial economic benefits from the removal in exchange for Iran’s compliance with the Deal. He held to the view that America was doomed, that is, in irreversible “political, civil

[^1582]: Iran Moves to Increase Uranium Enrichment.
[^1583]: Iran Moves to Increase Uranium Enrichment.
[^1586]: Iran Parliament Backs.
[^1587]: Iran Parliament Backs.
[^1588]: Iran Watchdog Passes.
and moral decline.”1589 Thus, whether the response of the Majlis was the beginning of more measures remained to be seen.

IX. Israel’s Anti-Iran Coalition and Double Double-Standard Debate

Was the Fakhrizadeh assassination an effort by Israeli Prime Minister Benjamin Netanyahu (1949, PM, 1996-1999, 2009-) to impede the efforts of the U.S., under President Joe Biden (1942-, President, 2021-) to re-enter the JCPOA?1590 The Israeli PM’s opposition to the Nuclear Deal was well known and oft-repeated. PM Netanyahu had built an anti-Iran axis that included Bahrain and the UAE, with which he forged peace agreements in September 2020 (the Abraham Accords), and Saudi Arabia, with whose Crown Prince, MBS, he reportedly met in secret in November (the first-ever such meeting by an Israeli leader since Israel’s founding on 14 May 1948) in the Saudi city of Neom.1591

The Israeli PM appeared to calculate Iran would retaliate to the assassination in a way that would make it more difficult for the Biden Administration to work with Iran. That may well have been a miscalculation, as Iran made clear it would not be duped into a clumsy response that would inflame regional tensions.1592 Indeed, the EU called the

1589 Quoted in Biden Wants to Rejoin.
1590 See David E. Sanger, Assassination in Iran Could Limit Biden’s Options. Was That the Goal?, THE NEW YORK TIMES, 28 November 2020, www.nytimes.com/2020/11/28/world/middleeast/israel-iran-nuclear-deal.html?referringSource=articleShare (also observing “[t]here was no real response to the [June 2020] explosion at Natanz, … other than the subsequent installation of some advanced centrifuges to make the point that Iran’s program would move ahead, slowly and methodically.”)
1591 On the unprecedented meeting, see Analysis: Covert Israeli-Saudi Meeting Sends Biden a Strong Message on Iran, REUTERS, 27 November 2020, www.reuters.com/article/israel-saudi-analysis-int/analysis-covert-israeli-saudi-meeting-sends-biden-a-strong-message-on-iran-idUSKBN28714V (noting that “[a] historic meeting between Israel’s Prime Minister and Saudi Arabia’s Crown Prince has sent a strong signal to allies and enemies alike that the two countries remain deeply committed to containing their common foe Iran,” against which both countries were fighting proxy wars: “Iran has built a network of armed Shi’ite militias across the Arab world, from Iraq to Syria and Lebanon and down into the Gulf and Yemen” and “Tehran-backed Houthi rebels in Yemen attacked Saudi oil installations last week, the latest in a string of attacks on Saudi targets,” and “Israel is waging a shadow war against Iranian forces, mostly through regular air raids in Syria on Lebanese Shi’ite paramilitary group Hezbollah, on Iran’s Revolutionary Guard, and on supplies of weapons as they are moved across the country”). See also Lyse Doucet, Analysis, Mohsen Fakhrizadeh: Iran Blames Israel for Killing Top Scientist, BBC NEWS, 28 November 2020, www.bbc.com/news/world-middle-east-55111064 (observing “[t]his assassination follows the not-so-secret meeting last week [on 22 November 2020] in Saudi Arabia between the Saudi Crown Prince and Israeli Prime Minister – the officially denied by the Kingdom” and “[i]t sent another signal that Mohammed bin Salman and Benjamin Netanyahu see this window as their last best chance in a while to try to inflict a crippling blow on their arch-enemy Iran”); Iran’s Nuclear Mastermind (reporting: “Undoubtedly, Israel is behind this crime. Israel is horribly present inside Iran,” said Mohammad Ali Aghtahi, a former reformist Vice-President who said this was the outcome of the ‘dangerous meeting’ of the U.S. Secretary of State, Israeli Prime Minister and Saudi Crown Prince in Saudi Arabia…” and that “Iran’s security strategy should go back to finding spies and Mossad infiltrators.”)
1592 See Arsalan Shahla & Golnar Motevalli, Iran Says It Won’t Fall in Trap of Scuttling Any U.S. Talks, BLOOMBERG, 29 November 2020, www.bloomberg.com/news/articles/2020-11-29/iran-says-it-won-t-fall-in-trap-of-scuttling-future-u-s-talks?ref=twsxw95x1 (quoting Ali Rabiei, Iranian government spokesman: that Iran “won’t fall into the trap’ of scuppering any future talks with the incoming Biden government following the assassination of a top nuclear scientist,” affirming that “Iran’s scientific and defense policies won’t change because of the assassination of one scientist or general,” and concluding: “This assassination
assassination a “criminal act” that was “counter to the principle of respect for human rights,” and urged “maximum restraint.”

Significantly, Israel’s alleged involvement drew renewed attention to its shadowy record:

Israel for decades has embraced a strategy of targeted assassinations in trying to slow down potential progress toward the development of a nuclear weapon among its hostile neighbors. Israeli intelligence agencies have been linked to the killings of scientists working for Egypt in the 1960s and for Iraq in the 1970s for the same reason….

Iran first accused Israel of killing one of its scientists when he dropped dead in his laboratory after a poisoning in 2007, and a series of more violent attacks on Iranian scientists between 2010 and 2012 have been widely attributed to Israel, too.

In one, a bomb in a parked motorcycle blew up a particle physicist as he was lowering a garage door at his home in Tehran. In three others, motorcyclists speeding past the moving cars of other scientists slapped magnetic bombs to their car doors, killing two and wounding a third. And in a fifth attack, gunmen on motorcycles sprayed a scientist with bullets while his car was stopped at a traffic light with his wife sitting beside him.

… Speaking on condition of anonymity to discuss covert operations, a senior Israeli official involved for years in tracking Mr. Fakhrizadeh said Israel would continue to act against the Iranian nuclear program as necessary. Iran’s aspirations for nuclear weapons, promoted by Mr. Fakhrizadeh, posed such a menace that the world should thank Israel, the official insisted.

To be sure, Israel’s security position in a dangerous neighborhood, not to mention persistent, horrific anti-Semitism, seemed to dictate its long-standing policies:

Israel, which has maintained an undeclared nuclear weapons stockpile since at least the 1970s, has regularly been involved in the murder and assassination of government officials and independent actors it considers hostile to the Jewish state’s interests.

… Ronen Bergman, the author of a [July 2019] book on Israeli assassinations Rise and Kill First [sub-titled “The Secret History of Israel’s Targeted Assassinations”] has estimated that Mossad and other agencies have

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1593 Iran Pledges Payback.
1594 Brazen Killings Expose.
murdered at least 2,700 people around the world, a number that the government has not denied.

Israel never claims official responsibility for the illegal acts, except when its spies are caught. But Israeli officials regularly brief U.S. publications to take indirect credit for the assassinations, adding to what one retired intelligence officer … [said] was a “box them in strategy, so that Iran (in this instance [the Fakhrizadeh assassination]) is publicly humiliated for failing to protect its most valued assets.”

Yet, Israel could ill afford to risk global condemnation.

The Israeli approach to Fakhrizadeh and previous threats highlighted to the world a double double-standard: (1) Israel has undeclared nuclear weapons, and (2) Israel got away with extra-territorial, extra-judicial killing as an instrument of defense and foreign policy. Iran’s Foreign Minister, Mohammed Javad Zarif, said “the international community – and especially the European Union – should ‘end their shameful double standards & condemn this act of state terror.’” Notably, the former CIA Director, John Brennan, called the Fakhrizadeh killing a “criminal” and “highly reckless” act that could inflame conflict in the Middle East.

1595 Machine Guns and a Hit Squad.
1596 Quoted in Iran’s Top Nuclear Scientist Killed.
1597 Quoted in Mohsen Fakhrizadeh, Iran’s Top Nuclear Scientist.
Chapter 21 \ IRAN SANCTIONS (CONTINUED):  
BLEAK FUTURE PROSPECTS  

I. \ February 2020 Blair Report on IRGC Expansionist Ideology  

KASRA AARABI, BEYOND BORDERS – THE EXPANSIONIST IDEOLOGY OF IRAN’S ISLAMIC REVOLUTIONARY GUARD CORPS, TONY BLAIR INSTITUTE FOR GLOBAL CHANGE, 5-10 (FEBRUARY 2020)\(^{1598}\)  

Executive Summary  

Unlike the Iranian army that protects Iran’s borders, the IRGC is mandated by Iran’s Constitution to pursue “an ideological mission of *jihād* in God’s way; that is extending sovereignty of God’s law throughout the world.” Since the inception of this paramilitary force in 1979, the Guard has emerged as the principal organization driving the Iranian regime’s revolutionary *Shī’a* Islamist ideology, within and beyond the regime’s borders. Over these 40 years, it has been linked to terrorist attacks, hostage-takings, maritime piracy, political assassinations, human rights violations, and the crushing of domestic dissent across Iran, most recently with bloodshed on the Iranian streets in November 2019, leaving 1,500 people dead in less than two weeks.  

Today, the IRGC remains Lebanese *Hizbullah*’s prime benefactor, with the Guard known to be providing arms, training, and funding to sustain the group’s hostile presence against Israel and its grip on Lebanese society, and key operational assistance that has resulted in attacks on civilians stretching from Argentina, Bulgaria to Thailand. Modelled on its support for *Hizbullah*, the IRGC has prepared an estimated 200,000 fighters – from Lebanon, Syria, Iraq, Yemen, Pakistan and Afghanistan – to rise in support of a cause that is built on a perceived existential threat to the *Shī’a* Muslim identity and a hostility towards global powers and their allies.  

There is no shortage of concern about the growing influence and operational capacity the IRGC now represents, although its goals are long standing and consistent. Drawing from internal IRGC documents used to train an incoming generation of Guardsmen, this Report lays out the Guard’s core objectives and the key aspects of its well-established worldview, placing the IRGC’s current activities in the Middle East region into much-needed context. … [W]ithin the IRGC ranks alone, the Iranian regime has prepared and invested in an elaborate programme of indoctrination that first set and then defined its course of action, long before the Guard’s actions gained momentum as it has today. First published in 2011, these documents have been subsequently reprinted, and the latest, published between 2012 and 2016, form the basis of this Report.  

In April 2019, the U.S. designated the IRGC as a foreign terrorist organisation (FTO). [See U.S. Department of State, Designation of the Islamic Revolutionary Guard Corps, 8 April 2019, \[www.state.gov/designation-of-the-islamic-revolutionary-guard-corps.\] This \[\url{www.state.gov/designation-of-the-islamic-revolutionary-guard-corps}\]  

\(^{1598}\) https://institute.global/sites/default/files/2020-01/IRGC%20Report%2027012020.pdf (minor formatting changes, diacritic marks inserted).  

Volume Four Wheat Law Library
An unprecedented step has placed the Guard on a list alongside the non-state actor groups it supports such as Hizbullah and Hamas, as well as the likes of ISIS and Al Qaeda. Since then, the status of the IRGC has been at the forefront of the international agenda. There appears to be good reason for this. The last six months of 2019 saw the IRGC attack nine commercial oil tankers in the Strait of Hormuz (including a U.K.-flagged ship) and shoot down a U.S. drone over international waters. It also conducted the Saudi Aramco oilfield strike causing the biggest disruption to global oil supplies in history, as well as ordering its proxies to ransack the U.S. embassy in Baghdad. The year 2020 began with the IRGC taking its escalation further: orchestrating a strike that killed a U.S. citizen and in doing so crossing Washington’s red line. This led the U.S. to respond with a targeted strike that left Qassim Soleimani, the Guard’s notorious Quds (Jerusalem) Force commander, dead. But the Guards activities are not limited to the region. The uncovering of an Iranian-linked London bomb factory in 2019 and a chain of IRGC terror plots across European cities from 2017 and 2018 suggests the Guard’s footprint and interests extend far beyond the Middle East.

Tehran’s most potent elements of its revolutionary Shi’a Islamist ideology pervade every aspect of the Guard’s ethos and its training programme. As stated in the Preamble to textbooks aimed at recruits of the Guard and written by Supreme Leader Ayatollāh Seyed Ali Khamenei himself, “If in the Revolutionary Guard there is not strong ideological-political training, then [the] IRGC cannot be the powerful arm of the Islamic Revolution.” Most recent escalations in the threat from the IRGC are the real-world outcomes of a worldview that Tehran has propagated for the last 40 years and that is reflected in black and white in the publications analysed in this study.

The Syrian conflict, from 2011 onwards, has no doubt emboldened Iran’s leadership and raised the Guard’s expeditionary ambitions. Yet the repercussions of the IRGC’s operational presence in Syria are far greater than foreign policy towards the Iranian state. Just as the Afghanistan conflict of the 1980s proved to be the single most important development in Salafi-jihādism and Sunni radicalisation, the Syrian battleground may prove to be the gear shift for a renewed Shi’a Islamist militarisation. Understanding what arguments and beliefs are put forward to legitimise this potential escalation may prove key to establishing a narrative to discredit it and preventing it from spreading further.

To date, policymakers have focused on Sunni extremist groups like ISIS and Al Qaeda when taking on the challenge of Islamist extremism and global terrorism. … [T]he IRGC trains recruits and Shi’a militias in an expansionist and divisive worldview, encouraging them to give their lives in favour of a cause that seeks to correct injustice towards Muslims beyond Iran’s borders. Policymakers should see the IRGC as the mobilization of a violent and extreme ideology that has repercussions that resonate far beyond Iran’s direct sphere of influence. Behind the recent instability in the Persian Gulf lies a force whose stated mission is to expand the Islamic Revolution beyond Iran’s borders, but the ideas that permeate IRGC training manuals relate to conditions facing oppressed Muslims worldwide and attempt to speak to audiences as disenfranchised as those whom Salafi-jihādi groups have often succeeded to recruit.
… [T]he IRGC and the network it controls should be viewed and treated through a counter-terrorism and countering violent extremism lens. … [This Report] analyses IRGC textbooks used to “ideologically and politically” train recruits in order to ensure their commitment to the Guard’s mission. … [T]he material analysed here demonstrates that the IRGC is the physical embodiment and mobilising force of this transnational ideology. … [T]his ideology is violent, extreme, and based on a perversion of Islamic scripture in order to glorify and prioritize armed jihād. It is also clear that the Iranian state and its clerical establishment are heavily involved and invested in this “ideological-political” training, with the Supreme Leader’s office signing off on educational materials. Given that the material analyzed was produced for internal IRGC consumption, it is perhaps the closest piece of evidence available in understanding the Guard’s psyche and, likely, its future objectives.

The Approach: Understanding the IRGC Training Manuals

… There are serious shortcomings when it comes to understanding the IRGC’s ideological, religious and cultural dimensions, despite the Guard being, fundamentally, an ideological force. This is, in part, due to a lack of access to primary Persian-language material from Iran. This … [Report] seeks to fill this research gap by analysing official IRGC textbooks that are used to ideologically train recruits and members of the Guard. The Persian-language textbooks, which have been authorized by Iran’s Supreme Leader through his representative office in the IRGC, give a rare insight into the group’s psyche, values and long game…. Using a qualitative approach, the methodology adopted in this Report is centred on content analysis, which has been previously used to look at propaganda, examining recurring concepts, references to scripture and religious justifications for violence of known Salafi-jihādi entities. The textbooks cover issues from the exportation of Iran’s extreme state-sanctioned model of Islamism, to the ideological basis for the subjugation of women and the distortion of scripture to justify violence against those who criticise the regime. This Report provides a snapshot of the IRGC’s violent and extremist ideology, with a view to informing Western policy in countering the threat from Shi‘a Islamist extremism.

Key Findings

- IRGC officers and members are trained in state-sanctioned Shi‘a Islamist ideology, which is violent and extremist. From modules on jihād, to family values and velayat-e faqih (the Shi‘a Islamist system of governance that transfers political power to the clergy), the IRGC is committed to what it refers to as “ideological-political” training of recruits. The worldview within which this training is framed is extremist and violent. It identifies enemies – from the West, to Christians and Jews, to Iranians who oppose the regime – and advocates supranational jihād in the name of exporting Iran’s Islamic Revolution. …

- IRGC ideological training documents frame a global conspiracy against Shi‘ism. The IRGC’s documents propagate the idea that there is an existential threat to Shi‘ism and Shi‘a Muslims from a “[Sunni] Arab-Zionist-Western axis” and in
doing so fuels regional sectarian tensions. This argument depicts the Sunni Gulf States as being in a tacit partnership with Israel, Britain, and the ... U.S. with the aim of eradicating Shi‘ism and its holy sites, as well as diverting attention from the Palestinian issue. To crystallise this conspiracy, the IRGC claims Wahhābīsm and Salafism – subsects of Sunni Islam – have Jewish origins and were created by British colonialists to destroy Islam from within. IRGC documents also claim ISIS and Al Qaeda were created, and are supported, by the U.S., Britain, Israel, and Saudi Arabia, as well as Western media, including the BBC. This is not reserved for the textbooks. The theory has been repeated by key Shi‘a leaders, from Iran’s Supreme Leader to former Prime Minister of Iraq, Nouri al-Maliki. Such ideas leverage regional anti-imperialist and anti-Semitic views that have long existed and have historically been leveraged by Salafi-jihādi groups.

● **The IRGC has clear expansionist ambitions.** Beyond the Guard’s Constitutional mandate, IRGC textbooks make no mention of Iran or Iranians in their framing of their mission to recruits. This both serves to make the materials (and the ideology) more accessible for non-Iranian Shi‘a militias, with which the IRGC works. It also reaffirms that the goal of the IRGC – and indeed Iran’s revolutionary ideology – is to expand and ensure the survival of veīyat-e faqih. Āyatollāh Khamenei, Iran’s Supreme Leader, is presented as having the same jurisdiction as the Prophet Muhammad and the Twelve divinely ordained Shi‘a Imāms. Consequently, the textbooks underline that he has the religious authority to expand Islam’s borders and “use the public funds and public assets of the community to develop military, political, cultural and other programmes for exporting Islam to other countries.”

● **The IRGC shares the same enemies as Salafi-jihādi groups like ISIS and Al Qaeda.** The textbooks justify the killing of the Christians, Jews and Zorastrians on the basis that their holy books “have been distorted and changed” and that “they do not have true and acceptable faith,” polytheists on the basis that they are idol worshipers, as well as atheists (those outside of the “People of the Book”). The IRGC also prescribes the same measures – namely, violence – against enemies and manipulates religious scripture to provide justification for these actions. The Guard states that “it is obligatory on the Muslims to fight them and to pressure them to give up their devious beliefs and to accept Islam.”

● The IRGC ideology targets opponents of the regime within Iran as enemies of Islam. The IRGC defines the “enemies of Islam” as being enemies of the Islamic faith and not simply the Iranian state. Primarily, the IRGC’s global vision divides the world into Muslims (dar al-Islam) and non-Muslims (dar al-Kuffar). Within that, the textbooks include baaghī (“internal conspirators”) and moḥarrabeh (“enemies of God”) as enemies for recruits to target. This includes those who “rise up, revolt and/or engage in conspiracies” against the “head of the Islamic government,” in this case Āyatollāh Khamenei. The IRGC has sought to mainstream this narrative to justify the killing of Iranian demonstrators in the most recent anti-regime protests in November 2019.
● **The IRGC lays out for recruits what it fights for not just what it fights against.** The IRGC focuses not just on destabilising strategies, but also puts forward an alternative Islamic utopian vision for its recruits. It paints an image of Islamic society in the eyes of the Iranian state that is to be protected and secured by IRGC soldiers. This vision hinges on a return to Islamic order, with special focus on the sanctity of religious family values. Matters of women’s rights form a significant portion of training for its recruits, emphasizing the responsibility to “enjoin what is right and forbid what is wrong,” an essential observance for all Muslims according to Islamic teachings. This is extended in other contexts to form the basis of justifying the application of violence to Muslims and non-Muslims who break moral principles, including the removal of the headscarf.

● The IRGC disseminates its violent and extremist ideological training manuals freely online and updates these periodically. The ease with which these materials were accessed online points to a broader problem. The IRGC is producing and disseminating extremist material in Persian (*Farsi*), both in print domestically and online on official Iranian government websites. This content is not part of the debate when government and technology companies discuss the availability of extremist content online. This is in part due to a lack of Persian-speaking expertise but more fundamentally, a failure to recognise the distinctiveness of Shī‘a extremism as a form of Islamist extremism.

**Policy Recommendations**

**Actions for Governments and Supranational Organizations**

Governments and supranational organisations should designate the IRGC as a Foreign Terrorist Organisation (FTO). The U.K. government and the European Union (EU), as well as the remaining members of the Five Eyes security alliance – Australia, Canada, New Zealand – should follow and build on the recent U.S. decision to designate the IRGC as an FTO. Designation will have both a practical and symbolic long-term impact on the IRGC’s ability to function, both inside and outside of Iran.

Designating the IRGC an FTO will enable efforts to limit the spread and legitimisation of its message, and provide a clear mandate and responsibility for governments, civil society and technology companies to comprehensively sanction, challenge and restrict IRGC activity. The U.K. government’s decision to designate *Hizbullah* an FTO has been motivated by a desire to limit the group’s ability to raise illicit funds and disseminate its jihadi propaganda. Efforts to contain *Hizbullah* are significantly undermined while the IRGC remains able to provide ongoing ideo-political, financial and armaments support to the group. The uncovering of an Iranian-linked London bomb factory in 2019, and a chain of IRGC terror plots across European cities from 2017 and 2018 underscores the extent of its influence, and the urgency of challenging the core of a growing movement.

**Actions for Western Countering Violent Extremism (CVE) Strategies**
These strategies should target the full spectrum of violent Islamist extremism. To date, Western governments and supranational bodies have focused almost exclusively on Salafi-jihādi ideology in their CVE efforts. This reflects the focus on Salafi-jihādi extremism in the post-9/11 context. Systematic rebuttals targeting Salafi-jihādism plays into the hands of Shi’a Islamist groups including the IRGC, leaving them with a moralistic monopoly as their perspectives are not countered. Western CVE efforts should work in tandem with civil society groups and governments to develop an effective counter-narrative to Shi’a Islamist extremism, working with religious leaders within the Shi’a community, both in the West and in countries with sizable Shi’a populations.

**Actions for Civil Society Groups, Governments and Policymakers**

These organisations and individuals should develop and expand counter-narrative efforts that challenge the violent and extremist worldview of the IRGC. The ideological basis that is used as justification for violence and global terrorism within Sunni Islamist extremism shares significant overlap with the ideological underpinnings of Shi’a Islamist extremism. The formative history of ideas that permeated political-clerical and Islamist circles within Sunni Islam had a parallel process in Shi’a Islam. Today, as is evidenced by these documents, there are shared ideological characteristics with a worldview that is associated with Sunni Islamist groups such as ISIS and Al Qaeda which are designated FTOs.

As with Sunni Islam, Shi’ism is not homogenous, and the narrow Shi’a Islamist ideology espoused by the IRGC and Iran’s political-clerical establishment is not representative of the 200 million Shi’a Muslims across world. The ricochet of protests across the Shi’a heartlands in Iraq, Lebanon and Iran – with anti-Khamenei and anti-IRGC slogans and the burning of Iranian consulates in Iraq – are an indication of the growing rejection of Iran’s state-sanctioned totalitarian Shi’a Islamist ideology.

Just as policymakers continue to engage religious leaders of the Salafi school in Islam to counter and challenge Salafi-jihādism, civil society groups and policymakers should identify and engage Muslim religious leaders with credibility and authority among Shi’a religious communities in order to counter the worldview and propaganda of the IRGC. This should be reflected in policies towards counter-narratives of all violent Islamist ideologies. The IRGC is inseparable from Iran’s political clerical establishment and as the manuals analysed in this paper reveal, the Guard uses religious scripture to justify its violent and extremist worldview. Counter-narrative efforts will require engaging with different Hawzas (Shi’a seminaries) that sit outside the Iranian regime’s control and empowering the voices of religious leaders, particularly those outside Iran, who are able to target the foundations of the IRGC’s ideological framework from within the Shi’a intellectual and theological discourse. These voices, which should include dissident Iranian clerics, will be able to expose the weaknesses and contradictions inherent in their use of scripture and debunk the IRGC’s theological foundation.

Beyond this, civil society groups and governments must fund online counter-narrative projects to ensure the dissemination of these voices more widely. For too long, policymakers concerned with rising Islamism have overlooked extremism within Shi’a
communities. This has resulted in a blind spot in counter-narrative efforts with global consequences.

**Actions for Technology Companies**

Technology companies should broaden their classifications on what is considered extremist beyond the realms of Salafi-jihādism to include Shi‘a Islamist extremist content. To achieve this, technology companies should address language blind spots by investing in Persian-language expertise. While global technology firms strive to deliver a consistent and standardised experience to users, each language represents a unique set of challenges. This extends to the threat of extremist and terrorist activity online, with each region subject to a variety of distinct contexts that require a localised understanding, spanning language and culture.

In addition to technical responses, global technology firms should invest in bolstering human subject matter expertise to ensure accurate understanding of the threats and challenges in the Persian and Arabic-speaking world and strengthen policy enforcement capabilities. As a first step towards this objective, technology companies should ban IRGC-linked accounts. This should include taking down the social media accounts of senior IRGC officials. Despite the ban on the use of social media in Iran, IRGC figures use social media to disseminate violent and extremist ideology to those outside of Iran’s borders.

**II. War with Iran?**

There were at least two reasons why America should not (as of June 2023) go to war with Iran: it would be illegal (under U.S. or International Law) and immoral (under Just War Theory). Table 37-1 summarizes these rationales.

**Table 37-1**  
**Reasons for Reflection**

<table>
<thead>
<tr>
<th>Would War with Iran be …</th>
<th>Criteria</th>
<th>Yes</th>
<th>No</th>
<th>Maybe</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal?</td>
<td>Under Domestic Law?</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Under International Law?</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Moral?</td>
<td>Last Resort?</td>
<td></td>
<td>X</td>
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<tr>
<td></td>
<td>Just Cause?</td>
<td></td>
<td>X</td>
<td></td>
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<tr>
<td></td>
<td>Competent Authority?</td>
<td></td>
<td></td>
<td>X</td>
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<tr>
<td></td>
<td>Intention?</td>
<td></td>
<td></td>
<td>X</td>
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<td></td>
<td>Proportionality?</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td></td>
<td>Probability of Winning?</td>
<td></td>
<td></td>
<td>X</td>
</tr>
</tbody>
</table>

(1) **Illegality**

- **Domestic Law?**
The President lacks the authority under U.S. law to plunge America into a third war in the Middle East in 18 years. Immediately after 9-11, Congress passed (98-0 in the Senate, and 420-1 in the House) Authorization for Use of Military Force (AUMF) (Public Law 107-40, codified at 115 Stat. 224, 18 September 2001).\textsuperscript{1599} Section 2(a) of this legislation states:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons \[i.e., \text{so-called associated forces}\] he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Neither Iran nor its proxies, nor indeed \textit{Sh	extquotesingle\text{i	extquotesingle}tes}, had anything to do with 9-11.

Rather, the 19 9-11 attackers, all professedly \textit{Sunnite}, but all perverters of the true meaning of \textit{jih	extacute{a}d} (struggle) in the \textit{Shar	extquotesingle{i}a} (Islamic Law), were citizens of Saudi Arabia (15), UAE (2), Egypt (1), and Lebanon (1). The U.S. has relied on the \textit{AUMF} 37 times in 14 countries and in international waters (as of May 2016) to hunt so-called “associated” or “affiliated” forces, 19 times by President Barack H. Obama, and 18 times by President George W. Bush.\textsuperscript{1600} The venues ranged from 14 countries (such as Afghanistan, Cuba (Guantanamo Bay), Djibouti, Eritrea, Ethiopia, Georgia, Iraq, Kenya, Libya, Philippines, Somalia, Syria and Yemen) to international waters. Critics charged Messrs. Obama and Bush with stretching the \textit{AUMF} far beyond its literal terms. Those stretches stayed within the bounds of fighting \textit{Al Qaeda}. \textit{Al Qaeda} and Iran are foes on opposite sides of the 1,400 year old \textit{Sunni-Sh	extquotesingle\text{i	extquotesingle}te} schism, meaning stretching the \textit{AUMF} to hit Iran would snap it.

Likewise, no domestic legal authority for attacking Iran exists under the 2002 Authorization for Use of Military Force Against Iraq Resolution, (Public Law Number 107-243, 116 Stat. 1498, 16 October 2002). Known as the \textit{Iraq Resolution}, which Congress passed (77-23 in the Senate, and 296-133 in the House), this legislation authorized American action against the Saddam Hussein regime of Iraq. It empowered President Bush, “as he determines to be necessary and appropriate,” to use military force to “defend the national security of the United States against the continuing threat posed by Iraq; and enforce all relevant United Nations Security Council Resolutions regarding Iraq.” Iran figures nowhere in this authorization. The \textit{Resolution} cited an array of justifications for war with Iraq – all of which history has proven bogus, as the 2018 movie \textit{Vice} chillingly chronicles – and none of which had to do with Iran.

\begin{itemize}
  \item \textbf{International Law?}
\end{itemize}

\begin{footnotesize}
\begin{enumerate}
  \item \textsuperscript{1599} See \url{www.govinfo.gov/content/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf}.
  \item \textsuperscript{1600} See Matthew Weed, Presidential References to the 2001 Authorization for Use of Military Force in Publicly Available Executive Actions and Reports to Congress, Congressional Research Service (11 May 2016), \url{https://fas.org/sgp/crs/natsec/pres-aumf.pdf}.
\end{enumerate}
\end{footnotesize}
Under international law, too, the President lacks authorization for war. The best argument is self-defense against “malign behavior” (to use a favorite Trump Administration phrase) by Iran. No prior approval is needed to launch a war against a prior attack. But, the rhetorical question posed by Senator Angus King (Republican-Maine), a member of the Senate Armed Service Committee and Select Committee on Intelligence, casts doubt on the causal sequence this argument presumes: “Who’s provoking who[m]? Are they reacting because they are concerned about what we’re doing, or are we reacting because we’re concerned what they’re doing?”

The second-best argument is pre-emptive self-defense, that American needs to attack Iran to protect itself from terrorism imminent from Iran, and that its attack on Iran is both necessary and proportional as self-defense. But, that argument is parlous: it is the same one America used to justify the world its March 2003 invasion of Iraq. Most of the world, and most credible international legal experts, never agreed; rather, former U.N. Secretary General Kofi Annan summarized in September 2004: the pre-emptive self-defense argument is “not in conformity with the U.N. Charter” and, therefore “is illegal.”

The third-best international legal argument is nearly frivolous. The U.S. could invoke Article 39 of the U.N. Charter, which says: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 [i.e., Chapter VII measures concerning “Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”], to maintain or restore international peace and security.” The U.S. could contend, as it did with respect to Iraq, that the various Security Council resolutions have declared Iran to be in material breach of its international legal obligations, most notably, the July 2015 JCPOA. Yet, the facts do not support that contention with respect to Iran. Quite the contrary, IAEA inspectors have repeatedly declared Iran complied with the Nuclear Deal (though on 31 May 2019 the IAEA observed Iran might have breached the limits on the number of advanced centrifuges it is permitted). It is America that quit the Deal.

Moreover, in the Iraq context, America’s contention was unpersuasive. The U.S. pointed to a 2002 Security Council Resolution (Number 1441), which declared Iraq materially breached the requirement of a 1991 Resolution (687), which obliged Iraq to cooperate with IAEA inspectors, and which established a ceasefire in the 1991 Gulf War authorized by the Security Council in 1990 (via Resolution 678). The U.S. said Iraq’s breach meant America could suspend the ceasefire (under Resolution 687) and attack Iraq (under 678). Most of the rest of the world, and most credible international legal scholars,

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1601 Quoted in U.S. Sends. See U.S. Deploys. Sales of precision-guided missile systems and laser-guided bombs to Saudi Arabia were particularly controversial, as critics said they would kill innocent civilians in the Kingdom’s violent quagmire in Yemen. The weapons included Javelin anti-tank missiles and F-15 and F-16 aircraft and parts. See Defying Congress.


disagreed with the American effort to restore the *status quo ante* of 1990 by tracing through these Resolutions and pervert the original one (678) to say something no one at the time imagined. They counselled for a second Security Council Resolution to authorize a second invasion of Iraq, which America failed to get – and then choose to invade anyway.

For Iran, America must point to a Security Council Resolution that holds Iran in material breach of its pertinent treaty obligations, with language therein that permits violence against Iran. Alas, the Security Council has made no such determination, nor likely will it. Russia is on Iran’s side of support for the Assad regime in Syria and will veto allowance of U.S. action against Iran. China, ever eager to counter multilateral condemnation of its repression of Tibetan Buddhists with the claim that foreigners are meddling in its internal affairs, will cast a veto against American violation of Iran’s sovereignty.

(2) Immorality

Just War Theory provides the most widely accepted metrics for the morality of war. The Theory originates in the 4th century B.C., in the world’s longest epic poem, *Mahābhārata*, and is refined thanks to Saints Augustine (354-430 A.D.) and Thomas Aquinas (1225-1274 A.D.), and to Michael Walzer in *Just and Unjust Wars* (1977). Six criteria must be met before war can be judged as “moral.” As to violence against Iran, America fulfils none of them.

**Last Resort?**

War with Iran is not a last resort, because America has not exhausted all non-violent measures. To the contrary, war would sabotaged those efforts. After its 8 May 2018, withdrawal from the July 2015 Nuclear Deal, the U.S. progressively strengthened its unilateral sanctions against Iran, making clear they applied extraterritorially to virtually all goods and services transactions with Iran denominated in dollars. In May 2019, seeking to drive Iranian energy exports to zero, the U.S. refused to extend its six-month waivers for India and seven other countries (China, Greece, Italy, Japan, Korea, Taiwan, and Turkey). By March 2020, U.S. sanctions had knocked offline one-fourth of all Iranian oil rigs.\(^{1604}\) Simply put, Iran could not exploit the one product in which it had a comparative advantage – energy resources – because it could not maintain and repair the infrastructure needed to do so.

Obviously, the tougher sanctions were designed to wreck (once again) Iran’s economy. Based on GDP forecasts (-6%), inflation (over 37%), unemployment (12%), exports (plummeting), FDI (also plummeting), exchange rate (plummeting, too, from 32,000 *rials* per dollar after the July 2015 Nuclear Deal to over 130,000 *rials*/dollar on 24 June 2019), and street protests (many of them among Iran’s 81 million people), the

wreckage was evident. Between April 2018 and May 2019, oil exports from Iran dropped from 2.5 million bpd to 400,000 bpd. By June 2019, there were shortages of baby’s diapers, and the plunging value of the rial caused egg and meat prices to soar. Still another sign of the efficacy of the sanctions was the internal migration they spurred: poorer and lower-middle class Iranians living in big cities like Tehran were forced to move, owing to the rising costs in those cities brought about by the sanctions. More time was needed for a verdict on their efficacy, and on Iran’s repeated threats that it would block the Straits of Hormuz if it could not sell oil owing to American sanctions.

And, in November 2019, protests again erupted in Iran, this time over fuel price rises of at least 50%, plus fuel rationing. They were “the worst unrest since late 2017 when more than 80 cities and towns saw protests by thousands of young and working-class Iranians fed up with alleged corruption, high unemployment and a widening gap between rich and poor.” Then, the IRGC “and their affiliated Basij militia quelled that bout of unrest, in which at least 22 people were killed.” In November 2019, Amnesty International said at least 106 people in 21 cities were killed in demonstrations against the decision by Iran’s government to reduce fuel subsidies. “The protests erupted on … [15 November] after the government announced the price of petrol would be increased by 50% to 15,000 rials ($0.12; £0.09 at the unofficial market exchange rate) a litre and that drivers would be allowed to purchase only 60 litres each month before the price rose to 30,000 rials.” Within two days, “the protests had reached some 100 cities and towns …, [and] at least 100 banks and 57 shops had been set on fire, and about 1,000 people had been arrested.” Such tallies proved to be underestimates. In fact, roughly 731 banks, 140 government offices, 50 security force bases, and 70 petrol stations were set ablaze, and the

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1608 See Monavar Khalaj, Impoverished Iranians Forced to Leave Tehran for a Cheaper Life, FINANCIAL TIMES, 29 September 2019, www.ft.com/content/4a6b53ee-df60-11e9-9743-db5a370481bc?shareType=nongift (also reporting “Iran’s economy has been hit hard by Tehran’s inability to export oil,” “[the rial] has fallen in value against the dollar by about 60 per cent since last year [i.e., from December 2018 through September 2019], the most recent data shows inflation of 42.7 per cent, and the IMF has estimated the economy will shrink 6 per cent this year [2019],” “[i]nflation has also hit the housing sector – house prices rose 82.2 per cent in the three months to the end of June [2019] on the previous year,” and “[r]ents rose 29.1 per cent in the same period.…”).
1610 Iran’s Guard’s Warn.
1611 Iran’s Guard’s Warn.
1613 Iran Protests: U.N. Fears.
1614 Iran Protests: U.N. Fears.
protestors numbered 200,000 across Iran, with at least 143 killed – a figure Amnesty
International later revised upwards to at least 208 dead.1615

Thus, the Financial Times characterized what happened as “the most violent
protests in four decades of Islamic rule [i.e., since the 1978-79 Islamic Revolution].”1616
That was for good reason: even these tallies were underestimates. In December 2019, it
became clear that about 1,500 were killed, including 400 women and 17 teenagers.1617
Chillingly, they were killed on the direct orders of the Āyatollāh:

After days of protests across Iran last month, Supreme Leader Āyatollāh Alī
Khamenei appeared impatient. Gathering his top security and government
officials together, he issued an order: Do whatever it takes to stop them.

…

What began as scattered protests over a surprise increase in gasoline prices
quickly spread into one of the biggest challenges to Iran’s clerical rulers
since the 1979 Islamic Revolution.

By Nov. 17 [2019], the second day, the unrest had reached the capital
Tehran, with people calling for an end to the Islamic Republic and the
downfall of its leaders. Protesters burned pictures of Khamenei and called
for the return of Reza Pahlavi, the exiled son of the toppled Shah of Iran….

That evening at his official residence in a fortified compound in central
Tehran, Khamenei met with senior officials, including security aides,
President Hassan Rouhani and members of his cabinet.

At the meeting, … the 80-year-old leader, who has final say over all state
matters in the country, raised his voice and expressed criticism of the
handling of the unrest. He was also angered by the burning of his image and
the destruction of a statue of the Republic’s late founder, Āyatollāh
Ruhollah Khomeini.

“The Islamic Republic is in danger. Do whatever it takes to end it. You have
my order,” the Supreme Leader told the group….

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1615 See Iran Protests: State TV Acknowledges Deaths During Unrest, BBC NEWS, 3 December 2019,
www.bbc.com/news/world-middle-east-50643445; Babak Dehghanpisheh, Iran Says Hundreds of Banks
Were Torched in “Vast” Unrest Plot, REUTERS, 27 November 2019, www.reuters.com/article/us-iran-
gasoline-protests-minister/iran-says-hundreds-of-banks-were-torched-in-vast-unrest-plot-
idUSKBN1Y10GY.
1616 Najmeh Bozorgmehr & Monavar Khalaj, Iranians Left With Questions After Worst Violence in
Decades, FINANCIAL TIMES, 1 December 2019, www.ft.com/content/25cc04ee-1114-11ea-a225-
db2f231cfeae?shareType=nongift.
1617 See Special Report: Iran’s Leader Ordered Crackdown on Unrest – “Do Whatever it Takes to End
It,” REUTERS, 26 December 2019, www.reuters.com/article/us-iran-protests-specialreport/special-report-
irans-leader-ordered-crackdown-on-unrest-do-whatever-it-takes-to-end-it-idUSKBN1YR0QR. [Special
Report: Iran’s Leader.]
Khamenei said he would hold the assembled officials responsible for the consequences of the protests if they didn’t immediately stop them. Those who attended the meeting agreed the protesters aimed to bring down the regime.

“‘The enemies wanted to topple the Islamic Republic and immediate reaction was needed,’ one of the [unnamed] sources [who was attended the meeting] said.

…

“Our Imām,” said … [another unnamed] official [who was briefed on the meeting], referring to Khamenei, “only answers to God. He cares about people and the Revolution. He was very firm and said those rioters should be crushed.”

Tehran’s clerical rulers have blamed “thugs” linked to the regime’s opponents in exile and the country’s main foreign foes, namely the United States, Israel, and Saudi Arabia, for stirring up unrest. Khamenei has described the unrest as the work of a “very dangerous conspiracy.”

…

Iranian authorities deployed lethal force at a far quicker pace from the start than in other protests in recent years…. In 2009, when millions protested against the disputed re-election of hardline President Mahmoud Ahmadinejad, an estimated 72 people were killed. And when Iran faced waves of protests over economic hardships in 2017 and 2018, the death toll was about 20 people….

…

Khamenei, the three sources said, was especially concerned with anger in small working-class towns, whose lower-income voters have been a pillar of support for the Islamic Republic. Their votes will count in February parliamentary elections, a litmus test of the clerical rulers’ popularity since U.S. President Donald Trump exited Iran’s nuclear deal – a step that has led to an 80% collapse in Iran’s oil exports since last year [2018].

Squeezed by sanctions, Khamenei has few resources to tackle high inflation and unemployment. According to official figures, the unemployment rate is around 12.5% overall. But it is about double that for Iran’s millions of young people, who accuse the establishment of economic mismanagement and corruption.1618

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1618 Special Report: Iran’s Leader.

Protests against Iran’s adventurism in Iraq, as well as economic mismanagement, happened in Iraq, perhaps suggesting American sanctions had knock-on effects favoring U.S. interests. See also Ahmed Aboulenein & Ahmed Rasheed, *Iraq Condemns U.S. Air Strikes as Unacceptable and Dangerous*, Reuters, 30 December 2019 (reporting that demonstrations in Iraq prior to the 30 December 2019 U.S. airstrikes (discussed above) against Iranian-backed Iraqi militia occurred as thousands Iraqis took “to the streets … to condemn, among other things, militias such as Kata‘ib Hezbollah and their Iranian patrons that support [Iraqi PM] Abdul Mahdi’s government,” and to “demand an overhaul of a political system they see as corrupt and...
Unsurprisingly, the government shut down the internet, and defended its policy decision to cut subsidies as being in the public interest, and asserted that money saved on fuel support would go to poor families. “President Hassan Rouhani’s government said the gasoline price rises were intended to raise around $2.55 billion a year for extra subsidies to 18 million families – or roughly 60 million Iranians – struggling on low incomes.” Manifestly, many Iranians were not buying the government line. It seemed U.S. sanctions had engineered one of America’s desire outcomes – foment serious internal opposition to Iran’s regime. “Now anger has resurfaced over the impact of renewed U.S. sanctions and the government’s failed promises of jobs and investment.”

That is, during the period of America’s so-called “maximum pressure” campaign on Iran, two conflicting trends in Iran occurred. On the one hand, the pain inflicted on everyday Iranians stirred resentment against the U.S. Iranian conservatives and liberals united – a “rally around the flag” effect to support their country in the face of the betrayal of Mr. Trump’s JCPOA withdrawal. On the other hand, the unpopularity of Iran’s aging, repressive Theocracy increased, became even more apparent, and even more resented, by talented, cosmopolitan young Iranians. Iranian police (on 24 May) arrested 30 men and women in a yoga class in a private residence in the northern city of Gorgan for inappropriate behavior and outfits. That was one of many neurotically silly inflictions by inflexible zealots on young people (especially women), who insist on stretching the Sharī’a to ban professional yoga instruction and mixed-gender sports. These events trigger a social media firestorm, with one reaction to the clampdown on yogis particularly apt: “An establishment that finds even yoga harmful does not need the U.S.S. Abraham Lincoln warship [which the Pentagon sent in May to the Gulf] to end its existence.”

●  Just Cause?

America has failed to articulate a just cause. The U.S. rightly complains about Iran’s malevolence in Iraq, Syria, and Lebanon, endeavors to tie the IRGC to evil and show the Corps acts with twisted benedictions from senior Iranian officials, and worries about threats posed to Israel from the roughly 125,000 Katyusha rockets Iran’s proxy in Lebanon, Hezbollah, points southward across the Golan Heights. But, war is just only to correct a serious wrong, which means there must be proof that Iran is blameworthy.

The evidentiary burden should be high, especially given that the last time the U.S. presented this kind of case to the Security Council – the 5 February 2003 oral advocacy by

keeping most Iraqis in poverty”), www.reuters.com/article/us-iraq-security-usa/iraq-condemns-u-s-air-strikes-as-unacceptable-and-dangerous-idUSKBN1YY0II.

1619 Iran’s Guard’s Warn

1620 Iran’s Guard’s Warn (also reporting, “[f]or many Iranians, the challenge to make ends meet became even harder last year when Trump withdrew the United States from the nuclear deal with world powers and re-imposed sanctions that had been lifted under the accord”).


Secretary of State General Colin Powell to show Iraq had WMDs – it offered circumstantial evidence with little probative value that proved false, and which its presenter repudiated as a “great intelligence failure.” Arguably, the standard should be that used in criminal law, “beyond a reasonable doubt,” because at issue is triggering overwhelming, irreversible, coercive force of a government against a relatively weaker target.

Moreover, the justness of any cause for violence ought not to be adulterated by sinister motives of allies in a war effort. Notably, one of the Iraq Resolution justifications was that Saudi Arabia despised Mr. Hussein and wanted him out of power. The House of Saud hates Iran’s current rulers and wants the U.S. to shed American blood to kill its Persian neighbors, just as it did 15 years earlier to get rid of its Arab rival in Iraq. Hardly a moment’s reflection is needed to see the unjustness of that choice for America, regardless of how much additional oil the Kingdom agrees to pump out to stabilize world energy markets. War is not just when the cause is a small guy subcontracting his fantasy hits to a bully.

● Competent Authority?

To meet the competent authority metric, Just War Theory demands the officials responsible for launching a war be legitimate public decision-makers who allow for debate. For two reasons, it is dubious whether the U.S. satisfies this criterion.

First, authorities should act as thought leaders to help the public draw lessons from history to avoid writing a new history that proves to be a march of folly. Shamefully, there has been no national debate on whether to go to war with Iran. Almost 40 years after Iranian militants seized the U.S. Embassy in Tehran and held 52 Americans captive for 444 days, most Americans suffer from the lack of public education about the origin, nature, and beliefs of Shi‘ism. Sending combat personnel into battle against Iran, with no understanding of the purported “enemy,” would be unfair to them, as it was in March 2003 when the U.S. invaded Iraq providing no education to its forces about the divisions within Islam that motivate conflict across much of the Muslim world. The unfairness would be inter-generational. The U.S. mistook the nationalist, anti-colonialist motivations of the Viet Cong for diehard Communism, and 58,220 Americans paid the price. Has pre-conflict discourse today evolved beyond what it was on 2 August 1964, when the Gulf of Tonkin incident occurred that led to the escalation of the Vietnam War?

Second, the authorities should indeed be competent. Whether some of the key decision makers on Iran are is questionable. The Secretary of State, Mike Pompeo, behaves more like a Secretary of War. He has never spoken directly with his Iranian counterpart, Foreign Minister Mohammad Javad Zarif. Tweeting in February 2019, he called him and

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Iran’s President, Hassan Rouhani, “front men for a corrupt religious mafia.”\(^{1624}\) (Notably, the Secretary later offered to go to Tehran, and at the August 2019 G-7 Summit in Biarritz, France, President Trump said he might meet President Rouhani “if the circumstances were correct or were right.”\(^{1625}\) Mr. Rouhani demurred: no meeting unless America lifted its sanctions.\(^{1626}\) Dr. Zarif – who earned his doctorate in 1988 from the University of Denver with a dissertation entitled “Self-Defense in International Law and Policy,”\(^{1627}\) and whose relationship with President Barack Obama’s Secretary of State, John Kerry, was constructive – replied that averting a crisis was unlikely, because: “Pompeo makes sure that every time he talks about Iran, he insults me. Why should I even answer his phone call?” (Zarif and Kerry defused a potential \textit{casus belli} (occasion for war) in 2016 when U.S. sailors strayed into Iranian waters.) Mr. Pompeo hails from Kansas, but his discourse is outside the mainstream diplomatic tradition of two of Kansas’ favorite Republican sons, President Dwight Eisenhower and Senator Robert Dole.

Worse yet, undignified sarcasm flows effortlessly from the mouth of an unelected official in a powerful position on which the lives of American soldiers depend for objectivity: John Bolton. This National Security Advisor seethes with hatred for Iran, intoning (on 29 May) with respect to the oil tanker attacks (of 12 May): “There’s no doubt in anybody’s mind in Washington who’s responsible for this. Who else would you think is doing it? Someone from Nepal?”\(^{1628}\) Chalking out hawkish positions is part of healthy policy debate, but unseemly rhetoric undermines the moral authority of those positions and reveals the intransigence on which they are based.

- **Intention?**

What is the intention of plunging America into war with Iran? Just War Theory requires that the only purpose for violence is to right a serious wrong.

Is America’s purpose regime change, meaning Iran’s theocratic rulers themselves embody the serious wrong and must be removed? That is what Mr. Bolton said in July 2017 (nine months before becoming the NSC Chief) at a “Free Iran” rally in Paris: “the declared policy of the United States should be the overthrow of the \textit{mullahs’} regime in Tehran.”\(^{1629}\) If so, then what is America’s intent after it inflicts an inevitable military defeat


\(^{1629}\) See Excerpts from Amb. John Bolton’s speech at the Free Iran Gathering Paris, 1 July 2017, \url{https://www.youtube.com/watch?v=hTMh24qlyQA&feature=youtu.be&t=4m17s}.


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on the IRGC? Having labelled the IRGC a Foreign Terrorist Organization on 8 April 2019 – the first time the U.S. designated the military of a sovereign nation a terrorist group – the U.S. cornered itself into making the same mistake the Coalition Provisional Authority did in May 2003 in Iraq. With Orders Numbers 1 and 2, the CPA banned Saddam’s Ba’ath Party and disbanded his defeated army. Demoralized and unpaid, the Party members and soldiers were fertile recruits for Al Qaeda and ISIS, inflicting brutalities on their own civilians and American soldiers. What will become of the IRGC and the occupying American force?

Or, is the serious wrong that America intends to correct not Iran’s theocracy per se, but its discretionary behavior, as Mr. Pompeo suggested on 22 April 2019? If so, then what are the terms of a peace deal America intends for Iran? Would they consist of an enforceable guarantee from Iran to eschew pursuit of a nuclear weapon, cessation of all ballistic missile testing, abandon support for any group the U.S. designates as an FTO, and acceptance of Israel’s post-June 1967 borders? On what points would America be flexible so as to avert war?

Look for no clarity as to America’s intention from where it is most needed, its Commander in Chief. President Trump said on 27 May at a Joint News Conference in Tokyo with Japanese Prime Minister Shinzo Abe: “We’re not looking for regime change. I want to make that clear.” Nine days earlier, Mr. Trump tweeted: “If Iran wants to fight, that will be the official end of Iran. Never threaten the United States again!” The flip flops are redolent of an unflattering comment made by a fellow Tory Member of Parliament about British leader Boris Johnson: “He is so fundamentally flawed, he’s the Kama Sutra candidate: he’s held every position on every conceivable topic. That’s why we don’t trust him.”

● Proportionality?

The fog enveloping the intent for war with Iran contrasts with the clarity of the skies when America launched its three previous Middle Eastern military campaigns: removing Saddam Hussein’s forces from Kuwait in the 1991 First Gulf War; capturing Osama Bin Laden in the 2001 War in Afghanistan; and eliminating the threat of WMDs by Saddam Hussein in the 2003 Second Gulf War. Yet, only with respect to the first adventure did the skies stay clear. Worse, this fog obscures the ability of America to satisfy the fifth

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1633 Quoted in Laura Hughes & Sebastian Payne, Philip Hammond Warns Tory Leadership Hopefuls on No-Deal Brexit Stance, FINANCIAL TIMES, 26 May 2019, www.ft.com/content/81a42938-7f8b-11e9-9935-ad75bb96ce849.
Just War criteria – proportionality. Just War Theory asks that the expected benefits of any conflict must at least offset any harm. For two reasons, the costs may exceed the benefits.

First, conflict with Iran will undermine whatever stability the U.S. helped to bring about or seeks around and within Iraq. Iraq’s two closest allies are America and Iran. Between 64%-69% of Iraqis are Shī’a. Stability in Iraq depends on calmness along its border with Iran. It is a mistake to think American forces chasing the IRGC and its proxies across that border will mitigate conflict, just as it was when America bombed Laos and raided Cambodia thinking it would cut off supplies to the Viet Cong along the Ho Chi Minh Trail. As in the Vietnam War, so it will be with Iran: with the integrity of the Iraq-Iran border trashed, conflict will spread, and neither American nor Iraqi security forces will be able to contain it, any more than Americans and their South Vietnamese allies could half a century ago.

Second, stability in Iraq also depends on warm ecumenical relations between Sunni and Shī’a within Iraq. It is a mistake to think all Iraqi Shī’a are pro-Iranian, just as it is farcical to suggest India’s Muslims are pro-Pakistan. Sadly, crises beget those mistakes. If the U.S. attacks Iran, can American and Iraqi security forces contain violence meted out against Sunnis on Shī’a who falsely accuse them of supporting Iran? Hindu-Muslim riot control is a reality with which Indian security forces too often must deal. Avoiding religious communalism helps explain why thousands of Iraqis peacefully protested (on 24 May) in Baghdad and Basra. They urged Iraq to stay out of any U.S.-Iran War. “No to war, Yes to Iraq,” were the chants of the supporters of Moqtada Al Sadr, the one-time leader of Shī’a militia who opposes U.S. and Iranian influence, and whose nationalist platform won his party the largest block of seats in Iraq’s 2018 Parliamentary elections.¹⁶³⁶

● Probability of Winning?

Indubitably, in a direct military conflict with the U.S., Iran will suffer a defeat the likes of which Persian civilization has not seen since the 331 B.C. Battle of Gaugamela (Arbela), when Alexander the Great’s Hellenic League defeated the larger forces of Darius III Achaemenid Empire. But, America’s victory – to use Shakespeare’s Sonnet 2 metaphor – “will be a tattered weed, of small worth held.” Contemporaneously with America’s “win,” the U.S. may suffer four losses. It may (1) create new and catalyzed existing enemies worldwide, as it did after the Second Gulf War, (2) bolster the narrative its conflicts are a War on Islam, as it will have attacked both of Islam’s great denominations, Sunni and Shi’ite; (3) stretch itself thinly in its escalating confrontation with China in the South China Sea and Formosa Strait; and (4) distract itself from the one war it cannot afford to lose, namely, against climate change.

The “small worth” of the American victory may be apparent as “tattered weeds” – the human costs – spread across the homeland. America’s seemingly endless conflicts since 9/11 have left combat veterans suffering with Post-Traumatic Stress Disorder, diminished sensory perception, and lost limbs, and suffering again through an over-crowded, under-funded health care system. Their families cope with suicide: 20 per day among veterans (based on 2001-2014 data), and about one per day among active duty personnel (in 2018). The military copes to replace these noble veterans, sometimes (it is whispered) through recruitment efforts among children of single parents, who are disproportionately in poor and lower-middle class minority communities and susceptible (given the skyrocketing costs of U.S. colleges) to pledges of tuition assistance.

(3) The Better Course

Absent a different predicate, an American-launched war with Iran would be illegal and immoral. The better course is for the U.S. to reverse course and re-engage with Iran.

Step One? Develop trust: co-sponsor with Iran a robust program of academic, cultural, linguistic, sports, and development exchanges, synthesizing ideas from American Field Service, Fulbright Scholarships, the 1971-1972 U.S.-China Ping Pong Diplomacy, and the Peace Corps. These measures are subtle ways of apologizing and moving forward, and may lead to a hoped-for exchange of formal apologies for damage and hurt each country perceives the other has done to it.

Step Two? Appreciate the status quo ante as of May 2018, when the U.S. withdrew from the JCPOA, cannot automatically be restored. From Iran’s perspective, heightened U.S. sanctions have inflicted tremendous damage on its economy, and in assassinating Qassem Soleimani in January 2020, America killed a figure widely respected in Iran. From America’s perspective, Iran’s violations of the JCPOA and continued nefarious activities in the Middle East have deepened suspicions about its trustworthiness, and served as reminders of the unresolved legacy of the 1979-1981 Hostage Crisis. Both sides may seek compensation from the other for damage caused by the other. Placement of funds into an escrow account for issue-by-issue resolution, along the lines of the Iran-U.S. Claims Tribunal that resolved cases after that Crisis, should be considered.

Step Three? Appreciate, too, that neither America nor Iran should be expected to renegotiate what already has been negotiated. The two countries can borrow from the strategy America used with respect to NAFTA and KORUS: revise the JCPOA, but with minor changes that not only save face for Iran, but also provide for all the necessary technical updates and timeline revisions. Walk back from the violations that have occurred since the May 2018 U.S. withdrawal, namely, (1) America

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should reverse that withdrawal and recommit to the Deal, and (2) Iran should return to respecting the limits in the Deal on enrichment, centrifuges, and inspections. And, revise the JCPOA deadlines so that Iran’s nuclear program – specifically, its ability to produce an unbounded amount of nuclear fuel – is not entirely unrestrained after 2030.

Step Four? In a step-by-step manner, as Iran reverses the technical violations it committed after the U.S. withdrawal, America should lift selected sanctions. For example, the U.S. can grant waivers to certain countries to purchase Iranian oil, particularly ones, such as India, that traditionally relied on Iran to supply their energy needs. Further, the U.S. can remove its designation of the Central Bank of Iran as a terrorist financier, so that the CBI can help begin the country begin the process of reintegrating into the global financial system. And, America can allow its European partners to make operation Instex, so Iran can make and receive payments for goods and services, and European banks to provide Iran with trade finance (such as lines and letters of credit), so Iran can increase oil production and exportation. Overall, this step entails “‘compliance for compliance,’ ‘calm for calm’ or ‘freeze for freeze’ measures, in which both sides move back to the terms of the Deal over time and avoid confrontational behaviour in the Middle East.” 1638

Step Five? Build on a new JCPOA: sign a separate agreement with Iran to commence negotiations on ballistic missile stockpile and testing limits, which may also include a pledge to end reciprocal cyberattacks. In other words, do not try to add into the Deal that which the U.S. could not persuade Iran to add when it was originally negotiated:

Iran has previously said that it would not compromise over its strategic regional and military policies, notably its support for Lebanon’s Hizbollah and the missile programme. “This [nuclear] agreement is done and sealed off. Iran has repeatedly said that the nuclear accord belongs to the past and cannot reopen for new considerations,” said Saeed Khatibzadeh, Iran’s Foreign Ministry spokesman…. 1639

Thus, “[i]f the U.S. raises issues such as Iranian ballistic missiles or its support for militias in the region – which did not feature as part of the original deal – or Tehran demands compensation for U.S. withdrawal from the accord, then the talks immediately become more difficult.” 1640

Step Six? Apply the positive lessons from how President John F. Kennedy (1917-1963, President, 1961-1963) handled the October 1962 Cuban Missile Crisis, and

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1638 Katrina Manson, Najmeh Bozorgmehr & Michael Peel, Biden Team Considers Options on Iran Nuclear Deal, FINANCIAL TIMES, 10 November 2020, www.ft.com/content/c6a3136d-804b-477a-953f-442645935ba2. [Hereinafter, Biden Team Considers.]

1639 Quoted in Biden Team Considers.

1640 Biden Team Considers.

Step Seven? Strengthen American society by investing in more “butter” and less “guns,” that is, by bolstering the quality and accessibility of America’s education and health infrastructure. America is only as strong as its people are smart and fit.

These Steps were ones President-Elect Joe Biden (1942-, President, 2021-) appeared ready to take: as the Financial Times observed, “Mr. Biden has said he will return to the multi-party 2015 Deal that limited Iran’s nuclear program, as long as Iran also returns to strict compliance, as a ‘starting point for follow-on negotiations.’” After all, though circumstances had changed during the Trump Era, the strategic logic of the Deal had not.

III. Biden Era and Beyond

● Deadlock?

President Biden’s interest in returning to the bargaining table with Iran with a view to America’s re-entry into an updated July 2015 JCPOA butted up against two realities. First, Iran continued its violations, albeit technical and reversible, of the Nuclear Deal. In particular, Iran declared in January 2021 it would enrich Uranium to the 20% purity level.
at its underground Fordow site. That would cut Iran’s break out time to developing a WMD to roughly six months.


Also, in January, Iran seized in the Persian Gulf, off the Omani coast, a South Korean-flagged oil tanker, alleging it violated safety and environmental regulations. The seizure may have been Iran’s way of pressuring Korea to unblock $7 billion of Iranian funds it froze in compliance with U.S. sanctions. Iran Increases Uranium Enrichment. The tanker was released in April, after plans were agreed to release at least a portion of the funds. See South Korea Says Tanker and Captain Detained in Iran Released, BBC NEWS, 8 April 2021, www.bbc.com/news/world-middle-east-56684775 (reporting: “Iran seized the Hankuk Chemi near the strategic Strait of Hormuz, accusing it of violating pollution rules. All the 20 crew members were set free in February, apart from the captain. The incident happened amid tensions over Iranian funds frozen in South Korean banks because of U.S. sanctions. Iran said the cases were not linked. But the release of the ship and the captain comes amid reports Seoul and Tehran have made some progress in unlocking the funds, which total $7 bn….”).

Predictably, Iran continued its efforts to ship hydrocarbons overseas to countries disinclined to following U.S. sanctions (indeed, opposed to them). Instances of sanctions evasion involving China in March 2021 prompted a stern admonition from the Biden Administration:

The Biden Administration has told Beijing it will enforce Trump-era sanctions against Iranian oil as shipments from the Islamic regime to China have soared.... Iranian oil exports to China have been increasing “for some time now,” ... [an unnamed] senior Administration official ... [said].

... “We’ve told the Chinese that we will continue to enforce our sanctions,” the senior Administration official said. “There will be no tacit green light.” ...

Enforcing the prohibition could take the form of “secondary sanctions.” In 2019, the Trump Administration imposed sanctions on a Chinese state-run energy company and several tanker companies it said were trading Iranian oil in violation of U.S. restrictions. ... China imported about 478,000 barrels of oil a day from Iran on average in February [2021] ... one of the highest monthly purchases on record. Iran had been offering steep discounts....

Iran’s ghost tankers are notoriously difficult to track and often include exports of petroleum products as well as crude oil that has been stored at sea for months, said Amrita Sen of consultancy Energy Aspects. “We always knew these barrels would come out; it was a question of when.”

Iran had exported crude and condensate -- an ultralight oil -- to China by disguising its barrels most recently as Omani ones.... Four tankers removed their transponders and transferred them to other vessels at an Omani port. They then went to Iran to load almost 8 m[illion] barrels of oil collectively after which they returned to Oman to pick up the transponders on the way to China.

Katrina Manson, Anjli Raval & Najmeh Bozorgmehr, U.S. Warns China it Will Enforce Sanctions on Iran Oil Shipments, FINANCIAL TIMES, 17 March 2021, www.ft.com/content/21eb2d88-3bae-4db3-944c-ba92f3924300?shareType=nongift.
Second, Iran insisted it would not commence negotiations unless the U.S. first withdrew all sanctions – or, presumably, at least those the Trump Administration had imposed since it departed in May 2018 from the Deal, which numbered over 1,500 separate measures in total.\(^{1644}\) (A separate tally, in May 2021, calculated over 700 entities and individuals the U.S. Treasury sanctioned after President Trump withdrew from the JCPOA in May 2018, and reimposed all measures the Deal had removed, including “two dozen institutions vital to Iran’s economy,” such as “its central bank and national oil company….”).\(^{1645}\) That was a “final and irreversible” stance, said \(\overline{\text{A}\text{y}a\text{t}o\text{l\text{a}h}}\) \(\text{A\text{r\text{i}l}\text{Khamenei}}.\(^{1646}\) It also was understandable, insofar as removing many of those sanctions was “inevitable if Iran is to export its oil, the biggest benefit it would receive for complying with the nuclear agreement and reining in its atomic program.”\(^{1647}\) However, the U.S. was loathe to drop sanctions against the IRGC, which it fingered for blame for Iran’s nefarious activities across the Middle East.

● **Turning Cameras Off**

   Days later, the \(\overline{\text{A}\text{y}a\text{t}o\text{l\text{a}h}}\)’s regime added another point: unless the U.S. lifted its sanctions, Iran might block certain additional IAEA inspections, namely, of Iran’s undeclared nuclear facilities, and snap (\(i.e.,\) unannounced) inspections of its declared sites, which Iran said were voluntary under the May 1997 Model Additional Protocol to the comprehensive safeguards agreements (CSAs) concluded between the IAEA and individual non-nuclear weapons states that (like Iran) are State Parties to the July 1968 NPT, and which Iran also said it had been allowing under as a goodwill gesture.\(^{1648}\) Iran

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\(^{1643}\) By no means was the January 2021 Iranian seizure of a Korean vessel the last such action by the Islamic Republic against foreign-flagged oil tankers. See, e.g., \(\text{Iran Seizes Two Greek Tankers Amid Row Over U.S Oil Grab},\) \(\text{REUTERS},\) 27 May 2022, www.reuters.com/world/middle-east/iran-summons-swiss-envoy-over-us-seizure-iranian-oil-isna-2022-05-27/.

\(^{1644}\) \(\text{Iran Increases Uranium Enrichment.}\)

\(^{1645}\) See Kasra Naji, \(\text{Iran Nuclear Deal: Shadow of Sabotage Hangs Over Critical Talks},\) \(\text{BBC NEWS},\) 13 April 2021, www.bbc.com/news/world-middle-east-56716472 (reporting: “More than 1,500 sanctions were imposed on Iran after President Trump withdrew from the agreement, many of them related to Iran’s nuclear activities. But a good number are also related to other issues – from alleged terrorist activities, to human rights violations, to Iran’s support for militias in neighbouring countries, and Iran’s development and testing of ballistic missiles. Iran insists that many of the U.S. sanctions under different headings are in essence nuclear-related and will have to go.”). [Hereinafter, \(\text{Iran Nuclear Deal: Shadow of Sabotage.}\)]

\(^{1646}\) See Daphne Psaledakis & Arshad Mohammed, \(\text{U.S. Tiptoes Through Sanctions Minefield Toward Iran Nuclear Deal},\) \(\text{REUTERS},\) 17 May 2021, www.reuters.com/world/middle-east/us-tiptoes-through-sanctions-minefield-toward-iran-nuclear-deal-2021-05-17/. [Hereinafter, \(\text{U.S. Tiptoes Through.}\)]

\(^{1647}\) \(\text{Quoted in Iran Takes “Final.”}\)

\(^{1648}\) \(\text{U.S. Tiptoes Through.}\)

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Note that “[u]nder a comprehensive safeguards agreement, the IAEA has the right and obligation to ensure that safeguards are applied on all nuclear material in the territory, jurisdiction or control of the State for the exclusive purpose of verifying that such material is not diverted to nuclear weapons or other nuclear
signed the *Additional Protocol* in December 2003, and *CSAs* date from 1974.\(^{1649}\) (Thus, only inspections of declared nuclear-related sites, which the IAEA regularly monitored, would continue.\(^{1650}\) Iran contended its move was to implement the *Majlis* passed on 1 December 2020 (discussed above).\(^{1651}\) And so, effective 23 February 2021, Iran ceased compliance with the *Additional Protocol*. The consequence was a diminution by 20%-30% in the IAEA’s “oversight capacity” in Iran, namely, unannounced ones concerning undeclared nuclear sites.\(^{1652}\) Fortunately, Iran said it would continue adhering to its *CSA*, which meant the IAEA would continue to have access to declared nuclear sites. And, Iran agreed with the IAEA to allow “necessary verification and monitoring activities for up to three months” (without defining precisely “necessary”) for three months.\(^{1653}\) Also

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> is not a stand-alone agreement, but rather a *Protocol* to a *Safeguards Agreement* that provides additional tools for verification. In particular, it significantly increases the IAEA’s ability to verify the peaceful use of all nuclear material in States with comprehensive safeguards agreements.

In May 1997, the IAEA Board of Governors approved the Model *Additional Protocol* contained in INFCIRC/540 (Corrected) and requested the Director General to use this Model as a standard text for the conclusion of *Additional Protocols* to *Comprehensive Safeguards Agreements*.

The Model *Additional Protocol* was designed for all States that have concluded any of the three types of *Safeguards Agreements* with the IAEA. States with … *CSAs* that decide to conclude and bring into force *Additional Protocols* must accept all provisions of the Model *Additional Protocol*. States with item-specific or voluntary offer agreements may accept and implement those measures of the Model *Additional Protocol* that they are prepared to accept.

... Under the *Additional Protocol*, the IAEA is granted expanded rights of access to information and locations in the States. For States with a *CSA*, the *Additional Protocol* aims to fill the gaps in the information reported under a *CSA*. By enabling the IAEA to obtain a much fuller picture of such States’ nuclear programs, plans, nuclear material holdings and trade, the *Additional Protocol* increases the IAEA’s ability to provide much greater assurance on the absence of undeclared nuclear material and activities in those States.

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\(^{1650}\) *International Atomic Energy Agency, IAEA and Iran: Chronology of Key Events*, (undated, updated as of June 2022), [www.iaea.org/newscenter/focus/iran/chronology-of-key-events](https://www.iaea.org/newscenter/focus/iran/chronology-of-key-events).


\(^{1653}\) *IAEA Strikes Deal* (quoting joint Iran-IAEA statement). That agreement, however, seemed to favor Iran:

> Under the plan, for the next three months Iran would hold recordings from monitoring equipment installed at sites by the IAEA but would not release the information unless
fortunately, in May 2021, Iran announced a one-month extension of such activities, including surveillance cameras at its sites.\textsuperscript{1654}

Unfortunately, that diminution worsened in June 2022. Iran announced it was turning off more cameras, after receiving criticism from the IAEA:

Iran has told the global nuclear watchdog it is removing 27 surveillance cameras from its nuclear facilities.

It comes after the International Atomic Energy Agency’s board censured Iran for not answering questions about uranium traces found at three undeclared sites.

IAEA Director General Rafael Grossi said 40 cameras would remain, but that the move posed a “serious challenge.”

Unless it was reversed within three to four weeks \textit{i.e.}, in July 2022, he warned, it would deal a “fatal blow” to the Iran Nuclear Deal.

\ldots the IAEA’s 35-nation Board of Governors approved a resolution that expressed “profound concern that the safeguards issues” related to the undeclared sites “remain outstanding due to insufficient substantive cooperation by Iran.” It also urged the country to “act on an urgent basis to fulfil its legal obligations.”

The U.S., U.K., France and Germany, which drafted the text, said in a Joint Statement that they welcomed “the overwhelming majority vote” in favour of the resolution, which they said sent “an unambiguous message to Iran.”

But the Iranian Foreign Ministry denounced it as a “political, unconstructive, and incorrect action.”

Spokesman Saeed Khatibzadeh tweeted that the Western powers had "put their short-sighted agenda ahead of [the] IAEA’s credibility,” and that they were “responsible for the consequences.”

“Iran’s response is firm & proportionate,” he added.
Russia’s mission to the IAEA, which voted against the resolution along with China, tweeted that the U.S. and its European allies did “not get the sensitivity of the moment,” adding: “Clearly #ViennaTalks taught them nothing: pressuring Tehran entails escalation.”

Iran has been withholding footage from the IAEA’s cameras for the past year in an attempt to increase pressure on the U.S. at the negotiating table.

… Mr. Grossi said he had been informed that Iran was removing “basically all” of the cameras and other monitoring equipment that were installed under a 2003 agreement on inspections, implemented months after Iran's secret nuclear sites were exposed.

“This, of course, poses a serious challenge to our ability to continue working there and to confirm the correctness of Iran's declaration under the [Deal]”….

The 40 cameras remaining were installed under a safeguards agreement that was completed by Iran after it signed the … NPT in 1970….

Mr. Grossi warned that the removal of the cameras would deal a “fatal blow” to the Nuclear Deal unless it was reversed in the next three to four weeks because the IAEA would no longer be able to maintain a “continuity of knowledge” about Iran’s nuclear activities and material.

