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SECONDARY SANCTIONS AFTER RUSSIA'S INVASION OF UKRAINE – A WHOLE NEW WORLD?

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SECONDARY SANCTIONS AFTER RUSSIA'S INVASION OF UKRAINE – A WHOLE NEW WORLD?

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Keywords

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1 Introduction

The adoption of secondary sanctions is commonly associated with United States policy, specifically with the adoption of comprehensive sanctions regimes against countries such as Iran or Cuba. These unilateral measures not only aim to impact the relations between the United States and the targeted States, but moreover seek to restrict trade interactions between third States and third-State operators, on the one hand, and the targeted countries and their respective companies, on the other hand. The rationale is clear. It is an effort to maximize the sanctions impact vis-à-vis the targeted countries with a view to achieving the underlying policy objectives of the sanctioning state – even if these objectives are not always clearly articulated. Relatedly, secondary sanctions seek to prevent that trade flows simply relocate, and to avoid, for instance, that US operators forced to terminate existing trade relations with the targeted country see the resulting vacuum filled by companies from other countries. At the same time, the legitimacy and legality of secondary sanctions have been widely questioned throughout the international community – adding a further layer to the lingering schism between the west and the global south regarding the place within the international legal order of 'unilateral coercive measures' and 'third-party countermeasures'.[1] Thus, previous chapters in this volume have, for instance, critically examined the compatibility of secondary sanctions with the customary principle of non-intervention, the rules restricting States' exercise of jurisdiction, or international trade law.

The European Union has long voiced its opposition to US secondary sanctions. Towards the end of 1981, the United States introduced a series of export restrictions aimed at undermining the construction of the Trans-Siberian gas pipeline. Specifically, these restrictions encompassed the trade of goods and technical data related to the exploration, exploitation, transmission, and refining of oil and gas destined for the Soviet Union.[2] In June 1982, the US decided to amend its trade control, broadening their reach to incorporate the export and re-export of such items via foreign subsidiaries of US corporations (including non-US origin items), foreign companies, or individuals (restricted to US items), and foreign goods manufactured under licenses granted by US companies. In response to these amendments, the European Community, the predecessor to the EU, raised objections to the measures, asserting that 'the US regulations as amended contain sweeping extensions of US jurisdiction which are unlawful under international law'.[3]

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[1] Cross-ref Silingardi Chapter. See further A. Hofer, 'The 'Curiouser and Curiouser' Legal Nature of Non-UN Sanctions: The Case of the US Sanctions against Russia' (2018) 23 *Journal of Conflict and Security Law* 75.

[2] See further G.H. Perlow, 'Taking Peacetime Trade Sanctions to the Limit: The Soviet Pipeline Embargo (1983) 15 *Case Western Reserve Journal of International Law* 253; J.B. Busby, 'Jurisdiction to Limit Third-County Interaction with Sanctioned States: The Iran and Libya Sanctions and Helms-Burton Acts' (1998) 36 *Columbia Journal of Transnational Law* 621.

[3] European Community, 'Comments of the European Community on the Amendments of 22 June 1982 to the U.S. Export Regulations', 12 August 1982, 21 *ILM* 891.

In 1996, Europe responded to the US Helms-Burton Act with the adoption of the ill-fated Blocking Statute, the preamble of which expressly holds that extraterritorial sanctions that purport to regulate activities of natural or legal persons under the jurisdiction of an EU Member State 'violate international law'.[4] At the time, the matter was temporarily laid to rest when the U.S. eventually agreed to partially suspend the application of the Act.[5] A 1998 U.S.-EU Transatlantic Partnership on Political Cooperation in fact asserted that 'a partner will not seek or propose, and will resist, the passage of new economic sanctions legislation based on foreign policy grounds which is designed to make economic operators of the other behave in a manner similar to that required of its own economic operators.'[6] That commitment, however, did not live a long life. In recent years, the United States has indeed strongly shored up its use of increasingly far-reaching secondary sanctions. Prominent examples include the reinstatement of secondary sanctions against Iran following the Trump administration's withdrawal from the 'Iran nuclear deal',[7] the reactivation of the notorious Title III of the United States Helms-Burton Act of 1996, or the use of sanctions targeting the construction of the Nord Stream 2 gas pipeline.[8] European leaders have repeatedly decried measures of this kind as unlawful,[9] and/or as encroaching upon the EU's and its Member States' economic and political sovereignty.[10] The transatlantic rift[11] triggered by the adoption of US secondary sanctions, and the EU's reactions thereto – chiefly the re-activation of the 1996 Blocking Statute[12] – provided the immediate inspiration for an academic conference in Ghent held in December 2021, an event which the present volume, and several of the chapters included therein, are essentially an outgrowth of.

