NOTE

RECASTING SANCTIONS AND ANTI-MONEY LAUNDERING: FROM NATIONAL SECURITY TO UNILATERAL FINANCIAL REGULATION

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Practitioners and academics traditionally think of U.S. sanctions and anti-money laundering rules as bargaining tools: measures that governments use to pressure adversaries and achieve national security goals. Open-ended non-state national security threats like terrorism, climate change, and corruption cast doubt on the accuracy of this "bargaining" model. This Note offers a "regulatory" view that treats these measures not as bargaining chips but as extra-territorial regulatory tools. This approach reflects the current state of these measures, which have leveraged U.S. dollar centrality and financial institutions' rigorous rule-following to impose economic restrictions on global threats, often permanently. In addition to describing more accurately current U.S. sanctions and anti-money laundering practice, the "regulatory" view better articulates these measures' functioning. Specifically, applying Professor Anu Bradford's "Brussels Effect" framework for analyzing extra-territorial regulations yields three insights. First, it offers a granular explanation of these measures' reach by offering five elements that are predictive of their functioning: "market size," "regulatory capacity," "stringent standards," "inelastic targets," and "non-

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divisibility." Second, it highlights the particularities of U.S. sanctions and anti-money laundering rules. Counter to Bradford's prediction, U.S. measures suggest that the extra-territorial regulation of finance is possible. Third, and finally, the application of Bradford's predictive elements to U.S. sanctions and anti-money laundering rules suggests both the continued durability of these measures and future threats to their use.

I. INTRODUCTION

If the Treasury Secretary wants to unilaterally shut down a foreign bank, the Treasury Secretary can.[1] This has

[1] *See* Joel Schectman, *Andorra Bank Seeks Probe After U.S. Treasury Forced Closure for "Money Laundering*," REUTERS (Mar. 14, 2017, 4:27 PM), https://www.reuters.com/article/us-usa-moneylaundering-andorra/andorra-bank-seeks-probe-after-u-s-treasury-forced-closure-for-money-laundering-

happened in the past, and there is little that other countries can do to stop it.[2] And if an office within the Treasury Department wants to freeze the assets of the central bank of the world's eleventh largest economy,[3] it can do that as well.[4] In addition to taking such blunt measures, U.S. Treasury offices can require financial institutions in the United States and abroad to restrict transactions, turn over information, and follow U.S. monitoring and reporting requirements.[5] U.S. sanctions and Anti-Money Laundering/Combating the Financing of Terrorism ("AML/CFT") regulations are what make all of these actions possible.[6]

In the past twenty years, the United States has turned to such coercive financial tools with increasing frequency.[7] It has used sanctions to tackle a broad range of threats—from countering Russia's use of force in Ukraine both in 2014[8] and

idUSKBN16L2KB [https://perma.cc/SE68-KGJ7] (labelling an Andorran bank as a "primary money laundering concern," helped drive the bank out of business).

2 *See, e.g.*, Frances Coppola, *Why the U.S. Treasury Killed a Latvian Bank*, FORBES (Feb. 28, 2018, 1:19 AM), https://www.forbes.com/sites/francescoppola/2018/02/28/why-the-u-s-treasury-killed-a-latvian-bank/?sh=4fd59ee77adc [https://perma.cc/TKV9-RA57] (detailing various measures the U.S. Treasury Department took against a Latvian bank to shut it down).

3 *GDP Current Prices*, INT'L. MONETARY FUND, https://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOWORLD (on file with the Columbia Business Law Review) (last visited Apr. 24, 2022).

4 Treas. Dir., Directive 4 Under Executive Order 14024 (Feb. 28, 2022), https://home.treasury.gov/system/files/126/eo14024_directive_4_02282022.pdf [https://perma.cc/T8M5-HDYA].

5 Treas. Order 180-01 (July 1, 2014); 31 U.S.C. § 5318(a) (2018).

6 *See infra* Section II.A.

7 Johnpatrick Imperiale, *Sanctions by the Numbers: U.S. Sanctions Designations and Delistings, 2009–2019*, CTR. FOR A NEW AM. SEC. (Feb. 27, 2020), https://www.cnas.org/publications/reports/sanctions-by-the-numbers [https://perma.cc/A9S8-42U7] (reporting an increased number of sanctions designations since 2009).

8 *See, e.g.*, Exec. Order No. 13,662, 79 Fed. Reg. 16,169, 16,169 (Mar. 20, 2014) (imposing sanctions in response to Russian actions "undermin[ing] democratic processes and institutions in Ukraine;

2022[9] to fighting "malicious cyber-enabled activities,"[10] to limiting Chinese companies' access to U.S. capital markets.[11] Anti-money laundering rules have expanded from serving as domestic information-collecting mechanisms focused on stopping tax evasion and drug trafficking to enabling complex international measures at the forefront of U.S. national security—most notably countering the financing of terrorism.[12]

These tools are uniquely powerful. Unlike other countries' similar measures, U.S. sanctions and AML/CFT regulations can take advantage of the structure of the global financial system and therefore reach actors abroad. Because U.S. dollars are the basis of a large part of international transactions, it is nearly impossible for any country, company, or individual to escape U.S. jurisdiction.[13] Moreover, because the dollar is so central in the global financial system, many infrastructures that make global commerce possible are located within U.S. jurisdiction. As a result, Washington can choke off, or at least threaten to restrict, its targets' access to global financial infrastructures whenever they go against U.S. policy demands. It is through control over these chokepoints that even small U.S. Treasury offices can exert substantial power over international financial institutions.

threaten[ing] its peace, security, stability, sovereignty, and territorial integrity").

9 *See, e.g.*, Press Release, Dep't of the Treasury, U.S. Treasury Announces Unprecedented & Expansive Sanctions Against Russia, Imposing Swift and Severe Economic Costs (Feb. 24, 2022), https://home.treasury.gov/news/press-releases/jy0608 [https://perma.cc/93Y8-VU68] [hereinafter Treasury Dep't, Press Release on Russian Sanctions] (taking "significant and unprecedented action to respond to Russia's further invasion of Ukraine").

10 Exec. Order No. 13,757, 82 Fed. Reg. 1, 1 (Dec. 28, 2016) (imposing sanctions on persons engaged in "cyber-enabled activities" posing "a significant threat to the national security, foreign policy, or economic health or financial stability of the United States").

11 Exec. Order No. 14,032, 86 Fed. Reg. 30145 (June 3, 2021) (imposing sanctions on certain publicly-traded securities related to the military-industry complex of the People's Republic of China).

12 *See infra* Section II.A.

13 *See infra* Section II.C.

As their use in varying contexts suggests, sanctions and AML/CFT measures are key parts of the U.S. national security toolkit. One can certainly subsume them in the language of international security. For example, one can discuss sanctions as deterrence measures, as one might discuss military forces as deterrence.[14] In 2014, the United States imposed sanctions on Russia to incentivize Moscow to comply with a series of ceasefire conditions.[15] At the close of 2021, the United States and the European Union (EU) made sanction threats the center of their deterrence against Russia's renewed danger to Ukraine—even as some called for military action alongside economic statecraft responses.[16] Sanctions can also serve as direct substitutes for military means of achieving foreign policy goals. After Russia invaded Ukraine in 2022, the United States reached for sanctions as one of its primary tools to get Moscow to walk back its aggression.[17] Contemporary academic literature on sanctions mostly reflects this bargaining model where sanctions serve as a tool to achieve foreign policy goals.[18] This literature has

14 *See infra* Sections III.B–C.

15 Alanna Petroff, *Russian Sanctions Could Be Gone in a Few Months, John Kerry Says*, CNN (Jan. 22, 2016, 11:35 AM), https://money.cnn.com/2016/01/22/news/russia-ukraine-sanctions-john-kerry-davos/index.html [https://perma.cc/8HTW-746K].

16 Alan Cullison & Michael R. Gordon, *Ukraine Wants Military Support To Deter Russia While the U.S. Weighs Response*, WALL ST. J. (Dec. 24, 2021), https://www.wsj.com/articles/ukraine-wants-military-support-to-deter-russia-while-the-u-s-weighs-response-11640363279 (on file with the Columbia Business Law Review).

17 *See, e.g.*, *Secretary Antony J. Blinken with Chuck Todd of NBC's Meet the Press* STATE DEP'T (Apr. 3, 2022), https://www.state.gov/secretary-antony-j-blinken-with-chuck-todd-of-nbcs-meet-the-press-3/ [https://perma.cc/Q8G5-7KPE] ("The purpose of the sanctions . . . is not to be there indefinitely. It's to change Russia's conduct. And if, as a result of negotiations, the sanctions, the pressure, the support for Ukraine, we achieve just that, then at some point the sanctions will go away.").

18 *See, e.g.*, *infra* notes 136–137, 142. *But see* Paul Massaro & Casey Michel, *Biden Might Stop a Sanctions Revolution*, FOREIGN POL'Y (Aug. 24, 2021, 8:00 AM), https://foreignpolicy.com/2021/08/24/biden-might-stop-a-sanctions-revolution/ https://perma.cc/VCT6-HJAY] ("[T]hose focused on

focused on whether these measures "work"—that is, whether they impose enough pressure on their targets such that they change their behavior and comply with U.S. national security requests.[19]

While studies that emphasize bargaining highlight the benefits and shortcomings of some applications of sanctions and AML/CFT rules, they also lose sight of other ways of thinking about these measures. This is particularly the case today, when the concept of "national security" covers a broad range of new long-term, non-state threats. Whereas previously one could imagine the end of the Cold War, one cannot imagine the end of cyber threats.[20] One can negotiate a ceasefire with Russia, but there may be no equivalent bargaining partner for diffuse threats in the cyber realm. These transformations have rendered incomplete the "bargaining" model of sanctions and AML/CFT rules.

Treating sanctions and AML/CFT rules as regulations offers a more accurate understanding of these tools. Whether or not these measures are intended as bargaining chips, their immediate effect has little to do with foreign policy negotiations. Sanctions and AML/CFT measures primarily affect the financial sector, comprised of players especially primed to respond to regulation; even general non-binding directives will prompt a response, as if they were more formal regulations.[21] For this reason, the short-term outcome of any new sanction or AML/CFT rule is to structure financial institutions' internal compliance processes and to shape the

behavioral change as the sole raison d'être of sanctions programs miss the forest for the trees.").

[19] *See infra* notes 136–142.

[20] J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1046 (2020) ("[I]t is nearly impossible to imagine a future in which the United States and other countries must no longer confront prevalent and severe 'malicious cyber-enabled activities' originating abroad.") (quoting Exec. Order No. 13,694, 80 Fed. Reg. 18,077, 18,077 (Apr. 2, 2015)).

[21] Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 194 (2019) ("[B]anks consider it important to stay on the agencies' good side, and sensitivity to guidance is an important part of that.").

flows of international capital.[22] Focusing primarily on whether a given sanction achieves its national security bargaining goal ignores this concrete, immediate outcome of their reshaping of economic behavior. As new permanent, non-state threats that do not lend themselves to bargaining rise in relevance, applying this regulatory model will become especially important for understanding, studying, and, potentially, employing sanctions.

But sanctions and AML/CFT rules are not just financial regulations: Because of the structure of the global financial system, they are extra-territorial financial regulations. Comparing them to other forms of extra-territorial regulation leads to insights about their enduring sources of power. Specifically, one can contextualize these U.S. measures by analyzing them through the framework proposed by Anu Bradford in *The Brussels Effect: How the European Union Rules the World*, which outlines five elements to explain why regulations can attain extra-territorial reach.[23] Applying Bradford's framework to sanctions and AML/CFT rules deepens the understanding of these measures. It highlights

[22] *See, e.g.*, Patricia Kowsimann, Julie Steinberg & Leslie Scism, *Sanction Carve-Outs for Energy Aren't Enough To Keep Money Flowing to Russia*, WALL ST. J. (Mar. 2, 2022, 3:21 PM), https://www.wsj.com/articles/sanction-carve-outs-for-energy-arent-enough-to-keep-money-flowing-to-russia-11646252514 (on file with the Columbia Business Law Review) (reporting financial institutions' risk aversion in dealings with Russia after the imposition of sanctions in 2022); Sam Goldfarb, *U.S. Funding Markets Show Signs of Stability Despite Russia Sanctions*, WALL ST. J. (Mar. 4, 2022, 4:00 PM), https://www.wsj.com/articles/u-s-funding-markets-show-signs-of-stability-despite-russia-sanctions-11646359036 (on file with the Columbia Business Law Review) (describing the reaction of short-term funding markets to the freezing of the Russian central bank's funds); Tatiana Mitrova, Ekaterina Grushevenko & Artyom Malov, SKOLKOVO: MOSCOW SCH. MGMT., *The Future of Oil Production in Russia: Life Under Sanctions* (2018), https://energy.skolkovo.ru/downloads/documents/SEneC/research04-en.pdf [https://perma.cc/NT35-Z7G5] (describing how the 2014 sanctions have limited investment in Russian oil reserve replacement harming its future potential production).

[23] ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD 25–26 (2020).

less-explored factors shaping sanctions' and AML/CFT regulations' reach, including U.S. regulatory capacity and the willingness by the U.S. political class to accept the domestic costs of sanctions—elements that the bargaining framework does not consider.[24]

But U.S. sanctions and AML/CFT rules go beyond Bradford's Brussels Effect predictions. Indeed, they give rise to a "Washington Effect." Bradford argues that because capital is elastic between jurisdictions—that is, it can relocate easily—attempts to regulate it extra-territorially will fail.[25] Any time policymakers try to impose new rules on finance in one jurisdiction, capital will evade them by moving outside of their reach.[26] Sanctions and AML/CFT rules, by leveraging U.S. control over the dollar system, make this elasticity impracticable: While financial services may relocate, they cannot fully exit the U.S. dollar system or avoid the chokepoints Washington uses to impose its will. Sanctions and AML/CFT rules are not just financial regulations—they are unique cases of successful *extra-territorial* financial regulations. Such a finding suggests that global finance may be amenable to regulation.

Finally, the Brussels Effect framework offers a new way to assess the threats ahead for U.S. extra-territorial financial regulation. Sanctions analysts have worried primarily about the loss of U.S. dollar dominance because this would be the biggest conceivable blow to U.S. financial leverage.[27] The Brussels Effect analysis highlights a broader range of elements that enable sanctions' and AML/CFT rules' effectiveness, and it consequently recognizes a broader range of potential threats to that effectiveness. For example, recent actions curtailing the regulatory capacity of the U.S. government and a rising tide of opposition to sanctions and AML/CFT rules seen as stifling economic growth could have more significant effects on these measures' power as extra-

[24] *See* discussion *infra* Section IV.C.

[25] BRADFORD, *supra* note 23, at 51.

[26] *Id.*

[27] *See infra* Section IV.F.

territorial regulations than the much-discussed dangers of losing dollar dominance.[28]

Part II discusses the current landscape of U.S. economic measures. It covers the evolution of sanctions and AML/CFT measures in the last two decades and explains how the structure of the global financial system makes these measures unique in their reach and power. Part III discusses how national security has been the preferred framework for analyzing these measures and how this focus has led to a specific emphasis on a "bargaining model" that treats these measures as negotiating tools. It then argues that an alternative "regulatory" model—which treats these measures as more prosaic forms of financial regulation—might be more descriptive of how these tools are employed today. Part IV places both sanctions and AML/CFT rules within the Brussels Effect framework for extra-territorial regulation. It argues that these measures fulfill all the elements that the framework argues are predictive of extra-territorial reach, including the elasticity element, one which Bradford argues is inapplicable to capital. As a result, Part IV suggests that the United States may be unique in its ability to regulate global finance. Part IV then analyzes threats to the elements enabling sanctions' and AML/CFT measures' extra-territorial reach. Part V concludes.

II. U.S. FINANCIAL TOOLS OF NATIONAL SECURITY AND THEIR REACH IN THE GLOBAL ECONOMY

The United States regularly advances national goals through economic tools, including international trade negotiations, strategic investments, sanctions, and

[28] *See infra* notes 269–273; *see also America's Aggressive Use of Sanctions Endangers the Dollar's Reign*, ECONOMIST (Jan. 18, 2020), https://www.economist.com/briefing/2020/01/18/americas-aggressive-use-of-sanctions-endangers-the-dollars-reign [https://perma.cc/4DVP-LPDR] (discussing how the use of sanctions threatens the U.S. dollar's dominance); CONG. RES. SERV., IF11707. THE U.S. DOLLAR AS THE WORLD'S DOMINANT RESERVE CURRENCY 2 (2020) (discussing the relationship between dollar dominance and U.S. sanctions).

embargoes.[29] Indeed, Washington "has been the predominant force on the international sanctions scene, leveraging its considerable economic power in pursuit of a variety of foreign policy objectives,"[30] outpacing other governments[31] and the United Nations.[32] In the past two decades, though, Washington has remade its economic tools. While relying on the same basic legal authorities,[33] the United States has moved away from traditional trade embargoes.[34] Instead, it has focused its restrictions on financial transactions—enlisting financial institutions as both primary enforcers of

[29] *See* DAVID A. BALDWIN, ECONOMIC STATECRAFT 93–97 (2020) (describing the United States' use of and thinking about economic statecraft); ROBERT D. BLACKWILL & JENNIFER M. HARRIS, WAR BY OTHER MEANS: GEOECONOMICS AND STATECRAFT 154–66 (2016) (discussing the use of economic measures to achieve national security goals).

[30] Court E. Golumbic & Robert S. Ruff III, *Leveraging the Three Core Competencies: How OFAC Licensing Optimizes Holistic Sanctions*, 38 N.C.J. INT'L L. & COM. REG. 729, 732 (2013).

[31] *See, e.g.*, *Restrictive Measures (Sanctions)*, EUR. COMM'N, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/what-are-restrictive-measures-sanctions_en [https://perma.cc/GR7N-UJX5] (last visited Apr. 7, 2022) (discussing European Commission sanction tools).

[32] *See, e.g.*, S.C. Res. 1267 (Oct. 15, 1999) (imposing sanctions on Afghanistan); S.C. Res. 864 (Sept. 15, 1993) (imposing sanctions on Angola); S.C. Res. 1298 (May 17, 2000) (imposing sanctions on Ethiopia and Eritrea).

[33] International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. §§ 1701–1707); Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended at 12 U.S.C. §§ 1730d, 1829d, 1951–59; 18 U.S.C. § 6002; 31 U.S.C. §§ 321, 5311–55).