…

Iran insists its nuclear program is entirely peaceful and that it has never sought nuclear weapons, but evidence collected by the IAEA suggests that until 2003, it conducted activities relevant to the development of a nuclear bomb.

The IAEA’s board voted to censure Iran after the Director General told a meeting … he was still unable to confirm the correctness and completeness of Iran’s declarations under the Comprehensive Safeguards Agreement (1974) and Additional Protocol (2003).

He said that was because Iran had “not provided explanations that are technically credible in relation to the Agency’s findings at three undeclared locations,” which he named as Turquzabad, Varamin, and Marivan.

According to the IAEA’s latest report, environmental samples taken by inspectors at the three locations in 2019 or 2020 indicated the presence of “multiple natural uranium particles of anthropogenic [man-made] origin.”

Mr. Grossi said Iran had also not informed the IAEA “of the current location, or locations, of the nuclear material and/or of the equipment
contaminated with nuclear material, that was moved from Turquzabad in 2018.”

The Director of the Atomic Energy Organisation of Iran (AEOI), Mohammad Eslami, insisted … his country had “no hidden or undocumented nuclear activities or undisclosed sites.”

Iran had maintained “maximum co-operation” with the IAEA, he said, adding that “fake documents” had been passed to the watchdog as part of a “maximum pressure” strategy provoked by Israel, its arch-enemy.

…

The IAEA’s latest report [dated May 2022] said Iran had 43.1kg (95 lbs) of uranium enriched to 60% purity, which Kelsey Davenport of the U.S.-based Arms Control Association said could be enriched to 90%, or weapons-grade, in under 10 days. However, Ms Davenport noted that “weaponization” – manufacturing a nuclear warhead for a missile – would still take one to two years.1655

Perhaps not, suggested two senior Iranian officials in July 2022: its Atomic Energy Chief (Mohammed Eslami) said, “…Iran has the technical ability to build an atomic bomb, but such a program is not on the agenda;” likewise, a Senior Advisor (Kamal Kharrazi) to the Supreme Leader (Āyatollāh Alī Khamenei) remarked, “Iran has the technical means to produce a nuclear bomb but there has been no decision by Iran to build one.”1656

Notwithstanding the debate about Iran’s break-out time, the JCPOA mandated those Protocol-based inspections, that is, snap inspections at any facility Iran had not declared to the IAEA.1657 Indeed, the U.S. took the position the Nuclear Deal obliged Iran to grant the IAEA the right to inspect any nuclear facility, anytime.1658 (Iran, predictably, said the U.S. walked away from the Deal, so it was not obliged to follow its strictures.) Unsurprisingly, the new U.S. President took the diametrically opposed stance: no talks, and no sanctions relief, until Iran stepped back from its violations.1659

President Biden made clear he sought to work with the EU and re-engage with Iran on the Nuclear Deal.1660 His Secretary of State, Antony Blinkin, said the period of the

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1657 See IAEA Strikes Deal.
1658 See Biden Administration Formally.
1659 Iran Nuclear Deal: U.S. Sanctions Will.
1660 See Katrina Manson, U.S. Offers to Join Negotiations on Iran’s Nuclear Program, FINANCIAL TIMES, 18 February 2021, www.ft.com/content/5e2e5f9a-f9f0-44d7-867e-8988025519f7?shareType=nongift.

The President also made his own “goodwill gesture,” namely the U.S. withdrew a demand from the Trump Administration [discussed earlier] last fall [2020] that the United Nations Security Council enforce international sanctions against Iran for violating the original 2015 agreement that limited its nuclear program.” Biden Administration Formally.
Trump Administration’s “maximum pressure” campaign was over. After all, the campaign failed – Iran was closer to building a nuke after Mr. Trump left office than when he entered. Iran was unmoved by the joint Euro-American effort: no talks without sanctions relief first. Mr. Biden proceeded with his the first military action of his Presidency – air strikes against Iranian proxies in Eastern Syria, near the Iraqi border, in response to their attacks on U.S. personnel in Iraq. Iran hit back through its Houthi proxy in Yemen. Eight ballistic missiles and 14 bomb-laden drones struck (but did no significant damage) to Ras Tanura (on the Gulf near Aramco’s headquarters at Dhahran) – Saudi Arabia’s giant oil giant oil storage yard and refinery, and the world’s largest oil terminal (namely, an offshore oil-loading facility and export port, called “Sea Island,” consisting of three connected offshore platforms at which super tankers dock), capable of daily shipment equivalent to nearly 7% of world oil demand.

However, the problem of sequencing – who goes first, Iran on compliance or America on sanctions relief – was not a surmountable impediment. Both sides could accommodate the other by taking a few steps sought by the other, i.e., some compliance for some sanctions relief in what would be a simultaneous, consecutive, gesture-for-gesture approach. (One Iranian official, albeit not speaking for the Foreign Ministry, hinted at this flexibility, saying on 4 March 2021 that “Iran would be ready to resume talks on the nuclear deal with the U.S. and other western powers if they provide a ‘clear signal’ that sanctions will be lifted within a year.”) More difficult, as the inspections spat suggested, was


1662 America is Back (quoting Secretary Blinkin: “We have a policy in recent years of so-called ‘maximum pressure’ on Iran that has not produced results. In fact, the problem has gotten worse. Iran is now much closer to being able to produce, on short order, enough fissile material for a nuclear weapon.”).


1666 Najmeh Bozorgmehr, Iran Ready To Resume Nuclear Talks If U.S. Lifts Sanctions Within A Year, FINANCIAL TIMES, 5 March 2021, www.ft.com/content/e9e58da-9225-422b-997-08d4bf1c9b1?shareType=nongift (quoting Mohsen Rezaei, “a senior Iranian conservative figure and a potential Presidential candidate … who led the Revolutionary Guards for 16 years:” “‘They can announce and reassure us that all sanctions imposed after the JCPOA … would be lifted in less than one year and tell us to go and negotiate this process…. We have to see every month during the talks that some sanctions which are of urgency to us are being lifted…. For instance, sanctions on financial transactions and restrictions that European banks have imposed should be lifted in the first month. Oil exports are also among our top priorities.’ He said other U.S. moves such as, for example, helping unfreeze billions of dollars of Iranian money held in overseas banks as an encouragement to start talks, would be akin to giving the republic ‘a candy.’”).
defining what constituted, and verifying, compliance assuming re-negotiated terms were agreed.  

As if to underscore this difficulty, in February 2021, the day after the President said he sought to return to the negotiating table, the IAEA announced a troubling finding: two unenriched Uranium particles at two undeclared nuclear facilities (albeit ones that presumably were inactive for roughly 20 years) to which Iran granted inspectors access for snap inspections in August and September 2020 after seven months of “stonewalling.” Indeed, “Iran … failed to explain traces of uranium found at several undeclared sites.”

Indirect negotiations – also called “proximate” talks or “shuttle diplomacy” in diplomatic lexicon – commenced in April 2021. America and Iran sent delegates to Vienna, where each side drew up lists of what they expected of the other – renewed compliance by Iran, and sanctions relief by America. That they did not meet face-to-face, and that they did not discuss Iran’s ballistic missile program or its Middle East foreign policy, was overshadowed by the fact they were, at least, in the same city talking through EU intermediaries. Or were they?

Iran cast doubt on this proposition, as its Deputy Foreign Minister, Abbas Araghchi, avowed:

Iran Fails to Explain Uranium Traces Found at Several Sites – IAEA Report, Reuters, 1 June 2021, www.reuters.com/article/us-iran-nuclear-iaea/iran-fails-to-explain-uranium-traces-found-at-several-sites-iaea-report-idUSKCN2DC1LG. [Hereinafter, Iran Fails to Explain.]

U.S. To Rejoin Talks on Iran Nuclear Deal, Financial Times, 2 April 2021, www.ft.com/content/3b08dde0-0ef0-452b-ba3d-7f98092aad55?shareType=nongift (reporting: “While no direct talks between officials from Washington and Tehran are anticipated, the presence of both countries at the same gathering would be an important step. The negotiations are expected to focus on how to achieve simultaneous action by the U.S. and Iran so that Trump-era sanctions can be removed at the same time as Tehran starts to re-comply with the limits imposed on its nuclear program by the accord....”) [hereinafter, U.S. To Rejoin Talks on Iran]; John Irish, Robin Emmott & Parisa Hafezi, U.S. Iran Head To Vienna For Indirect Nuclear Talks, Reuters, 2 April 2021, www.reuters.com/article/us-iran-nuclear-vienna/u-s-iran-to-go-to-vienna-for-indirect-nuclear-deal-talks-sources-idUSKBN2BPOP (reporting: “Iran and the U.S. will be in the same town, but not the same room,” a European diplomatic source said. A Western diplomat said a shuttle diplomacy approach would be adopted. The talks will seek to create negotiating lists of sanctions that the United States could lift and nuclear obligations Iran should meet....”).

The U.S. had been “open to direct talks,” but Iran preferred to “negotiate indirectly through the Europeans,” and the U.S. responded that this modality “presented a significant but not insurmountable task.”
“We will have no negotiations with Americans in Vienna, either directly or indirectly,” Abbas Araghchi was quoted as saying. The remaining parties to the nuclear accord “should persuade the United States any way they can” to lift all sanctions the Trump Administration imposed before Iran will undo its own breaches of the agreement, he said.1672

The avowal did not reflect reality, and thus did not reflect a unified position.1673 Tellingly:

Analysts disagree about why Iran has been willing to spend so heavily on a nuclear program that it claims is peaceful. Some view it as a matter of national pride. The more the Americans insisted that Iran should not have nuclear technology – or even nuclear knowledge – the more the nuclear program became a symbol of self-reliance and resistance to Western imperialism. Others see the program as Iran’s only bargaining chip in the effort to remove sanctions, some of which have been in place for decades. Still others believe that the Iranian regime needs a nuclear weapon – or at least the option of building one – to survive domestic unrest and intense geopolitical rivalries. The grisly death of the Libyan leader Muammar el-Qaddafi, who was overthrown with American help after he gave up his weapons program, serves as an unfortunate cautionary tale.1674

However, the statement itself seemed to be aimed at hardliners within Iran, reflecting discord with Iran’s government as to whether and how to proceed with the U.S. and/or concerns about upcoming summer 2021 Presidential election in Iran,1675 which resulted in victory (62% in his favor, but with a 48.8% turnout – the lowest in the history of the Islamic Republic) for the controversial hard-line candidate, Sayyid Ebrahim Raisi (1960-2024, President, 2021-2024).1676

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1673 Iran Nuclear Deal: Shadow of Sabotage (reporting: “The Iranian delegation is under strict orders from Supreme Leader Āyatollāh Āli Khamenei not to talk to the U.S. face-to-face. … The Iranian and the U.S. delegations are holed up in separate hotels that are situated about 100 m[eters] … across the street from each other. The EU’s deputy foreign policy chief is doing the shuttle diplomacy.”).
1675 See Najmeh Bozorgmehr, Iran: Nuclear Talks Intensify Domestic Power Struggle, FINANCIAL TIMES, 14 April 2021, www.ft.com/content/b7054f3e-3e7e-4e29-b2d3-99e9ce4a1c8a?shareType=nongift (observing: “The spectre of direct contact with the U.S. over the nuclear deal has intensified the power struggle in Tehran and further complicated Iran’s political scene ahead of presidential elections on June 18 which reformists fear will be dominated by hardliners and could see the lowest turnout in the country’s recent history. Such an outcome could limit the room for negotiation over the nuclear deal after the election. The poll comes as the various factions – hardliners, reformists, Revolutionary Guards, judiciary – all jostle to influence any succession battle that would follow the death of the 81-year-old supreme leader.”). [Hereinafter, Iran: Nuclear Talks Intensify.]
Indirect Negotiations

The answer came on 6 April 2020. Staying in different hotels in Vienna, American and Iranian negotiators started, on 9 April, speaking to – and through – the EU.\(^{1677}\) The U.S. indicated it understood it would have to remove sanctions the Trump Administration had imposed that were at variance with the JCPOA if it expected Iran to renew compliance with the Nuclear Deal. Iran welcomed that statement. And so, “constructive” indirect talks proceeded.\(^{1678}\) So, too, did the third largest oil importer in the world – India. India, which imports 85% of its oil, and which as of August 2018 had been Iran’s second biggest customer,\(^{1679}\) sought to purchase Iranian crude oil as soon as U.S. sanctions against such transactions were lifted.\(^{1680}\)

Conversely, Israel did not. It launched a successful cyberattack on the underground Natanz nuclear facility, in which Iran had just activated a cascade (cluster) of 164 new, advanced IR-6 centrifuges (and began testing new IR-9 centrifuges, which can enrich uranium 50 times faster than the IR-1 model, to which Iran is limited under the JCPOA).\(^{1681}\)
Presumably, Israel sought to derail both Iran’s Uranium enrichment and the negotiations. On 24 May came the damage report: the IAEA “verified … that 20 cascades, or clusters, of different types of centrifuges were being fed with uranium hexafluoride feedstock for enrichment,” whereas “before the explosion that figure was 35-37.”

The “undeclared ‘near war’” between the two thus “heat[ed] up,” as Iran vowed revenge. That revenge included increasing the purity level of its Uranium stockpile from 20% to 60% (which they achieved within four days), and then to 63%, replacing the centrifuges that were damaged in the cyberattack, plus installing 1,000 new centrifuges that are 50% stronger than those that were damaged. Ominously, IAEA enrichment plant was the target of ‘nuclear terrorism’ …, after initially reporting a power failure. … Israel has not commented, but public radio cited intelligence sources as saying it was a Mossad cyber operation. They said it had caused more extensive damage than Iran had reported. U.S. intelligence officials … [said] a large explosion had completely destroyed the independent internal power system that supplied the centrifuges inside the underground facility. They estimated it could take at least nine months to resume enrichment there.”]. [Hereinafter, Iran Vows Revenge.

The U.S. denied involvement in the attack, though it was unclear whether Israel provided the U.S. with advance knowledge, and if so, what the U.S. reaction was. See Michael Peel, Najmeh Bozorgmehr & Katrina Manson, U.S. Distances Itself from Alleged Attack on Iran’s Nuclear Site, FINANCIAL TIMES, 12 April 2021, www.ft.com/content/f90ebca1-ab73-4272-b30f-68367e0a55ae?shareType=nongift (reporting: “World powers have sought to distance themselves from an alleged attack on Iran’s main uranium enrichment facility that threatens to complicate talks to revive an international nuclear deal with Tehran. The U.S. denied involvement in the incident at the Natanz underground site, while Germany warned the episode could harm the nuclear accord negotiations. … News of the Natanz trouble emerged as Lloyd Austin, U.S. Defence secretary, began a trip to Israel. Austin also denied Washington was responsible.”).

Iran Fails to Explain.

Iran Vows Revenge (observing: “This is not the first time that Natanz has been the target of sabotage. Last July [2020], an above-ground centrifuge assembly plant was badly damaged by what Iranian officials said was a fire. In response, Iran began building a new structure underneath nearby mountains. Enrichment at the plant was previously disrupted by the Stuxnet computer virus, widely believed to have been created by the U.S. and Israel. The virus, which was discovered in 2010, changed the speeds at which the centrifuges spun and reportedly ruined almost 1,000 of them. Iran also accused Israel of being behind the assassination of its top nuclear scientist, Mohsen Fakhrizadeh [discussed earlier], last November.”).

And in recent months the countries have accused each other of being behind explosions that have damaged Israeli and Iranian commercial vessels.

Iran Vows Revenge. (reporting: “The Iranian Foreign Minister has said his country will ‘take revenge’ for an attack on an underground nuclear site, for which it has blamed Israel.”)


See Francois Murphy, Iran Has Enriched Uranium To Up To 63% Purity, IAEA Says, REUTERS, 11 May 2021, www.reuters.com/world/middle-east/iran-has-enriched-uranium-up-63-purity-iaea-report-says-2021-05-11/ (explaining: “Fluctuations at Iran’s Natanz plant pushed the purity to which it enriched uranium to 63%, higher than the announced 60% that complicated talks to revive its nuclear deal with world powers.”).

See Najmeh Bozorgmehr, Michael Peel & Henry Foy, Iran to Increase Uranium Enrichment in Blow to Nuclear Talks, FINANCIAL TIMES, 13 April 2021, www.ft.com/content/218bd3ad-c5ad-4990-bb15-dca90bdf7d0?shareType=nongift. The revenge also included an attack on an Israeli-owned cargo ship. See Farnaz Fassihi, David E. Sanger & William J. Broad, Iran Vows To Increase Uranium Enrichment After Attack on Nuclear Site, THE NEW YORK TIMES, 13 April 2021 www.nytimes.com/2021/04/13/world/middleeast/iran-nuclear-natanz.html?referringSource=articleShare
Director General Rafael Grossi observed: “A country enriching at 60 per cent is a very serious thing – only countries making bombs are reaching this level”…. “Sixty per cent is almost weapons grade, commercial enrichment is 2, 3 [per cent].”  

Iran persisted: in July 2021, the IAEA said Iran informed it “that UO₂ (Uranium Oxide) enriched up to 20% U-235 would be shipped to the R&D … laboratory at the Fuel Fabrication Plant in Esfahan, where it would be converted to UF₄ (Uranium Tetrafluoride) and then to Uranium metal enriched to 20% U-235, before using it to manufacture the fuel.”  

This move was consistent with the December 2020 law Iran’s Majlis passed “requiring the government to bring the metallic Uranium factory at the Isfahan Fuel Fabrication Plant on line within five months,” as well as to “produce[e] enriched Uranium with a 20% concentration of the most suitable isotope for nuclear fission, … U-235,” which “can be used in research reactors,” and with further enrichment to 90% or more, is weapons-grade."1691 As intimated earlier, in January 2021, “Iran began producing 20%-enriched Uranium … and the following month it started making uranium metal.”  

Thus, “the British, French and German Foreign Ministers said in a joint statement that they had ‘grave concerns’ about Iran’s [July 2021] decision,” and pointed out, “Iran has no credible civilian need for uranium metal R&D and production, which are a key step in the development of a nuclear weapon.”  

Iran’s move also seemed self-defeating. Bent on vengeance, Iran neglected its core weakness, namely, its economy. The IMF reported U.S. sanctions blighted that economy, contributing to a fall in GDP of 6% in 2018 and 6.8% in 2019.  

Moreover:  

Inflation rose from 8.2 per cent in May 2018 to 48.7 per cent … [in April 2021], according to official figures, and the national currency has lost its value by four times since then. The IMF estimate[d] that Iran’s gross official reserves declined from $122.5 bn in 2018 to just $4 bn in 2020, although this is disputed by the Central Bank.

(Quoting renting “Iran also attacked an Israeli-owned cargo ship off the coast of the United Arab Emirates …, the latest clash in its maritime shadow war with Israel. The attack was … reported to have caused little to no damage.”).


As a result, the number of Iranians experiencing extreme poverty has risen by five times to more than 20 million people, economic analysts say. Meanwhile, tens of billions of dollars of the country’s revenues are frozen and beyond reach in overseas banks due to sanctions making the system unable to support businesses. The pandemic has compounded the situation claiming more than 65,000 lives – the highest in the Middle East.\textsuperscript{1697}

Rationally, the strategy that would most serve the needs of the average Iranian would be direct talks to resurrect the JCPOA and end sanctions. But, little in Iranian-American relations was rational, and keeping them emotive was one, albeit cynical, ploy to deflect attention and blame.

The two principals, America and Iran, proceeded with their indirect negotiations seeking a text that would manifest a “compliance for compliance” agreement.\textsuperscript{1698} That was remarkable for several reasons, not the least of which was that their commitment to make an effort to restore the JCPOA, with appropriate revisions, showed there was daylight between America, on the one hand, and Israel and Saudi Arabia,\textsuperscript{1699} on the other hand. Biden Administration Iran policy would not be set in Jerusalem or Riyadh, regardless of their efforts to derail negotiations.\textsuperscript{1700} Rumors circulated a deal was in the offing,\textsuperscript{1701}

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\textsuperscript{1697} \textit{Iran: Nuclear Talks Intensify.} \\
\textsuperscript{1699} In respect of the Kingdom, it commenced direct talks in April 2021 “to contain tensions [especially in Yemen] at the same time as global powers have been embroiled in nuclear negotiations.” Ghaida Ghantous, \textit{As Iran Veers Right, Ties with Gulf Arabs May Hinge on Nuclear Pact}, REUTERS, 19 June 2021, \url{www.reuters.com/world/middle-east/iran-veers-right-ties-with-gulf-arabs-may-hinge-nuclear-pact-2021-06-19/}. That was because of “[a] perception that Washington was now disengaging militarily from the area under U.S. President Joe Biden [, which] has prompted a more pragmatic Gulf approach……” \textit{Id.} Bluntly put, “‘The Saudis have realised they can no longer rely on the Americans for their security … and have seen that Iran has the means to really put pressure on the kingdom through direct attacks and also with the quagmire of Yemen,’ [Jean-Marc] Rickli [, an Analyst at the Geneva Centre for Security Policy] said.” \textit{Id.} \\
\textsuperscript{1700} See Mehul Srivastava, Katrina Manson & Najmeh Bozorgmehr & Michael Peel, \textit{Israel’s Shadow Conflict Moves into the Light}, FINANCIAL TIMES, 16 April 2021, \url{www.ft.com/content/602f0b5b-7cc5-49be-a319-1602b82868ff?shareType=nongift} (reporting: “Iranian officials agree in private that Netanyahu’s intention is to derail the talks, while covert actions delay the nuclear program. ‘Israel has a record of destroying Iraqi and Syrian nuclear programs and has the self-defined mission to do the same with Iran’s but not through bombardment rather sabotage,’ said an Iranian hardliner. ‘It’s sending a message to the Americans that they don’t need to contain Iran through the talks and hence no need to lift the sanctions.’ A U.S National Security Council official said Washington and Tehran had a ‘common objective’ of returning to the nuclear accord. The Vienna talks were the best way to limit Iran’s nuclear ambitions and to ‘address the full range of concerns that we have with Iran’s activities in the region and beyond,’ the person added.”). \\
\textsuperscript{1701} See Maher Chmaytelli, Parisa Hafezi & Maher Chmaytelli, \textit{Washington Denies Iran State Media Report Saying Prisoner Swap Agreed}, REUTERS, 2 May 2021, \url{www.reuters.com/world/middle-east/iran-us-agree-prisoner-swap-release-frozen-funds-says-iranian-2021-05-02/} (reporting: “The United States on … [2 May 2021] denied a report by Iran’s state television that the arch-foes had reached a prisoner swap deal in exchange for the release of $7 billion frozen Iranian oil funds under U.S. sanctions in other countries. Iranian state television said … Tehran would free four Americans accused of spying in exchange for four Iranians held in the United States and the release of the frozen Iranian funds. The U.S. government
though considerable distance remained between (1) Iran’s desire to roll-back sanctions, including the un-freezing of freeze $20 billion of its oil revenues from accounts in countries as diverse as China, Iraq, and Korea, and (2) Iran’s willingness to accept nuclear restrictions so it would never attain a nuclear weapon. The formula – which sanctions to reverse in exchange for which limitations to accept – remained elusive.

After five rounds of negotiations – in the “basement of a luxury hotel” in Vienna, with “[t]he U.S. delegation … based in a hotel across the street as Iran refuse[d] face-to-face meetings” – there was no deal. When the sixth round ended on 20 June, there was no indication as to when – or whether – they would resume. Might they restart once President-Elect Raisi took office on 5 August?

On the one hand, on 11 June 2021, “Iran regained its vote in the U.N. General Assembly … after the United States enabled Tehran to use funds frozen in South Korea to pay some $16 million it owed to the world body.” (Iran had “lost its vote in the 193-member General Assembly in January because it was more than two years in arrears. It owed a total of more than $65 million, but paid the minimum amount needed to regain its vote.”) On the other hand, on 2 August, the U.S. (along with the U.K. and Israel) accused Iran of orchestrating an attack with one-way explosive drones on an Israeli-owned oil tanker, *MV Mercer Street*, in the Arabian Sea off the coast of Oman, resulting in the death of a British national and Romanian citizen. And, America expressed concern that denied that an agreement has been reached. Iran’s envoy to the United Nations, Majid Takht Ravanchi, said the report could not be confirmed, adding that Tehran has always called for a full prisoner exchange with Washington.

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1703 Francois Murphy, “*Intense* Iran Nuclear Talks Resume as Germany Calls for Rapid Progress”, REUTERS, 12 June 2021, [www.reuters.com/world/middle-east/intense-iran-nuclear-talks-resume-germany-calls-rapid-progress-2021-06-12/](www.reuters.com/world/middle-east/intense-iran-nuclear-talks-resume-germany-calls-rapid-progress-2021-06-12/).


1706 “Iran Regains U.N. Vote.”


Iran would not return to the JCPOA bargaining table unless the U.S. guaranteed it would never again withdraw from any renegotiated deal.1708

● China’s Role and Deadlock Again

Notably, the role China played in the negotiations appeared to shift, as the PRC sided entirely with Iran and slammed the U.S. for delaying in the removal of sanctions.1709

August 2021, www.bbc.com/news/world-middle-east-58061401 (explaining: “the MV Mercer Street, a medium-sized fuel tanker, was sailing without cargo off the coast of Oman on its way from Dar Es Salaam in Tanzania to the UAE refuelling port of Fujairah on the Gulf of Oman. The vessel is Liberian-flagged and Japanese-owned but operated by an Israeli-owned company, Zodiac Maritime. … [T]he tanker was struck by an explosive-laden Unmanned Aerial Vehicle, or drone, that exploded close to the bridge, damaging the nearby living quarters. Two people were killed – a Romanian and a British security guard - and after putting out a mayday distress radio call the tanker was then escorted to port by two U.S. Navy warships. … This is all part of what's been called ‘the shadow war’ between Iran and Israel. It's a dangerous game of tit-for-tat that includes Israel's suspected assassinations of Iranian nuclear scientists and its successful attempts to sabotage Iran's nuclear development programs.”).

1708  David E. Sanger, Lara Jakes & Farnaz Fassihi, Biden Promised to Restore the Iran Nuclear Deal. Now It Risks Derailment., THE NEW YORK TIMES, 31 July 2021, www.nytimes.com/2021/07/31/us/politics/biden-iran-nuclear-deal.html?referringSource=articleShare (observing: “The new President [Raisi] will not be the final word on whether the deal is restored. That judgment still belongs to Iran’s supreme leader, Ayatollah Ali Khamenei… And on … [28 July 202], the ayatollah echoed a key demand: that the United States provide a guarantee that it can never again walk away from the pact the way Mr. Trump did. ‘They once violated the Nuclear Deal at no cost by exiting it,’ Ayatollah Khamenei said. ‘Now they explicitly say that they cannot give guarantees that it would not happen again.’ In fact, Secretary of State Antony J. Blinken and Mr. [Robert] Malley [America’s lead negotiator] have said that in a democracy, there is no way to tie the hands of a future President and that the best way to preserve the deal is to show that it is working for both sides. ‘There is no such thing as a guarantee; that’s not in the nature of diplomacy,’ Mr. Malley said. ‘But we don’t have any intent – the President doesn’t have any intent – of spending all these months negotiating a return to the deal in order to then withdraw.’ … But the Biden Administration knows that whatever deal it strikes will be a political problem in Washington. In 2015, all Republicans and a good number of influential Democrats criticized the original accord as insufficiently tough. So, there is no way, officials say, they could abandon the threat of ‘snapping back’ sanctions if Iran fails to comply with its part of the bargain. ‘The problem is, in reality, the U.S. cannot disarm itself of one of the most powerful tools it has in its toolbox of statecraft,’” Mr. [Ali] Vaez [Director, Iran Project, International Crisis Group] said. And while the talks drag on, the Administration is confronting another reality: For the first time in years, international inspectors have very little idea of what is happening in the underground Natanz plant. The inspection teams have been barred from many facilities they once regularly visited, measuring enrichment levels and accounting for every gram of material produced. An agreement to keep cameras and sensors running lapsed in June [2020]. The Iranians suggest access to the equipment will be restored when an accord is reached, but there is no guarantee that inspectors will have access to the back footage.”).

Note that from an Iranian perspective, Mr. Malley’s reply (quoted above) was weak. First, America had spent several years (chronicled in a separate Chapter), not merely months, to negotiate the JCPOA, yet withdrew. Second, the U.S. could provide something akin to a guarantee to Iran by treating a renewed JCPOA as a treaty, which would pass under the solemn process of advice and consent from the Senate, and such a treaty could spell out clearly events of default, have a termination clause, and provisions penalizing a non-mutual withdrawal.

The U.S., in turn, considered imposing sanctions on China for its continued importation of oil from Iran. That was for good reason: Chinese refineries were the largest importers of Iranian oil, and in 2021, the monthly average of their imports of Iranian crude was 400,000-650,000 bpd, with almost 1 million in May. Fortunately, the two sides attempted to avert a clash through diplomatic negotiations that would lead to China curtailing its purchases of Iranian crude. Unfortunately, Iran found another market in which to raise oil revenues: Venezuela. Iran arranged a six-month (potentially renewable) swap contract that (1) would provide Venezuela “with a steady supply of condensate, which it needs to dilute output of extra heavy oil from the Orinoco Belt, its largest producing region” (because its “bituminous crude requires mixing before it can be transported and exported,” i.e., Iranian condensate would improve the quality of heavy, tar-like Venezuelan crude), and (2) “[i]n return, Iran will receive shipments of Venezuelan heavy oil that it can market in Asia.” And, in January 2022, China not only again

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For a set of 10 brilliant, wide-ranging articles on the relationship between China and Iran, see Special Section: Sino-Iranian Relations From Tentative Diplomacy to Strategic Partnership, LIII ASIAN AFFAIRS – JOURNAL OF THE ROYAL SOCIETY FOR ASIAN AFFAIRS number 1 (March 2022).

1710 See U.S. Weighs Crackdown on Imports of Iranian Oil, Nikkei Asia, 24 July 2021, https://asia.nikkei.com/Business/Markets/Commodities/US-weighs-crackdown-on-Chinese-imports-of-Iranian-oil (reporting: “The United States is considering cracking down on Iranian oil sales to China as it braces for the possibility that Tehran may not return to nuclear talks or may adopt a harder line whenever it does…. Washington told Beijing earlier this year its main aim was to revive compliance with the 2015 Iran Nuclear Deal and, assuming a timely return, there was no need to punish Chinese firms violating U.S. sanctions by buying Iranian crude…. That stance is evolving given uncertainty about when Iran may resume indirect talks in Vienna and whether incoming Iranian President-elect Ebrahim Raisi is willing to pick up where the talks ended on June 20 [2021] or demands a fresh start. ‘If we are back in the JCPOA, then there’s no reason to sanction companies that are importing Iranian oil,’ … [an unnamed U.S.] official … [said] …. If we are in a world in which the prospect of an imminent return to the JCPOA seems to be vanishing, then that posture will have to adjust,’ the official added.”). [Hereinafter, U.S. Weighs Crackdown.]

1711 See U.S. Weighs Crackdown on Imports.

See Arshad Mohammed & John Irish, Exclusive: U.S. Has Reached Out to China About Cutting Oil Imports from Iran, Officials Say, Reuters, 28 September 2021, www.reuters.com/business/exclusive-us-has-reached-out-china-about-cutting-oil-imports-iran-officials-say-2021-09-28/ (reporting: “Purchases of Iranian oil by Chinese companies are believed to have helped keep Iran’s economy afloat despite U.S. sanctions that are designed to choke off such sales to put pressure on Iran to curb its nuclear program. ‘We are aware of the purchases that Chinese companies are making of Iranian oil,’ said a senior U.S. official who spoke on condition of anonymity because of the sensitivity of the matter. ‘We have used our sanctions authorities to respond to Iranian sanctions evasion, including those doing business with China, and will continue to do so if necessary,’ he added. ‘However, we have been approaching this diplomatically with the Chinese as part of our dialogue on Iran policy and think that, in general, this is a more effective path forward to address our concerns,’ the official said. …. Commodity analytics firm Kpler estimates that year-to-date Chinese oil imports from Iran have averaged 553,000 barrels per day through August [2021].”)

1712 Deisy Buitrago, Marianna Parraga & Matt Spetalnick, Exclusive: Under U.S. Sanctions, Iran and Venezuela Strike Oil Export Deal, Reuters, 25 September 2021, www.reuters.com/business/energy/exclusive-under-us-sanctions-iran-venezuela-strike-oil-export-deal-sources-2021-09-25/ (also noting: “The deal could be a breach of U.S. sanctions on both nations, according to a Treasury Department email…. U.S. sanctions programs not only forbid Americans from doing business with the oil sectors of Iran and Venezuela, but also threaten to impose ‘secondary sanctions’ against any non-U.S. person or entity that carries out transactions with either countries’ oil companies. Secondary sanctions can carry a range of penalties against those targeted, including cutting off access to the U.S. financial system, fines, or the freezing of U.S. assets. Any ‘transactions with NIOC by non-U.S. persons are generally subject to secondary sanctions,’ the Treasury Department said…. It also said it ‘retains authority to impose sanctions
criticized America for its unilateral sanctions against Iran, but also launched the 25-year cooperation agreement it had signed with Iran in March 2021 to strengthen bilateral economic and political ties.\textsuperscript{1714} That agreement covered energy, as well as agriculture, cybersecurity, culture, and health care; notably, it also included infrastructure, thus bringing Iran into China’s BRI.

Not surprisingly, then, the negotiations did not resume in Summer 2021. Iran asked, and the U.S. refused, for America to unfreeze $10 billion Iranian assets.\textsuperscript{1715} About the only progress that did occur was Iran’s agreement, in September, to allow the IAEA to service its monitoring cameras at Iran’s nuclear sites.\textsuperscript{1716} Under the JCPOA, Iran agreed to monitoring additional areas of its nuclear program, such as making parts for centrifuges that enrich uranium, beyond those mandated under its basic legal obligations to the IAEA. In February 2021, Iran announced it was abandoning the supplemental monitoring scheme. “Concerned that without monitoring of those areas, Iran could secretly siphon off unknown quantities of equipment and material that could potentially be used to make a nuclear weapon,” the IAEA reached an agreement with Iran for the IAEA to continue servicing the equipment – but Iran abandoned that deal, too.\textsuperscript{1717} The IAEA cameras “must be serviced every three months to make sure its memory cards do not fill up and there are no gaps in the monitoring” – so-called “continuity of knowledge.”\textsuperscript{1718} In September, the three-month deadline passed, yet Iran granted the IAEA access to replenish the memory guards. Alas, that positive development “did little to resolve another issue between the IAEA and Iran – Tehran’s failure to explain uranium traces found at three undeclared former sites.”\textsuperscript{1719}

- Negotiations Resume Again

on any person that is determined to operate in the oil sector of the Venezuelan economy’…. U.S. sanctions are often applied at the discretion of the Administration in power.”).

The two countries appeared to implement the deal in October 2021. See Marianna Parraga & Deisy Buitrago, \textit{Iranian Supertanker Departing from Venezuela to Transport Heavy Oil}, \textit{REUTERS}, 16 October 2021, \url{www.reuters.com/business/energy/iranian-supertanker-departing-venezuela-transport-heavy-oil-2021-10-16/} (reporting: An Iran-flagged supertanker … was about to set sail from Venezuelan waters carrying 2 million barrels of heavy crude provided by [Venezuela’s] state-run oil firm \textit{PDVSA}…. The shipment is part of a deal agreed by \textit{PDVSA} and its [Iranian] counterpart … NIOC that exchanges Iranian condensate for Venezuela’s Merey crude. The swaps aim to ease an acute shortage of diluents that has cut Venezuela’s oil output and exports…. \textit{Dino I}, a … VLCC owned and operated by NIOC’s … NITC, finished loading the Venezuelan oil at \textit{PDVSA}’s Jose port…. The bilateral oil trade could be a breach of U.S. sanctions on both countries, the U.S. Treasury Department … [said]….\textsuperscript{1714})

\textsuperscript{1714} \textit{China Slams U.S. Sanctions on Iran as Cooperation Agreement Launched}, \textit{REUTERS}, 15 January 2022, \url{www.reuters.com/world/china/china-reaffirms-opposition-us-sanctions-iran-2022-01-15/} (also reporting “China firmly opposes unilateral sanctions against Iran, political manipulation through topics including human rights, and interference in the internal affairs of Iran and other regional countries.”).

\textsuperscript{1715} \textit{See Iran Asked U.S. to Unfreeze $10 Billion to Show Good Will, Iran Official Says}, \textit{REUTERS}, 2 October 2021, \url{www.reuters.com/world/middle-east/iran-asked-us-unfreeze-10-bln-show-good-will-iran-official-says-2021-10-02/}.

\textsuperscript{1716} \textit{See Francois Murphy, IAEA-Iran Agreement Raises Hopes for Fresh Nuclear Talks with U.S.}, \textit{Reuters}, 12 September 2021, \url{www.reuters.com/world/middle-east/iaea-chief-iran-talks-before-showdown-with-west-2021-09-12/}. [Hereinafter, \textit{IAEA-Iran Agreement Raises}.]

\textsuperscript{1717} \textit{IAEA-Iran Agreement Raises}.

\textsuperscript{1718} \textit{IAEA-Iran Agreement Raises}.

\textsuperscript{1719} \textit{IAEA-Iran Agreement Raises}.
Nonetheless, in November 2021, Iran agreed to recommence talks aimed at reviving the JCPOA, as well as (as Iran’s Chief Negotiator, Ali Baqeri Kani, put it), at “removal of unlawful and inhumane sanctions.”\textsuperscript{1720} The U.S. said it would attend, along with the other Nuclear Deal signatories, China, France, Germany, Russia, and the U.K. As an apparent goodwill gesture, in February 2022, the Biden Administration restored sanctions waivers whereby the President could grant exceptions to them for Iran’s civilian nuclear program.\textsuperscript{1721} That move seemed to be a “carrot.”

The “stick” (or one of them) was an indication from America’s Special Envoy for Iran, Robert Malley, the U.S. was “unlikely to strike an agreement with Iran to save the 2015 Iran Nuclear Deal unless Tehran releases four U.S. citizens Washington says it is holding hostage.”\textsuperscript{1722} While he:

repeated the long-held U.S. position that the issue of the four people held in Iran is separate from the nuclear negotiations, [he also] moved a step closer … to saying that their release was a precondition for a nuclear agreement.

“They’re separate and we’re pursuing both of them. But I will say it is very hard for us to imagine getting back into the Nuclear Deal while four innocent Americans are being held hostage by Iran….”\textsuperscript{1723}

Disingenuous rhetoric and political posturing? Perhaps. In the going-on-half-century of mistrust between America and Iran, discerning truth seemed a fool’s errand.

\textsuperscript{1721} See Najmeh Bozorgmehr & Andrew England, U.S. Restores Iran Sanctions Waivers for Civilian Nuclear Activity, FINANCIAL TIMES, 5 February 2022, www.ft.com/content/bf623f1b-f05b-4da8-91f4-a7d1e87131e5?shareType=nongift (reporting: “The U.S. has agreed to restore sanctions waivers related to Iran’s atomic activity, in what appeared to be a goodwill gesture ahead of crunch talks to save the 2015 nuclear accord designed to prevent the development of nuclear weapons. As a result of the agreement, Russian, Chinese, and European companies could receive waivers from the U.S. to engage in civilian nuclear activities. … The sanctions waiver would cover some nuclear projects, including the Arak heavy water reactor and Tehran Research Reactor, and allow export of Iran’s spent and scrap research reactor fuel.”); Humeyra Pamuk, U.S. Restores Sanctions Waiver to Iran with Nuclear Talks in Final Phase, REUTERS, 4 February 2022, www.reuters.com/world/middle-east/biden-administration-restores-sanctions-waiver-iran-nuclear-talks-final-phase-2022-02-04/ (reporting: President Joe Biden’s Administration … restored sanctions waivers to Iran to allow international nuclear cooperation projects.… The waivers had allowed Russian, Chinese, and European companies to carry out non-proliferation work to effectively make it harder for Iranian nuclear sites to be used for weapons development. The waivers were rescinded by the United States in 2019 and 2020 under former President Donald Trump, who pulled out of the nuclear agreement. … The activities [affected by possible sanctions waivers] … include redesign of Iran’s Arak heavy-water reactor, [and] the preparation and modification of its Fordow facility for stable isotope production, operations, training, and services related to its Bushehr nuclear power plant…. …”).
\textsuperscript{1723} [Hereinafter, Exclusive: Iran Nuclear Agreement Unlikely.]

Exclusive: Iran Nuclear Agreement Unlikely.
From the outset, the renewed negotiations were the proverbial “long shot” in terms of reinvigorating the JCPOA. On the one hand:

Iran’s Chief Nuclear Negotiator, Ali Bagheri Kani, said … Tehran had delivered two draft proposals to the remaining parties to the deal in Vienna, one on sanctions removal and the other on nuclear limitations.

Tehran said it will later provide a third draft proposal on the “mechanism and time of verification and issues related to receiving guarantees to prevent the re-withdrawal of the U.S. from the Nuclear Deal.”1724

That suggested Iran sought to be constructive. Yet, on the other hand, Iran (via its Tasnim News Agency) also said:

We believe that a deal is within reach if the U.S. government gives up its campaign of maximum pressure and the European parties show serious flexibility and political will in the talks.1725

In other words, against America’s “maximum pressure” campaign, Iran stuck to its “maximalist” position, insisting on sanctions relief before walking back any breaches. Regarding these developments in Iran, that is, intentional breaches:

Iran has started producing enriched uranium with more efficient advanced centrifuges at its Fordow plant dug into a mountain, … further eroding the 2015 Iran Nuclear Deal during talks with the West on saving it.

The announcement appeared to undercut indirect talks between Iran and the United States on bringing both fully back into the battered deal that resumed this week after a five-month break prompted by the election of hard-line President Ebrahim Raisi.

The … IAEA said Iran had started the process of enriching uranium to up to 20% purity with one cascade, or cluster, of 166 advanced IR-6 machines at Fordow. Those machines are far more efficient than the first-generation IR-1.

Underlining how badly eroded the Deal is, that pact does not allow Iran to enrich uranium at Fordow at all. Until now Iran had been producing enriched uranium there with IR-1 machines and had enriched with some IR-6s without keeping the product.


1725 U.S. Reluctance to Lift.
It has 94 IR-6 machines installed in a cascade at Fordow that is not yet operating, the IAEA said…

… [A]s a result of Iran’s move, the nuclear watchdog planned to step up inspections at … Fordow….\textsuperscript{1726}

To complicate the negotiations, Iran’s position included:

demanding a guarantee that no U.S. Administration would be able to unilaterally withdraw from the accord in the future and that all sanctions, not just those imposed by [President Donald] Trump, are lifted before it begins to reverse its nuclear gains. Experts say that while Iran’s concerns are understandable, they are unrealistic and it would be impossible for any U.S. Administration to make such guarantees.\textsuperscript{1727}

Essentially, these matters threatened to scupper the entire JCPOA simply by rendering it obsolete. In short, there was a point at which Iran had or would crisis the Rubicon, and entirely new treaty would be needed. Otherwise, the only remaining options – into which the U.S. was looking – might be military.\textsuperscript{1728}

\begin{itemize}
  \item Inching Toward Preliminary Deal?
  \end{itemize}

In February 2022, reports of a draft agreement circulated as to “how and to what extent to ease sanctions,” though “details remain[ed] up in the air,” and a “full return” to the JCPOA seemed “unlikely.”\textsuperscript{1729} Under the terms of the draft deal:

The first phase in a draft agreement now under consideration would involve Iran halting enrichment of uranium above 5% purity, with sanctions to be withdrawn after that, according to Reuters. Iran has denied this report.

\begin{itemize}
  \item \textsuperscript{1726} Francois Murphy & Parisa Hafezi, \textit{Iran Makes Nuclear Advance Despite Talks to Salvage 2015 Deal}, \textsc{Reuters}, 1 December 2021, \url{www.reuters.com/world/middle-east/iran-starts-enriching-with-advanced-machines-fordow-during-deal-talks-2021-12-01/}.
  \item \textsuperscript{1727} Katrina Manson, Andrew England & Najmeh Bozorgmehr, \textit{U.S. Commander Warns “Robust Range of Military Options” Exist to Deter Iran}, \textsc{Financial Times}, 10 December 2021, \url{www.ft.com/content/9b7d4d2e-ed35-4761-ad20-2f108538da40?shareType=nongift}.
  \item \textsuperscript{1728} See \textit{U.S. Commander Warns} (reporting: “The U.S. military commander for the Middle East has … [said] he has a ‘very robust range of military options’ to deter Iran, which has expanded its nuclear program and ballistic missile arsenal. ‘I think … Iran gravely underestimates us if they believe they’re going to be able to continue attacking and cause casualties in Iraq and Syria, and still be able to conduct nuclear negotiations with us without any effect,’ General Frank McKenzie, Centcom Commander, said…. … McKenzie described the threat from Iran as the region’s most significant and said recent overflights by U.S. strategic bombers in combination with allied fighter jets from Saudi Arabia, Israel, Bahrain, and Egypt was intended to send Tehran a message: ‘It assures your friends, and it makes your enemies and those who might potentially be your enemies worry a little bit,’ he said.”).
  \item \textsuperscript{1729} Hidemitsu Kibe, \textit{Prospect of Revived Iran Nuclear Deal Spurs Diplomatic Push}, \textsc{Nikkei Asia}, 19 February 2022, \url{https://asia.nikkei.com/Politics/International-relations/Prospect-of-revived-Iran-nuclear-deal-spurs-diplomatic-push}.
\end{itemize}
The implications of a revived deal that lifts economic sanctions would extend beyond the parties directly involved. South Korean banks have roughly $7 billion in Iranian assets frozen under American sanctions, and Tehran has repeatedly requested their return.

South Korea’s Ministry of Foreign Affairs has told Iran that it hopes to resolve the issue if the U.S. eases sanctions under a renewed agreement. The two sides held working-level talks Wednesday, involving representatives from Iran's central bank, petroleum ministry and foreign ministry, discussing the possibility of resuming oil trade if sanctions are lifted.

British Foreign Secretary Liz Truss on Monday told Iranian counterpart Hossein Amir-Abdollahian that the U.K. is urgently exploring repayment of 400 million pounds ($540 million at current rates) in debt to Iran.

The debt dates back to a 1970s arms sale to Shah Mohammad Reza Pahlavi, in which Tehran paid up front but London did not deliver the weapons before the shah was deposed in the 1979 revolution. The issue has been implicitly linked to the release of British-Iranian dual nationals detained in Iran.1730

However:

Going back to the 2015 deal in its original form would be difficult. That agreement aimed to keep Iran's breakout time -- the time needed to produce enough enriched uranium for a nuclear weapon -- to one year under monitoring by the International Atomic Energy Agency. This standard would have provided time to find a diplomatic solution if Tehran chose to pursue nuclear weapons development.

Iran has gained more know-how in uranium enrichment since then, and its current breakout time has been estimated at a matter of weeks. Lengthening it back to a year would not be realistic.1731

Of course, the U.S. and its allies had every incentive for a deal. They “face[d] the prospect of grappling with geopolitical challenges on three fronts – China, Russia, and Iran – as the three countries move closer economically and on security.”1732

On the eve of Russia’s February 2022 invasion of Ukraine, the JCPOA Parties appeared close to a deal, the key points in a draft text of which were as follows:

1. The U.S. would unfreeze billions of dollars in Iranian funds in South Korean banks, and the U.S. would release Iranian prisoners it held, including...

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1730 Prospect of Revived Iran.
1731 Prospect of Revived Iran.
1732 Prospect of Revived Iran.

(2) Iran would release American and other western prisoners it held (thus, with the first point, consummating a prisoner swap), including four Iranian-American dual nationals (notwithstanding the fact that under Iran’s Constitution, Iran does not recognize dual nationality), most of whom Iran held on “espionage and security-related charges.”\footnote{Iran Appears Ready to Swap.}

To be sure, these points were ambiguously worded, and did not represent the full resuscitation of the JCPOA.

Nor did the September 2023 agreement between American and Iran – whereby (1) Tehran released five dual U.S.-Iranian citizens from long imprisonments (as long as 2,898 days, \textit{i.e.}, nearly eight years\footnote{Michael D. Shear and Farnaz Fassihi, \textit{Iran Releases 5 Americans as U.S. Unfreezes Billions in Oil Revenue for Tehran}, \textit{THE NEW YORK TIMES}, 18 September 2023, \url{www.nytimes.com/2023/09/18/us/politics/iran-us-prisoner-release.html?smid=nytcore-ios-share&referringSource=articleShare}. [Hereinafter, \textit{Iran Releases 5 Americans}.]} in exchange for (2) Washington agreeing to release $6 billion of Iranian oil export revenues frozen in South Korean bank accounts (per U.S. sanctions) to a special Qatari fund Tehran could access for humanitarian items, and grant clemency too and release five Iranians jailed in the U.S. for violating U.S. sanctions against Iran – suggest a revised \textit{Nuclear Deal} was at hand.\footnote{See Bret Stephens, \textit{How Much Is An American Hostage Worth?}, \textit{THE NEW YORK TIMES}, 16 August 2023, \url{www.nytimes.com/2023/08/15/opinion/iran-hostage-swap.html?smid=nytcore-ios-share&referringSource=articleShare}. [Hereinafter, \textit{How Much Is}.]}


The unfrozen funds were transferred from Korea to Qatar via Switzerland. See Andrew England, Felicia Schwartz \& Bita Ghaffari, \textit{Iran Releases Prisoners in Swap Deal with U.S.}, \textit{FINANCIAL TIMES}, 18 September 2023, \url{www.ft.com/content/ed47bab4-f154-46e9-9ed8-9880dbcb9abb?shareType=nongift} (also observing: “For Iran, the unfreezing of the $6 bn will provide some vital hard currency as the country grapples with an economic malaise, with inflation soaring above 40 per cent.”).

Presumably, the intermediate wire transfer step was to be sure each side had fulfilled its pledge to release prisoners so neither side would be left empty-handed, \textit{i.e.}, “out the money and out the prisoners,” which could happen if the funds were unfrozen and transferred before both sides released the prisoners. With funds in an intermediary bank account, it is possible to verify the essential condition of a prisoner swap – that the prisoners to be swapped have cleared the airspace of the country in which they were imprisoned – has been fulfilled. \textit{But see} Andrew Mills, Humeyra Pamuk \& Parisa Hafezi, \textit{U.S.-Bound Plane Leaves Doha with Five Americans Freed by Iran}, \textit{REUTERS}, 18 September 2023, \url{www.reuters.com/world/south-korea-working-unfreeze-tehrans-funds-us-iran-detainee-deal-2023-09-18/} (reporting: “A plane sent by Qatar flew the five U.S. citizens and two of their relatives out of Tehran after both sides got confirmation the $6 billion was transferred from South Korea to Qatari accounts…” [Emphasis added.]) Whether Iran was the
linkage between hostage and nuclear negotiations, plus “announced fresh … sanctions targeting the former Iranian President Mahmoud Ahmadinejad and the Iranian Ministry of Intelligence for what … President Joseph R. Biden] said was their involvement in wrongful detentions.” 1737

Immediately the “Cold War-style” prisoner exchange deal engendered controversy about key aspects of the deal: 1738

Iranian officials have repeatedly declared they will spend their money as they wish. But [unnamed] sources involved in this process insist these funds will be strictly controlled.

“No funds will go into Iran,” they emphasized. “Only humanitarian transactions, including food, medicine, agriculture, paid to third party vendors, transaction by transaction.”

Sources … [said] this money was not part of Iranian assets frozen by sanctions. The money in South Korea, revenue from Iranian oil sales, had been available to Tehran for bilateral and non-sanctioned aid, but was not spent for various reasons including difficulties of currency conversion. 1739

Moreover, critics said the prisoner swap created a moral hazard problem, rewarding Tehran’s bad behavior of taking hostages to compel sanctions relief in a manner that would encourage more of it. 1740 Morever, even the Biden Administration admitted that while “financial sanctions and strict monitoring will prevent Iran from spending the money on

beneficiary of those accounts, in which case it would have had access to the funds immediately under the receiver finality rule in wire transfer law, whereby a credit to the beneficiary’s account at the beneficiary is final and irrevocable, was unclear). [Hereinafter, U.S.-Bound Plane Leaves Doha.] See also Iran Releases 5 Americans (reporting: “...[O]fficials at Iran’s Mission to the United Nations dismissed the criticism, saying that the timing of the American detainees’ release was conditional on the $6 billion arriving in the Doha bank account and that Iran did not control that process”); U.S.-Bound Plane Leaves Doha (reporting: “Biden aides argue the money belongs to Iran and is being transferred from restricted South Korean accounts to restricted Qatari accounts, where it can only be spent on food, medicine and other humanitarian items with U.S. oversight.”) (Emphasis added.)

All five prisoners held by Iran flew from Tehran to Doha; of the five prisoners the U.S. freed, two chose not to return to Iran. See U.S.-Bound Plane Leaves Doha.


1737 Iran Prisoner Swap: U.S. Citizens.
1738 Iran Releases 5 Americans.
1739 Iran Prisoner Swap: U.S. Citizens.
1740 See How Much Is (opining: “The [Biden] Administration argues that this costs U.S. taxpayers nothing because the money was Iran’s to begin with and that the Qataris will ensure that it will be spent only on food, medicine, and other basics. But money is fungible: Every dollar the Iranian regime doesn’t spend on basics can be used for other regime priorities, like buying surveillance technology from China, torturing women, funding terrorist proxies, and attacking American service members. … There is also precedent. Iran’s leaders have learned that an excellent way to erode American sanctions is to take more hostages. They’ve also learned to treat $1.2 billion as the baseline price for their eventual release.”).
anything except food, medicine and other humanitarian goods,” there was an opportunity
cost, because “the deal might free up money that Iran is already spending on those items
for other purposes.”1741 Those purposes – all averse to U.S. interests – could include its
nuclear and/or ballistic missile programs, and support for pro-Iranian non-state actors (e.g.,
Hezbollah).

How far would America go in lifting what Iran called “major” sanctions that had
crippled Iran’s economy?1742 America’s answer was expansive: on 12 October 2023, the
U.S. and Qatar agreed to deny Iran access to the $6 billion prisoner-swap funds, following
the attacks by Hamas on Israel that triggered a fifth war between those two adversaries,
because Iran backed Hamas.1743

Iran’s answer also was expansive, i.e., there was “disagreement over which U.S.
sanctions would be lifted if Iran agreed to limits on its nuclear activity,” because “Tehran
want[ed] all Trump-era sanctions lifted, including those related to alleged human rights
abuses and terrorism allegations, not just economic measures.”1744 Conversely, how far
would Iran go in reversing its many breaches of the JCPOA

Across all controversies was a basic issue of trust: “Iran … demanded legal
assurances that the United States will not exit the deal again, but Washington says it is
impossible for U.S. President Joe Biden to provide them.”1745 Iran could point to INARA,
under which “the Executive branch must give Congress the text of any accord with Iran
about its nuclear program within five days, opening a window for legislators to review and
vote on it if they wish.”1746 Iran also could cite the fact that in March 2022, “[f]orty-nine
of the 50 Republican U.S. Senators said … they will not back an emerging new nuclear
deal between Iran and world powers….1747 Against these Iran claimed it “had shown
flexibility in response by agreeing to ‘inherent guarantees.’”1748

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1741 Iran Releases 5 Americans.
1742 See Parisa Hafezi, Iran’s Raisi Calls on U.S. to Lift Sanctions to Revive Nuclear Deal, REUTERS, 21
February 2022, www.reuters.com/world/middle-east/significant-progress-seen-vienna-nuclear-talks-iran-
foreign-ministry-2022-02-21/ [Hereinafter, Iran’s Raisi Calls on U.S.] 
1743 See Michael Crowley & Alan Rappeport, U.S. and Qatar Deny Iran Access to $6 Billion From
1744 Andrew England & Najmeh Bozorgmehr, Russia Demands U.S. Guarantees Over Revival of Iran
Nuclear Accord, FINANCIAL TIMES, 6 March 2022, www.ft.com/content/d101bd66-da72-4432-abc5-
da217362bedb?shareType=nongift.
1745 Iran’s Raisi Calls on U.S.
1746 Patricia Zengerle & Arshad Mohammed, Analysis: U.S. Congress May Squawk Over a New Iran
Deal but is Unlikely to Block It, REUTERS, 17 February 2022, www.reuters.com/world/us-congress-may-
squawk-over-new-iran-deal-is-unlikely-block-it-2022-02-17/.
1747 Patricia Zengerle, U.S. Republican Senators Say They Will Not Back New Iran Nuclear Deal,
REUTERS, 14 March 2022, www.reuters.com/world/middle-east/us-republican-senators-say-they-will-not-
support-new-iran-nuclear-deal-2022-03-14/ (also reporting: “They [the 49 Republican Senators] pledged to
do everything in their power to achieve an agreement that does not ‘completely block’ Iran’s ability to develop
a nuclear weapon, constrain its ballistic missile program and ‘confront Iran’s support for terrorism.’”).
1748 Iran’s Raisi Calls on U.S.
Effect of Russia’s 24 February 2022 Invasion of Ukraine

At least, though, these points looked to be a step towards an updated version of it, one that might deal with the complex, technical rules to extend Iran’s break-out time to building a WMD. That is, at least until Russia invaded Ukraine on 24 February 2022, culminating an 8-year war it had launched in 2014 when Russia seized Crimea from Ukraine.

With Russia’s naked aggression against a sovereign nation, all bets were off as to whether America could, or would, collaborate with Russia, and its de facto ally, China, on the Iran Nuclear Deal. Russia’s post-invasion demands were confusing. They concerned an American guarantee that the sanctions the U.S. and its allies (e.g., the EU and U.K.) had imposed on Russia would not affect Russia’s operations in Iran. But what did that mean?

Did it mean operations concerning Russia’s duties under the JCPOA, or did it mean all Russian business transactions with Iran? The first, narrower scope was far less concerning than the second one:

Eleven months of talks to restore the [July 2015 Iran Nuclear] Deal which lifted sanctions on Iran in return for curbs on its nuclear programme have reached their final stages.

But they have been complicated by a last-minute demand from Russia for guarantees from the United States that Western sanctions targeting Moscow over its invasion of Ukraine would not affect its business with Iran.

… [T]he last big open question was whether Russia’s demands were manageably narrow and limited to nuclear cooperation spelled out in the agreement, as Moscow’s envoy to the talks [i.e., its top negotiator, Mikhail Ulyanov] has told other [JCPOA] Parties, or much broader, as Russian Foreign Minister Sergei Lavrov has described them.

… Western officials say there is common interest in avoiding a nuclear non-proliferation crisis, and they are trying to ascertain whether what Russia is demanding regards only its commitments to the Iran deal. That would be manageable, but anything beyond that would be problematic, they say.

The new agreement would lead to Russia taking in excess highly enriched uranium that would be taken out of Iran to bring Tehran back into compliance with the original Deal’s caps on the purity and amount of the enriched uranium it is stockpiling.
Rosatom, a state-run company formed by Russian President Vladimir Putin in 2007, is key to that and has still not been added to Western sanctions.\(^{1749}\) In other words, if Russia’s demand was limited to Rosatom not being sanctioned so that the company could transport highly-enriched Uranium from Iran to Russia, that was possible. The U.S. and its Allies could exempt Rosatom from the sanctions, or issue a waiver for it and provide the necessary licensing.

But, if Russia wanted a free hand for all its entities to trade and invest in Iran, then that was not possible.\(^ {1750}\) That certainly was what Foreign Minister Lavrov seemed to want:

… Russian Foreign Minister Sergei Lavrov complicated matters when he said Moscow wanted a guarantee from the United States that its trade, investment, and military-technical cooperation with Iran would not be hindered by sanctions imposed on Russia since it invaded Ukraine.

… Lavrov insisted on Moscow’s demand by telling Iranian Foreign Minister Hossein Amirabdollahian in a phone conversation that the revived nuclear deal should not allow for any discrimination between participants.\(^ {1751}\)

As France and other JCPOA Parties warned, that expansive position signalled Russia was clearly commingling the Ukraine and Iran issues, and trying to advantage itself by tearing a large hold in the sanctions regime.

Meanwhile, Iran expressed displeasure with Russia for potentially scuppering a nearly-complete deal to allow its re-entry into the JCPOA (or a modified version of it). So also did the U.S. and its allies, which stressed that notwithstanding their bitter opposition to Russia’s invasion of Ukraine, all of the JCPOA Parties shared a common interest in not seeing Iran develop a WMD. And, as Russia sorted out its position, Iran reiterated its “red lines.”

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\(^{1750}\) See Parisa Hafezi, Francois Murphy & John Irish, *Iranian Nuclear Talks Clouded by Russian Demands*, REUTERS, 7 March 2022, www.reuters.com/world/europe/iranian-nuclear-talks-clouded-by-russian-demands-2022-03-06/ (reporting: ""‘It is necessary to understand clearly what Moscow wants. If what they demand is related to the JCPOA, it would not be difficult to find a solution for it,’ said the [unnamed senior] Iranian official....’ ‘But it will be complicated, if the guarantees that Moscow has demanded, are beyond the JCPOA.’"). [Hereinafter, *Iranian Nuclear Talks Clouded*.]

\(^{1751}\) John Irish, Parisa Hafezi & Francois Murphy, *Iran Envoy Leaves as EU Says Time to Decide on Nuclear Talks*, REUTERS, 7 March 2022, www.reuters.com/world/middle-east/iran-shamkhani-says-tehran-is-evaluating-new-components-nuclear-talks-tweet-2022-03-07/ (also reporting: “Russia’s concerns about the impact of Western sanctions on its dealings with Iran follow a push by senior Iranian officials for deeper ties since hardliner Ebrahim Raisi became President last year [2021]. Iran’s top authority, Supreme Leader Āyatollāh Ali Khamenei, has called for closer ties with Russia due to his deep mistrust of the United States.”).
Iran has sought to remove all sanctions, and it wants guarantees from the United States that it will not abandon the agreement once more, after then-U.S. President Donald Trump walked out of the Deal in 2018 and re-imposed sanctions.

Diplomats have said until now that several differences still needed to be overcome in the talks, including the extent to which sanctions on Iran, notably its elite Revolutionary Guards, would be rolled back and what guarantees Washington would give if it were to again renege on the Deal.

Two Western officials said there was now a final text on the table and those issues had been resolved.1752

Iran demanded the U.S. remove its FTO designation against the IRGC.1753 And, Iran backtracked on what seemed to have been an agreed-upon sequencing of obligations:

A week ago [3 March 2022,] preparations were being made in Vienna for a … meeting to conclude an agreement bringing Iran back into compliance with the Deal’s restrictions on its rapidly advancing nuclear activities and bringing the United States back into the accord it left in 2018 by re-imposing sanctions on Tehran.

Then … Russian Foreign Minister Sergei Lavrov unexpectedly demanded sweeping guarantees that Russian trade with Iran would not be affected by sanctions imposed on Moscow over its invasion of Ukraine – a demand Western powers say is unacceptable and Washington has insisted it will not entertain.

Russia’s demand initially angered Tehran and appeared to help it and Washington move towards agreement on the few remaining thorny issues, diplomats said, but a sudden volley of public comments by Iranian officials including Supreme Leader [Āyatollāh] Alī Khamenei … suggested the wind had turned.

“U.S. approach to Iran’s principled demands, coupled with its unreasonable offers and unjustified pressure to hastily reach an agreement, show that US isn't interested in a strong deal that would satisfy both parties,” Khamenei’s top security official Alī Shamkhani said.…

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1752 Do Not Sabotage Iran Deal.
1753 See Andrew Mills & Ghaida Ghantous, U.S. Envoy Not Confident Iran Nuclear Deal is Imminent, REUTERS, 27 March 2022, www.reuters.com/world/middle-east/senior-adviser-irans-khamenei-says-nuclear-deal-with-world-powers-imminent-2022-03-27/ (also reporting: “The IRGC, created by the Islamic Republic’s late founder Āyatollāh Ruhollah Khomeini, is more than just a military force and has enormous political clout. It was placed under sanctions in 2017 and put on the FTO list in April of 2019. ‘IRGC is a national army and a national army being listed as a terrorist group certainly is not acceptable,’ said [Kamal] Kharrazi [a senior advisor to Iran’s Supreme Leader Āyatollāh Alī Khamenei]").
Shamkhani did not specify what the demands were but that there were any at all contradicted what four Western officials had said – that a final draft text had been agreed which only needed minor adjustments with the exception of the open question about Russia’s sweeping demand for guarantees.

The text does, however, include a similar but much narrower guarantee covering nuclear cooperation between Russia and Iran outlined in the agreement, diplomats said.

…

An Iranian official said … there were still two to three difficult questions to resolve and that Tehran was now also demanding a change in the sequencing of how an accord should be implemented.

Iran’s Foreign Minister Hossein Amirabdollahian appeared to suggest one of the stumbling blocks remained the extent to which sanctions on Iran’s elite Revolutionary Guards would be rolled back.

…

Iran has also said it wants guarantees that no future U.S. President will again abandon a Nuclear Deal.

Underscoring Iranian concerns, former U.S. Vice President Mike Pence said … that should Washington agree a new accord and were the Republicans to take power again, they would “rip up any new Iran Nuclear Deal on day one.”

Iran paved the way for sanctions relief by agreeing to help end a contentious nuclear investigation, removing one of the final hurdles to an atomic deal that could see Iranian oil return to markets by the third quarter [2022].

The agreement was announced … in Tehran between International Atomic Energy Agency Director General Rafael Mariano Grossi and Iran’s nuclear chief Mohammad Eslami. …

“We reviewed the outstanding issues and reached the conclusion to exchange necessary documents between the Atomic Energy Organization and the IAEA by May 21 [, 2022] at the latest,” Eslami said. “These issues should be resolved by the day of return to the Nuclear Deal.”

…

While the IAEA isn’t a formal party to the JCPOA, its inspectors guarantee that the agreement is being followed by verifying the amount of nuclear material in Iran. They discovered trace amounts of man-made uranium at several locations during a probe that was triggered by a cache of documents smuggled out of Iran by Israeli spies.

Likewise (as intimated above), the U.S. also stuck to its positions, such as “Tehran free[ing] four U.S. citizens, including Iranian-American father and son Baquer and Siamak Namazi.” And, it increased pressure on Iran by expanding its sanctions, namely, the SDN list to include persons involved in Iran’s ballistic missile program.

Yet, America had an additional incentive for an agreement: “The return [to world energy markets] of Iranian oil [with sanctions relief] would help replace Russian barrels lost as the United States and its allies … freeze out Moscow [i.e., ban imports of Russian oil], following the invasion and soften the impact on the West which is already struggling with high inflation.” In that respect, America’s incentive aligned with that of Iran’s business community:

Iran’s negotiators are under pressure at home to strike an agreement, particularly from the business community, as well as ordinary Iranians hit by the impact of the sanctions. Reform-minded analysts believe Russia’s

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1755 See Arshad Mohammed & Daphne Psaledakis, *U.S. Sanctions Target Suspected Suppliers to Iran Ballistic Missile Program*, Reuters, 30 March 2022, [www.reuters.com/world/us-issues-sanctions-over-iran-ballistic-missiles-treasury-2022-03-30/](www.reuters.com/world/us-issues-sanctions-over-iran-ballistic-missiles-treasury-2022-03-30/) (reporting: “Washington … imposed sanctions on a procurement agent in Iran and his companies and accused them of helping to support Tehran’s ballistic missile program following missile attacks by suspected Iran-backed proxies against countries in the region. … [T]he U.S. Treasury Department cited Iran’s March 13 [2022] missile attack on Erbil in Iraq and an ‘Iranian enabled’ Houthi missile attack on [18 March] against a Saudi Aramco facility as well as other missile attacks by Iranian proxies against Saudi Arabia and the United Arab Emirates. It accused the agent Mohammad Ali Hosseini and his network of companies of procuring ballistic missile propellant-related materials for the … IRGC unit responsible for research and development of ballistic missiles. Iran’s IRGC is subject to U.S. sanctions. A U.S. official … said the sanctions were unrelated to efforts to revive the Nuclear Deal under which Iran had limited its nuclear program to make it harder to develop a nuclear bomb – an ambition it denies – in return for relief from global economic sanctions. The sanctions freeze any U.S. assets of those targeted and generally bars Americans from dealing with them. Those that engage in certain transactions with them also risk being hit with sanctions…. The network of companies includes Iran-based Jestar Sanat Delijan and Sina Composite Delijan Co. Also sanctioned was P.B. Sadr Co, which the Treasury accused of acting on behalf of Parchin Chemical Industries, an element of Iran’s Defense Industries Organization also under U.S. sanctions.”). (Emphasis added.)

1756 See *Iranian Nuclear Talks Clouded*. 

1757 See *Iranian Nuclear Talks Clouded*. 

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invasion of Ukraine and the resultant rise in oil prices could benefit Iran and that the Islamic Republic should not let Moscow derail the talks.

But they also blame hardliners for what they see as capitulation to Moscow. “Putin sent the nuclear accord into a coma,” wrote Hamid Hosseini, a leading petrochemical trader in his personal channel on Telegram app.1758

So, it appeared negotiations were headed for a pause.

Pause they did, until renewed discussions in June 2022 in Doha suggested the improbability of an agreement:

“[Iran’s] vague demands, reopening of settled issues, and requests clearly unrelated to the JCPOA all suggests to us [the U.S.] … that the real discussion that has to take place is (not) between Iran and the U.S. to resolve remaining differences. It is between Iran and Iran to resolve the fundamental question about whether they are interested in a mutual return to the JCPOA,” … [an unnamed] senior U.S. official said.1759

That observation seemed fair enough, true of the U.S., too, and in keeping with a commonly observed phenomenon in international negotiations: until the domestic position of a party is settled, that party lacks the gravitas back home to commit to specific, enforceable provisions with a foreign party.

As Iran sorted out its position, Israel and the U.S. reaffirmed in an explicit manner their joint red line:

U.S. President Joe Biden and Israeli Prime Minister Yair Lapid signed a joint pledge on … [14 July 2022] to deny Iran nuclear arms, a show of unity by allies long divided over diplomacy with Tehran.

The undertaking, part of a Jerusalem Declaration crowning Biden’s first visit to Israel as President, came a day after he told a local TV station that he was open to “last resort” use of force against Iran – an apparent move toward accommodating Israel’s calls for a “credible military threat” by world powers.

“We will not allow Iran to acquire a nuclear weapon,” Biden told a news conference following the signing of the Declaration.

1758 Najmeh Bozorgmehr, Iran Nuclear Talks Should be Paused, Says EU’s Foreign Policy Chief, Financial Times, 12 March 2022, www.ft.com/content/7a0c9779-908a-4e25-9d96-9bbf69376e4f?shareType=nongift.
Washington and Israel have separately made veiled statements about possible pre-emptive war with Iran – which denies seeking nuclear arms – for years. Whether they have the capabilities or will to deliver on this has been subject to debate, however.

… [The new] statement reaffirmed U.S. support for Israel’s regional military edge and ability “to defend itself by itself.” Widely believed to have the Middle East’s only nuclear arms, Israel sees Iran as an existential threat.

“The United States stresses that integral to this pledge is the commitment never to allow Iran to acquire a nuclear weapon, and that it is prepared to use all elements of its national power to ensure that outcome,” the statement added.

Lapid cast this posture as a way of averting open conflict.

“The only way to stop a nuclear Iran is if Iran knows the free world will use force,” he said after the signing ceremony.1760

Notably, “[t]he Jerusalem Declaration further committed the United States and Israel to cooperating on defence projects such as laser interceptors, as well as mixed-use technologies, including artificial intelligence and quantum technology.”1761

**Iran Rejects EU Final Text**

A glimmer of hope for resurrecting a modified JCPOA emerged in August 2022. The EU presented Iran with what it called a final text. Iran’s reply was as follows:

A European Union proposal to revive the 2015 Iran nuclear deal ‘can be acceptable if it provides assurances’ on Tehran’s key demands, the state news agency IRNA said …, quoting a senior Iranian diplomat.

The EU said … it had put forward a “final” text following four days of indirect talks between U.S. and Iranian officials in Vienna.

A senior EU official said no more changes could be made to the text, which has been under negotiation for 15 months. …

IRNA quoted the unidentified Iranian diplomat as saying Tehran was reviewing the proposal. “Proposals by the EU can be acceptable if they provide Iran with assurance on the issues of safeguards, sanctions, and guarantees,” the diplomat said.