However, much has changed since then. In particular, the large-scale invasion by Russian armed forces of Ukraine in February 2022, triggering the largest conventional war in Europe since 1945, has proven to be a game-changer, not just geopolitically, but also more specifically in the sanctions domain. Early March 2022, a large majority consisting of 141 States voted within the UN General Assembly to condemn the Russian aggression against Ukraine, with only five States voting against.[13] Ever since, a large coalition of States – including i.a. the EU and its Members States, the United States, the United Kingdom, Canada, Australia, New Zealand, Japan and South Korea – have imposed an unprecedented range of economic, financial and sectoral sanctions against Russia, effectively making the latter the most heavily-sanctioned country around the globe. As the objective of countering the Russian aggression has become a common foreign policy priority, the long-standing transatlantic rift has mostly retreated

[4] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ 309, preamble.

[5] Andreas Falke, *The Conflict over Sanctions Policy: Confronting the Hegemon*, 5 EUR. FOREIGN AFFS. REV. 139, 160 (2000).

[6] Transatlantic Partnership on Political Cooperation, 18 May 1998, https://www.govinfo.gov/content/pkg/WCPD-1998-05-25/pdf/WCPD-1998-05-25-Pg923.pdf, para. 2(h).

[7] United States, White House, 'President Donald J. Trump is Ending United States Participation in an Unacceptable Iran Deal', 8 May 2018, https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-ending-united-states-participation-unacceptable-iran-deal/.

[8] United States, Countering America's Adversaries Through Sanctions Act (CAATSA), Pub. L. No. 115-44, 131 Stat. 886 (2017), codified at 22 USC, § 9401, Sec. 232 (Sanctions with Respect to the Development Of Pipelines in the Russian Federation).

[9] See, for instance, European Commission, 'Answer given by Vice-President Borrell on behalf of the European Commission, 4 February 2020, E-002880/2019, https://www.europarl.europa.eu/doceo/document/E-9-2019-002880-ASW_EN.pdf ('The EU does not recognise the extraterritorial application of US sanctions, which it considers to be contrary to international law. Furthermore, EU policies and practices should not be determined by the threat or imposition of third country sanctions.'); R. Sinha and S. Talmon, 'Germany Rejects U.S. Sanctions Against Nord Stream 2 as Contrary to International Law', GPIL – German Practice in International Law, 5 January 2021, https://gpil.jura.uni-bonn.de/2021/01/germany-rejects-u-s-sanctions-against-nord-stream-2-as-contrary-to-international-law/.

[10] See, e.g., France, Sénat, Report by Senator P. Bonnecarrère, 'Rapport d'information sur l'extraterritorialité des sanctions américaines', 4 October 2018, https://www.senat.fr/rap/r18-017/r18-0171.pdf.

[11] See further S. Sultoon and J. Walker, 'Secondary Sanctions' Implications and the Transatlantic Relationship', Atlantic Council, 19 September 2019, https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/secondary-sanctions-implications-and-the-transatlantic-relationship/.

[12] Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No. 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ L199I, 7 August 2018.

[13] Aggression against Ukraine, UNGA Res. ES-11/1, UN Doc. A/RES/ES-11/1, 2 March 2022.

into the background (at least provisionally), and has instead been supplanted by close coordination between Brussels and Washington, as well as beyond, e.g., under G7 auspices.[14]

What does this mean for the object of study of this volume? Evidently, the Russian aggression has created a major test case for sanctions, and secondary sanctions in particular. On the one hand, the uniqueness of the situation is that, for the first time, a significant coalition of States have sought to impose far-reaching sanctions against a major economic power – and one of the largest oil exporters at that.[15] On the other hand, numerous countries including important economies such as China, India or Brazil, have ruled out taking sanctions against Moscow themselves. The implication is that it seems far less obvious – even for an economic powerhouse such as the United States and notwithstanding the centrality of the US dollar in international trade and finance – that the adoption of secondary sanctions might bring third States and third-State economic operators to cease doing business with Russia. Conversely, it has meant that the incentives have been all the greater for Russia, as well as for third-State operators, to circumvent the various sanctions regimes and to detect and exploit existing loopholes therein.