[34] Daniel W. Drezner, *Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice*, 13 INT'L. STUD. REV. 96, 100 (2011) (describing the shift in policymaking away from "comprehensive trade embargoes"). *But see* Matthew C. Klein, *The Sanctions Are Already Working*, THE OVERSHOOT (Apr. 21, 2022), https://theovershoot.co/p/the-sanctions-are-already-working?s=r [https://perma.cc/8UAU-ECXH] (arguing that the response to the Russian invasion highlighted the continued importance of non-financial measures).

these new U.S. rules and as targets of regulation and enforcement.[35]

The first strand in this story focuses on the expansion of anti-money laundering and counter-terrorist financing regulation, while the second follows the movement of economic sanctions away from trade and toward finance. These strands are only superficially separate: While their origins and the administrative bureaucracies within the Treasury Department are divided, they are intertwined by current application. Policymakers use these measures to pursue similar objectives, and they depend on the same factors for their success.[36] Sections II.A and II.B discuss these

[35] Bryan R. Early & Keith A. Preble, *Going Fishing Versus Hunting Whales: Explaining Changes in How the US Enforces Economic Sanctions*, 29 SEC. STUD. 231, 250, 267 (2020) (highlighting the increased usage of financial sanctions); *see* Aaron Arnold, *The True Costs of Financial Sanctions*, SURVIVAL, June–July 2016, at 77, 77 (highlighting the differences in effect and power between financial and trade sanctions).

[36] Past treatments have discussed these two strands together. In particular, they have often discussed section 311 of the USA PATRIOT Act, 31 U.S.C. § 5318A (2018) in the same context as sanctions. *See, e.g.*, JUAN ZARATE, TREASURY'S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE 232–34, 251 (2013) (discussing the use of both sanctions and section 311 in the context of North Korea); PIERRE-HUGUES VERDIER, GLOBAL BANKS ON TRIAL: U.S. PROSECUTIONS AND THE REMAKING OF INTERNATIONAL FINANCE 1–39 (2020) (discussing the effect of the use of section 311 in a chapter on sanctions prosecutions); Suzanne Katzenstein, *Dollar Unilateralism: The New Frontline of National Security*, 90 IND. L.J. 293, 322 (2015). In explaining her choice of terminology, Suzanne Katzenstein makes this conflation of measures explicit by arguing that they ultimately rely on the same mechanism for their success. As a result, she adopts a taxonomy less focused on the historical background of each tool and more attentive on their effects. She writes:

> This Article avoids the terminology of "sanctions," since it tends to obscure differences among various types of sanctions and also creates terminological confusion. For instance, some scholars and policy makers would claim that the denial of correspondent banking to a third-party firm is not a sanction at all, but simply a regulatory condition that foreign parties can choose to follow or ignore. Other scholars and policy makers refer to correspondent banking restrictions using diverse terms including sanctions,

strands, and Section II.C describes the factors contributing to their international reach.

A. The AML/CFT Strand

Starting with the Bank Secrecy Act (BSA) of 1970,[37] Washington established a regulatory apparatus to track and counter money laundering.[38] These measures have added up to form the "BSA framework," which

> authorizes the Secretary of the Treasury . . . to require financial institutions to keep records and file reports that 'have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities . . . to protect against international terrorism.' [39]

sectoral sanctions, secondary sanctions, and triadic sanctions.

Id. at 312 n.113. The U.S. economic pressure campaign against Iran suggests how anti-money laundering and sanctions work in tandem. Robin Wright, *Stuart Levey's War*, N.Y. TIMES (Oct. 31, 2008), https://www.nytimes.com/2008/11/02/magazine/02IRAN-t.html [https://perma.cc/LA9L-UE9X] (describing how the Under Secretary of the Treasury invoked sanctions- and money laundering-risk concurrently to deter financial institutions from dealing with Iran). The 2022 sanctions on Russia included traditional sanctions measures and measures restricting correspondent banks akin to section 311. Treasury Dep't, Press Release on Russian Sanctions, *supra* note 9.

[37] Bank Secrecy Act § 101, 12 U.S.C. 1829(b)) (2018) (requiring financial institutions to maintain records and file reports with a "high degree of usefulness in criminal, tax, and regulatory investigations and proceedings"); *see also* Money Laundering Control Act of 1986 § 1352, 18 U.S.C. §§ 1956–57 (making money laundering a federal crime); Housing and Community Development Act of 1992 § 1517(b), 31 U.S.C. § 5318 (requiring the filing of Suspicious Activity Reports); William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 § 885, 41 § U.S.C. 2313(d) (requiring the collection of beneficial ownership information among other changes).

[38] 31 U.S.C. § 5318(h).

[39] Customer Due Diligence Requirements for Financial Institution, 81 Fed. Reg. 29,398, 29,399 (May. 11, 2016) (to be codified at 31 C.F.R. pts. 1010, 1020, 1023–24, 1026) (citing 31 U.S.C. § 5311).

The Financial Crimes Enforcement Network ("FinCEN") within the Treasury Department implements, administers, and enforces the BSA framework.[40] This includes requiring financial institutions to fulfill two primary compliance roles: reporting suspicious transactions and conducting due diligence about their customers.[41]

The administration of anti-money laundering rules is superficially similar to other forms of regulation—such as ensuring non-discrimination or solvency—faced by financial institutions.[42] Indeed, FinCEN has delegated the examination of BSA compliance to federal functional regulators who already supervise financial institutions in other regulatory contexts.[43] However, as these measures have evolved since the 1970s, their international context and national security focus have set them apart from other forms of regulation.[44] Initially focused on drug trafficking,[45] AML/CFT rules now cover over 250 predicate offenses.[46] The biggest shift came after the September 11 attacks, when countering money

40 Treas. Order 180–01 (July 1, 2014).

41 Christina Parajon Skinner, *Executive Liability for Anti-Money-Laundering Controls*, 116 COLUM. L. REV. SIDEBAR 1, 3 (2016) (summarizing the primary functions of U.S. AML laws).

42 Compliance with the Bank Secrecy Act, for example, is a topic covered in the Office of the Comptroller of the Currency's Comptroller's Handbook alongside matters including capital adequacy and the Community Reinvestment Act. *See Comptroller's Handbook*, OFF. OF THE COMPTROLLER CURRENCY, https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/index-comptrollers-handbook.html [https://perma.cc/6WJ4-FJZW] (last visited Apr. 19, 2022).

43 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-582, BANK SECRECY ACT: AGENCIES AND FINANCIAL INSTITUTIONS SHARE INFORMATION BUT METRICS AND FEEDBACK NOT REGULARLY PROVIDED 1 (2019).

44 See Pancho Nagel & Christopher Wieman, *Money Laundering*, 52 AM. CRIM. L. REV. 1357, 1358 (2015).

45 Bruce Zagaris, *The Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regimes After September 11*, 2001, 22 BERKELEY J. INT'L L. 123, 124 (2004); *see* Steven A. Bercu, *Toward Universal Surveillance in an Information Age Economy: Can We Handle Treasury's New Police Technology?*, 34 JURIMETRICS J. 383, 390 (1994) ("The first large task assigned to FinCEN was to assist in the 'War on Drugs.'").

46 United States v. Santos, 553 U.S. 507, 516 (2008).

laundering took on a national security, anti-terror role. The USA PATRIOT Act ("Patriot Act") makes this nexus between financial regulation and national security clear, stating that "money laundering, and the defects in financial transparency on which money launderers rely, are critical to the financing of global terrorism and the provision of funds for terrorist attacks."[47] Though the basic processes of AML/CFT regulation—such as due diligence, record-keeping, and examinations—may be traditional and its original goals primarily domestic, the September 11 attacks and the Patriot Act gave these measures a new purpose.

In addition to expanding the goals of U.S. money laundering rules, the Patriot Act also expanded their power.[48] Section 311 authorized the Treasury secretary to require financial institutions to take "special measures" against jurisdictions, financial institutions, or international transactions deemed of "primary money laundering concern."[49] One of these special measures allows the Treasury Department to prohibit the offering of correspondent bank accounts to section 311 targets.[50] Correspondent bank accounts are a key component of the global financial infrastructure.[51] They knit together the financial system by

47 31 U.S.C. § 5311 (2018).

48 USA PATRIOT Act § 302(b), 31 U.S.C. § 5311 note; *see also* Michael Levi, *Money Laundering and Its Regulation*, 582 ANNALS AM. ACAD. POL. & SOC. SCI. 181, 187 (2002) (noting that this expansion in authorities was partly made possible by the fact that opposition to know-your-customer banking regulations on the basis of privacy concerns, organized by the banking lobby, receded after "terrorism reoriented privacy values in 2001")

49 31 U.S.C. § 5318A. These five special measures include (1) "[r]ecordkeeping and reporting of certain financial transactions," (2) "[i]nformation relating to beneficial ownership," (3) "[i]nformation relating to certain payable-through accounts," (4) "[i]nformation relating to certain correspondent accounts," and (5) "[p]rohibitions or conditions on opening or maintaining certain correspondent or payable-through accounts." *Id.* § 5318A(b)(1)–(5).

50 *Id.* § 5318A(5).

51 *See, e.g.*, Joanna Diane Caytas, Note, *Weaponizing Finance: U.S. and European Options, Tools, and Policie*s, 23 COLUM. J. EUR. L. 441, 451 n.75 (2017) ("[S]ettlement . . . requires correspondent banking relationships or national payment platforms."); COMM. ON PAYMENTS & MKT.

making possible payments between account holders at different banks.[52] Restrictions on these accounts would amount to a death sentence for a targeted bank.[53] With these Patriot Act innovations, anti-money laundering policy moved beyond requiring disclosure and compliance toward imposing more immediate consequences.

Almost two decades of section 311 designations testify to the versatility and the shifting priorities of U.S. anti-money laundering policy. Policymakers have used the measure to address traditional bank regulation questions, such as the 2002 designation of Nauru as a jurisdiction of primary money laundering concern in light of its "offshore banking" sector,[54] as well as more geopolitically salient problems, such as the 2005 designation of Macao-based bank Banco Delta Asia as part of the U.S. crackdown on the financing of North Korea.[55]

B. The Sanctions Strand

Sanctions have a long history in U.S. policy. Early examples emerged at the start of the nineteenth century, though these measures would begin to take their recognizable

INFRASTRUCTURES, BANK FOR INT'L SETTLEMENTS, CORRESPONDENT BANKING 9–14 (2016), https://www.bis.org/cpmi/publ/d147.pdf [https://perma.cc/TQT8-YS4X] (discussing the role correspondent bank accounts play in the financial system).

52 Michael Gruson, *The U.S. Jurisdiction over Transfers of U.S. Dollars Between Foreigners and over Ownership of U.S. Dollar Accounts in Foreign Banks*, 2004 COLUM. BUS. L. REV. 721, 724–29 (explaining how interbank clearing works).

53 STEVEN MARK LEVY, FEDERAL MONEY LAUNDERING REGULATION: BANKING, CORPORATE, AND SECURITY COMPLIANCE § 30.03 (2nd ed. Supp. 2017).

54 Departmental Offices Designation of Nauru and Ukraine as Primary Money Laundering Concerns, 67 Fed. Reg. 78,559, 78,861 (notice Dec. 26, 2002).

55 Finding That Banco Delta Asia ARAL Is a Financial Institution of Primary Money Laundering Concern, 70 Fed. Reg. 55,214 (notice Sept. 20, 2005); *see* Juan Zarate, *Harnessing the Financial Furies*, WASH. Q., AUTUMN 2009, at 43, 50 (noting how the U.S. financial regulations like section 311 were one of the "few concrete levers to influence rogue regimes in Pyongyang, Tehran, and elsewhere").

current form during the First World War.[56] Their modern history begins in 1977 with the International Emergency Economic Powers Act (IEEPA),[57] which remains the statutory basis for many sanctions programs.[58] A broad delegation of power,[59] IEEPA allows the president, after declaring a national emergency under the National Emergencies Act,[60] to respond to "any unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States"[61] with special economic measures, including the blocking of the property of natural or legal persons.[62] In addition to IEEPA, Congress has passed independent sanctions legislation targeting specific countries, such as North Korea, Iran, and Russia.[63] The Office of Foreign Assets Control (OFAC) within the Treasury Department issues sanctions regulations, designates targets, maintains sanctions blacklists like the Specially Designated Nationals

[56] Golumbic & Ruff, *supra* note 30, at 736. For a discussion of the evolution of U.S. sanctions authorities, see *id.* at 735–50; NICHOLAS MULDER, THE ECONOMIC WEAPON: THE RISE OF SANCTIONS AS A TOOL OF MODERN WAR 68–73 (2022) (describing the evolving U.S. approach to sanctions during the First World War).

[57] International Emergency Powers Act (IEEPA), Pub. L. No. 95-223, 91 Stat. 1625 (1977).

[58] *See* CHRISTOPHER A. CASEY ET AL., CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINALS, EVOLUTION, AND USE 11 tbl.1. 17 (2020).

[59] Dames & Moore v. Regan, 453 U.S. 654, 671 (1981) (noting that "[t]he language of IEEPA is sweeping and unqualified").

[60] National Emergencies Act § 301, 50 U.S.C. § 1631 (2018).

[61] IEEPA § 202(a), 50 U.S.C. § 1701(a); *see also* CarrieLyn Donigan Guymon, *The Best Tool for the Job: The U.S. Campaign To Freeze Assets of Proliferators and Their Supporters*, 49 VA. J. INT'L L. 849, 860 (2009).

[62] IEEPA § 203, 50 U.S.C. § 1702(a).

[63] *See, e.g.*, Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017); Exec. Order No. 13,849, 83 Fed. Reg. 48,195 (Sept. 20, 2018) (authorizing the implementation of CAATSA); *see also* Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1094 (2020) (describing CAATSA).

and Blocked Persons ("SDN") List, and enforces these measures.[64]

Since the law's passage in 1977, the executive branch has reimagined what IEEPA and sanctions generally can do.[65] First, rather than just targeting state actors, the executive branch has also used these measures to counter transnational threats like proliferation, terrorism, and cybersecurity.[66] Second, in addition to the broad embargo-like sanctions, the President has imposed so-called "smart sanctions" which aim to target specific individuals and entities without harming the population at large.[67] Third, and related, the executive branch has relied on IEEPA to affect capital markets and the allocation of investment rather than simply to harm individuals or attack broader targets. For example, the executive branch has curtailed U.S. investors' ability to own securities of certain companies operating in the Chinese "military-industrial complex."[68] Fourth, the United States increased its usage of sanctions. In nearly four years, the Trump administration issued 3,577 sanctions designations, two-thirds more than those issued during the first term of the Obama administration.[69]

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64 Meredith Rathbone, Peter Jeydel & Amy Lentz, *Sanctions, Sanctions Everywhere: Forging a Path through Complex Transnational Sanctions Laws*, 44 GEO. J. INT'L L. 1055, 1058, 1061 (2013) (describing OFAC's role and responsibilities).

65 *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 86 (2010) (stating that while the IEEPA was passed to constrain executive action, the legislation "has been construed by the courts to grant broad executive power"); Chacko, *supra* note 63, at 1094 (describing the early limited use of the IEEPA).

66 Chacko, *supra* note 63, at 1094–95 (describing uses of IEEPA to address transnational threats).

67 *See, e.g.*, Drezner, *supra* note 34, at 100 (2011) ("Smart sanctions could raise the target regime's costs of noncompliance while avoiding the collateral damage that comes with comprehensive trade embargoes."). Targeted "smart sanctions include "financial sanctions, asset freezes, travel bans, restrictions on luxury goods, and arms embargos." *Id.*

68 *See* Exec. Order No. 14,032, 86 Fed. Reg. 30,145, 30,145 (June 3, 2021).

69 Michael R. Gordon & Ian Talley, *Biden Faces Choice on Trump's Economic Sanctions*, WALL ST. J. (Nov. 11, 2020, 8:27 AM),

Contemporary U.S. sanctions also reflect a new specific area of focus.[70] Since the early 2000s, U.S. policymakers have re-oriented these measures from trade to finance, bringing them closer to the primarily banking-focused AML/CFT strands.[71] New sanctions target the financial flows that make the sanctioned country's economic activity possible.[72] For example, in 2014 the United States limited the types of financing U.S. institutions can provide to targeted Russian energy projects.[73] Two financial "sticks" used against Iran show how these financial sanctions work in practice and demonstrate the parallels with the AML/CFT strand.[74] First, starting in 2006, the United States limited Iranian banks'

https://www.wsj.com/articles/trump-intensified-u-s-financial-warfare-leaving-it-for-biden-11605101245 (on file with Columbia Business Law Review).

[70] *See generally* Edoardo Saravalle, *The Watchful Eye of the U.S. Dollar*, ALCHEMIST MAG. (May 19, 2021), https://www.alchemistmag.com/past-editions/the-watchful-eye-of-the-us-dollar [https://perma.cc/LPD9-PPYY] (describing the functioning of U.S. financial sanctions).

[71] *See* Orde F. Kittrie, *New Sanctions for a New Century: Treasury's Innovative Use of Financial Sanctions*, 30 U. PA. J. INT'L L. 789, 792–93 (2009) (noting how the pre-existing ban on U.S. trade with Iran encouraged U.S. policymakers to turn to finance to put pressure on Tehran); Daniel W. Drezner, *Targeted Sanctions in a World of Global Finance*, 41 INT'L INTERACTIONS 755, 756, 758 (2015) (discussing the United States' increased focus on financial sanctions).

[72] Barry E. Carter & Ryan M. Farha, *Overview and Operation of U.S. Financial Sanctions, Including the Example of Iran*, 44 GEO. J. INT'L L. 903, 904 (2013) ("Financial sanctions focus on the flow of funds and other forms of value to and from a target country, corporation, individual, or other entity. These sanctions can have wide impact because they cannot only freeze financial assets and prohibit or limit financial transactions, but they also impede trade by making it difficult to pay for the export or import of goods and services.").

[73] *What Do the Prohibitions in Directives 1 and 2 Mean? Are They Blocking Actions?*, TREASURY DEP'T (Nov. 28, 2017), https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1576 [https://perma.cc/9EYY-JSVU].

[74] Katzenstein, *supra* note 36, at 315. Though Katzenstein notes three sticks, this Note discusses the third, increased enforcement, in the context of factors that increased U.S. reach below. *Id.*

U.S. dollar clearing,[75] "[t]he process of transmitting, reconciling and, in some cases, confirming transactions prior to settlement, potentially including the netting of transactions and the establishment of final positions for settlement."[76] This move complicated Iranians' ability to conduct business denominated in U.S. dollars and required them to rely on cumbersome alternative payment systems.[77] Second, rather than merely hampering Iranian financial access, Washington threatened to completely cut it off.[78] The 2010 Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA) empowered the Treasury Secretary to condition or prohibit the maintenance of correspondent accounts for financial institutions that engaged in certain banned activities with Iranian entities.[79] Fearing a death sentence similar to that under section 311, international banks terminated their relationships with Iranian banks.[80] Those that did not, like

[75] *See* Iranian Transactions Regulations, 71 Fed. Reg. 53,569, 53,570 (Sept. 12, 2006) (to be codified at 31 C.F.R. pt. 560); Press Release, U.S. Dep't Treasury, Treasury Revokes Iran's U-Turn License, HP-1257 (Nov. 6, 2008), https://home.treasury.gov/news/press-releases/200811611403711686 [https://perma.cc/Q8JT-9H7Z].