1761 *U.S., Israel Sign Joint Pledge.*
The Islamic Republic has sought to obtain guarantees that no future U.S. President would renege on the deal if it were revived, as then-President Donald Trump did in 2018 and restored harsh U.S. sanctions on Iran. It seemed unlikely President Joe Biden could “provide such ironclad assurances as Iran sought,” not only “because the deal is a political understanding rather than a legally binding treaty,” but also because he would face a political firestorm in the November 2022 and November 2024 elections.

The accumulated pressure of sanctions had mixed results on Iran. Iran remained “the holder of the world’s No. 2 natural gas and No. 4 crude reserves,” hence Iranians were “largely shielded from energy prices that soared following Russia’s [24 February 2022] invasion of Ukraine.” But, “the costs of key imported foods … [were] elevated by the war, and soared higher in May when the government stopped providing importers with heavily subsidized foreign currency.” Thus, inflation was at 52.5% in June 2022 (compared with June 2021). So, in August 2022, Iran dropped its demand the U.S. remove the “FTO” label from the IRGC.

However, Iran did not back down from military skirmishes in the Gulf with the U.S. Navy. And, Iran accelerated the pace of enriching Uranium hexafluoride (UF₆):

The first of three cascades, or clusters, of advanced IR-6 centrifuges recently installed at the underground Fuel Enrichment Plant (FEP) at Natanz is now enriching, … [a confidential IAEA Report said, the latest underground site at which the advanced machines have come onstream.]

Diplomats say the IR-6 is its most advanced model, far more efficient than the first-generation IR-1 – the only one the [July 2015 Iran Nuclear] Deal lets it enrich with.

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1764 A Sick Economy is Forcing.

1765 A Sick Economy is Forcing.

1766 See A Sick Economy is Forcing.

For more than a year Iran has been using IR-6 centrifuges to enrich uranium to up to 60% purity, close to weapons-grade, at an above-ground plant at Natanz.

Recently it has expanded its enrichment with IR-6 machines at other sites. Last month a second IR-6 cascade at Fordow, a site buried inside a mountain, started enriching to up to 20%.

… [In its Report, the IAEA] wrote: “On 28 August 2022, the Agency verified at FEP that Iran was feeding UF₆ enriched up to 2% U-235 into the IR-6 cascade … for the production of UF₆ enriched up to 5% U-235.”

…

Of the two other IR-6 cascades installed at the Natanz FEP, one was undergoing passivation with depleted UF₆, a process that is carried out before enrichment proper begins, and the other had yet to be fed with any nuclear material, the agency said.

…

Its installation of advanced machines at underground sites like Natanz and Fordow, however, could be a signal to any power that might want to attack it if there is no agreement [to resurrect the JCPOA], since it is unclear that airstrikes on those sites would be effective.1768

The indirect talks between America and Iran, which by August 2022 had dragged on for 16 months, had become theatre. It was as if the two sides were unwilling actors in play of their own making that they wanted to end but were twistedly co-dependent in continuing indefinitely.

IV. Iran’s Break Out Time Accelerates

● IAEA Reports

The theatre (discussed above) was dangerous, a play that could end in tragedy. That was evident from an IAEA update issued on 6 September 2022:

Iran’s stock of uranium enriched to up to 60%, close to weapons-grade, has grown to enough, if enriched further, for a nuclear bomb, a report by the United Nations nuclear watchdog showed….

Passing that threshold is a milestone in the unravelling of the 2015 Nuclear Deal between Iran and world powers, which capped the purity to which Iran was allowed to enrich uranium at 3.67%, well below the 20% it achieved before the Deal and the roughly 90% that is weapons grade.

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Washington’s withdrawal from the deal under then-President Donald Trump and its reimposition of sanctions against Tehran that had been lifted under the deal prompted Tehran to breach the Deal’s nuclear restrictions.

“Iran now can produce 25 kg (of uranium) at 90% if they want to,” a senior diplomat said in response to … [the new] International Atomic Energy Agency Report …, when asked if Iran had enough material enriched to 60% for one bomb.

The Report said Iran’s stock of uranium enriched to 60% and in the form of uranium hexafluoride, the gas that centrifuges enrich, was estimated to be 55.6 kg, an increase of 12.5 kg from the previous quarterly Report.

It would take Iran roughly three to four weeks to produce enough material for a bomb if it wanted to, the diplomat said, adding that it would take the IAEA two to three days to detect a move in that direction. Iran denies intending to.1769

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1769 Francois Murphy, Iran Has Enough Uranium Near Weapons-grade for a Bomb, IAEA Report Shows, Reuters, 7 September 2022, www.reuters.com/world/middle-east/irans-near-weapons-grade-uranium-stock-grows-probe-stuck-iaea-reports-2022-09-07/ (also reporting: “One stumbling block in … [the ongoing indirect] talks … has been Iran’s continued failure to explain the origin of uranium particles found at three undeclared sites. Iran has been calling at the talks for the IAEA’s years-long investigation into the issue to be scrapped. Western powers and the IAEA, however, say Iran has a duty to clear up the issue as a signatory of the nuclear Non-Proliferation Treaty and the issue has nothing to do with the 2015 Deal.”).

Notably, in September 2022, the U.S. relaxed certain sanctions against Iran, but for reasons that had nothing to do with the JCPOA:

The U.S. Treasury Department … issued guidance expanding the range of internet services available to Iranians despite U.S. sanctions on the country, amid protests around Iran following the death of a 22-year-old woman in custody.

Officials said the move would help Iranians access tools that can be used to circumvent state surveillance and censorship, but would not entirely prevent Tehran from using communications tools to stifle dissent, as it did by cutting off internet access for most citizens on Wednesday.

“As courageous Iranians take to the streets to protest the death of Mahsa Amini, the United States is redoubling its support for the free flow of information to the Iranian people,” Deputy Treasury Secretary Wally Adeyemo said.

“With these changes, we are helping the Iranian people be better equipped to counter the government’s efforts to surveil and censor them.”

Public outrage in Iran over Amini’s death … showed no sign of abating after days of protests in Tehran and other cities, with protesters torching police stations and vehicles …, and reports of security forces coming under attack.

Amini, a Kurdish woman, was arrested by the morality police in Tehran for wearing “unsuitable attire” (concerning her hijab), and fell into a coma while in detention. The authorities have said they would investigate the cause of her death.
Internet monitoring group NetBlocks … said a new mobile internet disruption has been registered in Iran, where access to social media and some content is tightly restricted. NetBlocks reported “near-total” disruption to internet connectivity in the capital of the Kurdish region,…, linking it to the protests.

Washington has long provided some internet-related exceptions to its sanctions on Iran, but … [the] update to the General License seeks to modernize them, the Treasury said.

The new license includes social media platforms and video conferencing and expands access to cloud-based services used to deliver virtual private networks (VPNs), which provide users with anonymity online, and other anti-surveillance tools.…

The license also continues to authorize anti-virus, anti-malware and anti-tracking software, the Treasury said, and removes a previous condition that communications be “personal” to ease compliance for companies.

Asked how the expanded license would help Iranians if their government again shuts down internet access, a State Department official also briefing reporters said Iran’s government would still have “repressive tools for communication.”

The new [General] License makes it “easier for the Iranian people to confront some of those oppressive tools,” the official said. “It doesn’t mean that they don’t exist anymore.”


Following unrelenting, nationwide, deadly protests, in December 2022, Iran appeared to be disbanding the morality police. See Siavash Ardalan & Marita Moloney, *Uncertainty Over Iran’s Morality Police After Official’s “Disbanded” Remarks*, BBC News, 5 December 2022, www.bbc.com/news/world-middle-east-63850656 (also noting: “Iran has had various forms of ‘morality police’ since the 1979 Islamic Revolution, but the latest version – known formally as the Guidance Patrol (Gasht-e Ershad) – is currently the main agency tasked enforcing Iran’s Islamic code of conduct. They began their patrols in 2006 to enforce the dress code which also requires women to wear long clothes and forbids shorts, ripped jeans and other clothes deemed immodest.”). What was clear was the breadth and depth of anti-regime sentiment among young Iranians:

“Just because the government has decided to dismantle morality police it doesn’t mean the protests are ending,” one Iranian woman told the BBC World Service’s Newshour program.

“Even the government saying the hijāb is a personal choice is not enough. People know Iran has no future with this government in power. We will see more people from different factions of Iranian society, moderate and traditional, coming out in support of women to get more of their rights back.”

Another woman said: “We, the protesters, don’t care about no hijāb no more. We’ve been going out without it for the past 70 days.

“A revolution is what we have. Hijāb was the start of it and we don't want anything, anything less, but death for the dictator and a regime change.”
Iran essentially confirmed the IAEA Report: in November 2022, it announced it began producing Uranium at 60% purity at the underground Fordow facility. That level of purity meant Iran was “one short, technical step away from weapons-grade levels of 90%,” and “[n]on-proliferation experts … warned … Iran … [possessed] enough 60%-enriched uranium to reprocess into fuel for at least one nuclear bomb.”

Id. Despite this apparent disbandment, the U.S. slapped additional sanctions on Iranian officials responsible for the latest crackdown. Daphne Psaledakis, U.S. Slaps Sanctions on Iran Officials Over Protest Crackdown, REUTERS, 21 December 2022, www.reuters.com/world/us-slaps-new-sanctions-iranian-officials-over-protest-crackdown-2022-12-21/ (reporting: “The U.S. Treasury Department … said it imposed sanctions on Mohammad Montazeri, Iran’s Prosecutor General, accusing him of directing courts in September [2022] to issue harsh sentences to many arrested during protests. … Also designated was Iranian company Imen Sanat Zaman Fara, which the Treasury said manufactures equipment for Iran’s Law Enforcement Forces, including armored vehicles used in crowd suppression. Washington also imposed sanctions on two senior officials of Iran’s Basij Resistance Forces, a militia affiliated with the Revolutionary Guards that has been widely deployed during the crackdown, and two … IRGC officials.”). Within Iran, a Sunnite leader stated that torture of the protestors was un-Islamic. See Top Iranian Sunni Cleric Says Torture of Protestors Un-Islamic, REUTERS, 6 January 2023, www.reuters.com/world/middle-east/top-iranian-sunni-cleric-says-torture-protesters-un-islamic, (reporting: “‘If someone does not accept the accusation, they torture him to accept it. Confessions under coercion and the beating of the accused have no place in Sharī’a … and our country’s Constitution,’ Molavi Abdolhamid Ismaeelzahi said in a Friday prayers sermon. Ismaeelzahi is based in Zahedan, capital of the impoverished Sistan-Baluchistan province, home to Iran’s Baluch minority. Authorities have reportedly pressured him by banning him from traveling abroad and restricting his travels and contacts within Iran.”).

In a subsequent development implicating the Islamic Law of blasphemy, Tehran tossed out its French Institute:

One of the more than 30 cartoons posted on Charlie Hebdo’s website depicts Āyatollāh Khamenei clinging to a giant throne above raised fists of protestors. Another depicts a woman urinating on the Supreme Leader. The front cover is a cartoon of a line of clerics walking into a naked woman’s vagina with the message: “Mullahs, go back to where you came from.”

The women-led protests against Iran’s clerical establishment erupted in September [2022] following the death in custody of a woman who was detained by morality police for allegedly wearing her ḥijāb, or headscarf, “improperly.”

Authorities have portrayed the protests as foreign-backed “riots” and responded with lethal force.

So far, at least 516 protesters have been killed and 19,260 others arrested…. Two of those detained were executed last month after trials that human rights groups said were gross miscarriages of justice.

Of particular importance in the acceleration of the break-out time was Iran’s use of sophisticated centrifuges:

Iran is rapidly expanding its ability to enrich uranium with advanced centrifuges at its underground plant at Natanz and now intends to go further than previously planned, a confidential U.N. nuclear watchdog report … [said].

While indirect talks between Iran and the United States on reviving the 2015 Iran nuclear deal have stalled, Tehran has brought onstream an ever-larger number of advanced centrifuges the deal bans it from using to produce enriched uranium.

These machines are far more efficient than the first-generation IR-1, the only centrifuge that the [July 2015 Iran Nuclear Deal] lets Iran use to grow its stock of enriched uranium. Iran has been adding them particularly at two underground sites at Natanz and Fordow that may be designed to withstand potential aerial bombardment.

At the underground Fuel Enrichment Plant (FEP) at Natanz, … [the IAEA] ad hoc report to member states showed Iran has quickly completed the installation of seven cascades, or clusters, of advanced centrifuges that were either not finished or at a very early stage of installation….

Iran has also informed the IAEA it plans to add an extra three cascades of IR-2m machines at the FEP, on top of the 12 already announced and now installed….

Of those three extra IR-2m cascades, installation has already started on two of them…. 

Iran recently installed three cascades of advanced IR-6 centrifuges at the underground … FEP at Natanz that came onstream soon afterwards. … [T]he IR-6 is Iran’s most advanced centrifuge.

Those seven cascades, one of IR-4 centrifuges and six of IR-2m machines, were fully installed but not yet enriching.1771

The diminution of Iran’s break-out time, from over one year under the JCPOA restrictions, to hardly one month following the Trump Administration’s withdrawal, seemed clear proof positive of the folly of that withdrawal.1772

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1772  Yet another controversy developed in October 2022 that imperiled further the JCPOA negotiations: the U.S. and its Allies said Iran supplied Russia with drones and ballistic missiles for Russia’s war against
Ukraine, and that these shipments violated the 2015 U.N. Security Council Resolution 2231, which was “linked to Iran’s nuclear accord, [and] bars Iranian transfers of certain military technologies.” *Ukraine War: U.S. Says Iranian Drones Breach Sanctions*, BBC NEWS, 18 October 2022, www.bbc.com/news/world-europe-63294698 (also reporting: “The U.S. agrees with the French and British assessment that the drones violate UN Security Council Resolution 2231, the U.S. State Department said. … ‘It is our belief that these UAVs that were transferred from Iran to Russia and used by Russia in Ukraine are among the weapons that would remain embargoed under 2231,’ said Vedant Patel of the State Department.”) (The 24 February 2022 Russian invasion of Ukraine, and consequent waves of sanctions, are discussed in separate Chapters.) Iran openly admitted it had arrangements to send missiles to Russia, but denied they violated U.N. sanctions:

Iran has promised to provide Russia with surface-to-surface missiles, in addition to more drones, two senior Iranian officials and two Iranian diplomats told Reuters, a move that is likely to infuriate the United States and other Western powers.

A deal was agreed on Oct. 6 [2022] when Iran’s First Vice President Mohammad Mokhber, two senior officials from Iran’s powerful Revolutionary Guards and an official from the Supreme National Security Council visited Moscow for talks with Russia about the delivery of the weapons.

“(...) the Russians had asked for more drones and those Iranian ballistic missiles with improved accuracy, particularly the Fateh and Zolfaghar missiles family,” said one of the Iranian diplomats....

A Western official briefed on the matter confirmed it, saying there was an agreement in place between Iran and Russia to provide surface-to-surface short range ballistic missiles, including the Zolfaghar.

One of the drones Iran agreed to supply is the Shahed-136, a delta-winged weapon used as a “kamikaze” air-to-surface attack aircraft. It carries a small warhead that explodes on impact.

Fateh-110 and Zolfaghar are Iranian short-range surface-to-surface ballistic missiles capable of striking targets at distances of between 300 km and 700 km (186 and 435 miles).

The Iranian diplomat rejected assertions by Western officials that such transfers breach a 2015 U.N. Security Council Resolution [2231].

“Where they are being used is not the seller’s issue. We do not take sides in the Ukraine crisis like the West. We want an end to the crisis through diplomatic means,” the diplomat said.

Ukraine has reported a spate of Russian attacks using Iranian-made Shahed-136 drones in recent weeks. Iran’s Foreign Ministry … dismissed as baseless reports of Iran supplying drones and other weapons to Russia for use in Ukraine, while the Kremlin … denied its forces had used Iranian drones to attack Ukraine.

Asked if Russia had used Iranian drones in its campaign in Ukraine, Kremlin spokesman Dmitry Peskov said the Kremlin did not have any information about their use.

“Russian equipment with Russian nomenclature is used,” he said. “All further questions should be directed to the Defense Ministry.”

The Ministry did not immediately reply to a request for comment.


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Thus, September 2022 proved to be when the last indirect negotiations occurred to revive the July 2015 Iran Nuclear Deal. Iran rejected a draft agreement that all other JCPOA signatories had accepted. The parties fractured over Iran’s supply to Russia of drones for use in the war Russia had launched against Ukraine in February 2022.

In January 2023, the EU, led by France and Germany, plus the U.K., set plans to designate the IRGC (or, at least, certain regional groupings of the Guards) as a terrorist organization. That would mean yet more sanctions on Iran – and put a new Deal further away. The following month, the U.S. DOC, specifically BIS, created an Iran Foreign Direct Product (FDP) Rule and applied it to any item in Categories 3-5 or 7 of the CCL (as well as to any item listed in its Supplement Number 7) that was the direct product of certain U.S. origin technology or software. Under the FDP Rule (analogous to the one for Russia and Belarus, discussed in a separate Chapter), exports to Iran of most foreign manufactured goods that use U.S.-origin software or technology as part of their manufacturing processes were restricted.

Contemporaneously, the IAEA confirmed Iran had enriched Uranium to the 83.7% purity level at its underground Fordow facility. Iran said that figure was due to “unintended fluctuations.” Nevertheless, Iran’s break-out time thus had decreased

Chafing under Western economic sanctions, Iran’s rulers are keen to strengthen strategic ties to Russia against an emerging, U.S.-backed Gulf Arab-Israeli bloc that could shift the Middle East balance of power further away from the Islamic Republic.

The top commander of Iran’s Revolutionary Guards, Hossein Salami, said last month [September] some of the “world’s major powers” are willing to purchase military and defense equipment from Iran.


Not surprisingly, in January 2023, OFAC put on its SDN list six executives and board members of Iran’s Qods Aviation Industries (QAI), as well as the Director of Iran’s Aerospace Industry Organization who had led Iran’s ballistic missile program. See U.S. Department of the Treasury, Office of Foreign Assets Control, Notice of OFAC Sanctions Action, 88 Federal Register number 7, 1627-1629 (11 January 2023), www.govinfo.gov/content/pkg/FR-2023-01-11/pdf/2023-00376.pdf. SDN designations continued, for example, in March 2023 with respect to Iran’s drone program. See U.S. Department of the Treasury, Office of Foreign Assets Controls, Iran-related Designations; Non-Proliferation Designations (21 March 2023), https://ofac.treasury.gov/recent-actions/20230321 (adding as SDNs 4 entities and 3 individuals located in Iran and Turkey, linked to Iran’s manufacture of UAVs.)

1773 Henry Foy, Najmeh Bozorgmehr & Andrew England, EU to Consider Listing Iran’s Revolutionary Guards as Terrorists, FINANCIAL TIMES, 29 January 2023, www.ft.com/content/49545fc1-e318-43c9-9bfd-142a4e3b65e4?shareType=nongift.

1774 See U.S. Department of Commerce, Bureau of Industry and Security, Export Control Measures Under the Export Administration Regulations (EAR) To Address Iranian Unmanned Aerial Vehicles (UAVs) and Their Use by the Russian Federation Against Ukraine, 88 Federal Register number 38, 12150-12155 (27 February 2023), www.govinfo.gov/content/pkg/FR-2023-02-27/pdf/2023-03930.pdf


1776 Iran Nuclear: IAEA Inspectors Find.
dramatically, from 12 months to 12 days.\footnote{Iran Nuclear: IAEA Inspectors Find (reporting: “Top U.S. Defense Department official Colin Kahl told a Congressional committee hearing … this so-called ‘breakout time’ had been shortened from 12 months to ‘about 12 days.’“)} That was unsurprisingly, given Iran had been “openly enriching Uranium to 60% purity” for the previous two years, and 90% purity was the level for weapons-grade Uranium.\footnote{Iran Nuclear: IAEA Inspectors Find.}

Ongoing domestic and worldwide protests against the Islamic Republic regime also lessened the probability of a resurrected JCPOA further away. Shirin Ebadi, winner of the 2003 Nobel Peace Prize intoned that Iran’s “revolutionary process” was “irreversible” and ultimately would cause the collapse of the Islamic Republic.\footnote{Parisa Hafezi, Nobel Laureate Ebadi Says Iran’s “Revolutionary Process” is Irreversible, REUTERS, 3 February 2023, www.reuters.com/world/middle-east/nobel-laureate-ebadi-says-irans-revolutionary-process-is-irreversible-2023-02-03/. [Hereinafter, Nobel Laureate Ebadi Says.]} She counselled against any renewal of the JCPOA, so as to avoid strengthening the government and putting off its demise. The protestors had every economic incentive to continue their demonstrations: Iran’s Statistic Center reported inflation had “soared to over 50%, the highest level in decades,” and youth unemployment “remain[ed] high with over 50% of Iranians being pushed below the poverty line.”\footnote{Emma Farge, Iran Violations May Amount to Crimes Against Humanity, U.N. Expert Says, REUTERS, 20 March 2023, www.reuters.com/world/middle-east/iran-violations-may-amount-crimes-against-humanity-un-expert-2023-03-20/ (reporting: “Iran’s authorities have committed violations in recent months that may amount to crimes against humanity, a U.N.-appointed expert told the Human Rights Council …, citing cases of murder, imprisonment, enforced disappearances, torture, rape, sexual violence and persecution. Addressing the Geneva-based council, Javaid Rehman, Special Rapporteur on Iran, said he had evidence that Amini died ‘as a result of beatings by the state morality police.’ Iran’s state coroner has said she died from pre-existing medical conditions, not blows to the head and limbs. Rehman, an independent expert, added that the scale and gravity of crimes committed by authorities as part of the repression following her death ‘points to the possible commission of international crimes, notably the crimes against humanity.’”).} And, in March 2023, perhaps they were emboldened by the opinion of a U.N. expert that the response of the regime to their protests amounted – possibly – to crimes against humanity.\footnote{Nobel Laureate Ebadi Says.}

The dysfunctional half-century pattern of two nations in a death grip of each other continued. In April 2023, the U.S. seized a vessel for its alleged Iran-origin cargo. Iran retaliated, in a predictable way, seizing an entire vessel:

U.S. authorities ordered a tanker of Iranian crude oil to redirect towards the U.S. …, in a move officials believe was the trigger for Iran’s decision to capture a U.S.-bound tanker….

… [T]he U.S. had intervened to summon a ship loaded with Iranian crude, originally destined for China, as Washington looks to step up enforcement of sanctions on Tehran. Iran’s navy unsuccessfully tried to pursue the tanker after it began its latest journey.
The ... U.S. Department of Justice seized the tanker, the *Suez Rajan*, under a Court order with co-operation from at least one company involved with the vessel. The *Suez Rajan* has been the subject of scrutiny since it was accused last year [2022] of taking on board a cargo of Iranian oil, then intended for China, from another ship near Singapore. ...

The ... U.S. action towards the *Suez Rajan* shines a new light on Iran’s decision to capture the *Advantage Sweet*, a U.S.-bound tanker of Kuwaiti crude that was chartered by Chevron.

A U.S. official said ... [Iran’s] “seizure appears to be in retaliation for a prior U.S. seizure of Iranian oil, which Iran recently attempted to get back but failed.”

... The U.S. interest in the vessel arose because the ship is owned by Fleetscape, an affiliate of U.S.-based Oaktree Capital. That contrasts with the so-called “ghost fleet” of vessels usually used to move Iranian oil. Those ships’ ownership is shrouded in secrecy, making it difficult to bring claims.

At the time of the 2022 claims, Fleetscape said all operational decisions were made by Empire Navigation, the vessel’s Greek operators. ...

... The *Suez Rajan* began its current voyage, up the Malacca Strait and then west across the Indian Ocean, on April 7 [, 2023]. Its current location is unclear..., it last broadcast its position on the evening of April 22 as it was heading south-west past Madagascar towards the Cape of Good Hope.

The *Advantage Sweet Suezmax* tanker that Iran seized was operating under a short-term charter for Chevron, one of the largest U.S. oil companies. Its crew, all Indian nationals, are now being held by Iran. It was taken in the Gulf of Oman east of the Hormuz Strait....Vessels and crew seized by Iran in the past have eventually been released, but often not for several months.1782

When, pray tell, might reasonably minded (and thus probably younger) people take charge of what their “elders” have utterly mucked up? As a corollary question, when might governments on the Indian Subcontinent and other third-countries stand up for their expatriate crews? Sometimes. the best advice legal counsel can give, exasperatedly, is for all sides to grow up, and thereby wise up.

In June 2023, Āyatollāh Khamenei avowed, “There is nothing wrong with the agreement (with the West), but the infrastructure of our nuclear industry should not be touched....,” and Iran stuck to its position that sanctions relief were a pre-condition to any

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renewal of the JCPOA.1783 The “agreement” to which the Supreme Leader referred was one in which Iran would (1) cease Uranium enrichment beyond 60% purity (i.e., well below the 90%-weapons grade level), (2) stop attacking (through its proxies) American contractors in Iraq and Syria (3) enhance its cooperation with IAEA inspectors, (4) terminate ballistic missile sales to Russia, and (5) free three Iranian-American prisoners. In return, the U.S. would (1) refrain from tightening sanctions, (2) drop efforts for U.N. and IAEA resolutions against Iran, (3) cease seizures of oil-bearing foreign tankers, and (4) unfreeze billions of dollar-denominated Iranian assets that Iran could use for humanitarian purposes. One sticking point was reluctance (especially by the U.S.) to call item (4) ransom money for item (5).

Manifoldly, such an agreement would be nowhere near full restoration of an updated June 2015 Iran Nuclear Deal. Rather, it would be a freeze on hostilities since the U.S. pulled out of the JCPOA. That sub-par outcome had a political benefit, though: aside from needing the Āyatollāh’s blessing, it would not be an accord subject to Congressional approval.

Yet even that outcome seemed beyond reach. In December 2023 joint statement “France, Germany, Britain, and the United States … condemned an increase by Iran in the production rate of highly enriched uranium of up to 60% purity, close to the level used for nuclear weapons fuel.”1785 Said the Allies: (1) “The production of high-enriched uranium by Iran has no credible civilian justification,” (2) “These decisions … represent reckless behavior in a tense regional context” [including the Fifth Israel-Hamas War, which began on 7 October 2023], and (3) “Tehran already has enough uranium of 60% purity, if enriched to 90%, to make three nuclear bombs, according to the IAEA’s theoretical definition.”

1786 France, Germany, U.K. Iranian support for Yemen-based Houthi forces, who repeatedly attacked (with drones and missiles) merchant ships transiting through the Red Sea and Bab Al-Mandab Strait, was an occasion for yet more U.S. sanctions:

The United States targeted Iranian and Houthi commanders and a vessel that shipped more than $100 million in Iranian commodities to businesses in China in sanctions announced on … [27 February 2024].

Mohammad Reza Falahzadeh, deputy commander of Iran’s Islamic Revolutionary Guard Corps-Qods Force …, and Ibrahim al-Nashiri, a member of Yemen’s Houthi militia, were designated under the sanctions….

… The Iranian military has provided weapons and intelligence support to the Houthis that support the group’s attacks on international shipping in the Red Sea….
Part Seven:

TRADE SANCTIONS: RUSSIA CASE STUDY

U.S. Hits Iran with New Sanctions Targeting Commanders, Shipping, REUTERS, 27 February 2024, www.reuters.com/world/us-hits-iran-with-new-sanctions-targeting-commanders-shipping-2024-02-27/. Among the other sanctions targets were (1) the “Cap Tees Shipping Co., Ltd, which owns and operates a vessel used to ship Iranian commodities that were sold to support both the Houthis and the IRGC-QF,” and (2) “two companies that run a vessel that shipped more than $100 million in Iranian commodities to businesses in China on behalf of Iran’s Defense Ministry.” Id. All of them were listed as SDNs by OFAC.
Chapter 22

RUSSIA SANCTIONS:
WAVES ONE, TWO AND THREE
(FEBRUARY 2022)\footnote{1787}

I. Russia’s 24 February 2022 Invasion of Ukraine

Not even the most farsighted policymaker in Moscow could have foreseen that Russia would go from a resource-rich, middle-income country well-integrated into the world trading system following its August 2012 WTO accession (discussed in a separate Chapter) to the most heavily sanctioned nation on earth. Russia took that mantle from North Korea and Iran thanks to the monstrous decision of its President, Vladimir Vladimirovich Putin (1952-, President, 2000-2008, 2012-) to invade Ukraine on 24 February 2022. His pretexts – the Ukraine had no authentic history of being a sovereign nation, that NATO and EU eastward expansionism toward and into Ukraine threatened Russia’s security interests, and it needed de-Nazification – was offensive poppycock.\footnote{1788}

\footnote{1787} Documents References:
(1) Havana (ITO) Charter Preamble, Article 99
(2) GATT Article XXI
(3) Relevant provisions in FTAs

This Chapter draws upon Raj Bhala, Waves of Russian Sanctions: American and Allied Measures, Indian and Chinese Responses, and Russian Countermeasures, 14 TRADE, LAW AND DEVELOPMENT number 2, 353-453 (Winter 2022).\footnote{1788}

For an explanation of why President Putin used the “de-Nazification” excuse, see Anton Troianovski, Why Vladimir Putin Invokes Nazis to Justify His Invasion of Ukraine, THE NEW YORK TIMES, 17 March 2022, www.nytimes.com/2022/03/17/world/europe/ukraine-putin-nazis.html?referringSource=articleShare (reporting: “The ‘Nazi’ slur’s sudden emergence shows how Mr. Putin is trying to use stereotypes, distorted reality, and his country’s lingering World War II trauma to justify his invasion of Ukraine. The Kremlin is casting the war as a continuation of Russia’s fight against evil in what is known in the country as the Great Patriotic War, apparently counting on lingering Russian pride in the victory over Nazi Germany to carry over into support for Mr. Putin’s attack. ‘This rhetoric is factually wrong, morally repugnant and deeply offensive,’ scholars of genocide and Nazism from around the world said in an open letter after Mr. Putin invaded. While Ukraine has far-right groups, they said, ‘none of this justifies the Russian aggression and the gross mischaracterization of Ukraine.’ … Mr. Putin, in a speech …, used the us-versus-them language of a dictator to proclaim that Russian society needed a ‘self-purification’ from the pro-Western ‘scum and traitors’ in its midst. Many believe that Mr. Putin’s stated determination to ‘denazify’ Ukraine is code for his aim to topple the government and repress pro-Western activists and groups. It is an echo of how he has used Russian remembrance of the nation’s suffering and victory in World War II to militarize Russian society and justify domestic crackdowns and foreign aggression. Ukrainians have closed ranks behind Mr. Zelensky, however, causing Mr. Putin to escalate the brutality of his war. Mr. Putin’s ‘denazification’ mission increasingly means that he is determined to ‘destroy all Ukrainians,’ the country’s Information Minister, Oleksandr Tkachenko, wrote…. … It may seem hard to fathom that regular Russians could accept Mr. Putin’s comparison of neighboring Ukraine – where millions of Russians have relatives and friends – to Nazi Germany, the country that invaded the Soviet Union at the cost of some 27 million Soviet lives.”).

As to President Putin’s claim the U.S. and its Allies promised Russia that NATO would not expand eastward, that, too was utterly false. To the contrary:
President Vladimir V. Putin and other Russian officials have asserted that Mr. Baker ruled out NATO expansion into Eastern Europe when he served as President George H.W. Bush’s top diplomat. The West’s failure to live up to that agreement, in this argument, is the real cause of the crisis now gripping Europe as Mr. Putin demands that NATO forswear membership for Ukraine as the price of calling off a potential invasion.

But the record suggests this is a selective account of what really happened, used to justify Russian aggression for years. While there was indeed discussion between Mr. Baker and the Soviet leader Mikhail S. Gorbachev in the months after the fall of the Berlin Wall about limiting NATO jurisdiction if East and West Germany were reunited, no such provision was included in the final treaty signed by the Americans, Europeans, and Russians.


When President George H.W. Bush sat down with Soviet President Mikhail Gorbachev to negotiate the peaceful end of the Cold War and the reunification of Germany, former Under Secretary of State Robert Zoellick … was in the room where it happened.

During the 1990 summit, Zoellick says President Gorbachev accepted the idea of German unification within the North Atlantic Treaty Organization, based on the principle that every country should freely choose its own alliances.

“I was in those meetings, and Gorbachev has [also] said there was no promise not to enlarge NATO,” Zoellick recalls. Soviet Foreign Minister, Eduard Shevardnadze, later president of Georgia, concurred, he says. Nor does the treaty on Germany’s unification include a limit on NATO enlargement. Those facts have undermined one of Russian President Vladimir Putin’s justifications for invading Ukraine – that the United States had agreed that former Warsaw Pact nations would never become part of the North Atlantic security alliance.

…

Zoellick vividly recalls the White House meeting he attended nearly three decades ago in which Bush asked Gorbachev if he agreed with the Conference on Security and Cooperation in Europe principle that nations are free to ally with others as they see fit. When Gorbachev said yes, he says, the Soviet leader’s “own colleagues at the table visibly separated themselves.”

Sensing the import of the possible breakthrough, he says a colleague at the meeting, Robert Blackwill, sent him a note checking what they had heard and asking if they should ask Bush to repeat the question. “Gorbachev agreed again,” Zoellick recalls, to the principle that Germany could choose to enter NATO.

“The reality was that, in 1989-90, most people, and certainly the Soviets, weren’t focusing on whether the Eastern European countries would become part of NATO,” Zoellick says. Knowing Soviet and Russian diplomacy, he believes Moscow would have demanded assurances in writing if it believed the U.S. had made such a promise. And even in 1996, when President Bill Clinton welcomed former Warsaw Pact nations to join NATO, he says that, “[o]ne of the German diplomats involved told me that as they discussed the enlargement with the Russians, no Russian raised the argument that there had been a promise not to enlarge.”

But if the West never gave the promise Putin has used to explain his decision to invade Ukraine, what does Zoellick think motivates the Russian president’s decision to inflict death and destruction on one of Russia’s nearest neighbors? “Putin does not see Ukraine
Following the 9-10 November 1989 fall of the Berlin Wall and collapse of the Soviet Union, Ukraine voted in 1991 (via an August Declaration of Independence, and a December referendum and Presidential election in which 92% of Ukrainians favored independence), not to integrate with Russia. By 1996, “Ukraine had returned all of its nuclear warheads to Russia in exchange for economic aid and security assurances, and in December 1994, Ukraine became a non-nuclear weapon state-party to the 1968 ... NPT.” In contrast, in 2014 the President Putin ordered the invasion and annexation of Ukraine’s southern territory on the Black Sea, Crimea. Ukraine’s fantastically courageous President, the lawyer-turned-comedian Volodymyr Oleksandrovych Zelenskyy (1978-, President, 2019-), was Jewish, and several of his relatives perished in the Holocaust.

The truth was Mr. Putin sought to rebuild the U.S.S.R., particularly by rectifying what from his perspective was the most painful loss of all former Soviet Republics, Ukraine. After all, save for Russia itself, Ukraine was the largest (by population) and most industrialized Soviet Republic, as well as a vital source of wheat. The Russian President simply could not accept that the Ukrainian people, following their March 2014 “Euromaiden Protest” and consequent “Revolution of Dignity,” turned their back on pro-Russian authoritarianism and embraced western-style democracy.

The three-front attack by Russian forces – from the East, in the ethnic Russian Ukrainian regions of Donetsk and Luhansk, from the North, via Belarus, which was run by

as an independent and sovereign state,” he says. “He has a view of Russian history where the Rus [the medieval ancestors of the people who came to form Russia, Belarus, and Ukraine] began in Kyiv. He believes that they are all Russians, living in a greater Russia. And I think at age 69, Putin feels that this is a question not only of Russian history, but his place in Russian history.”

Zoellick says that when Putin’s earlier attacks in the Crimea and country’s eastern regions failed to halt Ukraine’s drift towards the West, the Russian leader believed he had no other choice but to invade. “That’s his motivation. And I think we need to be aware that he’s going to double down. The resilience and resolve of the Ukrainian people to resist has been a surprise to him and everybody else. I don’t think he’s going to ultimately be successful. In addition to today’s brutal battles, Russia faces a difficult occupation and insurgency, even if it can seize cities and territory.”

Jeff Neal, “There Was No Promise Not to Enlarge NATO,” HARVARD LAW RECORD, 16 March 2022, https://today.law.harvard.edu/there-was-no-promise-not-to-enlarge-nato/.

Mr. Gorbachev passed away on 30 August 2022. See Quintin Peel, Mikhail Gorbachev, Last Soviet Leader, 1931-2022, FINANCIAL TIMES, 30 August 2022, www.ft.com/content/6493bdf9-bdd7-4e73-a8e3-484c00f06f1a?shareType=nongift. For an entertaining account of Pizza Hut’s Russian experience involving him and his granddaughter, see Ben Tobias, What a Pizza Hut Ad Says About Gorbachev – and Russia, BBC NEWS, 31 August 2021, www.bbc.com/news/world-europe-62736976.


David Kimball, Ukraine, Nuclear Weapons, and Security Assurances at a Glance, ARMS CONTROL ASSOCIATION, Fact Sheets & Briefs (February 2022), www.armscontrol.org/factsheets/Ukraine-Nuclear-Weapons (also noting: “[a]t the time of Ukraine’s independence from the Soviet Union in 1991, Ukraine held the third largest nuclear arsenal in the world, including an estimated 1,900 strategic warheads, 176 ... ICBMs, and 44 strategic bombers.”).
an intensely pro-Russian autocrat, Alexander Grigoryevich Lukashenko (1954-, President, 1994-), and from the South, via Crimea – was supposed to conclude in 96-hours with a clear Russian victory. Thanks to three factors, that did not happen. First and most importantly, the Ukrainian people, led by President Zelensky, fought like hell to defend their country. Second, though NATO avoided direct engagement with Russian forces so as to avoid triggering a Third World War, it supported Ukraine in every other way possible, from lethal arms shipment and intelligence sharing to humanitarian aid and refugee assistance. Third, not only America, but also Great Britain and the EU, quickly imposed crushing sanctions on Russia. Other than China, and to a lesser degree India, Russia had few friends as it found itself a near-pariah state.\textsuperscript{1791}

II. American and Allied Measures Immediately Before and After the Invasion

As for the American and Allied measures, they took the form of calibrated trade sanctions and export controls, applied across the first two-to-three weeks in advance of, and following, the 24 February Russian attack on Ukraine. The hope was President Putin would behave as a rational actor, and calculate his escalation of war in Ukraine would be met with an escalation of sanctions that would wreck his economy. That hope was dashed: he did not do so:

At about 1 a.m. on February 24 last year [2022], Sergei Lavrov, Russia’s Foreign Minister, received a troubling phone call.

After spending months building up a more than 100,000-strong invasion force on the border with Ukraine, Vladimir Putin had given the go-ahead to invade.

The decision caught Lavrov completely by surprise. Just days earlier, the Russian President had polled his Security Council for their opinions on recognizing two separatist statelets in the Donbas, an industrial border region in Ukraine, at an excruciatingly awkward televised session – but had left them none the wiser about his true intentions.

Keeping Lavrov in the dark was not unusual for Putin, who tended to concentrate his foreign policy decision-making among a handful of close

\textsuperscript{1791} That said, public opinion in India was not entirely pro-American, nor could it be expected to be so, given the legacy of Indo-Soviet ties during the Cold War, when India saw the U.S.S.R. as an ally that, contrary to the U.S., did not regularly demand a \textit{quia pro quo} for foreign assistance. Indians appraised America as the biggest threat to peace and security after China. \textit{See} Eltaf Najafizada, \textit{Indians View U.S. as Biggest Threat After China, Survey Shows}, BLOOMBERG, 17 January 2023, \url{www.bloomberg.com/news/articles/2023-01-17/indians-view-us-as-biggest-threat-after-china-survey-shows?sref=7sxw9Sxl} (reporting: “Indians view the US as the biggest military threat after China and place greater blame on NATO and Washington than on Vladimir Putin for his war in Ukraine…. Some 43\% of the 1,000 respondents perceived China – with whom [sic] India has a long-lingering border dispute and has seen tensions flare again since 2020 – as the greatest threat…. However, 22\% saw the U.S. as the second-most significant security threat, ahead of India’s historic arch-rival Pakistan….”). Arguably, the perceptions differ by age group, with Indians alive during the Cold War more likely to look askance at America than younger generations.
confidants, even when it undermined Russia’s diplomatic efforts.

Later that day, several dozen oligarchs gathered at the Kremlin for a meeting arranged only the day before, aware that the invasion would trigger western sanctions that could destroy their empires. “Everyone was completely losing it,” says a person who attended the event.

While they waited, one of the oligarchs spied Lavrov exiting another meeting and pressed him for an explanation about why Putin had decided to invade. Lavrov had no answer: the officials he was there to see in the Kremlin had known less about it than he did.

Stunned, the oligarch asked Lavrov how Putin could have planned such an enormous invasion in such a tiny circle – so much so that most of the senior officials at the Kremlin, Russia’s economic cabinet and its business elite had not believed it was even possible.

“He has three advisers,” Lavrov replied, according to the oligarch. “Ivan the Terrible. Peter the Great. And Catherine the Great.”

The people who know Putin describe a leader who has become even more isolated since the start of the war. “Stalin was a villain, but a good manager, because he couldn’t be lied to. But nobody can tell Putin the truth,” says one. “People who don’t trust anyone start trusting a very small number of people who lie to them.”

“He really believes all the stuff he says about sacrality and Peter the Great. He thinks he will be remembered like Peter,” a former senior official says.

“Putin was overconfident,” a former senior U.S. official says. “He knows better than his advisers just the way Hitler knew better than his generals.”

“He’s of sound mind. He’s reasonable. He’s not crazy. But nobody can be an expert on everything. They need to be honest with him and they are not,” another long-time Putin confidant says. “The management system is a huge problem. It creates big gaps in his knowledge and the quality of the information he gets is poor.”

For many in the elite, the stream of lies is a survival tactic: most of Putin’s presidential administration and economic cabinet have told friends they oppose the war but feel they are powerless to do anything about it. “It’s really a unique war in world history, when all the elite is against it,” says a former senior official.  

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1792_Quoted in Max Seddon, Christopher Miller & Felicia Schwart, _How Putin Blundered into Ukraine – Then Doubled Down_, FINANCIAL TIMES, 22 February 2023, [www.ft.com/content/80002564-33e8-48fb-b734-44810afab49?shareType=nongift](http://www.ft.com/content/80002564-33e8-48fb-b734-44810afab49?shareType=nongift). See also Barbara Plett Usher, _U.S. Diplomat on What It’s Like_
Behind this candid, colorful commentary was the reality of Mr. Putin’s personal experience. He served as an officer in the Soviet Union’s intelligence agency, but recalled he had to moonlight as a taxi driver to make ends meet after the collapse of the Soviet Empire.

Hence the violence the Russian President unleashed against Ukraine. The bad acts included war crimes against Ukrainian civilians, and crimes against humanity in Ukraine. They also included counter-measures against the U.S. and Allied governments that were laughably (if that adverb is appropriate in wartime) redolent of the tit-for-tat behavior of the CCP in the Sino-American Trade War (discussed in a separate Chapter).

Though there is no single correct way to organize and categorize the Russian sanctions, it is fair to say they occurred in multiple waves. They sent the international legal community into veritable a frenzy, as law firms across the globe struggled to help clients “get out of” Russia, and to avoid being hit themselves with sanctions for collaborating with instruments of Mr. Putin’s war machine. These waves overlap and, hence, are only roughly chronological. For instance, the identification and sanctioning of President Putin’s inner circle was a work-in-progress, taking months.

Overall, the wave of sanctions provides a veritable clinic not only on the invocation and allocation of the IEEPA, and not only on nearly multilateral action (indeed, the likes of Japan and Singapore, both of which traditionally after the Second World War had been reluctant to drawn hard, red lines in favor of deontological do-the-right-thing versus Utilitarian pay-attention-to-who-pays-the-bills), but also on a possible restructuring of international relations. Democracies united to fight tyranny not seen on the European Continent since the Second World War, as they appreciated a threat to freedom anywhere can be a threat to it everywhere. On a theological and philosophical level, the waves of sanctions are a brilliant case study of Just War Theory.

III. Wave One: Sanctions on Trade and FDI with Donetsk and Luhansk, and Parts of Russia’s Financial Sector

On 21 February 2022, three days before Russia’s attack on Ukraine, President Biden issued Executive Order 14065 that effectively imposed a complete trade and FDI embargo on Ukraine’s South-Eastern Donetsk and Luhansk region, collectively known as Donbas. Large portions of Donbas had been controlled by Russian-backed separatists.

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Negotiating with Putin, BBC NEWS, 22 February 2023, www.bbc.com/news/world-us-canada-64727302 (reporting: “The former U.S. Ambassador [John Sullivan] is the one who had conversations with Russian officials about trying to prevent a war, but ‘there was no engagement,’ he said. ‘They demanded security guarantees for Russia but wouldn’t talk constructively about security for Ukraine. They never moved beyond their talking points … it was a charade.’ … President Vladimir Putin ‘wasn’t interested in negotiating before the war. He’s still not interested in negotiating.’”).

1793 See The President, Executive Order 14065 of February 21, 2022, Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts To Undermine the
groups since approximately March 2014, and the area has known no peace since then. Then, counter to the Revolution of Dignity, parts of Donbas rebelled in favor of Russia and against the new, western-style democratic government in Kyiv. Donetsk and Luhansk declared themselves People’s Republics, which President Putin recognized amidst his war in Ukraine.

This Executive Order specifically barred new investment in, exportation to, and importation from Donetsk or Luhansk by any U.S. person (natural or legal) or to or from the U.S. It also barred a U.S. person from facilitating any transaction with a foreign person, if the transaction would be prohibited if done by a U.S. person. Further, the Order established criteria for the Secretary of the Treasury to designate blocked persons. The logic of the Order was to deter a Russian attack on Ukraine: Donetsk and Luhansk bordered Russia, ethnic Russians formed sizeable minorities across them, and Russian was widely spoken in them. In other words, Donbas was the most geographically identifiable area of Ukraine linked to the Russian narrative that it might have to conduct a “special military operation” to protect Ukrainians who were ethnically and linguistically Russian.

That logic also underpinned America’s next pre-war move, namely, a 22 February decision to sanction certain parts of Russia’s financial services sector. That decision took the form of a Determination Pursuant to Section 1(a)(i) of Executive Order 14024. That Order, issued on 15 April 2021, was entitled “Blocking Property with Respect to Specified Harmful Foreign Activities of the Government of the Russian Federation.” The Treasury Determination said Section 1(a)(i) applies to Russia’s financial services sector. So, the Determination provided the legal basis for most of the measures (discussed below) the U.S. imposed on Russia following the invasion. Of course, both Executive Orders – 14065 and 14024 – invoked the 1977 IEEPA (50 U.S.C. Section 1701 et seq.) and 1976 NEA (50 U.S.C. Section 1601 et seq.). Those were the key statutory foundations for all U.S. measures.

Likewise, OFAC took aim at key Russian economic agents under the authority of Executive Order 14024. On 22 February, OFAC listed as SDNs Vnesheconombank (commonly abbreviated as VEB) and Promsvyazbank Public Joint Stock Company (or PSB), plus 42 of their subsidiaries, 5 vessels under PSB ownership, and three members of President Putin’s inner circle. This sanction is the harshest among those available:

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The U.S. Treasury imposes sanctions and can penalize those who break them. Its most aggressive sanctioning tool freezes U.S. assets and excludes banks from accessing U.S. dollars – critical for international trade and finance.

The toughest sanctioning tool in OFAC’s arsenal, known as the SDN List, freezes assets held in the United States and bars American companies or citizens from trading with those listed, freezing a bank or individual out of all dollar payments.

This grants the United States influence far beyond its shores to enforce its sanctions [because (inter alia) targeted SDNs typically have dollar-denominated assets outside the U.S., such as in accounts of banks in London, Zurich, or Singapore]. Alternatively, OFAC can also resort to less stringent measures such as levying fines and sending warning letters over sanctions violations.\footnote{1797}

OFAC does not make SDN designations lightly, for at least one obvious reason: every SDN designation represents yet another weaponization of the U.S. dollar. That disincentivizes holding dollars by adding to their legal and political risk, while conversely incentivizing holding non-dollar (including Chinese yuan) assets.

Nonetheless, on 23 February, OFAC designated as SDNs Nord Stream 2 AG and one person.\footnote{1798} This action occurred pursuant to \textit{Executive Order} 14039 dated 20 August 2021, which targeted the Nord Stream 2 pipeline, running under the Baltic Sea from Russia to the European continent (parallel to Nord Stream 1), in the hope of reducing the EU’s dependence on Russian energy.\footnote{1799} As was typical in respect of the scope of SDN listings, they also applied to affiliates. Specifically, under OFAC’s “50% Rule,” any entity that was owned, directly or indirectly, 50% or more by one or more blocked person was itself blocked.\footnote{1800}

\section*{IV. Wave Two: Sanctioning Selected Entities and Oligarchs and Restricting Dual-Use, High-Tech Exports}


\footnote{1798} See U.S. Department of the Treasury, Office of Foreign Assets Control, \textit{PEESA Designations; Issuance of Russia-Related General License 4} (23 February 2022), \url{https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20220223_33}.


On the day of, and immediately following, the 24 February 2022 Russian invasion, the U.S. and its EU and NATO allies increased pressure on Russia, imposing a series of measures specifically on President Putin and his inner circle of senior government and business officials. Collectively, they were commonly referred to as “oligarchs,” though that term is misleading insofar as it generally refers to businesspersons in the 1990s who profited from privatization under Russia’s President Boris Yeltsin, whereas the current crop of officials shared a government background with President Putin in Russia’s intelligence and security apparatus.

Not surprisingly, other than government officials, most of the targeted persons were leaders in the agricultural, industrial, metallurgical, oil, pharmaceutical, and telecom sectors, because Russia garner substantial revenue from these areas. The amount of money oligarchs held was staggering, even measured five years before Russia’s invasion of Ukraine: “A 2017 study of Russian oligarchs published by the U.S.-based National Economic Bureau estimated that as much as $800 billion U.S. is held by wealthy Russians in the United Kingdom, Switzerland, Cyprus, and other offshore banking centers.”1801

Generally, this second wave of sanctions took the form of designating those persons as SDNs, thus limiting the ability of U.S. persons to enter into transactions with them, and freezing their assets, thus barring their access to their personal and real property subject to U.S. jurisdiction. In particular, OFAC took the following actions, all of them pursuant to Executive Order 14024:1802

1. On 24 February, OFAC designated as SDNs, VTB Bank, Russia’s second-largest financial institution, three other major financial institutions, Otkritie Bank, Novikom Bank, and Sovcom Bank, including 34 subsidiaries, several members of President Putin’s inner circle and their family members, and certain high-ranking financial sector of executives and some related business interests.1803

2. On 25 February, OFAC designated as SDNs Russian’s President and Foreign Minister, Vladimir Putin and Sergei Lavrov, respectively, plus 11 members of the Russian Security Council.1804

3. On 28 February, OFAC designated as SDNs, the Russian Direct Investment

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1802 Note that as appropriate, OFAC also issued General Licenses to allow either limited activity with SDNs, or activity ordinarily incident and necessary to wind down transactions (e.g., with respect to clearing and settlement of payments, debt, equity, and derivative contracts, and personal, non-commercial remittances and maintenance payments), and NGO-related humanitarian activities.


On 3 March, OFAC designated as SDNs, several individuals in the inner circle of President Putin’s inner circle, and their property, including Alisher Usmanov and his superyacht, and several Russian-Intelligence-Directed Disinformation Outlets.\footnote{See U.S. Department of the Treasury, Office of Foreign Assets Control, \textit{Treasury Prohibits Transactions with Central Bank of Russia and Imposes Sanctions on Key Sources of Russia’s Wealth}, 28 February 2022, \url{https://home.treasury.gov/news/press-releases/jy0612}.}

On 11 March, OFAC designated as SDNs, additional Russian oligarchs, Kremlin elites, members of their families, and certain luxury assets, the management board of VTB Bank; and 12 members of the Russian State Duma.\footnote{See U.S. Department of the Treasury, Office of Foreign Assets Control, \textit{Treasury Sanctions Kremlin Elites, Leaders, Oligarchs, and Family for Enabling Putin’s War Against Ukraine}, 11 March 2022, \url{https://home.treasury.gov/news/press-releases/jy0650}.}

On 31 March, OFAC issued multiple sanctions to prevent Russia’s technology sector from evading Western sanctions and developing harmful technologies.\footnote{See U.S. Department of the Treasury, Office of Foreign Assets Control, \textit{Treasury Targets Sanctions Evasion Networks and Russian Technology Companies Enabling Putin’s War} (31 March 2022), \url{https://home.treasury.gov/news/press-releases/jy0692}.} OFAC put full blocking sanctions on 17 entities and 10 individuals because they had tried to evade U.S. sanctions and procure restricted dual-use technology and equipment for the Russian government. Among those new SDNs were two Russian companies (OOO Serniya Engineering and Sertal), which had close ties to Russia’s military and intelligence agencies, four major Russian technology companies that made software and components for Russia’s defense sector (including Mikron, Russia’s largest microchip producer-exporter).

OFAC expanded its previous sanctions to target the State Research Center of the Russian Federation (FGUP) (specifically, its Central Scientific Research Institute of Chemistry and Mechanics), and its employees, for their involvement in significant cyberattacks. Here, OFAC’s SDN listing were under the authority of \textit{CAATSA} Section 224(a), which authorizes sanctions against an entity or person that undermines cybersecurity on
behalf of the Russian government.\textsuperscript{1809}

Additionally, the increased American and Allied pressure took the form of export controls.

On 24 February 2022, DOC (specifically, BIS) issued a final rule amending the \textit{EAR} to apply new such controls to Russia.\textsuperscript{1810} Likewise, on 3 March, BIS issued a final

\textsuperscript{1809} OFAC considered sanctioning Kapersky Labs, which was significant for multiple reasons:

As the U.S. government continues to ratchet up sanctions in response to the Russian invasion of Ukraine, public reporting suggests there may be a new target in the sites of U.S. sanctions authorities: Kaspersky Labs …, the popular Russian cybersecurity and antivirus company. Any sanctions imposed by … OFAC … would come on the heels of other recent government action against Kaspersky. On March 25, 2022, the … FCC added Kaspersky to its list of communications equipment and services that are deemed to pose an unacceptable risk to the national security of the United States, as well as the safety and security of the American people. \textit{Kaspersky, which is headquartered in Moscow, is the first non-Chinese company added to the list that includes Shenzhen-based Huawei Technologies Company and ZTE Corporation, among others.} Kaspersky has publicly disagreed with the decision.

Last week, several news outlets reported that the U.S. government has been privately warning some critical infrastructure companies that Russia could manipulate software designed by Kaspersky to gain remote access to customer information systems. Similarly, the United Kingdom’s National Cyber Security Center (NCSC) has pointed out that the risk calculus has “materially changed,” and the NCSC further notes that “Russian law already contains legal obligations on companies to assist the Russian Federal Security Service (FSB), and the pressure to do so may increase in a time of war.” Because many of Kaspersky’s most popular products relate to antivirus, endpoint protection, and cloud security, the chief concern is that such software may have privileged access to sensitive data or locations that could be exploited for Russia’s strategic advantage.

\textsuperscript{1810} See Department of Commerce, Bureau of Industry and Security, \textit{Implementation of Sanctions Against Russia Under the Export Administration Regulations (EAR)}, 87 Federal Register number 42 12226-12251 (8 March 2022), \texttt{www.govinfo.gov/content/pkg/FR-2022-03-03/pdf/2022-04300.pdf} (announcing the following export controls: “These new Russia measures: Impose new Commerce Control List (CCL)-based...
rule that added 91 entities to the Entity List,\(^{1811}\) and a final rule expanding existing sanctions targeting the oil refinery sector in Russia in Section 746:5 of the EAR.\(^ {1812}\) Likewise, the EU imposed a prohibition on the export of maritime navigation goods and technology to Russia. Its ban covered navigation equipment and radio-communication equipment, and the provision of technical or financing related to such goods. However, these bans on high-tech goods were not always easy to police, even by good-faith business actors:

When Silicon Valley chipmaker Marvell learned that one of its chips was found in a Russian surveillance drone recovered in 2016, it set out to investigate how that came to be.

The chip, which costs less than $2, was shipped in 2009 to a distributor in Asia, which sold it to another broker in Asia, which later went out of business.

“We couldn’t trace it any further,” Marvell Technology Group Ltd. … Chief Operations Officer Chris Koopmans said….

Years later, it reappeared in the drone recovered in Lithuania.

license requirements for Russia; add two new foreign ‘direct product’ rules (FDP rules) specific to Russia and Russian ‘military end users;’ specify a license review policy of denial applicable to all of the license requirements being added in this rule, with certain limited exceptions; significantly restrict the use of EAR license exceptions; expand the existing Russia ‘military end use’ and ‘military end user’ control scope to all items ‘subject to the EAR’ other than food and medicine designated EAR 99, or ECCN 5A992.c and 5D992.c unless for Russian ‘government end users’ and Russian state-owned enterprises (SoEs); transfer forty-five Russian entities from the Military End-User (MEU) List to the Entity List with an expanded license requirement of all items subject to the EAR (including foreign-produced items subject to the Russia-MEU FDP rules); and add two new Russia entities and revise two Russia entities to the Entity List. Lastly, this rule imposes comprehensive export, reexport and transfer (in-country) restrictions for the so-called Donetsk People’s Republic (DNR) and Luhansk People’s Republic (LNR) regions of Ukraine (‘Covered Regions of Ukraine’) and makes conforming revisions to export, reexport transfer (in-country) restrictions for Crimea Region of Ukraine provisions.”).

Throughout the saga of export controls and trade sanctions connected to Russia’s war in Ukraine, BIS made updates to its regulations – essentially tightening them by broadening or deepening them. For example, it issued a final rule (effective 15 September 2022) applicable to Russia and Belarus that (1) expanded the scope of industry sector sanctions to add advanced manufacturing and chemical industry items, (2) added Belarus to the industry sector sanctions, (3) widened Military End User (MEU) controls, (4) applied the Russia and Belarus MEU Foreign Direct Product (FDP) rule to additional entities, and (5) lowered the value threshold for luxury good controls. See Department of Commerce, Bureau of Industry and Security, Implementation of Additional Sanctions Against Russia and Belarus Under the Export Administration Regulations (EAR) and Refinements to Existing Controls, 87 Federal Register number 179, 57068-57106 (16 September 2022), [https://docs.regulations.justia.com/entries/2022-09-16/2022-19910.pdf](https://docs.regulations.justia.com/entries/2022-09-16/2022-19910.pdf). (The MEU and FDP are discussed in separate Chapters.)


Marvell’s experience is one of a myriad of examples of how chipmakers lack ability to track where many of their lower-end products end up, executives and experts said. That could stymie the enforcement of new U.S. sanctions designed to halt the export of U.S. technology into Russia.

While higher-end sophisticated chips that can build supercomputers are sold directly to companies, lower-cost commodity ones that might just control the power often go through several resellers before they end up in a gadget.

The global chip industry is expected to ship 578 billion chips this year, 64% of them “commodity” chips, said TechInsights’ chip economist Dan Hutcheson.

While Russia accounted for less than 0.1% of global chip purchases before the sanctions, according to the World Semiconductor Trade Statistics organization, new Western sanctions underscore the threat in human terms.

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Military weapons such as drones, guided missiles, helicopters, fighter jets, vehicles, and electronic warfare equipment all need chips and experts say they often use older chips that are well tested out. Now, under new U.S. sanctions even some of the most basic chips cannot be shipped to prohibited Russian entities.

For the most sensitive chips, controlled under the International Traffic in Arms Regulations [ITAR, discussed in a separate Chapter], the U.S. company selling them can be held responsible if the chip ends up with an entity on the U.S. banned list….

Figuring out where chips go is like tracking the flow of narcotics….

“It’s like the drug business,” said James Lewis, Director of the Technology Policy Program at Washington-based Center for Strategic and International Studies. “There’s cut-outs [sic]. There’s middlemen [sic]. There’s money laundering … There’s a black-market distribution network.”

The point of the Russian sanctions, Lewis said, isn’t to track every chip, but to disrupt their supply chain, which the intelligence community has been working on.

Finding a solution could take creative technical approaches.

“Knowing where the chips go is probably a very good thing. You could for example, on every chip put in essentially a public private key pair, which authenticates it,” and allows it to work, Eric Schmidt, the former Google Chairman, … [said], discussing high-end processors.
Marvell says it has a growing number of products supporting fingerprinting and tracing, and is working with industry partners and customers to advance this area. … 1813

In essence, without extraordinarily detailed – and thus costly – tracing mechanisms, keeping certain high-tech items, especially routinely used ones, was difficult. But, such mechanisms might raise the cost of a chip to a prohibitive degree.

By August 2022, it was apparent that American and Allied efforts to restrict exports of sensitive technology Russia could put to military use was not sufficiently rigorous.

Almost all Moscow’s modern military systems depend on western-made microelectronics, says the Royal United Services Institute (Rusi) report.

Moscow has found ways to bypass sanctions and export controls.

If the loopholes are closed, Russia's military might be permanently degraded.

Researchers for Rusi, a U.K. think tank, spent months in Ukraine, examining 27 of Russia’s most modern military systems, either captured, brought down, or abandoned by Russian troops.

They discovered at least 450 different kinds of unique, foreign-made components, most built in the U.S. but also in other Western countries.

Products from familiar brands, like Sony and Texas Instruments, are turning up on the battlefield in Russian weapons systems. There is no suggestion those firms have been complicit in sending components to Russia.

Jack Watling, a Senior Research Fellow at Rusi and one of the authors of the 60-page report, … [said] there was a chance to permanently deny Russia access to these sensitive components – many of which are manufactured in the U.S., but also in Switzerland, the Netherlands, U.K., Germany, and France.

“If these components can be denied then the Russians will not be able to replenish the arsenal of equipment that they have expended in Ukraine,” Dr. Watling says.

He points to Russia’s heavy reliance on artillery, missiles and rockets that have devastated the towns and villages of eastern Ukraine and allowed

Russian ground forces to make slow, incremental advances through a shattered wasteland.

“The Russian system of fighting is largely dependent on what's called reconnaissance strike: finding your targets and then hitting them with overwhelming firepower,” he says. “And what we found is that almost every link in that chain is dependent on Western components.”

Russi’s fleet of battlefield drones, which scout out the locations of Ukrainian positions before they can be bombarded with artillery, also use imported microelectronics, cameras, and communications systems. All are high-spec and many should be subject to export controls.

In order for long-range ballistic and cruise missiles to be accurate, says Dr. Watling, they have to have Western-made microchips.

So how exactly has Russia been able to get its hands on these high-tech components?

It seems to have found several methods. A clandestine network has been in existence in some form since Soviet times. Operated by Russian intelligence officers it uses intermediate shipment hubs like Hong Kong and Malaysia.

In addition, some companies exporting these vital components are unaware of who the end user really is.

Others, says Dr. Watling, prefer not to ask too many questions.1814

Simply put, the urgent importance of tightening export controls to cut off Russia’s “silicon lifeline,” before Russia established secure black-market channels, could not be overstated.

In this vein, America and its Allies put additional pressure on Russia and President Putin via its, and his, unequivocal international ally. The U.S. sanctioned Belarus and its President, Mr. Lukashenko. So, pursuant to Executive Order 14038, whereby on 9 August 2021 President Biden blocked property of certain Belarusian officials,1815 on 24 February 2022, OFAC designated as SDNs 24 Belarusian individuals and entities in the defense and financial industries.1816 OFAC did so because of their support and facilitation of Russia’s invasion of Ukraine. Likewise, on 2 March 2022, BIS issued a final rule amending the EAR

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to render Belarus subject to the aforementioned requirements it imposed on Russia under the EAR by BIS on 24 February.\textsuperscript{1817}

The OFAC SDN and BIS export control expansions were complemented by another measure, this one by the U.S. Department of Justice. DOJ created “KleptoCapture,” an Interagency Task Force dedicated to enforcing sanctions, export controls, and economic measures America imposed in response to Russia’s invasion of Ukraine.\textsuperscript{1818}

V. Rebuilding Ukraine with Seized Assets?

In May 2022, Canada proposed to the G7 that sanctioning countries consider unfreezing the assets of the oligarchs for use to rebuild Ukraine – in effect, a trade-off whereby Russian SDNs would regain access to their accounts in exchange for surrendering some of their monies to assist in the reconstruction of Ukraine, and thus the U.S. and its Allies could help Ukraine while the oligarchs could distance themselves from President Putin’s war.\textsuperscript{1819} The damage to Ukraine caused by Russia was astounding. As of 28 May:

Ukraine’s Prime Minister, Denys Shmyhal, said the Russian invasion of his country had destroyed more than 25,000 km (15,000 miles) of roads, several hundred bridges, and 12 airports.

More than 100 educational institutions, over 500 medical facilities, and 200 factories have also been ruined or damaged, he said.

He called for Russia to be forced to pay for “the destruction it has created,” saying frozen Russian assets should be transferred to Ukraine to fund reconstruction work.\textsuperscript{1820}

So, Canada was far-sighted in considering how, once the war ended, would Ukraine be rebuilt? The question involved (\textit{inter alia}) an important distinction between assets of oligarchs versus a sovereign government, in effect, private versus public property. To what extent were the rules different for the freezing and seizure of the two categories.

The Canadian proposal garnered support: “In a \textit{Joint Statement} …, Finance Ministers from Estonia, Latvia, Lithuania, and Slovakia urged the European Union to create a way to fund the rebuilding of cities and towns in Ukraine with frozen Russian

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\textsuperscript{1817} See Department of Commerce, Bureau of Industry and Security, \textit{Imposition of Sanctions Against Belarus Under the Export Administration Regulations (EAR)}, 87 Federal Register 13048 (8 March 2022), www.govinfo.gov/content/pkg/FR-2022-03-08/pdf/2022-04819.pdf (stating: “this rule is adding new license requirements and review policies for Belarus to the … to render Belarus subject to the same sanctions that were imposed on Russia under the EAR effective February 24, 2022.”).


\textsuperscript{1819} See Western Countries Considering Whether.

central bank assets, so that Russia can be “held accountable for its actions and pay for the damage caused.”

However, America hesitated, thinking that seizure of the assets of oligarchs, or indeed of the Russian government or Central Bank, would be illegal under U.S. law, specifically the IEEPA, and disincentivize investors from holding assets in the U.S.:

The devastation in Ukraine brought on by Russia’s war has leaders around the world calling for seizing more than $300 billion of Russian central bank assets and handing the funds to Ukraine to help rebuild the country.

But the movement, which has gained momentum in parts of Europe, has run into resistance in the United States. Top Biden Administration officials warned that diverting those funds could be illegal and discourage other countries from relying on the United States as a haven for investment.

The United States, which has led a global effort to isolate Russia with stiff sanctions, has been far more cautious in this case. Internally, the Biden Administration has been debating whether to join an effort to seize the assets, which include dollars and euros that Moscow deposited before its invasion of Ukraine. Only a fraction of the funds are [sic] kept in the United States; much of it was deposited in Europe, including at the Bank for International Settlements in Switzerland.

Russia had hoped that keeping more than $600 billion in central bank reserves would help bolster its economy against sanctions. But it made the mistake of sending half those funds out of the country. By all accounts, Russian officials were stunned at the speed at which they were frozen – a very different reaction from the one it faced after annexing Crimea in 2014, when it took a year for weak sanctions to be imposed.

Treasury Secretary Janet L. Yellen appeared to close the door on the United States’ ability to participate in any effort to seize and redistribute those assets. Ms. Yellen, a former central banker who initially had reservations about immobilizing the assets, said that while the concept was being studied, she believed that seizing the funds would violate U.S. law.

In addition to the legal obstacles, Ms. Yellen and others have argued that it could make nations reluctant to keep their reserves in dollars, for fear that in future conflicts the United States and its allies would confiscate the funds. Some national security officials in the Biden Administration say they are concerned that if negotiations between Ukraine and Russia begin, there

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would be no way to offer significant sanctions relief to Moscow once the reserves have been drained from its overseas accounts.

… One official said that while seizing the funds to pay for reconstruction would be satisfying and warranted, the precedent it would set – and its potential effect on the United States’ status as the world’s safest place to leave assets – was a deep concern.

In explaining Ms. Yellen’s comments, a Treasury spokeswoman pointed to the *International Emergency Economic Powers Act of 1977*, which says that the United States can confiscate foreign property if the President determines that the country is under attack or “engaged in armed hostilities.”

Legal scholars have expressed differing views about that reading of the law.

Laurence H. Tribe, an emeritus Law Professor at Harvard University, argues that the *International Emergency Economic Powers Act* gives the President ample authority to freeze and seize Russia’s central bank assets. Even if that were in doubt, he said, an amendment to the law that passed after the Sept. 11, 2001, terrorist attacks gives the President broader discretion to determine if a foreign threat warrants confiscation of assets. President Biden could cite Russian cyberattacks against the United States to justify liquidating the central bank reserves, Mr. Tribe said, adding that the Treasury Department was misreading the law.

…

Mr. Tribe pointed to recent cases of the United States confiscating and redistributing assets from Afghanistan, Iran, and Venezuela as precedents that showed Russia’s assets did not deserve special safeguards.

But according to Paul B. Stephan, a Law Professor at the University of Virginia, the examples of Afghanistan and Venezuela are not comparable because the United States did not recognize those governments as legitimate. He also argued that Mr. Biden would be escalating the conflict with Russia if he conflated cyberattacks with an act of war to justify seizing Russian assets.

“I would find that alarming,” Mr. Stephan said. “We’ve been trying to be stable, rather than destabilizing, in this area.”

He added that Congress could amend the law to clearly grant the United States the authority to confiscate Russia’s assets, but that doing so was likely to lead to complex legal battles between the two countries.  

Query, then, whether Russia committed an attack on, or was “engaged in armed hostilities,” with, the U.S. so as to justify seizure of its, or its citizens, assets? Notably, the country that
initiated the proposal acted resolutely: “Canada … introduced legislation in April [2022] that would give its government new authority to seize and sell assets of sanctioned Russian oligarchs and give the proceeds to Ukraine.”\(^{1823}\)

Likewise, at least one Canadian scholar opined that the sale and redistribution of the assets of Russian oligarchs would violate Public International Law, plus potentially redound negatively to the detriment of Canada and its Allies, and noted the EU was hesitant to take such a step:

If the House of Commons passes the budget implementation bill as expected …, the Canadian government could have new powers to seize and sell sanctioned Russian assets to fund the reconstruction of Ukraine, setting up a potential violation of International Law.


Article 49 says countermeasures “shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.”

That’s where the powers Prime Minister Justin Trudeau’s government proposes in [Bill] C-19 – allowing authorities to not just freeze assets held in Canada, as they can now, but seize these assets and sell off Russian-owned property to help Ukraine’s recovery – step onto shaky legal ground.

In adopting these articles, U.N. members agreed that countermeasures must “induce the wrongdoing state to comply with its international obligations,” and be reversible if a targeted state ends its unlawful conduct.

“Once those proceeds, and notably Russian assets, have been handed over to, say, the Ukrainian government, they’re lost. They cannot be returned,” said David Kleimann, a Researcher and Adviser on International Law and Visiting Fellow with Bruegel, a Brussels-based think tank.

“Therefore, there’s no way of inducing the resumption of performance of international obligations.”

... 

“I believe that the legal question is relatively clear here, that such an action or such procedures would violate international law,” he said.

\(^{1823}\) *Seizing Russian Assets to Help.*
“That might be a risk that, given the stakes, [the Canadian government is] willing to take.”

…

Kleimann … said Europeans are also reluctant.

Customary international laws like these U.N. Articles are “rather unenforceable,” he said.

“Even if they remain unenforceable, we have a problem here that foreign governments in the future may see this as a precedent and say, ‘we can do the same’ when, let’s say the government of Canada, finds itself in a military conflict or is supporting one side or the other,” Kleimann said.

“We go back to the law of the jungle, and that makes Western assets very much vulnerable to seizure, confiscation and using those proceeds for other purposes. And that is not necessarily something that Western countries would like to see, I imagine.”

Despite these concerns about consistency with Public International Law, in June 2022, Canada enacted legislation to permit the government to seize Russian-owned assets and sell them to pay the victims, that is, for the reconstruction of Ukraine:

C-19, the budget implementation bill, received royal assent … [on 23 June]. Among its many measures are new powers to seize and sell off assets owned by individuals and entities on Canada’s sanctions list. While the new powers could be used in any international conflict, the Liberal government’s current priority is helping victims of the Russian invasion of Ukraine.