Paradoxically perhaps, the United States has refrained from adopting some of the most far-reaching secondary sanctions previously imposed upon countries such as Iran and Cuba – irrespective of occasional calls e.g., by US Senators to move in that direction[16] - perhaps revealing, or at the very least hinting at, the limitations of the utility of the secondary sanctions 'weapon'. Meanwhile, notwithstanding the EU's traditional insistence that it does not apply sanctions extraterritorially and regardless of its past opposition to US secondary sanctions, the period since February 2022 has seen a marked expansion of the scope or reach of EU restrictive measures. Remarkably, the European Parliament has expressly called for 'urgent steps to block any attempt to circumvent [existing] sanctions and to work on a secondary sanctions mechanism that would close any loopholes.'[17] What unfolds, *prima facie*, is a certain *rapprochement* between Europe and the US in the sanctions domain.

Against this background, the final chapter of this volume explores how the imposition of unprecedented sanctions against Russia and the constant cat-and-mouse game of enforcement and evasion has altered the secondary sanctions landscape. More specifically, it examines to what extent the EU itself has gradually moved towards adding a 'secondary' layer to its sanctions toolbox. A first section exposes the EU's ambiguity towards

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[14] See e.g. European Commission, 'U.S. and EU sanctions teams enhance bilateral partnership', 16 May 2023, https://finance.ec.europa.eu/news/us-and-eu-sanctions-teams-enhance-bilateral-partnership-2023-05-16_en; European Commission, '"Freeze and Seize Task Force": Almost €30 billion of assets of Russian and Belarussian oligarchs and entities frozen by the EU so far', 8 April 2022, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2373. The degree of US-EU coordination is all the more remarkable given the different exposure on both sides to restrictions on trade with Russia. Indeed while Russia was one of the main trading partners of the EU until February 2022 (see e.g. European Commission, Russia: EU trade relations with Russia. Facts, figures and latest developments', https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/russia_en), US-Russia trade was much more limited in comparison (see e.g. United States, Office of the United States Trade Representative, https://ustr.gov/countries-regions/europe-middle-east/russia-and-eurasia/russia).

[15] International Energy Agency, 'Oil Market and Russian Supply', https://www.iea.org/reports/russian-supplies-to-global-energy-markets/oil-market-and-russian-supply-2; See also A. Demarais, *Backfire: How Sanctions Reshape the World Against U.S. Interests* (Columbia University Press, 2022), pp. 23-24 ('At any rate, Russia was too big to target: going for stringent sanctions would be devastating for Moscow but also for Washington's European allies; A more nuanced form of sanctions was needed.').

[16] See e.g., D. Flatley, 'Senators seek secondary sanctions on Russian oil purchases', Bloomberg, 20 September 2022, https://www.bloomberg.com/news/articles/2022-09-20/senators-seek-secondary-sanctions-on-russian-oil-purchases#xj4y7vzkg.

[17] European Parliament, Resolution, 'One year of Russia's invasion and war of aggression against Ukraine', 16 February 2023, 2023/2558(RSP); See also European Parliament, Debates, 'The EU's response to the appalling attack against civilians in Dnipro : strengthening sanctions against the Putin regime and military support to Ukraine', 17 January 2023, https://www.europarl.europa.eu/doceo/document/CRE-9-2023-01-17-ITM-015_EN.html. (Guy Verhofstadt, on behalf of the Renew Group: 'The second thing is secondary sanctions. There are still companies and individuals making deals and doing business in Russia. I ask you, as fast as possible, to declare secondary sanctions on this, because that's the only possibility to stop it.').

extraterritoriality, both within and without the sanctions domain. Subsequent sections zoom in on a number of specific EU measures, namely the imposition of the so-called 'price cap' on Russian oil (Section III), the adoption of far-reaching import and export restrictions, including the prohibition to import certain Russian products even after these are located or have already been processed in third countries (section IV), and the threat of financial sanctions against, and criminal prosecution of, non-EU persons that facilitate the circumvention of EU sanctions against Russia. The fifth and last section offers some concluding observations.