[76] COMM. ON PAYMENTS & MKT. INFRASTRUCTURES, BANK FOR INT'L SETTLEMENTS, A GLOSSARY OF TERMS USED IN PAYMENTS AND SETTLEMENT SYSTEMS 4 (2016), https://www.bis.org/dcms/glossary/glossary.pdf?scope=CPMI&base=term [https://perma.cc/ZK9P-QAPZ].

[77] Iranian Banks Reconnected to SWIFT Network After Four-Year Hiatus, REUTERS (Feb. 17, 2016, 7:38 AM), https://www.reuters.com/article/us-iran-banks-swift/iranian-banks-reconnected-to-swift-network-after-four-year-hiatus-idUSKCN0VQ1FD [https://perma.cc/7DVD-GMUN] (discussing consequences of SWIFT ban).

[78] David Cohen, Under Sec'y, Terrorism & Fin. Intelligence, Remarks at N.Y.U. L. Sch.: The Law and Policy of Iran Sanctions (Sept. 12, 2012), https://home.treasury.gov/news/press-releases/tg1706 [https://perma.cc/X648-V4TX] ("The impact was dramatic. Nearly everyone we spoke with readily recognized that there really was only one choice—to terminate relationships with designated Iranian banks.").

[79] Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA) § 104(c)(1), 22 U.S.C. § 8513(c)(1) (2018).

[80] *See, e.g.*, Joe Palazzolo, *U.A.E. Banks Distancing Themselves from Iran*, WALL ST. JOURNAL (Oct. 6, 2010, 10:25 AM), https://www.wsj.com/articles/BL-CCB-651?page=4 (on file with the

the Chinese Bank of Kunlun, faced a cutoff from the global financial system.[81] Other financial measures that followed, including in response to Russia's invasion of Ukraine, have suggested the continued viability of using such sticks as foreign policy tools.[82]

Secondary sanctions, which "subject foreign persons to sanctions for actions that they take wholly outside of U.S. jurisdiction,"[83] have both showcased the reach of the sanctions

Columbia Business Law Review) (reporting that United Arab Emirati banks were cutting ties with Iranian banks following the expansion of U.S. sanctions); Roula Khalaf, *No Compromise as Sanctions Bite in Iran*, FIN. TIMES (Sep. 16, 2010), https://www.ft.com/content/0173519c-c1af-11df-9d90-00144feab49a (on file with the Columbia Business Law Review) ("The number of companies and financial institutions cutting ties to Tehran has accelerated . . . . Even in Turkey, where the government is keen on promoting trade with Iran, bankers are nervous, and those with international ties are unwilling to jeopardise their links with the US by dealing with Iranian counterparts."); Press Release, U.S. Dep't Treasury, Written Testimony by Under Secretary for Terrorism and Financial Intelligence Stuart Levey Before the House Committee on Foreign Affairs (Dec. 1, 2010), https://home.treasury.gov/news/press-releases/TG985 [https://perma.cc/HK89-AW9H] ("[E]ven banks that had been willing to maintain accounts for designated Iranian banks are now reversing course or cutting ties with Iran altogether.").

81 Press Release, U.S. Dep't Treasury, Treasury Sanctions Kunlun Bank in China and Elaf Bank in Iraq for Business with Designated Iranian Banks (July 31, 2012), https://home.treasury.gov/news/press-releases/tg1661 [https://perma.cc/U5Y3-KWA5]; Cohen, *supra* note 78 ("Nearly everyone . . . recognized that there really was only one choice—to terminate relationships with designated Iranian banks. And those that did not appear to recognize this . . . have now been cut off from the United States banking system.").

82 *See, e.g.*, 22 U.S.C. § 8513 (freezing assets of Iranian financial institutions and restricting foreign financial institutions' dealings with the Central Bank of Iran and certain Iranian banks); Imposing Additional Sanctions with Respect to the Situation in Venezuela, Exec. Order No. 13,808, 82 Fed. Reg. 41,155 (Aug. 24, 2017) (limiting financial dealings with certain Venezuelan entities); Treasury Dep't, Press Release on Russian Sanctions, *supra* note 9.

83 Rathbone et al., *supra* note 64, at 1071.

and caused particular controversy in recent decades.[84] In one contentious case, the United States imposed limitations on foreign investments in the Iranian oil industry.[85] In response, the European Union put in place Council Regulation 2271/96, a blocking statute prohibiting EU firms from complying with U.S. sanctions.[86] In that case, the United States ultimately suspended its imposition of these sanctions,[87] so there was no opportunity to test the statute's effect. Brussels again promulgated a blocking statute following the 2018 U.S. exit from the Iran nuclear deal and its re-imposition of sanctions on Tehran.[88] The effects of this pushback have been muted. One 2019 study found that no "EU member state had opened investigations into, or imposed penalties on, European companies that left the Iranian market due to U.S. secondary sanctions."[89] The study found that the statutes fell short, in part, because European "companies did not wait until the U.S. had begun procedures against them before making [their exit] decisions. Thus, commercial actors . . . opted to abide by, and even over-comply with, the US sanctions framework."[90]

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84 *See Developments in the Law: Extraterritoriality*, 124 HARV. L. REV. 1226, 1247–50 (2011) (describing historic EU opposition to U.S. secondary sanctions).

85 Iran and Libya Sanctions Act of 1996 § 3(a), 50 U.S.C. § 1701 note (2018).

86 Council Regulation 2271/96, 1996 O.J. (L 309) 1 (EC).

87 *Developments in the Law: Extraterritoriality*, *supra* note 84, at 1249.

88 Council Regulation 2018/1100, 2018 O.J. (LI 199/1) 1 (EC).

89 Ellie Geranmayeh & Manuel Lafont Rapnouil, *Meeting the Challenge of Secondary Sanctions*, EUR. COUNCIL ON FOREIGN RELS. (Jun. 25, 2019), https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/ [https://perma.cc/34K3-XNXE].

90 *Id.*; *see also* Edoardo Saravalle, *Bargaining Chip?* PHENOMENAL WORLD (Mar. 9, 2022), https://www.phenomenalworld.org/analysis/bargaining-chip/ [https://perma.cc/3PUU-F2PP] (describing global over-compliance with the 2022 sanctions on Russia); GIBSON DUNN, THE "NEW" IRAN E.O. AND THE "NEW" EU BLOCKING STATUTE—NAVIGATING THE DIVIDE FOR INTERNATIONAL BUSINESS 8–10 (Aug. 9, 2018), https://www.gibsondunn.com/new-iran-e-o-and-new-eu-blocking-statute-navigating-the-divide-for-international-business/ [https://perma.cc/E2SQ-6RZU] (contrasting the "rhetoric and

The controversial status of secondary sanctions should not lead one to overestimate the difference between secondary and primary sanctions in practice. First, under its primary sanctions regulations, OFAC can sanction parties for their "material support" of or for "acting on behalf" of sanctioned entities, two approaches that do not fulfill restrictive definitions of "secondary sanctions"—and usually only target immediate enablers of proscribed activities—but that could conceivably reach as broadly as their secondary counterparts.[91] Second, banks tend to over-comply with U.S. sanctions. Even though Washington may only impose primary sanctions (and carve out non-U.S. businesses), financial institutions might proactively refuse to process a broader set of non-targeted businesses.[92] For this reason, there can often

regulation" of the EU blocking statute with the likely more muted "reality" of "uneven application" and "flexibility" of these rules).

91 SAMANTHA SULTOON & JUSTINE WALKER, SECONDARY SANCTIONS' IMPLICATIONS AND THE TRANSATLANTIC RELATIONSHIP (2019), https://www.atlanticcouncil.org/wp-content/uploads/2019/09/SecondarySanctions_Final.pdf [https://perma.cc/6U5S-9MYG] (noting that "[s]econdary sanctions, even when wielded as a threat, often prompt strong reactions from allies, particularly in Europe" but that "[c]uriously, use of the 'material support' criterion for the application of sanctions is rarely questioned or criticized."); *see also* David Murray (@dave_murr), TWITTER (Aug. 6, 2019, 1:49 PM), https://twitter.com/david_murr/status/1158797200392097793 (on file with the Columbia Business Law Review) ("[T]he difference between secondary sanctions and material support prongs is razor thin. Secondary sanctions are not much more than an explicit warning about targeting intent.").

92 Brent J. McIntosh, *Wielding the Tools of Economic Statecraft*, 12 J. NAT'L SEC. L. & POL'Y 101, 104 (2021) ("[R]esponsible actors are wary of coming anywhere close to crossing the United States, and therefore they often 'comply' with U.S. measures more broadly than the measures themselves require."); Tom Ruys & Cedric Ryngaert, *Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, BRIT. Y.B. INT'L L. (Sept. 22, 2020), https://academic.oup.com/bybil/advance-article/doi/10.1093/bybil/braa007/5909823 [https://perma.cc/HDP9-YYTP] (reporting an interview with a European bank's compliance officer who noted that "[f]ear of sanctions even leads to over-compliance by non-US persons."); *see, e.g.*, *G-7 Finance Ministers Seek To Isolate Russia, Raise Costs for Putin: Latest*, BLOOMBERG (Apr. 21, 2022, 12:06 AM),

be little difference between secondary sanctions and certain primary sanctions that nonetheless have a chilling effect on non-U.S. business. Third, even secondary sanctions may be acceptable under international law. A common form of U.S. secondary sanction against Iran, the restriction on access to U.S. financial markets, is not illegal under customary international law of jurisdiction.[93] Therefore, though it may provoke protests and pushback, the designation of a sanction as "secondary" category may say little about its legal acceptability. Fourth, support or opposition to these measures often depends more on the diplomatic alignment between countries rather than on principle. When the United States approved CISADA in 2010, the European Union supported and followed the measure.[94] In short, these considerations counsel a focus on the practical effects of sanctions rather than their classifications.

C. Explaining the Reach of Sanctions and AML/CFT Measures

What is unique about U.S. sanctions and AML/CFT authorities is not so much the laws and regulations themselves but their reach and power. Banks spend billions of dollars, hire thousands of employees, and preemptively close lines of business to comply with U.S. measures.[95] Global

https://www.bloomberg.com/news/articles/2022-04-20/ukraine-update-mariupol-in-jeopardy-china-stands-with-moscow [https://perma.cc/A5U2-XZRK] ("Russian banks under sanctions won't be able to issue UnionPay cards because the Chinese payments provider is concerned about the risk of secondary sanctions.").

93 Ruys & Ryngaert, *supra* note 92.

94 Developments in the Law, *Extraterritoriality*, *supra* note 84, at 1251.

95 Yalman Onara, *Stung by Big Fines, Big Banks Beef Up Money-Laundering Controls*, BLOOMBERG (Apr. 4, 2019, 5:00 AM), https://www.bloomberg.com/news/articles/2019-04-04/global-banks-beef-up-money-laundering-controls-as-fines-sting (on file with the Columbia Business Law Review) (highlighting the doubling of compliance staff focused on AML/CFT at major international banks following the U.S. imposition of significant fines); BANK POL'Y INST., GETTING TO EFFECTIVENESS—REPORT ON U.S. FINANCIAL INSTITUTION RESOURCES DEVOTED TO BSA/AML & SANCTIONS COMPLIANCE, 2 (2018),

aluminum prices spiked over twenty percent when Washington targeted Russian aluminum producer Rusal.[96] United States measures act globally: They do not just affect relations between U.S. persons and targets, but between third parties, even when foreign governments oppose U.S. measures.[97]

The U.S. dollar's role in the global financial system is the source of this unilateralism.[98] Nearly fifty percent, or almost $22.6 trillion, of outstanding cross-border loans and international debt securities are denominated in dollars.[99] Roughly forty percent of international payments are denominated in dollars, as is half of all international trade.[100] Most oil transactions are denominated in dollars as well.[101]

https://bpi.com/wp-content/uploads/2018/10/BPI-AML-Sanctions-Study-vF.pdf [https://perma.cc/YSN9-485T] (reporting that fourteen surveyed institutions invested a total of $2.4 billion on BSA/AML compliance); Victoria Anglin, Note, *Why Smart Sanctions Need a Smarter Enforcement Mechanism: Evaluating Recent Settlements Imposed on Sanction-Skirting Banks*, 104 GEO. L.J. 693, 717 (2016) (discussing the phenomenon of de-risking).

96 Henry Sanderson, *Metal Prices Surge After US Sanctions on Rusal*, FIN. TIMES (Apr. 19, 2018), https://www.ft.com/content/4d16620a-4326-11e8-803a-295c97e6fd0b (on file with the Columbia Business Law Review).

97 Bruce Love, *Companies Caught in EU-US Sanctions Crossfire*, FIN. TIMES (Jan. 29, 2020), https://www.ft.com/content/97a75318-16a8-11ea-b869-0971bffac109 [https://perma.cc/8DB9-FGDH] (describing international companies navigating U.S. sanctions compliance and pushback from their home government).

98 Caytas, *supra* note 51, at 453 ("The importance of [Section 311] depends on the unique status of the dollar."); Katzenstein, *supra* note 36, at 294 ("Dollar unilateralism occurs when the government uses the unique status of the U.S. dollar in global financial markets to pursue policy goals independently.").

99 COMM. ON THE GLOB. FIN. SYS., BANK FOR INT'L SETTLEMENTS 5–6, U.S. DOLLAR FUNDING: AN INTERNATIONAL PERSPECTIVE (2020), https://www.bis.org/publ/cgfs65.pdf [https://perma.cc/7MXG-Q5CK].

100 *Id.* at 3; *see also* VERDIER, *supra* note 36, at 28 ("What sets the United States apart is that it possesses two crucial advantages: U.S. dollar dominance and control over vital hubs of the international financial system.").

101 Summer Said & Stephen Kalin, *Saudi Arabia Considers Accepting Yuan Instead of Dollars for Chinese Oil Sales*, WALL ST. J. (Mar. 15, 2022,

Dollar denomination of oil transactions, for example, is what ensured that the United States' so-called "U-turn restriction" on Iran (limiting international roundabout transactions with a brief U.S. touchpoint) would hamper Tehran's primary export: difficulty in executing a financial transaction translated in difficulty in executing the underlying physical transaction.[102] The effectiveness of the U-turn ban also clarifies the uniqueness of the United States' position. A similar U-Turn restriction from a country without influence over the international flow of dollars would not have a similar impact.

Widespread use of the dollar shapes the global economic architecture. This system is not, as a traditional trade-centric view would have it, a series of islands (countries) with bilateral economic flows connecting them.[103] Instead, as a more finance-centric view might suggest, it is an interlocking

11:48 AM), https://www.wsj.com/articles/saudi-arabia-considers-accepting-yuan-instead-of-dollars-for-chinese-oil-sales-11647351541 (on file with the Columbia Business Law Review) (reporting that roughly eighty percent of oil transactions are done in dollars).

102 *See* Steven R. Weisman, *U.S. Puts the Squeeze on Financing in Iran and North Korea*, N.Y. TIMES (Oct. 16, 2006), https://www.nytimes.com/2006/10/16/world/americas/16iht-sanctions.3173938.html [https://perma.cc/5KGY-27FF].

> [A U-turn] transaction permits, for example, Iran to sell oil to a German customer, who in turn directs a European bank to deposit dollars obtained from a U.S. bank into an Iranian bank account located in Europe. The phrase 'U-turn' applies because the funds are transferred to a U.S. bank and instantly turned back as dollars to a European bank.

Id.

103 Hyun Song Shin, Econ. Adviser & Head of Rsch. of the Bank for Int'l Settlements, Remarks at the IMF-IBRN Joint Conference on Transmission of Macroprudential and Monetary Policy Across Borders: Accounting for Global Liquidity: Reloading the Matrix (Apr. 19, 2017), https://www.bis.org/speeches/sp170419.pdf [https://perma.cc/323H-KSH9]. Shin describes this trade-centric view as one where "[t]he global economy is a collection of islands where the exchange rate determines the trade balance. A weaker currency boosts one island's economy through higher exports. An island running a trade surplus would see its currency appreciate, unless something interferes with that adjustment." *Id.*

matrix of corporate balance sheets or a series of nodes ultimately centered around the United States.[104] Here, trade between two islands (countries) might still be bilateral (as in the old system), but it would rely on the U.S. dollar, immediately making this transaction more matrix-like than bilateral. As economist Hyun Song Shin notes, "The striking feature is how the dollar is everywhere, not just to and from the United States."[105] Because these dollar transactions are everywhere, it is difficult to leave the "dollar world"—with major consequences for sanctions and AML/CFT practice. Cases like the 2019 OFAC enforcement action against the British Arab Commercial Bank suggests how far U.S. rules can reach in this matrix.[106] There, dollar-denominated transactions with Sudan never cleared in the United States.[107] However, OFAC found that even more tenuous, intermediated, and evasive relationships could result in a U.S. nexus.[108] Compounding this, legislation has further expanded

104 *Id.* ("Doing justice to global liquidity means moving from the islands view of the global economy to that of the dense network of connected nodes. Exchange rates have a financial channel, not just a trade channel.").

105 *Id.*

106 *Settlement Agreement Between the U.S. Department of the Treasury's Office of Foreign Assets Control and British Arab Commercial Bank plc*, TREASURY DEP'T (Sept. 17, 2019), https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20190917_33 [https://perma.cc/BK5M-ELTL] [hereinafter *OFAC Action*]; *see* MORRISON & FOERSTER, TOP 10 LESSONS LEARNED FROM OFAC'S 2019 FINANCIAL INSTITUTION ENFORCEMENT ACTIONS (OFAC 2019 YEAR IN REVIEW PART 2) (2020), https://www.mofo.com/resources/insights/200206-financial-institution-enforcement-actions.html [https://perma.cc/MNN2-2HYB]. As this example suggests, concurrent with the broad reach of the dollar, the assertion of U.S. jurisdiction plays a part as well.

107 *OFAC Action*, *supra* note 106, at 3 ("BACB received assurances from Bank B that it had "an internal USD clearing system and [could] settle USD in [the country of Bank B] without going through New York [i.e., the United States]" (international quotation marks omitted)).