…

“We think it’s really important to extend our legal authorities because it’s going to be really, really important to find the money to rebuild Ukraine,” Finance Minister Chrystia Freeland … [said]. “I can think of no more appropriate source of that funding than confiscated Russian assets.”

That sentiment was shared by Ontario Senator Ratna Omidvar, who proposed her own Senate legislation to enable similar asset seizures two years ago [2020]. At the time, she was motivated to help the displaced Rohingya population by sanctioning corrupt generals in Myanmar.

“Kleptocrats must pay for their crimes, not through simply being sanctioned and their assets being frozen, but by their assets being repurposed and confiscated,” said Omidvar.

Although C-19 will work a bit differently than her bill, Omidvar still calls it a “good start” and supports the government's move.

“The question no longer is ‘if we should confiscate,’” the Senator said. “The question is: ‘How should we repurpose? ... Who’s involved? How do we provide accountability? How do we protect ourselves?’”

... Although some jurisdictions, notably Switzerland, already confiscate and return certain illicit assets, this move by Canada – and potentially other G-7 countries — is unprecedented.

Allies agree on the imperative of cranking up more economic pressure on Russian President Vladimir Putin, but it’s still a risky play. Other hostile governments could seize Canadian-owned assets abroad in retaliation. It also may violate customary International Law, such as the U.N. Articles on states responsibility.

The new powers target assets in Canada owned by an individual or entity on the Federal government’s sanctions list. Previously, authorities could seize the proceeds of crime. With C-19, they can confiscate the assets of sanctioned individuals whether they’re acquired legally or illegally.

... When asked about the legality of these new powers..., Justice Minister David Lametti said “you don’t have an absolute right to own private property in Canada,” and compared it to other processes of government expropriation.

Adrien Blanchard, a spokesperson for Foreign Affairs Minister Melanie Joly, … [said] told that “necessary checks and balances” are provided in C-19, including a formal judicial process to forfeit any asset.

“Procedural fairness was a key consideration in the development of these measures, and forfeiture proceedings before a judge are not automatic,” Joly’s spokesperson said.

... Separate from its powers to seize assets, the budget implementation bill also implements a publicly accessible beneficial ownership registry to make it easier to trace the ownership of anonymous shell companies. That could reveal more about Russian assets in Canada.

... Omidvar’s original bill would have required the recipient of redistributed funds to report back to a Court on its use.
C-19 puts the Minister of Foreign Affairs in charge of who gets the money and what happens to it.\textsuperscript{1825}

As to the cost of rebuilding Ukraine, Ukrainian President Volodymyr Zelensky, “estimated this month [June 2022] that it could be $600 billion after months of artillery, missile, and tank attacks – meaning that even if all of Russia’s central bank assets abroad were seized, they would cover only half the costs.”\textsuperscript{1826}

Notwithstanding the dispute about the legality of the proposal (and as discussed further below and in separate Chapters), the U.S. continued to add oligarchs, along with prominent Russian government officials, certain yachts, and aircraft and related entities, as SDNs.\textsuperscript{1827} And, in December 2023, the U.S. issued a paper to its Allies arguing “Russia’s invasion of Ukraine meant the seizure of assets [valued at about $300 billion] could be ‘pursued as a lawful countermeasure by those states that have been injured as specially affected by Russia’s violation of the international law.’”\textsuperscript{1828} No doubt what fueled the American argument was increasing scepticism in Congress, and across the electorate, to provide Ukraine with \textit{carte blanche} support from official budgetary outlays.\textsuperscript{1829} But not all the Allies agreed. In February 2024, at a G-7 meeting, France argued the international legal basis to use seized Russian assets as a victims compensation fund was insufficient, and that without consensus to do so across the G-20 before, doing so could be illegal.\textsuperscript{1830}

\section*{VI. Wave Three: Restricting Russia’s Access to the SWIFT System and Freezing Reserves}

Save for Iran, no country had ever been banned from SWIFT.\textsuperscript{1831} This Brussels-based international payments messaging system is owned by a consortium of roughly 2,000 banks, and about 11,000 banks – including many Russian ones – participate in it as

\footnotesize
\begin{itemize}
\item \textsuperscript{1826} \textit{Seizing Russian Assets to Help}. (Emphasis added.)
\item \textsuperscript{1828} Laura Dubois, James Politi & Lucy Fisher, \textit{G7 Moves Closer to Seizing Russian Assets for Ukraine}, \textit{Financial Times}, 15 December 2023, \url{www.ft.com/content/918645f8-e0b6-4cab-92fa-4f965569c2a6?shareType=nongift}. [Hereinafter, \textit{G7 Moves Closer}.] See also Daniel Flatley, \textit{White House Throws Support Behind Seizing Frozen Russian Assets}, BLOOMBERG, 10 January 2024, \url{www.bloomberg.com/news/articles/2024-01-10/white-house-throws-support-behind-seizing-frozen-russian-assets?slide=75xw95x1} (reporting: “President Joe Biden’s administration is backing legislation that would let it [\textit{i.e.,} authorize the Executive branch to] seize some of $300 billion in frozen Russian assets to help pay for reconstruction of Ukraine…. The Administration welcomes ‘in principle’ a bill that would allow it to confiscate the funds….”).
\item \textsuperscript{1829} \textit{See G7 Moves Closer}.
\item \textsuperscript{1830} See Andrea Shalal & Christian Kraemer, \textit{G7 Finance Meeting Marred by Divisions Over Seizing Russian Assets}, REUTERS, 28 February 2024, \url{www.reuters.com/world/g7-finance-meeting-marred-by-divisions-over-seizing-russian-assets-2024-02-28/}.
\item \textsuperscript{1831} For a discussion of SWIFT, see Ernest T. Patrikis, Thomas C. Baxter, Jr. & Raj Bhala, \textit{Wire Transfers} (Chicago, Illinois: Irwin/Probus, 1993).
\end{itemize}
members representing over 200 countries and territories. Through SWIFT, participating banks send and receive payment messages as originators, originating banks, intermediary banks, beneficiary banks, and beneficiaries of cross-border payments associated with the commercial and financial transactions in dollar and non-dollar currencies. Daily, SWIFT (as of 2020) facilitates trillions of dollars of cross-border transfers through over 40 million payment messages, about 1.5% of which are Russian. Though not part of the popular consciousness, SWIFT is indispensable to the world economy – a key part of the plumbing, as it were, which keeps trade, investment, and financial flows flowing.

Thus, shutting Russia out of SWIFT – that is, barring the sending or receipt of payment messages via it, except for a limited number of communications related to non-sanctioned Russian oil and NG sales to Europe – was the single most severe sanction imposed. The U.S. and its Allies agreed to do so in late February 2022 (after initial reluctance by Germany on account of its need to make payments to Russia for oil and NG on which it was dependent), and SWIFT naturally complied. The ban exempted certain payments (thus accommodating Germany’s interests.) Note the gradualist approach they took. For instance, initially, the EU announced that seven major Russian banks and majority-owned subsidiaries would be disconnected from SWIFT. The EU expanded the SWIFT ban (effective 20 March 2022) to three Belarusian banks: Belagroprombank, Bank Dabrabyt, and Development Bank of the Republic of Belarus. Subsequently, the EU cut off three more Russian banks from SWIFT, “including Russia’s largest lender, Sberbank.”

VII. Russian Default?

Notably, the SWIFT ban meant Russia risked defaulting on its international debt obligation payments – a nearly unprecedented event. At issue was $117 million in interest payments on two dollar-denominated bonds Russia sold in 2013. The face value of those bonds summed to $38.5 billion, of which overseas investors owned about $20 billion. Fortunately:

JPMorgan … processed interest payments sent by the Russian government for two of the country’s bonds, boosting investor expectations that Moscow will avoid defaulting on its debt for the first time since 1998.

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1834 See Marc Jones, Sanctioned Russia Teeters on Brink of Historic Default, REUTERS, 16 March 2022, www.reuters.com/business/finance/sanctions-savaged-russia-teeters-brink-historic-default-2022-03-16/ (also reporting: “Russian Finance Minister Anton Siluanov … said Moscow had made the payment which had reached the correspondent American bank, and it was now down to Washington to clarify whether settlement is possible.”). [Hereinafter, Sanctioned Russia Teeters.]

1835 Tommy Stubbington & Robin Wigglesworth, What to Expect as Russia Warns of Historic Default, FINANCIAL TIMES, 15 March 2022, www.ft.com/content/9ed033f2-eaa4-4c1e-974d-78592a3075af?shareType=nongift. [Hereinafter, What to Expect as Russia.]
The Wall Street bank has passed the $117 mn in coupon payments to Citigroup, the payment agent responsible for distributing the money to investors.…

JPMorgan sought approval from the U.S. Treasury Department before sending the funds to Citi to ensure that it was not contravening U.S. sanctions.…

The interest payments for the two bonds were due on Wednesday [16 March 2022], but Moscow has a 30-day grace period to make good on its obligations.

“It’s totally common for the money to only arrive with a day or two’s lag,” … [an unnamed European] the investor said. “We all know the Russians have plenty of U.S. dollars. It was always a question of whether they would be allowed to pay. Whether they keep on paying has become a political question.”

Moscow has repeatedly claimed that western sanctions are preventing it from servicing its debt, with Anton Siluanov, Finance Minister, saying … that Russia was being forced into an “artificial default.”

Siluanov also said it would be “absolutely fair” for the Russian government to make payments on its dollar debt in roubles until western sanctions on the Russian Central Bank were lifted.

Although some of Russia’s dollar bonds contain a clause allowing repayment in roubles, the two bonds due with coupons that came due on … [16 March 2022] are not among them. Fitch Ratings said … that payment in the Russian currency would constitute a default.

According to the U.S. Treasury Department, current U.S. sanctions on Russia do not prohibit the country from making these payments to bondholders.

The restrictions stipulate that U.S. entities and individuals are able to “receive interest, dividend, or maturity payments on debt or equity” from Russia’s central bank, its Sovereign Wealth Fund or the Finance Ministry until May 25 [2022], after which a specific licence will be required to receive related funds.1836

Had Russia defaulted in March 2022, it would have been the first time it had done so since

1836 Tommy Stubbington, Robin Wigglesworth & Joshua Franklin, Russia Edges Closer to Averting Default as JPMorgan Processes Bond Payment, FINANCIAL TIMES, 17 March 2022, www.ft.com/content/4419e072-ae44-4791-98c5-ef840c650ace?shareType=nongift.
1998, when it unilaterally devalued the *rouble* and restructured its debt. Before that shock, its last instance of a complete external default was in 1918, when the Bolshevik regime repudiated Tsarist-era debts.\textsuperscript{1837}

Many investors and rating agencies forecast Russia would default on its foreign debt because of sanctions that included a freeze on a substantial portion of its nearly $650 billion in hard currency FX and gold reserves,\textsuperscript{1838} coupled with comments from Mr. Siluanov that it would be “absolutely fair” for Russia to pay its dollar-denominated obligations in roubles until the sanctions were removed.\textsuperscript{1839} (In truth, “[s]ix of Russia’s 15 dollar- or euro-denominated bonds … contain[ed] a “fallback” clause allowing repayment in *roubles*, but the [above-referenced] two bonds with coupons … were not among them.”\textsuperscript{1840}) The freeze applied to about $300 billion worth of reserves. The remainder were in China and other jurisdictions beyond the reach of America and its Allies. Still, blocking Russian access to those $300 billion inhibited the ability of the Central Bank not only to make timely payments of principal and interest on bonds, but also to stabilize the *rouble*. The Central Bank could not access those reserves, sell a portion of them to buy *roubles* and thereby stem the significant depreciation of the rouble. And, the freeze, at least as applied by the EU, included a prohibition on transactions relating to the management of reserves or assets of the Central Bank of Belarus.

In May 2023, the forecast of default became more certain. The U.S. Treasury Department, which already had barred American banks from transferring payments to Russia, announced it would close the loophole that allowed for Russia to access dollar-denominated accounts and make timely payment of principal and interest on its international debt obligations to U.S. persons, which they could lawfully accept.\textsuperscript{1841} That

\textsuperscript{1837} What to Expect as Russia.

\textsuperscript{1838} See Sanctioned Russia Teeters.

\textsuperscript{1839} Quoted in What to Expect as Russia.

\textsuperscript{1840} What to Expect as Russia (also noting: “Typically, a default is followed by a period of negotiation between a government and its bondholders to reach an agreement on restructuring the debt. This is usually done by eventually exchanging the old, defaulted bonds with new, less onerous ones, either simply worth less, with lower interest payments or with longer repayment schedules – or a combination of all three. Investors are usually reluctant to head to Court and get a formal default declared, because that could make the entire bond come due and potentially trigger defaults in other bonds where payments have not been missed. But a ‘normal’ restructuring seems unlikely in Russia’s case. The sanctions are designed to lock the country out of global bond markets and the participation of western investors in any new debt sales is forbidden. Instead, investors will probably have to sit tight, writing off their Russian bonds and awaiting a de-escalation in the Ukraine conflict that might lead to an easing of sanctions. Some may actually want to quickly vote to demand immediate repayment and get Court judgments from U.S. and U.K. judges that allow them to try to seize overseas Russian assets, to ratchet up pressure on Moscow. In the meantime, some investors will be hoping that the failure to make interest payments triggers a payout on credit-default swaps – insurance-like derivatives used to protect against default. The decision will be made by a finance industry ‘Determinations Committee,’ made up of representatives of big banks and asset managers active in the CDS market. The swaps may not end up helping bondholders, however, because the financial sanctions could snarl up the intricate system used to settle the contracts.”).

loophole had taken the form of a temporary General License (in effect, a waiver), which Treasury decided to let expire and not renew, arguing it always was intended to be temporary to allow an “orderly transition.” Hence, the U.S. began blocking those payments to U.S. investors.

Russia owed a $100 million interest payment on 27 May 2022, and said it sent the funds to Euroclear, which was supposed to distribute them to investors. Euroclear, however, said it would respect applicable sanctions – hence the payments seemed “stuck” with it. At end-June, the technical – but historic – default occurred.

Russia defaulted on its external sovereign bonds for the first time in a century, the culmination of ever-tougher Western sanctions that shut down payment routes to overseas creditors.

For months, Russia had found paths around the penalties imposed after the Kremlin’s invasion of Ukraine. But at the end of the day on Sunday, [26 June.] the [30 calendar day] grace period on about $100 million of trapped interest payments due May 27 expired, a deadline considered an “Event of Default” if missed.

The route to this point has been far from normal, as Russia has the resources to pay its bills – and tried to do so – but was blocked by the sanctions. …

Moody’s Investors Service said the missed payments constituted a default under its definition and warned that the government would likely also default on future bond payments. Moody’s and other assessment firms no longer rate Russia due to sanctions.

…

Russia’s last sovereign default occurred in 1998, during the nation’s financial collapse and rouble devaluation.

At the time, Russia avoided defaulting on its foreign Eurobonds, although President Boris Yeltsin’s government reneged on $40 billion of rouble-denominated debt, and also missed payments on dollar notes issued by state-owned Vnesheconombank.
While those bonds were issued after an agreement with the so-called London Club in 1997 to restructure Soviet-era debt held by Western banks, they were technically obligations of Vnesheconombank, rather than the Russian Federation. In May 1999, the government also defaulted on a Soviet-era dollar bond, known as the MinFin III that was domestically issued, but was widely held by foreign investors.

According to Lee Buchheit and Elena Daly, sovereign debt lawyers who provided advice to Russia during its 1990s restructuring, while the country did restructure some of its debt then, that didn’t include its Eurobonds at the time. “MinFins, while denominated in dollars, were governed by Russian law and therefore could be viewed as internal debt,” they said.

The last time Russia fell into direct default \textit{vis-à-vis} its foreign creditors was more than a century ago, when the Bolsheviks under Vladimir Lenin repudiated the nation’s staggering Czarist-era debt load in 1918.

By some measures it approached a trillion dollars in today’s money....

By comparison, foreigners held the equivalent of almost $20 billion of Russia’s Eurobonds as of the start of April [2022].

By year-end 2022, Russia had nearly $2 billion on its debt obligations due. To be sure, the Treasury Department’s decision affected only U.S. persons. However, because of the predominant position of American banks in the international financial system (including in processing debt payments), the ramifications of that decision were global, and the specter of multiple defaults loomed.

Russia vowed it would contest any declaration of default, and contest efforts by


\footnote{For an excellent review of sovereign debt defaults and restructuring, see Federico Sturzenegger & Jeromin Zettelmeyer, \textit{Haircuts: Estimating Investor Losses in Sovereign Debt Restructurings, 1998-2005}, IMF Working Paper WP/05/137 (July 2005), \url{www.imf.org/external/pubs/ft/wp/2005/wp05137.pdf} (stating: “This paper estimates bond-by-bond “haircuts” – realized investor losses – in recent debt restructurings in Russia, Ukraine, Pakistan, Ecuador, Argentina, and Uruguay. We consider both external and domestic restructurings. Haircuts are computed as the percentage difference between the present values of old and new instruments, discounted at the yield prevailing immediately after the exchange. We find average haircuts ranging from 13 percent (Uruguay external exchange) to 73 percent (2005 Argentina exchange). … With exceptions, domestic residents do not appear to have been treated systematically better (or worse) than foreign residents.”).}

\footnote{U.S. Closes Loophole.

\footnote{See Jeff Stein, \textit{U.S. Pushes Russia Toward Default by Blocking Debt Payments}, \textit{THE WASHINGTON POST}, 24 May 2022, \url{www.washingtonpost.com/us-policy/2022/05/24/treasury-russia-debt-default/} (noting the expiry of the General License “means American banks will not be able to process debt payments when Russia tries to make them.”).}
Russia has the money and is willing to pay, but sanctions make it impossible to get the payments to international creditors.

Default seemed inevitable when the U.S. Treasury decided not to renew the special exemption in sanctions rules allowing investors to receive interest payments from Russia, which expired on 25 May.

The Kremlin now appears to have accepted this inevitability too, decreeing on 23 June stating that all future debt payments would be made in rubles through a Russian bank, the National Settlements Depository, even when contracts state they should be in dollars or other international currencies.

Finance Minister Anton Siluanov admitted foreign investors would “not be able to receive” the payments....

This was for two reasons, he said. “The first is that foreign infrastructure - correspondent banks, settlement and clearing systems, depositories – are prohibited from conducting any operations related to Russia. The second is that foreign investors are expressly prohibited from receiving payments from us.”

Because Russia wants to pay and has plenty of money to do it, he denied that this amounts to a genuine default, which usually occurs when governments refuse to pay, or their economies are so weak that they cannot find the money.

“Everyone in the know understands that this is not a default at all” ... [he said]. “This whole situation looks like a farce.”

Still, Russia was in big trouble. In March 2022, even before the Treasury Department’s decision, major credit rating agencies had downgraded Russia’s debt to “junk status.” That meant many investors (according to their investment parameters) could not buy Russian obligations, hence Russia impeding Russia’s ability “to raise money on international markets.”

As for the SWIFT ban, it was complemented by a related measure. On 7 March 2022, the Financial Crimes Enforcement Network issued an alert advising financial institutions to be vigilant against efforts to evade U.S. sanctions. The FinCEN alert

1849 Russia on Brink of Default.
1850 U.S. Closes Loophole.
1851 U.S. Closes Loophole.
included examples of suspicious activity, and summarized the reporting obligations of financial institutions under the 1970 Bank Secrecy Act.

VIII. Weaponization of Finance

U.S. and Allied sanctions concerning the international banking, securities, and payments system signalled the “weaponization of finance.” The Financial Times aptly summarized several considerations about launching a financial war against a sovereign nation:

The stated intention of the [financial] sanctions is to significantly damage the Russian economy. Or as one senior U.S. official put it … after the measures were announced, the sanctions would push the Russian currency “into freefall.”

This is a very new kind of war – the weaponization of the U.S. dollar and other western currencies to punish their adversaries. It is an approach to conflict two decades in the making. As voters in the U.S. have tired of military interventions and the so-called “endless wars,” financial warfare has partly filled the gap. In the absence of an obvious military or diplomatic option, sanctions – and increasingly financial sanctions – have become the national security policy of choice. “This is full-on shock and awe,” says Juan Zarate, a former senior White House official who helped devise the financial sanctions America has developed over the past 20 years. “It’s about as aggressive an unplugging of the Russian financial and commercial system as you can imagine.”

The weaponization of finance has profound implications for the future of international politics and economics. Many of the basic assumptions about the post-Cold War era are being turned on their head. Globalisation was once sold as a barrier to conflict, a web of dependencies that would bring former foes ever closer together. Instead, it has become a new battleground.

The potency of financial sanctions derives from the omnipresence of the U.S. dollar. It is the most used currency for trade and financial transactions – with a U.S. bank often involved. America’s capital markets are the deepest in the world, and U.S. Treasury bonds act as a backstop to the global financial system.

As a result, it is very hard for financial institutions, central banks and even many companies to operate if they are cut off from the U.S. dollar and the

2022, OFAC designated as SDNs Transkapitalbank (TKB), a global network of more than 40 individuals and entities led by SDN designee Konstantin Malofeyev, and several companies operating in Russia’s virtual currency mining industry, for sanctions evasion activities. See U.S. Department of the Treasury, Office of Foreign Assets Control, U.S. Treasury Designates Facilitators of Russian Sanctions Evasion (20 April 2022), https://home.treasury.gov/news/press-releases/jy0731.
American financial system. Add in the euro, which is the second most held currency in central bank reserves, as well as sterling, the yen and the Swiss franc, and the impact of such sanctions is even more chilling.

The U.S. has sanctioned central banks before – North Korea, Iran, and Venezuela – but they were largely isolated from global commerce. The sanctions on Russia’s central bank are the first time this weapon has been used against a major economy and the first time as part of a war – especially a conflict involving one of the leading nuclear powers.

Of course, there are huge risks in such an approach. The central bank sanctions could prompt a backlash against the dollar’s dominance in global finance. In the five weeks since the measures were first imposed, the Russian rouble has recovered much of the ground it initially lost and officials in Moscow claim they will find ways around the sanctions.

Whatever the result, the moves to freeze Russia’s reserves mark a historic shift in the conduct of foreign policy. “These economic sanctions are a new kind of economic statecraft with the power to inflict damage that rivals military might,” U.S. President Joe Biden said in a speech in Warsaw in late March [2020]. The measures were “sapping Russian strength, its ability to replenish its military, and its ability to project power.”

…

Like so much else in American life, the new era of financial warfare began on 9/11. In the aftermath of the 2001 terror attacks, the U.S. invaded Afghanistan, moved on to Iraq to topple Saddam Hussein and used drones to kill alleged terrorists on three continents. But with much less scrutiny and fanfare, it also developed the powers to act as the global financial police.

Within weeks of the attacks on New York and the Pentagon, [President] George W Bush pledged to “starve the terrorists of funding.” The Patriot Act, the controversial law that provided the basis for the Bush Administration’s use of surveillance and indefinite detention, also gave the Treasury Department the power to effectively cut off any financial institution involved in money laundering from the U.S. financial system.

…

Treasury officials also negotiated to gain access to data about suspected terrorists from Swift, the Belgium-based messaging system that is the switchboard for international financial transactions – the first step in an expanded network of intelligence on money moving around the world.

The financial toolkit used to go after Al Qaeda’s money was soon applied to a much bigger target – Iran and its nuclear program [as discussed in separate Chapters].

…

The U.S. sought to squeeze Iran’s access to the international financial
system. … [American] officials would visit European banks and quietly inform them about accounts with links to the Iranian regime. European governments hated that an American official was effectively telling their banks how to do business, but no one wanted to fall foul of the U.S. Treasury.

During the Obama Administration, when the White House was facing pressure to take military action against its nuclear installations, the U.S. imposed sanctions on Iran’s central bank – the final stage in a campaign to strangle its economy.

… [F]inancial sanctions not only put pressure on Iran to negotiate the 2015 deal on its nuclear program but also cleared a path for this year’s action on Russia.

…

Central banks do not just print money and monitor the banking system, they can also provide a vital economic buffer in a crisis – defending a currency or paying for essential imports.

…

There is an irony behind a joint package of American and EU financial sanctions: European leaders have spent much of the past five decades criticizing the outsized influence of the U.S. currency.1853

To what extent does financial weaponization undermine the use of the currency that is being weaponized?

On the one hand, is there an incentive to minimize political risk of holding dollar- or euro-denominated assets by converting them into assets in other currencies, thus eroding the political clout of the dollar or euro? On the other hand, what other lower political risk, convertible currencies are there into which to switch instruments? The Chinese yuan? Asked differently, is the dollar (and to a lesser extent, the euro), like the English language – it is universal, and there is tremendous inertia built up across centuries that will keep it as such? Note the U.S. Treasury cleverly used its discretion to authorize access to frozen Russian dollar-denominated accounts to allow for bond payments and thus default avoidance:

Russia appears to be on track to avoid a looming sovereign default after tapping its domestic dollar reserves to make payments on two foreign bonds that had previously been blocked by sanctions.

The U.S. is allowing the funds to be transferred…. The fact that Russia is using its domestic reserves has been a key aim of the U.S. restrictions. The idea is to force Russia to drain that pool and undermine its capacity to

1853 Valentina Pop, Sam Fleming & James Politi, Weaponization of Finance: How the West Unleashed “Shock and Awe” on Russia, FINANCIAL TIMES, 5 April 2022, www.ft.com/content/5b397d6b-bde4-4a8c-b9a4-080485d6c64a?shareType=nongift.
finance its invasion of Ukraine.

… Russia’s Finance Ministry said it sent dollars to the paying agent, Citibank N.A., London branch. The amounts were $564.8 million on a 2022 Eurobond and $84.4 million on a 2042 bond.

Russia used a non-sanctioned bank, Bank Dom.RF JSC, to make coupon payments on its Eurobond using its dollar reserves…. Bank Dom.RF then passed along the funds to Bank of New York Mellon Corp., the correspondent bank on the bond…. After BNY Mellon got proper assurances from regulators, it forwarded the payment on to Citigroup Inc…. Citigroup is unlikely to process the payment until it has received sign-off from both U.S. and U.K. regulators….

Citigroup will pass the payment onto clearing houses, who will be charged with distributing the cash to investors’ accounts held with custody banks.

…
The country had previously tried to make the payment in roubles after the dollar transfers were stopped in early April [2022] by its correspondent bank. That breached the terms on the debt and set the clock ticking on a 30-day grace period….1854

The grace period ended on 4 May, but no default was declared.1855

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1855 See Rodrigo Campos & Davide Barbuscia, Explainer: Russia Serves to Avoid Default: What is Next?, REUTERS, www.reuters.com/business/russia-swerves-avoid-default-what-is-next-2022-05-02/ (reporting: “Russia may have averted default as it announced it had made several overdue payments in dollars on its overseas bonds, shifting the market's focus to upcoming payments and whether it would stave off a historic default. Russia’s $40 billion in international bonds and the chance of a default have become the focus of global financial markets since it was hit with sanctions from the United States and its allies after its invasion of Ukraine in late February [2022]. … The chance of default dramatically increased in early April when the United States stopped the Russian government from using frozen reserves to pay some $650 million to its bondholders. With the end of a grace period on those payments looming, Russia’s Finance Ministry said on … [30 April] it had paid, in dollars, $564.8 million of coupon and redemption obligations on a bond maturing in 2022 and a coupon payment of $84.4 million on another due in 2042. The announcement surprised markets that had been gearing up for a default at the end of the grace period on … [4 May], which would have been Russia’s largest major external default in over a century. The Russian Finance Ministry announced it paid nearly $650 million it owed holders of two of its dollar bonds. … [S]enior U.S. government official confirmed that the payments had been made and that the source appeared to be outside the limits of the current sanctions. The Credit Derivatives Determinations Committee, representing major global banks and asset managers, met on Friday and acknowledged the reports of Russia’s payments, but nonetheless made plans for a credit default swap auction next week 'solely in order to prepare for the possibility of a Failure to Pay Credit Event.' … The threat of Russian default is peculiar in that Moscow is expected to have the funds to pay its obligations. The fact that some of its sources are frozen or under sanctions boils it down to Moscow's willingness to pay from other cash sources, rather than its ability to do so. Only half of Russia's over $600 billion of foreign reserves was frozen as a result of the sanctions.”).

On 1 June 2022, CDS contracts insuring Russian bondholders against Russian default was triggered on one category of Russian bonds:
Recall the dollar did not supplant Britain’s pound sterling as the world’s reserve currency until after the Second World War, when the U.K. was exhausted by two World Wars (1914-1918, and 1939-1945), whereas the U.S. passed Britain as the world’s largest economy at the end of the 19th century. Or, is the fate of the dollar tied more to the strength of the American economy? If so, then is financial weaponization less relevant to the international importance of the dollar than America running its political and economic affairs competently and efficiently?

Russia’s failure to pay a slice of interest on one of its bonds will trigger $2.5 bn of insurance-like contracts used to protect against debt defaults, according to a panel of derivatives dealers and investors.

The ruling by the Credit Derivatives Determinations Committee that a “failure to pay” event has occurred pushes Moscow one step closer to a historic debt default, as western sanctions following President Vladimir Putin’s invasion of Ukraine choke off its ability to make payments to US and European investors.

Moscow appeared to have dodged the long-expected default on its foreign currency debt when it belatedly repaid investors in early May [2022], just before the end of a grace period on two payments originally due on April 4. But Russia did not include $1.9mn of interest accrued during the 30-day period, prompting some investors to ask the international committee to rule on whether a default had occurred.

… [The] decision means holders of Russian credit default swaps will receive a payout, with the size to be determined by an auction process of Russian bonds. JPMorgan estimated last month that there were about $2.5 bn of CDS to be settled, including deals tied directly to Russia and others based on a basket of issuers.

U.S. bond-investing giant Pimco was among the investors with exposure to Russian CDS, having amassed a derivatives wager that Moscow would not default worth at least $1 bn at the end of 2021….

The small size of the accrued interest payment, along with the fact that Moscow repaid the principal of the bond due in April, means the decision will not trigger a wider default on Russia’s debt. However, most investors think an official default is only a matter of time after [as discussed above] U.S. authorities … ended a sanctions exemption that allowed American investors to continue receiving Russian bond payments.

Tommy Stubbington, Russia’s “Failure to Pay” Bond Interest Triggers Credit Default Swaps, FINANCIAL TIMES, 1 June 2022, www.ft.com/content/f270f38d-b0a4-4f97-9ffd-e55962955fad?shareType=nongift.
Chapter 23

RUSSIA SANCTIONS (CONTINUED):
WAVES FOUR AND FIVE, AND NON-SANCTIONING COUNTRIES
(MARCH 2022)1856

I. Wave Four:
Banning Russian Oil and Natural Gas Imports

On 8 March 2022, the U.S. took a major step in broadening the sanctions regime. President Joseph R. Biden (1942, President, 2021-) issued Executive Order 14066.1857 This Order prohibited importation of Russian-origin coal, crude oil, NG, petroleum, and related products. It also barred new investment in Russia’s energy sector by U.S. persons. Importantly, the definition of “investment” was broad: it included any transaction involving a “contribution of funds or other assets for” new “energy sector activities” that are “located or occurring” in Russia after 8 March.

Simply put, the Order took aim at the heart of the Russian economy, namely, its energy sector. The Order also made illegal the approval, financing, facilitation, or guarantee by a U.S. person of a transaction by a foreign person, where the transaction would be prohibited if done by a U.S. person or within the U.S.

Australia and Canada did likewise, declaring an embargo on purchases of Russian oil.1858 The U.K. pledged it would “phase out” the import of Russian oil by year-end 2022, but gave no specifics on how it would do so.

As for the EU, and especially Germany, it was not positioned to forswear immediately Russian oil or NG. The EU heavily on Russia for oil and NG – 27% and 41%,

1856 Documents References:
(1) Havana (ITO) Charter Preamble, Article 99
(2) GATT Article XXI
(3) Relevant provisions in FTAs

This Chapter draws upon Raj Bhala, Waves of Russian Sanctions: American and Allied Measures, Indian and Chinese Responses, and Russian Countermeasures, 14 TRADE, LAW AND DEVELOPMENT number 2, 353-453 (Winter 2022).


respectively, of its imports were sourced from Russia\textsuperscript{1859} – whereas America sourced only 8% of its oil from Russia. However, the EU resolved to wean itself off that dependence by year-end 2022, and even Green Parties suggested they would relax their opposition to nuclear power to help find alternatives to Russian hydrocarbons.

In particular, initially, the EU targeted a reduction of “its dependence on Russian oil and gas by two-thirds by the end of the year and to zero by the end of 2027.”\textsuperscript{1860} “Germany, the EU’s largest economy, … announced plans to end its dependence on Russian oil by the close of this year [2022].”\textsuperscript{1861} In other words, by early May, the EU reached consensus on a total embargo of Russian oil within six months – with possible additional transition periods for the Czech Republic and Slovakia of 2-3 and 3 years, respectively, and a possible exception for Hungary\textsuperscript{1862} – and a gradual embargo of Russian NG. And, the European Commission published its steps toward this NG embargo:

… the EU plans to speed up its shift to green energy, but says it must also invest in pipelines in other countries.

…

The \textit{REPowerEU} strategy was first announced in March [2022] with the stated aim of reducing Russian gas imports by two-thirds in 2022.

…

The [May] updated proposals outline not just how the EU plans to negotiate both the immediate gas crisis, but also deliver on promises to completely wean itself off Russian energy by 2030.

The strategy focuses on three key topic areas. Improving energy efficiency, expanding the use of renewable energy, and securing non-Russian suppliers of oil and gas.

…

The \textit{REPowerEU} plan is estimated to cost €210 billion (£178 billion) over the next five years.

\textsuperscript{1859} \textit{From Where Do We Import Our Energy?}, EUROSTAT, \url{https://ec.europa.eu/eurostat/cache/infographs/energy/bloc-2c.html} (reporting: “Russia is the main EU supplier of crude oil, natural gas and solid fossil fuels,” and: “In 2019, almost two thirds of the extra-EU’s crude oil imports came from Russia (27%), Iraq (9%), Nigeria and Saudi Arabia (both 8%) and Kazakhstan and Norway (both 7%). A similar analysis shows that almost three quarters of the EU’s imports of natural gas came from Russia (41%), Norway (16%), Algeria (8%) and Qatar (5%), while over three quarters of solid fuel (mostly coal) imports originated from Russia (47%), the United States (18%) and Australia (14%).”). [Hereinafter, \textit{From Where Do We Import}].

\textsuperscript{1860} \textit{Fact Box: Who is Buying Russian}.

\textsuperscript{1861} \textit{Fact Box: Who is Buying Russian}.

\textsuperscript{1862} See Paul Kirby, \textit{Ukraine War: EU Plans Russian Oil Ban and War Crimes Sanctions}, BBC NEWS, 4 May 2022, \url{www.bbc.com/news/world-europe-61318689} (also reporting: “Germany has drastically reduced its reliance on Russian oil imports, down from 35% to 12%. The U.K., which is no longer in the EU, is already phasing out Russian oil, which accounts for 8% of its imports. … The problem for Hungary, Slovakia and the Czech Republic is that they are all landlocked and rely on their neighbors for fuel supplies. Czech Special Envoy for Energy Security Vaclav Bartuska … [said] that Europe was currently trying to redraw the map of energy supplies as fast as it could: ‘We want to get rid of Russian crude once and for all and we want to be absolutely sure there’ll be no need to go back and ask Russia again.’”).
Energy Saving

The Commission report highlights energy saving as the “cheapest, safest and cleanest” way to reduce dependence on Russian fuel.

It wants to improve how buildings of insulated, as well as encourage consumers to be more aware of energy use.

It also plans to speed up the transition from fossil fuel burning boilers to electric heat pumps (a device that absorbs heat from the air, ground, or water around a building).

Plans to reduce energy consumption in the EU have also made more ambitious, from the original plan of a 9% cut to 13% cut by 2030.

More Green Energy

The bloc has earmarked €113 billion for a “massive scale up in renewables” and new hydrogen infrastructure.

New EU legislation is being proposed to make it easier to build solar and wind farms.

“Whenever we talk about rapid deployment of renewables, there is an elephant in the room- getting a permit,” said Frans Timmermans, Vice President of the European Commission.

“It might take as long as nine years for wind and up to four years for solar projects, so this is time that we do not have and we have to speed things up,” he added.

The Commission has proposed specially designated “go-to” areas where permission can be given in just one year. Certain new buildings could also be required to have solar panels installed on the roof.

The EU target for renewable energy has also been … raised. The goal is for green energy to provide 45% of energy needs by 2030, up from 40%.

More Gas and Oil Infrastructure

Even if they are fast-tracked in special zones, new wind and solar plants will still take time.

To quickly diversify from Russian fossil fuels, the EU is investing up to €12 billion in pipelines and … LNG terminals to improve access to gas and oil
from other countries including Egypt, Israel, and Nigeria.\textsuperscript{1863}

Even absent an immediate, outright embargo of Russian fossil fuels, many EU companies voluntarily self-sanctioned, winding down their extant long-term energy supply contracts with Russia, and avoiding signing any new deals.

On 31 May 2022, the EU struck a major deal to eliminate 90% of Russian crude oil and petroleum product imports by year-end 2022. The key points of the deal involved a compromise, principally with Hungary:

(1) Seaborne Oil Import Ban:

The entire EU agreed to ban (on or before 5 December 2022) all Russian oil “that arrives by sea – around two-thirds of imports – but not pipeline oil, following opposition from Hungary.”\textsuperscript{1864} “This immediately covers more than 2/3 of oil imports from Russia, cutting a huge source of financing for its war machine,’ [European Council President Charles] Michel said in a tweet. “Maximum pressure on Russia to end the war.”’\textsuperscript{1865} Specifically, the EU accepted the EC’s proposal to ban seaborne crude oil within six months, and refined petroleum products within eight months.\textsuperscript{1866}

However, some EU countries received an extended transition to implement the seaborne oil ban. For example, for Bulgaria, “a period until June or December 2024 … [was] envisioned, while Croatia” sought “an exemption for imports of vacuum gas oil, which is used to make products including gasoline and butane.”\textsuperscript{1867}

(2) Temporary Pipeline Import Allowance:

Because Hungary “import[ed] 65% of its oil from Russia through pipelines,” it was the “main opponent” of an immediate, comprehensive import ban.\textsuperscript{1868}

Keeping pipelines out of any initial embargo was a crucial demand for Hungary, which had argued that a ban would put its economy at risk because of its dependence on Russian crude. Viktor Orbán, Hungary’s Prime Minister, also secured measures to ensure that Budapest could still obtain Russian oil from other sources if there was an “accident” with [the] Druzhba [Pipeline], which crosses


\textsuperscript{1864} Russian Oil: EU Agrees Compromise Deal on Banning Imports, BBC NEWS, 31 May 2022, \url{www.bbc.com/news/world-europe-61638860}. [Hereinafter, Russian Oil: EU Agrees Compromise.]

\textsuperscript{1865} Quoted in \textit{EU Leaders Back Push}.

\textsuperscript{1866} EU Leaders Back Push.

\textsuperscript{1867} EU Leaders Back Push.

\textsuperscript{1868} Russian Oil: EU Agrees Compromise.
Ukraine.\footnote{Sam Fleming, Valentina Pop & Andy Bounds, *EU Leaders Agree to Ban Majority of Russian Oil Imports*, FINANCIAL TIMES, 30 May 2022, www.ft.com/content/acc55aee-1b63-4f23-b52d-41fe661b0714?shareType=nongift (also reporting: “Croatia … could expand the capacity of its Adria pipeline, which runs from the Adriatic Sea, to provide supplies of crude to Hungary,” and that “it was helpful to offer extra time to Hungary so the country could ‘really switch off’ [as EC President Ursula Von der Leyen said] Russian oil.”). [Hereinafter, *EU Leaders Agree to Ban Majority*.]

Similarly, the Czech Republic and Slovakia also were reliant on pipeline imports. So, the EU agreed to a temporary exemption to allow for such imports via pipeline.\footnote{See Russian Oil: EU Agrees Compromise.}

“Left over [\emph{i.e.}, not included in the EU import ban] is around 10-11\% [of Russian oil imports into the EU] that is covered by the Southern Druzhba [Pipeline],” \ldots [European Commission President Ursula] Von der Leyen said, referring to the Russian pipeline supplying oil to Hungary, Slovakia, and the Czech Republic. The European Council would revisit this exemption “as soon as possible,” she added.

A senior EU official confirmed that the three landlocked countries were given an additional guarantee that they could obtain supplies of seaborne Russian oil in the event of an interruption to pipeline supply.\footnote{See EU Leaders Agree to Ban Majority (reporting: “European governments have not settled on how long the carve-out of Russian oil supplied via pipeline will last, declaring only that it will be ‘temporary’ and that they will return to the matter as soon as possible.”).}

Manifestly, this allowance was necessary for all 27 EU states to reach a deal, as was, perhaps, the intentional ambiguity as to its precise duration.\footnote{EU Leaders Agree to Ban Majority.} However, re-exports of Russian oil delivered by pipeline were forbidden (to ensure the landlocked countries were invoking their exemption for \emph{bona fide}, domestic consumption purposes, and not selling that oil abroad at a profit).\footnote{EU Leaders Agree to Ban Majority.}

\footnote{Simplified, there were three major pipelines from Russia westward to Europe:
(1) the Druzhba Pipeline, which crossed Ukraine, carrying crude oil from West Siberia, from Perm and Almetyevsk, Russia, to Rostock and Leipzig, Germany and Gdansk, Poland (via the Northern Druzhba branch) and to Litvinov, Czech Republic, Bratislava, Slovakia, and Budapest, Hungary (via the Southern Druzhba branch).
(2) the Baltic Pipeline System (laid out north of the Druzhba Pipeline), carrying crude oil from West Siberia and from Timan-Pichora, from Perm and Yaroslavl, Russia, to Primorsk and Ust-Luga, Russia (near Estonia and the Gulf of Finland), and Novopolosk, Belarus.
(3) The Baltic Pipeline System 2, carrying crude oil from Unecha, Russia at the Druzhba Pipeline to Ust-Luga.
A different pipeline (laid out south and east of the Druzhba Pipeline) carried Russian crude from West Siberia to the Russian Black Sea ports of Novorossiysk and Tuapse. See *EU Leaders Back Push*.}

\footnote{1869}
(3) German and Polish Pledge on Pipeline Imports:

Germany and Poland pledged to cease all pipeline imports, too, thus raising the figure of embargoed imports [pipeline plus seaborne] to 90%.  

(4) Insurance:

The EU (as well as the U.K.) agreed to “a ban on insurance related to shipping oil to third countries,” to take effect six months after the adoption of the above-listed measures.

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1874 See Russian Oil: EU Agrees Compromise.

1875 EU Leaders Back Push. Because of the central role London plays in international maritime insurance, the coordinated British-European action was important: it “shut[] Moscow out of the vital Lloyd’s of London insurance market and sharply curbing its ability to export crude.” Andy Bounds, Sam Fleming, Jim Pickard & Ian Smith, U.K. and EU Hit Russian Oil Cargoes with Insurance Ban, FINANCIAL TIMES, 31 May 2022, www.ft.com/content/10372dd3-be3c-42b9-982b-241a38efce88?shareType=nongift (also noting: “Lloyd’s has been the heart of the marine insurance industry for centuries and blocking its members from insuring Russian oil cargoes will pile more pressure on global commodity markets, which have been in turmoil since Moscow’s invasion of Ukraine,” and observing: “Years of complying with sanctions on Iranian oil cargoes have provided a template for compliance, said senior figures in the Lloyd’s market. ‘The only complication is making sure it is Russian oil to begin with,’ said one. ‘It’s not the easiest job in the world, but neither is it impossible.’”). [Hereinafter, U.K. and EU Hit Russian Oil Cargoes.] See also Ian Smith & Harry Dempsey, Insurance Ban to Tighten Squeeze on Russian Oil Shipments, FINANCIAL TIMES, 1 June 2022, www.ft.com/content/56379aac-674d-49ca-9574-e2eff3d4a8d?shareType=nongift (explaining: “One key area of marine insurance is liability cover, which covers shipowners for huge accidents such as oil or bunker fuel spills that can incur multibillion-dollar claims. Without such cover, many ports decline entry. The maritime sector has its own special insurance arrangements through the International Group of P&I Clubs, 13 protection and indemnity insurers, most of which operate from Europe. They provide mutual insurance coverage for 90 per cent of oceangoing tonnage, pooling their risk, and rely on Lloyd’s for reinsurance cover. Some P&I executives … said the Iran oil experience would make complying with a Russian ban easier, but others see a Russian ban as adding to an already-crushing compliance workload because of other strictures coming from the conflict.”). [Hereinafter, Insurance Ban to Tighten Squeeze.] The utility of drawing and applying lessons from the Iranian to the Russian context (mentioned in the above-quoted articles) was noteworthy. But, so, too, was the deft (and sometimes illegal) ways in which the Iranian and Russian regimes countered sanctions (as discussed in other Chapters). As to the extent to which they could do so with respect to marine insurance, as well as container vessels, consider the following facts:

The EU has proposed a six-month phase-in period for the insurance ban [discussed above], which could give Russia and interested parties time to sort out alternative cover through less well-developed insurance markets such as India and China, and in Russia itself. Since the conflict began, Moscow has moved to beef up the capacity of its state-owned reinsurer.

In the case of Iran, Tokyo began to offer sovereign guarantees for Japanese vessels carrying Iranian oil. India granted permission for ships to enter its ports covered by certain Iranian underwriters. Iran has its own P&I insurer, Kish, created as western insurers pulled back.

Analysts, however, believe that the state-owned Russian, Indian, and Chinese fleets are not large enough to handle all of the country’s oil exports on their own.

Some experts argue that shipping companies looking to move Russian oil could find that insurance capacity outside of the UK and EU is insufficient, while ports may not accept ships covered by arrangements outside of the International Group of P&I Clubs.
Prior to the EU deal, “about 2.3 million barrels a day of Russian crude head[ed] west through a network of pipelines and ports,” and the EU had been “pay[ing] Russia around € 400 bn ($ 430 bn) a year in return” for oil. So, Russia stood to lose as much as € 400 bn ($387 bn) annually from its previously assured EU market. It seemed unlikely China and India, though (as discussed below) they were eager to boost their sourcing of Russian-origin oil, especially at cheaper prices given the decline in EU demand, could make up fully for Russia’s lost EU sales revenues.

To assist its EU Allies in cutting their dependence on Russian hydrocarbons, Canada pledged to step up oil and NG production and exports (though it could not plug the entire deficit created by removal of Russian products from the world market). Arguably, there was no net adverse impact on GHG emissions, because of a substitution effect, that is, Canadian hydrocarbons were being substituted for Russian ones. The EU had

Insurance Ban to Tighten Squeeze. Simply put, it was difficult even for powerful target countries, and countries friendly to the targets, to create anew a services market where none, or an inchoate one, existed before a sanctions regime took effect.

To assist its EU Allies in cutting their dependence on Russian hydrocarbons, Canada pledged to step up oil and NG production and exports (though it could not plug the entire deficit created by removal of Russian products from the world market). Arguably, there was no net adverse impact on GHG emissions, because of a substitution effect, that is, Canadian hydrocarbons were being substituted for Russian ones.

EU Leaders Agree to Ban Majority.

See Jonathan Josephs, Canada Pledges to Help Countries Stop Using Russian Oil, BBC NEWS, 27 March 2022, www.bbc.com/news/business-60879685 (also reporting: “Canada says it can provide more oil, gas and uranium to help solve the global energy crisis. Prices have soared as a result of Russian supplies being squeezed because of its invasion of Ukraine. Canada’s Natural Resources Minister said many countries are committed ‘to help as much as we can in terms of displacing Russian oil and gas.’ The world’s fourth biggest oil producer has committed to exporting an extra 200,000 barrels of oil. Its Natural Resources Minister Jonathan Wilkinson … [said] it would also export an additional 100,000 barrels of natural gas. … ‘We expect that by the end of the year [2022] we will be fully up to the 300,000 barrels,’ said Mr Wilkinson. However, that is only a fraction of the three million barrels a day that the IEA says will be removed from global markets by next month because of sanctions against Russia.”). [Hereinafter, Canada Pledges to Help.]
complementary options in addition to sourcing from Canada. For example, before its move to end dependence on Russia, i.e., as of 2021, when Russia was the EU’s primary source at 24.8% of its imported oil, the EU also sourced oil from Norway, 9.4%; U.S., 8.8%; Libya, 8.2%; Kazakhstan, 8.0%; Nigeria, 7.1%; Iraq, 6.6%; Saudi Arabia, 5.1%; U.K., 5.1%; and all other countries, 16.9%. These figures suggested there was no single supplier that could step in quickly to replace Russia, but that over time, the EU could shift purchasing to a variety of countries with the capacity to bolster output and ensure safe deliveries.

The EU was not alone in acting resolutely. On 30 May 2022, the entire G7 agreed to eschew Russian energy. G7 leaders issued a bold pledge:

“We commit to phase out our dependency on Russian energy, including by phasing out or banning the import of Russian oil. We will ensure that we do so in a timely and orderly fashion,” G7 leaders said in a Joint Statement. “We will work together and with our partners to ensure stable and sustainable global energy supplies and affordable prices for consumers.”

Associated with this pledge was President Biden’s Proclamation 10371 (dated 21 April), which (in Section 1) prohibited Russian-affiliated vessels from entering U.S. ports (with certain exceptions in Section 2 for such vessels carrying source material, special nuclear material, and nuclear by-product material, or for force majeure reasons). That ban obviously covered ships carrying Russian oil.

II. Russian Tanker Sanctions Evasion

The efforts of America and its Allies to remove Russian energy from world markets triggered sanctions-evasion behavior by Russian tankers:

Russian tankers carrying oil chemicals and oil products are increasingly concealing their movements, a phenomenon that some maritime experts warn could signal attempts to evade unprecedented sanctions prompted by the invasion of Ukraine.

In the week ended March 25, [2022,] there were at least 33 occurrences of so-called “dark activity” – operating while onboard systems to transmit their locations are turned off – by Russian tankers, said Windward Ltd., an Israeli

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1882 See Russian Oil: EU Agrees Compromise.
consultancy that specializes in maritime risk using artificial intelligence and satellite imagery. That’s more than double the weekly average of 14 in the past year.

The dark operations occurred mainly in or around Russia’s Exclusive Economic Zone…. The ships engaging in dark activity include vessels connected to big corporations and multinational shipping firms, as well as small businesses….

Commercial vessels are required by international maritime law to have their automatic identification system, or AIS, turned on while at sea. Disabling or manipulating a ship’s identification system is at the top of deceptive shipping practices cited by the U.S. Treasury Department in an advisory last May [2021] to curb illicit shipping and sanctions evasions.

“There’s no reason why they should have their AIS turned off,” said Gur Sender, Windward’s program manager who specializes in compliance and risk issues. “Investigating if a vessel is engaged in deceptive shipping practices related to specific regimes is crucial to protect your business from dealing with sanctioned entities.”

…

As more countries and businesses shun commerce with Russia, the country’s fleet will be under pressure to conduct dark activity and even engage in illicit shipping to stay afloat, said Ian Ralby, Chief Executive of I.R. Consilium, a maritime law and security consulting firm that works with governments.

“Russia has quickly become a pariah state so they are obscuring some of their activities because a lot of people on both ends of a transit don’t want any association to Russia,” said Ralby. “Anywhere that Russia appears in the overall management or operation and ownership of the vessel, there are concerns about dark activity right now. Almost anything that they are going to be doing is gaining scrutiny and legal concerns because of all the various sanctions.”

If the isolation of Russian ships and crew continues, they will have little choice but to take offers that are given to them, making them susceptible to “all sorts of criminal and nefarious manipulation,” said Ralby. “We may see a parallel global market emerge where there is internal trading among all these sanctioned states and their enablers,” he said.

…

In many of the cases of dark activity, operations are conducted between a Russian-flagged or owned ship and non-Russian vessels…. Ships that conduct operations side-by-side exhibit tell-tale patterns of movements and speed, even if their transponders are off. Satellite imagery can also reveal operations.
Windward’s data shows that the number of ship-to-ship meetings that lasted at least three hours between Russian oil tankers and non-Russian vessels has remained relatively normal. That’s enough time to allow oil tankers to transfer their goods to a third vessel that’s not affected by sanctions or bans….  

So, the game of cat-and-mouse was on. That this game would be played was foreseeable: it had occurred (and, indeed, was occurring contemporaneously) in the context

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1885  K Oanh Ha, Russian Tankers Going Dark Raises Flags on Sanctions Evasion, BLOOMBERG, 27 March 2022, www.bloomberg.com/news/articles/2022-03-27/russian-tankers-going-dark-raises-flags-on-sanctions-evasion?sref=7sxw9Sxl. See also Julian Lee, Oil Tankers Make Rare Mid-Atlantic Switch of Russian Crude Cargo, BLOOMBERG, 6 June 2022, www.bloomberg.com/news/articles/2022-06-06/oil-tankers-make-rare-mid-atlantic-switch-of-russian-crude-cargo?sref=7sxw9Sxl (reporting: “Shippers of Russian crude are turning to unusual methods to move cargoes displaced from Europe over much longer distances to new customers. The most recent example is a ship-to-ship transfer in the middle of the Atlantic Ocean. The Aframax tanker Zhen I discharged its cargo into the super-tanker Lauren II in waters 300 miles west of the island of Madeira…. The transfer took place May 26 to 27 [, 2022]. Moving cargoes onto larger vessels is not unusual, but what is far less common is the location where it happened. Most transfers take place in sheltered waters, where the risks of oil spills are greatly reduced. Russian cargoes have been transferred to bigger ships off Skaw in Denmark, in the western Mediterranean off the Spanish North African town of Ceuta, and even in the North Sea off Rotterdam. This is the first transfer seen on the high seas. …. A ship as large as the Lauren II can hold as many as three cargoes of the size typically carried by a vessel like the Zhen I. That makes them a much more economic option for carrying crude over very long distances. Self-sanctioning of Russian crude by some European refiners is already forcing greater volumes to be moved much longer distances to buyers, particularly in India. As European Union sanctions begin to bite deeper into flows to Europe, we can expect to see more Russian crude being shipped further, with the country seeking new markets for its oil. Mid-ocean cargo transfers may become more common, if buyers and sellers start to try masking the destinations of Russia’s oil exports.”).

1886  The EU contemplated an expansive boycott of Russian oil, that is, a rule that would forbid any EU-owned vessel from transporting Russian-origin crude oil and petroleum products, oil to and from any location, including ship-to-ship transfers. See Nikos Chrysoloras, Alberto Nardelli, & Ewa Krukowska, EU Drops Plan to Stop Tankers Moving Russian Oil Anywhere, BLOOMBERG, 9 May 2022, www.bloomberg.com/news/articles/2022-05-09/eu-drops-plan-to-stop-tankers-moving-russian-oil-to-other-buyers?sref=7sxw9Sxl. The proposal rule would have applied to exports originating from Russia, or later previously exported from Russia. However, “Greece, whose economy is heavily reliant on shipping, was among the [EU] member states that pushed the provision on exporting to third countries … be dropped.” Id. (also reporting: “Greeks own more than a quarter [26%] of the world’s oil tankers by capacity.”). Moreover, the proposal would have adversely affected Central Asian countries, which opposed Russia’s war against Ukraine, but were dependent on Russian energy. See id. (observing: the revised “ban will fully exempt goods that don’t originate in Russia even if they transit through the country. That would free up oil from Kazakhstan or other third countries.”).

The EU did, however, entertain a ban on insuring any such cargo. See id. (explaining: a “ban on providing insurance would span the vast majority of the global fleet of oil tankers seeking to transport Russian barrels. Tanker companies insure their vessels collectively against risks including oil spills. Through an overarching organization called the International Group of P&I Clubs in London, vessel owners collectively purchase cover from 80 reinsurers, including from more than 20 of the 25 largest providers in the world. As such, an insurance ban would make it all but impossible to obtain such cover given how many reinsurers are European…. The International Group’s members sort out cover for 95% of the tanker fleet for spills and other maritime liabilities. If they could no longer do so, then it would force Moscow or its buyers to come up with alternative arrangements at a time when Russia is already being heavily sanctioned.”).
of sanctions against Iran (discussed in separate Chapters).  

III. Non-Sanctioning Countries: India and China

Russia was the world’s third-largest crude oil producer. With the U.S., Allied, and G7 measures against importation of its oil, Russia sought other customers. They included China, India, and Turkey. India’s case seemed especially regrettable.

That is, India – which took only about 3% of its oil from Russia – seemed rather unprincipled in its approach to Russian oil. India saw an opportunity to purchase Russian oil at a discounted price, given that Russian suppliers could neither sell to, nor collect payments from, sanctioning countries:

Russian oil exports to India have quadrupled this month [March 2022] in a sign of the vast reshaping of global energy flows since Russia’s invasion of Ukraine.

India, the world’s third-largest energy-consuming country, has snapped up multiple cargoes of Russian oil from traders as buyers in Europe shunned the country’s vast commodities market following western sanctions on Moscow.

Russia has exported 360,000 barrels a day of oil to India in March so far, nearly four times the 2021 average. The country is on track to hit 203,000 barrels per day in April.


1888 U.K. and EU Hit Russian Oil Cargoes.

1889 Interestingly, China imported over 40% of its oil from the Persian (Arabian) Gulf region. It was, therefore, keen on stability in that region. In March 2023 brokered the restoration of diplomatic relations between arch-rivals Iran and Saudi Arabia, and resuscitation of lapsed security, trade, and cultural pacts between them. See Vivian Nereim, Saudi Arabia and Iran Agree to Restore Ties, in talks Hosted by China, THE NEW YORK TIMES, 10 March 2023, www.nytimes.com/2023/03/10/world/middleeast/saudi-arabia-iran-reestablish-ties.html?smid=nytcore-ios-share&referringSource=articleShare (also reporting: “Saudi Arabia cut ties with Iran completely in 2016, when protesters stormed the Kingdom’s Embassy in Tehran after Saudi Arabia’s execution of a prominent Saudi Shi‘ite cleric.”). China’s sponsorship of the Saudi-Iranian accord signalled a relative decline in American influence in the Gulf (which was not surprising, given its pivot to the Indo-Pacific launched by the Obama Administration), a failure of Israeli efforts to cozy up to the Saudis and isolate the Iranians – but most of all, the power of oil in shaping Chinese foreign policy. It also showed up India: India played almost no role in Middle East peace diplomacy, despite its long-standing warm relations with Iran, the Kingdom, and Israel.
b/d for the whole month based on current shipment schedules, according to Kpler, a commodities data and analytics firm. Export data represent cargoes that have been loaded onto tankers and are *en route* to India.

Alex Booth, Head of Research at Kpler, said India typically buys CPC [Caspian Pipeline Consortium], a blend of predominantly Kazakh and Russian crude, but the big increase in March was for Russia’s flagship Urals crude, suggesting Indian buyers weighed up significant discounts against public opinion.

“Already committed oil cargoes from Russia that can’t find buyers in Europe are being bought by India,” he said. “Exports to India surged in March before any official announcement by New Delhi.”

Historically, Russian crude oil has constituted below 5 per cent of India’s total imports, which were 4.2 mn b/d last year.

“Indian companies weren’t sourcing much from Russia given high shipping costs,” said Vivekanand Subbaraman, Research Analyst at Ambit Capital. “This appears to be changing now.”

With 85 per cent of India’s crude needs covered by imports, higher oil prices act as a drag on its treasury.

Subbaraman said: “I think that all three state-owned refiners will purchase oil from Russia given how import dependent and politically sensitive energy is for Indians.”

Speaking to Indian lawmakers this week, Indian Oil Minister Hardeep Singh Puri stressed that energy prices in India have not soared as much as they have in Europe and the U.S., rising only 5 per cent. India would act in the interest of local consumers within “the margin of persuasion,” he added.

Russia’s Deputy Prime Minister Alexander Novak and Singh Puri spoke by phone… “We are interested in further attracting Indian investment to the Russian oil and gas sector and expanding Russian companies’ sales networks in India,” Novak said.

Indian officials have said that the central bank and government are looking at establishing a *rupee-rouble* trading mechanism, which would facilitate trade after western restrictions on international payments to and from Russia.

The two countries have several joint energy interests. Rosneft owns 49 per
cent of Nayara Energy, which runs India’s second largest refinery.\footnote{1890}

India’s approach was nakedly unprincipled and self-interested, as its Minister of Finance confirmed:

Nirmala Sitharaman … [said] India would continue to buy discounted oil from Russia.

“I would put my country’s national interests first and I would put my energy security first,” she said. “Why should I not buy it? I need it for my people.”\footnote{1891}

Had she forgotten how Mahatma Gandhi defined “national interests” and “security”? Better to launch a Salt March than buy salt from the British. Fortunately, in the Gandhian tradition,\footnote{1890} Harry Dempsey & Chloe Cornish, *Russian Oil Exports to India Surge as Europe Shuns Cargoes*, FINANCIAL TIMES, 18 March 2022, \url{www.ft.com/content/5efc6338-3f01-4015-aedf-53a4a1944ca8?shareType=nongift}. \footnote{1891} Krishna N. Das, “Russia’s Lavrov Hopes to Bypass Sanctions in Trade with ‘Friend’ India,” REUTERS, 1 April 2021, \url{www.reuters.com/world/russias-lavrov-lobbies-india-after-western-emissaries-make-case-sanctions-2022-04-01/}.

As of end-April 2022, at least five Indian entities were importing Russian oil:

**BHARAT PETROLEUM…**

Indian state-run refiner Bharat Petroleum Corp. Ltd. has bought 2 million barrels of Russian Urals for May loading from trader Trafigura…. The company regularly buys Russian Urals for its 310,000 barrels per day (bpd) Kochi refinery in Southern India.

**HINDUSTAN PETROLEUM…**

India’s state refiner bought 2 million barrels of Russian Urals for May loading….

**INDIAN OIL CORP….**

India’s top refiner has bought 6 million barrels of Urals since Feb. 24, [2022,] and has a supply contract with Rosneft for up to 15 million barrels of Russian crude in 2022. The refiner, which also buys crude on behalf of its Chennai Petroleum …subsidiary, however, has excluded several high-sulphur crude grades, including Urals, from its latest tender….

**MANGALORE REFINERY AND PETROCHEMICALS…**

The state-run Indian refiner has bought 1 million barrels of Russian Urals crude for May loading via a tender from a European trader, a rare purchase driven by the discount offered.

**[NAYARA ENERGY]**

The Indian private refiner, part-owned by Rosneft …, has purchased Russian oil after a gap of a year, buying about 1.8 million barrels of Urals from trader Trafigura.

Fact Box: Who is Buying Russian (also reporting, not surprisingly, “China’s state-run Sinopec …, Asia’s largest refiner, is continuing to purchase Russian crude under previously signed long-term contracts but is steering clear of new spot deals.”).
India’s Judge on the ICJ did not behave that way: he voted against Russia, calling on it to withdraw from Ukraine.1892

India’s approach also wrongly assumed Russia was monolithic in support of Mr. Putin’s war. It was not: “[M]ore and more top insiders [i.e., “critics at the pinnacle of power … spread across high-level posts in government and state-run business”] have come to believe that Putin’s commitment to continue the invasion will doom Russia to years of isolation and heightened tension that will leave its economy crippled, its security compromised and its global influence gutted.”1893 Such critics “remain[ed] limited,” for fear of retribution if they spoke openly and honestly, but India was foolish to ignore the

1892 In particular:

An Indian Judge at the International Court of Justice … voted with the majority against Moscow, a decision at odds with India’s abstention from a United Nations General Assembly resolution on March 2 [, 2022] condemning the Russian invasion of Ukraine.

The United Nations Court’s order was backed by 13 of its 15 judges and demanded that Russia “immediately suspend” military operations in Ukraine. The two judges voting against were ICJ Vice President Kirill Gevorgian from Russia and Judge Xue Hanqin from China. India’s Judge Dalveer Bhandari voted with the majority, which included ICJ President Joan E. Donoghue of the U.S., Judge Ronny Abraham of France, and Judge Yuji Iwasawa of Japan.

Judge Bhandari’s vote differs from the Indian government’s stance on the issue. Given its long-standing defense and strategic ties with Russia, India has refrained from outright condemnation of Moscow over its invasion of Ukraine. It has also abstained from key U.N. votes on the crisis, calling instead for an immediate cessation of violence and a return to dialogue.

Bhandari, a former Judge with the Supreme Court of India, was first nominated to serve on the ICJ in 2012, before the ruling Bharatiya Janata Party and Prime Minister Narendra Modi came in power in 2014. He was renominated by India in 2017 to fill a vacancy for the 2018-2027 term. Modi’s government had supported Bhandari through diplomatic efforts in various forums.

Although ICJ Judges are nominated by their home-country governments, they do not represent them once elected. Thus, Judge Bhandari’s vote is independent and based on his own understanding of the Russia-Ukraine crisis.

The Court order … said, “The court is profoundly concerned about the use of force by the Russian Federation in Ukraine, which raises very serious issues of international law.”

The ruling came in response to a suit filed by Ukraine after the Russian invasion began on Feb. 24. Although Court rulings are binding, it has no direct means of enforcing them.


truths they did speak.1894

India argued its ties with Russia and America “stand on their own merit,”1895 essentially meaning that India would not be pushed into an “us-versus-them” mentality. This response was redolent of India’s Cold War era leadership of the Third World’s Non-Aligned Movement. However, India was fooling itself: not to make a choice in such a naked breach of International Law was to ignore the demerits of Russia’s behavior.

India’s pro-Russian tilt was particularly nauseating for reasons beyond oil: “[f]rom rifles to rockets, about 60% of India’s military supplies come from Russia, which analysts say are more cost-effective than those from the United States.”1896 As The New York Times put it:

As tensions increase along India’s border with China, experts have said India doesn’t feel it can risk its relationship with Russia – a key source for weapons.1897

But this rationale was ever-less persuasive. Russia itself was short of weapons, and (in contrast to before its military adventure in Ukraine), no longer was a net arms exporter. Russia tried to restock itself from wherever it could, including Iran and North Korea. Moreover, Russian weaponry performed poorly on the battlefield. So, Russia was not a reliable source of weapons supply for India – neither in volume nor in quality. India’s procurement needs would be better satisfied with the U.S. and its Allies. And, as for offsetting China, Russia is practically aligned with China on Ukraine. If India thought Russia would help keep China at bay on the LAC, then that was wishful thinking. Why would Russia pressure China on the LAC when China has tilted in Russia’s favor in Ukraine?

Nonetheless, among the justifications for India’s approach was to blame America and its Allies for being arrogant and indifferent:

1894 Kremlin Insiders Alarmed. 1895 India Says U.S., Russia Ties “Stand on Their Own Merit” Despite Ukraine War, REUTERS, 24 March 2022, www.reuters.com/world/asia/india/says-us-russia-ties-stand-their-own-merit-despite-ukraine-war-2022-03-24/ (reporting: “India has friendly relations with both the United States and Russia that stand on their own merit, the Foreign Ministry told Parliament …, in reply to a query whether the Ukraine war had affected ties. … India is the only major country close to the United States that has not to have condemned Russia’s invasion of Ukraine or imposed any sanctions on it. ‘India has called for immediate cessation of hostilities and return to the path of diplomacy and dialogue with respect to the conflict in Ukraine,’ junior Foreign Minister Meenakshi Lekhi told Parliament. ‘India has close and friendly relations with both the U.S. and Russia,’ she added. ‘They stand on their own merit.’”). [Hereinafter, India Says U.S., Russia Ties.]

1896 India Says U.S., Russia Ties (also reporting: “aa U.S. diplomat said the country stood ready to help India with more supplies of military hardware and energy to reduce its reliance on Russia.”).

Indian government officials said that state-controlled Indian Oil Corp. had reached a deal to buy 3 million barrels of oil from Russia’s Rosneft Oil Co. at a 20% discount to global prices. This is a drop in the ocean of India’s oil needs, which stood at 4.5 million barrels a day in January. Still, if a payment system in rupees is worked out that insulates the transaction from sanctions placed on Russia [via, for example, a bank in India that has no assets exposed to U.S. authorities, and thus could clear and settle trade denominated in rupees and rubles without being ensnared in a U.S. secondary boycott], much more could follow.

The United States isn’t happy. White House spokesperson Jen Psaki said India should worry about how it will feature in the history books when the story of the Ukraine invasion is written. …

Yet India has equal cause to wonder if it’s placed too much faith in the West. Even as Europe and the U.S. congratulate themselves on the speed and effectiveness of their sanctions against Russia, they seem blind to the impact of these sanctions on the rest of the world.

To India and many other developing countries, Western powers, and the institutions they dominate appear to have different standards for conflicts close to home. While the World Bank has been slow to address the concerns of other war-torn nations, it has put together a $700 million package for Ukraine in record time. …

Meanwhile, those same Western nations are proving themselves poor stewards of the global commons. Take the cut-off of several Russian banks from the SWIFT financial messaging system. We have grown accustomed to thinking of interbank communications as a global utility; they’ve now been turned into a tool of Western foreign policy.

This was a unilateral decision by the countries that control SWIFT which, besides the U.S. and Japan, are all European. Little thought was given to how countries such as India, which rely on SWIFT to pay for oil and fertilizers from Russia, would manage the fallout. It should come as no surprise that India’s reaction has been to look for a way around the sanctions by settling trade with Russia in rupees and rubles.

Criticizing India for continuing to buy oil from Russia is especially galling, given that European nations have yet to wean themselves off Russian energy supplies either. And, unlike them, India can hardly afford such bills. If oil remains above $70 a barrel for months, the rupee will collapse, the government will run out of spending money, inflation will skyrocket, and the country will have to start worrying about a balance of payments crisis.
We have lived through this sort of disruption at least twice before, in 1991 and 2012. Yet our supposed partners in the West do not seem to recognize that avoiding another one is a major national priority.

Nor do they appreciate how hypocritical their talk of sanctions can appear. The U.S. spent most of the last decade trying to convince India not to buy Iranian oil, only to try to get Iranian shipments back on the market as soon as the focus shifted to Russia. While the U.S. and Europe expect other countries to bear the costs of sanctions, they’re too timid even to send Polish fighter jets to Ukraine.

Moreover, in the long-term, Indians fear that sanctions will push Russia ever closer to China and expand Beijing’s control over the global economy. If some in the West worry that India is not lining up on their side, just as many Indians worry that the West’s notion of “their side” does not include India.

… [T]he West needs to learn, yet again, that its actions have consequences. Countries such India, struggling to manage deficits, or Kenya, facing a mounting grain import bill, may not be suffering as much as Ukraine is, but they are victims, nonetheless. The international system needs to make space for these unexpected challenges through bailouts, central bank liquidity swaps and other extraordinary measures.\footnote{Mihir Sharma, Why India Is Losing Faith in the West, BLOOMBERG QUINT (MUMBAI), 17 March 2022, www.bloombergquint.com/gadfly/ukraine-invasion-why-india-is-angry-about-russia-sanctions.}

However (as discussed below), Mr. Sharma’s argument fell flat.