2 The EU and Extraterritoriality: Practice what you Preach?

As hinted at above, the European Union has been keen on juxtaposing its own – supposedly international law-abiding – approach to the adoption of 'restrictive measures' to that of the United States, thereby repeatedly stressing that EU sanctions do not apply extraterritorially. This mantra surfaces multiple times, for example, in the periodically updated 'Commission Consolidated FAQs' on the application of EU restrictive measures against Russia,[18] where the Commission asserts that 'EU sanctions are never extraterritorial and do not apply to non-EU companies or individuals that do business entirely outside the Union'.[19] In a similar vein, pursuant to an MEP inquiring whether sanctions ought to be imposed upon South Africa after the latter allowed a Russian oligarch's vessel to enter its territorial waters, thus granting it sanctuary, the EU High Representative for Foreign Affairs and Security Policy responded that 'EU sanctions are not extraterritorial and therefore do not bind South Africa to implement them. South Africa has the right to make its own decisions about access to the country's territorial waters.'[20]

The question remains, however, whether the claim that 'EU sanctions are never extraterritorial' corresponds to reality. As the present section argues, upon closer scrutiny, it must be taken with more than the proverbial grain of salt. This is all the more so in the wake of the Russian aggression against Ukraine. A few observations are in order.

First, a closer look at the standard jurisdictional clause used in relevant EU legal instruments sheds a different light on the matter. This clause indeed stipulates that EU restrictive measures apply '(a) within the territory of the Union; (b) on board any aircraft or any vessel under the jurisdiction of a Member State; (c) to any person inside or outside the territory of the Union who is a national of a Member State; (d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State; (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union.'[21]

Paragraphs (b), (c) and (d) are contingent on the involvement of a national of an EU Member State, or of a company, vessel or aircraft registered in an EU Member State, irrespective of where the relevant conduct takes place. Put differently, these jurisdictional triggers undeniably have an extraterritorial dimension. That is not to say that they are necessarily problematic under the international law of jurisdiction. The nationality principle is indeed an accepted and well-established permissive principle that justifies an extraterritorial exercise of prescriptive

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[18] European Commission, 'Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014', last update 22 August 2023, https://finance.ec.europa.eu/system/files/2023-08/faqs-sanctions-russia-consolidated_en_0.pdf.

[19] Ibid., Section F(1), query 7 ('Are non-EU companies required to comply with EU sanctions when they import agricultural products from Russia? Does it make any difference if those goods transit through the EU territories or the Euro is used as a currency for the transaction?'), See also Section F(2), query 6 ('Are non-EU companies required to comply with EU sanctions when they import agricultural products from Ukraine? Does it make any difference if those goods transit through the EU territories or if the Euro is used as a currency for the transaction?').

[20] European Parliament, 'Question for written answer E-000420/2023(ASW)', 10 February 2023, https://www.europarl.europa.eu/doceo/document/E-9-2023-000420_EN.html.

[21] See e.g., Art. 13 of Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, [2014] OJ L 229.

jurisdiction.[22] It does imply, however, that a blanket assertion that EU sanctions do not apply extraterritorially is inaccurate. The more cautious formula, which is sometimes used at the EU level, namely that the EU 'refrains from adopting sanctions having extra-territorial application *in breach of international law*'[23] may be closer to the truth.

One should moreover not ignore that EU jurisdiction over EU legal persons can be wielded not only to restrict trade between the EU and a targeted State, but equally – at least indirectly[24] – between third States and the primary sanctions target. This is particularly so where EU legal persons provide critical goods or services for which there is a strong demand globally. Nothing illustrates this better in all likelihood than SWIFT, the Belgian-based hub in the international financial system which is by far the dominant financial messaging service provider globally. The EU first 'weaponized' SWIFT in 2012, when it prohibited EU companies from supplying specialized financial messaging services to exchange financial data to listed persons and companies.[25] This novel measure had a major impact on Iran's economy and finance.[26] As part of its sanctions against Russia, the EU has again prohibited the provision of specialized financial messaging services to a range of Russian banks.[27] What is important here is that SWIFT's role is of course not limited to financial transactions that are going in or out of the European Union. Rather, it plays an equally crucial role for financial transactions located wholly outside the European Union that use the SWIFT messaging service. This further explains why countries such as Russia and China have begun working on alternatives to the SWIFT payment system – albeit hitherto with limited success.[28]