108 Meredith Rathbone & Peter Jeydel, *OFAC's Case Against British Arab Commercial Bank and Offshore Use of the US Dollar*, STEPTOE & JOHNSON (Oct. 7, 2019), https://www.steptoe.com/en/news-publications/ofacs-case-against-british-arab-commercial-bank-and-offshore-use-of-the-us-dollar.html [https://perma.cc/X9DS-KYJB] (explaining how OFAC charged a "non-US bank with no presence in the

U.S. reach, for example, by broadening the definition of what money counts as being "inside" the United States.[109] While in an island-world one can avoid touching the United States, in a matrix-world, one cannot.

Within this hard-to-leave system, Washington holds disproportionate power.[110] It exercises it through the "chokepoint" effect, which allows the hub, the United States, to cut adversaries off from network flows.[111] The chokepoint effect's operation is clearest in the context of correspondent banking accounts. Based in the hub, these accounts enable all sorts of transactions between the spokes.[112] Through

United States[] conducting transactions with Sudan that did not clear through the United States, using an account at another non-US bank that it funded through yet two more non-US banks" and relying on, as a jurisdictional hook, the non-U.S. banks' transaction "with US-based banks or US branches of non-US banks while processing the funds transfers").

109 *See* Gruson, *supra* note 52, at 744–49 (explaining how the "Patriot Act uses a fiction, namely, that funds deposited in a foreign account are deemed to have been deposited in a U.S. account").

110 *See, e.g.*, Herman Mark Schwartz, *American Hegemony: Intellectual Property Rights, Dollar Centrality, and Infrastructural Power*, 26 REV. POL. ECON. 490, 490 ("Dollar centrality in the global monetary system is a crucial pillar of US global power."); Henry Farrell & Abraham L. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, INT'L SEC., Summer 2019, at 48–49 (challenging liberal scholars' belief that "globalization creates decentralized networks that generate new opportunities for cooperative diplomacy").

111 Farrell & Newman, *supra* note 110, at 55–56 (explaining the "chokepoint effect"); *see also* Thomas Oatley, *Weaponizing International Financial Interdependence*, in THE USES AND ABUSES OF WEAPONIZED INTERDEPENDENCE 115, 115–16 (Daniel W. Drezner, Henry Farrell & Abraham L. Newman eds., 2021) (describing U.S. uses of the chokepoint effect).

112 Saravalle, *supra* note 70.

> [W]hen a Middle Eastern oil producer sells its oil to an Asian buyer, the sale takes place in dollars. Since buyers do not ship dollar bills back and forth, "payment," in practice, means subtracting dollar amounts in an account at one bank and adding them to an account at another one. Firms do not usually have accounts at the same bank, so for the numbers to even out, there has to be a dollar-dealing intermediary institution, a "correspondent bank," that subtracts the money from one account it holds on behalf of the buyer's

measures like the Iran and Russia sanctions and section 311, Washington holds the power to remove access to these accounts—or to extract concessions in exchange for allowing access.[113]

Even when the United States does not have legal control over these chokepoints, it can use its influence to exert control. The experience of the Society for Worldwide Interbank Financial Telecommunication (SWIFT) stands out in this respect. A Belgian company, SWIFT facilitates the messages between financial institutions that make global money transfers possible, and thus constitutes a key chokepoint in the global financial system.[114] Though SWIFT is not regulated directly by the United States, it cannot risk running awry of U.S. rules. As a result, it has twice complied with U.S. pressure to cut off Iranian banks from its messaging services, and following EU regulations, it restricted Russian banks following the invasion of Ukraine.[115] SWIFT even acted when

> bank and adds it to another account it also holds for the seller's bank. Given the importance of correspondent banks and their likelihood of being located in the United States, most international transactions will end up having a tie-in with U.S. jurisdiction and its rules.

Id.

[113] Perry Anderson, *Situationism à L'envers*, NEW LEFT REV., Sept./Oct. 2019, at 47, 86 (arguing that sanctions are "the inseparable, geopolitical face of the global dollar system"); Farrell & Newman, *supra* note 110, 55–56 (describing how the United States can weaponize correspondent bank accounts).

[114] Farrell & Newman, *supra* note 110, at 58–60; *see also* Nicholas Comfort & Natalia Drozdiak, *Why SWIFT Ban Is Such a Potent Sanction on Russia*, BLOOMBERG (Mar. 24, 2022, 4:26 AM), https://www.bloomberg.com/news/articles/2022-01-26/why-swift-s-global-payments-are-sanctions-pain-point-quicktake (on file with the Columbia Business Law Review).

[115] Rick Gladstone & Stephen Castle, *Global Network Expels as Many as 30 of Iran's Banks in Move To Isolate Its Economy*, N.Y. TIMES (Mar. 15, 2012), https://www.nytimes.com/2012/03/16/world/middleeast/crucial-communication-network-expelling-iranian-banks.html [https://perma.cc/H574-S3Y8] (describing the 2012 removal of Iranian banks from SWIFT); Michael Peel, *SWIFT To Comply with U.S. Sanctions on Iran in Blow to EU*, FIN. TIMES (Nov. 5, 2018),

the European Union opposed a cutoff after the United States' exit from the Iran deal.[116]

By focusing on finance rather than trade and thus wielding the chokepoint effect, both AML/CFT measures and sanctions can exert disproportionate power. Rather than shaping individual bilateral relationships through trade sanctions, Washington's transition to a financialized practice of sanctions and AML/CFT regulations allows it to shape the matrix of the entire global economy. Other countries can exert some influence over some bilateral relationships; but only the United States can control the matrix.[117]

https://www.ft.com/content/8f16f8aa-e104-11e8-8e70-5e22a430c1ad (on file with the Columbia Business Law Review) (describing the 2018 removal of Iranian banks from SWIFT). In 2022, the European Union imposed restrictions on SWIFT access for Russian banks. Press Release, Eur. Comm'n, Ukraine: EU Agrees To Exclude Key Russian Banks from SWIFT (Mar. 2, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1484 (on file with the Columbia Business Law Review); *see also* Mark Landler, Katrin Bennhold & Matina Stevis-Gridneff, *How the West Marshaled a Stunning Show of Unity Against Russia*, N.Y. TIMES (Mar. 5, 2022), https://www.nytimes.com/2022/03/05/world/europe/russia-ukraine-invasion-sanctions.html [https://perma.cc/Z8WA-DU2L] (describing the transatlantic coordination that resulted in the imposition of SWIFT sanctions).

116 Peel, *supra* note 115; Farrell & Newman, *supra* note 110, at 67–70 (describing the two pressure campaigns against SWIFT).

117 *See, e.g.*, Julia C. Morse, *The E.U. Tried To Blacklist Countries at High Risk for Money Laundering, But It Backfired. Here's Why.*, WASH. POST (Mar. 14, 2019), https://www.washingtonpost.com/politics/2019/03/14/eu-tried-blacklist-countries-high-risk-money-laundering-it-backfired-heres-why/ [https://perma.cc/B7KW-WQK3] (describing the European Union's failed unilateral attempt to include U.S. territories on an anti-money laundering blacklist); Daniel W. Drezner, *Introduction: The Uses and Abuses of Weaponized Interdependence*, in THE USES AND ABUSES OF WEAPONIZED INTERDEPENDENCE, *supra* note 110, at 1, 4 (arguing that Russian and Chinese efforts to weaponize interdependence have yielded mixed results).

III. MOVING SANCTIONS AND AML/CFT REGULATIONS FROM THE NATIONAL SECURITY TO REGULATORY FRAMEWORK

Today, sanctions and AML/CFT rules are part of the U.S. national security toolkit. Practitioners see themselves as members of the national security community, and the key statutory authorities in this space require a connection to national security.[118] However, viewing sanctions and AML/CFT solely through this lens has analytical implications. Scholars and practitioners have traditionally judged sanctions and AML/CFT measures within a "bargaining" model, evaluating their effectiveness based on whether these tools enabled successful national security negotiations.[119] This approach has reflected how these measures function in practice—U.S. policymakers, for example, argue that the Iran sanctions led to negotiations and an agreement with Tehran.[120] At the same time, this approach does not take into account that many of today's national security challenges do not lend themselves to resolution through bargaining, and that policymakers may not have this framework in mind when imposing these measures.[121]

But there is another way to look at these tools. Sanctions and AML/CFT rules are also "regulatory" measures focused

118 *See infra* discussion Section III.A.

119 *See infra* notes 136–143 and accompanying text.

120 *See, e.g.*, William J. Burns & Jake Sullivan, *We Led Successful Negotiations with Iran. Trump's Approach Isn't Working*, ATL. MONTHLY (May 19, 2019), https://www.theatlantic.com/ideas/archive/2019/05/trumps-iran-strategy-all-coercion-no-diplomacy/589558/ (on file with the Columbia Business Law Review) (arguing that economic pressure on Iran was "necessary but not sufficient" to bring Iran to the bargaining table); *see also* Suzanne Maloney *Un-Sanctioning Iran: What the Nuclear Deal Means for the Future of Sanctions*, BROOKINGS INST. (Aug. 3, 2015), https://www.brookings.edu/blog/markaz/2015/08/03/un-sanctioning-iran-what-the-nuclear-deal-means-for-the-future-of-sanctions/ [https://perma.cc/J3FF-DWHG] ("[T]he fierce multilateral sanctions regime erected between 2007 and 2013 played a pivotal role in persuading Iran to abandon its recalcitrance toward the nuclear negotiations with six world powers, including the United States.").

121 *See infra* Section III.B.

not only on a theoretical bargain down the line, but also on curbing certain types of activity in the short-term.[122] "Regulatory" in this context means that they are focused on shaping the immediate behavior they are targeting as opposed to trying to achieve some ulterior goal.[123] Sanctions on a country's coal producers to get the country to stop nuclear proliferation would constitute traditional "bargaining" measures. Long-term sanctions countering nuclear proliferation by limiting, say, the correspondent banking access of would-be proliferators would qualify as "regulatory": measures essentially focused on excluding a certain activity from the global financial system. By distinguishing the two approaches and looking at these measures through this alternative "regulatory" model one can draw comparisons with other forms of financial regulation and highlight sanctions' and AML/CFT measures' unique characteristics.[124]

A. The National Security Lens

There are good reasons to view sanctions and AML/CFT through a national security lens. First, this is how the practitioners often see themselves. Treasury Secretary Stephen Mnuchin himself has noted that "the Treasury has played an increasingly central role in national security matters."[125] Both OFAC and FinCEN classify their respective

122 *See infra* Section III.C.

123 *See infra* notes 159–161 and accompanying text.

124 *See infra* Section III.C.

125 Ian Talley, *Top U.S. Sanctions Chief To Leave Trump Administration for Private Sector*, WALL ST. J. (Oct. 2, 2019, 5:16 PM), https://www.wsj.com/articles/top-u-s-sanctions-chief-to-leave-trump-administration-for-private-sector-11570025888 (on file with the Columbia Business Law Review); *see also* Lea McGrath Goodman & Lynnley Browning, *The Art of Financial Warfare: How the West Is Pushing Putin's Buttons*, NEWSWEEK (Apr. 24, 2014, 6:06 AM), https://www.newsweek.com/2014/05/02/art-financial-warfare-how-west-pushing-putins-buttons-248424.html [https://perma.cc/8VWK-SLXD] ("'Fifteen years ago, the idea that the Treasury Department would be at the center of our national security would have been inconceivable,' Daniel Glaser, assistant secretary for terrorist financing at Treasury, said in an

missions as ones of national security.[126] The United States' use of these measures justifies this self-conception. Washington regularly employs sanctions and AML/CFT rules against countries deemed adversaries of the United States, such as Iran, Russia, North Korea, and China.[127] The Trump administration's *U.S. National Security Strategy* states, "Economic tools—including sanctions, anti-money-laundering and anti-corruption measures, and enforcement actions—can be important parts of broader strategies to deter, coerce, and constrain adversaries."[128] A Biden administration review of U.S. sanctions policy focused on recommendations to "preserve and enhance their effectiveness in supporting national security and U.S. interests."[129] This self-positioning

interview. 'But we have developed a whole new set of tools to put at the president's disposal.'").

126 *Mission*, FIN, CRIMES ENF'T NETWORK (last visited Apr. 10, 2022), https://www.fincen.gov/about/mission [https://perma.cc/7DQQ-9X3K] ("The mission of the Financial Crimes Enforcement Network is to safeguard the financial system from illicit use, combat money laundering and its related crimes including terrorism, and promote national security through the strategic use of financial authorities and the collection, analysis, and dissemination of financial intelligence."); *Office of Foreign Assets Control—Sanctions Programs and Information*, TREASURY DEP'T, https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information [https://perma.cc/7MM3-SX9V](last visited Apr.. 10, 2022) ("[OFAC] administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States.").

127 *Sanctions Programs and Country Information*, TREASURY DEP'T, https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information [https://perma.cc/3G8F-3MC4] (last visited Apr. 10, 2022).

128 WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 34 (2017), https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf [https://perma.cc/V48A-PGFP].

129 Press Release, U.S. Department of the Treasury Releases Sanctions Review, TREASURY DEP'T (Oct. 18, 2021)

is not mere rhetoric; it shapes how other parts of the government treat these measures. Courts have traditionally been deferential in reviewing these measures in light of their national security role.[130]

Second, national security concerns often form the legal basis for the use of these measures. For example, invoking the IEEPA requires an emergency determination.[131] This means that any use of sanctions necessitates a tie-in to national security and a national emergency.[132] For example, in Executive Order 13818 implementing the Global Magnitsky Act[133] targeting corruption and human rights abuses, President Trump "determine[d] that serious human rights abuse and corruption around the world constitute[d] an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States."[134] To be sure, officials can treat the invocation of national security as pro forma.[135] Nonetheless, this legal requirement means that

https://home.treasury.gov/news/press-releases/jy0413 [https://perma.cc/LN2Z-NXEX].

130 *See* Chachko *supra* note 63, at 1102 ("Despite the resemblance of agency decisionmaking in this context to ordinary administrative decisionmaking, judicial oversight has been limited and confined to specific policy areas. When courts have ruled against the government, it was mostly on constitutional grounds."); *see also* Elena Chachko, *Due Process Is in the Details: U.S. Targeted Economic Sanctions and International Human Rights Law*, 113 AM. J. INT'L L. UNBOUND 157, 160 (2019) [hereinafter Chachko, *Due Process*) ("Judicial treatment of OFAC designations has generally been deferential."); David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 228 (2010) ("Treasury's increasingly important national security role, in other words, affects a great deal of daily economic operations. Nevertheless, Treasury enjoys a vast amount of discretion in overseeing those operations because of its national security claims." (emphasis omitted)).

131 *See supra* notes 59–61 and accompanying text.

132 *See* 50 U.S.C. §§ 1601, 1621–22, 1631, 1641, 1651 (2018) (describing national emergency powers of the President).

133 Global Magnitsky Human Rights Accountability Act §§ 1261–65, 22 U.S.C. § 2656 note.

134 Exec. Order No. 13,818, 82 Fed. Reg. 60,839 (Dec. 26, 2017).

135 Gregory Korte, *White House: States of Emergency Are Just Formalities*, USA TODAY (Apr. 9, 2015, 12:33 PM), https://www.usatoday.com/story/news /politics/2o15/o4/o 9/pro-forma-

any use of sanctions, and often AML/CFT measures, will have a "national security" gloss from inception.

The treatment of sanctions and AML/CFT measures as national security tools may lead to the perception that they are simply bargaining chips—that is, that what matters is the national security goal and the tool itself is just incidental. This view elevates the national security end goals of these measures—whether stopping Iranian terrorism or North Korean nuclear proliferation—and evaluates sanctions and AML/CFT regulations' utility based on whether they can foster a bargain between the United States and the target. Under this model, there is a two-step process: first, sanctions impose economic pain; second, this economic pain creates behavioral change.[136] As then-Treasury Secretary Jacob J. Lew argued, sanctions "create pressure to change future behavior."[137]

This approach recurs in the academic literature on sanctions. Studies have compared U.S. sanctions programs' ability to achieve their stated goals and have offered overarching assessments of whether these tools have their intended effect.[138] This empirical research has found varied

states-of-national-emergency/25479553 [https://perma.cc/BY2T-UGQT] (quoting Deputy National Security Advisor Ben Rhodes saying that the "extraordinary threat" verbiage "is a language that we use in executive orders around the world . . . So the United States does not believe that Venezuela poses some threat to our national security. We, frankly, just have a framework for how we formalize these executive orders.").

136 RICHARD NEPHEW, THE ART OF SANCTIONS: A VIEW FROM THE FIELD 9 (2018) ("Sanctions are intended to create hardship—or to be blunt, 'pain'—that is sufficiently onerous that the sanctions target changes behavior.").

137 Jacob J. Lew, Sec'y, Treasury Dep't, Remarks of Secretary Lew on the Evolution of Sanctions and Lessons for the Future at the Carnegie Endowment for International Peace (Mar. 30, 2016), https://home.treasury.gov/news/press-releases/jl0398 [https://perma.cc/M4SS-XZ2Z].

138 *See e.g.*, GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED 2–3 (3rd ed. 2007) (studying 204 sanctions episodes, each with 14 variables); Anu Bradford & Omri Ben-Shahar, *Efficient Enforcement in International Law*, 12 CHI. J. INT'L L. 375, 377 (2012) ("Despite their frequent use, sanctions are controversial, costly, and usually ineffective.").

success rates (including five percent,[139] thirty-four percent,[140] and forty-one percent[141]) while generally questioning these measures' effectiveness in light of their collateral damage.[142] Critics of this literature argue it adapts an unduly restrictive lens. They have questioned these studies' definitions of success, their choice of timeframe for analysis, their neglect of alternative policy options, and an excessive state-centric focus that ignores the major role played by sanctions on non-state actors.[143] Other sanctions research has widened the range of analysis, including by expanding the range of national security concerns[144] or by discussing sanctions in a macroeconomic rather than national security context.[145]

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139 Robert A. Pape, *Why Economic Sanctions Do Not Work*, 22 INT'L SEC. 90, 106 (1997).

140 HUFBAUER ET AL., *supra* note 138, at 158.

141 ELIZABETH ROSENBERG ET AL., CTR. FOR A NEW AM. SEC., THE NEW TOOLS OF ECONOMIC WARFARE: EFFECTS AND EFFECTIVENESS OF CONTEMPORARY U.S. FINANCIAL SANCTIONS (2016), https://www.cnas.org/publications/reports/the-new-tools-of-economic-warfare-effects-and-effectiveness-of-contemporary-u-s-financial-sanctions [https://perma.cc/E5XK-3ESY].