IV. Critiquing India’s Neutrality

The argument for India steering a neutral course between the U.S. and its Allies, and India’s traditional Ally, Russia, omitted key facts. For example, one omission was that following Russia’s invasion of Ukraine, the EU was trying to wean itself off Russian oil, on which it had been far more heavily dependent, than India, whereas India was eager to increase Russian oil imports. Indeed, by March 2023, Russian crude accounted for approximately one-third of India’s oil imports, and India had replaced the EU has the single largest purchaser of seaborne Russian oil, “snapping up cheap barrels and increasing imports of Russian crude 16-fold compared to before the war.”\footnote{Nidhi Verma & Noah Browning, India’s Oil Deals with Russia Dent Decades-old Dollar Dominance, REUTERS, 7 March 2023, www.reuters.com/markets/currencies/indias-oil-deals-with-russia-dent-decades-old-dollar-dominance-2023-03-08/. [Hereinafter, India’s Oil Deals with Russia Dent.]} Did India need to stay neutral, much less tilt toward Russia? The Indian argument also omitted these facts:

India sources 10% of its crude imports from the U.S., and 1%-2% from Russia….
[In an 11 April 2022 virtual meeting, President Biden] explained the impact of U.S. and European sanctions on Russia to [PM] Modi, and offered to help India diversify its oil imports.\footnote{\textit{Yukihiro Sakaguchi, Biden to Modi: Importing More Russian Oil Not in India’s Interest, NIKKEI ASIA, 12 April 2022, \url{https://asia.nikkei.com/Politics/International-relations/Biden-to-Modi-Importing-more-Russian-oil-not-in-India-s-interest}, (Emphasis added.) [Hereinafter, \textit{Biden to Modi: Importing}.]}

It also omitted to acknowledge the possibility that Indian oil refineries were “laundering” Russian crude oil – a possibility the U.S. investigated.\footnote{\textit{See Naoyuki Toyama & Ryosuke Hanada, India Under Spotlight for “Laundering” Russian Oil, NIKKEI ASIA, 14 July 2022, \url{https://asia.nikkei.com/Business/Energy/India-under-spotlight-for-laundering-Russian-oil} (reporting: “Oil refineries near the western Indian port city of Sikka, where conglomerate Reliance Industries and other Indian companies operate, have come under the spotlight recently for becoming a hub for the ‘laundering’ of Russian oil. U.S. officials believe that Russian crude is being refined in India and then exported to the U.S. and Europe, circumventing sanctions that have been imposed on Russian President Vladimir Putin’s government for its invasion of Ukraine. … While it is difficult to identify the source of crude once it has been processed, the numbers tell their own story. According to financial information provider Refinitiv, nearly 24 million barrels of Russian crude oil arrived in India in May [2022], more than eight times the amount a year earlier. In June, the number remained high at more than 20 million barrels. Imports of Russian oil have surged since Moscow launched its invasion of Ukraine in February. Sales in India are estimated at close to $1.9 billion in May alone, making it an important source of income for Putin’s government. Around 26 million barrels of Russian oil are believed to have arrived in Sikka alone between April and June, 5.3 times more than the level a year earlier. Russian oil comprises 20\% of the total delivered to Sikka via sea. India processes crude oil into exports such as gasoline, diesel fuel, and jet fuel. Oil products exported from the port in Sikka totaled around 75 million barrels in the April-June period, with 20\% going to Europe or the U.S. ‘Oil is not separated and stored in different tanks by source,’ said an employee at a major Japanese oil wholesaler. ‘It’s almost impossible to precisely locate where imported oil is from.’ Reliance Industries declined to comment on the allegations that Russian crude oil might be getting mixed in with raw materials for petroleum products exported to the West. Indian External Affairs Minister Subrahmanyam Jaishankar was more dismissive, saying, ‘Not even heard about anybody in India thinking along the lines of [buying Russian oil and selling it to somebody else]’ … on June 3.”).}

Likewise, Indian banks are neither among the owners nor biggest participants in SWIFT. And, the IMF and World Bank have arranged countless bailouts across Asia since their founding under the 1944 \textit{Bretton Woods Agreement}. As for fighter jets, sure India had no interest in seeing NATO start the Third World War, which is what President Biden warned could happen if NATO and Russian forces directly engaged each other. The collateral damage would extend to India and across the developing world. Notwithstanding the availability of a functioning \textit{rupee-rouble} payment bilateral payment mechanism, popular would it be among Indian exporters or importers – particularly ones interested in doing business with the U.S.? Why, for example, would Tata Steel sell steel to Russia and thus imperil all the businesses – from steel to consultancy services – Tata does in America?

Indeed, overall, counter-arguments from the Indian side were paltry, amounting to little else than a litany of weak, outdated, anti-American arguments that attempt to self-exonereate India from its moral hypocrisy.\footnote{\textit{As one example of an unconvincing reply, see Brahma Chellaney, \textit{Washington’s Clumsy Attempts to Bully India Must Stop, NIKKEI ASIA, 21 April 2022, \url{https://asia.nikkei.com/Opinion/Washington-s-clumsy-attempts-to-bully-India-must-stop}.}}
insulting, such as the contention that the war in Ukraine was, in the words of “India’s External Affairs Minister, S. Jaishankar, … the ongoing conflict ‘could be a wake-up call for Europe’ to also look at challenges faced by Asia and to rules-based order in the region.”

Jaishankar … hinted at the West being oblivious to some developments in Asia, including the return to power of the Taliban. “I remember less than a year ago what happened in Afghanistan, where an entire civil society was thrown under the bus by the world,” he said.

“When the rules-based order was under challenge in Asia, the advice we got from Europe is ‘do more trade.’ At least we are not giving you that advice,” he said. “In terms of Afghanistan, please show me which part of the rules-based order justified what the world did there.”

Jaishankar responded that in the last two months many in the West have argued that “there are things happening in Europe and Asia [that we] should worry about... because these could happen in Asia.”

“Guess what, things have been happening in Asia for the last 10 years [and] Europe may not have looked at it,” he said. “This could be a wake-up call for Europe … to also look at Asia.”

“This is a part of the world where boundaries have not been settled; [and] where terrorism is still practiced, often sponsored by states,” he said in an indirect reference to issues New Delhi has with neighboring China and Pakistan. “This is a part of the world where the rules-based order has been under continuous stress for more than a decade.”

The truth was that neither the EU nor U.S. had ever ceased to pay attention to Central, South, or East Asia, or to offer de-confliction assistance. The West had poured blood, sweat, tears, and toil across the 20 years after the 9-11 terrorist attacks into rebuilding Afghanistan, giving aid to the Subcontinent, and attempting to de-nuclearize the Korean Peninsula. But, the exogenous force of the West could no more kill the ideology of Islamist extremism than India and Pakistan, and North and South Korea, could embrace each other: change had to come endogenously from Asians themselves. Mr. Jaishankar’s point was nothing more than to point his government’s finger at the West and thus deny accountability for Asia’s role in Asia’s continued messes.

Put differently, the Modi Administration’s neutrality with respect to Russia’s war on Ukraine was unbecoming of the world’s largest secular democracy, free market, and religiously pluralistic country. The excuse of historic ties was ridiculously outdated Cold

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1903 Quoted in Kiran Sharma, India Says Ukraine Crisis “Wake-up Call” for Europe to Look at Asia, Nikkei Asia, 26 April 2022, https://asia.nikkei.com/Politics/Ukraine-war/India-says-Ukraine-crisis-wake-up-call-for-Europe-to-look-at-Asia. [Hereinafter, India Says Ukraine Crisis “Wake-up Call.”]

1904 Quoted in India Says Ukraine Crisis “Wake-up Call.”
War thinking. If balance-of-power politics were at issue, then India’s long-term concern was China. Rightly so, America admonished India for its behavior: “White House Press Secretary Jen Psaki warned that India would be on the wrong side of history if it bought Russian oil, although she acknowledged the purchases would not violate U.S. sanctions.” But, whether the U.S. would go so far as to enforce rigorously a secondary boycott on India – an emerging ally in the Indo-Pacific region against China – was questionable. India’s former colonial master seemed to try to head off that outcome, with the British PM (Boris Johnson (1964-, PM, 2019-2022)) visiting Delhi to “announce a raft of commercial agreements and hail a ‘new era’ in bilateral trade and investment ties.”

Nevertheless, by the end of March 2022, India extended its direct interaction with Russia beyond energy trade:

… [India has become] one of the biggest buyers of Russian commodities since the international community began isolating Moscow for its invasion of Ukraine.

There is little sign that buying will slow down any time soon, as more deals get signed. … [T]he two countries could discuss smoothening trade payments disrupted by Western sanctions on Russian banks.

Russia is India’s main supplier of defense hardware, but overall annual trade is small, averaging about $9 billion in the past few years, mainly fertilizer and some oil. By comparison, India’s bilateral trade with China is more than $100 billion a year.

But given sharp discounts on Russian crude oil since the attack on Ukraine, India has bought at least 13 million barrels, compared with nearly 16 million barrels imported from the country for the whole of last year [2021]. …

New Delhi has called for an immediate ceasefire in Ukraine but has refused to explicitly condemn Moscow’s actions. It has abstained from voting on multiple U.N. resolutions on the war.

India is now considering doubling its imports of Russian coking coal used in making steel, the Indian Steel Minister…. … India recently contracted to buy 45,000 tons of Russian sunflower oil for April delivery after supplies from Ukraine stopped. Last year, India bought about 20,000 tons from Russia a month.

See Russian Oil Exports to India (observing: “India and Russia have a longstanding partnership, from defense to trade, and [Russian President Vladimir] Putin visited India last December [2021] – only his second overseas trip since the [COVID-19] pandemic. New Delhi has so far abstained on U.N. votes condemning Russian aggression.”)

Russian Oil Exports to India.

“India will import more items from Russia, especially if it is at a discount,” one senior Indian government official said.

The government has been looking to establish a rupee-rouble trade system and discussions between Indian and Russian financial officials are ongoing. … …

Besides the rupee-rouble trade window, several other options are on the cards, including settling all government and quasi-government payments directly through the central banks of the two countries, said the source.

…

In a sign of sustained ties despite the Ukraine crisis, India is considering allowing Russia to use its funds lying with the Reserve Bank of India … to invest in Indian corporate bonds. …

Russia has retained about 20 billion rupees ($263 million) of Indian payments for Russian defense equipment with the RBI. 1908

But two problems arose with the rupee-rouble payment mechanism.

First, volatility in the value of the rouble against all currencies made pricing under the mechanism impractical. 1909 The mechanism appeared to be barely functional. Second, Russia’s build-up of rupees, which in an accounting sense was an asset, became a practical liability. Indeed, by May 2023, Russian Foreign Minister Sergei Lavrov admitted the “problem” of holding billions worth of the Indian currency that it could not spend. 1910 Even if Russia wanted to go on a shopping spree in India, India did not have all the merchandise Russia needed to use up the rupees. Normally, Russia would adapt by converting the rupees into hard currencies, like dollars, euros, and yen, and shop in the U.S., EU, and Japan, respectively. Sanctions rendered such currency conversion (especially as Russia was banned from SWIFT, so its payment messages to send rupees in exchange for a hard currency could not be processed) and export-import transactions (under U.S., EU, and Japanese sanctions measures) illegal.

Fortunately for India, America exercised patience. President Biden said “India was ‘somewhat shaky’ in acting against Russia,” and “had not asked partners like India to suddenly stop energy purchases from Russia.” 1911 Likewise:

“The United States and India are going to continue our close consultation

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1909 Russia Says It Has Billions of Indian Rupees That It Can’t Use, BLOOMBERG, 5 May 2023, www.bloomberg.com/news/articles/2023-05-05/russia-says-it-has-billions-of-indian-rupees-that-it-can-t-use?leadSource=verify%20wall&ref=7sxw9SxI. [Hereinafter, Russia Says It Has Billions.]
1910 Russia Says It Has Billions, India Stands by Trade with Russia.
on how to manage the destabilizing effects of this Russian war,” Biden said at the beginning of the [11 April 2022 virtual] meeting [with PM Modi].

“The President conveyed very clearly” that it is not in India’s interest to increase oil imports from Russia, White House Press Secretary Jen Psaki told reporters after the meeting.1912

The Americans were following the letter of their sanctions law. Technically, India had yet to breach in an egregious manner U.S. and Allied sanctions against Russian energy purchases, and strategically, the more aggressive they were in weaponizing the dollar, the greater the disincentive to clear and settle payments in dollars.

So, by early 2023, the situation was interesting, to say the least:

Some Dubai-based traders, and Russian energy companies Gazprom and Rosneft are seeking non-dollar payments for certain niche grades of Russian oil that have in recent weeks been sold above the $60 a barrel price cap [discussed below]….

…

Those sales represent a small share of Russia’s total sales to India and do not appear to violate the sanctions, which U.S. officials and analysts predicted could be skirted by non-Western services, such as Russian shipping and insurance.

Three Indian banks backed some of the transactions, as Moscow seeks to de-dollarize its economy and traders to avoid sanctions.…

But continued payment in [UAE] dirhams for Russian oil could become harder after the United States and Britain last month added [February 2023] Moscow and Abu Dhabi-based Russian bank MTS to the Russian financial institutions on the sanctions list.

MTS had facilitated some Indian oil non-dollar payments.…

An Indian refining source said most Russian banks have faced sanctions since the war, but Indian customers and Russian suppliers are determined to keep trading Russian oil.

“Russian suppliers will find some other banks for receiving payments,” the source … [said].

“As it is, the [Indian] government is not asking us to stop buying Russian oil, so we are hopeful that an alternative payment mechanism will be found in case the current system is blocked.”

1912 Biden to Modi: Importing.
Paying for oil in dollars has been the nearly universal practice for decades. By comparison, the currency’s share of overall international payments is much smaller at 40%, according to January [2023] figures from ... SWIFT.

In response [to sanctions], Russia said it would seek payment for its energy in the currency of “friendly” countries and last year [2022] ordered “unfriendly” EU states to pay for gas in roubles.

For Russian firms – as payments were blocked or delayed even if they were not violating any sanctions, due to overly zealous compliance – dollars became potentially a “toxic asset,” independent analyst and former adviser at the Bank of Russia Alexandra Prokopenko, said.

“Russia desperately needs to trade with the rest of the world because it’s still dependent on its oil and gas revenues so they are trying all options they have,” she ... [said].

“They’re working on building a direct infrastructure [discussed below] between the Russian and Indian banking systems.”

India’s largest lender State Bank of India has a nostro, or foreign currency, account in Russia. Similarly, many banks from Russia have opened accounts with Indian banks to facilitate trade.

While India does not recognize the sanctions against Moscow, the majority of purchases of Russian oil in any currency have complied with them, ... and almost all sales have taken place at levels below the price cap.

Even so, most banks and financial institutions are cautious about clearing any payments to avoid unwittingly breaching any International Law.

For Indian refiners that ... started settling some Russian oil purchases in roubles ..., payments have been processed in part by the State Bank of India via its nostro roubles account in Russia.

Those transactions are mostly for oil purchases from Russian state energy giants Gazprom and Rosneft.... Bank of Baroda and Axis Bank have handled most of the dirham payments....

... India has prepared a framework for settling trade with Russia in Indian rupees should rouble transactions be cut off by further sanctions....

India’s potential sanctions-skirting framework, lawful or not, obviously was of concern to the U.S.

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1913  India’s Oil Deals with Russia Dent.
From the American perspective, India’s pro-Russian tilt put it on the wrong side of history. President Biden’s Secretary of Commerce intoned: “Now is the time to stand on the right side of history, and to stand with the United States and dozens of other countries, standing up for freedom, democracy, and sovereignty with the Ukrainian people, and not funding and fueling and aiding President Putin’s war,” … [said] Gina Raimondo.\textsuperscript{1914}

\textit{Quoted in} Eric Martin & Sudhi Ranjan Sen, \textit{U.S. Criticizes India on Russia Talks as Lavrov Visits Delhi}, \textit{BLOOMBERG QUINT} (Mumbai), 30 March 2022, \url{www.bloombergquint.com/politics/u-s-criticizes-india-over-russia-talks-as-lavrov-visits-delhi}.

Data (as of October 2022) reinforced the Commerce Secretary’s argument:

Russian fossil fuel exports to China and India have risen significantly since Moscow invaded Ukraine early this year [24 February 2022], helping to replenish the Kremlin’s war chest even as shipments to the U.S., Europe and Japan fall sharply.

The value of Russia’s energy exports to China increased 17%, or 30 million euros ($29 million), in the July-August period compared with February and March…. Coal exports jumped 53%, while oil shipments rose 16%.

Exports to India increased by a factor of 5.7, or 40 million euros, during the same period, marking the largest increase in the world. Russia was the second-largest supplier of crude for India in June, jumping from 10th place in 2021, according to Indian trade statistics. …

Energy is a key industry for Russia, with oil and gas accounting for about 40% of government revenue. To starve Moscow of funds to finance its war in Ukraine, the U.S., Japan and the European Union have imposed a series of sanctions on Russian oil and coal.

As a result, Russia’s fossil fuel exports to the EU fell 35%. The U.S. and the U.K. saw plunges of roughly 90%, and Japan a drop of around 70%. The decrease in exports to these countries totals about 250 million euros per day.

But the overall decrease in Russia’s energy exports is much smaller, at about 170 million euros because of Moscow’s successful efforts to sell to countries not participating in the sanctions, such as China and India, at a discount.

Exports to the Middle East also expanded, with shipments to the United Arab Emirates and Egypt increasing by factors of about nine and three. They are reportedly processing Russian crude oil into petrochemical products for export to the rest of the world.

…

The value of exports to Turkey increased about 20%. The country is a NATO member and has criticized the Russian invasion of Ukraine, but it is also cautious about economic sanctions.

U.S. Treasury Secretary Janet Yellen revealed in September that Russia is heavily discounting oil for emerging economies, adding that she has confirmed a 30% price reduction to several countries. Indonesian President Joko Widodo did not rule out the possibility of importing Russian oil, telling the Financial Times that “we always monitor all of the options.” …

To exact a bigger toll on Russia’s finances, [as discussed above] Finance Ministers from the Group of Seven major economies agreed in September [2022] to introduce a price cap on Russian oil imports, starting in December. The arrangement bars insurance companies from insuring marine transportation of oil above the cap. EU member states agreed to the cap on … [5 October 2022].
Unfortunately for America, India did not re-balance its policy.

Worse yet, the U.S. seemed to misjudge, at a fundamental level, India. As the *Financial Times* astutely observed:

The West’s habit of projecting its desires on to India has an ancient pedigree. Edward Said famously called it “orientalism.” Though most of us have long since dropped the snake charmers and timeless mysticism that bewitched our forebears, the West’s capacity to misread India – and assign it roles for which it has not auditioned – endures. The latest version is to assume that India is basically part of the West even if it does not yet want to acknowledge it. Pride may stop India from becoming a formal treaty ally of the U.S., or any other power. But New Delhi essentially shares our worldview.

This is an easy mistake to make. Think of the prominence of Indian-born figures in US public life. … The ease with which Indian-Americans have thrived in U.S. society makes it easier to suppose that the country of their birth is doing the same on the geopolitical plane. That supposition is an error, and is very likely to remain wrong.

…

Two reasons lie behind India’s unwillingness to join Western alliances. The first is that China would quickly overwhelm India’s military in a direct clash between the two. For understandable reasons, India wishes to avoid that fate. … [I]f the U.S. and China went to war over Taiwan, India would stand apart, though it would root from the sidelines for America to prevail. The second reason is that India has no wish to see a bipolar world or to be part of either camp. Though India remains a democracy of sorts – … [arguably,] an electoral autocracy – New Delhi’s foreign policy is strictly realist. India has no preference either way for democracy in other countries and refrains from preaching about rights. This is a consensus view among Hindu majoritarians and their greatly weakened secular opponents.

Because India is still seen as a democracy, and shares America’s fear of China, we in the West habitually misread the character of its world view. When Indian diplomats – such as S. Jaishankar, its powerful Foreign Minister – say India wants to see a multipolar world, that is exactly what they mean. Perhaps we are so accustomed to French Presidents, from Charles de Gaulle to Emmanuel Macron, paying lip service to multipolarity without really meaning it that we assume India is a Subcontinental version of France. That would be a false analogy. India has recently overtaken China to become the world’s most populous country [as discussed in a separate Chapter]. It wants neither a China nor an America-dominated

Simply asked, was it reasonable for America ever to expect, even under the most egregious circumstances of unprovoked war and documented human rights violations, for India to be its ally, or was America blinded by its own romantic version of Indian values?

V. Bypassing SWIFT: A Rupee-Based Payment System

In July 2022, India established a mechanism to facilitate international trade transactions denominated in rupees, and also a flexibility for the exchange of payment messages to bypass SWIFT:

The Reserve Bank of India has put in place an additional mechanism for invoicing, payment, and settlement of exports / imports in Indian rupees.

“In order to promote growth of global trade with emphasis on exports from India and to support the increasing interest of global trading community in Indian rupees, it has been decided to put in place an additional arrangement for invoicing, payment, and settlement of exports / imports in Indian rupee,” the Central Bank said.

Under the new mechanism:

(1) Authorized dealer banks in India have been permitted to open rupee vostro accounts. [A “nostro” account is an account in which one bank, X, keeps funds at another bank, Y. A “vostro” account is an account in which the other bank, Y, keeps funds at the first bank, X. “Nostro” and “vostro” are Italian terms for “ours” and “yours.” Thus, a “nostro” account is “our” account with “you,” and a “vostro” account is “your” account with “us.” They are mirror images. Under the RBI mechanism, the RBI would grant permission to an Indian bank (X, the first bank) to set up a “vostro” account for a Russian bank (Y, the other bank).]

(2) For settlement of trade transactions with any country, authorized dealer banks in India may open special rupee vostro accounts of correspondent bank/s of the partner trading country.

(3) Indian importers undertaking imports through this mechanism shall make payment in Indian rupee which shall be credited into the special vostro account of the correspondent bank of the partner country, against the invoices for the supply of goods or services from the overseas seller /supplier.

\(^{1915}\) Edward Luce, Financial Times, 5 May 2023, www.ft.com/content/d842b152-86d4-4dde-ad14-17bfb2993859
(4) Indian exporters, undertaking exports of goods and services through this mechanism, shall be paid the export proceeds in Indian rupee from the balances in the designated special vostro account of the correspondent bank of the partner country.

Any rupee surplus balance held in the vostro accounts can be used for:

(1) Payments for projects and investments.
(2) Export/Import advance flow management.
(3) Investment in government treasury bills, and government securities.

The RBI has also given exporters flexibility to borrow against any receivables they have under this facility, and the ability to set off their import payables against receivables. The bank of a partner country may approach an authorized dealer bank in India for opening of special Indian rupee vostro account. The bank will seek approval from the Reserve Bank with details of the arrangement….

The [RBI] circular added that the method of exchange of messages in safe, secure, and efficient way may be agreed mutually between the banks of partner countries. Until now, most messages regarding financial transactions went via the SWIFT network. On the outbreak of the Russia-Ukraine war, Russia had been excluded from this network.

…

The RBI’s new mechanism will likely resolve the ongoing trade settlement issues with Russia, said a banker…. This banker said that the arrangement to one which existed in the 1980s. The option to invest surplus amounts in Indian government securities is a great way to internationalize the rupee and make Indian rupees part of forex reserves of other countries….

A second banker, … explained that the new scheme, if successful, will reduce the exchange rate risk for importers and exporters.

For example, if an Indian exporter is exporting garments to Russia, the RBI and the Russian Central Bank would have a reference rate to value the export in rupee terms. Once the Russian company has settled … payments in rupees, the Indian exporter could theoretically use that to pay for the import of raw materials from China under the new scheme. The Chinese company could, in turn, use those rupees for any other imports from India.

The structure essentially helps in lowering the exchange risk for domestic traders….

The RBI’s move to set up an international trade settlement mechanism in Indian rupees would facilitate trade with countries under sanction[s,] like
Note the importance of setting a reference exchange rate to minimize currency risk. How is that done, and by whom? If the reference rate is off-market, then a “black” market for the currencies involved will develop.

Obviously, the fact this new settlement system was established by the RBI meant it had the official blessing of the government of India. Equally obviously, in the short-term, the system was primed for use for Indo-Russian trade and would stem outflows of conventional hard currencies (from both India and Russia) such as the U.S. dollar. In the long-term, the new system aligned with India’s goals to internationalize its currency, hardening it (i.e., making it increasingly acceptable as a means for invoicing, payment, and settlement) and thereby lessening India’s dependence on conventional hard currencies.

Yet, how hard could America press India? For India, Russia historically had been an easy ally of India – it dealt with India, but did not ask much of India. America, on the other hand, was a hard ally – it always sought a quid pro quo. So, consider this reality:

A former Indian diplomat said Delhi’s stand has put Washington in a Catch-22 situation.

The U.S. wants India to be part of its wider strategy of isolating Russia but at the same time, it can’t afford to weaken India against China [by, for example, imposing severe sanctions on India for its support of Russia] – both diplomatically and militarily.

Experts say this has created confusion in the White House about the best way to deal with India.

[Thus,] Washington has not directly criticized India but has issued statements that experts call “mild warnings.”

India surely was taking advantage of this situation – and to declare its self-interested opportunism to be nauseating was to fail to see it from India’s vantage point.

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On India’s continued – indeed, increased – purchases of Russian oil through August 2022, see, e.g., Serene Cheong & Sharon Cho, *India Is New Major Player In Russian Oil Market Once Dominated By China*, BQ PRIME, 1 September 2022, www.bqprime.com/global-economics/india-bursts-into-key-russian-oil-market-once-dominated-by-china.
To be sure, India’s view could not be rationalized by India’s hope for greater regional cooperation, though PM Modi made a rather woolly-headed attempt at doing so.\footnote{1919} At a Shanghai Cooperation Organization Summit (held in Samarkand, Uzbekistan) in September 2022, he said to President Putin, “today’s era is not an era of war.”\footnote{1920} Read literally, that statement was false: wars abounded across the globe. What the PM surely meant was that the present era ought not to be one for war. The PM added: “We have spoken about this issue with you many times on the phone also,” Modi continued, stressing the importance of “democracy, diplomacy, and dialogue.” He then highlighted what mattered to India and other developing countries, namely, food, fuel, and fertilizer security. India appeared to take another small step away from Russia at the February 2023 G-20 Finance Ministers Summit Chaired by India in Bangalore: no \textit{communiqué} was agreed, because Russia and China declined to deplore Russia’s aggression, but the Chair’s summary said all other countries – by implication, including India – agreed to do so in the “strongest terms.”\footnote{1921}

VI. Non-Sanctioning Countries:

China

As non-sanctioning countries, China – and to a lesser degree, India – signalled a

\footnote{1919} \textit{See} Kiran Sharma, \textit{Modi Seeks Greater Regional Cooperation Amid Russia-Ukraine War}, NIKKEI ASIA, 30 March 2022, \url{https://asia.nikkei.com/Politics/International-relations/Modi-seeks-greater-regional-cooperation-amid-Russia-Ukraine-war} (reporting: “Indian Prime Minister Narendra Modi … said recent developments in Europe have raised a question mark over the stability of the international order, although he did not directly refer to Russia’s invasion of Ukraine. ‘In this context, it has become important to make BIMSTEC regional cooperation more active,’ he said in a virtual address at the fifth summit of the seven-nation group called the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation…. ‘It has also become essential to give greater priority to our regional security,’ he added.’). On the one hand:

BIMSTEC was founded in 1997 with aims of establishing trade links, and mutual developments in cultural, technical, and economic areas. The group provides a unique link between South and Southeast Asia, with five countries – Bangladesh, Bhutan, India, Nepal, and Sri Lanka – in South Asia and Myanmar and Thailand in Southeast Asia.

Over 1.7 billion people, or 22\% of the global population, live in BIMSTEC countries, which have a combined gross domestic product of $3.8 trillion. \textit{Id}. On the other hand, how India could enhance its security by burying itself in BIMSTEC amidst the Russian war against Ukraine, while maintaining cozy ties with Russia, plus square that behavior with its Indo-Pacific and global ambitions, was entirely unclear. \textit{Quoted in} Kiran Sharma, \textit{Modi Tells Putin That Today is “Not an Era of War,”} NIKKEI ASIA, 16 September 2022, \url{https://asia.nikkei.com/Politics/International-relations/Modi-tells-Putin-that-today-is-not-an-era-of-war}. \textit{See also} John Reed, Nastassia Atrasheuskaya & Max Seddon, \textit{Narendra Modi Chides Vladimir Putin Over Ukraine War}, FINANCIAL TIMES, 16 September 2022, \url{www.ft.com/content/d0ac0361-c101-4605-ba22-ec20f9f2233?shareType=nongift} (reporting: “In his meeting with Modi, Putin spoke warmly of Russia’s ‘strategic, privileged partnership’ with India. He hailed the ‘constructive’ economic relations between the two countries and their growing trade. ‘Deliveries of fertilizers from Russia to India increased more than eightfold – not by some percentage, but more than eight times,’ said Putin. ‘I hope that this will help Indian farmers to solve the difficult task of providing food for the country’s population.’ Russia is also India’s biggest supplier of arms, though New Delhi is stepping up purchases from other countries in a bid to diversify supplies, while also trying to build up its domestic defense production.’”). \textit{Quoted in} Oliver Slow, \textit{China Refuses to Condemn Russia’s Ukraine Invasion During G20 Deadlock}, BBC NEWS, 26 February 2023, \url{www.bbc.com/news/world-asia-64773618}. 

\textit{International Trade Law E-Textbook} (Raj Bhala, 6\textsuperscript{th} Edition, 2025) 
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possible long-term trend of decoupling from trade and direct and portfolio investment relations with the U.S. and its Allies. Indeed, in December 2022, in connection with the declaration of a Sino-Saudi comprehensive strategic partnership (discussed in a separate Chapter), Chinese President Xi Jinping “told Gulf Arab leaders … that China would work to buy oil and gas in yuan,” which not only would advance China’s goal of increasing the relative prominence of the yuan against the dollar as a hard-currency medium of exchange, but also defy American-led sanctions against Russia.1922

What seemed to be happening was not a not a full-scale cancellation of traditional ties, but a pull-back not in energy markets, as well as in agricultural, industrial, and service markets, amidst a large geo-politically driven realignment of supply chains:

For weeks Chinese officials and analysts have endorsed Russia’s claims that NATO’s expansion in Europe triggered its invasion of Ukraine. Now they are pointing to a new spectre to justify their support of Russia’s war: an “Indo-Pacific NATO” that could ultimately force China to decouple from the west and achieve self-sufficiency in everything from food to semiconductors.

Ever since Xi Jinping and Joe Biden refused to budge from their opposing assessments of the conflict during a two-hour phone call on March 18, 2022, Chinese diplomats have gone on a rhetorical offensive, arguing that U.S.-led alliances are as much a threat to Beijing as they are to Moscow.

Most of their ire is directed at the “free and open Indo-Pacific” strategy Biden inherited from Donald Trump, which seeks to bind the U.S., Japan, Australia, and India in a united front against China.

“Alliance has kept strengthening and expanding, and intervened militarily in countries like Yugoslavia, Iraq, Syria and Afghanistan,” Le Yucheng, Vice Foreign Minister, said…. “The Indo-Pacific strategy is as dangerous as the NATO strategy of eastward expansion in Europe,” he added. “It allowed to go unchecked, it would bring unimaginable consequences and ultimately push the Asia-Pacific [region] over the edge of an abyss.”

In an attempt to counter Biden’s “real goal” of establishing “an Indo-Pacific version of NATO,” Le’s boss, Foreign Minister Wang Yi, met his Indian counterpart [Indian Foreign Minister S. Jaishankar] in New Delhi….

… [Also,] Wang addressed the Organization of Islamic Cooperation [OIC] in Islamabad, where he touted $400 bn in Chinese-led projects across 54 Islamic countries. China, India, and Pakistan, which have a combined population of 3 bn, all abstained on the U.N. resolution condemning

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Russia’s invasion of Ukraine.

…

Ni Lexiong, an independent military analyst in Shanghai, said China needed to adopt a long-term perspective when making assessments about the situation in Ukraine and its relationship with Russia. “If we don’t [handle the Ukraine crisis] right, 30 years from now the west will treat China the same way it is treating Russia,” Ni said.

Chinese officials increasingly worry that such treatment could include wide-ranging sanctions similar to those imposed by the U.S. and EU on Russia. In that event, they argued, China would need Russia’s support as much as Russia now needed China’s support.

…

China rescinded phytosanitary restrictions on Russian wheat exports on February 24, [2022,] the same day that Putin’s troops invaded Ukraine, and can now congratulate itself for having resisted U.S. demands for reforms of its state-led agriculture sector during the two countries’ trade war in 2018-19.

“Beijing probably feels very validated in their approach,” said Darin Friedrichs at Sitonia Consulting, an agriculture consultancy in Shanghai. “They have kept a high level of state control and stockpiles.

“And now, while a lot of other countries are scrambling for supplies, they are relatively insulated,” he added. “Those policies were pretty successful and meant for a time like this.”

Thus, as one of many examples concerning China’s de facto pro-Russian stance, effective 1 May 2022, China suspended tariffs on imports of Russian coal.

Essentially, China appeared to adhere to the letter of U.S. and Allied sanctions, but neither abjure transactions with Russia beyond the scope of those sanctions, nor engage in much self-sanctioning. Perhaps that approach was unsurprising: China had a wealth of experience across many years in dealing with American sanctions against Iran, North Korea, and itself. Another illustration of how far China tilted in favor of Russia came on 10 August, when China dubbed America the “main instigator” of the Ukraine crisis.

1923 Edward White & Tom Mitchell, Spectre of “Indo-Pacific NATO” Accelerates China’s Decoupling from the West, FINANCIAL TIMES, 26 March 2022, www.ft.com/content/98529d12-6cd6-40dc-a242-3ca907720a73?shareType=nongift.

1924 See China Suspends Import Tariffs on Coal (noting this “decision … will likely benefit Russia at a time when its coal exports to Europe are being phased out over its invasion of Ukraine”).

1925 China Calls U.S. “Main Instigator” of Ukraine Crisis, REUTERS, 10 August 2022, www.reuters.com/world/china-calls-us-main-instigator-ukraine-crisis-2022-08-10/ (reporting: “China, which Russia has sought as an ally since being cold-shouldered by the West over its invasion of Ukraine, has called the United States the ‘main instigator’ of the crisis. …China’s Ambassador to Moscow, Zhang Hanhui, accused Washington of backing Russia into a corner with repeated expansions of the NATO defense alliance and support for forces seeking to align Ukraine with the European Union rather than Moscow. ‘As the
As Singapore’s thoughtful PM pointed out, in polite terms, the risks associated with China’s perspective on the Russian war in Ukraine:

Singapore Prime Minister Lee Hsien Loong said Russia’s invasion of Ukraine raises “awkward questions” for China because it violates Beijing’s closely-held principles of territorial integrity, sovereignty and non-interference.

Lee was asked during an event organized by the Washington-based Council on Foreign Relations … whether he thinks China has paid a political price in the region for maintaining ties with Russia.

“I think it presents them with awkward questions because on Ukraine, it violates the principles which the Chinese hold very dearly – territorial integrity, and sovereignty and non-interference,” Lee said. “And if you can do that to Ukraine, and if the Donbas can be considered to be enclaves, and

initiator and main instigator of the Ukrainian crisis, Washington, while imposing unprecedented comprehensive sanctions on Russia, continues to supply arms and military equipment to Ukraine,’ Zhang was quoted as saying. ‘Their ultimate goal is to exhaust and crush Russia with a protracted war and the cudgel of sanctions.’ The Ambassador’s reasoning closely followed one of Russia’s own justifications of its invasion of Ukraine….”)

Still another illustration of China opting not to adhere to U.S. and Allied sanctions on Russia came in October 2022. Hong Kong refused to seize the yacht of a sanctioned oligarch, and expressly rejected those sanctions:

Hong Kong has said it will not seize the superyacht of a Russian oligarch who is under Western sanctions.

Chief Executive John Lee said Hong Kong would be accountable to United Nations sanctions but not “unilateral” ones imposed by “individual jurisdictions.”

The $ 521m (£ 472m) boat belongs to Alexei Mordashov, an ally of Russia’s President Vladimir Putin and one of the country’s richest men.

His yacht arrived in Hong Kong last week after sailing from Russia.

But Mr. Mordashov is not believed to be on it. The billionaire was sanctioned by the U.S., the U.K. and the EU after Russia invaded Ukraine earlier this year.

But Hong Kong’s government said it was not bound by those sanctions. For close to a week now, the multi-storey Nord superyacht has been a conspicuous sight in the city’s Victoria Harbor with the Russian flag flying at its mast.

“‘We will comply with United Nations sanctions, that is our system, that is our rule of law,’” said Mr. Lee, who has himself been sanctioned by the U.S. for his role in implementing Hong Kong’s repressive National Security Law.

Frances Mao, Hong Kong Declines to Act on Sanctioned Russian Superyacht in Harbor, BBC NEWS, 11 October 2022, www.bbc.com/news/world-asia-63210647. Given his status as a sanctioned person, Mr. Lee’s position was deliciously ironic.
maybe republics,” he added before the moderator interrupted to ask what about Taiwan.

“Or other parts of non-Han China?” Lee then said. “So, that is a very difficult question.”

In essence, the American-led sanctions regime amidst the War against Ukraine gave China an additional strong incentive – along with (as discussed in separate Chapters) America’s Section 301 tariffs in the Sino-American Trade War and its Indo-Pacific military policies – to steer trade and investment toward Russia.

After all, on the eve of Russia’s invasion of Ukraine, President Xi Jinping intoned there were “no limits” to China’s friendship with Russia, hence helping Russia by buying oil, and collaborating “to promote real democracy based on nations’ own conditions,” was consistent with such ties. Ironically, however, there was at least one limit: Iran. Russia not only cozuied up to China, but also to Iran. In doing so, that is, in trying to sell oil its oil to China, Russia was displacing Iranian oil sales to China. Like Russia, Iran was trying to generate export revenues from energy sales; unlike third-country transactions with Russia, those with Iran were forbidden under America’s secondary boycott of Iran (discussed in a separate Chapter). Simply put, a Sino-Russian-Iranian axis against the U.S. and its allies was fraught with tension between competing Russian and Iranian oil sales to China.

To be sure, America’s sanctions regime was not entirely pure, as in steering clear of Russian-origin merchandise. The U.S. regime included multiple self-interested omissions. Uranium was among the most notable one:

The United States has over 90 nuclear reactors, more than any other country, and is heavily reliant on imported uranium. Russian Uranium made up 16% of U.S. purchases in 2020, according to the Energy Information Administration, with Canada and Kazakhstan each providing 22%.

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1927 Quoted in China Says It Will Work With Russia to Promote “Real Democracy,” BLOOMBERG, 1 June 2022, www.bloomberg.com/news/articles/2022-06-01/china-will-advance-real-democracy-with-russia-says-diplomat?sref=7sxw9Sxl (also reporting Chinese Foreign Minister stated “that ‘monopolizing’ the definition of democracy and human rights to influence other nations was a tactic ‘doomed to fail,’ in a veiled swipe at the United States….”).

1928 See Guy Faulconbridge & Parisa Hafezi, Putin Forges Ties with Iran’s Supreme Leader in Tehran Talks, REUTERS, 19 July 2022, www.reuters.com/world/putin-visits-iran-first-trip-outside-former-ussr-since-ukraine-war-2022-07-18/ (reporting: “… Russia’s increased tilt towards Beijing in recent months has significantly reduced Iranian crude exports to China – a key source of income for Tehran since then-U.S. President Donald Trump reimposed sanctions in 2018. In May [2022], … Iran’s crude exports to China had fallen sharply as Beijing favored heavily discounted Russian barrels, leaving almost 40 million barrels of Iranian oil stored on tankers at sea in Asia and seeking buyers.”). A cynic might rejoice, given that the axis involved Xi’s CCP, Putin’s oligarchy, and Khameini’s un-Islamic theocracy.
Russia also supplies a fuel called high-assay, low enriched uranium (HALEU), which is enriched up to 20% and could be used in advanced nuclear plants expected to be developed later this decade or in the 2030s.\footnote{1929}

So, one measure President Biden did not order was a ban on importation of Russian origin-Uranium. Republican Senators attempted a legislative plug, introducing a bill “to ban U.S. imports of Russian uranium to punish Moscow for its invasion of Ukraine.”\footnote{1930} Interestingly (as discussed in a separate Chapter), his predecessor considered a Section 232 action against all foreign-sourced Uranium, but opted against any formal adjustment of such imports. Indubitably, an import ban would boost the fortunes of domestic Uranium mines.

VII. Non-Sanctioning Countries:

Turkey and UAE

Interestingly, as of August 2022, Indian and Chinese purchases of Russian oil had largely replaced those by Europe, casting doubt on the effect of the embargos America and its Allies had placed on Russian hydrocarbons.\footnote{1931} Casting yet more doubt on their efficacy was that fact India and China hardly were alone among G-20 countries in opting not to join the U.S. and the rest of the G-7 in sanctioning Russia:

Comprising nations that account for some 85% of global economic output, the G-20 is supposed to be more reflective of the world. Yet only half its number has joined the international sanctions imposed on fellow member Russia over its invasion of Ukraine.\footnote{1932}

Indonesia, South Africa, and Turkey were among the G-20 countries trying to stay non-aligned. Given the considerable energy sourcing from Russia by India, China, and other non-compliant countries, the effect of American and Allied sanctions thus was


\footnote{1931} Andy Lin, John Reed & Max Seddon, \textit{India and China Soften Russia’s Oil Sanctions Pain}, \textit{Financial Times}, 7 September 2022, [Hereinafter, \textit{Financial Times}].

\footnote{1932} Alan Crawford, Jenni Marsh & Antony Sguazzin, \textit{The U.S.-Led Drive to Isolate Russia and China Is Falling Short}, \textit{Bloomberg}, 5 August 2022, [Hereinafter, \textit{Bloomberg}].
Turkey, for example, announced five of its banks were adopting Russia’s Mir payments system.\textsuperscript{1934} What explained the positions of countries opting not to follow the sanctions regime? Consider Turkey’s apparent rationale. On the one hand, “Turkey voiced its opposition to Russia’s invasion of Ukraine.”\textsuperscript{1935} On the other hand, Turkey “has … continued to import energy from Russia [with partial payment in roubles], which provided a quarter of its crude oil imports and around 45% of its natural gas deliveries last year [2021],” and “Russia has … provided much needed foreign-exchange liquidity to Turkey by transferring billions of dollars to a Turkey-based subsidiary of Rosatom for completion of a nuclear power plant’s [known as Akkuyu] construction on the Mediterranean coast.”\textsuperscript{1936} Compare Turkey’s dependence on Russian-origin oil and NG to that of the EU: if the EU could cut energy imports from Russia, why could Turkey not also do so?

By no means were India, China, and Turkey alone in their tacit support for Russia. Indonesia and South Africa tried to stay non-aligned. Similarly, the UAE not only failed to condemn Russia’s aggression against Ukraine, but also opened itself to high-net-worth Russians:

Dubai has emerged as a haven for wealthy Russians fleeing the impact of western sanctions over the war in Ukraine.

Russian billionaires and entrepreneurs have been arriving in … UAE in unprecedented numbers….

\textsuperscript{1933} Tom Wilson, \textit{Western Sanctions Have Had “Limited Impact” on Russian Oil Output, Says IEA}, \textsc{Financial Times}, 11 August 2022, \url{www.ft.com/content/b75d0b8e-fcd8-4722-9180-39a01279d3b4?shareType=nongift} (reporting: “Western sanctions have had ‘limited impact’ on Russian oil output since the start of the war in Ukraine, the International Energy Agency said…, as it raised its forecast for Russian crude production into 2023. Moscow’s exports of crude and oil products to Europe, the U.S., Japan, and Korea had fallen by nearly 2.2 mn barrels a day since its full-scale invasion of Ukraine…. But the rerouting of flows to countries including India, China, and Turkey had mitigated financial losses for the Kremlin. Russian oil production in July was only 310,000 b/d below prewar levels, a fall of less than 3 per cent, while total oil exports were down about 580,000 b/d… As a result, Russia would have generated $19 bn in oil export revenues last month [July 2022], and $21 bn in June, the IEA’s data showed. ‘Asian buyers have stepped in to take advantage of cheap crude,’ the IEA said, with China having overtaken the EU as the biggest importer of Russian crude in June. Increased demand for Russian crude compared with earlier in the year also meant that the discounts being paid for Russian cargoes had narrowed…”).

Pakistan was yet another non-compliant country: in light of its “cash-strapped economy,” it started purchases of Russian oil in 2023, though given Russian LNG supply shortages, it was unlikely to secure Russian LNG until 2025-2026. Adnan Aamir, \textit{Pakistan to Buy Discounted Russian Oil to Ease Economic Pains}, \textsc{Nikkei Asia}, 9 December 2022, \url{https://asia.nikkei.com/Politics/International-relations/Pakistan-to-buy-discounted-Russian-oil-to-ease-economic-pains}.

\textsuperscript{1934} Tugce Ozsoy, \textit{Turkish Banks Are Adopting Russian Payments System, Erdogan Says}, \textsc{Bloomberg}, 6 August 2022, \url{www.bloomberg.com/news/articles/2022-08-06/turkish-banks-are-adopting-russian-payments-system-erdogan-says?sr=7sxw9Sx1}. \[Hereinafter, \textit{Turkish Banks Are Adopting}.\]

\textsuperscript{1935} \textit{Turkish Banks Are Adopting}.

\textsuperscript{1936} \textit{Turkish Banks Are Adopting}. 
Property purchases in Dubai by Russians surged by 67% in the first three months of 2022.

The UAE has not put sanctions on Russia or criticized its invasion of Ukraine.

It is also providing visas to non-sanctioned Russians while many Western countries have restricted them.

It is estimated that hundreds of thousands of people have left Russia over the last two months.

One Russian economist said as many as 200,000 Russians had left in the first 10 days after the war began.

Virtuzone, which helps companies to set up operations in Dubai, has seen a huge surge of Russian clients.

“We are receiving five times more enquiries from Russians since the war began,” said Chief Executive George Hojeige.

“They are worried about an economic meltdown that’s coming. That is why they are moving here to secure their wealth,” he added.

The influx of Russian nationals has bolstered demand for luxury villas and apartments across the city. Real estate agents are reporting a surge in property prices, as Russians arriving in Dubai are looking to purchase homes.

Many multinational companies and Russian start-ups are also relocating their employees to the UAE.

Fuad Fatullaev is the co-founder of WeWay – a blockchain technology company that had offices in Russia and Ukraine. After the war broke out, he and his partners shifted hundreds of employees to Dubai.

“The war had a massive impact on our operations. We couldn’t continue [as we were] as we had to move hundreds of people outside of Ukraine and Russia,” says Fuad, who is a Russian citizen.

… [T]hey chose to shift their employees to the UAE as it offers a safe economic and political environment to operate a business.

He said Russian businesses were moving out as they were finding it incredibly difficult to operate due to sanctions. The challenge was even
more acute for companies dealing with international clients and brands, as most western firms have severed ties with Russian-based enterprises.…..

Global firms like Goldman Sachs, JP Morgan and Google that have shut down offices in Russia, are also relocating some of their employees to Dubai. 1937

The UAE position seemed based on self-interest. With a hydrocarbon-based economy, it had long sought to diversify its production and export base. What better way to achieve that policy goal than to attract top, services-sectors talent, which was fleeing Russia, without alienating Russia in a way that would attract Russian countermeasures against the Emirates?

VIII. Wave Five:
Revoking Russia’s MFN Status

Still another big step in expanding the sanctions regime came on 11 March 2022, when USTR announced America would revoke Russia’s MFN status,1938 and the G7 nations did likewise. The legislative instrument in the U.S. was H.R. Bill 7109, Suspending Normal Trade Relations with Russia and Belarus Act (19 U.S.C. § 2434).1939 (Under the Foreign Commerce Clause, Article I, Section 8, Clause 3 (discussed in a separate Chapter), the authority to change Russia’s trade treatment lay with Congress, not the President), which passed the House and Senate, and which President Biden signed, on 8 April.1940 Under it, effective 9 April, HTSUS Column 2 duty rates applied to all entered products of Russian and Belarussian origin.

This Act stated: “Notwithstanding any other provision of law, beginning the day after the date of the enactment of this Act, the rates set forth in Column 2 of the [HTSUS] shall apply to all products of the Russian Federation and the Republic of Belarus.”1941 The new Column 2 rate was 35%. Technically, the U.S. suspended for Russian- and Belarussian-origin merchandise the HTSUS Column 1 MFN rates on 9 April.

1941 Note, then, an importer of such products needed to move quickly to avoid the new, higher rates by filing CBP entry forms (or having its customs broker do so) with a date on or before 8 April 2022 – if that date was factually accurate. Left unclear by the Act was the disposition of Russian- and Belarus-origin merchandise held in inventory in FTZs before the effective date of Act. Based on its plain language, it did not appear merchandise in PF zone status would benefit from Column 1 rates if entered on or after the Act is effective, i.e., the Column 2 rates would apply to it if entered on or after 9 April.
Subsequently, pursuant to this Act, President Biden (via Presidential Proclamation) announced a significant increase in ad valorem tariffs – under Column 2, non-MFN rates – on 553 8-digit categories of Russian origin products, including aluminum, ammunition, aircraft, arms, automotive-related items, chemicals, electronic parts, machinery, metal, metals, minerals, paper, steel, and wood. These tariff hikes took effect on 29 July 2022.\(^{1942}\) (The President created a new HTSUS 8-digit Sub-Heading, 9903.90.08, with the description, “Articles the product of the Russian Federation, as provided for in U.S. Note 30(a) to this Sub-Chapter and as provided for in the Sub-Headings enumerated in U.S. Note 30(b) to this Sub-Chapter,” and likewise for Belarus.)

This move (discussed in a separate Chapter) was cataclysmic from four perspectives. First, it was a rare (if not unprecedented) instance in which significant WTO Members, in their own way under their own domestic rules, quickly forged a consensus to deny MFN tariff rates to Russian-origin merchandise. Second, the announcements came with an invocation of GATT Article XXI as an affirmative defense to the violation of the Article I:1 obligation to accord immediately and unconditionally all WTO Members MFN treatment. Third, the coupling of MFN revocation with export controls risked exacerbating the global food crisis. As WTO Director General Dr. Ngozi Okonjo-Iweala opined:

“I do hope we have learned something” from the previous global food crisis in 2007-2008, Okonjo-Iweala said, referring to a period in which problems were caused by droughts in key wheat and rice-producing countries, along with a surge in the cost of energy. “The signs we see now don’t show that learning very much, because we’re having the same situation of spiking food prices, spiking energy prices and an emerging spiral.”

“We should try not to compound the issues by having export restrictions put in place that may encourage others to put on their own export restrictions,” she said. Governments with surplus stocks in products like vegetable oils and grains should release them on world markets, she said, although she declined to name specific countries.

Okonjo-Iweala, formerly Nigerian Finance Minister and World Bank Managing Director, said only around 12 WTO Member countries had so far imposed export restrictions to keep food at home, which they are permitted to do under a loophole [the GATT Article XI:2 exceptions] in WTO rules.

The Ukraine war has put intense stress on the WTO as a negotiating forum, as divisions between Russia and a coalition of mainly rich governments supporting Ukraine have spilled over into talks. Those governments have issued a statement in the WTO denouncing Moscow, blocked Belarus’s

application to join the institution and withdrawn so-called “most-favored nation” status for Russia, enabling them to impose higher tariffs on Russian goods than on other members of the Organization.\footnote{Alan Beattie, Export Controls Risk Exacerbating Food Crisis, WTO Chief Warns, FINANCIAL TIMES, 26 March 2022, www.ft.com/content/4bcb5b9a-de9c-4a2e-9c19-fd0552eb9975?shareType=nongift. The WTO document condemning the Russian invasion of Ukraine is World Trade Organization, Joint Statement on Aggression by the Russian Federation Against Ukraine with the Support of Belarus, Communication from Albania; Australia; Canada; European Union; Iceland; Japan; Republic of Korea; Republic of Moldova; Montenegro; New Zealand; North Macedonia; Norway; United Kingdom; and United States, WT/GC/244 (15 March 2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/244.pdf&Open=True (declaring, “We will take any actions, as WTO Members, that we each consider necessary to protect our essential security interests. These may include actions in support of Ukraine, or actions to suspend concessions or other obligations with respect to the Russian Federation, such as the suspension of most-favored-nation treatment to products and services of the Russian Federation.”). The WTO document suspending the Belarussian accession application is World Trade Organization, Joint Statement Regarding the Application from Belarus for Accession to the World Trade Organization, Communication from Albania; Australia; Canada; European Union; Iceland; Japan; Republic of Korea; Montenegro; New Zealand; North Macedonia; Norway; United Kingdom; and United States, WT/GC/246 (24 March 2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/246.pdf&Open=True#:~:text=We%20condemn%20Belarus%20for%20its%20consider%20its%20application%20for%20accession (declaring, “Belarus is unfit for WTO Membership. We will not further consider its application for accession.”).}

Fourth, the U.S. revocation was hardly the only one. The EU, G-7 (including Japan\footnote{See Mari Yamaguchi, Japan Formally Revokes Russia’s “Most Favored Nation” Status, ASSOCIATED PRESS, 20 April 2022, https://apnews.com/article/russia-ukraine-business-tokyo-europe-moscow-e264ff718a4e998fe66c67e687864b12 (also reporting: (1) “The measure, however, does not affect imports of crude oil and liquified natural gas, as well as palladium, a type of rare metal, which had no tariffs before Russia joined the World Trade Organization in 2012 and gained the most favored nation status,” (2) “Japan has already faced reprisals from Russia. Moscow recently announced the suspension of talks on a peace treaty with Tokyo that included negotiations over Russian-held islands that the former Soviet Union seized from Japan at the end of World War II,” and (3) “Japan’s trade with Russia is relatively small but has been growing swiftly in recent years, with exports in the fiscal year that ended in March up nearly 40% and imports up almost 70%.”).}, and other “other like-minded partners (Albania, Australia, Iceland, Republic of Korea, Moldova, Montenegro, New Zealand, North Macedonia, Norway)” also withdrew MFN treatment for Russian-origin merchandise.\footnote{European Commission, Statement, Statement by Executive Vice-President Dombrovskis on EU Decision to Stop Treating Russia as a Most-Favored-Nation at the WTO, 15 March 2022, https://ec.europa.eu/commission/commissioners/2019-2024/dombrovskis/announcements/statement-executive-vice-president-dombrovskis-eu-decision-0_en. Moldova, which is land-locked between Ukraine and Romania, is neither a NATO (as its neutrality is enshrined in its Constitution) nor EU member (though in June 2022 it became a candidate for EU membership). Amidst Russia’s war against Ukraine, Moldova battled Russian interference and intimidation. In October 2022, the U.S. imposed sanctions designed to counter Russian manipulation of Moldovan affairs. See Michael Crowley, New U.S. Sanctions Target Russian Efforts to Manipulate the Politics in Moldova, a Neighbor of Ukraine, THE NEW YORK TIMES, 26 October 2022, www.nytimes.com/2022/10/26/world/europe/russia-us-sanctions-moldova.html?smid=nytcore-ios-share&referringSource=articleShare (reporting: “The Biden Administration … imposed sanctions on more than 20 Moldovan and Russian individuals and entities for assisting Russian efforts to manipulate Moldova’s political system. … The new American sanctions [which included freezes on any assets subject to U.S. jurisdiction] are aimed at punishing Moldovans allied with Moscow who have worked to keep the country in Russia’s sphere of influence.”).} What Russia had worked hard during years
of accession negotiations towards its August 2012 WTO entry (discussed in a separate Chapter) it had lost in a matter of weeks.
Chapter 24

RUSSIA SANCTIONS (CONTINUED):
WAVES SIX-ELEVEN
(MARCH 2022-MARCH 2023)

I. Wave Six:
Banning Imports of Russian-Origin Iconic Goods, and Exports to Russia of Luxury Goods and Bank Notes

On 11 March 2022, President Joseph R. Biden (1942-, President, 2021-) further broadened trade sanctions against Russia that originated in the run-up to Russia’s 24 February 2022 invasion of Ukraine. He signed an (unnumbered) Executive Order prohibiting importation into the U.S. of certain iconic goods of Russian origin, the exportation or supply by U.S. persons or from the U.S. to Russia of certain luxury goods and dollar-denominated bank notes, and certain new investment in Russia. As with other Orders, this one forbade the approval, financing, facilitation, or guarantee by a U.S. person of a transaction by a foreign person, where the transaction would be prohibited if done by a U.S. person or within the U.S. Likewise, the same day, BIS issued a final rule adding a new Section (746:10) to the EAR. This addition restricted the export of luxury goods to Russia, Belarus, and worldwide to certain Russian and Belarusian oligarchs.

America’s Allies acted similarly, widening their import and export prohibitions. For instance, on 20 March 2022, Australia announced it was banning exportation of alumina to Russia. That measure was significant. Alumina is a key input into aluminum, Russia relied for 20% of its alumina on Australia, and Russia’s aluminum exports were an important source of its export revenues. Likewise, the Allies extended the measures they had taken, as need be. For example, on 26 July 2022, the EU renewed restrictions on specific sectors of Russia’s economy through 31 January 2023, including measures concerning luxury goods, as well as dual-use items, and ones affecting the energy, finance, industry, and technology sectors.

1946 Documents References:
(1) Havana (ITO) Charter Preamble, Article 99
(2) GATT Article XXI
(3) Relevant provisions in FTAs

This Chapter draws upon Raj Bhala, Waves of Russian Sanctions: American and Allied Measures, Indian and Chinese Responses, and Russian Countermeasures, 14 TRADE, LAW AND DEVELOPMENT number 2, 353-453 (Winter 2022).


Bolstering these measures against the importation of Russian merchandise, and thereby the effort to curtail its export revenues, were the actions of fuel suppliers. Per private sector self-sanctions (discussed below), by 1 April 2022, “[m]arine fuel sellers have stopped serving vessels flying the Russian flag at major European hubs including Spain and Malta in another blow to Moscow’s exports….1950 Notably, “[l]osing access to refuelling points in the Mediterranean Sea pose[d] major logistical problems for Russian oil tankers going from Baltic ports to Asia and also create[d] safety concerns over potentially being stuck at sea with flammable cargoes….1951 The reluctance to provide Russian vessels with fuel followed logically from the payments system sanctions on Russia, that is, “[p]ayment problems due to banking restrictions … added to complications with deals for marine fuel, which … [was] typically priced and paid for in U.S. dollars.”1952

II. Wave Seven: Private Sector Withdrawals

Throughout all the waves of American and Allied sanctions, the private sector – that is, MNCs headquartered in America, Britain, and Europe – pulled out of, or scaled back their operations in, Russia. In fact, following Russia’s Ukraine invasion through early July 2023, 600 American companies had left Russia.1953 Examples ranged from McDonalds and Starbucks to an array of French luxury brands.1954 Did they act out of


1951 Exclusive: Ship Fuel Suppliers.

1952 Exclusive: Ship Fuel Suppliers.

1953 See Biden Warned China’s Xi on West’s Investment after Putin Meeting, REUTERS, 7 July 2023, www.reuters.com/world/biden-told-xi-after-putin-meeting-be-careful-your-economy-depends-western-2023-07-08/ (also reporting that amidst the Sino-American Trade War (discussed in a separate Chapter), President Biden flagged this fact to Chinese President Xi Jinping, warning him that the CCP’s economic growth aspirations depended in part on FDI from America and the EU).

1954 The story of McDonalds decamping Russia was particularly poignant:

McDonald’s has said it will permanently leave Russia after more than 30 years and has started to sell its restaurants.

The move comes after it temporarily closed its 850 outlets in March [2022].

The fast-food giant said it made the decision because of the “humanitarian crisis” and “unpredictable operating environment” caused by the Ukraine war.

The opening of McDonald’s first restaurant in Moscow in 1990 came to symbolize a thaw in Cold War tensions.

A year later, the Soviet Union collapsed, and Russia opened up its economy to companies from the West. More than three decades later, however, it is one of a growing number of corporations pulling out.
“This is a complicated issue that’s without precedent and with profound consequences,” said McDonald’s Chief Executive Chris Kempczinski…

…

“… [I]t is impossible to ignore the humanitarian crisis caused by the war in Ukraine. And it is impossible to imagine the Golden Arches representing the same hope and promise that led us to enter the Russian market 32 years ago.”

McDonald’s said it would sell all its sites to a local buyer and would begin the process of “de-arching” the restaurants which involves removing its name, branding, and menu. It will retain its trademarks in Russia.

The chain said its priorities included seeking to ensure its 62,000 employees in Russia continued to be paid until any sale was completed and that they had “future employment with any potential buyer.”


Starbucks has become the latest consumer brand to pull out of Russia as the wider exodus of multinational companies from the country continues three months after its invasion of Ukraine.

The U.S. coffee shop chain … said that following the temporary suspension of its Russian business in March [2022], it had “made the decision to exit and no longer have a brand presence in the market.”

It said it would continue to pay its 2,000 Russian workers for six months and help them “to transition to new opportunities outside of Starbucks.”

The chain has 130 outlets in Russia operated under license by the Kuwait-based franchise company Alshaya Group.

…

The departure of high-profile consumer brands from Russia represents a sharp reversal of the country’s embrace of western habits and companies following the fall of the USSR.

…

Edward Lewis, an analyst at Atlantic Equities, said companies had suspended operations to assess how long the war in Ukraine was likely to last before deciding on a full exit from the Russian market.

“It’s not a surprise given what we are seeing from a whole host of consumer companies in the U.S.,” he said, adding that compared to the size of McDonald’s business in Russia, Starbucks’ departure was far less material. Its Russian operations accounted for less than 1 per cent of revenues.

Starbucks opened its first store in Russia in 2007 in a shopping mall north of Moscow, two years after it won a legal dispute over the use of its name by an unlicensed local operator.

Alice Hancock, *Starbucks to Exit Russia Over Invasion of Ukraine*, FINANCIAL TIMES, 23 May 2022, www.ft.com/content/096ddd00-5f4c-4129-aa23-c7a8bb22f68?shareType=nongift (also noting: “Yum Brands, which owns Pizza Hut and KFC, this month [May 2022] said it was also in the process of transferring its restaurants to a local operator.”).

In contrast to McDonald’s and Starbucks, Burger King remained in Russia as of October 2023, despite its March 2022 statement it had commencement withdrawal. See Michael Race, *Ukraine War: Burger
conviction, *i.e.*, an affirmative belief in sacrificing short-term profits for enduring principle? Or, were they motivated by fear, *i.e.*, they anticipated incurring a cost of losing more business than whatever sales revenues they might preserve if they stayed in an aggressor state?

Either way, as of March 2024, summing to about 1,000 companies, “the corporate exodus from Russia since its 2022 invasion of Ukraine ha[d] cost foreign companies more than $107 billion in write-downs and lost revenue…,” and “highlight[ed] the sudden loss of Western expertise from Russia’s economy.” To be sure, the entire foreign-headquartered private sector did not decamp Russia, triggering calls to name, shame, and boycott those firms that remained in the country:

Some 400 U.S. and other multinational firms have pulled out of Russia, either permanently or temporarily, according to Yale’s Jeffrey Sonnenfeld, who has kept the authoritative list of corporate actions in Russia. Oil companies (BP, Shell, ExxonMobil) and tech companies (Dell, IBM, Apple, Google, Facebook, Twitter) led the way, and many others (McDonald’s, Starbucks, Coca-Cola) eventually followed.

But, according to Sonnenfeld, there are, at the other extreme, 33 companies … that form a “hall of shame,” defying demands that they exit Russia or reduce their activities there.

“They are funding the Russian war machine, and they are undermining the whole idea of the sanctions,” Sonnenfeld … [said]. “The whole idea is to freeze up civil society, to get people out on the streets and outraged. They’re undermining an effective resolution” and increasing the likelihood of continued bloodshed.

Those who want to stop Russia’s murderous attack against Ukraine should stop investing in or buying the products of these companies.1956

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Another high-profile example of an MNC pulling out of Russia – at a significant loss – came in August 2023: Heineken sold its entire business in the country for one euro, thus losing €300 million. The sale – encompassing seven breweries and 1,800 workers – was to Arnest, a Russian entity specializing in making aerosol cans. Despite the loss, perhaps Heineken was lucky: in July, “President Vladimir Putin seized Russian assets owned by Carlsberg and French yoghurt-maker Danone,” and in August, “the franchise owner of Domino’s Pizza signalled it would shut its Russian shops and put the business into bankruptcy.”

A notorious, shameful counterexample was Wichita-based, hydrocarbon-intensive Koch Industries. It was not alone:

Koch Industries, whose owners gave to right-wing causes for years, is now financing Putin’s war. The people who make Brawny paper towels, Dixie cups, Quilted Northern toilet paper, Vanity Fair napkins and Georgia-Pacific lumber are abetting the spilling of Ukrainians’ blood.

Like Reebok shoes? They’re being used to stomp on Ukraine. Authentic Brands Group, which also owns Aeropostale, Eddie Bauer, Brooks Brothers and Nine West, among others, is in the hall of shame.

The main change has been to supply routes, but the products remain available both online and in stores. Buyers just need to know where to look.

Crucially, the vast majority of goods concerned are not subject to sanctions and these cross-border flows are legal. And Moscow is happy to let them in, whatever route they take [including a variety of truck routes from neighboring countries].

While Coca-Cola Co … stopped producing and selling drinks in Russia last year [2022], others have been importing them, with labels on cans and bottles showing they have arrived from Europe, Kazakhstan, Uzbekistan, and China.

Some brands face years battling copies and unauthorized imports. Meanwhile, Coca-Cola’s Russian rivals have increased bottling capacity and launched new Cola beverages.

Swedish furniture giant IKEA sold its stock to Yandex Market, tech giant Yandex’s … e-commerce division, when it left Russia. …

Yandex Market says it puts suppliers who previously sold goods via IKEA stores in direct contact with customers.

But former suppliers are also ready to sell lightly modified IKEA items under different names. …


Before you bite into a Cinnabon (or Carvel ice cream, Schlotzsky’s sandwich or Auntie Anne’s pretzel) consider that parent company Focus Brands is taking a bite out of democracy in Ukraine.

So is Subway. While selling you the All-American Club, it’s giving Ukrainians the Cold-Cock Combo by refusing to cut loose its 446 Russian franchises.

Several other household brands – Truvia and Diamond Crystal salt (Cargill), Avon cosmetics (Natura), LG appliances, ASUS laptops, Mission tortillas (Gruma), and Pirelli tires – are produced by companies on the shameful list.

Are you or your mutual fund invested in Halliburton, Baker Hughes, or Schlumberger? Then you should know that these oil-services companies could deal a huge blow to Putin’s ability to wage war – but they choose profit instead.

Let’s name and shame all the others among the 33: advertising firms BBDO, DDB and Omnicom; accountant Baker Tilly; industrial companies Air Liquide, Air Products, Greif, IPG Photonics, Linde, Mettler Toledo, Nalco, and Rockwool; French hotelier Accor and retailers Auchan, Decathlon and Leroy Merlin; German wholesaler Metro; cloud service Cloudflare; International Paper; and Sweden’s Oriflame Cosmetics.

An additional 72 multinationals have made only partial pullbacks from Russia, such as reducing current operations or holding off on new investments – actions Sonnenfeld calls “very questionable” and “smokescreens.” Included here: Dunkin Donuts, General Mills, Mondelez (Oreos and other Nabisco products), candymaker Mars, Procter & Gamble, Yum Brands (Pizza Hut, Taco Bell), Hilton, Hyatt, and Marriott.

All these businesses could be doing more to stop Putin’s savagery and war crimes. Because they won’t, we all should do more to stop them.1959

(In fairness, ultimately several such MNCs, including Yum Brands and Marriott, pulled

1959 Opinion: Stop Buying.
out. What motivated companies to remain in Russia?

The Yum Brands exit is noted earlier; concerning the Marriott’s exit from Russia, see *Ukraine War: Marriott Hotel Chain to Leave Russia After 25 Years*, BBC NEWS, 3 June 2022, [www.bbc.com/news/business-61685925](http://www.bbc.com/news/business-61685925) (reporting: “The company closed its Moscow office and paused investment in Russia in March [2022], following the invasion of Ukraine. However, its 22 hotels in the country are owned by third parties and remained open. Marriott said the process of suspending operations in Russia was ‘complex.’ But in a statement, it said: ‘We have come to the view that newly announced U.S., U.K., and EU restrictions will make it impossible for Marriott to continue to operate or franchise hotels in the Russian market.’ The company said it remained ‘focused on taking care of our Russian-based associates,’ and had been supporting individuals in Ukraine and Russia to secure employment with Marriott outside countries affected by the conflict.”).

In June 2022, Nike and Cisco added themselves to the list of MNCs decamping Russia. See *Nike Latest Brand to Leave Russia Permanently*, BBC NEWS, 24 June 2022, [www.bbc.com/news/business-61914165](http://www.bbc.com/news/business-61914165) (reporting: “The U.S. sportswear giant halted online orders and closed the stores it owned in the country in March [2022]. Shops run by local partners continued to operate, but the firm is winding down those agreements. Networking giant Cisco also said it would start to fully shut down operations in Russia and Belarus. … ‘Nike has made the decision to leave the Russian marketplace,’ the company said…. ‘Our priority is to ensure we are fully supporting our employees while we responsibly scale down our operations over the coming months.’ … Nike has more than 50 stores in Russia, about a third of which are closed…. In May, Russian media reported that the company was ending its agreement with its largest franchisee in Russia, responsible for 37 stores. Nike had previously disclosed that Russia and Ukraine together accounted for less than 1% of the company’s revenue. Cisco said … it had ‘made the decision to begin an orderly wind-down of our business in Russia and Belarus.’ This decision will affect a few hundred employees, the U.S. company said, adding that it wanted to ensure they are ‘treated with respect.’ … The networking giant had already stopped business operations, including sales and services, in the region in March.”).

To be sure, as laudable as voluntary self-sanctioning by MNCs was, divestment was not always an easy option, because it raised both unpleasant ethical and economic dilemmas. For example:

After weeks of silence over the future of its Russian operations, *Société Générale* delivered a bleak blueprint for other multinationals that have pledged to exit the country.

The French bank said in early April [2022] that it would sell its *Rosbank* network to Vladimir Potanin, one of Russia’s richest men and a nickel baron who has avoided EU or U.S. sanctions, taking a €3.1 bn hit in the process.

The transaction stunned some rivals and underlines the difficulties facing groups from oil majors to car companies who want to exit Russia following the invasion of Ukraine: few potential buyers, costly exit options and uncertain prospects for any future return.

“We are all trying to find a clever way to exit the country. But what *SocGen* did isn’t the best way to do it,” said one senior executive at a bank with operations in the country. “There is an ethical discussion … there is a reputational risk to consider when selling, or basically donating, to an oligarch.”

“Essentially, they are giving a … gift to [Vladimir] Potanin [a “Russian billionaire and owner of OAO GMK Norilsk Nickel”]. O.K., he is not sanctioned, [but] is it the right thing to do?” the banker added.
First, some MNCs feared nationalization if they quit the country. 

President Putin threatened to nationalize assets of MNCs that decamped. That would amount to a seizure the likes of which had not occurred, since 1918, following the Bolshevik Revolution. Mr. Putin also authorized Russian airline companies effectively to abrogate their lease agreements. Were, therefore, foreign companies still in Russia stuck there?

If you want out, it is now too late to withdraw from the country in conditions allowing the extraction of much value, if any. The Kremlin must approve any sale of companies in strategic sectors such as banking and energy. It imposes a minimum 50 per cent discount on the value of the assets sold and requires a 10 per cent “voluntary” contribution to the state budget. But that is only if it has not confiscated the assets to hand them over to regime loyalists, as with the seizures of Carlsberg and Danone in July [2023].

“Western firms that chose to remain in the Russian market are now stuck with billions in profits they cannot repatriate, and there is no reason to believe that the Russian leadership will adopt a more flexible posture on

Many Western companies have found themselves caught between the prospect of expropriation by Russia, selling to locals caught in sanctions, or trying to scout out investment from Chinese or Middle Eastern buyers that might be freer to make deals but have so far shown little appetite.

The costs of a fire sale could be considerable, as Renault showed this week after it emerged that it was in talks to sell its majority stake in Lada-maker Avtovaz to the state for one rouble.

Under a deal outlined by Denis Manturov, Russia’s Trade Minister – which the French carmaker would not confirm – Renault would have the option of buying the stake back in five or six years at a price that takes into account any subsequent investments.

The divestment means Renault is giving up more than 14 years of investments, during which time it bought a 68 per cent stake in Avtovaz, overseeing a workforce of 40,000, and generating 10 per cent of its turnover and half its automotive operating margin last year [2021]. It has warned of a write-off of up to € 2.2 bn.

A restructuring expert advising several companies on sales said: “A number of people made very grandiose statements about ‘we’ll never do this, and we’ll never do that’ and now they’re thinking ‘oh, bugger.’ The reality is for most of these exits you’re going to have to dance with the devil at some point.”

Andrew Jack, Stephen Morris, Sarah White & Andrew Edgecliffe-Johnson, Companies Trying to Exit Russia Have to “Dance with the Devil,” FINANCIAL TIMES, 30 April 2022, www.ft.com/content/4d66f931-563a-4fbd-9032-18cfa73a7f6?shareType=nongift.