Returning to the EU's standard jurisdictional clause, it may be observed that paragraphs (a) and (e) presuppose a territorial link with the European Union and are thus *prima facie* unproblematic from a jurisdictional perspective. Be that as it may, what amounts to a territorial nexus may not always be clear-cut, and various examples exist where States have sought to interpret that connection very broadly, at times stretching to breaking point the requirement of a sufficient or genuine connection under the law of jurisdiction. US domestic courts have, for instance, taken the position that the mere clearing of a dollar-denominated transaction between two non-US banks on behalf of non-US clients by a US correspondent bank account suffices to create a territorial link with the United States for sanctions purposes. There is, to the authors' knowledge, no indication that the EU would be similarly inclined to apply its restrictive measures to euro-denominated international payments cleared by an EU-based correspondent bank where both the originator and the beneficiary are located outside the euro area.[29] Such approach would indeed go against the presumption that what qualifies as 'business done in whole or in part within the Union' must be understood in light of the

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[22] C. Ryngaert, *Jurisdiction in International Law*, 2nd edn (Oxford University Press, 2015) p. 57.

[23] See e.g., European Union External Action, 'European Union sanctions', https://www.eeas.europa.eu/eeas/european-union-sanctions_en; See also Council of the European Union, General Secretariat of the Council of the European Union, 'Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy', Doc No 5664/18, 4 May 2018, 19: 'The EU will refrain from adopting legislative instruments having extra-territorial application in breach of international law. The EU has condemned the extra-territorial application of third country's legislation imposing restrictive measures which purports to regulate the activities of natural and legal persons under the jurisdiction of the Member States of the European Union, as being in violation of international law.'

[24] A. Bianchi, 'Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy Between European and U.S. Approaches' (1992) 35 German Yearbook of International Law 366, 373.

[25] Art. 23(4) of Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010, [2012] OJ L 88.

[26] Demarais (n. 15), p. 20. Note that, following the US withdrawal from the Iran nuclear deal, US secondary sanctions continued to force SWIFT to cut off Iranian financial institutions, notwithstanding the lifting of the EU's own sanctions, leaving the latter bitterly frustrated.

[27] Article 5h(1) of Council Regulation (EU) No 833/2014 (n. 21).

[28] See e.g., M. Motamedi, 'What's behind Iran and Russia's efforts to link banking systems?, Al Jazeera, 9 February 2022, https://www.aljazeera.com/news/2023/2/8/whats-behind-iran-and-russias-efforts-to-link-banking-systems.

[29] A 2019 analysis of the European Central Bank suggests that while non-euro area to non-euro area transactions constituted only a minor part of the volume of correspondent banking in euro, it did account for more than a quarter in value. See European Central Bank, 'Eleventh survey on correspondent banking in euro – 2019', November 2020, https://www.ecb.europa.eu/pub/pdf/other/ecb.eleventhsurveycorrespondentbankingeuro202011~c280262151.en.pdf, 24.

requirement under customary international law for a sufficient connection with the State(s) exercising prescriptive jurisdiction. Either way, coming back to Europe's weaponization of SWIFT, if secondary sanctions are understood broadly as any attempt to regulate foreign conduct without the existence of genuine or substantial nexus, it could well be argued that such practice is comparable by analogy to currency-based jurisdiction, yet instead of being grounded on the denomination of a transaction in Euro, it instrumentalizes the most important messaging network for financial payments in the world.

This brings us to a second and broader observation, viz. the European Union's ambiguity when it comes to applying its legislation beyond its territory. The examples are well-known and need not be reiterated here at length. They range from the wide reach of the EU's data protection law,[30] to the CJEU's approval of the extension of the EU's emissions trading scheme to all flights in and out of the European Union (for the entirety of the aircrafts' trajectory),[31] or the European Commission's suggestion in its amicus curiae brief in the *Kiobel* case that 'universally condemned behaviour that occurs abroad' could trigger jurisdiction pursuant to the 'protective principle'.[32]