142 Navin A. Bapat & Bo Ram Kwon, *When Are Sanctions Effective? A Bargaining and Enforcement Framework*, 69 INT'L ORG. 131, 131 (2015) ("Much of the empirical literature argues that economic sanctions are ineffective tools of coercive bargaining."); Richard N. Haass, *Sanctioning Madness*, FOREIGN AFFS., Nov.–Dec. 1997, at 74, 75–78 ("[T]he problem with economic sanctions is that they frequently contribute little to American foreign policy goals while being costly and even counterproductive").

143 Dursun Peksen, *When Do Imposed Economic Sanctions Work? A Critical Review of the Sanctions Effectiveness Literature*, 30 DEFENCE & PEACE ECON. 635, 640–42 (2018) (reviewing criticism and limitations of the sanctions literature); *see also* Özgür Özdamar & Evgeniia Shahin, *Consequences of Economic Sanctions: The State of the Art and Paths Forward*, 23 INT'L STUD. REV. 1646, 1658–61 (2021) (cataloguing thematic, methodological, and theoretical critiques of existing sanctions literature).

144 *See, e.g.*, Daniel W. Drezner, *Economic Statecraft in the Age of Trump*, 42 WASH. Q. 7, 19 (2019) (arguing that President Trump's repeated threats that the United States did not follow through with erodes the threat of U.S. threats).

145 ESFANDYAR BATMANGHELIDJ, THE INFLATION WEAPON: HOW AMERICAN SANCTIONS HARM IRANIAN HOUSEHOLDS 7 (2022), https://sanctionsandsecurity.org/wp-content/uploads/2022/01/2022-

B. Problems with the National Security Lens

While the bargaining model reflects some U.S. experiences with sanctions and, less so, with AML/CFT rules, it is a partial view. It does not fit well in a world where the content and practice of "national security" are dynamic.[146] In recent years, policymakers have broadened their idea of what constitutes protecting "national security."[147] In the process, they have blurred distinctions between economic and national security questions.[148] These changes have made the bargaining framework of limited applicability to sanctions and AML/CFT rules as used today.

First, new national security threats and actors have emerged. As Benton Heath notes, since the Cold War, the United States has expanded its definition of a national security threat to encompass problems such as climate change and disease control, moving beyond an older model focused on interstate rivalries.[149] U.S. economic measures bear out this expansion, as the United States has used sanctions to counter problems like drug-trafficking, corruption, and terrorism.[150] Heath argues that these new, more capacious definitions of

January-Iran-Case_Batmanghelidj.pdf [https://perma.cc/K6F7-S5LR] (studying the macroeconomic impact of sanctions in Iran, including the diminished welfare in households).

146 *See* Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *The Geoeconomic World Order*, LAWFARE (Nov. 19, 2018, 11:17 AM), https://www.lawfareblog.com/geoeconomic-world-order [https://perma.cc/ZE3D-8YAN] (arguing that the "increased convergence of economic and security thinking and strategies is likely to lead to a significant restructuring of the laws and institutions that govern international trade and investment").

147 *See e.g.*, ROSA BROOKS, HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING 9–14 (2016) (describing the modern U.S. military's "vastly expanded . . . sphere of activities").

148 Heath, *supra* note 15, at 1024 ("The global economic order and the concept of national security are today deeply intertwined and difficult to disentangle.").

149 *Id.* at 1034–1039.

150 *Id.* at 136 (citing various executive orders declaring national emergencies and imposing sanctions related to drug-trafficking, corruption, and terrorism).

"national security" grew in part out of government agencies' attempts to expand their purviews and budgets following the end of the Cold War, while activists similarly seized on the language of national security to bolster their causes.[151] Section 311 designations reflect the evolution of "national security" language in AML/CFT practice. While in its first section 311 Notice of Proposed Rulemaking ("NPRM"), FinCEN did not argue that bad banking practices were a national threat to the United States,[152] its subsequent NPRMs stated that fighting money laundering "enhanced" national security.[153] The combination of threats and priorities listed in Treasury Department's most recent *Anti-Money Laundering and Countering the Financing of Terrorism National Priorities*—including corruption, cybercrime, terrorist financing, fraud, international crime, nuclear proliferation, and trafficking—suggests how capacious the languages of both AML/CFT and national security can be.[154]

151 Heath, *supra* note 20, at 1034–1035.

152 Imposition of Special Measures Against the Country of Nauru, 68 Fed. Reg. 18,917, 18,920 (proposed Apr. 17, 2003) (to be codified at 31 C.F.R. pt. 103) ("The action is expected to have virtually no effect on United States national security or foreign policy.").

153 Imposition of Special Measure Against FBME Bank Ltd., 79 Fed. Reg. 42,486, 42,488 (proposed July 22, 2014) (to be codified at 31 C.F.R. pt. 1010) ("The exclusion of FBME from the U.S. financial system . . . would enhance national security by making it more difficult for money launderers, transnational organized crime, other criminals, sanctions evaders, and terrorists to access the U.S. financial system.").

154 FIN. CRIMES ENF'T NETWORK, ANTI-MONEY LAUNDERING AND COUNTERING THE FINANCING OF TERRORISM NATIONAL PRIORITIES 1 (2021), https://www.fincen.gov/sites/default/files/shared/AML_CFT%20Priorities%20(June%2030%2C%202021).pdf [https://perma.cc/SP9C-XGYY]. The incorporation of a terrorism mission into the BSA after the September 11, 2001 attacks testifies to the increased national security valence of AML/CFR rules. Zagaris, *supra* note 45, at 124. National Security Advisor Jake Sullivan's combined advocacy of anti-corruption, anti-tax evasion, and anti-money laundering suggests how framing a set of issues as all part of "national security" can make them part of a single strategy and can reach new audiences. Rebecca Brocato & Jake Sullivan, Opinion, *Want To Stop Dirty Money from Flowing into the U.S.? Tell Congress to Pass This Law*, WASH. POST (Sep. 10, 2019), https://www.washingtonpost.com/opinions/2019/09/10/want-stop-dirty-

Many of these new national security threats, however, do not lend themselves to the national security bargaining framework. They tend to be non-state, transnational threats carried out by actors with whom few bargains can be struck. In these cases, there is no opposing foreign minister, but rather, diffuse hackers.

The second major challenge to the traditional national security paradigm has come the new "temporality" of these national security threats. During the Cold War, one could envision an "endpoint" to conflict—a permanent victory of one side over the other. Today, "it is nearly impossible to imagine a future in which the United States and other countries must no longer confront prevalent and severe 'malicious cyber-enabled activities' originating abroad."[155] This change in temporality obviates the traditional coercive approach to sanctions and AML/CFT rules. The old temporality made possible a final bargain with an adversary and the subsequent lifting of sanctions. Today's open-ended threats suggest that sanctions and AML/CFT measures will have to be in place over the long-term—and that a different lens might help analyze them better.

Already, the changes in national security are affecting existing legal frameworks outside of the context of sanctions and AML/CFT measures. The World Trade Organization's (WTO) national security exception is one victim of this change.[156] Under the old vision of national security, states could deviate from their trade commitments in light of well-defined, time-limited national security crises. However, as "national security pervades even relatively mundane decisions regarding trade and investment" and the threats become more long-term, deviations risk becoming permanent.[157] Similar distortions caused by the evolution of national security have

money-flowing-into-us-tell-congress-pass-this-law/ [https://perma.cc/LCG3-2SN8].

155 Heath, *supra* note 20, at 1046 (citing Exec. Order No. 13,694, 80 Fed. Reg. 18,077 (Apr. 2, 2015)).

156 General Agreement on Tariffs and Trade, art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, at 38–39.

157 *Id.* at 1031.

occurred in the U.S. context. Kathleen Claussen has argued that expansive conceptions of national security have broadened the "exceptionalism" in trade law, allowing the executive branch to move away from laws encoding free trade and to use special authorities as long-term means of regulating trade.[158] As new evidence accumulates that the bargaining framework built into national security exceptions no longer reflects reality, a different model will have to explain how tools like sanctions and AML/CFT rules function today.

C. The "Regulatory" Framework

If the bargaining approach no longer maps onto current "national security" conceptions and sanctions and AML/CFT practices, what does? Former Treasury Secretary Jacob J. Lew offers an answer: In addition to functioning as bargaining tools, sanctions can be "forward-looking, intended to keep illicit or dangerous conduct out of our system."[159] Rather than imposing financial restrictions to foster a bargain, these measures simply impose the restrictions to thwart bad behavior.[160] Under this approach, the target is the disfavored activity itself. The emergence of new non-state threats not amenable to bargaining, like climate change and corruption, is not a challenge to this alternative view. And because this model does not envision a bargain as a defined endpoint, the new temporalities of national security would not be a problem: U.S. sanctions targeting cyber-security can be in place permanently.[161]

158 Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1102–03 (2020).

159 Lew, *supra* note 137.

160 Massaro & Michel, *supra* note 18 (describing alternatives to the bargaining model)..

161 The shift to permanence might raise a set of constitutional concerns related to the Takings Clause. In *Holy Land Found. for Relief & Dev. v. Ashcroft*, the court argued "temporary blockings" through sanctions were not takings, but that "long-term blocking" could "ripe[n] into a vesting of property in the United States." 219 F. Supp. 2d. 57, 79 (D.D.C. 2002), *aff'd* 333 F.3d 156 (D.C. Cir. 2003).

Treating sanctions and AML/CFT measures not as chips to be traded for foreign policy concessions but as tools to limit disfavored behaviors reflects the "regulatory" vision. Though the goals of the measures might fit in a national security agenda, the posture is different. Maximum compliance with the restrictive measures is no longer a means to an end—the bargain—but the end itself. This shift is not a complete departure from the status quo, but it is a shift in emphasis. Even under the two-step bargaining approach, the first step was often a financial regulation—such as limiting funds for the Iranian oil industry—to impose pain on the bargaining partner. This led to tension between officials focused on the restriction step and those focused on the bargaining step. As one former State Department sanctions official has written, "diplomats and sanctions experts struggle to find common language. While sanctions are an instrument of foreign policy, they are also a component of domestic financial regulation."[162] Under the regulatory model, the latter goal would take precedence over the former.

The section 311 action against Banco Delta Asia highlights this division. On one side, State Department officials who embraced the national security approach thought of the section 311 action as a way to pressure the North Korean regime.[163] Once Pyongyang began negotiations, State Department officials were willing to undo the restrictions on the Macao bank to get to a deal.[164] On the other side, Treasury officials saw the designation differently. They had targeted Banco Delta Asia because it was an institution of primary money laundering concern.[165] Removing that designation because of an, in their view, unrelated nuclear negotiation without addressing the bank's regulatory and compliance problems would undermine the U.S. AML/CFT complex.[166] As

[162] Edward Fishman, *How To Fix America's Failing Sanctions* Policy, LAWFARE (Jun. 4, 2020, 9:21 AM), https://www.lawfareblog.com/how-fix-americas-failing-sanctions-policy [https://perma.cc/2UEB-49EM].

[163] ZARATE, *supra* note 36, at 252.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 253.

long as the bank did not remediate its practices, the restriction should stay. In the words of a Treasury participant:

> Our move against [Banco Delta Asia] had been an act of systemic inoculation [against the bank's bad practices], not a singular political act that could be easily reversed. There was no on-off switch to this kind of pressure, and unwinding [it] would prove problematic.[167]

As changes in national security make bargaining less likely, the Treasury side's way of thinking is acquiring increase relevance. Of the two strands, the AML/CFT one had originally been the closest to the "regulatory" view, with section 311 serving as a sanctions-like bargaining outlier. The clash over Banco Delta Asia simply dramatized the divide in views.

Abandoning the "on-off switch" view and embracing sanctions and AML/CFT rules as regulations allows comparisons with other forms of financial regulation. Suzanne Katzenstein notes that the threat of exclusion from the U.S. financial system is a potent tool available to the United States generally.[168] Discussing U.S. measures against Iran, she notes that "the government frequently conditions access to the U.S. financial market (or uses some other financial stick) based on financial policies, such as ensuring adequate capitalization."[169] Her comparison reduces the importance of the underlying national security objectives of these threatened cutoffs and suggests how, more broadly, Washington uses its leverage to shape all sorts of global behavior without aiming for a diplomatic bargain. Independent of their bargaining goals, sanctions measures are ultimately just financial regulations, "rules for where money can and cannot flow," except that in the case of sanctions the rules dictate that money should not go into Iran

167 *Id.* at 253–254.

168 Katzenstein, *supra* note 36, at 315.

169 *Id.* at 312 n.114.

as opposed to dictating that money should not go to undercapitalized banks.[170]

In a similar vein, Pierre-Hugues Verdier compares sanctions and AML/CFT rules to other forms of U.S. regulation by looking at their enforcement.[171] He describes how the dollar system gives U.S. prosecutors the unparalleled ability to enforce U.S. rules against international banks, whether or not there are national security considerations.[172] He examines four case studies: the prosecutions of UK banks for benchmark manipulation,[173] Swiss banks for tax evasion,[174] various international banks for sanctions and money laundering violations,[175] and the private suits against Argentina by holdout bond creditors.[176] In each of these instances, prosecutors, and, in the last example, private individuals, used U.S. courts to restrict or threaten to restrict actors' access to the global dollar system.[177] In their action against Swiss bank Wegelin, which held at least $1.2 billion in undeclared tax-evasion facilitating accounts, prosecutors filed a civil forfeiture against its correspondent bank account in Stamford, Connecticut.[178] Wegelin could no longer process U.S. dollar payments and eventually closed permanently.[179] Verdier distinguishes this anti-evasion action from the more unilateral national security-focused U.S. enforcement of

170 Saravalle, *supra* note 70.

171 VERDIER, *supra* note 36, at 31.

172 *Id.*

173 *Id.* at 41–74.

174 *Id.* at 75–107.

175 *Id.* at 109–45.

176 *Id.* at 147–77; *see id.* at vii ("U.S. federal prosecutors have brought dozens of criminal cases against the world's most powerful banks, charging them with sanctions violations, money laundering, tax evasion, and manipulating benchmark rates.").

177 *Id.* at 39.

178 *Id.* at 88; *see also* Press Release, Dep't of Justice, U.S. Attorney's Off., S.D.N.Y., Swiss Bank Sentenced in Manhattan Federal Court for Conspiring to Evade Taxes (Mar. 4, 2014), https://www.justice.gov/usao-sdny/pr/swiss-bank-sentenced-manhattan-federal-court-conspiring-evade-taxes [https://perma.cc/TV63-H24U].

179 VERDIER, *supra* note 36, at 89.

sanctions and AML/CFT rules against foreign banks. He notes that other countries disagree with these latter actions, that these tools do not engender regulatory cooperation, and that they "may encourage other states to look for alternatives to the U.S. dollar and the country's financial infrastructure, loosening its hold over the international financial system."[180] Despite these cautions about international disapproval, Verdier's analysis makes clear that sanctions and AML/CFT rules are comparable to non-national security prosecutions like the enforcement of benchmark and tax rules.[181] The underlying national security considerations ultimately do not void these comparisons, and whether targeting Wegelin or Banco Delta Asia, the methods are the same.

Verdier's and Katzenstein's parallels suggest that sanctions and AML/CFT are not particularly different from other U.S. regulations affecting financial institutions. Given their dependence on the U.S. dollar, their ongoing close relationship with regulators, and their fear of enforcement, financial institutions will be primed to follow U.S. rules—whether imposed through rulemaking or guidance.[182] OFAC and FinCEN policymakers may think of themselves as national security officials and may not consider the combination of sanctions designations, OFAC enforcement actions, OFAC Frequently Asked Questions, AML/CFT priorities, and FinCEN advisories as part of a coherent effort of global financial regulation.[183] Still, these measures,

180 *Id.* at 144.

181 *Id.* at 33.

182 *See* Parrillo, *supra* note 21.

183 *See e.g.*, NEPHEW *supra* note 136, at 9;, Brian O'Toole & Samantha Sultoon, *Sanctions Explained: How A Foreign Policy Problem Becomes A Sanctions Program*, ATL. COUNCIL (Sept. 22, 2019), https://www.atlanticcouncil.org/commentary/feature/sanctions-explained-how-a-foreign-policy-problem-becomes-a-sanctions-program/ [https://perma.cc/FF3Q-F8SP] (describing how sanctions policy focuses on achieving national security goals, for example by noting that "[s]trategic messaging seeks to articulate the US foreign policy reasons for the imposition of sanctions and an explanation of the behavior change or other outcome that the US expects as a result of the sanctions or broader policy effort"); *see also* NEPHEW *supra* note 136, at 9.

together, serve as a skeletal effort to impose rules on the global financial system as long as the affected regulated entities in the United States and abroad are so responsive to each action out of the Treasury Department. This mix of rules and guidance shapes the global economy on a daily basis, whichever model—"bargaining" or "regulatory"—policymakers apply to analyze their actions. The more policymakers rely on sanctions and AML/CFT measures to counter open-ended non-state problems, the more the regulatory model will gain relevance as these measures become more permanent fixtures of the global financial system.

IV. THE WASHINGTON EFFECT?

Moving away from the bargaining model and embracing the regulatory allows for a more complete view of these measures. The regulatory approach highlights facets of sanctions and AML/CFT measures that the bargaining model misses. Analyzing the two strands through Anu Bradford's Brussels Effect framework is especially instructive, as this framework helps explain why U.S. sanctions and AML/CFT rules succeed as extra-territorial regulatory measures, what their sources of strength are, and what potential dangers lie ahead. This Brussels Effect analysis also allows comparisons to a universe of extra-territorial regulations beyond Katzenstein's and Verdier's parallels with other financial measures. Finally, this approach suggests potential new paths in global financial regulation. Specifically, it raises the possibility that sanctions and AML/CFT rules may solve a previously intractable problem. Under the bargaining model, extra-territorial measures like correspondent banking restrictions factor solely as sources of leverage. Under the regulatory model, they take on a new significance, suggesting that even in a globalized world, finance is amenable to unilateral, extra-territorial regulation. By showing that finance can be regulated extra-territorially, these measures extend Bradford's analysis and suggest that there is a distinct "Washington Effect."

In *The Brussels Effect: How the European Union Rules the World*, Bradford argues that, contrary to declinist views, the European Union "wields significant, unique, and highly penetrating power to unilaterally transform global markets."[184] Bradford calls this ability to change global rules and norms in areas like antitrust, privacy, and chemicals "the Brussels Effect."[185] As she explains, five elements underlie the effect: "market size, regulatory capacity, stringent standards, inelastic targets, and non-divisibility."[186] All of these elements are necessary for successful extra-territorial regulation.[187]

This Part argues that U.S. sanctions and AML/CFT rules embody all of these requisite elements. First, they fulfill the "market size," "regulatory capacity," "stringent standards," and "non-divisibility" elements. Second, they also meet the elasticity requirement, suggesting that some forms of unilateral extraterritorial financial regulations are possible, contrary to Bradford's prediction.[188] Finally, this Part argues that this richer understanding of sanctions and AML/CFT measures' extra-territorial reach points to a wider range potential threats to their power. Specifically, the Brussels Effect analysis suggests that in addition to the publicized dangers to "market size" and "elasticity," other determinants such as "regulatory capacity" and "stringency" face threats that could weaken the measures' extra-territorial reach.