See, e.g., Richa Naidu & Jessica DiNapoli, Analysis: Western Companies Wrestle with Russia “Half-Exits,” REUTERS, 18 March 2022, www.reuters.com/business/western-companies-wrestle-with-russia-half-exits-2022-03-18/ (reporting: “Companies that left Russia may find it difficult to reclaim their property and assets once they are expropriated. Tiffany Compres, a Partner with law firm FisherBroyles, said companies may sue Russia in international venues such as the International Center for Settlement of Investment Disputes, but such cases can drag on for years and Russia cannot be forced to pay out. ‘Even if the company wins the claim, Russia has a reputation for not paying,’ Compres said.”).
this question any time soon,” says Agathe Demarais, Senior Policy fellow at the European Council on Foreign Relations. “If anything, the Russian government will probably adopt an even more hard-line approach, with asset seizures likely – notably for companies that brought R&D or high-tech knowhow to Russia.”

The hard-line approach seemed to pay off for Russia’s President. As of December 2023, Western companies that left Russia declared they had lost over $103 billion (measured from 24 February 2022, when the war started). The exit taxes Mr. Putin imposed on businesses that exited generated in 2023 about $1.25 billion in funds, all of which Russia could use to prosecute its war in Ukraine.

Second, MNCs feared for the Russian nationals whom they employed – might they be the targets of retaliation by the Putin regime if the employers and ex-patriates left? And, third, they played the long game, projecting that one day the war will end, and they will want to profitable operations in Russia again, which could be impeded if they left. (The companies could not plausibly argue they wanted to safeguard their profits from Russian operations: aside from that being callous, they could not repatriate any such profits, because of the exclusion of Russia from SWIFT and other sanctions on banks dealing with Russia.)

However, these reasons could be challenged on the ground that leaving Russia, even at the risk of hurting Russian consumers by cutting off the non-humanitarian goods and services the MNCs supply, was preferable to the deaths of soldiers and civilians in Ukraine and Russia. That is, Just War Theory (discussed in a separate Chapter) suggested pursuing non-violent sanctions (with appropriate exceptions for humanitarian items such as medicines) in the hope of stopping violence was appropriate. Likewise, the argument Koch Industries gave – that business and government should be separate, hence the latter should not foist sanctions upon the former – was laughable. The line between business and government always has been, and always will be, fuzzy. Moreover, that argument was extremist: it reflected a fanatical misreading of classical libertarian ideology.

III. Wave Eight: More SDN Designations Plus State Sanctions

On 24 March 2022 came another tranche of sanctions, this time not only Federal, but also state. OFAC added to its SDN list as follows, clearly targeting the Russian legislature and Russian military-industrial complex:

(1) The State Duma of the Federal Assembly of the Russian Federation and 328...
of its members.1966

(2) Herman Gref, the CEO and Chairman of Sberbank, Russia’s largest bank (following previous restrictions on dealings with Sberbank under Executive Order 14024 (Directive 2)).

(3) Multiple Russian defense companies, their subsidiaries, and their leaders, including Tactical Missiles Corporation JSC …, JSC NPO High Precision Systems, NPK Tekhmash OAO, Joint Stock Company Russian Helicopters, and Joint Stock Company Kronstadt.

(4) 17 directors of PJSC Sovcombank (which itself was a designated entity).1967

Accordingly, as with all SDNs, U.S. persons were generally prohibited from transacting with them, and all property and interests in property of SDNs was blocked. Similarly, the U.K. added 65 sanctions measures targeting strategic Russian industries, banks, and oligarchs.1968

U.S. States started sanctioning Russia. In so doing, they delineated the scope of their sanctions by defining the types of Russian business operations they were sanctioning, and identified the risks to differently situated government contractors in dealing with such businesses. Three patterns emerged.

First, most States’ sanctions were narrow in scope. For example, Ohio1969 and Virginia,1970 limited their actions to Russian institutions and/or companies. Second, some States, such as New Jersey1971 and North Carolina,1972 targeted entities that were headquartered or had their principal place of business in Russia, as well as the subsidiaries of such entities. (New Jersey also sanctioned Belarussian entities.) Third, New York took the broadest approach: it targeted entities that conduct business operations in Russia, which captured any entity (a) conducting any commercial activity in Russia, (b)
transacting business with the Russian Government; or (c) transacting business with 
commercial entities headquartered or with their principal place of business in Russia. 1973

Regarding the actual State sanctions, they took either or both of two methods: a ban 
on State contracting, and disinvestment. The first method aimed to sever State business 
with contractors operating in or with Russia or Belarus. The second method sought to sever 
portfolio investment links with Russia or Belarus by selling any State-government held 
Russian or Belarussian financial instruments (e.g., equity or debt). The divestment, as it 
were, also included liquor: several States “adopted bans prohibiting the sale of Russian-
origin vodkas in State liquor stores.” 1974 The first method, and possibly the second, entailed 
reporting or certification burdens on State-level government contractors and portfolio 
investors.

Several Governors ordered State agencies from engaging in Russia-related 
contracts. Via New York Executive Order Number 14, Governor Kathy Hochul (1958, 
Governor, 2021-) directed all New York State agencies to review and divest public funds 
from Russian entities, and to terminate contracts with Russian entities. 1975 The Governor 
also “directed State agencies to refrain from contracting with entities ‘conducting business 
operations in Russia,’ and to request certification from bidders regarding operations in 
Russia as part of the procurement process.” 1976

Likewise, the Governors of California, Colorado, Indiana, Massachusetts, Ohio, 
New Jersey, and North Carolina, issued Executive Orders (or otherwise took action) 
directing their State agencies to disassociate from Russian companies or SOEs. For 
example, in California, the EO “require[d] contractors with projects valued at over $5 
 million to affirmatively report to the state their compliance with Federal economic 
sanctions, as well as any steps taken in response to Russia’s actions in Ukraine.” 1977 As for 
New Jersey, it:

banned its state agencies from doing business with companies closely linked 
to the governments of Russia or Belarus. Governor Phil Murphy introduced 
these restrictions in EO 291 (March 2, 2022), by ordering a mandatory 
review of New Jersey state contracts, including those with “businesses that

1973 See State of New York, Executive Chamber, Executive Order Number 16: Prohibiting State 
Agencies and Authorities from Contracting with Businesses Conducting Business in Russia (17 March 2022), 

1974 Lindsay B. Meyer Paul A. Debolt, Dismas Locaria & Anna Perina, Venable LLP, Do You Contract 
with State Governments? If So, Beware of Emerging State Sanctions’ Obligations Related to Russia and 
Belarus, INSIGHTS (3 June 2022), www.venable.com/insights/publications/2022/06/do-you-contract-with-
state-governments?utm_source=vuture&utm_medium=email&utm_campaign=20220603%20-%20do%20you%20contract%20with%20state%20governments%3f%20if%20so%20beware%20of%20 emerging%20state%20sanctions%20obligations%20related%20to%20russia%20and%20belarus.
[Hereinafter, Do You Contract with State Governments?].

1975 See State of New York, Executive Chamber, Executive Order Number 14: Directing State Agencies 
and Authorities to Divest Public Funds Supporting Russia (27 February 2022), 

1976 Do You Contract with State Governments?

1977 Do You Contract with State Governments?
invest directly in … companies [owned or controlled by the government of Russia, Belarus, or their instrumentalities], directly or as subcontractors.” While this EO doesn’t directly place an onus on the business community, a companion New Jersey State Law, P[ublic] L[aw] 2022, c[hapter] 3, does. Under this Law, State agencies are generally prohibited from doing business with entities or persons determined by the state to be “engaged in prohibited activities” in Russia or Belarus, including those with close links to the governments of Russia or Belarus or headquartered in Russia. Importantly, an entity contracting with the State of New Jersey must certify that neither it, nor any of its subsidiaries or affiliates under common ownership, is “engaged in prohibited activities” in Russia or Belarus. Otherwise, it must accurately explain such activities in these countries. Moreover, if the contracting company is performing any “prohibited activities,” it will be obliged to terminate such activities within 90 days and certify as to the same to the state. Finally, under this New Jersey law, a false certification may result in civil penalties and suspension or termination of contracting rights.1978

Indeed, by 1 April 2021, more than 20 States (including Alabama, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Maryland, Massachusetts, Minnesota, Missouri, Mississippi, Montana, North Carolina, Nebraska, New Jersey, New York, Ohio, Texas, Virginia, Vermont, and Washington) had implemented or proposed the review and/or termination of existing State contracts and procurements with Russian entities, and prohibited State agencies from entering into new contracts with Russian entities. They did so regardless of which political party – Democrat or Republican – controlled the Governor’s Mansion and State Legislature.

Concomitant with the outright bans on dealing with Russian (and sometimes Belarusian) entities and/or divestitures of State investments in these entities, several States imposed obligations on State contractors, namely certification and disclosure requirements for them. For example, California’s regulation covered all contracts valued at $5 million or more. Contractors had “to report on steps they have taken in response to Russia’s actions in Ukraine, including, but not limited to, desisting from making new investments in, or engaging in financial transactions with, Russian entities, not transferring technology to Russia or Russian entities, and directly providing support to the government and people of Ukraine.”1979 Similarly, before awarding, renewing, or amending a State procurement contract, New Jersey mandated contractors to certify they are not dealing with any OFAC-designated SDN – and tacked on a whopping set of penalties for a false certification (namely, (1) a fine “equal to the greater of $1,000,000 or twice the amount of the [contract] bid,” (2) “termination of an existing contract [or bid],” and (3) exclusion from public contracting with the State for 3 years (assuming the violating entity ceased its prohibited

1978 Do You Contract with State Governments?
Finally, many States followed President Biden’s import ban (discussed above) on Russian-origin vodka by sales of such vodka in State liquor stores.

IV. Wave Nine:  
Further Degrading Kremlin Power and Imposing More Economic Pain

In response to mounting, incontrovertible evidence of human rights atrocities (including civilian murders in Bucha, a town outside Kyiv) committed by Russian forces in Ukraine, in early April the U.S., EU, and G-7 announced another set of wide-ranging measures. All of them were “intended to degrade key instruments of Russian state power and impose acute and immediate economic harm on Russia, … while holding accountable … a ‘kleptocracy’ that funds and supports the war.”

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1981 See, e.g., Nandita Bose, Matt Spetalnick & Alexandra Alper, Russia Hit with New Round of U.S. Sanctions as Biden Decrees “Major War Crimes,” REUTERS, 6 April 2022, www.reuters.com/world/us-allies-ban-investments-russia-sanction-banks-2022-04-06/ (reporting: “There’s nothing less happening than major war crimes,’ Biden said … referring to the Ukrainian town of Bucha retaken from Russian forces, where bodies of civilians shot to death had been found. ‘Responsible nations have to come together to hold these perpetrators accountable,’ he said. ‘And together with our allies and our partners, we’re going to keep raising economic costs and ratchet up the pain for Putin.’ Grim images emerging from Bucha include a mass grave and the bodies of people shot at close range, some of them bound, prompting calls for tougher action against Moscow and an international investigation”) [hereinafter, Russia Hit with New Round]; Michelle Nichols, Humeyra Pamuk & Doina Chiacu, In U.N. Speech, Ukraine’s Zelenskiy Accuses Russia of Worst War Crimes Since WW2, REUTERS, 5 April 2022, www.reuters.com/world/un-chief-warns-ukraine-war-one-greatest-challenges-international-order-2022-04-05/ (reporting: “Ukrainian President Volodymyr Zelenskiy told the United Nations Security Council on Tuesday that ‘accountability must be inevitable’ for Russia as he accused invading Russian troops of committing the ‘most terrible war crimes’ since World War Two. Zelenskiy showed a short video of burned, bloodied, and mutilated bodies, including children, in Irpin, Dmyrka, Mariupol, and Bucha, where Ukraine accuses Russian troops of killing hundreds of civilians. Russia’s U.N. Ambassador, Vassily Nebenzia, then told the Security Council that Russian troops are not targeting civilians, dismissing accusations of abuse as lies. He said that while Bucha was under Russian control ‘not a single civilian suffered from any kind of violence.’ Zelenskiy questioned the value of the 15-member U.N. Security Council, which has been unable to take any action over Russia’s Feb. 24 [2022] invasion of Ukraine because Moscow is a veto power, along with fellow permanent council members the United States, France, Britain, and China. ‘We are dealing with a state that turns its veto at the U.N. Security Council into the right to (cause) death,’ Zelenskiy said in a live video address from Ukraine’s capital Kyiv, urging reform of the world body. ‘Russia wants to turn Ukraine into silent slaves.’ Russia’s partner China, which has abstained on most U.N. votes since the war started, was "deeply disturbed" by the images of civilian deaths in Bucha, China’s U.N. Ambassador Zhang Jun said, calling for verification of what happened. India, which relies heavily on Russia for military hardware and has also abstained on U.N. action, condemned the killings in Bucha and called for an independent investigation. Russia’s Nebenzia said: ‘We are not shooting against the civilian targets in order to save as many as civilians possible. This is precisely why we’re not advancing as fast as many expected.’).”

The American measures included:1983

(1) A complete prohibition on all FDI in Russia:

President Biden issued a new Executive Order, Number 14071, entitled “Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression,” in which he imposed a sweeping ban on FDI by any U.S. person (natural or legal).1984 The Order, dated 6 April 2022, extended the existing ban on FDI in Russia’s energy sector to its entire economy, so as to send Russia “further down the road of economic, financial, and technological isolation.”1985 The ban applied only to new investments, hence it did not – for example – mandate existing American companies, such as Koch Industries, divest.1986 However, by early April 2022, 600 American companies voluntarily had quit Russia.1987

The new Executive Order contained two additional bans, one on services and the other on facilitation. First, it forbade the direct or indirect export, reexport, sale, or supply from the U.S. or by a U.S. person, of “any category of services as may be determined by the Secretary of the Treasury, in

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1985 James Politi & Hannah Murphy, U.S. to Announce Sanctions Including Ban on New Investment in Russia, FINANCIAL TIMES, 5 April 2022, www.ft.com/content/1eb4af84-a17a-4aae-add2-8f71a3e73b68?shareType=nongift.


consultation with the Secretary of State, to any person located in the Russian Federation.” Second, it forbade any U.S. person from facilitating, approving, financing, or guaranteeing any transaction by a foreign person, if such a transaction would be prohibited under the Order were it to be performed by a U.S. person or within the U.S.

(2) Increased financial penalties on Russian banks and restrictions on SOEs:

The new measures – by OFAC SDN listings pursuant to Executive Order 14024 – included the form of the “most severe level of sanctions” on Sberbank, a PJSC and Russia’s largest financial institution, 42 subsidiaries that were 50% or more owned, directly or indirectly, by Sberbank, and Alfa-Bank, a JSC and the country’s biggest privately-owned bank plus six of its subsidiaries and five vessels owned by one of the subsidiaries.1988 (Sberbank held “one-third of Russia’s total banking assets, and Alfabank … [was] the country’s fourth largest financial institution.”)1989) Immediately following Russia’s 24 February 2022 invasion of Ukraine, America forbade all equity and debt transactions with Alfa and Sberbank. Now, the U.S. escalated its financial measures to “much stricter curbs,” namely, so-called “full blocking sanctions.” The full blocking sanctions “prevent[ed] the lenders from transacting with any U.S. institutions or individuals.”1990 That is, unless authorized by an exception (through an OFAC General License or other exception), any entity or person subject to U.S. jurisdiction was prohibited from transacting with anyone designated as an SDN, and obliged to block all property and interests in property of SDNs, unless authorized.

U.S. Treasury Secretary Janet Yellen explained: “in practice, the history of sanctions is when we impose full blocking sanctions … the rest of the world, even in other jurisdictions that have not yet imposed a full block, they respect the regime. So there tends to be a multiplier effect.”1991 However, the block was not truly a “full” one. The U.S. allowed an exception for energy sector transactions.1992 So, the U.S. Treasury issued “licenses [that] exempted transactions with the targeted banks involving European allies’ purchases of Russian oil and gas.”1993


1989 Russia Hit with New Round. OFAC made clear the sanctions were inapplicable to Alfa Bank (Ukraine), because it was a distinct legal entity from Alfa Bank.


1991 Quoted in U.S. Imposes “Severe” Sanctions. See also Russia Hit with New Round (reporting: “Daniel Fried, a former State Department coordinator for sanctions policy in the Obama Administration, said the latest package ‘basically makes Sberbank untouchable.’”).


1993 Russia Hit with New Round.
Separate new measures also targeted large Russian SOEs critical to the support of Russia’s war effort. Examples of such SOEs included United Aircraft Corporation and United Shipbuilding Corporation (another JSC), which the U.S. believed operated in close connection with Russia’s government (in particular, it made Russian warships). Another example was “Alrosa, the world’s largest diamond mining company, and a top Russian state-owned enterprise.”

Yet, these measures also exempted energy sector transactions. And, of course, along with China, India remained an outlier: India continued to import diamonds from Russia and process them in its jewellery industry into finished merchandise, which it consumed domestically and exported. Moreover, the EU struggled to agree on an import ban on Russian diamonds. That was because of Belgian objections: Antwerp was a leading center for international diamond trade and feared losing business to rivals that did not implement a ban, diamonds accounted for 5% of Belgian exports and supported 30,000 Belgian jobs. Why not, the Belgians argued, let consumers decide which country of origin they preferred for their diamonds? The answer, of course, is that would turn a sanctions regime into a forum to express consumer tastes, i.e., it would transform a foreign and national security policy issue into one of private preferences.

(3) Additional SDN and Entity List listings:

The U.S. – again via OFAC designations – targeted President Putin’s two adult daughters, Ekaterina Tikhonova and Maria Vorontsova, the wife and daughter of Foreign Minister Sergei Lavrov, members of Russia’s Security Council, (including Dmitry Medvedev, Russia’s ex-President), and Russia’s ex-PM, Mikhail Mishustin, and Russia’s Minister of Justice, Konstantin Chuychenko. (The President and Foreign Minister already were SDNs, as noted above.) Why sanction Mr. Putin’s daughters? Because the U.S. “believed they were helping shield the Russian President’s

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1996 James Politi, Russian Diamond Miner and State-Owned Shipbuilder Hit by U.S. Sanctions, FINANCIAL TIMES, 7 April 2022, www.ft.com/content/c45cbe9-741a-4934-9918-3fc4db82346?shareType=nongift (also reporting the U.S. put “new sanctions on USC, the Russian shipbuilder, and individual members of its board of directors.”). The subsidiaries and Board members of both USC and Alrosa also were designated as SDNs.
1999 Russia Hit with New Round.
wealth.\textsuperscript{2000}

Further, on 1 April, BIS added 120 entities to the Entity List for supporting the Russian and Belarusian militaries. Importantly, BIS inserted a so-called “Footnote 3” designation to 95 of these entities, which were ones it decided were MEUs. That Footnote meant entities were subject to the FDP Rule, which restricted the export to Russia and Belarus of most foreign manufactured goods that use U.S.-origin software or technology as part of their manufacturing processes.\textsuperscript{2001}

\textsuperscript{2000} \textit{U.S. Imposes “Severe” Sanctions.} See also \textit{U.S. to Sanction Putin Children} (reporting: “The U.S. believes Putin and his allies hide wealth with family members, … [an] official said …, on condition of anonymity.”); \textit{Russia Hit with New Round} (reporting: “Putin’s daughter, Katerina Vladimirovna Tikhonova, is a tech executive whose work supports the Russian government and its defense industry, according to details released by the U.S. Treasury Department. His other daughter, Maria Vladimirovna Vorontsova, ‘leads state-funded programs that have received billions of dollars from the Kremlin toward genetics research and are personally overseen by Putin,’ the Treasury said.”).

Additions to the Entity List continued through Spring-Summer 2022, and to the year’s end. For instance, BIS added or modified 71 entities located in Russia and Belarus, thus bringing the total number of parties added to the Entity List as a result of Russia’s invasion of Ukraine in February to 322, or about 15% of the entire List. See U.S. Department of Commerce, Bureau of Industry and Security, \textit{Additions of Entities to Entity List, 87 Federal Register number 108, 34154-34164} (6 June 2022), www.govinfo.gov/content/pkg/FR-2022-06-06/pdf/2022-12144.pdf; U.S. Department of Commerce, Bureau of Industry and Security, \textit{Commerce Adds 71 Entities to Entity List in Latest Response to Russia’s Invasion of Ukraine}, (2 June 2022), www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3006-2022-06-02-bis-press-release-71-russia-belarus-entity-list-additions/file. Similarly, on 2 June, BIS published a Final Rule revising Russia and Belarus MEU and end-uses controls, and clarifying the categories of licenses BIS reviews on a case-by-case basis. See U.S. Department of Commerce, Bureau of Industry and Security, \textit{Export Administration Regulations: Revisions to Russia and Belarus Sanctions and Related Provisions; Other Revisions, Corrections, and Clarifications, 87 Federal Register number 108, 34131-34153} (6 June 2022), www.govinfo.gov/content/pkg/FR-2022-06-06/pdf/2022-11885.pdf. And, on 21 December, BIS modified the Entity List listing of the Wagner Group (a Russian private military company), adding to it a Footnote 3 designation, whereby indicating Wagner is a Russian or Belarusian MEU under \textit{EAR} Section 744:11, and thus:

Licenses for this entity will now be reviewed under a policy of denial for all items subject to the \textit{EAR} apart from food and medicine designated as \textit{EAR} 99, which will be reviewed on a case-by-case basis. The license requirements under this entry also extend to any export, reexport and transfer (in-country) to the entity wherever located worldwide.

Department of Commerce, Bureau of Industry and Security, \textit{Modification to the Entity List, 87 Federal Register 78856} (23 December 2022), www.govinfo.gov/content/pkg/FR-2022-12-23/pdf/2022-28033.pdf. This designation was notable because of the significant involvement by this mercenary Group in much of the fighting against Ukraine.

In January 2023, the U.S. sanctioned a Chinese entity (Changsha Tianyi Space Science and Technology Research Institute, also known as Spacety China), and its Luxembourg subsidiary, for aiding and abetting the Wagner Group. See Kelly Ng, \textit{Ukraine: U.S. Sanctions Chinese Firm Helping Russia’s Wagner Group}, BBC NEWS, 29 January 2023, www.bbc.com/news/world-europe-64421915 (reporting: “Under the sanctions, there can be no transfer, payment, or export of any property or interests in the United States to the targeted entities.”). But, the Group and its founder had an army of lawyers to defend it. See Miles Johnson, \textit{Wagner Inc: A Russian Warlord and his Lawyers}, FINANCIAL TIMES, 24 January 2023, www.ft.com/content/8c8b0568-cdd1-4529-a4fd-82e57983dde5?shareType=nongift.
(4) Blocking Russian bond payments:

That is, the U.S. prevented “the Russian government … from paying holders of its sovereign debt more than $600 million from [foreign currency] reserves held [by Russia’s Central Bank in accounts] at U.S. banks [and frozen in those accounts],” a move that increased the risk Russia would be declared in default of its international bond obligations. This measure “was meant to force Moscow to make the difficult decision of whether it would use dollars that it has access to for payments on its debt or for other purposes, including supporting its war effort.” Said a U.S. Treasury: “Russia must choose between draining remaining valuable dollar reserves or new revenue coming in, or default.” Such a default would be “historic.”

(5) Expanded List of Merchandise Subject to Export Controls

BIS expanded significantly the list of items subject to U.S. export controls, explaining:

In response to … Russia’s ongoing aggression against Ukraine, the Department of Commerce is expanding the existing sanctions against Russian industry sectors by imposing a license requirement for exports, reexports, or

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2002 Megan Davies & Alexandra Alper, U.S. Stops Russian Bond Payments, Raising Risk of Default, REUTERS, 5 April 2022, [www.reuters.com/business/us-cracks-down-russian-debt-payments-latest-sovereign-payments-halted-2022-04-05](http://www.reuters.com/business/us-cracks-down-russian-debt-payments-latest-sovereign-payments-halted-2022-04-05) (also reporting: “The Treasury Department had been allowing the Russian government to use those funds to make coupon payments on dollar-denominated sovereign debt on a case-by-case basis. On … [4 April 2022], as the largest of the payments came due, including a $552.4 million principal payment on a maturing bond, the U.S. government decided to cut off Moscow’s access to the frozen funds…. An $84 million coupon payment was also due on Monday on a 2042 sovereign dollar bond.”). [Hereinafter, U.S. Stops Russian Bond Payments.]

2003 U.S. Stops Russian Bond Payments (also reporting: “Russia, which has a total of 15 international bonds outstanding with a face value of around $40 billion, has managed to avoid defaulting on its international debt despite unprecedented Western sanctions. But the task is getting harder. “What they’re [the U.S.] basically trying to do is force their [Russia’s] hand and put even more pressure on (to deplete) foreign-currency reserves back home,” said David Wolber, a sanctions lawyer at Gibson Dunn in Hong Kong. “If they have to do that, obviously that takes away from Russia’s ability to use those dollars for other activities, in essence to fund the war.” It may also put pressure on Russian demands to be paid roubles for gas by European customers…. Russia was last allowed to make a $447 million coupon payment on a 2030 sovereign dollar bond, due … [on 31 March 2022], which was at least the fifth such payment since the war began. If Russia fails to make any of its upcoming bond payments within their pre-defined timeframes, or pays in roubles where dollars, euros, or another currency is specified, it will constitute a default. While Russia is not able to access international borrowing markets due to sanctions, a default would prohibit it from accessing those markets until creditors are fully repaid and any legal cases stemming from the default are settled.”).

2004 U.S. Stops Russian Bond Payments (quoting an unnamed spokesperson, and also reporting: “Russia does have the wherewithal to pay from reserves, since sanctions have frozen roughly half of some $640 billion in Russia’s gold and foreign currency reserves. But a drawdown would add pressure just as the United States and Europe are planning new sanctions … [discussed above] to punish Moscow over civilian killings in Ukraine.”).

2005 U.S. Stops Russian Bond Payments.
transfers (in-country) to and within Russia for additional items subject to the …EAR identified under specific Schedule B numbers or Harmonized Tariff Schedule codes. … BIS is taking these actions to further restrict Russia’s ability to withstand the economic impact of the multilateral sanctions, further limit sources of revenue that could support Russia’s military capabilities, and to better align with the European Union’s controls. 2006

So, in its final rule (dated 11 May 2022), BIS expanded the items subject to the Russian Industry Sector Sanctions in Supplement Number 4 to 15 C.F.R. Part 746 of the EAR. The rule added 205 HTS codes at the 6-digit level, corresponding to 478 10-digit numbers on Schedule B. All the items were designated EAR 99. The items included boilers, bulldozers, fans, industrial engines, motors, sewing machine needles, ventilation equipment, wood products, and several other items with commercial and industrial applications. Further, BIS clarified the scope of the controlled list was based on the HTS description.

The growing breadth and increasing depth of BIS measures created EAR compliance challenges for producer-exporters, importers, and investors. Accordingly, BIS issued FAQs on a range of issues involving Russia, including applicable license requirements, license application review policy, and license exceptions, FDP and de minimis rules, identity of excluded countries, lists of sanctioned luxury goods, and country group and country chart changes. 2007 OFAC did the same with respect to its Russia-related sanctions. It amended and reissued all its Ukraine-Russia-Related Sanctions Regulations (31 C.F.R. Part 589) to provide more comprehensive guidance than before, including with respect to general licenses, and revised several of its FAQs. 2009

(6) Limited Secondary Boycott

The U.S. also expanded its Russia sanctions to “encompass not only carriers that fly U.S.-made planes, but even companies in countries such as China or India that refuel, repair or service these aircraft with the knowledge that they are violating sanctions.” In other words, it imposed secondary boycott measures on air and air transport services.

On all such measures, the EU acted in tandem with the U.S.

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2010 See Taisei Hoyama, *U.S. Turns Up Heat on Chinese, Indian Companies Servicing Aeroflot*, Nikkei Asia, 20 April 2022, https://asia.nikkei.com/Business/Transportation/U.S.-turns-up-heat-on-Chinese-Indian-companies-servicing-Aeroflot (reporting: “The Commerce Department earlier this month [April 2022] suspended exports to Aeroflot and two other Russian airlines in response to ongoing sanctions violations. The move bars these carriers from receiving U.S. parts or services for their aircraft, without which the airlines will have difficulty operating. In the announcement, the Department cited cities where the carriers have continued service to and from Moscow, including Beijing, Delhi, Dubai, Istanbul, and the Turkish city of Antalya.”).

Interestingly, the Biden Administration was encouraged to ban British lawyers who had worked for Russian SDNs:

A member of Congress has urged the Biden Administration to place travel bans on senior British lawyers that acted for wealthy Russian clients against investigative journalists.

Steve Cohen, a Democratic Representative from Tennessee, has written to Antony Blinken, the U.S. Secretary of State, urging him to sanction the lawyers for having “enabled malign activities of Russian oligarchs.”

His letter comes as the Biden administration looks to increase its support for Ukraine in its war against Russia and tighten sanctions against those who have supported the Russian regime.

Cohen wrote: “Oligarchs who hire lawyers to engage in abusive cases against journalists to silence them cannot exert malign influence in our system … the United States must establish deterrents for foreign enablers serving individuals who are undermining democracy.”

Cohen singled out several lawyers he believed should be subject to bans on visas for travel to the U.S.: Nigel Tait of Carter-Ruck; John Kelly of Harbottle & Lewis; barrister Hugh Tomlinson; Geraldine Proudler of CMS; Keith Schilling of Schillings; and Shlomo Rechtschaffen of SR Law.

Each of the lawyers is well known in London legal circles….

Kiran Stacey & Kate Beioley, *Biden Administration Urged to Ban U.K. Lawyers Who “Enabled” Oligarchs*, Financial Times, 19 April 2022, www.ft.com/content/08744ab8-6574-4ae1-bb48-5713a31315e3?shareType=nongift. Whether the proposed ban would raise U.S. Constitutional questions (concerning, for instance, due process and the right to counsel, assuming such rights had extraterritorial application and/or applied to non-U.S. citizens) was unclear.

2011 See, e.g., Sam Fleming, *EU to Hit Russia with Trade Bans and Tech Export Controls worth €11 bn*, Financial Times, 15 February 2023, www.ft.com/content/0d3babcf-e047-4b5f-bb0f-1c3011bb96e0?shareType=nongift (reporting: “With nine packages of sanctions in place, the Russian economy is going backwards.” [EC President Ursula] von der Leyen said. ‘To keep up this strong pressure, we are proposing a 10th package of sanctions, with new trade bans and technology export controls to
So, the EU banned all Russian coal imports. Specifically, on 7 April 2022, it decided to phase out these imports across four months, a reasonably fast period given that the EU imported 47% of its coal from Russia (in 2019). Further, the EU closed its ports to Russian ships, barred Russian (and Belarusian) road transporters from the EU. The EU also sanctioned additional Russian political figures, propagandists, and tycoons, and the daughters of President Putin, “expanding export controls on technologies used in the Russian defense sector and other key industries,” “restrictions on sales of equipment that can be used to liquefy natural gas,” and placed more strictures on Russian financial institutions, such as VTB Bank PJSC and Sberbank, which had been cut off from SWIFT (as noted above), but which were “not yet fully sanctioned.”

Japan also banned Russian-origin imports. Japan did so with no specific timetable, but by April 2023, it clearly had:

slashed its reliance on Russian coal, as power companies and other buyers have sought different sources for the fuel, such as Indonesia and South Africa.

Japan imported 230,000 tonnes of thermal coal from Russia in February [2023], 73% less than a year earlier…. Russian coal accounted for just 2% of total imports, down from 9% a year before.

The declines show Japan’s progress toward the 2022 pledge by Group of
Seven leaders to phase out or ban this trade, a source of revenue for Moscow’s war on Ukraine.

Japan’s imports of thermal coal from Russia totaled about 6.5 million tons for April 2022 to February 2023 – down 45% on the year.

Imports of Indonesian coal grew 28% on the year during the same period. Indonesia overtook Russia to become Japan’s second-largest supplier from third place before the war. Imports from Canada roughly doubled, while those from South Africa grew about sixfold.

By contrast, imports of Russian liquefied natural gas were down only about 20% on the year in February, reflecting the greater difficulty of finding alternative sources of LNG.  

Likewise, the U.K. followed the EU and Japanese actions.

The U.K. also banned all new FDI in Russia, and imposed a full asset freeze against Sberbank and Credit Bank of Moscow. The U.K. also put “sanctions on a further eight individuals linked to key Russian industries, including Andrey Akimov, Chief Executive of Gazprombank, and Leonid Mikhelson, founder and Chief Executive Officer of Novatek [and associated with a petrochemical company known as “SIBUR”].” The others were “Gazprom Neft CEO Alexander Dyukov,” “PhosAgro [a phosphate fertilizer company] founder Andrey Guryev,” and “Boris Rotenberg, son of the co-owner of Russia’s largest gas pipeline producer, SGM Group,” plus Viatcheslav Kantor, the Chair of Acron, a fertilizer company. And, the U.K. put sanctions on Mr. Putin’s adult daughters. Japan, too, imposed “new sanctions on Russia to freeze the assets of an additional 141 individuals, including Prime Minister Mikhail Mishustin” and “133 people are from the Donetsk People’s Republic and the Luhansk People’s Republic, both of which are effectively controlled by pro-Russian factions in Eastern Ukraine.” Japan “also added 71 more organizations on its list of export ban, bringing the total number of targeted bodies to 201.”

All these additional measures were taken in light of evidence that the previous waves of sanctions were working, in that they were having a serious deleterious effect on the Russian economy. And, telling was this observation:

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2020 U.K. Freezes Sberbank.

2021 Ukraine Latest: Crucial NATO Decisions Expected in Finland, Sweden this Week, NIKKEI ASIA, 28 April 2022 (Tuesday, 10 May, 11:30 AM Tokyo Time update), https://asia.nikkei.com/Politics/Ukraine-war/Ukraine-war-Free-to-read/Ukraine-latest-Crucial-NATO-decisions-expected-in-Finland-Sweden-this-week. [Hereinafter, Ukraine Latest: Crucial NATO].
Edward Fishman, a former Russia and Europe sanctions lead at the State Department, called … [the new] measures “the most significant sanctions taken since the [Russian] Central Bank sanctions” imposed in late February.

“We’re headed towards Iran-style sanctions,” he added, referring to the decades-long measures against Tehran beginning in 1979. “This is a conveyor belt, and it only leads in one direction.”

That direction spelled potential doom for Russia’s economy, just as sanctions had wrecked Iran’s economy and forced it to the JCPOA bargaining table (as discussed in separate Chapters). Already, thanks to the sanctions, Russia’s inflation rate rose above 15% by early April 2022 (and perhaps a whopping 200%), and its GDP was projected to contract in 2022 by 15%. Put simply, the U.S. and its Allies had confidence that their sanctions-driven strategy was putting such economic pressure on Russia that, ultimately, Russia would be forced to change it political and military goals in Ukraine.

V. Wave Ten: Exclusion from International Bodies

In late March 2022, President Biden called for Russia to be tossed out of the G-20. That body had lost its original, shared purpose after the Cold War, namely, advancing the “Washington Consensus” in favor of open markets and political reform. The political economies of Russia and its partners, like China, had evolved (or devolved) toward state intervention in markets and authoritarian rule – in a word, nationalism over internationalism. In mid-April, the tear in the G-20 was obvious: U.S. Treasury Secretary Janet Yellen walked out of a Group meeting to protest the presence of, and presentation by, Russia’s Minister of Finance, and she was joined by “Jerome H. Powell, the Federal Reserve Chair, Christine Lagarde, the President of the European Central Bank, Andrew Bailey, the Governor of the Bank of England, and Chrystia Freeland, Canada’s Deputy Prime Minister and Minister of Finance.”

Ms. Freeland intoned:

2024 *U.S. Imposes “Severe” Sanctions.*
2025 *U.S., EU to Hit Russian.* On 12 August 2022, Russia conceded its GDP had shrunk:

The economy shrank 4 percent from April through June compared with a year earlier, the Russian statistics agency said…. It is the first quarterly Gross Domestic Product report to fully capture the change in the economy since the invasion of Ukraine in February. It was a sharp reversal from the first quarter, when the economy grew 3.5 percent.


2027 Alan Rappeport, *Treasury Secretary Janet Yellen Walked Out of a G20 Meeting as Russia’s Finance Minister Spoke*, THE NEW YORK TIMES, 20 April 2022,
“The G-20 can’t function effectively with Russia at the table” …

“Russia does not have a place at the table of countries who have come together to maintain global economic prosperity,” Freeland said, adding Russia has violated longstanding international rules with its invasion of southern Ukraine. “You can’t be a poacher and gamekeeper at the same time.”

She was right: the “G-20 Finance Ministers and Central Bank Governors … failed to agree on its traditional communique outlining economic policy goals, as Russia blocked strong language condemning its invasion of Ukraine,” and the IMF and World Bank also could not agree on statements.

And, in early April, the U.N. tossed Russia out of its Human Rights Council. The vote was not close: 93 in favor (including the U.S., U.K., and all EU countries), 24 against (predictably including China, Belarus, Bolivia, Iran, Kazakhstan, Kyrgyzstan, Laos, North Korea, Syria, Tajikistan, Uzbekistan, and Vietnam), and 58 abstentions (regrettably including Bahrain, Bangladesh, Bhutan, Brunei, Cambodia, Egypt, India, Indonesia, Malaysia, Maldives, Mongolia, Nepal, Pakistan, Singapore, South Africa, Sri Lanka, and Thailand). This vote was resounding, in that even if all the abstaining countries had voted against, the resolution would still have passed.

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2029  Hiona Shiraiwa & Tsukasa Hadano, *Divisions Exposed in Vote to Suspend Russia from U.N. Rights Council*, NIKKEI ASIA, 9 April 2022, [https://asia.nikkei.com/Politics/International-relations/Divisions-exposed-in-vote-to-suspend-Russia-from-U.N.-rights-council](https://asia.nikkei.com/Politics/International-relations/Divisions-exposed-in-vote-to-suspend-Russia-from-U.N.-rights-council). That said, the vote was closer than it might have been owing to ferocious lobbying by China based in part on its self-interest:

[The] vote to suspend Russia from the United Nations Human Rights Council underscored the country’s isolation over alleged war crimes, but also reflected Russian and Chinese efforts to pull support away from Western critics.

Ninety-three members of the General Assembly voted for the resolution, which removed a permanent member of the Security Council from a U.N. body for the first time. But abstentions and “no” votes totaled 82 – far more than during previous resolutions related to the invasion of Ukraine.

…While the measure passed, many members distanced themselves from it after backing earlier resolutions targeting Moscow.

Of the 24 countries that voted against the suspension – five times the “no” votes for a March 2 [2022] resolution calling on Russia to withdraw its troops from Ukraine and a March 24 resolution on the humanitarian situation – 18 had abstained during the March 24 vote, including China, Vietnam, and Iran.
voted “no,” Russia still would have been suspended from the Council.  

VI. Should America Designate Russia a “Foreign Terrorist Organization”? 

A vigorous debate within the Biden Administration occurred as to whether to designate Russia as a terrorist state. Doing so would isolate Russia in the category of a handful of pariah countries. But America continued to have far more engagement, and necessarily so, with Russia than those pariahs. Slapping the sobriquet “FTO” on Russia would trigger even stiffer sanctions than those already imposed, and thus imperil yet more efforts for diplomatic solutions that America sought and needed Russian support to achieve, including, for example, resurrecting the July 2015 JCPOA with Iran (discussed in a separate Chapter): 

The number of abstentions jumped to 58 from the previous 38, including 39 that had supported the March 24 resolution, such as Indonesia, Brazil, Thailand, and Mexico.

“Mexico is convinced that even in the midst of the war, all channels should be maintained for dialogue with the authorities of the Russian Federation,” said Juan Ramon de la Fuente, the Mexican Ambassador to the U.N.

Russia and China have positioned the vote as a quasi-loyalty test for developing countries. Moscow had reportedly warned some U.N. members that a “yes” vote, or even an abstention, would be seen as an “unfriendly gesture” that would be “taken into account both in the development of bilateral relations and in the work on the issues important for [each country] within the framework of the U.N.”

... Beijing conducted a diplomatic full-court press in the weeks before the vote. Foreign Minister Wang Yi met with counterparts from Southeast Asia, the Middle East and Africa, seeking to persuade them to take a neutral stance rather than side with Western nations that have been critical of Russia.

... Saudi Arabia, which had voted “yes” last month, abstained … following a similar meeting in which China said both sides “emphasized that all countries have the right to make independent judgments” and “withstand external pressure,” according to Beijing.

Suspending a member state from a U.N. body represents a much bigger step than the previous resolutions.

Discussing the drop in support, Richard Gowan of the International Crisis Group noted that the resolution “creates precedent” that worries China, which has its own human rights issues in Xinjiang [discussed in a separate Chapter]. Other countries in a similar position include Venezuela and Cuba.

Russia has so far used its veto power at the Security Council to block any legally binding measures on the Ukraine conflict. Its suspension from the Human Rights Council “is meaningful in that it made clear that violations of the rules won’t be tolerated even from a permanent member of the Security Council,” said Hiroyuki Banzai, an International Law researcher at Waseda University in Tokyo.

Id. (Emphasis added.)

For a synopsis of the country-specific reasons why certain U.N. members abstained or sided with Russia, see Frank Gardner, Ukraine: The Narrative the West Doesn’t Want to Hear, BBC News, 29 April 2022, www.bbc.co.uk/news/world-europe-61272203.
The U.S. Senate supports it unanimously. So does House Speaker Nancy Pelosi, along with Ukraine’s President, Volodymyr Zelensky, and the Ukrainian Parliament.

But Secretary of State Antony J. Blinken is not so sure.

For weeks, pressure has mounted on Mr. Blinken to formally declare Russia a state sponsor of terrorism, a label currently reserved for North Korea, Syria, Cuba, and Iran. But despite the emotional appeal, Mr. Blinken is resisting a move that could force him to sanction U.S. allies that do business with Russia and might snuff out the remaining vestiges of diplomacy between Washington and Moscow.

…

“To me, Putin is now sitting on top of a state terrorist apparatus,” Senator Lindsey Graham, Republican of South Carolina, and a co-sponsor of the resolution, … [said]. He said the sanctions that had already been imposed on Russia “have been effective, but we need to do more.”

… Mr. Graham and Senator Richard Blumenthal, Democrat of Connecticut, visited Mr. Zelensky in Kyiv and presented him with a framed copy of their resolution.

But Mr. Blinken responded noncommittally when asked about the issue …, echoing other State Department and White House officials. Any decision must be based on existing legal definitions, he said, while also suggesting that the point was moot because Russia was already under many sanctions.

“The costs that have been imposed on Russia by us and by other countries are absolutely in line with the consequences that would follow from designation as a state sponsor of terrorism,” Mr. Blinken said…. “So, the practical effects of what we’re doing are the same.”

…

A State Department finding that Russia is a state sponsor of terror – a label that agency officials refer to as the “nuclear option” – would result in more sanctions on Russia’s battered economy, including penalties on countries that do business with Moscow. It would also waive traditional legal barriers that prevent private citizens from suing foreign governments for damages, potentially including the families of American volunteers killed or injured while fighting Russia in Ukraine.

And it could rupture, once and for all, the Biden Administration’s limited diplomatic links with Moscow, analysts say, which Mr. Blinken called important to keep intact.

In a reminder of that dynamic, Mr. Blinken spoke to his Russian
counterpart, Sergey V. Lavrov, by phone on … [28 July 2022] and pressed him to accept a proposal for the release of two Americans, Brittney Griner and Paul N. Whelan, but he reported no breakthrough. It was their first conversation since Russia invaded Ukraine [on 24 February].

…

A senior U.S. official … expressed concern that such a measure would limit the administration’s ability to exempt some transactions with Russia from Western penalties. The official did not specify the activities, but the United States has, for instance, taken care to ensure that Russian food exports are not affected by trade sanctions.

The Secretary of State has wide latitude to impose various designations on other countries or groups, legal experts say. But the Department prefers to wield the designations only under specific circumstances.

According to the State Department, the terrorism designation results in restrictions on U.S. foreign assistance, limits on some exports of “dual use” technology items that might have military applications and a ban on defense exports and sales.

Much of that is covered by existing sanctions. But the finding could force the United States to go further, Mr. Graham said…, by adding new restrictions to how third-party countries could interact with Russia without fear of American penalties.

“It means that doing business with Russia, with that designation, gets to be exceedingly hard,” Mr. Graham said.

Experts said that the diplomatic cost of such a move could be significant, and that Mr. Putin might expel all American diplomats from the country. So far, Moscow has allowed the U.S. Embassy in Moscow to remain open and for some diplomats to stay, including Ambassador John J. Sullivan.

Even during the Ukraine war, the United States wants to continue working with Russia on some issues, including the international talks with Iran over restoring a 2015 nuclear agreement [the JCPOA] to which Moscow was a party and from which President Donald J. Trump withdrew [in May 2018].

“For diplomacy, it’s not practical to designate a state with which the U.S. has a multifaceted relationship,” said Brian Finucane, a Senior Adviser at the International Crisis Group….

Some supporters of the designation would not mind further isolating Russia, however.

“The designation of state sponsorship of terrorism puts Russia in a very
small club,” Mr. Blumenthal said… “It consists of nations like Syria, Iran, Cuba, that are outside the bounds of civilized countries. They are pariahs.”

American officials have so far employed the label mainly in cases where a nation or its proxy has committed a narrowly targeted, nonmilitary act, such as bombing a civilian airliner.

“U.S. officials want to make a clear delineation between terrorism and the type of conflict where the U.S. military might engage in combat operations,” Mr. Finucane said.2032

Note the debate implicated Constitutional separation of powers over dicey foreign policy, national security, and international trade issues. Congress wanted the Executive Branch to designate Russia a state-sponsor of terrorism. The Senate expressed its collective view via a July 2022 non-binding resolution.2033 But, if the White House did not bend to Congress’ will, then it (Congress) threatened to mass a veto-proof mandatory directive.2034

Note, too, the practical effects of the designation, as discussed below. Is there an unseemly utilitarian calculation on which the Secretary of State relies? Even if the practical effects of a designation are modest given the relatively comprehensive nature of sanctions already imposed, is there a deontological argument in favor of sanctions? That is, is it morally correct to affix the right label to Russia?

LESLIE CASTELLO, JOHN L. MURINO & DAVID (DJ) WOLFF, CROWELL & MORING LLP, WHAT DESIGNATING RUSSIA AS A STATE SPONSOR OF TERRORISM WOULD MEAN (20 APRIL 2022)2035

According to recent reports, Ukrainian President Zelenskyy has directly requested that the United States designate Russia as a State Sponsor of Terrorism (“SSST”), an action that the United States has been considering for some time. The designation would have far-reaching implications and would automatically trigger some of the most aggressive unilateral sanctions in the United States’ arsenal, including restrictions on financial transactions, defense exports and sales, and foreign aid. These would further ramp up pressure from even the existing slew of sanctions imposed on Russia and its oligarchs.

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An SST designation would implicate other sanctions laws that penalize persons and countries engaging in certain trade with SSTs. The designation would also benefit U.S. victims of international terrorism by removing Russia’s immunity from U.S. jurisdiction for terrorism-related civil lawsuits, making Russian assets available for attachment in satisfaction of terrorism-related judgments, and by directing sanctions violators’ penalties into a fund designed to satisfy terrorism-related judgments against SSTs.

Currently, only four countries have been designated as SSTs: Iran, North Korea, Syria, and Cuba (which was listed, delisted, and recently relisted). Iraq, Libya, South Yemen, and Sudan were previously designated, but have since been delisted. In order to apply an SST designation, the Secretary of State must determine that a country has repeatedly provided support for acts of international terrorism pursuant to § 1754(c) of the National Defense Authorization Act for Fiscal Year 2019, § 40 of the Arms Export Control Act, and § 620A of the Foreign Assistance Act of 1961.

**Sanctions**

An SST designation comes with a heavy list of unilateral sanctions, including but not limited to:

1. A ban on arms-related exports and sales;
2. Controls over exports of dual-use items;
3. Prohibitions on economic assistance;
4. Requirement that the United States oppose loans by the World Bank and other international financial institutions for the benefit of the SST;
5. Removal of sovereign and diplomatic immunity under the Foreign Sovereign Immunity Act’s (“FSIA”) terrorism exception, allowing terrorism victims and their families to file lawsuits against the SST in the United States;
6. Denial of income tax credits for individuals and entities for income earned in the SST;
7. Denial of duty-free treatment of goods exported to the United States;
8. The authority (which must then be proactively utilized and does not take effect automatically) to prohibit any U.S. citizen from engaging in a financial transaction with the SST without an OFAC license; and
9. Prohibition of U.S. Department of Defense contracts exceeding $100,000.00 with companies controlled by SSTs.

Violation of these rules can come with hefty penalties, typically ranging up to … [approximately] $330,000 (adjusted for inflation) or twice the value of the transaction. Moreover, the reputational costs of transacting with someone identified as a sponsor of terrorism often leads even non-U.S. companies to elect to decline otherwise permissible activity.

**Terrorism Litigation and Recovery**
Although foreign sovereigns are typically immune from jurisdiction in the United States under the FSIA, an SST designation would remove this immunity for claims arising from personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources. Pursuant to 28 U.S.C. § 1605A(a)(2)(i)(I), the claim must arise from an act that occurred either at the time that a foreign state was designated as an SST or otherwise an act that led to the SST being so designated. If the United States does designate Russia as an SST, Russia would become subject to the jurisdiction of the United States for any claims brought by U.S. persons arising from acts of terrorism that Russia directly or indirectly facilitated.

Under this exception, thousands of victims of Cuban, North Korean, Syrian, and Iranian terrorism have successfully brought suit against SSTs and have obtained judgments in the tens of billions of dollars. These judgments can factor into diplomatic negotiations and stipulations for the eventual removal of a country from this list, as was most recently accomplished by Sudan in 2020. In the meantime, the designation would allow victims of terrorism who obtain judgments against Russia to pursue Russian assets located in the United States – even those blocked or frozen by OFAC – to satisfy their judgments pursuant to the Terrorism Risk Insurance Act of 2002 (“TRIA”).

Victims of other SSTs would also stand to benefit. The United States Victims of State Sponsored Terrorism Fund (“USVSST Fund”) was created by Congressional Act in 2015 and amended in 2019. The USVSST Fund provides compensation to victims of state-sponsored terrorism who have obtained federal district court judgments against an SST. It is set to exist until at least 2039 and pays eligible claimants a pro rata percentage of their judgments each year that it has collected enough funding to authorize a distribution. Funding arises primarily through the civil and criminal penalties assessed against violators of SST sanctions programs. Thus, if Russia is designated as an SST, penalties assessed against violators of the sanctions program will be used in part to satisfy the judgments of all eligible victims of terrorism.

Investors and victims of terrorism alike will be closely following any developments regarding the designation of Russia as a State Sponsor of Terrorism and the wide-reaching implications that such an action would have.

VII. War Crime Arrest Warrants

As suggested, by late March 2022, there was no doubt the rapid accretion of American and Allied trade, FDI, and financial sanctions, export controls, and related measures, was taking its toll on the Russian economy. For average Russians, the cost of living had risen by late March to over 14%.\textsuperscript{2036} Moreover:

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{2036}] Annabelle Liang, \textit{Russia’s Cost of Living Soars by More than 14%}, BBC NEWS, 24 March 2021, \url{www.bbc.com/news/business-60856873} (reporting: “The cost of living in Russia is surging following the country’s invasion of Ukraine…. Official figures show price of some household staples – such as sugar – have jumped by as much as 14% over the past week. Inflation is set to keep rising in Russia where the rouble has fallen sharply since the Ukraine war began. The value of the currency has dropped about 22% this year, and this has pushed up the cost of importing goods. … Russia’s Economic Ministry said annual inflation had jumped 14.5% in the week ending 18 March – the highest rate since late 2015. The Federal State Statistics
\end{itemize}
\end{footnotesize}
Russia is set to erase 15 years of economic gains by the end of 2023 after its invasion of Ukraine spurred a multitude of sanctions and prompted companies to pull out of the country, according to the Institute of International Finance.

The economy is expected to contract 15% in 2022, followed by a decline of 3% in 2023, leaving gross domestic product where it was about fifteen years ago, economists Benjamin Hilgenstock and Elina Ribakova wrote in a preliminary assessment of the impact of the war, noting that further sanctions may change their view.

“Sharply lower domestic demand is likely to play a crucial role while a collapse in imports should offset lower exports, leading to a marginally-positive contribution from net foreign demand,” the economists wrote. “However, should further sanctions in the form of trade embargos be implemented, exports might fall more than we currently forecast.”

…

Even after the immediate hit to Russia’s economy, the economy will suffer for years to come from a so-called “brain drain” – the exodus of educated, middle-class Russians with the financial means to leave the country – and from U.S. and EU export controls on technology, including microelectronics, which will hinder technological development in Russia for years….

At the same time, “self-sanctioning” by foreign companies which no longer want to do business with Russia will lead to a weakening of important sectors of the Russian economy….

“The negative effect on medium- and long-term economic prospects could be even more important,” the IIF economists wrote.

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Service said the cost of sugar rose by as much as 37.1% in certain regions of the country and increased by an average 14%. Sugar, which is commonly used to preserve food or make liquor, was the biggest gainer in the week…. The price of onions was the second biggest riser over the week, up 13.7% nationwide and 40.4% in some areas. Meanwhile, nappies were 4.4% more expensive. Prices for black tea rose 4% and toilet paper increased by 3%. Stephen Innes, Managing Partner at SPI Asset Management, said prices were higher because of the weaker rouble. ‘The biggest culprit is imported inflation,’ Mr Innes … [said]. ‘Anything Russia imports is exponentially (pricier) due to the weaker rouble.’ The U.K., the U.S. and the European Union have cut off a number Russian banks from financial markets in the West. They have also prohibited dealings with Russia’s central bank, state-owned investment funds and the Finance Ministry. The Bank of Russia more than doubled its interest rate to 20% in March, in an attempt to stop its currency from sliding further. A large number of Western businesses have pulled out of Russia because of the war in Ukraine. Others, such as the Swiss food giant Nestle, have withdrawn major brands such as KitKat and Nesquik.”). [Hereinafter, Russia’s Cost of Living.]

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Yet, the effects of the sanctions were yet to coax a change in Russian political or military strategy. Led by President Putin, Russia persisted with its war – and its war crimes – in Ukraine. To be sure, the Law of War applies to both the aggressor and defending state, and in November 2022, it appeared Ukraine, too, may have engaged in war crimes – albeit on a lesser (but still inexcusable) scale than Russia.

Notwithstanding the failure of the sanctions to compel a Russian withdrawal from Ukraine territory, or even to bring Russia to the bargaining table to settle the conflict, or perhaps in part because of this failure, the ICC (which had been established under the 1998 Rome Statute to investigate war crimes and genocide) took action. In March 2023, the Hague-based War Crimes Court issued an arrest warrant for President Putin, and Russia’s Children’s Commissioner, Maria Lvova-Belova, for the war crime of forcibly deporting children from Russian-occupied areas of Ukraine to Russia. At least 16,000 such incidents were alleged, and ICC Judges said there were “reasonable grounds” to believe Mr. Putin bore “individual criminal responsibility” for the unlawful transfers.

Ukrainian President Zelensky was correct in labelling the ICC move “historic,” as it would lead to “historical responsibility.” He added: “Separating children from their families, depriving them of any opportunity to contact their relatives, hiding children on the territory of Russia, scattering them in remote regions – all this is an obvious state policy of Russia, state decisions and state evil.” Ms. Lvova-Belova defended (and thus admitted to) the transfers by saying:

It is great that the international community appreciated our work to help the children of our country.

We do not leave them in the war zone, we take them out to ensure good condition, we surround them with loving caring people.

Indeed, “Russia … acknowledged transferring 2,000 children; Ukrainian officials say they


Polina Ivanova, War Crimes Court Issues Arrest Warrant for Vladimir Putin, FINANCIAL TIMES, 17 March 2023, www.ft.com/content/4e1a51ac-3996-43ab-b70a-483f1b4764a2?shareType=nongift. [Hereinafter, War Crimes Court Issues Arrest Warrant.]
Thus, ICC President Judge Piotr Hofmański essentially rebutted her defense: “It is forbidden according to international law for occupying powers to transfer civilians from the territory they live in to other territories, and children are under special protection."2047

Russia condemned the ICC’s decision as immaterial: “Maria Zakharova, a [Russian Foreign] Ministry Spokeswoman, said Russia would not cooperate with the court and that its decisions ‘have no meaning for our country, including from a legal point of view.’”2048

To be sure, the likelihood of either the Russian President or his Children’s Commissioner being tried by the ICC seemed low. Though Ukraine “recognized the Court’s jurisdiction over events occurring in the country since 2014, when Russia annexed the Crimean Peninsula, Russia was not a signatory to the Rome Statute (nor was China, India, or the U.S.). But the two Russian suspects had to be careful: the ICC had jurisdiction in every country that had signed its founding document, and there were 123 such States Parties – 3 in Africa, 19 in the Asia-Pacific, 18 in Eastern Europe, 28 in Latin America and the Caribbean, and 25 in Western Europe and North America.2049 Going to any of them meant they risked arrest, being sent to The Hague, and being prosecuted for war crimes.2050

Simply put, they were in a box. The dimensions of that box decreased further when the United Nations Commission on Ukraine issued an 18-page Report categorically stating there was evidence not only of Russia illegally transferring children from areas under its control, but also of other war crimes such as rape, torture, wilful killings, and attacks on hospitals.2051 In other words, Russia violated both International Human Rights Law and International Humanitarian Law.

In commenting on the historical nature of the ICC arrest warrants, President Zelensky was correct in another respect. The global reputation of the Russian suspects was irreparably damaged. They were in the worst of cohorts of pariahs. Since 1 July 2002, when the Rome Statute entered into force, the ICC had issued 38 arrest warrants, which resulted in 21 detentions and 10 convictions after a trial.2052 Indeed, Mr. Putin was “only the third

2047 Quoted in War Crimes Court Issues Arrest Warrant.
2050 See War Crimes Court Issues Arrest Warrant (observing: “The ICC does not have its own police force and relies on national authorities to arrest and deliver the suspects for which it has issued warrants. If arrested, a suspect is brought to the ICC detention center in The Hague, and a trial begins.”).
2052 War Crimes Court Issues Arrest Warrant.
serving president to have been issued an ICC arrest warrant, after Sudan’s Omar al-Bashir and Libya’s Muammar Gaddafi.\textsuperscript{2053}

VIII. Russian Counter-measures, including Capital Controls, and Sabotaged Pipelines

As war crimes investigations continued, U.S. and Allied sanctions did have a political effect. In response, Russia took a page from China’s playbook. Throughout the Sino-American Trade War (discussed in a separate Chapter), China engaged in tit-for-tat retaliation against America’s Section 301 measures. Similarly, Russia, imposed counter-measures against U.S. businesses.

For instance, on 3 March 2022, a Russian Court rejected a trademark claim by Hasbro Inc. for misuse of its “Peppa Pig” trademark, reasoning that sanctions imposed by the U.K. and other Western countries justified its decision. The same day, President Putin announced he was looking for “legal solutions” to seize Western assets left by MNCs in Russia. And, on 5 March 2022, Russia apparently issued a decree stating that Russian patents from 47 “unfriendly states” would be entitled to no compensation for infringement.

Still another Russian counter-measure came on 24 March 2022, when President Putin “announced that the country would start selling natural gas to ‘unfriendly’ countries in \textit{roubles}:

\begin{quote}
Russian President Vladimir Putin is demanding foreign buyers pay for Russian gas in \textit{roubles} … or else have their supplies cut, a move European capitals rejected and which Germany said amounted to “blackmail.”
\end{quote}

Putin’s decree … leaves Europe facing the prospect of losing more than a third of its gas supply. Germany, the most heavily reliant on Russia, has already activated an emergency plan that could lead to rationing in Europe’s biggest economy.

Energy exports are Putin’s most powerful lever as he tries to hit back against sweeping Western sanctions imposed on Russian banks, companies, businessmen and associates of the Kremlin in response to Russia’s invasion of Ukraine. Moscow calls its Ukraine action a “special military operation.”

Putin said buyers of Russian gas “must open \textit{rouble} accounts in Russian banks. It is from these accounts that payments will be made for gas delivered starting from tomorrow,” or April 1 [2022].

“If such payments are not made, we will consider this a default on the part


\textsuperscript{2054} Quoted in \textit{Russia’s Cost of Living}.\textsuperscript{2054}
of buyers, with all the ensuing consequences. Nobody sells us anything for free, and we are not going to do charity either – that is, existing contracts will be stopped,” he said.

It was not immediately clear whether in practice there might be a way for foreign firms to continue payment without using roubles, which the European Union and G7 have ruled out.

…

Under the mechanism decreed by Putin, foreign buyers would use special accounts at Gazprombank to pay for the gas. Gazprombank would buy roubles on behalf of the gas buyer and transfer roubles to another account, the order said.

Putin’s decision to enforce rouble payments has boosted the Russian currency, which fell to historic lows after the Feb. 24 invasion. The rouble has since recovered much lost ground.

Western companies and governments have rejected any move to change their gas supply contracts to another payment currency. Most European buyers use euros. Executives say it would take months or longer to renegotiate terms.

Payment in roubles would also blunt the impact of Western curbs on Moscow’s access to its foreign exchange reserves.

…

Putin said the switch to roubles would strengthen Russia’s sovereignty. He said the West was using the financial system as a weapon, and it made no sense for Russia to trade in dollars and euros when assets in those currencies were being frozen.

“What is actually happening, what has already happened? We have supplied European consumers with our resources, in this case gas. They received it, paid us in euros, which they then froze themselves. In this regard, there is every reason to believe that we delivered part of the gas provided to Europe practically free of charge,” he said.

“That, of course, cannot continue,” Putin said….
As suggested, Mr. Putin’s dictat aimed to support the currency, but though the EU relied on Russia for 40% of its NG, roughly 97% of those energy contracts called for payments in euros or dollars, hence it was “unclear” if Russia could unilaterally demand payment in roubles.

Indeed, said French Minister of Finance Bruno Le Maire, “The contracts include provisions that stipulate the currency they must be settled in and therefore the contracts must be settled in that currency.” Concomitant with this dictat were further countermeasures to defend the rouble: Russia imposed “stringent currency controls, which … prevented Russians from moving money to foreign bank accounts or taking significant amounts of cash out of the country,” and “temporarily banned banks and brokers from operating cash-based foreign exchanges for dollars and euros.” (Fortunately for the EU, it had reduced its dependency on Russian NG from 40% in 2021 to 9% by October 2022.)

On 27 April 2022, President Putin made good on his threat to cut off NG shipments to European buyers that refused to pay in roubles: he halted all NG supplies to Poland and Bulgaria. That is, “Gazprom …, Russia’s gas export monopoly, suspended gas supplies ‘due to absence of payments in roubles,’ as stipulated in a decree from Russian President Vladimir Putin that aims to soften the impact of sanctions.” President Putin did not seem bothered by the fact the EU was “the single largest consumer of crude and fuel from Russia,” perhaps figuring China and India would combine to replace it.

The EU President, Usula Von Der Leyen, denounced his move as “yet another attempt by Russia to use gas as an instrument of blackmail.” This attempt, in the EU’s view, breached its sanctions, because payment in roubles necessitated clearing through the Russian Central Bank, but that Bank was a sanctioned entity:

customers. ‘If such payments are not made, we will consider this a default on the part of the buyers – with all the ensuing consequences,’ he added during a speech at the Kremlin.

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2056 See Valentina Pop & Andy Bounds, Russian Gas Payment Demands in “Breach” of Sanctions, EU Warns, FINANCIAL TIMES, 28 April 2022, www.ft.com/content/aa0d294b-0982-4f94-a327-a93300444083?shareType=nongift. [Hereinafter, Russian Gas Payment Demands.]

2057 Quoted in Russia’s Cost of Living.

2058 Quoted in Putin Issues Decree Requesting.


2060 Sam Fleming, Henry Foy, Alice Hancock & Valentina Pop, Germany Concedes Move to Cap Gas Prices as EU Wrestles with Energy Crisis, FINANCIAL TIMES, 21 October 2022, www.ft.com/content/80a0a4bf-2d05-4292-8542-e0f7929fe663b?shareType=nongift.


2063 Russia Halts Gas Supplies.

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The EU has warned European buyers of Russian gas that they will be in breach of sanctions against Moscow if they accept Kremlin demands for payment to be completed in roubles.

The warning … comes after several European companies indicated they would comply with a March 31 [, 2022] decree by President Vladimir Putin to introduce a two-tiered system for gas payments.

This involves opening rouble and euro accounts at Gazprombank in Russia. Under existing payment arrangements, most European companies were paying in euros into Gazprombank’s Luxembourg-based accounts.

Gas distributors in Germany, Austria, Hungary, and Slovakia had been planning to comply….

“Complying with the decree is a breach of sanctions,” European Commission Chief Spokesperson Eric Mamer … [said].

“If companies pay in euros, they are not in breach of the sanctions,” said an EU official. “What we cannot accept is that companies are obliged to open a second account in roubles and that the payment is complete only when payment is converted into roubles.”

Companies and national energy regulators are now in the invidious position of breaching EU sanctions, or defying Moscow and having gas supplies possibly cut off. The EU gets about 40 per cent of its gas from Russia and some countries are almost completely reliant.

The EU believes that accepting completion of gas deals in roubles, as Putin has demanded, would mean involving Russia’s Central Bank in the transactions, which would violate the sanctions imposed on the Russian financial system in a bid to hamper Putin’s capacity to finance the war.

By having the gas payments cleared only when they are converted into roubles, Moscow is seeking to have European companies circumvent the sanctions on the Central Bank, the EU official said.

…

Gazprombank, as the main financial arm of Russia’s monopoly gas provider, was deliberately excluded from EU sanctions – underlining how reluctant Europe is to cut off access to vital Russian gas supplies.

Gas importers in Poland and Bulgaria, which have refused to sign up to the Kremlin scheme, had gas supplies from Russia halted …, a decision European Commission President Ursula von der Leyen described as
“blackmail.”

Accordingly, by July 2022, Gazprom “ha[d] cut gas supplies altogether to Bulgaria, Denmark, Finland, the Netherlands, and Poland over their refusal to comply with a Kremlin order to pay their bills in roubles, instead of euros or dollars.”

Fortunately for Poland and Bulgaria, and the rest of the EU, the Russian counter-measure – that is, turning off the spigot of heating fuel if payments were not made in roubles – came “as the weather turn[ed] warmer and the need for gas heating dwindle[d].” And, Poland reported it had “ample gas in storage,” and Bulgaria sought replacement “supplies from Greece and Turkey.”

Unfortunately for the entire EU, in summer 2022, Russia – specifically, Gazprom – made dramatic cuts NG supplies through the Nord Stream 1 pipeline. (NG from Vyborg, Russia, near Saint Petersburg, flows south-east to Greifswald, in north-eastern Germany, through this 1,200 km pipeline, which consists of two parallel branches running under the Baltic Sea.) Russia said the reductions – by about half of the normal amount – were necessary for technical reasons, to allow repairs on a turbine in that pipeline. The EU rejected that excuse.

Bracing itself for what EU President Ursula von der Leyen called the “likely scenario” Russia would cut off all NG supplies, the EU hedged its risk exposure by agreeing (with the sole exception of Hungary) that member states (1) voluntarily decrease their gas consumption by 15% over the subsequent seven months (from August 2022-March 2023), and (2) empower the Commission to make consumption cuts mandatory in the event of an emergency. The plan allowed flexibility (a so called “get out clause”) for three groups of EU members:

… [S]ome countries not connected to the EU’s gas pipelines, such as Ireland, Malta, and Cyprus, would be exempt from any mandatory gas

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2064 Russian Gas Payment Demands. (Emphasis added.)

2065 Michael Race, EU Allows Get-Out Clause in Russian Gas Cut Deal, BBC NEWS, 26 July 2022, www.bbc.com/news/business-62305094 (also observing: “While the U.K. would not be directly impacted by gas supply disruption, as it imports less than 5% of its gas from Russia, it would be affected by prices rising in the global markets as demand in Europe increases.”) [Hereinafter, EU Allows Get-Out Clause.]

2066 Russia Halts Gas Supplies.

2067 Russia Halts Gas Supplies.

2068 See Leo Sands, Ukraine War: Russia Waging Gas War with Nord Stream 1 Cuts – Zelensky, BBC NEWS, 26 July 2022, www.bbc.com/news/world-europe-62300684. [Hereinafter, Ukraine War: Russia Waging Gas War.] Indeed, in August 2022, Russia shut down supplies altogether through Nord Stream 1, saying it “discovered a fault during maintenance.” Russia Delays Reopening of Nord Stream in Blow to Gas-Starved Europe, REUTERS, 2 September 2022, www.reuters.com/business/energy/russia-says-nord-stream-gas-supplies-still-risk-stoking-european-fears-2022-09-02/ (also reporting: “Gazprom, the state-controlled firm with a monopoly on Russian gas exports via pipeline, said … it could no longer provide a timeframe for restarting deliveries after finding an oil leak that meant a pipeline turbine could not run safely. Moscow has blamed sanctions, imposed by the West after Russia invaded Ukraine, for hampering routine operations and maintenance of Nord Stream 1. Brussels says this is a pretext and Russia is using gas as an economic weapon to retaliate.”).

2069 Quoted in Ukraine War: Russia Waging Gas War.
reduction order as they would not be able to source alternative supplies.

Elsewhere the Baltic nations, which are not hooked up to the European electricity system and are heavily reliant on gas for electricity production are also exempt from compulsory targets in order to avoid the risk of an electricity supply crisis.

Countries can also ask to be exempt if they exceed gas storage filling targets, if they are heavily dependent on gas for “critical” industries, or if their gas consumption has increased by at least 8% in the past year compared to the average of the past five years.

... Kadri Simson, European Commissioner for Energy, said initial calculations indicated that even if all exemptions to ration were used, the EU as a whole would still reduce demand to a level “that would help us safely through an average winter.”

She also outlined work to boost alternative gas supplies from countries including Azerbaijan, the United States, Canada, Norway, Egypt, and Israel.

To be sure, these compromises made the deal look (in the words of one EU diplomat) “like Emmental cheese.” Germany’s Economy Minister, Robert Habeck, commented: “Of course there are a lot of compromises in this text now. This is how Europe works.”

Ukraine and its President, Mr. Zelensky, intoned Russia was engaging in “gas blackmail,” and waging a “gas war,” to inflict “terror” on people. Indeed, Mr. Putin had weaponized Russia’s most precious commodity in a way no country had done since the Saudi-led OPEC oil embargo of 1973-1974, and American grain embargo of 1979. War catalyzed both cataclysms: Arab countries protested the West’s support for Israel during the October 1973 Yom Kippur War; and America protested the U.S.S.R.’s December 1979 invasion of Afghanistan. The parallel did not end there: the two-front Arab attack on Israel (by Syria in the Golan Heights and Egypt in the Sinai Peninsula) was unprovoked, as was the Soviet invasion of Afghanistan. Like Israel and Afghanistan, Ukraine did not provoke the naked aggression on its soil. In the Russian context, the alleged “terror” continued when (in September 2022), the Nord Stream 1 and 2 pipelines suffered major NG leaks caused by three ruptures in 18 hours – a rare occurrence. “Powerful explosions” blew four in the two pipelines, destroying at least 50 meters of the Nord Stream 1 line.

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2070 EU Allows Get-Out Clause.
2071 EU Allows Get-Out Clause (analysis by Jessica Parker).
2072 EU Allows Get-Out Clause.
2073 Quoted in Ukraine War: Russia Waging Gas War.
2075 Merlyn Thomas, Nord Stream Blast “Blew Away 50 Meters of Pipe,” BBC NEWS, 18 October 2022, www.bbc.com/news/world-europe-63297085 (also reporting “[g]as deliveries have been suspended since the 26 September explosions on the pipes crossing the Baltic Sea”). [Hereinafter, Nord Stream Blast.]
The EU said the ruptures were acts of sabotage from explosions, suspected Russia was behind them, and pledged to hit Russia with further sanctions.\footnote{\textit{Russia, of course,}}

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As of May 2023, circumstantial evidence supported these suspicions:

Russian ships able to perform underwater operations were present near to where explosions later took place on the Nord Stream pipelines.\footnote{\textit{Russian ships able to perform underwater operations were present near to where explosions later took place on the Nord Stream pipelines.}}

The vessels were … located using intercepted Russian Navy communications.

Underwater explosions last September \footnote{\textit{Underwater explosions last September [2022] knocked the two Nord Stream pipelines – built to carry gas from Russia to Europe – out of action.}} knocked the two Nord Stream pipelines – built to carry gas from Russia to Europe – out of action.