Over the years, the instrumentalisation of access to the European market has made the EU the global norm-setter in domains ranging from food security to data protection, et cetera, in a phenomenon that has become known as the 'Brussels effect'.[33] Already a decade ago, Joanne Scott demonstrated how the EU often uses the existence of a territorial connection with the EU, especially access to its internal market to influence conduct occurring beyond the EU.[34] Scott coined this regulatory technique as territorial extension, consisting of a regulation whose 'application depends upon the existence of a relevant territorial connection, but where the relevant regulatory determination will be shaped as a matter of law, by conduct or circumstances abroad'.[35]

The EU has also, on occasion, stretched the boundaries of nationality jurisdiction by regulating the wholly foreign conduct of subsidiaries of an EU parent company, for example by introducing a bonus cap for certain staff categories[36] - an approach the EU has (hitherto) expressly discarded when it comes to sanctions policy (in contrast to the US).[37] What is more, as Scott explains, the EU has had recourse to novel legislative triggers, such as 'anti-evasion' 'that serve to extend the global reach of EU law and impose 'over-the-border obligations' on non-EU persons in relation to conduct that takes place entirely abroad.'[38] Such legislation is 'geographically agnostic' in

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[30] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L 119, 4 May 2016.

[31] CJEU, *Air Transport Association of America*, Judgment, Case No. C-366/10, ECLI:EU:C:2011:864, 21 December 2011, paras. 121ff.

[32] See Supplemental Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party, United States, Supreme Court, *Kiobel v. Royal Dutch Petroleum*, 17 April 2013, 569 US 108 (2013).

[33] A. Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press, 2020).

[34] J. Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87.

[35] Ibid., 90.

[36] Art. 92(2) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, [2013] OJ L 176; See also J. Scott, 'The new EU "Extraterritoriality"' (2014) 51 *Common Market Law Review* 1343, 1352.

[37] While the US has extended the reach of various sanctions regimes to encompass foreign subsidiaries owned (for 50% or more) by U.S. companies (see further T. Ruys and C. Ryngaert, 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions' (2020) *British Yearbook of International Law* 1, 18–19), the EU has refrained from doing so. See e.g., the Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014 (n. 18) stipulate on several occasions that 'Russian subsidiaries of EU parent companies are incorporated under Russian law, not under the law of a Member State, hence they are not bound by the measures' (e.g., 'General questions', Q14). At the same time, the FAQs assert that 'it is prohibited for EU parent companies to use their Russian subsidiaries to circumvent the obligations that apply to the EU parent, for instance by delegating to them decisions which run counter the sanctions, or by approving such decisions by the Russian subsidiary.'

[38] Scott (n. 36), 1344.

the sense that it applies also to conduct taking place abroad,[39] even when the person engaging in the foreign conduct in question is neither a national of an EU Member State nor physically or legally present within the EU.[40] Scott observes how, even though this legislation is unequivocally extraterritorial in reach and has extraterritorial effects, 'it is far from clear whether the triggers themselves should be viewed as extraterritorial or not'.[41] Indeed, 'the line between territorial jurisdiction and extraterritorial jurisdiction becomes difficult to draw'.[42] She pleads in favour of self-restraint and the inclusion of certain 'safety valves'[43] in order to ensure the reasonableness, and ultimately the legality, of such legislation.

Interestingly, Scott links the advance of these novel triggers to the 2008 financial crisis and the desire to protect EU persons and public authorities from financial risk and to protect the stability of the EU financial markets.[44] In fact, writing in 2014, she suggests that the incorporation of novel 'extraterritorial' triggers into EU legislation appears to be confined to the financial services domain.[45] Recent developments would nonetheless appear to suggest it may also have spilled over to other fields, specifically the sanctions domain.

Before moving to concrete illustrations of the expanding reach of EU restrictive measures in the wake of the Russian invasion of Ukraine, some final observations are in order. First, notwithstanding the ostensible clarity of the standard jurisdictional clause used in EU instruments imposing restrictive measures, the EU has admittedly maintained some ambiguity as to where it draws the outer bounds of an acceptable exercise of jurisdiction. In particular, it is remarkable that the abovementioned EU Blocking Statute starts from the assumption that 'extraterritorial' sanctions are unlawful, without, however, explaining in any meaningful way (1) what makes a sanction 'extraterritorial' and (2) what makes an extraterritorial sanction unlawful to begin with. Rather than setting general parameters to guide this assessment, the EU has instead chosen to list in Annex specific (US) legislative instruments to which the Blocking Statute is considered applicable.[46] The cursory references in that annex to the contested elements of compliance in the respective instruments[47] provide some indirect and limited insight into the EU's legal convictions. In turn, the absence of a more clearly articulated position on impermissible 'extraterritorial' sanctions may to some extent reflect the broader ambiguity with regard to extraterritorial legislation on the part of the EU. In retrospect, this ambiguity may have also proven useful for the EU, allowing it sufficient leeway to further expand the reach of its own sanctions against the Russian Federation (see further).