A. Market Size

Leveraging a country's large market size is the "foundational condition" that sustains the Brussels Effect.[189] When a market is a major source of demand, a supplier will

184 BRADFORD, *supra* note 23, at xiv.

185 *Id.*

186 *Id.* at 25 (emphasis omitted).

187 *Id.* at 53 (arguing that extra-territorial U.S. financial regulation is unlikely to succeed because of the missing inelasticity element).

188 *Id.* ("The United States' regulatory efforts have predominantly targeted the more elastic financial sector in recent decades, making the United States a less likely source of global standards.").

189 *Id.* at 30.

adjust its practices to cater to the destination country's regulatory requirements. The larger the benefits of access, the greater the costs a supplier is willing to bear to ensure its continuance.[190] For example, because the EU is the most important destination for African agricultural products, the continent's producers have adapted to comply with EU food safety regulations and to ensure their access to the market.[191]

The United States fulfills the market size element of the Brussels Effect when it comes to finance.[192] In addition to the dominance of the U.S. dollar,[193] the United States has the world's most liquid markets in debt and equity.[194] In 2020, U.S. market capitalization was $40.7 trillion, more than three times that of China, its closest competitor.[195] United States stock exchanges host large numbers of international listings.[196] U.S. investors are among the largest shareholders in companies listed abroad and make up almost a third of cross-market equity investments globally.[197]

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190 *Id.* at 27–28. The number of consumers and purchasing power of such consumers contributes to the calculation of the benefits of access. *Id.*

191 *Id.* at 180–87.

192 VERDIER, *supra* note 36, at 27 ("U.S. market power goes some way in explaining the country's ability to impose its rules on global banks.").

193 *See* discussion *supra* Section II.C.

194 *See, e.g.*, Lorie K. Logan, Exec. Vice President, Exec. Vice President, Fed. Rsrv. Bank N.Y., Remarks at Brookings-Chicago Booth Task Force on Financial Stability (TFFS) Meeting: Treasury Market Liquidity and Early Lessons from the Pandemic Shock (Oct. 23, 2020), https://www.newyorkfed.org/newsevents/speeches/2020/log201023 [https://perma.cc/AJY9-KG7N] ("The Treasury market is the deepest and most liquid fixed-income market in the world.").

195 *Market Capitalization of Listed Companies (current US$)*, WORLD BANK, https://data.worldbank.org/indicator/CM.MKT.LCAP.CD?most_recent_value_desc=true [https://perma.cc/H9EK-4XB2] (last visited Apr. 11, 2022). United States market capitalization is roughly forty-three percent of the entire world market capitalization combined. *Id.*

196 New York Stock Exchange, International Listings, https://www.nyse.com/listings/international-listings [https://perma.cc/H6T8-BN23] (last visited Apr. 11, 2022).

197 ALEJANDRA MEDINA, A. DE LA CRUZ & YUNG TANG, OWNERS OF WORLD'S LISTED COMPANIES 15 (2019),

The experience of French energy giant Total makes the role of market size clear. Following the unilateral U.S. exit from the Iran nuclear deal and its announced re-imposition of sanctions on Iran, Total withdrew from an oil project.[198] In doing so, the company noted that it could not risk running afoul of U.S. sanctions due not only to "the loss of financing in dollars by U.S. banks for its worldwide operations (U.S. banks are involved in more than 90% of Total's financing operations)," but also to "the loss of its U.S. shareholders (U.S. shareholders represent more than 30% of Total's shareholding)."[199] U.S. policymakers and experts regularly make explicit the market power dimensions of their approach, arguing for example that sanctions mean a choice between business with the United States and business with Iran.[200]

B. Regulatory Capacity

Market size alone does not denote market power.[201] Market power requires regulatory capacity—"a jurisdiction's ability to promulgate and enforce regulations," to translate this presence into influence.[202] As Bradford argues, while

https://www.oecd.org/corporate/Owners-of-the-Worlds-Listed-Companies.pdf [https://perma.cc/946G-F535].

198 Press Release, Total, U.S. Withdrawal from the JCPOA: Total's Position Related to the South Pars 11 Project in Iran (May 16, 2018), https://www.total.com/media/news/press-releases/us-withdrawal-jcpoa-totals-position-related-south-pars-11-project-iran [https://perma.cc/R4UR-5EMD].

199 *Id.*

200 *See, e.g.*, Cohen, *supra* note 78 ("CISADA offered foreign banks a choice: they could do business with banks in the U.S., or they could do business with designated Iranian banks. But they could not do both."); 153 CONG. REC. H8856 (2007) (Statement of Rep. Brad Sherman) ("[T]he key is to change the behavior of these multinational corporations, and the best way to do that is with American policies that make them choose between the benefits of doing business with the American people, American investors on the one hand, and the so-called benefits they might get from doing business with Tehran on the other.").

201 See BRADFORD, *supra* note 23, at 30 (noting that market size is not enough); VERDIER, *supra* note 36, at 28 (noting that the size of the U.S. financial market is not determinative).

202 BRADFORD, *supra* note 23, at 30–31.

Asian countries have experienced economic growth sufficient to expand their market size, they have yet to develop the experience and institutional capacity required to enforce rules.[203] In one of the preeminent examples of the Brussels Effect, competition law, the EU has built major regulatory capacity, developing the institutions and expertise necessary to serve as an influential standard-setter for what mergers can and cannot go forward.[204] When dealing with competition, the European Commission, the executive branch of the EU, holds substantial enforcement powers with limited constraints imposed by member states and the European Court of Justice, and it maintains the authority to target a broad range of activities in addition to antitrust.[205]

The United States possesses regulatory capacity in both the sanctions and AML/CFT contexts that distinguishes it from other powers like Europe. First, it has a single bureaucracy that imposes and enforces sanctions and anti-money laundering policies.[206] By comparison, the European Union splits its responsibilities: While the EU makes decisions on the adoption, renewal, and lifting of sanctions, its member states enforce them.[207] Further limiting EU capacity, the bloc's sanctions programs require country member unanimity[208] A similar problem manifests itself in the

[203] *Id.* at 31.

[204] *Id.* at 106–07.

[205] *Id.*

[206] *See* discussion *supra* Sections II.A–II.B.

[207] *See* Melanie C. Papadopoulos, *Do the Decision-Making Mechanisms in The EU Undermine Member States' National Interest?: A Case Study Of The Sanctions Regime*, 31 EMORY INT'L L. REV. 553, 575–76 (2017). United Nations (UN) sanctions suffer the same problem of disjunction between enactment and enforcement, relying on member states to translate UN sanctions into law and enforce them. David S. Cohen & Zachary K. Goldman, *Like It or Not, Unilateral Sanctions Are Here to Stay*, 113 AM. J. INT'L L. UNBOUND 146, 150 (2019).

[208] *Adoption and Review Procedure for EU Sanctions*, EUR. COUNCIL, https://www.consilium.europa.eu/en/policies/sanctions/adoption-review-procedure/ [https://perma.cc/R42H-K3JX] (last visited Apr. 11, 2022); *see also* BRADFORD, *supra* note 23, at 35 (arguing that unanimity can stifle regulatory reach and action).

AML/CFT space, where EU supervisory capacity is dispersed across national authorities.[209] Like the EU, where the United States has split its AML/CFT authorities between the federal government and the states, its regulatory capacity has been impaired.[210]

The role of the courts is also different: while EU courts have imposed "substantial bureaucratic burdens" on the Council,[211] U.S. courts have tended to be more deferential, giving U.S. regulators greater flexibility and power.[212] The

[209] JOSHUA KIRSCHENBAUM & NICOLAS VÉRON, A BETTER EUROPEAN UNION ARCHITECTURE TO FIGHT MONEY LAUNDERING 14 (2018), https://www.bruegel.org/wp-content/uploads/2018/10/PC-19_2018-241018.pdf [https://perma.cc/DGG4-RS5Y]. Kirschenbaum and Véron note that

> [t]he core problem is one of supervisory incentives and of supervisory architecture. It results from the coexistence of an integrated, enforceable single financial market policy with the national structures of AML supervision. As a consequence, AML supervisory weakness in any one EU/EEA member state leads to that country becoming attractive for money launderers who can use it for access to the entire single market.

Id. New reform proposals may shift the balance of national and federal anti-money laundering responsibilities, enhancing regulatory capacity. *Anti-Money Laundering and Countering the Financing of Terrorism Legislative Package*, EUR. COMM'N (July 20, 2021), https://ec.europa.eu/info/publications/210720-anti-money-laundering-countering-financing-terrorism_en [https://perma.cc/PAF9-LW5E].

[210] *See* FIN. ACTION TASK FORCE, UNITED STATES MUTUAL EVALUATION REPORT 222–226 (2016), https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf [https://perma.cc/M6YF-E3S9] (rating the United States noncompliant in beneficial ownership disclosure and noting that state law governs the collection of this information). Recent legislation giving the federal government more authority over beneficial ownership disclosure may increase regulatory capacity in this sphere. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3387, 4604–25 (2021).

[211] Elena Chachko, *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, 44 YALE J. INT'L L., 41 (2019).

[212] BRADFORD, *supra* note 23, at 45 (arguing that the EU's "precautionary principle grants the EU wide discretion to make regulations,

United States has also developed other ways to enhance its capacity. For example, U.S. prosecutors have used Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) with extensive monitoring and compliance commitments that allow the government to commandeer banks into extending Washington's reach globally.[213]

C. Regulatory Stringency

Regulatory capacity and market power would still be unable to establish extra-territorial influence if the regulations themselves were superfluous. For this reason, Bradford argues that regulatory influence requires "the propensity to promulgate stringent regulatory standards."[214] Stringency ensures that when producers must choose what regulatory regime to follow to minimize product variation and attendant cost, they will follow the most stringent, enhancing the regulating country's influence.[215] Merger review offers an example of the importance of stringency. Because global corporate combinations by definition cannot be split on a jurisdictional basis, the most stringent jurisdiction decides whether a merger can be consummated.[216] In the European context, Bradford highlights two factors that enable regulatory stringency. First, the EU displays a preference for a social market economy and sustainable development—compared to pro-business, free market-oriented U.S. ideological preferences.[217] Second, the EU's orientation

which "stands in stark contrast to U.S. courts['] strict scrutiny review); Chachko, *supra* note 130, at 160–61 (comparing EU and U.S. courts' treatment of alleged terrorism financier Yasin Kadi).

213 VERDIER, *supra* note 36, at 133 (highlighting the United States' use of a DPA in a case against HSBC). As a tool an exercise of prosecutorial discretion, DPAs often receive deference by courts. *See id.* (citing United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *7 (E.D.N.Y. 2013) (Gleeson, J.)).

214 BRADFORD, *supra* note 23, at 37.

215 *Id.* at 37.

216 *Id.* at 56.

217 *Id.* at 39–41.

toward rulemaking and its embrace of the precautionary principle ensures a lower threshold for regulation and helps ensure greater stringency ex ante compared to the United States, where cost-benefit analysis can raise the burden necessary to justify action.[218]

The United States generally employs the most stringent sanctions and AML/CFT measures globally. Its use of unilateral sanctions has distinguished it from the rest of the world.[219] Even when acting with buy-in from partners and allies, such as during the build-up of Iran sanctions during the Obama administration, the United States adopted the most stringent rules on what transactions could occur with Tehran.[220] This pattern has repeated itself: the 2014 U.S. sanctions on Russia, for example, contained fewer exceptions than EU ones[221] and the 2022 sanctions have also been more far-reaching.[222] On AML issues, Washington has similarly tended to impose more stringent rules than comparable jurisdictions. Following the U.S. use of section 311 against a Latvian bank, European officials criticized the failure to implement EU rules consistently and noted their apparatus' shortcomings compared to the United States.[223] In addition to the rules themselves, the United States displays a greater

218 *Id.* at 41–45.

219 Daniel W. Drezner, *The United States of Sanctions*, FOREIGN AFFS., Sept.–Oct. 2021, at 142, 147. https://www.foreignaffairs.com/articles/united-states/2021-08-24/united-states-sanctions [https://perma.cc/7RLU-JQTF] (highlighting "the increasingly unilateral nature of U.S. economic pressure").

220 *See* KENNETH KATZMAN, CONG. RSCH. SERV., RS20871 IRAN SANCTIONS 43 (2020) (noting that even at their most comprehensive, the European Union's Iran sanctions were not as extensive as the U.S. counterparts).

221 Cohen & Goldman, *supra* note 207, at 148.

222 *See, e.g.*, Joshua Kirschenbaum & Nicolas Véron, *The EU Should Sanction Sberbank and Other Russian Banks as It Ponders Banning Russian Oil and Gas*, PETERSON INST. FOR INT'L ECON. (Apr. 15, 2021), https://www.piie.com/blogs/realtime-economic-issues-watch/eu-should-sanction-sberbank-and-other-russian-banks-it-ponders [https://perma.cc/GGG8-AQWJ] (comparing U.S. and EU sanctions on Russian banks).

223 KIRSCHENBAUM & VÉRON, *supra* note 209, at 2.

enforcement zeal. Its sanctions and AML fines have consistently been greater than those of other jurisdictions, increasing the salience of compliance with the U.S. regulatory standard.[224]

Sanctions and AML/CFT rules do not suffer from the attributes that can hobble U.S. stringency in other contexts. Though in both the AML/CFT and the sanctions contexts, regulated entities and policymakers have complained about these measures' harmful effects on business and dynamism,[225] Washington has been able to impose these measures despite the bias Bradford highlights.[226] These measures' association with national security may counteract the pro-business bias that can limit the stringency of U.S. rules elsewhere.[227] Civil society groups, for example, have invoked national security to push businesses to cut with ties

[224] *Id*. at 13 ("The US government history of imposing fines of hundreds of millions and even billions of dollars for AML and sanctions violations is singular."); *see also* VERDIER, *supra* note 36, at 111–12 (noting foreign governments' complaints after the United States settled criminal cases for sanctions violations with eleven of the world's largest banks that "U.S. sanctions were too high . . . and threatened international financial stability").

[225] *See, e.g.*, Editorial, *A New Small Business Burden*, WALL ST. J. (July 15, 2019, 7:21 PM), https://www.wsj.com/articles/a-new-small-business-burden-11563232900 (on file with the Columbia Business Law Review) (arguing that an AML reform targeting "drug-dealers and terrorists" would end up "hitting mom and pop"); Tom Benning, *Texas Republican Pete Sessions Carries Big Oil's Fight Against Parts of Russia Sanctions Bill*, DALLAS NEWS (July 7, 2017. 10:37 AM), https://www.dallasnews.com/news/politics/2017/07/07/texas-republican-pete-sessions-carries-big-oil-s-fight-against-parts-of-russia-sanctions-bill/ [https://perma.cc/DT8U-Q2GB] (illustrating a U.S. Congressman's opposition to U.S. sanctions to protect U.S. companies' competitiveness).

[226] BRADFORD, *supra* note 23, at 41–44.

[227] To be sure, a national security rationale is not always necessary to circumvent the United States' overall lack of support for regulation. Bradford highlights two examples of U.S. regulatory stringency, the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745, and the Dodd-Frank Wall Street Reform and Consumer Protection of 2013, Pub. L. 111-203, 124 Stat. 1376, that were not tied to national security. BRADFORD, *supra* note 23, at 47.

to Iran.[228] Their success suggests that in some subject areas, concern with national security—or at the very least, reputational fears—could overwhelm the profit motive.[229] The rapid exit of many U.S. companies from Russia following the Ukraine invasion may similarly point to a "security exception" to the prevailing pro-business bias.[230]

United States sanctions and AML/CFT measures have also evaded the cost-benefit analysis requirements that can hamper U.S. regulation. OFAC is formally exempt from cost-benefit review.[231] While certain rules undertaken by FinCEN are subject to cost-benefit analysis,[232] measures like section

228 *See, e.g.*, Harvey Morris, *Caterpillar Moves To Cut Links with Iran*, FIN. TIMES (Feb. 28, 2010), https://www.ft.com/content/75f16576-248a-11df-8be0-00144feab49a (on file with the Columbia Business Law Review) (describing pressure group United Against a Nuclear Iran's campaign against U.S. manufacturer Caterpillar's dealings with Iran).

229 *See, e.g. id.*

230 Jeffrey Sonnenfeld & Steven Tian, Opinion, *Some of the Biggest Brands Are Leaving Russia. Others Just Can't Quit Putin. Here's A List.*, N.Y. TIMES (Apr. 7, 2022), https://www.nytimes.com/interactive/2022/04/07/opinion/companies-ukraine-boycott.html [https://perma.cc/UDB7-8GGA] (listing firms that left Russia following Moscow's invasion of Ukraine).

231 TREASURY DEP'T, MEMORANDUM OF AGREEMENT, DEP'T OF THE TREASURY & THE OFFICE OF MGMT. & BUDGET, REVIEW OF TAX REGULATION UNDER EXECUTIVE ORDER 12866, (2018), https://home.treasury.gov/sites/default/files/2018-04/04-11%20Signed%20Treasury%20OIRA%20MOA.pdf [https://perma.cc/VCY3-FSTL]; *see also* Lanier Saperstein, Geoffrey Sant & Michelle Ng, *Practitioner Comment, The Failure of Anti–Money Laundering Regulation: Where Is the Cost-Benefit Analysis*?, 91 NOTRE DAME L. REV. ONLINE 1, 10 (2015) ("[A]s the massive new compliance costs continue to pile upon banks, no analysis has been done to determine whether their efforts are effective, and whether the benefits, if any, are worth the cost."). *But see* Peter E. Harrell, *How To Reform IEEPA*, LAWFARE (Aug. 28, 2019, 11:29 AM), https://www.lawfareblog.com/how-reform-ieepa [https://perma.cc/V689-MQBT] (arguing that "administration rules and regulations issued pursuant to IEEPA be made subject to notice-and-comment rule-making" and for rigorous ex post cost-benefit analysis of IEEPA actions).