… \footnote{\textit{… [O] ne possible lead pointing towards Russian involvement has emerged from details of suspicious Russian ship movements in the run-up to the Nord Stream blasts, reported by four Nordic public broadcasters.}}

… \footnote{\textit{… [O] ne possible lead pointing towards Russian involvement has emerged from details of suspicious Russian ship movements in the run-up to the Nord Stream blasts, reported by four Nordic public broadcasters.}}

And Denmark’s Defense Command has confirmed a separate report that a Danish patrol boat called \textit{Nymfen} took 26 photos of a Russian submarine-rescue ship in the area days before the explosions. The Information website said the SS-750 had sailed from Kaliningrad and was close to Bornholm Island on 22 September 2022.

The investigation by Denmark’s DR, Norway’s NRK, Sweden’s SVT, and Finland’s Yle focuses on the movements and actions of ships between June and September last year which they describe as highly unusual.

The ships are believed to include the Russian Naval research vessel \textit{Sibiryakov}, the tugboat \textit{SB-123}, and a third ship from the Russian Naval fleet that the media outlets have not been able to identify by name.

These were so-called “ghost-ships,” which had their transmitters turned off. The broadcasters … were able to track their movements, using intercepted radio communications the vessels sent to Russian naval bases.

The first vessel departed from a Russian naval base in Kaliningrad before arriving near the pipeline on 7 June.

One radio message places it directly above Nord Stream 2 before moving further north, close to the Nord Stream 1 pipelines, spending hours in the area where the pipeline runs about 80 m\text{eters} (260 f\text{eet}) below the surface and where some of the leaks would later occur.\footnote{\textit{One radio message places it directly above Nord Stream 2 before moving further north, close to the Nord Stream 1 pipelines, spending hours in the area where the pipeline runs about 80 m\text{eters} (260 f\text{eet}) below the surface and where some of the leaks would later occur.}}

The tugboat, the \textit{SB-123}, sailed out to the area on the evening of 21 September. The broadcasters … intercepted communications that suggest it was operating close to the pipelines and the areas of the explosion from late that evening until around 14:00 on 22 September.\footnote{\textit{The tugboat, the \textit{SB-123}, sailed out to the area on the evening of 21 September. The broadcasters … intercepted communications that suggest it was operating close to the pipelines and the areas of the explosion from late that evening until around 14:00 on 22 September.}}

Satellite imagery examined by the broadcasters is said to support the claims about the unusual routes, and other reports in Germany had claimed it was in the area on 21-22 September.\footnote{\textit{Satellite imagery examined by the broadcasters is said to support the claims about the unusual routes, and other reports in Germany had claimed it was in the area on 21-22 September.}}

The \textit{Sibiryakov} is believed to be capable of underwater surveillance and mapping as well as launching a small underwater vehicle. It can be used to support and rescue submarines.
denied the allegation, but it was evident no NG would flow from it to the EU, because repairs would take 3-6 months.\textsuperscript{2077} The U.S. tentatively reached a different conclusion from that of the U.S.: rather than a state-sponsored act, pro-Ukrainian groups – not acting at the behest or with the knowledge of the Ukrainian government – were responsible.\textsuperscript{2078}

In March 2023, the repairs were put off indefinitely. With the EU curtailing and ultimately eliminating its imports of Russian NG, Russia announced it would seal up and mothball the ruptured Nord Stream pipelines, with no plans to reanimate their operation.\textsuperscript{2079} Russia would conserve the pipelines for possible use in a post-conflict future.

and has the ability to carry out operations on the seabed, according to experts interviewed by the broadcasters.

The Nordic broadcasters do not say there is conclusive proof of what the vessels were up to or that Russia was behind the blast.

Gordon Corera, \textit{Nord Stream: Report Puts Russian Navy Ships Near Pipeline Blast Site}, BBC NEWS, 3 May 2023, \url{www.bbc.com/news/world-europe-65461401}. To be sure, other circumstantial evidence also pointed in a different direction. \textit{See, e.g.,} James Politi, Demetri Sevastopulo, Laura Pitol & Roman Olearchyk, \textit{Ukraine Denies Any Involvement in Nord Stream Pipeline Explosions}, FINANCIAL TIMES, 7 March 2023, (reporting: “German daily newspaper Die Zeit reported officials investigating the explosions had also found indications the perpetrators were linked to Ukraine…. The newspaper … said investigators had identified the boat that was believed to have conducted the sabotage operation: a yacht rented by a Poland-based company with Ukrainian owners. The seaborne operation, it said, was carried out by five men – a captain, two divers and two diving assistants – along with a female doctor. The nationality of the suspected saboteurs, who used forged passports, was unknown…. Die Zeit said the group set off from the north German town of Rostock on the Baltic coast on September 6, [2022,] 20 days before the explosions, and was later located on the Danish Island of Christiansø. The boat was eventually returned to its owner in an uncleaned state, and investigators found traces of explosives in the cabin….”).\textsuperscript{2077} \textit{See also} Rebecca R. Ruiz & David E. Sanger, \textit{Sweden Closes Investigation Into Nord Stream Pipeline Blasts}, THE NEW YORK TIMES, 7 February 2024, \url{www.nytimes.com/2024/02/07/world/europe/sweden-nord-stream-pipeline.html?smid=nytcore-ios-share&referringSource=articleShare} (reporting: “Swedish authorities said that their investigation had been ‘opened in order to examine whether the sabotage targeted Sweden and thereby threatened the security of Sweden, and it was determined that this was not the case,’ hence in February 2024 they closed that investigation); \textit{Nord Stream Blast} (reporting: “German, Danish, and Swedish authorities have all been investigating the incident,” but Swedish prosecutors reportedly rejected a joint investigation out of fears of sharing sensitive information related to national security,” and “Russia previously demanded to be involved in any investigations, saying the damage was in international waters, but Denmark and Sweden refused.”).\textsuperscript{2078} \textit{See Adam Entous, Julian E. Barnes & Adam Goldman, Intelligence Suggests Pro-Ukrainian Group Sabotaged Pipelines, U.S. Officials Say}, THE NEW YORK TIMES, 7 March 2023, \url{www.nytimes.com/2023/03/07/us/politics/nord-stream-pipeline-sabotage-ukraine.html?smid=nytcore-ios-share&referringSource=articleShare}.

\textsuperscript{2079} \textit{See Vladimir Soldatkin, Olesya Astakhova & Christoph Steitz, Exclusive: Russia Set to Mothball Damaged Nord Stream Gas Pipelines – Sources}, REUTERS, 3 March 2023, \url{www.reuters.com/business/energy/russia-set-mothball-damaged-nord-stream-gas-pipelines-sources-2023-03-03/} (also reporting: “Nord Stream 1 and Nord Stream 2, each consisting of two pipes, were built by Russia’s state-controlled Gazprom to pump 110 billion cubic meters (bcm) of natural gas a year to Germany under the Baltic Sea. Three of the pipes were ruptured by unexplained blasts in September, and one of the Nord Stream 2 pipes remains intact. … Gazprom has said it is technically possible to repair the ruptured lines, but two sources familiar with plans said Moscow saw little prospect of relations with the West improving enough in the foreseeable future for the pipelines to be needed. Europe has drastically cut its energy imports from Russia over the past year, while the state-controlled Gazprom’s … exports outside the former Soviet Union almost halved in 2022 to reach a post-Soviet low of 101 bcm.”).
In the meantime, to combat the exodus of MNCs from what it termed “unfriendly” countries, in late May 2022, Russia announced it was considering a new counter-measure: taking control of the assets of any business that opted to leave. The Duma passed on first reading a new draft law gave the Russian government “sweeping powers to intervene where there is a threat to local jobs or industry, making it more difficult for western companies to disentangle themselves quickly unless they are prepared to take a big financial hit.”\textsuperscript{2080} The law empowered the government to “seize the property of foreign investors,” and “appoint administrators over companies owned by foreigners in ‘unfriendly’ countries,” meaning companies in which at least 25% of the shares were in the hands of investors from countries that had imposed sanctions on Russia. In the face of those sanctions, the Russian government sought was:

“… interested in preserving jobs and tax revenues,” said Sergej Suchanow, a lawyer with risk management and compliance consultancy RSP International.

…

“First and foremost, the government will apply the rules to big companies. To avoid an administrator, companies must show they are not leaving their Russian businesses in the lurch.”

… [The draft law] laid down a wide range of criteria for intervention, such as when a company plays a critical role as a local employer or provides important services. It makes clear that the state can justify taking control on many grounds.

The bill cited the example of companies making medical devices, but also lists a host of other sectors, such as transport and energy, as well as any firm whose closure could push up shop prices.

The state-appointed administrator would also be allowed to sell the confiscated business, while its former owners would be barred from doing business in Russia.

A court or the Ministry of Economic Development could decide to put an administrator, such as Russia’s development bank $VEB$, in charge.\textsuperscript{2081}

It was expected that following approval via two further readings in the Duma, and review by the upper house of Russia’s parliament, President Putin would sign it into law. Query whether the invocation of the law would constitute an expropriation of assets: on the one hand, an affected MNC had chosen to leave; on the other hand, it was not free to sell its assets to the highest bidder.


\textsuperscript{2081} Analysis: Russia Prepares to Seize.
President Putin followed through on a similar counter-measure in August 2022. He signed a decree that immediately banned any investor from a country that supported sanctions against Russia from selling its assets in a bank, strategic entity, company producing energy equipment or engaged in coal, oil, NG, or nickel production, or in a PSA.2082 The affected investors – from so-called “unfriendly countries” – came from the U.S., U.K., EU, and Japan, though Mr. Putin’s decree did not specifically list any investor. Citibank, Exxon, and Shell were among the companies at risk, but if necessary, they could apply for a special waiver – to the Russian President. In effect, under his decree, “foreign owners from ‘unfriendly’ countries could not complete deals [to leave Russia] without his approval,” trapping a sizeable “list of implicated companies include[ing] 45 banks with subsidiaries in Russia.”2083 Thus by January 2023, “only a handful of western banks ha[d] managed to leave Russia, albeit at steep cost, while others … made the choice to hold on to their businesses in the country.”2084

And, in November 2023, Russia tightened its capital controls on Western companies:

Russia has restricted western companies that sell their Russian assets from withdrawing the proceeds in dollars and euros, imposing additional de facto currency controls in an effort to shore up the weakening rouble.

Western companies exiting Russia must agree on a sale price in roubles or, if sellers insist on receiving foreign currency, face delays and even losses on the amounts that can be transferred abroad, according to people familiar with the matter.

The fresh restrictions underscore Moscow’s concerns about the rouble continuing to depreciate as its economy grapples with western sanctions imposed in response to Russia’s full-scale invasion of Ukraine last year [2022].2085

Indeed, in 2023, the rouble depreciated by over 20% against the U.S. dollar in 2023, to over 100 roubles per dollar – “‘psychological threshold’ for President Vladimir Putin, forcing authorities to act.

The additional capital controls thus made it even more difficult for MNCs to

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2083 Owen Walker, Western Banks Struggle to Exit Russia after Putin Intervention, FINANCIAL TIMES, 16 January 2023, www.ft.com/content/98f91997-db83-4a23-8497-9348c7e7247f?shareType=nongift. [Hereinafter, Western Banks Struggle to Exit.]
2084 Western Banks Struggle to Exit.
2085 Anastasia Stognei, Max Seddon & Courtney Weaver, Russia Tightens Capital Controls on Western Companies, FINANCIAL TIMES, 31 October 2023, www.ft.com/content/e0216489-a57d-46d2-90b9-b2e26b0a9973?shareType=nongift.
Western companies [in July 2023, as noted earlier] were presented with two options when selling their assets in foreign currencies: [(1)] having the money transferred to a highly restricted type “C” account at a Russian bank, or having the proceeds wired to an account abroad – in which case the sum was to be paid in several instalments. Alternatively, [(2)] the seller could cash out in **roubles** and receive the entire sum immediately into a regular Russian bank account.

So, if an MNC chose option (1), getting paid in U.S. dollars, **euros**, or other hard currency, then its receivables would be spread out over an extended period. Hence, the MCN would incur an opportunity cost, namely, the lost time value of the full sum, which otherwise have been for productive, revenue-generating activities (including investments in interest-bearing securities). If the MNC chose option (2), then it would get its entire payment due, but in **roubles**, at a lousy exchange rate. That rate would mean a currency conversion loss, as the MNC would get fewer dollars, euros, or other hard currency (thanks to a government-set under-valuing **rouble**). The additional contribution to the Russian government that any MNC essentially had to make to Russia’s coffers further eroded the probability it could exit Russia without incurring a sizeable loss.

**IX. Wave Eleven:**

**Targeting Services and Gazprombank, and More SDN Designations and Entity Listings**

In late April 2022, the U.S. and U.K. banned certain services exports to Russia. The bans were impressive as the first ones hitting white collar professional services outside of the energy, finance, and transportation sectors. They affected accountancy, management consultancy, public relations, and trust and corporate formation services: American and British entities could not provide such services to Russia. For example,

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**2086** See Felicia Schwartz, Sam Fleming & Marton Dunai, *U.S. Places Sanctions on Gazprombank Executives for First Time*, FINANCIAL TIMES, 8 May 2022, [www.ft.com/content/398aa2f1-1f4c-46b2-a5f0-f5c84913b362?shareType=nongift](http://www.ft.com/content/398aa2f1-1f4c-46b2-a5f0-f5c84913b362?shareType=nongift). [Hereinafter, *U.S. Places Sanctions on Gazprombank*.]

no U.S. person could provide them, nor could they be provided by any person from the U.S. to any person in Russia; doing so would trigger imposition of sanctions.

But, they were not comprehensive, i.e., they did not cover (for example) all sectors and sub-sectors on the U.N. CPC W120 List used for GATS classification (discussed in a separate Chapter). American and British authorities had yet to define their scope and, importantly, whether it would include lawyers.\textsuperscript{2089} Regardless of that scope, Russian litigants struggled to find legal representation in British courts – and that raised basic questions of fairness, due process, and right to counsel.\textsuperscript{2090}

This wave of sanctions also included, for the first time, measures by the U.S. against

\textsuperscript{2089} Predictably, potentially affected service suppliers lobbied for exceptions. \textit{See} Michael O’Dwyer \& Daniel Thomas, \textit{U.K. Professional Services Firms Seek Exemptions to Ban on Russia Work}, \textit{Financial Times}, 24 May 2022, www.ft.com/content/3f74c9d7-d945-4a77-b0d5-81fdef3b7b23?shareType=nongift (also noting: “U.K. firms, which have a long history of advising Russian companies and wealthy individuals, account for 10 per cent of Russian imports in the accountancy, management consultancy, and … public relations sectors.”).

\textsuperscript{2090} \textit{See} Jane Croft, \textit{Russian Litigants Left Struggling to Find Lawyers for Court Actions}, \textit{Financial Times}, 4 June 2022, www.ft.com/content/fd2707b4-f8bb-4b67-95ed-45872884a124?shareType=nongift (reporting: “Russian litigants fighting cases in London’s High Court are being forced to find new representation as the biggest U.K.-based law firms are increasingly refusing to act for them in the wake of the invasion of Ukraine. Lawyers at some of the top London firms have warned the wider fallout from U.K. and other western sanctions targeting those close to the Kremlin could spell the end to the heyday of big-ticket Russian litigation in the capital. Adam Greaves, litigation practitioner at law firm LK Law, said that City law firms had started to conduct a ‘sniff test’ on potential Russian clients irrespective of whether they face sanctions as a result of the war in Ukraine. He added that he did not foresee certain Russian work returning to London in the long term and suggested it would shift to places such as Dubai or Singapore. ‘There are signs that law firms are steering clear of Russian work and are thinking twice about it partly for reputational reasons,’ added Jonathan Fisher QC, a barrister at Red Lion Chambers. In the past, Russians litigants have flocked to London’s High Court attracted by the independence of the judiciary and a robust legal system that unlike the US does not use juries to try civil cases, which makes the outcome more predictable. Big law firms, which typically make less than a quarter of their profits from all litigation, are technically permitted to act for sanctioned Russian clients but only if they first receive a special government license. But as the west increasingly severs its links with Russia and targets those linked to the regime of President Vladimir Putin, law firms, which are typically partnerships owned by the most senior lawyers, are turning their backs on one of their more lucrative client bases. Russians were the second-largest group of litigants by nationality, after British citizens, to use the English courts to settle commercial disputes in the 12 months to March 2022…. … [T]here were 21 cases involving Russian litigants, including four brought by Russia state-owned bank \textit{VTB}. Several high-profile cases have already been affected due to law firms dropping their Russian clients. In April [2022], Freshfields told the High Court it had ceased to act for \textit{VTB}, which was sanctioned earlier this year. … White & Case, a U.S. law firm, told the High Court in April it was going to stop representing the Russian Federation in another case due to be heard later this year. The firm said in a statement it was “ceasing all representations” of Russian state and state-owned entities and those of Belarus, the Kremlin’s closest ally. … But those on the other side of legal disputes involving Russian clients worry that law firms turning their backs on Russian clients now seen as pariahs in the west will leave them struggling to pursue their claims and gain access to justice. … London law firms are now looking at court decisions in other jurisdictions including a recent ruling made by a British Virgin Islands court, which sent shockwaves through the legal world. Mr. Justice Adrian Jack, sitting in the Eastern Caribbean Supreme Court, refused an application by law firm Ogier … to stop acting in another lawsuit involving \textit{VTB} Bank. \textit{The Judge said in his ruling: ‘VTB may be a pariah. It is precisely when VTB is stigmatized as a pariah that VTB needs the best endeavors of their legal representatives to advise them. Even pariahs have rights.’"). (Emphasis added.)
Gazprombank, “Russia’s third-largest lender and a subsidiary of state-owned energy company Gazprom.” That was the first U.S. action against this bank. Specifically, on 8 May 2022, OFAC “targeted [as SDNs] 27 executives [specifically, Board members] of Gazprombank,” and “imposed some 2,600 visa restrictions on Russian and Belarusan officials.” But, the U.S. “did not freeze the company’s assets or prohibit transactions with it,” because the bank was the “main way” Russia sold NG to Europe, and Europe had yet to agree on an NG embargo. OFAC also designated as SDNs 8 Sberbank board members, Moscow Industrial Bank and 10 of its subsidiaries, a private rifle manufacturer, and three Russian state-owned television stations.

Further, on 28 June, following a G-7 Summit, OFAC “added over 90 individuals and entities to the Specially Designated Nationals and Blocked Persons List (SDN List), with a focus on Russia’s military-industrial base, including major state-owned defense-related actors.” Most notably, the new designations included:

State Corporation Rostec … and its numerous subsidiaries are a major target of the new SDN designations under … EO 14024. Rostec is a massive Russian state-owned enterprise that consolidates Russia’s technological, space, aerospace, and military-industrial expertise, with a corporate umbrella reaching 800 entities across sectors. As the result of the latest actions, U.S. persons are now prohibited from transacting, directly or indirectly, with Rostec or any other Rostec holdings or affiliates named on the SDN list. Furthermore, pursuant to OFAC’s 50% rule, any entity owned 50% or more, directly or indirectly, by Rostec is also blocked. This action expands previous U.S. sanctions on certain Rostec-related entities, including Rostec’s pre-existing designation on OFAC’s Sectoral Sanctions Identifications List and on Directive 3 under EO 13662.) Notably, General License No. 39 provides a wind-down license for transactions involving Rostec or its subsidiaries until August 11, 2022.

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2091 U.S. Places Sanctions on Gazprombank.
2092 See G7 to Phase Out Russian Oil.
2094 G7 to Phase Out Russian Oil.
2095 U.S. Places Sanctions on Gazprombank.
2098 Russia Update: U.S. Tightens Pressure.

The subsidiaries of the Russian state-owned holding company, Rostec, indeed were “numerous.” This holding company consolidated Russia’s expertise in the fields of aerospace, defense, industry, and technology. Under the OFAC 50% Rule, over 800 companies under Rostec’s control were subject to the same SDN prohibitions as was Rostec. See U.S. Department of the Treasury, Office of Foreign Assets Control,
The EU, U.K., and other Allies placed sanctions on Rostec. With a view to weakening Russia’s war machine, the U.K. also targeted with asset freezes and travel bans two key supporters of President Putin: (1) “Anna Tsivileva, Putin’s cousin and President of a major [Russian coal] mining firm [JSC Kolmar Group],” and (2) “Vladimir Potanin, Russia’s second richest man…,” who was “said to be worth $37.1 bn (£30.5 bn)…, continue[d] to amass wealth supporting Putin’s regime…” [,] “head[ed] the world’s largest refined nickel and palladium producer, Nornickel,” and “acquired Russian bank Rosbank and shares in Tinkoff Bank in the period since the invasion of Ukraine.”

Likewise, BIS “continue[d] to designate new entities (in Russia and elsewhere) to its Entity List, including 36 new entities on June 28, in order to prevent U.S.-origin technologies from being routed to Russian military end users and uses.” The fact several such listings were Chinese companies suggested an intersection between U.S. measures against China in the Sino-American Trade War (discussed in a separate Chapter) and against Russia amidst the war in Ukraine: the intersection point was that those companies aided and abetted Russia’s war.

Indeed, the EU, too, took several parallel actions. As part of its compromise deal concerning a ban on Russian oil (discussed above), the EU agreed to:

(1) “Ban[] the ability to provide consulting services to Russian companies and trade in a number of chemicals.”

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2099 Andre Rhoden-Paul, Ukraine War: Putin’s Cousin Among Inner Circle Hit by New U.K. Sanctions, BBC NEWS, 30 June 2022, www.bbc.com/news/uk-61981765 (also reporting, as to Mr. Potanin, “he moved his $300 mn superyacht to the safe haven of Dubai as a precaution,” and “spent $2 bn building the Rosa Khutor ski resort that hosted the 2014 Winter Olympics in Sochi…”).

2100 Russia Update: U.S. Tightens Pressure.

2101 See Demetri Sevastopulo, U.S. Blacklists Chinese Companies for Allegedly Supporting Russian Military, FINANCIAL TIMES, 29 June 2022, www.ft.com/content/a866bf53-ed1a-4329-aa01-2d7e1fcbf305d?shareType=nongift (reporting: “The Biden Administration has placed five Chinese companies on an export blacklist for violating sanctions by allegedly providing support to Russia’s military and defense companies before and during the invasion of Ukraine. The Commerce Department put the Chinese firms on the “entity list,” which effectively bars US companies from exporting to them. The companies, which are not globally recognized names, are Connec Electronic, King Pai Technology, Sinno Electronics, Winninc Electronic, and World Jetta (HK) Logistics. … The blacklisting was announced as the U.S. grows increasingly worried about strengthening ties between Beijing and Moscow, particularly after Xi Jinping and Vladimir Putin in February [2022] signed a statement that described the China-Russia partnership as having “no limits.” The Financial Times reported in March that China had signalled a willingness to provide military assistance to Russia, which set off alarm bells in Washington. … The Commerce Department did not accuse the Chinese government or military … of supplying equipment to the Russian Army. “We have not seen China provide Russia with military equipment or systematic evasion of sanctions,” said a White House official. But the decision to place the companies on the entity list emphasized the broader concern about ties between China and Russia. It also marked the first time that President Joe Biden’s Administration has penalised Chinese entities for helping the Russian military since Putin launched the invasion of Ukraine in February.”) (Emphasis added.)
“Sanction[] Alina Kabaeva, a former Olympic gymnast who … [was] ‘closely associated’ with Putin…,” “and Patriarch Kirill, who heads the Russian Orthodox Church and has been a vocal supporter of the Russian President and the war in Ukraine” (despite Hungary’s opposition to sanctioning the Patriarch).\textsuperscript{2103}

“Sanction[] dozens of military personnel, including those deemed responsible for reported war crimes in Bucha, as well as companies providing equipment, supplies and services to the Russian armed forces.”\textsuperscript{2104}

Ban “[t]hree more Russian state-owned broadcasters.”\textsuperscript{2105}

Chronologically, all such measures (including the oil embargo) were part of the EU’s sixth sanctions wave. Overall, these waves bespoke swift, dramatic, collaborative action by 27 different EU members. All told, by end-June 2022, the EU, along with the U.S., U.K., and other Allies, had “sanctioned more than 1,000 Russian individuals and businesses.”\textsuperscript{2106}

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\textsuperscript{2103} EU Leaders Back Push.  
\textsuperscript{2104} EU Leaders Back Push.  
\textsuperscript{2105} Russian Oil: EU Agrees Compromise.  
Chapter 25

RUSSIA SANCTIONS (CONTINUED):
WAVES TWELVE-SEVENTEEN
(MARCH 2023-)

I. Should America Impose Secondary Boycott?

The most obvious next step in sanctioning Russia – the step that would put the
greatest additional pressure on Russia – would be a secondary boycott. But, it also would
put pressure on America’s Allies, and on countries, such as India, the U.S. had sought to
wean away from Russia. Accordingly, as of June 2022, the Biden Administration was split
as to whether to pursue a comprehensive secondary boycott against Russia:

Biden Administration officials are divided over how much further the U.S.
can push sanctions against Russia without sparking global economic
instability and fracturing transatlantic unity.

…

… [F]actions have emerged over how hard to push. One group, which
includes many officials at the State Department and White House,
advocates even stricter measures known as secondary sanctions in response
to Russian atrocities, arguing opposition from Allies can be overcome.

Another group of officials, many based at Janet Yellen’s Treasury
Department, worry about further strains on a global economy already
suffering from supply-chain woes, inflation, volatile oil prices and a
potential food crisis. Some fret about the looming midterm [November
2022] elections and Democrats’ chances if prices at the pump stay high.
They argue for a different, untested approach: a cap on oil prices that would
allow countries to buy Russian energy while limiting Moscow’s income.

…

… [W]ith [Russian President] Putin undaunted by the economic chokehold
and pressing ahead with his war, there are growing calls within the [Biden]
Administration to test that [Allied] unity by taking action against other
countries and companies that help Russia evade sanctions or provide what
the U.S. calls “material support” to sanctioned entities.2108

2107  Documents References:
(1)   Havana (ITO) Charter Preamble, Article 99
(2)   GATT Article XXI
(3)   Relevant provisions in FTAs
This Chapter draws upon Raj Bhala, Waves of Russian Sanctions: American and Allied Measures, Indian
and Chinese Responses, and Russian Countermeasures, 14 TRADE, LAW AND DEVELOPMENT number 2, 353-
453 (Winter 2022).
2108  Nick Wadhams, U.S. Officials Are Split Over the Next Round of Russia Sanctions, BLOOMBERG, 1
of-divide-grow?rf=7sxw9Sxl. [Hereinafter, U.S. Officials Are Split.]
Not all secondary boycotts are alike. Consider nuanced differences among them.

The secondary measures against Iran (discussed in separate Chapters) were comprehensive, “targeting almost any country or company that did business with Tehran.” What less-than-thorough secondary boycotts could be imposed by the U.S., perhaps taking a lesson from the EU’s concession to the Czech Republic, Hungary, and Slovakia with respect to a prohibition on Russian oil imports (discussed above), which would up the pressure on the target, Russia, but preserve unity among the sanctioning countries? Might a hard-line secondary boycott serve only to entrench the target regime further, as seems to have occurred with the Āyatollāh, IRGC, and Islamic Republic?

II. Wave Twelve: Prohibition on Russian Financial Instruments and Gold

In June 2022, OFAC took an action that caught at least some portfolio investors off guard: it forbade U.S. entities from investing in Russian debt (whether corporate or sovereign), and Russian equities. That is, investors could maintain their existing holdings of those bonds or stocks, or sell them to non-U.S. residents. But, they could not buy any new Russian financial securities, either in the IPO or secondary market. In truth, the sweeping sanction against purchases of new and existing Russian financial instruments should not have been a surprise:

Banks trading Russian corporate and sovereign bonds have … faced criticism in the US. Senator Elizabeth Warren [Democrat-Massachusetts] has blasted them for undermining sanctions, and called out market makers JPMorgan Chase & Co. and Goldman Sachs Group Inc. for purchasing and making recommendations to clients.

(Not on their own volition, but thanks to OFAC’s updated guidance, on 13 June 2022, Morgan and Goldman announced they halted market-making, and thus primary and secondary market purchasing on behalf of existing or potential clients, in Russian debt.) Obviously, OFAC’s decision was a “further blow [in addition to the default risk, discussed earlier] to funds holding Russian bonds, as it reduce[d] the number of potential buyers of

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2109 U.S. Officials Are Split.
2111 U.S. Treasury Prohibits Investors.
the assets and undermines any remaining value.”

Later in June 2022, in connection with a G-7 Summit, the U.S., along with Canada, Japan, and U.K., announced a ban on imports of Russian gold. (The EU did likewise in July.) The prohibition affected newly mined or refined gold, but not gold previously exported from Russia. As British PM Boris Johnson put it, the measure aimed to “strike at the heart of Putin’s war machine.” In 2021, Russia exported £12.6bn ($15.4bn) worth of gold, and the U.K. said their importance had “increased since the [23 February 2023] invasion [of Ukraine],” as oligarchs rush[ed] to buy bullion to avoid sanctions. France, Germany, and Italy were persuaded by this logic, and following a G-7 meeting, joined their allies in forbidding Russian gold imports into their jurisdictions.

III. Wave Thirteen: Oil Price Cap

By the June 2022 G-7 Summit meeting, the U.S. and its Allies knew they had failed to persuade China, India, and various other countries (e.g., Argentina, Indonesia, Senegal, and South Africa) to ban importation of Russian oil. Whether motivated by economic necessity or political disposition, such countries continued to provide Russia with export revenues by purchasing its oil and petrochemical products. So, the U.S. and its Allies proposed a fall-back idea, namely, a price cap on Russian oil:

They hope a cap will limit the benefits of the soaring price of crude to the Kremlin war machine, while cushioning the impact of higher energy prices on western economies.

... Under the price-capping scheme, Europe would limit the availability of shipping and insurance services that enable the worldwide transport of Russian oil, mandating that the services would only be available if the price
ceiling was observed by the importer. A similar restriction on the availability of U.S. financial services could give the scheme added impact.

... The U.K. would need to come on board, given it is the home of the Lloyd’s of London insurance market. ...2118

The price cap entailed a balancing of demand and supply side considerations – respectively, not hurting American Allies, while penalizing Russia. On the demand side, the basic idea of a price cap was to “let buyers continue to use Russian crude if they agreed to pay below-market rates.”2119 On the supply side, the price cap on Russian-origin oil would be between $40-$60 dollars per barrel so as to limit Russia’s revenues and minimize disruptions in U.S. and Allied economies.2120 Ideally, the price cap would be at above the cost of production, but beneath the market price. (At the time of the G-7 deliberations, Russian crude traded at approximately $80 per barrel.) Also ideally, it would be applied by 5 December 2022, which was the date the EU ban on ocean imported Russian oil was set to take effect.

But, even that range was controversial. It “span[ned] from what is believed to be Russia’s marginal cost of production and the price of its oil before the Feb. 24 invasion of Ukraine….”2121 Moreover, how to operationalize a price cap and strike a balance between limiting funds flowing to Russia, on the one hand, without causing world market energy prices to rise (by driving up demand for non-Russian hydrocarbons), on the other hand the balance, was not a trivial matter. One possibility was to “ban[] insurance and transportation services needed to ship Russian crude and petroleum products unless the oil is purchased below an agreed price.”2122 Finally, imposing a price cap would cross the line between primary and secondary sanctions: “The Biden Administration has so far steered away from deploying extra-territorial secondary sanctions to enforce restrictions imposed on Russia and such moves are usually seen with concern among some European allies,” [hence] “[t]heir use alongside a price cap is likely a measure of last resort….”2123

2118 Guy Chazan, Sam Fleming & David Sheppard, G7 Aims to Hurt Russia with Price Cap on Oil Exports, FINANCIAL TIMES, 26 June 2022, www.ft.com/content/ce090a48-5407-496f-b0e4-1fe78f37495d?shareType=nongift. The U.S. and G-7 were careful to assure OPEC their plan “to cap Russian oil sales at an enforced low price will not be replicated against OPEC producers,” even though OPEC announced production cuts (of 2 million bpd, effective November 2022, allegedly because of global economic uncertainty and a possible slump in demand) that “irked consumer countries.” See Noah Browning & Dmitry Zhdannikov, Exclusive: U.S. Says Russia Oil Price Cap Will Not Be Aimed at OPEC, REUTERS, 19 October 2022, www.reuters.com/business/energy/exclusive-us-says-russia-oil-price-cap-will-not-be-aimed-opec-2022-10-19/.


2121 U.S., Allies Discuss Capping Russian.

2122 U.S., Allies Discuss Capping Russian.

2123 U.S., Allies Discuss Capping Russian.
Nonetheless, in September 2022, the U.S. and its Allies announced agreement on three price caps: one for oil, and two for petroleum products.\textsuperscript{2124} In effect, they had established themselves as a buyer’s cartel among many countries. The per barrel oil price seemed likely to be between $40-$60 per barrel. In particular, the G-7 issued a \textit{Joint Statement} stating it would implement a comprehensive, global prohibition on maritime services that enable the transportation of Russian crude oil (effective 5 December 2022) or petroleum products (effective 5 February 2023) that are purchased at below the relevant price cap.\textsuperscript{2125} Likewise, the EU said it would “press ahead with a price cap on Russian [natural] gas, and … a ceiling on the price paid for electricity from generators that do not run on gas.”\textsuperscript{2126}

However, the EU struggled, however, to come up with a number and sufficient flexibilities for its enforcement. In November, they considered a cap of $65-$70 per barrel, mindful the benchmark price for Russian oil (known as the “Urals blend”) was $65-$75. They were divided: “maritime nations said they wanted a higher price and even compensation if they lost business due to the price cap; Poland and other hard-line pro-Ukraine nations wanted a lower price, to deprive the Kremlin of as much revenue as possible.”\textsuperscript{2127}

Russia countered it would refuse to sell energy to any country obeying any of the caps. President Putin intoned that “contracts could be ripped up in the event of price caps and warned the West it risked being frozen like a wolf’s tail in a famous Russian fairy tale \textit{[The Sister-Fox and the Wolf],} by Aleksandr Nikolayevich Afanasyev (1826-1871).”\textsuperscript{2128} In November, the Kremlin drafted a Presidential \textit{Decree} to “prohibit Russian companies and any traders buying the nation’s oil from selling it to anyone that participates in a price cap.”\textsuperscript{2129} Though the draft did not define “participation,” it appeared the \textit{Decree} would “forbid dealings with both companies and countries that join the price-cap mechanism,”


\textsuperscript{2125} See \textit{G-7 Finance Ministers’ Statement}.


thus “essentially ban any reference to a price cap in contracts for Russian crude oil or products, and prohibit loadings destined for any countries that adopt the restrictions….”

The U.S. rightly noted then Russia would get no revenue whatsoever; plus, even China and India agreed to buy oil at the capped price. That is, Russia had an incentive to sell something rather than nothing, and China and India had an incentive to pay reduced priced. As to how the cap would be enforced, the U.S. and its Allies necessarily “would rely heavily on denying London-brokered shipping insurance, which covers about 95% of the world’s tanker fleet, and finance to cargoes priced above the cap.” At the same time, the U.S. Treasury Department issued guidance stating “individuals making ‘significant purchases of oil above the price cap,’ as well as those who provide false information about those purchases, ‘may be a target for a sanctions enforcement action.’” “Significant” was a deliberately ambiguous adjective that gave the Treasury Department room for discretion, while making clear its world-wide threat to buyers anywhere.

OFAC also issued helpful advice as to the scope of application of the price caps, per its Oil Price Cap Guidance and Petroleum Products Price Cap Guidance documents of November and December 2022, respectively. These publications explained (inter alia) when the price caps applied during the transportation of oil or petroleum products, i.e., when the caps started and stopped:

The price cap applies from the embarkment of maritime transport of Russian oil (e.g., when the crude oil is sold by a Russian entity for maritime transport) through the first landed sale in a jurisdiction other than the Russian Federation (through customs clearance).

[Likewise, for petroleum products, “The price cap applies from the embarkment of maritime transport of Russian petroleum products (e.g., when the Russian petroleum products are sold by a Russian entity for maritime transport) through the first landed sale in a jurisdiction other than the Russian Federation (through customs clearance).]

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2130 Russia Drafts Decree Banning.
2131 G-7 Minister Forge Ahead with Russian.
2132 James Politi & Derek Brower, U.S. Warns of Sanctions for Buyers that Flout Price Cap on Russian Oil, FINANCIAL TIMES, 9 September 2022, www.ft.com/content/e5b63797-1aad-46cd-ab30-c1b5d014b140?shareType=nongift (also reporting the Treasury Department explained “service providers that were misled would not face liability, as long as they complied with rigorous record-keeping requirements.”).
This means that once the Russian oil [or petroleum products] … clear[...] customs in a jurisdiction other than the Russian Federation, the price cap does not apply to any further onshore sale.

If, however, after clearing customs, the Russian oil is taken back out on the water (i.e., using maritime transport) without being substantially transformed outside of the Russian Federation, the price cap still applies. This means any covered services, as listed in the determination, can only be provided by U.S. service providers if such Russian oil is sold at or below the relevant price cap.\(^{2134}\)

Once Russian oil was substantially transformed in a third country, then the price cap no longer applied. So:

… once crude oil is substantially transformed (e.g., it is refined or undergoes other substantial transformation such that the product loses its identity and is transformed into a new product having a new name, character, and use) in a jurisdiction other than the Russian Federation, it is no longer considered to be of Russian Federation origin, and thus the price cap no longer applies (even if the refined oil is further exported using maritime transport). Thus, a refiner in a jurisdiction that has not banned the import of Russian oil can purchase crude oil at or below the price cap and rely on U.S. service providers for services related to the maritime transport of that crude oil. In addition, such a refiner can subsequently refine the crude oil and then export the refined oil via marine transport, including with the use of U.S. service providers, without that refined oil being subject to the price cap.

OFAC does not consider blending of crude oil alone to be substantial transformation for the purpose of the determination.\(^{2135}\)

Similarly, with respect to oil products:

Once Russian petroleum products or Russian oil are substantially transformed (e.g., subjected to any of the refining processes listed below) in a jurisdiction other than the Russian Federation, they are no longer considered to be of Russian Federation origin, and thus the price cap no longer applies: distillation (crude – atmospheric, crude – vacuum), thermal processes (delayed coking, fluid coking including flexicoking, visbreaking), catalytic cracking (hydrocracking, fluid catalytic cracking), catalytic reforming, catalytic hydrotreating (desulfurization), alkylation, isomerization, solvent extraction (de-asphaltizing, lube solvent extraction), de-waxing, or other refinery processes involving chemical transformation, separation, conversion, or treatment.

\(^{2134}\) OFAC Oil Price Cap Guidance, 3-4.
\(^{2135}\) OFAC Oil Price Cap Guidance, 3-4.
OFAC does not consider blending operations, including gasoline blending, distillate blending, crude blending, residual fuel oil blending, or other simple blending operations, to be substantial transformation for the purposes of the crude oil determination or the petroleum products determination.\textsuperscript{2136}

OFAC allowed for a \textit{de minimis} exception. For oil:

OFAC would not consider crude oil to be of Russian Federation origin solely because it contains a \textit{de minimis} amount of crude oil left over from a container or tank (\textit{e.g.}, a “tank heel,” or unpumpable quantity of substance that cannot be removed from the container without causing damage to the container).\textsuperscript{2137}

Likewise, for oil products:

OFAC would not consider petroleum products to be of Russian Federation origin solely because they contain a \textit{de minimis} amount of Russian petroleum products left over from a container or tank (\textit{e.g.}, a “tank heel,” or an unpumpable quantity of substance that cannot be removed from the container without causing damage to the container).\textsuperscript{2138}

But as the U.S. articulated the operational details of the price caps, the EU struggled to conclude the price that would define the cap.

That was because Poland, along with Estonia and Lithuania, stuck to their position that a price cap of $65-$70 was too high. On 1 December 2022, five days before the price cap was set to take effect, the G7 (\textit{i.e.}, the U.S. and U.K., France, Germany, Italy, and Japan, plus the entire EU), which included the EU, agreed to a threshold of $60 (€57, £48) per barrel: no country would be permitted to pay more than that amount for Russian seaborne crude oil.\textsuperscript{2139} At the time, Urals crude traded at $64-$67 per barrel.\textsuperscript{2140} The agreement contained a key a guarantee – on which Poland insisted – that this limit always would be at least 5% below the market price of Urals blend. So, “[t]he initial G-7 proposal … for a price cap of $65-$70 per barrel, with no adjustment mechanism,” was rejected.\textsuperscript{2141} Accordingly, as a G-7-Australia \textit{Joint Statement} explained:

\begin{itemize}
\item \textsuperscript{2136} OFAC Petroleum Products Price Cap Guidance, 2.
\item \textsuperscript{2137} OFAC Oil Price Cap Guidance, 4.
\item \textsuperscript{2138} OFAC Petroleum Products Price Cap Guidance, 1-2.
\item \textsuperscript{2140} See Ukraine War: G7 and Allies Approve; G7 Coalition Agrees $60.
\item \textsuperscript{2141} G7 Coalition Agrees $60.
The decision to impose a price cap was taken to “prevent Russia from profiting from its war of aggression against Ukraine” ….

It [the Joint Statement] said the move aims to “support stability in global energy markets and to minimize negative economic spillovers of Russia’s war of aggression, especially on low-and middle-income countries, who have felt the impacts of Putin’s war disproportionately.”

That is:

The price cap—which was agreed by the G7 group of nations, Australia and the EU – came into force on 5 December [2022].

The cap prohibits countries from paying more than $60 (€56; £50) per barrel of Russian oil.

The price cap aims to reduce Russian oil revenue further. It stops any Russian crude sold for more than $60 from being shipped using G7 and EU tankers, insurance companies and credit institutions.

Many major global shipping and insurance companies are based within the G7.

The achievement of consensus among the EU 27 was a significant moment in the history of the bloc: it underscored its unity in the face of Russia’s aggression against Ukraine, and willingness to incur energy shortages and higher energy costs as it sought non-Russian sources. It also bespoke their extraterritorial thinking, because the price cap was intended “to affect oil exports worldwide.”

Equally significant was Japan’s assent. Japan was dependent on imports for nearly all of its energy, and traditionally was wary of involvement in matters not pertaining to its own self-defense (per its Constitutional strictures), yet it stood with the Alliance. For instance, in December 2022, Japan forbade its insurers and reinsurers from coverage of any merchandise transported through Russian waters. That decision reflected marketplace

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2142 Quoted in Ukraine War: G7 and Allies Approve.
realities, too: without the additional insurance available for such cargo because of sanctions, it was too risky – specifically, the war risk was too high – for Japanese companies to provide either primary or back-up insurance. That almost certainly meant neither Russian oil nor NG would flow to Japan, because by definition it would have to be transported through Russian waters. It definitely meant “the perceived danger has spread beyond the Black Sea and the Sea of Azov, both close to the actual fighting.”

Still, whether every country would “sign up to the G7-led policy” – the so-called “Price Cap Coalition” and thereby “only be permitted to purchase oil and petroleum products transported via sea that are sold at or below the price cap” was dubious. In October 2023, the Coalition issued a helpful Advisory for the Maritime Oil Industry and Related Sectors: Best Practices in Response to Recent Developments in the Maritime Oil Trade. Non-Coalition countries had two obvious financial incentives to sign up: no insurance or re-insurance for oil priced above the cap, and avoidance of doling out monies above that cap. Indeed, as U.S. Treasury Secretary Janet Yellen pointed out, the cap would especially benefit low- and medium-income countries, which had suffered from high food and energy prices. Moreover, “any non- EU-flagged tanker that was found to have breached the cap would face a ban from western maritime services for 90 days” (though that was considerably less than the “lifetime ban as originally proposed,” because of the lobbying of both Greece and the U.S., where tanker operators play a major role in shipping Russian oil – often with vessels flagged in other countries).

IV. Unintended Consequences: Insurance Prohibitions, Shadow Fleets, and Environmental Disasters

Japan Insurance, and Mitsui Sumitomo Insurance started to inform shipowners of their decision… The move, which comes about 10 months after the start of Russia’s invasion of Ukraine, was prompted by overseas reinsurance companies refusing to take on Russia-related risks. The Japanese insurers’ decision means that coverage for war damage will not be provided anywhere in Russian waters – even in the Far East, far from the war in Ukraine. Nearly all vessels take out ship insurance. A lack of additional coverage for Russian waters would make sailing there too risky for most operators. Japanese imports of liquefied natural gas from Russia’s Sakhalin-2 project and elsewhere could be affected by the inability to secure coverage. Shipowners have to sign up for extra war damage insurance before sailing through Ukrainian and Russian waters. Insurers would have to be notified in advance to follow up on terms for payouts and premiums. … [Shipowners will no longer have that option from the three Japanese insurers.”]. [Hereinafter, Japanese Insurers to Halt Ship.]

Japan Insurers to Halt Ship.

Ukraine War: G7 and Allies Approve.

G7 Coalition Agrees $60.

Ukraine War: G7 and Allies Approve.


G7 Coalition Agrees $60.

David Sheppard, Chris Cook & Polina Ivanova, Russia Assembles “Shadow Fleet” of Tankers to Help Blunt Oil Sanctions, FINANCIAL TIMES, 3 December 2022, www.ft.com/content/cdef936b-852e-43d8-ae55-33bcbbb82eb6?shareType=nongift. [Hereinafter, Russia Assembles “Shadow Fleet.”]

By October 2023, the U.S. had initiated enforcement actions against oil price cap violators. For example, that month OFAC sanctioned two ship owners in Turkey and the UAE, and two of their vessels for transporting Russian oil sold above the global price cap America and its Allies had set. See U.S. Department of the Treasury, Office of Foreign Assets Control, Russia-related Designations: Publication of Maritime Oil Industry Advisory: Issuance of Russia-related General License (12 October 2023), https://ofac.treasury.gov/recent-actions/20231012.
There was a negative externality caused by the lack of insurance and re-insurance for Russian-origin oil and NG, albeit an unintended one – the risk of an environmental disaster:

The Chief Executive of one of the world’s biggest shipping insurers has warned of the growing risk of a disastrous oil spill after the knock-on effects of sanctions on Russia left thousands more ships without third-party liability cover from “well-tested” insurers.

“Nobody will be there to help clear up the mess [without sufficient liability cover],” said Rolf Thore Roppestad, Chief Executive at Norway’s Gard. “This is a social and environmental disaster waiting to happen, and it should be a big worry for all of us.”

The rare public warning from a senior insurer comes amid concern among big trading houses and some policymakers over the unintended consequences of the west’s sanctions regime, which has pushed the Russian oil trade into the shadows.

There is unease in the energy sector that smaller, less experienced traders are now moving crude over longer distances on older vessels with unknown levels of insurance provision.

… Roppestad estimated that since Russia invaded Ukraine “several thousand” more ships were trading around the globe without cover from the International Group of 12 Protection & Indemnity Clubs. The group is made up mostly by European and U.S. insurers, including Gard, which have historically covered about 90 per cent of the world’s ocean-going tonnage.

He raised concerns about the reliability and ability of … [non-International Group] insurers to handle a spill or other accident.

Among these vessels are much of the so-called shadow fleet, an aged group of oil tankers believed by brokers to have been amassed by Russia to circumvent western sanctions and often insured locally.

Roppestad said there was a much greater risk of a worst-case scenario in which “nobody will be there to pay” to clean up after an accident. “As the shadow fleet continues to grow, it will only become more acute.”

The International Group P&I clubs are mutually owned by shipowners and charterers and offer insurance for third-party liability such as crashing a vessel. P&I cover is critical to the shipping trade and a condition for entry at global ports.

Western insurers and brokers have expressed private concerns that P&I
cover from … [the non-International Group] insurers will be less reliable and result in more limited payouts.

“I am much less convinced about their reliability and ability to effectively handle a casualty if something goes wrong,” said Roppestad. 2153

In a sense, the problem was trebled, because non-Insurance Group insurance shipments affected not only Russian cargo, but also cargo from Iran and Venezuela:

Many ships eschewing … [Insurance Group] cover are relying on other P&I insurers in Russia and the Middle East, according to insurance experts and ship records. Iran and Venezuela have long used their own shadow fleets of several hundred vessels to skirt sanctions. Iran has its own P&I insurer, Kish, created after western insurers pulled back. 2154

But for the U.S. and its Allies, how could it implement the oil and NG embargos without an insurance prohibition?

V. Russian Oil Price Cap Counter-measures

One of the steps Russia took to deal with the ban on insurance and reinsurance of tankers carrying its crude was to ship oil overland. In particular, Russia exported oil to Iran via rail. To be sure, Iran produced and refined oil, but by April 2023, “its consumption had exceeded domestic fuel production, especially in its northern provinces…” 2155

Rail shipments, in lieu of shipments via the Caspian Sea, meant Russia could avoid the oil price cap (and consequentially high ocean freight rates), and the insurance and reinsurance bans. The solution was hardly perfect, though, because of rail congestion, and the presumptive need to insure rail cargo in some way.

More important than changing the mode of shipment was Russia’s countermeasures against the oil price cap per se. Predictably, Russia countered by finalizing the Presidential Decree it had threatened, namely, an ukase to ban oil sales to buyers that obeyed the oil price cap. That created a kind of choice of law, or better put, choice of transaction, problem – either follow the cap, and find oil elsewhere, or reject the cap, and enjoy Russian oil:

Russia has banned oil sales to countries and companies that comply with a price cap agreed by Western nations earlier this month [December 2022].

Russia has now said its oil and oil products will not be sold to anyone imposing the price cap.

2153 Ian Smith, Tom Wilson & Chris Cook, Russian Sanctions Heighten Threat of Oil Spill Disaster, Shipping Insurer Warns, FINANCIAL TIMES, 1 April 2023, www.ft.com/content/9514309a-a123-4069-a1eb-e90106d61162?shareType=nongift. [Hereinafter, Russian Sanctions Heighten Threat.]

2154 Russian Sanctions Heighten Threat.

The Presidential Decree said the ban would take effect for five months from 1 February until 1 July [2023].

The Decree also said Russian President Vladimir Putin could give “special permission” to supply to countries that fall under the ban.

…

Although Western demand for Russian oil fell after the invasion, Russian revenue remained high due to a price spike and demand elsewhere, including from India and China.2156

Specifically, the Decree banned Russian crude oil and refined product exports to foreign buyers that adhere to a price cap, applied “to ‘supply contracts that directly or indirectly use the mechanism of setting a price cap,’” and was “‘in force at all stages up until the final buyer.’”2157 Yet, this Decree was restrained in one sense: it “held back from the most drastic retaliatory measures that could have further disrupted global oil supplies,” namely, it “avoid[ed] extreme measures that the market feared would further upend trade, such as designating a minimum price for its crude or bans on specific countries from buying Russian oil.”2158

Russia also (in February 2023) cut oil output by 500,000 bpd.2159 That was equivalent to 5% of Russia’s total oil output, and 0.5% of world oil supply.2160 With oil prices sagging (below $60 per barrel) thanks to its former customers sourcing elsewhere, Russia needed to shore up its government revenues – and oil accounted for more of them than NG. In other words, Russia sought to boost prices and thus revenues by forcing an inward shift in the world oil supply curve. Russia argued the oil price cap was a destructive energy policy that interfered with normal market relations, which its move would help restore.2161 And, the following month, Russia altered the way in which it taxes oil companies, so as to garner additional tax revenue:

Russia is overhauling how oil companies are taxed, aiming to bolster state revenues by capturing a bigger share of crude sales that often exceed the G7-imposed price cap on the country’s exports.

The Kremlin will from April shift to an indicator pegged to Brent, the international crude benchmark, for calculating taxes on oil exports, a move it expects to generate an additional Rhs 600 bn ($8 bn) of annual revenue.

2156  Russia Bans Oil Sales.
2158  Putin Responds to Oil-Price Cap.
2159  David Sheppard & Anastasia Stognei, Russia to Cut Oil Output in Response to Western Nations’ Price Cap, FINANCIAL TIMES, 10 February 2023, www.ft.com/content/dc898690-653a-47f1-af56-b0216abd7dcd?shareType=nongift. [Hereinafter, Russia to Cut Oil Output in Response.]
2160  See Russia to Cut Oil Output in Response.
2161  See Russia to Cut Oil Output in Response.
by reducing the market “discount” on Russian oil.

The planned reforms, first unveiled by President Vladimir Putin late last month, reflect the growing murkiness of the Russian oil market under sanctions and rivalry between the Kremlin and oil producers over potential additional revenue from sales.

The dispute has turned attention to the pricing of Russian oil and whether the international benchmarks the Kremlin has used as its basis for taxation have kept pace with recent market shifts.

After G7 countries imposed a $60-a-barrel ceiling on Russia’s exports in December [2022], most Russian grades of oil exceeded the cap that month….

Urals, Russia’s main export grade, has been selling for as much as $40 a barrel below Brent, largely because the EU barred seaborne imports. [Hence, the aforementioned “discount” is the difference between the higher-priced Brent crude and lower-priced Urals crude.]

Western powers have hailed the discounts as evidence their approach to sanctions is working. But the customs data suggests Russian oil producers have been able to secure higher prices for at least some of their exports.

The pricing anomalies have implications for Moscow’s tax haul. The average post-embargo price for all Russian crude blends exported in December was close to $74 a barrel…. That is only $10 below Brent prices for the same period and well above the $60 cap.

But the Urals price quoted by pricing agency Argus, which is Russia’s main reference point for calculating tax, averaged just $43 during the same month.2162

In other words, Russian tax authorities changed the base of taxation from the lower-priced Urals crude to the higher-price Brent crude.2163 Mathematically, the higher the price of the benchmark from which Russian authorities based the imposition of taxes, the higher the tax revenue they could collect (ceteris paribus, i.e., assuming no change in any other relevant variable, such as tax rates). Their justification was Russian oil exporters were, at least on some shipments, fetching a price more like that of Brent crude. Their motivation

2162 Anastasia Stognei, Russia Alters Oil Taxes to Capture Bigger Share of Trades Above Price Cap, FINANCIAL TIMES, 22 March 2023, www.ft.com/content/1679afca-0aa5-4498-b1a5-1eb65c6f9d91?shareType=nongift.
2163 See also James Politi, Anastasia Stognei & Derek Brower, Russia’s Energy Sector Hit as Kremlin Forced to Increase Tax, FINANCIAL TIMES, 8 May 2023, www.ft.com/content/f4b9276-efcf-4731-9ed3-7afea3be4e27?shareType=nongift (reporting: “The move was intended by Moscow to capture up to Roubles 600 bn ($8 bn) in additional revenue and plug the hole in oil export revenue caused by western sanctions aimed at crimping financing for the Ukraine war.”).
was to fuel Russian revenues that suffered under U.S. and Allied sanctions.

In this reality of weaponized energy, Moscow had its allies, too. It seemed the world oil market was heading for bifurcation: with Ukraine and its U.S., EU, and other partners on one side, and Russia and its Chinese, Indian, and other customers on the other side. Moreover, not only did Russia reject the price cap, it actively planned to navigate around it—literally. Russia said it had procured a fleet of 100 oil cargo vessels to carry its oil. How, exactly, it would do so was unclear, because the U.S. and EU made clear they would forbid the insuring or re-insuring of any vessel carrying Russian oil. Even Ukraine conceded the cap may be limited in its effects: in December 2022, “Ukraine’s President Volodymyr Zelensky, called the price cap a ‘weak’ idea that was not ‘serious’ enough to damage the Russian economy.”

And yet, by February 2023, perhaps the G-7 $60-a-barrel price cap on crude oil, which the G-7 imposed in December 2022, and a cap on refined products implemented in February 2023, were working, that is, they were “keep[ing] Russian oil gushing, while at the same time depriving the Kremlin of petrodollars.” Russia had increasing difficulty to find “work arounds,” or pry western companies to work with it, to allow “barrels traded above the threshold” to be shipped:

A chunk of the vast fleet of tankers that Russia uses to deliver its crude oil is grinding to a halt under the weight of U.S. sanctions, a sign that tougher measures by western regulators might be starting to have tangible effects on Moscow.

About half of the 50 tankers that the U.S. Treasury began sanctioning on Oct. 10 [, 2023] have failed to load cargoes since they were listed…. The latest to be targeted – the Sovcomflot carrier NS Leader – performed an immediate U-turn off the coast of Portugal on Thursday when its owner was named by the U.S. It was sailing toward a Russian port in the Baltic Sea at the time.

The result [of intensified sanctions enforcement by the U.S.] has been

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2165 Russia Assembles “Shadow Fleet” (reporting: “Russia has quietly amassed a fleet of more than 100 ageing tankers to help circumvent western restrictions on Russian oil sales following its invasion of Ukraine…. Shipping broker Braemar estimates Moscow, which relies heavily on foreign tankers to transport its crude, has added more than 100 ships this year [2022], through direct or indirect purchases. Energy consultancy Rystad says Russia has added 103 tankers in 2022 through purchases and the reallocation of ships servicing Iran and Venezuela, two countries under western oil embargoes.”).  
2166 See G7 Coalition Agrees S60 (reporting: “The G7 price cap will allow non-EU countries to continue importing seaborne Russian crude oil, but it will prohibit shipping, insurance, and re-insurance companies from handling cargoes of Russian crude around the globe, unless it is sold for less than the price cap. Because the most important shipping and insurance firms are based in G7 countries, the price cap would make it very difficult for Moscow to sell its oil for a higher price.”).  
2167 Russia Bans Oil Sales.
ballooning freight costs and Russian oil that’s being trading at deeper discounts to international benchmarks…. Russian Energy Minister Alexander Novak said that the country’s barrels are going cheaper.

…

Of the 50 tankers sanctioned since early October [2023], 18 have collected cargoes. Of those, nine were shuttle ships and nine appeared to collect consignments as normal since they were added to the list. One is still carrying a cargo it took on board before it was sanctioned.

That leaves 31. Of those, seven had been idled even before sanctions and three may well load soon. That leaves 21 that haven’t loaded cargo since.2168

Of course, time would tell whether the U.S. could keep up the pressure to enforce the cap, particularly with respect to the shadow fleet (discussed earlier) of non-western service providers carrying Russian oil at prices above that cap.

VI. Wave Fourteen: Natural Gas Price Cap

Impressively, in December 2022, the EU came together on a NG price cap, thus putting more pressure on Russia and its allies. With effect from 15 February:

… European Union countries’ Energy Ministers agreed that the cap on gas prices would be triggered when benchmark gas prices spike to 180 euros per megawatt hour.

The EU gas price cap would kick in if prices on the front-month Dutch Title Transfer Facility [a virtual NG trading point in the Netherlands for physical and futures transactions] gas hub contract exceed 180 euro/MWh for three days….2169

Note the scope of application of the NG price cap did not apply to spot market contracts:

The cap will initially apply to gas contracts traded on all European trading hubs for supplies between one month and a year ahead. Prices must also be €35/MWh above an average of global liquefied natural gas prices in order to be triggered. Over-the-counter deals may be included at a later stage.

2168 Julian Lee & Alex Longley, Tankers Tied to the Russian Oil Trade Grind to a Halt Following U.S. Sanctions, BLOOMBERG, 12 February 2024, www.bloomberg.com/news/articles/2024-02-13/tankers-tied-to-the-russian-oil-trade-grind-to-a-halt-following-us-sanctions?ref=7sxw98wl (also recalling the two goals of the cap, namely, “‘…denying Russia the energy profits it needs to wage its illegal war, while simultaneously promoting stable energy markets’” (quoting Eric Van Nostrand, Acting Assistant Secretary of the Treasury for Economic Policy, U.S. Department of the Treasury).

That is, the cap applied (at least initially) only “to gas contracts traded on the TTF between one month and a year ahead,” and triggered only where the price specified in those contracts was at least €35 per megawatt hour above an average of global liquefied natural gas prices. This figure represented a significant drop from the earlier one proposed, and a climbdown by Austria, Germany, and the Netherlands, which had opposed one.

To be sure, as with the oil price cap, the one on NG raised the challenge of enforcing it in third countries that potentially were disinclined to follow it.

VII. Wave Fifteen: Russia’s Annexation of Donbas and More Sanctions

That there was no end game in sight was depressingly obvious on 30 September 2022. On that day, President Putin formally annexed approximately 15% of Ukrainian territory. He did so following a sham plebiscite in the Donbas region concerning the willingness of the population to join Russia – a vote the international community swiftly rejected, as it had with respect to one concerning Crimea after Mr. Putin’s troops took it over, and annexed it, in 2014:

The annexations are a dramatic attempt to raise the stakes in the conflict by bringing them under Russia’s nuclear umbrella.

The move “represents the most serious escalation since the start of the war,” said NATO Secretary-General Jens Stoltenberg.

Putin said Russia was willing to hold peace talks with Ukraine but declared the four regions – Donetsk, Luhansk, Kherson, and Zaporizhzhia – off limits in any future negotiations following hastily organised “referendums.”

“People made their choice, an unambiguous choice,” Putin said, describing the votes, which were met with international condemnation, as “the will of millions of people.”

“The people living in Luhansk and Donetsk, Kherson, and Zaporizhzhia are

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2170 Alice Hancock, EU Energy Ministers Reach Deal on Gas Price Cap, FINANCIAL TIMES, 20 December 2022, www.ft.com/content/5b2fiae4-04d1-4e09-89ce-b85f575d8422?shareType=nongift. [Hereinafter, EU Energy Ministers Reach Deal on Gas.]

2171 EU Energy Ministers Reach Deal on Gas.

2172 EU Energy Ministers Reach Deal on Gas (reporting: “The ceiling is almost €100 per MWh less than the European Commission first proposed last month [November 2022], when it suggested a mechanism to limit prices when they reached €275 per MWh for 10 consecutive days. Several ministers had branded that higher level ‘a joke’ as it would not have been activated even when prices in the bloc hit record highs in August. The final deal was reached after Germany, which had been strongly opposed to the cap due to concerns it would cause valuable gas supplies to be redirected from Europe to higher paying regions, eventually agreed to the measure. The Netherlands and Austria, which had also been against the cap, abstained in the final vote and Hungary voted against.”).
becoming our citizens. Forever,” Putin said. “Kyiv’s current government should treat the free expression of these people’s will with respect and nothing else. Only this way can there be a path to peace.”

To be sure, declaring – as Mr. Putin did – “this is my land now” – did not make it true, and the referenda he concocted were nothing more than a “smokescreen for Moscow to grab 15% of Ukraine’s territory,” which neither Ukraine nor the international community ever would accept.

On 13 October 2022, the U.N. General Assembly voted overwhelmingly to condemn the annexation. The vote was 143-5-35: Belarus, Nicaragua, North Korea, Russia, and Syria voted “no,” and China and India were among the countries casting an “abstention” ballot. Again in February 2023, the vote among the 193 U.N. members was lopsided in favor of a resolution calling on Russia to end its war in Ukraine: 141-6-32, with Belarus, North Korea, Eritrea, Mali, Nicaragua, North Korea, Russia, and Syria voting “no,” and China and India abstaining.

The Kremlin’s sham referenda and annexation was an effort to force upon Ukraine and its friends a fait accompli. The battlefield realities – the facts on the ground – were different: in the weeks up to the referenda and annexation, Russia had been losing territory in Ukraine. Unsurprisingly, America and its Allies hit back. OFAC listed as SDNs over 300 parties, plus issued guidance foreign parties outside of Russia could be designated as such for giving economic or political assistance to Russia in its annexation.

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2173 Max Seddon, Vladimir Putin Annexes Four Ukrainian Regions, FINANCIAL TIMES, 30 September 2022, www.ft.com/content/38a1ea78-5530-4eba-85e5-70c2e38024a9?shareType=nongift. [Hereinafter, Vladimir Putin Annexes Four.]
2176 See Michelle Nichols, Russia Isolated as U.N. Marks One Year of Ukraine War, REUTERS, 23 February 2023, www.reuters.com/world/russia-isolated-un-marks-one-year-ukraine-war-2023-02-23/. See also Pamela Falk, U.N. Votes to Call on Russia to End Ukraine War, CBS NEWS, 23 February 2023, www.cbsnews.com/news/united-nations-russia-ukraine-war-general-assembly-resolution/ (reporting: “The resolution … calls for Russia’s ‘immediate cessation of the attacks on the critical infrastructure of Ukraine and any deliberate attacks on civilian objects, including those that are residences, schools and hospitals,’ and it calls on nations and international organizations to ‘redouble support for diplomatic efforts to achieve a comprehensive, just and lasting peace in Ukraine.’ … The measure, although unenforceable in international law, also stresses the need for accountability for the crimes that may have been committed by Russia in Ukraine through investigations and prosecutions. Through five previous resolutions on Ukraine, the 193-nation General Assembly is front and center at the United Nations because of the ability of Russia to nix any significant resolutions in the 15-nation Security Council through its veto power.”).
Not surprisingly, SDN listings continued apace in late December 2022 and throughout 2023. For instance, in July 2023, OFAC designated new SDNs such as (1) Russian industries supporting the defense sector, (2) Russian banks, (3) Russian metals and mining companies, (4) Russian importers of dual-use items, plus Kyrgyz Republic-based entities (5) engaged in trans-shipment of dual-use technology, and (6) facilitating sanctions. See U.S. Department of the Treasury, Office of Foreign Assets Control, Treasury Sanctions Impede Russian Access to Battlefield Supplies and Target Revenue Generators (20 July 2023), https://home.treasury.gov/news/press-releases/jy1636. See also U.S. Department of the Treasury, Office of Foreign Assets Control, Russia Harmful Foreign Activities Sanctions (FAQs in which OFAC responds to queries as to whether a particular individual or entity is blocked).

Likewise, in September 2023, OFAC tagged over 150 individuals and entities (including Russian financial institutions, metal companies, and vehicle manufacturers) with the SDN label, because they supplied Russia with controlled goods or otherwise aiding the Russian government. U.S. Department of the Treasury, Office of Foreign Assets Control, Russia-related Designations, Designations Updates, and Designations Removals; Issuance of Russia-related General Licenses (14 September 2023), https://ofac.treasury.gov/recent-actions/20230914. OFAC also imposed sanctions on three entities that were part of a sanction-evasion network attempting to support arms deals between Russia and North Korea. See U.S. Department of the Treasury, Office of Foreign Assets Control, Treasury Sanctions Entities Tied to Arms Deals Between North Korea and Russia (16 August 2023), https://home.treasury.gov/news/press-releases/jy1697. Further, the State Department blacklisted (1) 37 entities in Russia’s energy sector, (2) 7 entities in its minerals and mining sector, (3) 11 entities that provide weapons repair and maintenance to Russia, and (4) Turkish entities involved in sanctions evasion. See U.S. Department of State, Press Release, Imposing Further Sanctions in Response to Russia’s Illegal War Against Ukraine (14 September 2023), www.state.gov/imposing-further-sanctions-in-response-to-russias-illegal-war-against-ukraine/. This round of sanctions was particularly noteworthy:

The United States … imposed one of its largest sanctions packages related to the war in Ukraine, penalizing more than 150 companies and individuals that officials said were profiting from Russia’s invasion and their proximity to the Kremlin and President Vladimir V. Putin.

The sanctions are part of the U.S. effort “to target Russia’s military supply chains and deprive Putin of the equipment, technology, and services he needs to wage his barbaric war on Ukraine,” Janet L. Yellen, Secretary of the Treasury, said….

…

The Treasury Department’s sanctions targeted nearly 100 Russian military-linked elites and individuals – including some in Turkey, Georgia, Finland, and the United Arab Emirates – involved with Russia’s industrial, financial and technology industries. One individual, Vitalij Victorovich Perfilev, was identified as an official with the Wagner mercenary group who served as the National Security Adviser to the Central African Republic’s President.

The State Department’s measures focused on more than 70 individuals, including Pavel Pavlovich Shevelin, identified as being affiliated with Wagner and having facilitated arms shipments between North Korea and Russia. Among the other targets were a Georgian-Russian oligarch, Otar Anzorovich Partskhaladze, and a Russian intelligence officer, Aleksandr Vladimirovich Onishchenko.

Five companies and one individual from Turkey, a NATO member, were designated for supporting sanctioned vessels tied to Russia’s defense industry and for helping Moscow evade sanctions.

Russia, which has been searching for ways to evade the existing net of Western sanctions, has mined its relationship with Turkey for avenues to ease restrictions. …
Contemporaneously, BIS added 57 parties to the Entity List, 50 of which BIS said would be subject to the Russia-Belarus Military End User Foreign Direct Product (FDP) Rule.

Indeed, the U.S. targeted Elvira Nabiullina, the Governor of Russia’s Central Bank: “The U.S. Treasury Department explained its decision to impose sanctions on Nabiullina, saying she had been instrumental in Russia’s efforts to protect its economy in recent years from western sanctions dating back to the 2014 invasion of Crimea.” The EU vowed additional measures. The U.S. indicted Oleg Deripaska, a Russian metals tycoon, and his associates, on charges of conspiring to violate and evade U.S. sanctions imposed on the oligarch and his private investment company Basic Element.

The newly imposed sanctions also targeted several companies and individuals, including a Finland-based network, that have shipped electronics – including computers, drones, and software – into Russia.


Additionally, the State Department put sanctions on 11 individuals and one entity connected for forcibly transferring and deporting Ukrainian children to Russia, and transferring Ukrainian children within Russia. See U.S. Department of State, Imposing Sanctions and Visa Restrictions on Individuals and Entities to Promote Accountability for Forced Transfer and Deportation of Children During Russia’s Illegal War Against Ukraine (24 August 2023), www.state.gov/imposing-sanctions-and-visa-restrictions-on-individuals-and-entities-to-promote-accountability-for-forced-transfer-and-deportation-of-children-during-russias-illegal-war-against-ukraine/. New entries on the DOC BIS Entity List also continued apace. For example, in September 2023, BIS added 28 entities China, Finland, Germany, Oman, Pakistan, Russia, and the UAE to the Entity List for assisting with Russian and Iranian UAV programs, and supporting Russian weapons production. See U.S. Department of Commerce, Bureau of Industry and Security, Addition of Entities and Revision to Existing Entities on the Entity List; Removal of Existing Entity From the Military End User List, 88 Federal Register number 186 66271-66278 (27 September 2023). In October 2023, the U.S. added 42 Chinese companies to the Entity List (out of 49 total new additions), because of their support for Russia’s military-industrial base, specifically, supplying Russian consignees with U.S.-origin integrated circuits that could be used in precision guidance systems in missiles and drones deployed against Ukraine. See U.S. Department of Commerce, Bureau of Industry and Security, Addition of Entities to the Entity List, 88 Federal Register number 195, 70352-70360 (11 October 2023), www.govinfo.gov/content/pkg/FR-2023-10-11/pdf/2023-22536.pdf; U.S. Restricts Trade with 42 Chinese Entities over Russia Support, Nikkei Asia, 7 October 2023, https://asia.nikkei.com/Politics/Ukraine-war/U.S.-restricts-trade-with-42-Chinese-entities-over-Russia-support#. That support included supplying Russia with U.S.-origin integrated circuits, such as ones used in precision guidance systems in Russia’s missiles and drones fired against Ukrainian civilians in its war with Ukraine. China’s MOFCOM retorted the American measures were “economic coercion and unilateral bullying,” and “unreasonable suppression of Chinese companies.” Quoted in id.

Deripaska and 23 other Russian oligarchs and government officials in April 2018 faced the hardest measures imposed by the U.S. in response to Russia’s 2014 invasion of Ukraine’s Crimea and alleged meddling in the 2016 U.S. election.

The tycoon at the time said the claims were baseless and sued the Office of Foreign Assets Control, the Treasury division overseeing U.S. sanctions policy. A U.S. District Court judge dismissed the lawsuit last year [2021].

U.S. authorities allege that after the 2018 sanctions, Deripaska illegally used the country’s financial system to keep three luxury properties in the country. [Olga] Shriki in 2019 helped arrange the sale of a California music studio owned by Deripaska via several shell companies that fetched more than $3 mn, which she attempted to transfer into an account owned by one of the oligarch’s companies.…. “While serving the Russian state and energy sector, Oleg Deripaska sought to circumvent U.S. sanctions through lies and deceit to cash in on and benefit from the American way of life,” Lisa Monaco, Deputy U.S. Attorney General, said….2181

The charges carried punishments of up to 20 years imprisonment. Further, “Ukraine’s President Volodymyr Zelenskyy announced his country’s formal application for accelerated accession to NATO” – precisely what Russia most opposed.2182

President Putin dedicated much of his rhetoric to invective against the West, which only served to polarize the conflict yet more. His annexation speech: covered topics as varied as western sanctions, European imperial history, crude jokes about sex change operations and accusations that “Anglo-Saxons” had attacked two gas pipelines in the Baltic [Nord Stream I and II, discussed in an earlier Chapter]…. As he cited Russia’s imperial and Soviet past as justification for seizing the Ukrainian territories, Putin issued a stark rallying cry to end U.S. hegemony through an “anti-colonial movement” led by Moscow.