Lastly, we previously noted how the European Parliament has expressly called for 'a secondary sanctions mechanism that would close any loopholes' in the EU's sanctions against Russia.[48] Whether and to what extent that call has been heeded by the Council and the Commission will be explored in subsequent sections. Before doing so, however, it is worth recalling that the notion of a 'secondary sanction' is not a legal term of art with an established meaning, and that the mere use of this label does not *ipso facto* entail illegality under international law. Indeed, as one of the authors has argued elsewhere, notwithstanding frequent assumptions that secondary

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[39] Ibid., 1356.
[40] Ibid., 1363.
[41] Ibid., 1356
[42] Ibid., 1345. 'While it is plain that the EU legislation in question regulates activities that take place abroad, what is not straightforward is the determination of whether the triggers that the EU is relying on should be understood as territorial or not.'
[43] Ibid., 1364ff. Scott identifies two 'safety valves'. First, EU legislation could be 'disapplied' when the foreign conduct in question is satisfactorily regulated by another State or international body (this is the concept of 'contingency'). Second, the application of EU law can be rendered conditional on contextual standards that require a case-by-case assessment, albeit such approach more pose a risk to legal certainty.
[44] Ibid., 1364.
[45] Ibid., 1346.
[46] On the selectivity in the choice of US sanctions regulations to which the Blocking Statute applies, see C. Ryngaert, 'Interpreting an unsatisfactory EU Blocking Statute: *Bank Melli Iran'* (2023) 60 *Common Market Law Review* 517, 528-9.
[47] The contested element of 'required compliance' is sometimes framed in general terms, e.g., by reference to a given Title of the Helms-Burton Act, and sometimes more specifically, by setting out the content of specific extraterritorial sanctions.
[48] European Parliament, Resolution, 'One year of Russia's invasion and war of aggression against Ukraine' (n. 17).

sanctions 'have to be' violating WTO law or other forms of conventional or customary law, the reality is that examining their compatibility with international law is no straightforward and monolithic exercise.[49] Rather, and as previous chapters in this volume have explained, it requires unpacking the various sanctions triggers and concomitant consequences in case of breach.[50]

3 The Oil Price Cap

One of the most remarkable, and contested, sanctions adopted against Russia concerns the so-called oil 'price cap', adopted in October 2022 and effective as of December 2022. Akin to other measures, it was designed to exert pressure on Moscow to end its aggression against Ukraine, having regard in particular to the fact that oil provides almost half of Russia's budget revenues.[51]

The introduction of the 'price cap' followed an earlier ban – as part of the EU's 'sixth sanctions package' – on the import of Russian seaborne crude oil and petroleum products, subject to certain transition periods and with limited exceptions, such as a temporary exemption for pipeline crude oil.[52] It sought to put an end to the EU's dependence on Russian oil imports. Thus, in 2020 some 29% of extra-EU crude oil was imported from Russia.[53] In 2021, the EU imported EUR 48 billion worth of crude oil and EUR 23 billion of refined oil products from Russia.[54] Conversely, for Russia the EU was its main oil export market, accounting for ca. 50% of total exports before the invasion of Ukraine in 2022.[55] The introduction of the abovementioned import ban sent Russian oil imports into the EU plummeting from 4 million barrels per day in early 2022 to 600,000 barrels per day in February 2023.[56] Importantly, in addition to banning most imports of Russian oil products into the EU, the sixth sanctions package also introduced a prohibition on EU operators to provide, directly or indirectly, technical assistance, brokering services or financing or financial assistance, related to the transport of Russian-origin crude oil or petroleum products to third countries.[57] The latter addition was clearly intended to make it more difficult for Russia to replace reduced oil exports to the EU with increased exports to third countries, in particular by instrumentalising the importance of EU operators as providers of the aforementioned services. It should be noted that this was not the first restrictive measure of its kind: EU sanctions against Iran previously also included a ban on the provision of insurance services to trade in crude oil and petroleum products of Iranian origin.[58]

The introduction of the 'oil price cap' in the EU's eighth sanctions package in October 2022 can be seen as an effort to soften or mitigate the abovementioned measure, out of concern that it could eventually result in shortages on

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[49] Ruys and Ryngaert (n. 37), 32.