232 *See, e.g.*, Customer Due Diligence Requirements for Financial Institution, 81 Fed. Reg. 29,398, 29,399 (May. 11, 2016) (to be codified at 31 C.F.R pts. 1010, 1020, 1023–24, 1026) (explaining the cost-benefit

311 against specific banks have not been deemed "significant regulatory action[s]" requiring submission to the Office of Management of the Budget and the Office of Information and Regulatory Affairs for cost-benefit analysis.[233] In the case of the imposition of the section 311 Fifth Special Measure against Iran, FinCEN avoided Administrative Procedures Act requirements entirely by invoking the national security exemption.[234] As the concept of national security becomes more capacious, so might this exemption.

D. Non-Divisibility

The Brussels Effect is only triggered once a regulated entity, having complied with a European requirement, decides to convert the rest of its production to the EU standard.[235] This is most likely to occur when a product is non-divisible across markets—that is, when the benefits of product standardization to meet the most stringent regulatory standard are greater than the benefits of catering to lower, but divergent, standards.[236] Non-divisibility can take three different forms—legal, technical, and economic—each of which can give rise to extra-territorial effects.[237] Legal non-divisibility occurs when legal requirements in the most stringent jurisdiction drive outcomes globally.[238] For example, one jurisdiction's decision about a merger will inevitably

methodology applied to Customer Due Diligence requirement for financial institutions).

233 Proposal of Special Measure Against ABLV Bank, AS as a Financial Institution of Primary Money Laundering Concern, 83 Fed. Reg. 6986, 6993 (proposed Feb. 16, 2014) (to be codified at 31 C.F.R. pt. 1010) (citing Exec. Order 12866, 3 C.F.R. § 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 app. (2018)).

234 Imposition of Fifth Special Measure Against the Islamic Republic of Iran as a Jurisdiction of Primary Money Laundering Concern, 84 Fed. Reg. 59,302, 59,303 (Nov. 14, 2019) (to be codified at 31 C.F.R. pt. 1010) (citing Administrative Procedure Act, 5 U.S.C. § 553(a)(1)).

235 BRADFORD, *supra* note 23, at 53.

236 *Id.* at 54.

237 *Id.* at 55.

238 *Id.* at 56

require the regulated company to carry out that outcome internationally.[239] Technical non-divisibility describes situations when technological problems thwart the division of production across different markets.[240] In the data protection context, technology companies' uncertainty in identifying which user is a "European data subject" has encouraged them to apply EU rules globally.[241] Finally, economic divisibility points to areas where the costs of complying with multiple sets of rules are prohibitive, and companies instead choose to adapt their production to the most stringent rule.[242] Following strict EU regulation of genetically modified organisms, U.S. processors found it unprofitable to divide their production and instead stopped purchasing genetically modified corn and soybeans.[243]

Firms facing U.S. sanctions and AML/CFT rules experience all three types of non-divisibility. Explicitly extra-territorial sanctions, which do not require a U.S. nexus, are the clearest form of legal non-divisibility since they suggest that there is no way for a company to alter its activities to avoid compliance with U.S. rules.[244] The monitoring and compliance commitments in international banks' settlements for breaking sanctions and AML laws also showcase this form of non-divisibility.[245] These agreements force banks to follow

239 *Id.*

240 *Id.* at 57.

241 BRADFORD, *supra* note 23, at 57.

242 *Id.* at 58.

243 *Id.* at 60.

244 *See, e.g.*, Exec. Order 13,902, 85 Fed. Reg. 12,957 (Jan. 10, 2020) (imposing sanctions on "*any person*," not just a U.S. person, doing business with certain sectors in Iran (emphasis added)); *see also* MORRISON & FOERSTER, OFAC ISSUES NEW FAQS CLARIFYING IRAN SECONDARY SANCTIONS (2020), https://www.mofo.com/resources/insights/200618-ofac-new-faqs-iran-sanctions.pdf?#zoom=100 [https://perma.cc/K4TX-ZUC3] (explaining which types of companies and transactions fall under Executive Order 13,902).

245 *See* Corporate Compliance Monitor at B-4, Attachment B to Deferred Prosecution Agreement para. B-8–9, United States v. HSBC Bank USA, N.A., No. 12-763 (E.D.N.Y. Dec. 11, 2012); VERDIER, *supra* note 36, at 32.

U.S. AML and sanctions rules across all of their subsidiaries and therefore prevent the bank from following separate business practices. Following its deferred prosecution agreement, for example, HSBC reported Chinese company Huawei's Iran sanctions violations to the U.S. government.[246] In response to complaints by the Beijing government, the bank noted that the appointment of an independent monitor empowered to find violations had made it impossible not to comply with U.S. rules.[247]

The same problems of technical non-divisibility encountered by U.S. technology companies are present in the sanctions and AML contexts. Banks struggle to determine whether transactions have a U.S. nexus and, out of an abundance of caution, will simply comply with U.S. rules.[248] The complexity of these regulatory schemes can also encourage parties globally to comply with U.S. rules.[249]

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246 David Crow, Henny Sender & James Kynge, *HSBC Tells China It Is Not To Blame for Arrest of Huawei's CFO*, FIN. TIMES (June 30, 2019), https://www.ft.com/content/c832a476-9983-11e9-8cfb-30c211dcd229 (on file with the Columbia Business Law Review).

247 *Id.*; *see also* VERDIER, *supra* note 36, at 32 (describing the role of the monitor at HSBC in the Huawei sanctions case); Pierre-Hugues Verdier, *New Financial Extraterritoriality*, 87 GEO. WASH. L. REV. 239, 259–264 [hereinafter Verdier, *Extraterritoriality*] (explaining how NPA- and DPA-mandated monitoring and compliance reforms within banks result in global changes in financial institutions' practices).

248 MORRISON & FOERSTER, *supra* note 106, at 3 (noting the difficulty in determining touch-points with the United States).

249 *See, e.g.*, Lisa Du & Nick Wadhams, *China Damps U.S. Concern on Russian Sanctions by Drilling Into Their Details*, Bloomberg (Mar. 25, 2022, 2:06 PM), https://www.bloomberg.com/news/articles/2022-03-25/china-damps-u-s-concern-on-sanctions-by-drilling-into-details (on file with the Columbia Business Law Review) (describing how Chinese firms were informing themselves about and complying with U.S. sanctions to avoid being shut out of the market); Martin Arnold & Sam Fleming, *Banks Push Brussels for Clarity To Avoid 'Over-Compliance' with Sanctions on Russia*, FIN. TIMES (Apr. 7, 2022), https://www.ft.com/content/a2fcd6e9-6b1a-4bd8-b035-047eb0791a94 (on file with the Columbia Business Law Review) ("One of the main worries of the bigger European banks with operations across the globe is that they are being pulled in different directions because of a lack of harmony between EU, US, and UK sanctions on Russia."); Joe Rennison, *US Corporate Bond Trades Fail as Banks Avoid Russia Links*,

Economic non-divisibility also plays a major role in ensuring global compliance with U.S. rules. Given the severity of U.S. penalties, financial institutions balk at following different sets of standards.[250] Following the implementation of the nuclear deal with Tehran, the United States lifted its prohibitions on non-U.S. banks dealing with Iran while keeping in place its restrictions on U.S. banks.[251] In this world of divergent standards, the biggest non-U.S. players still found the risks prohibitive. Former Under Secretary of the Treasury Stuart Levey, then-Chief Legal Officer of HSBC,

FIN. TIMES (Apr. 15, 2022), https://www.ft.com/content/a60018df-1a7b-4560-9479-7baea28623df (on file with the Columbia Business Law Review) (explaining how the complexity of sanctions can result in complications in settling trades).

250 An industry survey conducted by the Financial Action Task Force and the Basel Committee on Banking Supervisions found that more than sixty-five percent of respondents considered divergent standards a significant or the most significant contributor to higher costs for cross-border payments. FIN. ACTION TASK FORCE, CROSS-BORDER PAYMENTS: SURVEY RESULTS AND IMPLEMENTATION OF THE FATF STANDARDS, 10–11 (2021), https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/Cross-Border-Payments-Survey-Results.pdf [https://perma.cc/738X-VCG2]. An OFAC enforcement action further raises an economic concern for integrated international companies, noting that such would have to ensure the U.S.-based portions must comply with U.S. sanctions. Integrated international companies would, for example, have to potentially restructure or create parallel approval processes to ensure compliance with U.S. sanctions across the corporate structure. Such efforts may incur costs that outweigh potential benefits, resulting in economic indivisibility. TREASURY DEP'T, SETTLEMENT AGREEMENT BETWEEN THE U.S. DEPARTMENT OF THE TREASURY'S OFFICE OF FOREIGN ASSETS CONTROL AND SCHLUMBERGER ROD LIFT, INC. (2021), https://home.treasury.gov/system/files/126/20210927_SRL.pdf [https://perma.cc/QT64-YETH].

251 Stuart Levey, Opinion, *Kerry's Peculiar Message About Iran for European Banks*, WALL ST. J. (May 12, 2016, 6:49 PM), https://www.wsj.com/articles/kerrys-peculiar-message-about-iran-for-european-banks-1463093348 (on file with the Columbia Business Law Review ("On the one hand, Washington is continuing to prohibit American banks and companies from doing Iran-related business. . . . On the other hand, Mr. Kerry wants non-U.S. banks to do business with Iran without a U.S. repudiation of its prior statements about the associated financial-crime risks.").

argued that notwithstanding the Secretary of State's encouragement, the risks of rekindling ties were too high and that it did not make sense to risk future enforcement action.[252] The 2021 limitations on investing in Chinese Military-Industrial Complex Companies list (the "CMIC List") may similarly show the effects of economic non-divisibility.[253] The new regulations restrict U.S. persons' ability to own certain Chinese securities.[254] Non-U.S. asset managers may own these restricted securities, but only to the extent that they do not manage the money of any U.S. persons.[255] The implementation of these rules may provide indication of whether the economic benefits of maintaining separate funds allowing non-U.S. investors to own CMIC List companies will be greater than the compliance costs of ensuring that no U.S. customers gain exposure to these restricted companies.

E. Inelastic Targets

One more element is required for the Brussels Effect: an inelastic target.[256] Regulatory influence only occurs when producers cannot exit or avoid regulatory changes and, as a result, must comply with the regulatory regime.[257] Because consumers are located in a specific market, a producer cannot search for better regulations abroad while still serving that market. For example, U.S. technology platforms are inelastic because as long as they serve Europeans engaging in online speech, they must follow European speech laws.[258] These companies cannot evade EU rules by restructuring, reincorporating abroad or somehow catering to these customers without entering EU jurisdiction.

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252 *Id*.

253 Exec. Order No. 14,032, 86 Fed. Reg. 30,145 (June 3, 2021).

254 *Id.* at 30,145–46.

255 *Frequently Asked Questions: Chinese Military Companies Sanctions*, TREASURY DEP'T (June 3, 2021), https://home.treasury.gov/policy-issues/financial-sanctions/faqs/903 [https://perma.cc/8G8P-3KBU].

256 BRADFORD, *supra* note 23, at 48.

257 *Id.*

258 *Id.* at 164.

While consumer goods are inelastic, capital is elastic.[259] Capital is mobile enough to relocate to other jurisdictions when rules become burdensome. After the passage of Sarbanes-Oxley,[260] companies delisted from U.S. stock exchanges to avoid new stringent accounting and investor standards.[261] Although some companies found such a move too burdensome, other entities were able to move relatively smoothly, thereby avoiding the new U.S. regulatory imposition. Bradford concludes, "Capital is, indeed, often elastic and can move as long as a credible exit opportunity exists."[262] In this view, the elasticity of capital reveals the limitations of U.S. regulatory influence in finance compared to the more solid European measures targeting consumer goods.[263] This elasticity of capital points to a limit to the Brussels Effect.[264] While a country can set norms and improve regulatory outcomes in some domains, finance—ever ready with an exit option—is out of reach.[265]

United States sanctions and AML/CFT measures make clear that capital is less elastic than the stock exchange delisting example would suggest. While it is true that business entities can indeed move jurisdictions, this matters only if one imagines capital moving through a global economy understood as a world of islands. If one imagines the global financial system as an interlocking matrix or a system of nodes, capital's right of exit appears more circumscribed. Capital, instead, will always likely find itself in an institution with some touchpoint with the U.S. dollar and, probably, U.S.

259 *Id.* at 48–49.

260 Sarbanes-Oxley Act, Pub.L. 107-204, 116 Stat. 745 (2002).

261 BRADFORD, *supra* note 23, at 51 (citing Nikhil Kalyanpur & Abraham L. Newman, *Mobilizing Market Power: Jurisdictional Expansion as Economic Statecraft*, 73 INT'L ORG. 8 (2018)).

262 *Id.*

263 *Id.*

264 *Id.*

265 *Id.*

jurisdiction.[266] Similarly, while reincorporation is an option, this company will still likely find itself going through a U.S.-controlled chokepoint. Thus, whether capital can be elastic enough to avoid control is not a property of capital itself, it is a question of the regulatory means employed.

As a thought experiment, one can imagine a different Sarbanes-Oxley Act that gave companies no right of exit from accounting requirements. Instead of imposing the accounting requirements based on listing location, the United States could have made compliance with accounting standards a condition for use of U.S. correspondent banking services.[267] While capital could reincorporate, it could not avoid that U.S. chokepoint. This is hardly farfetched. As part of a recent major reform of U.S. money laundering laws, the United States required any bank with a correspondent bank account in the United States to comply with U.S. subpoenas—even when the information is held outside of the United States and does not relate to U.S.-based accounts—and authorized the cutting-off of the relationship in cases of non-compliance.[268]

A similar leveraging of U.S. chokepoints has already occurred in the context of taxation. Bradford notes that companies can reincorporate to avoid taxes, limiting the

[266] *See* Saravalle, *supra* note 70 ("Capital is mobile, but the infrastructure that makes those moves possible is stationary and responsive" to U.S. power.).

[267] The incorporation of accounting practices into a "national security" discussion would hardly be novel. In 2019, Senator Marco Rubio argued that U.S. exchanges should not include Chinese firms that do not follow transparent accounting practices and tying this measure to criticism of Beijing's "Orwellian levels of mass surveillance and systemic human-rights abuses." Marco Rubio, Opinion, *You Can't Trust a Chinese Audit*, WALL ST. J. (Jun. 4, 2019, 6:35 PM), https://www.wsj.com/articles/you-cant-trust-a-chinese-audit-11559687739 (on file with the Columbia Business Law Review).

[268] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 § 6308, 31 U.S.C. 5318(k)(3)(A) (2018); *see also* Zia M. Faruqui, Jessica K. Liu & Noha K. Moustafa, *The Long Arm of U.S. Law: The Patriot Act, the Anti-Money Laundering Act of 2020 and Foreign Banks*, JUST SEC. (Feb. 23, 2021, 9:01 AM), https://www.lawfareblog.com/long-arm-us-law-patriot-act-anti-money-laundering-act-2020-and-foreign-banks [https://perma.cc/J8A2-CCM3] (describing the reform and its background).

prospects of success in a crackdown.[269] However, the chokepoint approach to taxation enforcement points to the limits of elasticity. In the Wegelin case, prosecutors used civil asset forfeiture against the tax-evasion facilitating Swiss bank's U.S.-based correspondent bank account.[270] After losing access to the account, the bank shut down.[271] Although this was a one-off prosecutorial action rather than a permanent regulatory scheme, the measure suggests that even a bank structured to avoid touching the United States and bent on enabling illegal conduct cannot escape the chokepoint effect.[272] As long as the global financial system is built around the U.S. dollar, financial institutions are as inelastic to U.S. financial regulation as firms reliant on European consumers and data subjects. What matters is making the switch from targeting capital itself—which is elastic—to targeting the infrastructures that facilitates its mobility—which are not. Verdier makes the stakes of this change clear: "By asserting authority over this central element of the global financial infrastructure, governments are reclaiming some of the sovereignty lost to financial globalization."[273]

In their modern practice, sanctions and AML are built to target these infrastructures and, as a result, to thwart elasticity. These measures offer a unique way to internationalize norms and end the ability of certain sectors to evade meaningful regulation. U.S. elected officials and policymakers have begun to recognize how targeting not the underlying activity but the facilitating financial infrastructure can curtail elasticity and ensure the global reach of U.S. policy. Members of Congress have proposed harnessing the power of sanctions to tackle climate change, in

269 BRADFORD, *supra* note 23, at 52 (noting new proposals to lessen the problem of elasticity).

270 Press Release, Dep't of Justice, U.S. Attorney's Off., S.D.N.Y., Swiss Bank Indicted on U.S. Tax Charges (Feb. 12, 2012), https://www.justice.gov/opa/pr/swiss-bank-indicted-us-tax-charges [https://perma.cc/C5E4-ZG35].

271 VERDIER, *supra* note 36, at 88–89.

272 *Id.*

273 *Id.* at 107.

effect using U.S. control of major chokepoints to help solve a transnational issue.[274] Such a use of sanctions would be in keeping with the growing incorporation of climate change within the national security framework.[275] Similarly, some, including this author, have called for a more expansive use of section 311, leveraging financial infrastructures to impose global rules on the flow of illicit capital.[276] Here, again, the focus on fixed global financial infrastructures, such as correspondent banking accounts, ensures a high degree of responsiveness from regulated entities.

To be sure, there are concerns about the use of sanctions and AML/CFT measures as unilateral, extra-territorial financial regulation. First, these tools raise questions about accountability. There are few avenues for redress from countries exposed to unilateral U.S. regulation.[277] Administrative law requirements, like NPRMs, may not result in accountability given that financial institutions are quick to comply with even proposed rules, making procedural

274 Targeting Environmental and Climate Recklessness Act of 2019, S.2565, 116th Cong. (2019); Targeting Environmental and Climate Recklessness Act (TECRA), H.R. 5625, 116th Cong. (2020); *see also* Edoardo Saravalle, *Why World Leaders Should Impose Green Sanctions*, FIN. TIMES (Aug. 8, 2019), https://www.ft.com/content/25342e48-2ba2-3cdd-b5db-84d65c7628ed (on file with the Columbia Business Law Review) (advocating for the use of sanctions to fight climate change).

275 *See* Heath, *supra* note 20, at 1037 (highlighting the increasing agreement that climate change poses a national security threat).

276 Joshua Kirschenbaum, *Russian Malign Finance and U.S. Economic Statecraft: The Indirect Approach, Alliance for Securing Democracy*, GERMAN MARSHALL FUND (Dec. 4, 2019), https://securingdemocracy.gmfus.org/russian-malign-finance-and-u-s-economic-statecraft-the-indirect-approach/ [https://perma.cc/PC65-NU6Q]; Yakov Feygin, Ben Judah & Edoardo Saravelle, *Biden Could End Kleptocracy's Grip on the United States*, FOREIGN POL'Y (June 3, 2020, 5:41 PM), https://foreignpolicy.com/2020/06/03/biden-united-states-kleptocracy-power-sanctions/ [https://perma.cc/V8XJ-BDUX] (arguing that the United States should require international banks that use U.S. correspondent bank accounts to disclose the beneficial ownership of their accountholders).