“They are blatantly dividing the world into their vassals and everyone else,” Putin said, accusing the western elite of being “colonial” and “racist.” “The west is looking for new ways to strike against our country, to weaken and destroy Russia,” he added. “They just can’t put up with there being such a big country with its territory, rich natural resources, and people who won’t

2181 Russian Oligarch Oleg.
2182 Vladimir Putin Annexes Four.
live by anyone else’s rules.”

Putin claimed Russia had defeated a “sanctions blitzkrieg” and warned other countries could face similar restrictions.

“They thought they could build the whole world again. But it turned out that not everyone is so excited about this rosy future. Only total masochists and fans of other non-traditional forms of international relations,” Putin said, making a homophobic quip.

“We have heard about the containment of Russia, China, and Iran. We think Latin American and Middle Eastern countries will soon join this list,” he added. “Everyone is in their scope – including our neighbors” in the former U.S.S.R….“

The truth was that several of those neighbors had “distanced themselves from Moscow over the war.” Nevertheless (and worse yet), Mr. Putin threatened of nuclear war:

How will Mr. Putin respond when Ukrainian troops push on to try to reclaim their land?

Russia has already warned that any attack on its “new territories” will be viewed as an attack on the territorial integrity of Russia. The Kremlin says it reserves the right to respond “with all means available to it.”

That includes, potentially, nuclear weapons. In recent weeks, senior Russian officials have been dropping unsubtle hints about Moscow’s nuclear arsenal.

In his speech…, Vladimir Putin said the United States had created a “precedent” by using nuclear weapons against Japan at the end of World War Two.

...Russia’s nuclear sabre-rattling has been causing concern in the West.

Mr. Putin’s remarks were “worrying people inside Russia, too,” as shown through “an editorial in the country’s mainstream Nezavisimaya Gazeta newspaper, which “was heavily critical of ‘senior Russian officials’ for making ‘nuclear threats.’” Might their worries lead to a change in Russian thinking, if not leadership?

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2183 Vladimir Putin Annexes Four.
2184 Ukraine War: Putin Raises.
2185 Ukraine War: Putin Raises.
2186 Wave Thirteen sanctions were accompanied in November 2022 by a decision (discussed in a separate Chapter) by DOC to revoke Russia’s status, which it had held since its 2012 WTO accession, as a market economy for AD purposes. Technically, DOC’s move to resume treating Russia as an NME was not a sanction, though the coincidence of this move with the ongoing Ukraine conflict was notable.
VIII. Wave Sixteen: Aluminum Tariffs

To mark the one-year anniversary of Russia’s invasion of Ukraine, on 24 February 2023, the U.S. decided upon another wave of sanctions. This one focused on one of Russia’s most vaunted export industries: aluminium. Russia was the world’s second largest aluminium producer (second only to China).\(^{2187}\) Russia’s aluminium products included not only bulk aluminium, but also automotive parts and construction materials. The U.S. slapped 200% tariffs on all imports of Russian-origin aluminum and aluminum derivative merchandise.\(^{2188}\) However, the question of the legal authority under which the Biden Administration took this measure was interesting.

Though the U.S. had suspected Russia dumped aluminium, the U.S. could not impose AD duties without an investigation by the DOC and ITC (as discussed in separate Chapters). Besides, already certain Russian aluminium products were subject to ADs, “including a 62.2% tariff on imports of Russian aluminium foil.”\(^{2189}\) Likewise, an investigation would be needed before imposing CVDs, insofar as Russia’s aluminium producer-exporters might have received injury-causing illegal subsidies. Safeguards were not contemplated, as there had been a diminution – not surge – in Russian imports of aluminium, and no Section 201 investigation. Russia had accounted for 10% of American aluminium imports before the Ukraine War; but with the War, that figure plunged to 3%.\(^{2190}\) There also had been no Section 301 investigation, so invoking that remedy was not immediately possible. Moreover, the issue with Russia was not so much of unfair acts, policies, or practices of a foreign government (Russia), which Section 301 targets, but rather a national security threat. That suggested Section 232 was the right legal justification. But, there had been no investigation under this statute, either. The strongest possibility seemed to be invocation of the IEEPA, which had been the basis for so many sanctions across the decades since its inception in 1977. Ultimately, the Biden Administration issued two companion Presidential Proclamations, citing Section 232.

JEFFREY L. SNYDER, DANIEL CANNISTRA & WERONIKA BUKOWSKI, CROWELL & MORING LLP, THE UNITED STATES ANNOUNCES NEW TARIFFS ON RUSSIAN GOODS, INCLUDING A FAR-REACHING 200% TARIFF ON ALUMINUM, ALERTS AND NEWSLETTERS (6 MARCH 2023)\(^{2191}\)

Proclamation 10522 [Adjusting Imports of Aluminum Into the United States, 88 Federal


\(^{2188}\) See U.S. Customs and Border Protection, CSMS # 55438432 - (UPDATED) GUIDANCE: Section 232 Aluminum Smelt and Cast Requirements (10 March 2023), https://content.govdelivery.com/bulletins/gd/USDHSCBP-34dec60?wgt_ref=USDHSCBP_WIDGET_2


\(^{2190}\) See U.S. Plans 200% Tariff.

Register, number 41, 13267-13276 (24 February 2023), www.govinfo.gov/content/pkg/FR-2023-03-02/pdf/2023-04470.pdf imposes, pursuant to Section 232 ..., 200 percent *ad valorem* tariffs on “aluminum articles” and “aluminum derivatives” that are products of Russia or are products that incorporate Russian aluminum. Specifically, the following products will be subject to a 200 percent *ad valorem* tariff:

1. All imports of aluminum articles or aluminum derivatives that are a product of Russia with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. Eastern Daylight Time on March 10, 2023.

2. All imports of aluminum articles or aluminum derivatives where any amount of the primary aluminum used in the manufacture of the aluminum articles or aluminum derivatives is smelted in Russia, or the aluminum articles or aluminum derivatives are cast in Russia with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. Eastern Daylight Time on April 10, 2023.

… [Under] *Proclamation 10522*, “aluminum articles” includes products classified under HTSUS Headings 7601, 7604, 7605, 7606, 7607, 7608, 7609, and Sub-Heading 7616.99.51. “Aluminum derivatives” includes products classified under six Sub-Headings: 7614.10.50, 7614.90.20, 7614.90.40, 7614.90.50, 8708.10.30, and 8708.29.21. The HTSUS headings subject to the *Proclamation* may be updated or further revised in the future. [Examine the HTSUS and note the breadth of the 4- and 6-digit categories subject to the 200% levy.]

The *Proclamation* states that “importers shall provide to U.S. Customs and Border Protection (CBP) information necessary to identify the countries where the primary aluminum used in the manufacture of aluminum articles imports … and derivative aluminum articles … are smelted” and that “CBP shall implement the smelt and cast information requirements as soon as practicable.” … [I]t is possible that CBP will take a rigorous approach to supply chain tracing. The language of *Proclamation 10522* appears to supersede country of origin and substantial transformation rules with respect to any products manufactured in third countries by targeting products in which any amount of Russian aluminum is incorporated. *Proclamation 10522* does not refer to any *de minimis* levels of aluminum or other exceptions to this language. …

The issuance of *Proclamation 10522* comes on the heels of a Court of Appeals for the Federal Circuit decision reversing a Court of International Trade opinion that held that a *Proclamation* issued pursuant to Section 232 during the Trump Administration fell outside of the President’s delegated authority and was thereby invalid. [This case, *PrimeSource Building Products, Inc. v. United States*, No. 21-2066 (Fed. Cir., 7 February 2023), is excerpted in a separate Chapter.] The issuance of *Proclamation 10522* appears to indicate that the Biden Administration will continue to use Section 232 as a tool in its trade policy.

*Proclamation 10523 [Increasing Duties on Certain Articles From the Russian Federation,
IX. Wave Seventeen: Targeting Repurposed Goods and Sanctions Evasion

By February 2023, no less than 30 Allies had joined the U.S. in what had become the most comprehensive sanctions regime against any major country in human history. (As discussed in separate Chapters, restrictions on Iran and North Korea were all-encompassing, too, but they were minor players in the world trading system.) Expectedly, Russia devised clever ways to blunt the effects of the sanctions. One method was to use dual-use items, changing their purpose from civilian to military. Another method was to conceal transactions:

… in a speech … at the Council on Foreign Relations, Wally Adeyemo, the Deputy Treasury Secretary, said the United States would be working “to identify and shut down the specific channels through which Russia attempts to equip and fund its military.”

“Our counter-evasion efforts will deny Russia access to the dual-use goods being used for the war and cut off these repurposed manufacturing facilities from the inputs needed to fill Russia’s production gaps,” he said.

…

The actions that the United States has taken against Russia in partnership with more than 30 countries constitute the broadest set of sanctions and export controls ever imposed against a major economy. But this regime still has its limits.

One year into the war, the Russian economy is stagnant, but not crippled. The country has lost direct access to coveted Western consumer brands and imports of the most advanced technology, like semiconductors. But individuals and companies around the world have stepped in to provide Russia with black market versions of these same products, or cheaper alternatives made in China or other countries.

Goods appear to be finding their way to Russia, just through a longer route. Exports from European countries to countries like Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Turkmenistan, and Uzbekistan have exploded, as have exports from those countries to Russia…. Both this data [on trade volumes], and Russian tax collections, suggest that the country’s
overall imports have essentially recovered to pre-war levels….

… [T]he United States and its Allies appear to have had limited success in stopping the trade of so-called dual-use technologies that can be used in both military equipment and consumer goods.

The United States included many types of dual-use goods in the export controls it issued against Russia last February [2022], because the goods can be repurposed for military uses. Aircraft parts that civilian airlines can use, for example, may be repurposed by the Russian Air Force, while semiconductors in washing machines and electronics might be used for tanks or other weaponry.

“While we are concerned about Russia’s deepening ties with them, Beijing cannot give the Kremlin what it does not have, because China does not produce the advanced semiconductors Russia needs,” Mr. Adeyemo said…. “And nearly 40 percent of the less advanced microchips Russia is receiving from China are defective.”

But Ivan Kanapathy, a former China Director for the National Security Council, said that most of what Russia needed for its weapons were less advanced chips, which are manufactured in plenty in China.

“The U.S. government is very well aware that our export control system is designed in a way that really relies on a cooperative host government, which we don’t have in this case,” Mr. Kanapathy said.

He added that it was “quite easy” for parties to circumvent export control through the use of front companies, or by altering the names and addresses of entities. “China is quite adept at that.”

Many countries – even ones otherwise friendly to the U.S. and its Allies – were potentially involved in, or the venue for, skirting of U.S. sanctions. The UAE was an example. As the Financial Times reported in March 2023, “[t]he U.S. government is worried the UAE is becoming a hub for the shipment of items such as electronics that can be repurposed to help Russia’s war effort,” including “so-called ‘re-exporting,’ where goods are routed through the UAE to sidestep restrictions.”

Manifestly, this wave of sanctions measures brought the U.S. and Allies into close confrontation with China, because – thanks to chummy Sino-Russian relations – China

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allegedly assisted Russia with dual use items and evasive tactics. (Indeed, China threatened the EU that it would retaliate against any sanctions the EU imposed on Chinese companies for their alleged assistance to Russia’s war effort.\textsuperscript{2194}) Of course, they gave China a stern warning about such assistance, plus warned China not to supply Russia with weaponry for use in Ukraine.\textsuperscript{2195} That was for good reason: the broader and deeper Chinese engagement, the more the Ukraine conflict risked expanding into other theaters, and/or putting American or Allied militaries in direct confrontation with Russian and Chinese ones.

As expected, or perhaps better said, because of the circumstances, the Biden Administration and its Allies announced a new round of sanctions targeting repurposed goods and sanctions evasion. On 24 February 2023, the one-year anniversary of Russia’s invasion, the Administration imposed new “restrictions target[ing] more than 100 entities both within Russia and worldwide, including banks and suppliers of defense equipment.”\textsuperscript{2196} Among the specific measures in this new Wave affecting Russia and third countries in Europe, the Middle East, and Asia, were:

1. The U.S. State Department imposed sanctions, such as visa restrictions, on Russian Cabinet ministers, military members, and “dozens of governors and regional chiefs,” plus “Olga Skabeyeva, a leading propagandist on state television, and Oleg Romanenko, who was appointed to oversee Ukraine’s Zaporizhzhia Nuclear Power Plant after it was seized by Russian troops” in March 2022.\textsuperscript{2197}

2. OFAC froze assets of allies of President Putin, hitting “22 Russian..."

\textsuperscript{2194} See Guy Chazan, China Vows to Retaliate Against EU Sanctions on its Companies, FINANCIAL TIMES, 9 May 2023, www.ft.com/content/7b482ea6-49ff-4212-8475-87e74a16f8e5?shareType=nongift.


\textsuperscript{2197} Steve Holland, Jonathan Landay & Andrea Shalal, U.S. Targets Russia with Sanctions, Tariffs on War Anniversary, REUTERS, 24 February 2023. www.reuters.com/world/us-targets-russia-with-sanctions-tariffs-ukraine-war-anniversary-2023-02-24/. [Hereinafter, U.S. Targets Russia with Sanctions.] See also Jonathan Landay, U.S. State Department Sanctions Target Russian Cabinet Ministers, Nuclear Arms Institutes, REUTERS, 24 February 2023, www.reuters.com/world/us/state-department-issues-hundreds-sanctions-against-russians-2023-02-24/ (reporting: “The U.S. State Department … marked the first anniversary of Russia's full-scale invasion of Ukraine by sanctioning more than 60 top Russian officials, including cabinet ministers and regional leaders, and three nuclear weapons institutes. Also targeted … were scores of other Russian officials and entities, a Russian involved in the theft of grain from Ukraine and the official who oversees its main nuclear power plant…. [T]he Department slapped U.S. visa restrictions on more than 1,200 members of the Russian military and banned entry into the United States of three military officials it accused of ‘gross human rights violations’ and their families.”).

Significantly, in March 2024, the EU announced it would raise its applied MFN tariffs to its maximum bound rates. See Andy Bounds, Paola Tamma & Raphael Minder, EU to Impose Tariffs on Russian Grain, FINANCIAL TIMES, 19 March 2024, www.ft.com/content/438dce75-98d4-4850-ba13-878de1614e03?shareType=nongift. To be sure, the EU contemplated a ban on importation of Russian grain, but that prophylactic measure would have required approval from each EU member.
individuals and 83 entities,” designating them as SDNs.

(3) BIS issued four new Final Rules amounting to a dizzying array of new and/or revised sanctions measures:

1st: Additional Sanctions Against Russia and Belarus: BIS revised sanctions on Russia and Belarus in EAR Part 746 by adding 322 HTSUS Sub-Heading classifications to the “Russian Industry Sector Sanctions.”

2nd: Military End User Additions to the Entity List: BIS added 13 more entities to its Entity List.

3rd: Russian Entity Additions to the Entity List: BIS added another 76 Russian entities to its Entity List.

Notably, “BIS backlisted Megaphone (a Public Joint Stock Company, and Russia’s second largest mobile phone company, because it tried to get U.S. technology to assist the Russian military), putting it on the Entity List, thus adding to the more than 2,500 sanctions imposed over the past year, plus putting penalties on “more than 30 people and companies from Switzerland, Germany, 

2198 U.S. Targets Russia with Sanctions. See also Karen Freifeld, Susan Heavey & Alexandra Alper, U.S. Hits Chinese, Russian Firms for Aiding Russian Military, REUTERS, 24 February 2023, www.reuters.com/world/us-commerce-targets-entities-china-other-countries-latest-russia-action-2023-02-24/ (reporting: “The actions by the U.S. Commerce Department aim[ed] ‘to cut off the Russian defense industrial base and military from even low-technology consumer goods Russia seeks to obtain to sustain the war effort,’ it said. … The blacklisted companies also include[d] two Chinese satellite companies, Spacety Co Ltd, and China HEAD Aerospace Technology Co,…… … The agency also imposed new export curbs on Iran, targeting Russia’s use of Iranian-made drones in Ukraine. Of the scores of new additions to its trade restriction list, 79 were Russia-based, five are listed under China, and two are based in Canada. Another three entities are based in France, Luxembourg, and the Netherlands. Five of the Russian entities were listed for providing support for what the United States called ‘filtration operations’ in occupied areas of Ukraine, which include ‘the use of biometric technology in suppressing Ukrainian resistance and enforcing loyalty among the Ukrainian population in occupied areas.’”) [Hereinafter, U.S. Hits Chinese, Russian Firms for Aiding.]


and other nations for helping Moscow finance its war against Ukraine." In respect of the new placements by BIS on the Entity List, there were 79 Russian entities (including Megaphone), five Chinese entities, two Canadian entities, one French entity, one Luxembourg entity, and one Netherlands entity. Thus, any prospective export, reexport, or transfer to these entities that was subject to the EAR required a license from BIS. Further, BIS stated the MEU FDP Rule for Russia and Belarus applied to 66 of these 79 Russian entities.

4th: Export Controls on Iranian UAVs and Their Use by Russia: BIS imposed controls to address Russia’s use of UAVs against Ukraine by (a) adding Iranian entities to the Entity List, (b) creating a new list of EAR 99 items used in Iranian UAV production, (c) subjecting these items to Russia/Belarus FDP controls and a new Iran FDP Rule when destined to Russia, Belarus, or Iran, and (d) adding new controls for foreign-produced items specified in certain ECCNs when destined for Iran.

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2202 U.S. Targets Russia with Sanctions. See also Karen Freifeld, Susan Heavey & Alexandra Alper, U.S. Hits Chinese, Russian Firms for Aiding Russian Military, REUTERS, 24 February 2023, [www.reuters.com/world/us-commerce-targets-entities-china-other-countries-latest-russia-action-2023-02-24/](https://www.reuters.com/world/us-commerce-targets-entities-china-other-countries-latest-russia-action-2023-02-24/) (reporting: “The actions by the U.S. Commerce Department aim[ed] ‘to cut off the Russian defense industrial base and military from even low-technology consumer goods Russia seeks to obtain to sustain the war effort,’ it said. … The blacklisted companies also includ[e] two Chinese satellite companies, Spacety Co Ltd, and China HEAD Aerospace Technology Co,……. The agency also imposed new export curbs on Iran, targeting Russia’s use of Iranian-made drones in Ukraine. Of the scores of new additions to its trade restriction list, 79 were Russia-based, five are listed under China, and two are based in Canada. Another three entities are based in France, Luxembourg, and the Netherlands. Five of the Russian entities were listed for providing support for what the United States called ‘filtration operations’ in occupied areas of Ukraine, which include ‘the use of biometric technology in suppressing Ukrainian resistance and enforcing loyalty among the Ukrainian population in occupied areas.’”). [Hereinafter, U.S. Hits Chinese, Russian Firms for Aiding.]


2205 February Entity List Additions.

2206 February Entity List Additions.

2207 February Entity List Additions.

2208 February Entity List Additions.

(4) The U.S. increased tariffs on over 100 Russian-origin metal, mineral, and chemical products, all worth about $2.8 billion, including a 200% tariff on Russian-origin aluminum and derivatives (effective 10 March), and primary aluminum (effective 10 April), thus effectively banning these products from entry into the U.S.

(5) The Treasury limited the activities of Russian banks, and impeded Russia’s ability to manufacture arms, via (inter alia) export controls “on nearly 90 Russian and third-country companies, including in China, for engaging in sanctions evasion in support of Russia’s defense sector and prohibit[ed] them from buying items like semiconductors.”

2210 U.S. Targets Russia with Sanctions.
2211 See U.S. to Impose 200% Tariff on Aluminum from Russia – White House, REUTERS, 24 February 2023, www.reuters.com/markets/commodities/us-impose-200-tariff-aluminum-russia-white-house-2023-02-24/ (reporting: “Russian aluminum is produced by Rusal …, which accounts for about 6% of global supplies,” observing “[n]either Russian metal nor the companies that produce it have been targeted by sanctions imposed on some Russian companies in response to Russia sending troops into Ukraine last year [2022],” and noting Alcoa, a major competitor of Rusal, “‘welcome[d] the imposition of tariffs by the U.S. government on Russian aluminum,’ because Alcoa ‘continue[d] to advocate for sanctions as the most effective means for the government to take action against Russia and level the playing field for U.S. producers.’” Manifestly, Alcoa’s position was second rationale was self-interested.). As a percentage of America’s imports of aluminum, Russian aluminum had fallen from 14.6% in 2017 to 8.9% in 2018 to 4.4% in 2022. See id. In 2018, “U.S. Treasury Department sanctions on Rusal froze the bulk of the company’s exports….”

2212 U.S. Targets Russia with Sanctions. See also Andrea Shalal & Jonathan Landay, U.S. Treasury Sanctions Russian Mining Sector, Goes After Sanctions Evasion, REUTERS, 24 February 2023, www.reuters.com/world/us-treasury-sanctions-russian-mining-sector-goes-after-sanctions-evasion-2023-02-24/ (reporting: “Treasury said the latest measures were aimed at impeding Russian President Vladimir Putin’s ability to raise capital to fund the war by targeting banks, wealth management-related firms and individuals in Russia’s financial services sector. The action, which freezes any U.S. assets of those targeted and generally bars Americans from dealing with them, marks the latest round of U.S. sanctions on Russia. … Among other entities hit … were more than a dozen Russian banks. They included the Moscow-based Credit Bank of Moscow Joint Public Stock Company, Russia’s largest non-state public bank, which the European Union fully blocked in December [2022]. … Another hit was MTS Bank, which is located in Moscow and Abu Dhabi…. Other new targets included Walter Moretti, a Swiss-Italian business executive and a network of companies involved in secretly purchasing sensitive Western technology for Russian intelligence services and the military…. A German, an Italian, a Swiss Italian and four Swiss who worked with Moretti also were sanctioned…. Treasury also sanctioned the founders of Russian wealth-management firm Confideri Pte Ltd, Russian-Israeli citizens Olga Borisovna Raykes and Marat Maratovich Savelov, who also own a firm in Vienna, Austria.”). Moreover, “in a significant widening of Russia-related sanctions, Treasury announced a new determination by … OFAC that allows sanctions on any individual or entity operating in Russia’s metals and mining sector.” Under that authority, OFAC immediately “hit four mining and metals sector companies, including TPZ-Rondol, a unit of Russia’s largest ammunition maker, for producing weapons for the Russian military, including the navy…..”

The February 2023 “Metals and Mining Determination” was a designation by OFAC of a new authority under Section 1(a)(i) of Executive Order 14024 (which is discussed earlier). This Determination: added “metals and mining” to its list of sectors of the Russian Federation economy in which it can designate non-U.S. persons simply for “operat[ing] or hav[ing] operated in” those sectors…. In simultaneously issued FAQs for the Metals and Mining Determination, OFAC defined the “metals and mining sector” to include “any act, process, or industry of
Roughly one week later, in early March, BIS added 37 entities to its Entity List, on the grounds they contributed to Russia’s military or defense industrial base, (2) supported China’s military modernization, and/or facilitated or engaged in human rights abuses in Burma and in China. These 37 new listings were from Belarus (1), Burma (3), China (28), Pakistan (4), Russia (1), and Taiwan (1), thus illustrating how global the American sanctions regime associated with the war in Ukraine had become. Not surprisingly, the additions by BIS to its Entity List, and by OFAC to its SDN designations, for companies or individuals connected to sanctions evasions continued.

extracting, at the surface or underground, ores, coal, precious stones, or any other minerals or geological materials in the Russian Federation, or any act of procuring, processing, manufacturing, or refining such geological materials, or transporting them to, from, or within the Russian Federation.”

OFAC’s guidance also clarifies that its Metals and Mining Determination “exposes persons that operate or have operated in an identified sector to sanctions risk; however, a sector determination does not automatically impose sanctions on all persons who operate or have operated in the sector.” This comes in contrast to determinations pursuant to Executive Order 14071 Section 1(a)(ii) [discussed earlier], which automatically prohibit U.S. persons from exporting, re-exporting, selling, or supplying, directly or indirectly, certain categories of services to persons located in the Russian Federation.

See Caroline E. Brown, Weronika Bukowski, Carlton Greene, Jason Prince, Anand Sithian & David (Dj) Wolf Crowell & Moring LLP, The United States Imposes New Sanctions and Export Controls Targeting Russia and Belarus, Issues Joint Compliance Guidance, and Announces Corporate Compliance with Sanctions and Export Controls as an Enforcement Priority, All Alerts & Newsletters (10 March 2023), www.crowell.com/NewsEvents/AlertsNewsletters/all/The-United-States-Imposes-New-Sanctions-and-Export-Controls-Targeting-Russia-and-Belarus-Issues-Joint-Compliance-Guidance-and-Announces-Corporate-Compliance-with-Sanctions-and-Export-Controls-as-an-Enforcement-Priority. 2213 See U.S. Department of Commerce, Bureau of Industry and Security, Additions and Revisions of Entities to the Entities List, 88 Federal Register number 43, 13673-13686 (6 March 2023), www.govinfo.gov/content/pkg/FR-2023-03-06/pdf/2023-04558.pdf?utm_source=federalregister.gov&utm_medium=email&utm_campaign=subscription+mailing+list. 2214 See, e.g., U.S. Department of Commerce, Bureau of Industry and Security, Additions and Revisions of Entities to the Entity List, 88 Federal Register number 73, 23332-23340 (17 April 2023), www.govinfo.gov/content/pkg/FR-2023-04-17/pdf/2023-07840.pdf (adding to the Entity Lise 28 entities from China, Armenia, Malta, Russia, Singapore, Spain, Syria, Turkey, UAE, and Uzbekistan; these companies, which included semiconductor and other technology firms, attempted to evade export controls or acquired or attempted to acquire U.S.-origin items in support of Russia’s military or defense industrial base; several of these companies also were designated as MEUs, thus subjecting them to licensing requirements under the Russia/Belarus MEU rules); U.S. Department of the Treasury, Office of Foreign Assets Controls, Russia-related Designations; Issuance of Russia-related General Licenses and Frequently Asked Question; Revocation of Russia-related General License (12 April 2023), https://ofac.treasury.gov/recent-actions/20230412 (adding 100 firms and persons to the SDN list for helping Russia import critical defense technologies and access the international financial system, including a facilitation network led by Russian billionaire Alisher Usmanov, who already was subject to sanctions).

Ultimately, the EU joined the U.S. in sanctioning Chinese firms that aided and abetted Russia’s military apparatus including through providing electronic or technological equipment, and/or re-exporting goods to Russia from China. See Alberto Nardelli, EU Proposes Curbs on Three Chinese Firms for Aiding Russia, BLOOMBERG, 12 February 2024, www.bloomberg.com/news/articles/2024-02-12/eu-proposes-curbs-on-three-chinese-firms-for-aiding-russia?oref=7sxw9sxl (reporting: “The European Union has proposed new trade restrictions on about two dozen firms, including three based in China, accused of
All such measures, said the White House, were designed “to disrupt Russian financial institutions, officials, and authorities from ‘illegitimately operating in Ukraine,’ and ‘stop those helping Russia exploit loopholes to get sanctioned materials.’”2215 And, in a resolute statement, the G-7 said not only were the actions aimed at “third-country actors” that “materially support[ed] Russia’s war in Ukraine,” but also that its support for Ukraine was “unwavering” and would last “as long as it takes.”2216 Thus, intoned the G-7, “We call on third-countries or other international actors who seek to evade or undermine our measures to cease providing material support to Russia’s war, or face severe costs.”2217 To back its rhetoric with respect to anti-circumvention, the G-7 established an “Enforcement Coordination Mechanism,” which the U.S. initially chaired.2218

Both the violence in Ukraine, and the sanctions attendant to it, had become wars of attrition. Which side could inflict the most pain on the other? Which side could hang on the longest? In considering these and related questions, critically evaluate the first-ever Tri-Seal Compliance Note (excerpted below). Three Departments jointly issued this Note to (1) identify warning signs of sanctions evasion behavior, and (2) exhort the establishment of rigorous internal compliance procedures. Their audience was the private sector in the U.S. and around the world. That was because companies are the first line of defense in enforcing trade sanctions and export controls.

DEPARTMENT OF COMMERCE, DEPARTMENT OF THE TREASURY, AND DEPARTMENT OF JUSTICE, TRI-SEAL COMPLIANCE NOTE: CRACKING DOWN ON THIRD-PARTY INTERMEDIARIES USED TO EVADE RUSSIA-RELATED SANCTIONS AND EXPORT CONTROLS (2 MARCH 2023)2219

Overview

Over the year following Russia’s illegal and unprovoked war against Ukraine, the U.S. government has used its economic tools to degrade Russia’s economy and war machine. Along with international partners and allies, the Department of the Treasury’s Office of Foreign Assets Control (OFAC) and the Department of Commerce’s Bureau of Industry and Security (BIS) have imposed sanctions and export controls of an unprecedented scope and scale … to degrade Russia’s ability to wage its unjust war and to prevent it from taking military action elsewhere.

supporting Russia’s war efforts in Ukraine. If adopted, it would be the first time the EU has imposed restrictions on companies in mainland China since Russia invaded Ukraine. The list includes firms in Hong Kong, Serbia, India, and Turkey, some of which are also being targeted for the first time….“). The EU was slower to act, however, not only because several EU companies (e.g., German ones, such as Volkswagen – China was its largest market) had strong trade interests in China and feared retaliation against them by the CCP, but also because all 27 EU members had to agree on sanction measures.

2215 New U.S. Sanctions for Russia.
2216 Quoted in G7 Says It Is Taking Action Against Countries Supporting “Russia’s War,” REUTERS, 24 February 2023, www.reuters.com/world/europe/g7-says-it-is-taking-action-against-countries-supporting-russias-war-2023-02-24/. [Hereinafter, G7 Says It is Taking Action.]
2217 Quoted in G7 Says It is Taking Action.
2218 U.S. Targets Russia with Sanctions.
2219 https://home.treasury.gov/system/files/126/20230302_compliance_note.pdf. (Footnotes omitted.)
The Department of Justice (DOJ) has matched these unprecedented restrictions with equally unprecedented enforcement efforts to aggressively prosecute those who violate U.S. sanctions and export control laws, led by the work of Task Force KleptoCapture.

Despite these efforts, malign actors continue to try to evade Russia-related sanctions and export controls. One of the most common tactics is the use of third-party intermediaries or trans-shipment points to circumvent restrictions, disguise the involvement of Specially Designated Nationals and Blocked Persons (SDNs) or parties on the Entity List in transactions, and obscure the true identities of Russian end users. …

**Detecting Sanctions and Export Control Evasion**

It is critical that financial institutions and other entities conducting business with U.S. persons or within the United States, or businesses dealing in U.S.-origin goods or services or in foreign-origin goods otherwise subject to U.S. export laws, be vigilant against efforts by individuals or entities to evade sanctions and export control laws. Effective compliance programs employ a risk-based approach to sanctions and export controls compliance by developing, implementing, and routinely updating a compliance program, depending on an organization’s size and sophistication, products and services, customers and counterparties, and geographic locations. Companies such as manufacturers, distributors, resellers, and freight forwarders are often in the best position to determine whether a particular dealing, transaction, or activity is consistent with industry norms and practices, and they should exercise heightened caution and conduct additional due diligence if they detect warning signs of potential sanctions or export violations.

Equally important is the maintenance of effective, risk-based compliance programs that entities can adopt to minimize the risk of evasion. These compliance programs should include management commitment (including through appropriate compensation incentives), risk assessment, internal controls, testing, auditing, and training. These efforts empower staff to identify and report potential violations of U.S. sanctions and export controls to compliance personnel such that companies can make timely voluntary disclosures to the U.S. government. Optimally, compliance programs should include controls tailored to the risks the business faces, such as diversion by third-party intermediaries.

Common red flags can indicate that a third-party intermediary may be engaged in efforts to evade sanctions or export controls, including the following:

1. Use of corporate vehicles (i.e., legal entities, such as shell companies, and legal arrangements) to obscure (i) ownership, (ii) source of funds, or (iii) countries involved, particularly sanctioned jurisdictions;
2. A customer’s reluctance to share information about the end use of a product, including reluctance to complete an end-user form;
3. Use of shell companies to conduct international wire transfers, often involving financial institutions in jurisdictions distinct from company
registration;
(4) Declining customary installation, training, or maintenance of the purchased item(s);
(5) IP addresses that do not correspond to a customer’s reported location data;
(6) Last-minute changes to shipping instructions that appear contrary to customer history or business practices;
(7) Payment coming from a third-party country or business not listed on the End-User Statement or other applicable end-user form;
(8) Use of personal email accounts instead of company email addresses;
(9) Operation of complex and/or international businesses using residential addresses or addresses common to multiple closely-held corporate entities;
(10) Changes to standard letters of engagement that obscure the ultimate customer;
(11) Transactions involving a change in shipments or payments that were previously scheduled for Russia or Belarus;
(12) Transactions involving entities with little or no web presence; or
(13) Routing purchases through certain trans-shipment points commonly used to illegally redirect restricted items to Russia or Belarus. Such locations may include China (including Hong Kong and Macau) and jurisdictions close to Russia, including Armenia, Turkey, and Uzbekistan.

Further, entities that use complex sales and distribution models may hinder a company’s visibility into the ultimate end-users of its technology, services, or products.

Best practices in the face of such risks can include screening current and new customers, intermediaries, and counterparties through the Consolidated Screening List and OFAC Sanctions Lists, as well as conducting risk-based due diligence on customers, intermediaries, and counterparties. Companies should also regularly consult guidance and advisories from Treasury and Commerce to inform and strengthen their compliance programs.

**Civil Enforcement and Designation Actions**

Companies should also review BIS and OFAC enforcement and targeting actions, as they often reflect certain tactics and methods used by intermediaries engaged in Russia-related sanctions and export evasion. In November 2022, for example, OFAC designated individuals and entities involved in a global procurement network maintained by a Russian microelectronics company, AO PKK Milandr, which used a front company to transfer funds from Milandr to another front in a third country, which purchased microchips to divert to Russia. Another front company elsewhere also purchased Asian-made components for Milandr. OFAC’s civil enforcement actions also illustrate a range of sanctions evasion techniques employed across multiple sanctions programs, including falsifying transactional documents, omitting information from internal correspondence, and shipping goods through third countries.¹

Similarly, BIS imposed an administrative penalty of $497,000 on Vorago Technologies,
an Austin, Texas company, for shipping integrated circuit components, which are critical components in missiles and military satellites, to Russia via a Bulgarian front company. BIS has also imposed restrictions on seven Iranian drone entities in January 2023 due to their production of Iranian unmanned aerial vehicles (“UAVs”) used by Russia against Ukraine. These Iranian UAV entities, which, according to public reporting, had been using diverted U.S.-branded parts and components, were also sanctioned by OFAC.

**Criminal Enforcement of Russia-Related U.S. Sanctions and Export Control Laws**

DOJ has pursued criminal charges against those who it alleges are using front companies and intermediate trans-shipment points to evade Russia-related U.S. sanctions and export controls. These cases highlight additional tactics used for evasion purposes. For example, in October 2022, DOJ unsealed an indictment charging six Russian nationals and one Spanish national with multiple offenses arising from the defendants’ alleged operation of a network of shell companies designed to enable them to illegally export military and sensitive dual-use items to Russia and embargoed Venezuelan oil to Russian and Chinese end users. Two months later, DOJ unsealed an indictment charging five Russian nationals, including a suspected Federal Security Service officer, and two U.S. citizens with violating U.S. sanctions and export controls in a global procurement and money laundering scheme for the Russian government.

In both cases, DOJ alleges that the defendants used shell companies and trans-shipment points in third-party countries to evade sanctions and procure powerful dual-use items for use by the Russian defense sector. The sensitive items at issue included advanced electronics and sophisticated testing equipment used in quantum computing, hypersonic, and nuclear weapons development as well as advanced semiconductors and microprocessors used in fighter aircraft, missile systems, smart munitions, radar, and satellites. In one of the cases, the indictment alleges that U.S.-manufactured component parts were found in seized Russian weapons platforms in Ukraine.

The allegations in the indictments describe tactics that the defendants purportedly employed to evade detection, including the following:

1. Claiming that shell companies located in third countries were intermediaries or end users; in one case, DOJ alleges that only one of the five intermediary parties had any visible signage and consisted of an empty room in a strip mall;
2. Claiming that certain items would be used by entities engaged in activities subject to less stringent oversight; on at least one occasion, a defendant allegedly claimed that an item would be used by Russian space program entities, when in fact the item was suitable for military aircraft or missile systems only;
3. Dividing shipments of controlled items into multiple, smaller shipments to try to avoid law enforcement detection;
4. Using aliases for the identities of the intermediaries and end users;
(5) Transferring funds from shell companies in foreign jurisdictions into U.S. bank accounts and quickly forwarding or distributing funds to obfuscate the audit trail or the foreign source of the money;

(6) Making false or misleading statements on shipping forms, including underestimating the purchase price of merchandise by more than five times the actual amount;

(7) Claiming to do business not on behalf of a restricted end user but rather on behalf of a U.S.-based shell company.

Conclusion

Given the proliferation of sanctions and export controls imposed in response to Russia’s unjust war, multinational companies should be vigilant in their compliance efforts and be on the lookout for possible attempts to evade U.S. laws. The U.S. government has a variety of tools to crack down on evasion efforts, and … will not hesitate to pursue criminal prosecutions, administrative enforcement actions, or additional designations where the circumstances so warrant. Businesses of all stripes should act responsibly by implementing rigorous compliance controls, or they or their business partners risk being the targets of regulatory action, administrative enforcement action, or criminal investigation.

U.S. DEPARTMENT OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, OFAC ALERT, POSSIBLE EVASION OF RUSSIAN OIL PRICE CAP

… OFAC is issuing this alert to warn U.S. persons about possible evasion of the price cap on crude oil of Russian Federation origin (Russian oil), particularly involving oil exported through the Eastern Siberia Pacific Ocean (ESPO) pipeline and ports on the eastern coast of the Russian Federation.

…

For ship owners, protection and indemnity clubs, and flagging registries:

Deceptive Practices, Including AIS Manipulation to Disguise Russian Port Calls: … OFAC is aware of reports that ESPO and other crudes exported via Pacific ports in the Russian Federation, such as Kozmino, may be trading above the price cap and may be using covered services provided by U.S. persons. These U.S. service providers may be unaware that they are providing covered services involving Russian oil purchased above the price cap, as the non-U.S. persons involved in the exports may have provided incomplete or false documentation or used other deceptive practices.

Specifically, some tankers may be manipulating their Automatic Identification Systems (AIS), a practice known as “spoofing,” to disguise the fact that they have called at the port of Kozmino or other ports on the Russian Federation’s eastern coastline. For example, basic vessel tracking data may show the tanker at one location, but more sophisticated reporting from maritime intelligence services may show that the vessel called at the port of Kozmino

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or another eastern port in the Russian Federation. Spoofing can also be used to mask ship-to-ship transfers carried out to disguise the origin of Russian oil. **U.S. persons providing covered services to tankers should view AIS manipulation that disguises a tanker’s port of call in the Russian Federation as evidence of possible evasion of the price cap.**

**Recommended Measures to Ensure Price Cap Compliance:** Good-faith actors, including shipowners and other service providers, can use the recordkeeping and attestations described in the Price Cap Guidance to be afforded safe harbor from OFAC enforcement if someone causes them to inadvertently violate the price cap determinations. At the same time, U.S. service providers, especially ship owners, protection and indemnity clubs, and flagging registries, should be mindful of the risk of evasion for some ESPO and other crude exports via Pacific ports in the Russian Federation and should take appropriate due diligence measures, such as:

-- Disseminating this alert to counterparties or members.
-- Using maritime intelligence services to improve detection of AIS manipulation.

**For commodities brokers/oil traders:**

**Opaque Shipping Costs:** As noted in the Price Cap Guidance, shipping, freight, customs, and insurance costs are not included in the price caps. The failure to itemize these costs can be used to obfuscate the fact that Russian oil was purchased above the price cap.

**Recommended Measures to Ensure Price Cap Compliance:** In order for Tier 1 actors (defined in the Price Cap Guidance as actors who regularly have direct access to price information, such as commodities traders) to be afforded the safe harbor explained in the Price Cap Guidance, they must retain documents showing that Russian oil or Russian petroleum products were purchased at or below the relevant price cap. Examples of these documents include invoices, contracts, and receipts/proof of payment. OFAC notes that such documents do not need to make any mention of the price cap in order for the Tier 1 actor to be afforded the safe harbor. **However, shipping, freight, customs, and insurance costs must be invoiced separately from the purchase price of the Russian oil and must be at commercially reasonable rates.** A refusal by a counterparty to provide documentation showing Russian oil or Russian petroleum products were purchased at or below the price cap (when, for example, the total price inclusive of other costs is above the cap) should be considered a red flag for possible evasion of the price cap.

**X. Forever Sanctions, Just War Theory, and Future Litigation**

None of the American sanctions restrained agricultural or medical exports, NGO activities, COVID-19 relief, the free flow of information, humanitarian assistance, or other support to people affected by Russia’s war against Ukraine. Indeed, OFAC made that clear on 19 April 2022. Similary, on 25 and 27 April, respectively, the U.K. and EU

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2221 See U.S. Department of the Treasury, Office of Foreign Assets Control, Fact Sheet: Preserving Agricultural Trade, Access to Communication, and Other Support to Those Impacted by Russia’s War Against Ukraine (19 April 2022),

eliminated all tariffs on Ukrainian-origin merchandise.\textsuperscript{2222} But, these moves, which were both logical and necessary to ensure sanctions were not over-inclusive and thereby impactful on the innocent, were nowhere close to signalling an end-game to U.S. measures and Russian counter-measures, nor indeed to the violent conflict. Put differently, these moves were consistent with the Just War Theory criterion of minimizing collateral damage and harm to innocents. But (as in the case with Iran, discussed in separate Chapters), when sanctions go on seemingly forever, are they just? Do they not signal a failure on all sides to seek genuine peace?

One year later, these questions became ever-more poignant. That was because the U.S. pushed the G-7 to change the baseline presumption about exports to Russia subject to sanctions:

U.S. officials … expect G7 members will agree to adjust their approach to sanctions so that, at least for certain categories of goods, all exports are automatically banned unless they are on a list of approved items.

The Biden Administration has previously pushed G7 allies to reverse the Group’s sanctions approach, which today allows all goods to be sold to Russia unless they are explicitly blacklisted.

That change could make it harder for Moscow to find gaps in the sanctions regime.

While the Allies have not agreed to apply the more-restrictive approach broadly, U.S. officials expect that in the most sensitive areas for Russia’s military G7 members will adopt a presumption that exports are banned unless they are on a designated list.

Some U.S. Allies have resisted the idea of banning trade broadly and then issuing category-by-category exemptions.

The European Union, for instance, has its own approach….


\url{https://home.treasury.gov/system/files/126/russia_fact_sheet_20220419.pdf}. For additional details, including circumvention possibilities, concerning price cap enforcement, see \textit{Fact Box: Why Russian Oil and Gas Price Cap is Easier Said than Done}, \url{www.reuters.com/business/energy/why-russian-oil-gas-price-cap-is-easier-said-than-done-2022-06-28/} (reporting: “Imposing a price cap on Russian oil sales could be done via shipping insurance…. The International Group of Protection & Indemnity Clubs in London covers around 95% of the global oil shipping fleet. However, traders point to an abundance of parallel fleet that can handle Russian oil using non-Western insurance. The next obstacle would be China and India which have been accepting Russian insurance. State-controlled Russian National Reinsurance Company (RNRC) has become the main reinsurer of Russian ships.”).
“The sometimes-discussed approach of ‘we ban everything first and allow exceptions’ will not work in our view,” said one top German government official. “We want to be very, very precise and we want to avoid unintended side effects.”

To borrow terminology from GATS and GPA scheduling, the U.S. sought a shift from a more permissive Negative List approach to a more restrictive Positive List one. That shift bespoke the long-term hardening of sanctions.

Perhaps the question – would these sanctions continue forever, even if they seemed ineffectual in incentivizing a peaceful resolution to the war? – seemed not to matter to America or its Allies. They were as locked into sanctions as Russia was to its narrative about Ukraine. “Keep up increasing the pressure,” was their narrative. So, for example, in May 2023, following a G-7 meeting, the U.S., U.K., and other Allies announced new measures against key entities and sectors of the Russian and Belarussian military-industrial complex that had been complicit in Russia’s war effort, sanctions evasion, and/or theft of Ukrainian grain, and/or bolstering its energy revenues. Specifically, they:

1. Expanded the number of sanctioned entities by over 300. For instance, BIS put 71 new entities on the Entity List, 69 of which it gave Footnote 3 designations as MEUs, and added Russian-occupied Crimea to the FDP Rule. To its existing sectoral sanctions (which were accounting, aerospace, construction, corporate and trust formation, defense, electronics, engineering, financial services, management consulting, marine, metals and mining, quantum computing, technology), OFAC added architecture, engineering, construction, manufacturing, and transportation, to encompass more individuals and/or firms deemed to be supporting Russia, and listed nearly 200 new targets (aircraft, entities, individuals, and vessels) as SDNs, thus blocking the property concerned.

2. Increased by 1,224 the items subject to EAR 99 industrial and commercial controls (for example, advanced fibers for the reinforcement of composite materials, such as carbon fibers, instruments, and electronics) by including the entirety of HTSUS Chapters 84-85 and 90 to EAR restrictions. Consequently, over 2,000 product categories, many from industries not traditionally subject to export controls, along with services, were subject to export licensure – which, most likely, BIS would be denied. In October 2023, BIS added another seven HTS codes covering common high-priority items (including antennas, antenna reflectors, and certain ball bearings) for exporters to monitor for possible diversion to Russian weapons programs.

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2224 OFAC did so pursuant to Section 1(a)(i) of Executive Order 14024 (discussed in an earlier Chapter), and as to architectural and engineering services, via its determination under Executive Order 14024 (also discussed in an earlier Chapter).

2225 See U.S. Department of Commerce, Bureau of Industry and Security, Commerce, International Partners Continue Coordination in Response to Russia’s Illegal Invasion of Ukraine (19 September 2023),
(3) Aligned measures so as to achieve better coordination across sanctioning countries.

(4) Informed financial institutions of new export controls evasion risks and outlining
due diligence measures to mitigate these risks.2226

With respect to mining, the G-7 also forged a “‘traceability’ initiative’ to stop Moscow bypassing sanctions by using India, which operates the world’s largest diamond-polishing industry, as a middleman.”2227

Russia itself was “the biggest producer of rough diamonds cut from hundreds of mines beneath the Siberian permafrost, where a third of the world's diamond supply comes from,” and “diamonds mined in Russia’s north-east … [were] used in engagement rings, necklaces, and earrings all over the world.”2228 In April 2023, America “banned imports of rough diamonds from Russia and imposed sanctions on Alrosa,” which was the Russian company, mainly owned by Russian government entities, that produces over 90% of Russian diamonds.2229 The EU followed. In November 2023, as part of its twelfth round of Russia sanctions the European Commission added diamonds to a list of banned Russian-origin imports that, since 2022, had included caviar, coal, gas, gold, and vodka,2230 and it nailed Russia’s largest diamond maker (Alrosa) – targeting it for sanctions, that is, freezing its assets held in the EU, and banning from travel to the EU its Chief Executive (Pavel Marinichev).2231

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2227 Jim Pickard, Henry Foy & Demetri Sevastopulo, G7 to Impose Fresh Sanctions on Russian Ships, Aircraft and Diamonds, FINANCIAL TIMES, 18 May 2023, www.ft.com/content/fa5b007c-b09b-422e-a011-b102332ab3ac?shareType=nongift; Sofia Bettiza, Ukraine War: Russian Diamonds Set for Ban Under New EU Sanctions, BBC NEWS, 15 November 2023, www.bbc.com/news/world-europe-67413029. [Hereinafter, Ukraine War: Russian Diamonds Set for Ban.]

2228 See Ukraine War: Russian Diamonds Set for Ban.

2229 See Ukraine War: Russian Diamonds Set for Ban.

2230 See Ukraine War: Russian Diamonds Set for Ban.

2231 See Paola Tamma & Anastasia Stognei, EU Adds Russia’s Largest Diamond Maker to Sanctions List over Ukraine War, FINANCIAL TIMES, 3 January 2024, www.ft.com/content/7e4b3a7c-fe5c-42c9-a2ff-c270b6d1f9ae?shareType=nongift (reporting: “The designation … is part of a G7 ban on imports of Russian diamonds that came into effect on January 1. The ban exempts Russian diamonds processed in third countries [e.g., India] – but the exemption will be phased out by September 1 this year [,2024]. By listing Alrosa and its Chief, the EU seeks ‘to deprive Russia of this important revenue source,’ EU Foreign Policy Chief Josep
In effect, the Commission stared down Antwerp, the “diamond capital of the world,” a status that Belgium had “been keen to protect.” Predictably, the consequence of the European ban, on top of the American one, would be an outward shift of the demand among jewellery producers and end-consumers for non-Russian-origin (e.g., Canadian) diamonds. After all, “Western countries accounted for about 70% of global demand for diamond jewellery….” So, Antwerp dealers would need to re-orient their supply chains, and prices would rise. But whether India would join the U.S. and EU was dubious: over one half million Indians were employed in the diamond industry. The Modi Administration – with general elections on the horizon – did not want them to be made redundant owing to sanctions.

Days after the May 2023 G-7 meeting, the U.S. further expanded the SDN list, “imposing sanctions on … members of a Russian intelligence-linked group for their role in Moscow’s efforts to destabilize democracy and influence elections in Moldova.”

By September 2023, the U.S. and its Allies – the Global Export Control Coalition – proclaimed that as a result of their measures:

exports to Russia have decreased by 52.3 percent ($81.1 billion), which has led to numerous challenges for the Russian defense industrial base including the bankruptcy of Russia’s most advanced semiconductor producer, ongoing struggles with supplies to repair, replace, and replenish a variety of military equipment, and efforts to acquire weapons and other support from pariah states like Iran and North Korea.

All true. But, of course, a 52.3% sanction-induced slash to Russia-destined exports had not altered Russia’s behavior. They seemed to have made Russia’s prosecution of the war more inconvenient, more expensive – and, arguably, more determined.

Notably, the EU commented as early as March 2023 that the scope of the sanctions was so wide there was almost nothing and no one left to sanction: Josep Borrell, the High Representative of the Union for Foreign Affairs and Security Policy, said “There is not much more to do from the point of view of sanctions, but we can continue to increase financial and military support.” That was why focus shifted to tightening the sanctions

Borrell wrote… … The company has already been subject to similar sanctions in the U.S. since April 2022. The US also implemented a unilateral ban on Russian diamonds in March 2022.”

Ukraine War: Russian Diamonds Set for Ban (also noting: “The Flemish-speaking port city has been a diamond hub since the 15th Century. More than 80% of all rough diamonds mined across the globe are traded here, and before the [Ukraine] war, one in four of them came from Russia.”).

See Ukraine War: Russian Diamonds Set for Ban.


International Partners Continue Coordination.

regime by \textit{(inter alia)} preventing its circumvention. Russian oil exports were an example: for the year 2023, Russia was the biggest supplier of oil to China. The success those two countries had in skirting U.S. and Allied sanctions was because (1) “Chinese refiners use[d] intermediary traders to handle the shipping and insurance of Russian crude to avoid violating the Western sanctions,” and (2) “[b]uyers also use[d] the waters off Malaysia as a trans-shipment point for sanctioned cargoes from Iran and Venezuela …, with [i]mports tagged as originating from Malaysia climbed 53.7% last year [2023].”\footnote{Andrew Hayley, \textit{China Defies Sanctions to Make Russia its Biggest Oil Supplier in 2023}, \textit{Reuters}, 21 January 2023, \url{www.reuters.com/business/energy/china-defies-sanctions-make-russia-its-biggest-oil-supplier-2023-2024-01-20/}.}

Interestingly, to say options for sanctions or export controls were nearly exhausted, that there was little left to target, was not technically true. First, there seemed to be no end

\footnote{See, e.g., \textit{Fact Box: EU Targets Sanctions Circumvention with 11th Package Against Russia}, \textit{REUTERS}, 23 June 2023, \url{www.reuters.com/world/eu-targets-sanctions-circumvention-with-11th-package-against-russia-2023-06-23/} (reporting the new EU sanctions “focus[ed] on preventing the circumvention of existing measures”). The June 2023 sanctions included trade measures that:
\begin{itemize}
  \item[(1)] “restrict[ed] the sale of sanctioned goods and technology to third countries if these third countries re-sell those goods or technology to Russia,”
  \item[(2)] “bann[ed] the transit of certain sensitive goods like advanced technology or aviation-related materials, exported from the EU to third countries, via Russia,”
  \item[(3)] “add[ed] 87 new entities to the list of those directly supporting Russia’s military and industrial complex which means they will be subject to tighter export restrictions for dual-use and advanced technology items,”
  \item[(4)] denied “export[ation] to Russia 15 new technology items that have been found on the battlefield in Ukraine in Russian weaponry or equipment needed to produce such items,”
  \item[(5)] “tighten[ed] restrictions on imports of iron and steel goods by requiring importers of sanctioned iron and steel goods that have been processed in a third country to prove that the inputs used do not come from Russia,”
  \item[(6)] forbade “the sale, licensing, transfer or referral of intellectual property rights to Russia for the manufacture of sanctioned goods outside the EU, and
  \item[(7)] “extend[ed] the export ban on luxury cars to Russia to all new and second-hand cars above 1,900 cm³ engine size, and all electric and hybrid vehicles.”
\end{itemize}
\textit{Id.} The new sanctions also included transport measures, such as:
\begin{itemize}
  \item[(1)] “ful[ly] ban[ed] … trucks with Russian trailers and semi-trailers from transporting goods to the EU,” so as “to stop the circumvention of the ban on Russian freight road operators to carry goods in the EU, because under the existing sanctions Russian trailers were allowed to move on after the Russian-registered truck was switched to one with a different registration,”
  \item[(2)] denying entry to EU ports to “[s]hips that engage in ship-to-ship transfers of sanctioned Russian cargo like Russian crude oil or petroleum products to circumvent a price cap introduced on the products by the G7…” and
  \item[(3)] also denying entry to EU ports to “[s]hips that turn off their navigation tracking systems when transporting Russian oil subject to the oil import ban or G7 price cap…”
\end{itemize}
\textit{Id.} And, the new sanctions contained energy measures such as:
\begin{itemize}
  \item[(1)] “end[ing] the possibility of importing Russian oil by pipeline to Germany and Poland [the so-called Russian “Friendship” pipeline],”
  \item[(2)] “introduce[ing] strict and very targeted derogations to the existing export bans to enable the maintenance of the Caspian Pipeline Consortium pipeline, which transports Kazakh oil to the EU through Russia,” and
  \item[(3)] extend[ing] the exemption from the oil price cap for Sakhalin oil for Japan until March 31, 2024.
\end{itemize}
\textit{Id.}
to measures that tightened, in one way or the other, the sanctions regime. For instance, in January 2024, BIS issued a Final Rule (effective 23 January) significantly expanding sanctions on Russia and Belarus. BIS widened the range of goods covered by the Russia and Belarus Industry Sector Sanctions, plus revised rules to target the supply of drones to Russia from Iran. The next month:

The U.S. unveiled its biggest one-day sanctions package against Russia since the invasion of Ukraine two years ago, targeting more than 500 people and entities in a fresh bid to squeeze the country’s economy and send a message over the death of dissident Alexey Navalny.

Sanctioned people and entities included Russia’s Mir payment system, a military drone manufacturer and its top staff, and three people linked to Navalny’s death earlier this month in a Russian prison. A State Department advisory said the moves – which also included pressure on Russia’s state-owned atomic energy company Rosatom Corp. – were aimed at “imposing additional costs on Russia for both its internal repression and foreign aggression” led by President Vladimir Putin.

The sanctions also target companies that provide optics, navigational instruments, software, and hardware to the Russian military.

A handful of Chinese companies, primarily microelectronics firms, were also sanctioned. …

Specifically, “[t]he U.S. Treasury Department targeted nearly 300 people and entities … [as SDNs], while the State Department hit over 250 people and entities [including ones involved in sanctions evasion and Russia’s energy, minerals, and mining industry, and three persons connected to Navalny’s death], and the Commerce Department added over 90 companies [in particular, 93 companies – 63 in Russia, 16 in Turkey, 8 in China, 4 in the UAE, 2 in the Kyrgyz Republic, 1 in Egypt, and 1 in Korea] to the Entity List.” Of the new editions to the DOC BIS Entity List, 50 were MEUs, hence they were subject to additional controls. And, they included “Russia’s core financial infrastructure,” especially the operator of the Mir National Payment System and Russian banks, investment firms, and financial technology (fintech) companies,” in keeping with G-7 commitments “to curtail Russia’s use of the international financial system to further its war against

With these new targets, the sum total of individuals and entities sanctioned by the U.S. across the previous two years—i.e., since the war started—exceeded 4,000. Yet, even this stunning figure, with the remarkable February 2024 expansion, did not make the regime comprehensive:

Just as important was what was left off the list: the U.S. largely avoided sanctions on Russia’s metals sector and held off major sanctions on energy amid wariness of economic shocks in an election year [2024]. …

… [T]he U.S. has held off a more severe clampdown on Russian oil sales for fear of causing a surge in crude prices—a politically perilous scenario during an election year. The U.S. has also resisted singling out Russia’s metals sector. In 2018, aluminum surged in response to sanctions imposed on Russians including … Rusal…. Those sanctions were later unwound.

Simply put, the regime was “extensive,” but stopped well short of being thorough in a way that would adversely affect the American economy and the President’s re-election bid.

Second, that reality suggested the logic for the sanctions was dubious. The logic could not be deontological, i.e., that it was morally reprehensible to engage in any kind of transactions with Russia. Otherwise, the regime would be comprehensive so as to avoid sullying one’s soul. Rather, the rationale was utilitarian—to degrade the ability of Russia

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2242 Regarding the Mir payment system and other financial institutions:

National Payment Card System Joint Stock Company (NSPK) is the state-owned operator of Russia’s Mir National Payment System. NSPK is owned by the Central Bank of Russia and plays a key role in facilitating financial transactions both internal to Russia and abroad. The Government of Russia’s proliferation of Mir has permitted Russia to build out a financial infrastructure that enables Russian efforts to evade sanctions and reconstitute severed connections to the international financial system. The United States has repeatedly emphasized the risks of the Mir system….

NSPK was designated pursuant to … [Executive Order] 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

OFAC also designated nine regional financial institutions, including several headquartered in Russian military-industrial base hubs; five investment and venture capital funds that seek to underwrite Russia’s development of advanced and next-generation technology and industry and inject domestic and foreign investment into Russian companies; and six … fintech companies that provide software and IT solutions for Russian financial institutions.

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2243 Treasury, On Second Anniversary.

2244 U.S. Unveils Fresh Sanctions.

2245 U.S. Targets Russia with Hundreds.
to prosecute its war in Ukraine, and penalize individuals and firms that “provid[ed] backdoor support for Russia’s war machine.”

But, “Russia’s export-focused $2.2-trillion economy has proved more resilient to two years of unprecedented sanctions than either Moscow or the West anticipated.” Russia was finding plenty of work-arOUNDS (as discussed elsewhere), casting doubt on the efficacy of the sanctions.

Third, the regime still did not punish third countries with a secondary boycott. And the U.S. and its Allies continued to give India a “pass” with respect to demanding India reconsider its support for Russia.

Fourth, the regime did not threaten penalties against financial institutions that aided and abetted Russia in circumventing sanctions – not until December 2023, when President Biden issued a new Executive Order. Under EO 14114, America expanded its sanctions to encompass foreign financial institutions that facilitated significant transactions involving designated parties or merchandise for Russia’s military-industrial base. So, under this Order, not only did the U.S. broaden its import ban to include certain key Russian exports transformed in third countries (e.g., diamonds, seafood), but it also threatened to deny access to the American financial system any bank – that acted on behalf of entities linked to Russia’s military-industrial base. Simply put, banks were the “choke point” between Russian front companies and the Russian military-industrial complex, hence the Order targeted that choke point in transactions in which Russia procured military-industrial inputs.

The Order did not specifically targeted any country or its financial institutions, but the suspects were Chinese, Emirati, and Turkish banks. For a foreign bank to lose access to the U.S. market could mean the loss of its subsidiaries, branches, agencies, and/or representative offices, and also to the large-value, electronic dollar payment system (Fedwire). Moreover, the shameful loss of prestige could have negative worldwide ramifications on a sanctioned bank. The President’s Order was in junction with the G-7 ban on Russian diamonds (effective 1 January 2024) and tightening of financial measures across the G-7.

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2247 *U.S. Targets Russia with Hundreds* (also reporting: “Brian O’Toole, a former Treasury official, said the action, while a lot of names, was short on impact. ‘They’re not going to have a big impact,’ … because the majority of the entities listed are Russian, rather than foreign firms, and are easily replaceable as Moscow seeks to skirt sanctions.’


2249 See *U.S. Takes Aim at Financial*.

2250 U.S. Takes Aim at Financial.

2251 See *U.S. Takes Aim at Financial*. 

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Mr. Borrell’s remark also intimated a long war, as Russia was undeterred by sanctions. First, it kept the pressure on India not to switch sides. In a version of the proverbial Russian bear hug, Russia issued thinly veiled threats that it would upend defense and energy ties with India, including with respect to:

(1) Cooperation between oil giant Rosneft and Nayara Energy Limited
(2) Exports of Russian weapons and military equipment to India, as well as defense sector technical cooperation.
(3) Russian proposals for new joint aviation projects presented at the Aero India 2023 exhibition in February.
(4) Technology and energy cooperation at India’s Kudankulam nuclear power plant.
(5) An agreement between Russian Railways’ RZD Logistics and the Container Corporation of India on cargo transportation services linked to development of a North-South trading corridor. 2252

The pressure worked, based on a December 2023 Indo-Russian announcement the two countries would enhance their military and technological cooperation, and jointly produce military equipment.2253 Across the previous 20 years (2003-2023), “Russia supplied 65% of India’s weapons purchases of more than $60 billion….”2254

Or, did that pressure work? “[T]he Ukraine war hastened the impetus [of India] to diversify its weapons base.”2255 India realized Russia may not have the stockpiles of ordnance and spare parts India needed to manage its own conflicts with China and Pakistan, and to combat internal extremist movements. So, in January 2024, India sought “to distance itself from its largest arms supplier.”2256 But, India had to “step carefully to avoid pushing

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2253 Kiran Sharma, India and Russia Inch Closer to Jointly Producing Weapons, NIKKEI ASIA, 27 December 2023, https://asia.nikkei.com/Politics/International-relations/India-and-Russia-inch-closer-to-jointly-producing-weapons. To be sure, the Russian Foreign Minister, Sergey Lavrov, after meeting in Moscow his counterpart, Indian Foreign Minister S. Jaishankar, cast their plans as mutually beneficial, because it “correspond[ed] to the national interests of our states, the interest of maintaining security in the Eurasian continent,” and because:

“We are respectful of the aspirations of our Indian colleagues to diversify their military and technical links. We also understand and we are ready to support their initiative to produce military products as part of the ‘Make in India’ program,” … referring to India’s plan to transform itself into a manufacturing hub.

Id. Make in India industrial policy is discussed in a separate Chapter.

2255 India Pivots Away.
2256 India Pivots Away.
Moscow closer to China.” A Sino-Russian alliance against India would (inter alia) be a formidable force (a force multiplier, as it were), and put India in the position of needing to cozy up to America and the western alliance, thus eroding further whatever was left of India’s identity as a non-aligned nation.

Predictably, Russia hit back against the U.S. with its own counter-measures. Its doing so was redolent of CCP behavior in the Sino-American Trade War, i.e., a “take that” mentality indicating a lack of desire to resolve a conflict, indeed, a willingness to inflame it. But, with America’s economy far less exposed to Russia than to China, the efficacy of Russian counter-measures to inflict damage to American business interests was limited.

Less dubious was the length of time the waves of sanctions and counter-measures would remain in place. On 27 March 2022, British Foreign Secretary Liz Truss declared the U.K._and presumably the U.S._and all the other Allies_would retain them until Russia fully withdrew from Ukraine and agreed to a lasting ceasefire. Judging from battlefield events, Russia had no intention of accepting those terms, and thus _presumably_—every intention of maintaining its counter-measures. Simply put, each side wanted to keep

2257 India Pivots Away.
2259 One of the interesting moves made by Russian companies, though not technically an official government counter-measure, was to change their preferred forum for arbitration of contract disputes from London to Hong Kong:

Russian companies are turning to Hong Kong for dispute arbitration services as sanctions over the Ukraine war restrict their access to Western courts.

… Russian companies are also increasingly adopting Hong Kong’s governing law in their commercial contracts for similar reasons.

Russian litigants have traditionally favored London’s commercial courts for their proximity and the common law legal system. But after the U.S. and European Union slapped sanctions on Russia over the Ukraine war, many large Western law firms dropped Russian clients.

… “The position [among Russian companies] is that Hong Kong is a sophisticated, common law jurisdiction, just like the U.K.,” said a disputes lawyer. “But it is neutral – Hong Kong doesn’t impose sanctions on Russian companies and any unilateral sanctions.”

… [P]roviding such services to Russian companies actively undermines the effectiveness of Western sanctions.

“While the core purpose of Hong Kong’s arbitration system is to provide a neutral platform for dispute resolution, it indirectly aids sanctioned companies in carrying out their business transactions,” said Julien Chaisse, a Law Professor specializing in international economic law and arbitration at the City University of Hong Kong.

“By resolving disputes in a reputable jurisdiction like Hong Kong, these companies can ensure their contracts are still enforceable in many parts of the world,” he said. “This can pave the way for smoother business transactions, even when faced with sanctions.”
pressure on the other, hence restoration of the *status quo ante* to before 24 February seemed a long way off. And so, the horrific saga continued.

**IAN A. LAIRD, JOHN L. MURINO, EDUARDO MATHISON & LESLIE CASTELLO, CROWELL & MORIZING LLP, RUSSIA AND UKRAINE: THE NEXT WAVE OF INTERNATIONAL DISPUTES (18 MARCH 2022)**

With the geopolitical and economic crisis in Russia and Ukraine growing rapidly…, international commercial operations in the region will be severely impacted in some manner, and many such impacts will result in disputes. The events surrounding the *peso* crisis in Argentina in early 2000s, as well as those in Venezuela from the actions of Hugo Chavez, and others arising out of the Arab Spring, all resulted in dozens of international disputes. We may see the same from current events, and there will be dispute options available to numerous companies with operations in either country who are experiencing severe disruptions of operations, loss of profit, or destruction of property, including, potentially: investor-State arbitration, domestic litigation, or claims tribunal recovery.

From an immediate and practical perspective, as the situation is developing, companies should begin compiling and preserving all materials relating to communications with Russian government officials, documents relating to the ownership and corporate structure of their foreign investment, to operations and profitability, and to insurance carriers and other coverage. Companies should also compile and preserve inventories of all assets currently in Russian and/or Ukrainian territories, and record and preserve contemporaneous notes of all developments. To the extent possible, such information should be stored in or at least accessible from a location outside of the territories of Russia and Ukraine.

Perhaps most importantly, because Russia has over 60 operating treaties that provide foreign investors with certain protections, Investor-State dispute settlement (ISDS) mechanisms may be available for parties eligible to bring claims under those treaties. Specifically, the treaties provide a process to seek compensation for expropriation and nationalization….

Impacted parties may also consider pursuing recovery of their commercial damages through other avenues, including domestic litigation in the United States or elsewhere, international commercial arbitration, and potential future mass claims tribunals. Each avenue of recovery will present unique challenges. And if none of these options offer a viable avenue for recovery against Russia or Russian entities, impacted parties should consider if their agreements or applicable treaties allow for actions against third parties.

In other words, Russian companies felt the choice of arbitration clause in their international contracts in favor of the Hong Kong International Arbitration Center could lessen the political and legal risk that their contracts would be declared invalid on account of U.S. and Allied sanctions, because China did not adhere to those sanctions. Pak Yiu & Echo Wong, *Russian Companies Move Legal Battles to Hong Kong Courts*, * Nikkei Asia*, 3 August 2023, [https://asia.nikkei.com/Politics/International-relations/Russian-companies-move-legal-battles-to-Hong-Kong-courts](https://asia.nikkei.com/Politics/International-relations/Russian-companies-move-legal-battles-to-Hong-Kong-courts).
Investor-State Arbitration

Foreign investors in Russia may consider pursuing investor-State arbitration if (a) the investor is a national of a State that is a party to an in force international investment agreement (IIA) with Russia, such as defined by a bilateral investment treaty (BIT), a … FTA, or other similar instrument; or (b) the investor is itself a signatory to a contract or some form of investment agreement with Russia, its municipalities, and/or agencies or instrumentalities that includes an international dispute resolution clause.

There are currently more than 60 in-force investment treaties to which Russia is a signatory, and they all provide for procedures to seek compensation arising from direct and indirect expropriation. The signatories to these treaties include all of the major members of the European Union, Canada, Japan, and others. Although there is not currently an in-force BIT or other investment agreement between the United States and Russia, American investors may consider whether their investment structure would permit bringing an investor-State claim through an affiliate or subsidiary under the auspices of another BIT or IIA, such as those to which the United Kingdom, Italy, Germany, France, or the Netherlands are a signatory.

Such treaties may also include protections against arbitrary and discriminatory treatment, assurances for monetary transfers, and obligations of general compensation for losses caused by war and armed conflict on a most-favored nation basis. For example, Article 4 of the U.K.-Russia BIT provides that:

Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to any armed conflict, a state of national emergency or civil disturbances in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favorable than that which the latter Contracting Party accords to investors of any third State. Resulting payments shall be made without delay and be freely transferable.

Parties should carefully review the relevant IIA for a full understanding of what claims may be brought and what damages they may be entitled to. In the event that a party is a signatory to an investment contract with the State, its municipalities, and/or the agencies or instrumentalities of the State or municipality, the party should also carefully review their contract to determine what dispute resolution mechanism, if any, is identified, and what claims may be available outside or beyond the scope of the IIA, to the extent that any are applicable.

A State party to an IIA may also consider directly engaging in State-to-State investment arbitration against Russia on behalf of its investors, likely depending on the breadth of claims and the investors impacted in that particular State.
Litigation

Depending again on the individual circumstances and factors present, parties may consider initiating litigation proceedings under the relevant and applicable domestic law. Companies should pay particular attention to questions of jurisdiction and which parties it can or should bring claims against. Companies should also review their underlying contracts and the applicable domestic law to address these questions. In the United States, for example, the *Foreign Sovereign Immunities Act* (*FSIA*) provides broad jurisdictional immunity for sovereigns, subject to a few key exceptions.

Claims Tribunal

Although most mass claims tribunals and commissions that are organized following acts of war, invasion, and occupation are largely designed to address the critical issues pertaining to humanitarian needs, such tribunals have also been used to compensate individuals and businesses whose commercial activities were disrupted as a direct result of war. One of the best-known examples of a claims tribunal is the Iran-U.S. Claims Tribunal which arose after the 1979 Iranian Revolution and the widespread expropriation of U.S. investments. Approximately 4,700 private U.S. claims were filed against the Government of Iran at the Tribunal, resulting in more than $2.5 billion in awards to U.S. nationals and companies.

Such tribunals and commissions have been created in a myriad of ways, including through United Nations resolutions and domestic legislation. However, the creation of a commercial claims tribunal in this instance is likely to face significant obstacles. For example, the U.N. Security Council has been previously responsible for passing the resolution which created the United Nations Compensation Commission (UNCC), which was designed to compensate individuals and businesses for claims arising out of the 1990 Iraqi invasion and occupation of Kuwait. Russia’s position on the U.N. Security Council makes a similar process unlikely, as Russia could be expected to veto any attempt. Similarly, the international community justifiably has little optimism that Russia would pass domestic legislation creating a commission itself.

Realistically, the only way that parties could expect a tribunal to address these claims would be if the affected States included some framework as a condition in any future diplomatic resolution with Russia. Alternatively, States could establish their own claims’ tribunals (independently or in collaboration with the broader international community) to compensate their investors and pursue their own recovery, independently, in any actions they take against Russia. Parties should not rely exclusively on this avenue, however, as all control and determination will be subject to individual governments, and recovery – if any – is likely to be relatively far off.