277 Katzenstein, *supra* note 36, at 347 (noting that unilateral sanctions and AML measures "enable the United States to circumvent traditional international and multilateral legal processes of participation and consent").

steps like NRPMs less useful as forms of accountability.[278] Moreover, the United States often relies on informal mechanisms like diplomacy and over-compliance to ensure the reach of its sanctions and AML/CFT measures, further complicating efforts by targets to contest them.[279] Additionally, countries may object to regulatory unilateralism even if it is proven that the United States "can act effectively on its own to address a global problem."[280] Finally, unilateral action may not be effective—it may ultimately make impossible the very goals it sets out to achieve, by alienating potential partners.[281] Switching to the "regulatory" framework and imposing unilateral financial regulatory measures to tackle global problems does not necessarily obviate the need for diplomacy and negotiation, key building blocks of the bargaining framework.

Notwithstanding these prudential concerns, this analysis points to sanctions' and AML/CFT rules' ability to transcend traditional limitations imposed by the elasticity of capital and raise new possibilities for unilateral global financial regulation.

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[278] *Id*. at 346 ("[W]hile requirements for public scrutiny may increase Treasury's accountability, they also inflict immediate damage on the designated entity as it comes under the public spotlight.").

[279] *Id*. at 345 ("Without Treasury formally requiring [foreign banks to cut off blacklisted institutions], it is more difficult for a blacklisted bank . . . to obtain legal redress and repair its reputation[.]").

[280] William Magnuson, *Unilateral Corporate Regulation*, 17 CHI. J. INT'L L. 521, 567 (2016) (emphasis omitted).

[281] *See, e.g.*, Nicholas Mulder, *Sanctions Are No Climate Fix*, QUINCY INST. RESPONSIBLE STATECRAFT (Sept. 18, 2020), https://quincyinst.org/2020/09/18/sanctions-are-no-climate-fix/ [https://perma.cc/26KH-E5AS] (arguing that "climate sanctions" would impede cooperation with China to address climate change); Nicholas Mulder, *Can "Climate Sanctions" Save the Planet?*, NATION (Nov. 18, 2019), https://www.thenation.com/article/archive/climate-green-new-deal/ [https://perma.cc/L9QH-TDUN] (arguing that cooperation, not sanctions, would better address climate change).

F. Implications of the "Washington Effect"

Analyzing U.S. measures through the Brussels Effect framework accomplishes two tasks. First, it suggests how sanctions and AML rules can be assimilated into broader analyses of extra-territorial regulation. Studying the applicability of the five elements to sanctions and AML/CFT rules suggests new ways of fulfilling the elements. In the context of elasticity, for example, the Brussels Framework analysis suggests that shifting the object of analysis from capital itself to its enabling infrastructures can yield new ways of limiting elasticity. At the same time, this frame of analysis highlights that a series of measures that otherwise might seem distinctive to the United States are not in fact unique. While only Washington can impose such far-reaching financial measures, it is not alone in being able to impose onerous extra-territorial regulations.

Regardless of these similarities, the Washington Effect distinguishes itself from the Brussels Effect in one key area. The latter does not, in general, require enforcement or coercion; rather, market forces ensure the reach of the regulation—for example, through farmers voluntarily adapting to meet EU agricultural rules.[282] In the case of the Washington Effect, the coercion can be clearer, whether it is U.S. officials imposing explicitly extra-territorial sanctions (such as blanket limitations on any country's investment in Iran's oil production[283]), putting in place monitors globally as part of settlements, or invoking a choice between the United States and a sanctions target's market. Yet, this distinction can be subtle. Take the enforcement of the EU Research, Evaluation, Authorisation, and Restriction of Chemicals (REACH) regulations[284]: Bradford writes that these

[282] BRADFORD, *supra* note 23, at 180–87.

[283] 50 U.S.C. § 1701–08 (2018).

[284] Regulation (EC) 1907/2006, of the European Parliament and of the Council of 18 December 2006 Concerning the Registration, Evaluation, Authorisation, and Restriction of Chemicals (REACH), Establishing a European Chemicals Agency, 2007 O.J. (L 136) 3 (regulating the production and usage of chemical products and substances).

regulations simply require foreign companies to play by EU rules: "If the self-interest of multinational corporations leads them to voluntarily adopt EU regulation across their global operations, the EU can hardly be accused of 'imperialism.'"[285] Such a defense would apply equally to Washington's market access restrictions, such as its curbs on U.S. correspondent bank accounts. Here, too, it is the self-interest of international firms that drives them to comply with U.S. rules and avoid the risk of losing access to U.S. banking services.[286]

Second, compared to the bargaining framework, the Brussels Effect "regulatory" analysis provides a better understanding of the future of these U.S. measures. In analyzing these measures' long-term prospects, commentators have tended to focus on inelasticity and non-divisibility as the elements most likely to fall short. These, in the bargaining framework, would be the most important. They are the biggest determinants of how much pain Washington can impose, how much leverage it can accumulate, and, consequently, whether the target will come to the negotiating table. Focusing on the elasticity element, experts have cautioned that excessive U.S. application of these sanctions could encourage other countries to stop using the U.S. dollar. This would cripple the power of these measures as targets could rely on non-dollar-based financial services.[287] To date,

285 BRADFORD, *supra* note 23, at 237.

286 Cohen, *supra* note 78 ("CISADA was novel and innovative, but it was not, as some have claimed, extraterritorial. It does not purport to regulate foreign banks. To the contrary, it provides authority to the Secretary of the Treasury to regulate U.S. financial institutions, limiting our banks' ability to transact with certain foreign banks.").

287 Daniel W. Drezner, Perspective, *Why I Am Starting To Worry About the Dollar*, WASH. POST (Nov. 15, 2018), https://www.washingtonpost.com/outlook/2018/11/15/why-i-am-starting-worry-about-dollar/ [https://perma.cc/E2DC-7CGF] (describing non-dollar financial as ways to hedge the power of U.S. sanctions); Jacob J. Lew & Richard Nephew, *The Use and Misuse of Economic Statecraft*, FOREIGN AFFS., Nov.–Dec. 2018, at 139, , https://www.foreignaffairs.com/articles/world/2018-10-15/use-and-misuse-economic-statecraft [https://perma.cc/L4L8-AVAF] (arguing that efforts to divert the financial system away from its reliance on the U.S. dollar "could eventually lead to the development of new strategies for working around

there has been little indication of the decline of the dollar, even as the United States has increased the salience of its measures targeting, for example, major economic powers like China[288] and Russia.[289] The power of the internationally-condemned U.S. sanctions on Iran similarly suggests that inelasticity still holds.[290]

Focusing on non-divisibility, commentators have highlighted companies' growing ability to meet divergent regulatory standards. For example, French energy company Total was able to raise financing for a Russian energy project from Chinese sources without involving U.S. dollars or U.S.

U.S. policy"). *But see* Edoardo Saravalle, *How U.S. Sanctions Depends on the Federal Reserve*, CTR. FOR A NEW AM. SEC. (July 29, 2020), https://www.cnas.org/publications/commentary/how-u-s-sanctions-depend-on-the-federal-reserve [https://perma.cc/T2HV-9FTT] ("[R]ather than constantly looking for the exits every time the United States adds an anti-money laundering rule or sanctions restrictions, international players are instead flocking to the Federal Reserve asking for support. Washington is a maker, not just a taker, of the global dollar system. And that means that Washington continues to have enormous power to impose economic pain through sanctions.").

288 Kerry Soo Lindberg, Nick Wadhams & Jenny Leonard, *Dollar's Dominance Gives U.S. Upper Hand in China Fight*, BLOOMBERG (Sep. 10, 2020, 12:02 AM), https://www.bloomberg.com/news/articles/2020-09-09/dollar-dominance-gives-u-s-upper-hand-in-china-sanctions-fight (on file with the Columbia Business Law Review).

289 *See* Adam Tooze, *Chartbook #107: The Future of the Dollar—Fin-Fi (Finance Fiction) and Putin's War*, CHARTBOOK (Apr. 7, 2022), https://adamtooze.substack.com/p/chartbook-107-the-future-of-the-dollar?s=r [https://perma.cc/ABE2-5MDE] (discussing the potential implications for the dollar of the 2022 sanctions on Russia).

290 Francesco Guarascio, *EU Pushes for Broader Global Use of Euro To Challenge Dollar*, REUTERS (Dec. 5, 2018, 6:41 AM), https://www.reuters.com/article/us-eu-euro/eu-pushes-for-broader-global-use-of-euro-to-challenge-dollar-idUSKBN1O41CU [https://perma.cc/FQ4L-ASJW]; *see also* Adam Tooze, *Is This the End of the American Century?*, LONDON REV. BOOKS (Apr. 4, 2019), https://www.lrb.co.uk/the-paper/v41/n07/adam-tooze/is-this-the-end-of-the-american-century [https://perma.cc/949M-9BD9] (describing how the United States could use sanctions and its power in the dollar-based system to impose pressure on Iran unilaterally).

persons.[291] Here, as well, such stories are overshadowed by banks' continued difficulty to avoid U.S. rules.[292] Moreover, U.S. policymakers could thwart cases such as the Total one by simply adopting broader sanctions that offer fewer avenues for divisibility.

By considering all five elements of Bradford's Brussels Effect when analyzing sanctions and AML/CFT measures, other threats to these measures' long-term viability emerge. Regulatory capacity is one such area. Recent judicial decisions point to a potential curtailment of the traditional flexibility and deference enjoyed by OFAC. In one case, a district court vacated an OFAC fine,[293] a rare outcome when most actions are not challenged and do not result in victory.[294] The judicial objections to the Trump administration's use of the IEEPA to target Chinese-owned applications similarly raises questions about the long-term durability of the sanctions strand.[295]

[291] Konstantin Rozhnov, *Blessing in Disguise, or the Business of Geopolitics*, ARGUS (Nov. 3, 2017), https://www.argusmedia.com/en/blog/2017/november/3/blessing-in-disguise-or-the-business-of-geopolitics [https://perma.cc/LA54-XYQX] (quoting Total's CEO as saying, "Thanks to western sanctions on Russia, Total discovered that China is able to provide project financing without US dollars.").

[292] *See, e.g.*, Julia Fioretti, *Left Bankless by Sanctions, H.K. Leader Has "Piles of Cash"*, BLOOMBERG (Nov. 29, 2020, 8:13 PM), https://www.bloomberg.com/news/articles/2020-11-29/left-bankless-by-sanctions-hong-kong-leader-has-piles-of-cash (on file with the Columbia Business Law Review).

[293] Exxon Mobil Corp. v. Mnuchin, 430 F.Supp.3d 220, 224 (N.D. Tex. 2019).

[294] MORRISON & FOERSTER, OFAC 2019 YEAR IN REVIEW (PART 1 OF 3) (2020), https://www.mofo.com/resources/insights/200204-ofac-2019-year-in-review.pdf?#zoom=100 [https://perma.cc/MP96-G9JG].

[295] *See* U.S. WeChat Users All. v. Trump, 488 F. Supp. 3d 912, 917 (N.D. Cal. 2020) (raising First Amendment concerns); Tiktok Inc. v. Trump, 490 F.Supp. 3d. 73, 80, 83 (D.D.C. 2020) (issuing preliminary injunction against use of IEEPA for exceeding scope of the President's authority); Maryland v. Trump, 498 F. Supp. 3d 624, 636, 641 (E.D. Pa. 2020) (ruling the same); *see also* Elena Chachko, *Could the TikTok and WeChat Executive Orders Undermine IEEPA?*, LAWFARE (Aug. 8, 2020, 2:49 PM), https://www.lawfareblog.com/could-tiktok-and-wechat-executive-orders-undermine-ieepa [https://perma.cc/Y4TV-8SUD].

Although this pushback may not represent an immediate change in posture by the judiciary,[296] it raises questions about future judicial intervention—and potential limitations on regulatory capacity. In another branch of the law, courts could read U.S. law about extra-territoriality more narrowly, reining in U.S. enforcement's authority and limiting the reach of sanctions and AML/CFT prosecutions.[297] German researcher Sascha Lohmann has focused on this "regulatory capacity" weakness, arguing that legal challenges to U.S. sanctions measures by European companies in U.S. courts could "provide the only remedy to effectively protect European sovereignty" from U.S. extraterritorial regulation.[298] Finally, legislative proposals to restrict executive branch invocations of the National Emergencies Act and IEEPA could also limit U.S. regulatory capacity in this area.[299]

Opposition to stringency in U.S. rules is another potential future limitation on the extra-territorial reach of the U.S. strands. The use of these measures in areas more and more distant from traditional national security concerns, such as to confront climate change, and the increasing compliance costs for financial institutions could awaken the U.S. anti-regulatory bias that limits of stringency of U.S. rules in other

296 The Biden administration asked courts for delays on both WeChat and TikTok proceedings as it conducts of broader review of Department of Commerce Activity. Stephanie Connor, *Biden Paused Trump's WeChat and TikTok Bans: Now What?*, JUST SEC. (Feb. 12, 2021) https://www.justsecurity.org/74664/biden-paused-trumps-wechat-and-tiktok-bans-now-what/ [https://perma.cc/M4JC-6QNF].

297 Verdier, *Extraterritoriality*, *supra* note 247, at 270.

298 Sascha Lohmann, *Extraterritorial U.S. Sanctions*, SWP COMMENT. NO. 5, Feb. 2019, at 1, 8, https://www.swp-berlin.org/publications/products/comments/2019C05_lom.pdf [https://perma.cc/ZVW2-2AHY].

299 Congressional Oversight of Sanctions Act, H.R. 5879, 116th Cong. § 4 (2020) (limiting IEEPA's initial use to sixty days); *see* Elizabeth Goitein & Andrew Boyle, *Limiting This Governmental Emergency Power Could Curb Presidential Overreach*, BRENNAN CTR. FOR JUST. (Mar. 5, 2020), https://www.brennancenter.org/our-work/analysis-opinion/limiting-governmental-emergency-power-could-curb-presidential-overreach [https://perma.cc/V7VJ-2938].

contexts.[300] Already, there have been examples of opposition to the use of sanctions as unduly burdensome on economic activity coming from the business community.[301] Additionally, following President Trump's proposal to employ IEEPA to impose tariffs, members of his own party in Congress who support trade liberalization put forward legislation that would limit the IEEPA's grant of authority related to tariffs.[302] A decline in white-collar prosecutions during the Trump administration could also reduce the perception of stringency and limit firms' focus on complying with U.S. rules.[303] Finally, some have called for greater procedural checks on sanctions and AML/CFT rules, for example invoking the need for cost-benefit analysis that in other contexts has limited U.S. regulatory prowess.[304]

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300 BRADFORD, *supra* note 23, at 39–41.

301 Saleha Mohsin, *Banks Seek Biden's Aid After Trump's 1,000-Sanctions-a-Year Pace*, BLOOMBERG (May 6, 2021, 10:00 AM), https://www.bloomberg.com/news/articles/2021-05-06/banks-urge-treasury-to-ease-burden-of-complying-with-sanctions (on file with the Columbia Business Law Review) (describing private sector lobbying efforts against sanctions); *see also* Henry Farrell & Abraham L. Newman, *Weaponized Interdependence and Networked Coercion: A Research Agenda*, in THE USES AND ABUSES OF WEAPONIZED INTERDEPENDENCE, *supra* note 111 at 305, 315 (arguing that private sector firms have agency in shaping U.S. use of economic coercion measures).

302 S. REP. NO. 116-159, at 2 (2019); *see also* Peter E. Harrell, *The Right Way To Reform the U.S. President's International Emergency Powers*, JUST SEC. (Mar. 26, 2020) https://www.justsecurity.org/69388/the-right-way-to-reform-the-u-s-presidents-international-emergency-powers/ [https://perma.cc/JD7D-8NFJ] (describing uses of IEEPA farther from traditional conceptions of national security and outlining ways to curb such expanses applications).

303 Patricia Hurtado et al., *Trump Oversees All-Time Low in White Collar Crime Enforcement*, BLOOMBERG (Aug. 10, 2020, r:00 AM), https://www.bloomberg.com/news/articles/2020-08-10/trump-oversees-all-time-low-in-white-collar-crime-enforcement (on file with the Columbia Business Law Review).

304 BRADFORD, *supra* note 23, at 41–44; *see, e.g.*, Elizabeth Goitein, *The Biden Administration's Disappointing Sanctions Report: What Should Come Next*, JUST SEC. (Oct. 29, 2021), https://www.justsecurity.org/78785/the-biden-administrations-disappointing-sanctions-report-what-should-come-next/

V. CONCLUSION

In the past two decades, the United States has developed innovative sanctions and AML/CFT tools, and it has employed them for an ever-evolving set of goals. Unique among its peers, Washington has found a way to ensure that its coercive financial measures reach globally, shaping the behavior not just of U.S. firms and financial institutions, but of foreign ones as well—even when the nexus with the United States is tenuous.[305] The structure of the global financial system, particularly global players' reliance on the U.S. dollar, has made this reach possible.

While these measures emerged in the national security space and adopt its language, there are more clarifying ways of analyzing them. The national security frame traditionally emphasizes the use of sanctions and AML/CFT measures as bargaining tools to achieve U.S. national security goals. However, changes in national security itself are making this model less descriptive given that new threats do not lend themselves to bargaining. Climate change, for example, is a non-state threat without a credible bargaining counterpart, and it is a permanent threat not conducive to a one-time deal. A "regulatory" model better describes a world where the final bargain never seems to arrive and where, instead, sanctions and AML/CFT measures extra-territorially dictate the rules of global finance over the medium- and long-term.

Studying sanctions and AML/CFT measures as extra-territorial regulatory tools yields insights that the national security bargaining model obfuscates. Specifically, placing these tools within the Brussels Effect framework for extra-territorial regulatory influence unpacks the individual elements that enable this reach—a deeper level of analysis than the simple appreciation of the global role of the U.S. dollar. This more granular focus highlights threats to the long-term viability of these measures that are less apparent when looking at them in a bargaining, rather than a

[https://perma.cc/K28A-8SSR] (calling for cost-benefit analysis of sanctions).

305 *See supra* Section II.C.

regulatory, framework. If the Brussels Effect leads to a richer understanding of sanctions and AML/CFT, the reverse is true as well. Bradford's Brussels Effect analysis argued that finance was not amenable to extra-territorial regulation because capital is elastic and could evade regulation. Sanctions' and AML/CFT measures' targeting of the inelastic infrastructures of global finance points to a way to neutralize this elasticity and make unilateral global financial regulation possible.