[50] Ibid.

[51] European Parliament, European Parliamentary Research Service (EPRS), 'EU sanctions on Russia: overview, impact, challenges', 10 March 2023, https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739366/EPRS_BRI(2023)739366_EN.pdf, 5.

[52] Art. 1 of Council Regulation (EU) 2022/879 of 3 June 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, [2022] OJ L 153; Art. 1 of Council Decision (CFSP) 2022/884 of 3 June 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, [2022] OJ L 153.

[53] Council of the European Union, 'Infographic – where does the EU's energy come from?', last updated 27 September 2022, https://www.consilium.europa.eu/en/infographics/where-does-the-eu-s-energy-come-from/.

[54] European Commission, 'Russia's war on Ukraine: EU adopts sixth package of sanctions against Russia', 3 June 2022, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2802.

[55] 'Factbox: How the EU ban on Russian oil imports affects oil flows', Reuters, 15 March 2023, https://www.reuters.com/business/energy/how-eu-ban-russian-crude-affects-oil-flows-2023-02-27/.

[56] Ibid.

[57] Council Regulation (EU) 2022/879 (n. 52) (adding a new Article 3n to Regulation 833/2014); Council Decision (CFSP) 2022/884 (n. 52) (adding a new Article 4p to Council Decision 2014/512/CFSP).

[58] Council Regulation (EU) No 267/2012 (n. 25), Art. 11ff.

the global energy markets and trigger a spike in prices, both for the EU and for importing third States.[59] In particular, the relevant instruments created an exception for the provision of technical assistance, brokering services or financial assistance to the transport of Russian oil products to third countries inasmuch as 'the purchase price per barrel of such products does not exceed the price laid down' in the Annexes to the relevant EU instruments.[60] That price cap was initially set at USD 60 per barrel for crude oil, with a price of USD 100 per barrel for products that trade at a premium to crude (e.g. jet fuel) and a price of USD 45 per barrel for products that trade at a discount (e.g. hydraulic oils).[61]

The price cap was not exclusively the work of the EU, but was devised under the auspices of the so-called 'Price Cap Coalition', bringing together the EU and the G-7 countries, as well as Australia.[62] This Coalition also comprises a Price Setting Body, tasked with reviewing and potentially adjusting the abovementioned prices per barrel. Several participants have adopted elaborate guidelines on the implementation of the price cap policy.[63] These instruments detail the type of services covered by the measure, including trading and commodities brokering, financing, shipping, insurance and reinsurance, flagging, and customs brokering. The inclusion of insurance services and shipping are of particular importance, given the fact that companies from the countries participating in the Coalition account for ca. 90% of the market for relevant maritime insurance products and reinsurance,[64] and the fact that Greek tankers carry an estimated 70% of the world's crude oil.[65] The instruments further clarify what products are covered by the price cap and which are not. In particular, Russian crude oil that is substantially transformed in a third State is no longer considered to be of Russian origin and is accordingly not caught by the price cap, as opposed to crude oil that is merely blended with other products (unless such blending entails a customs tariff shift).[66] The guidelines moreover spell out a recordkeeping and attestation process – in excess of standard due diligence – that, if properly complied with by the companies of the countries concerned, assures that they will not be found to fall afoul of the relevant prohibitions.[67]

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[59] Some indeed predicted at the time that an insurance ban 'would have further-reaching consequences for the oil market than the EU oil embargo'. See 'EU insurance ban targets Russian oil exports', France 24, 29 June 2022, https://www.france24.com/en/live-news/20220629-eu-insurance-ban-targets-russian-oil-exports.

[60] Art. 1(8) of Council Regulation (EU) 2022/1904 of 6 October 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, [2022] OJ L 259I, 3–75. (amending Article 3n of Regulation 833/2014); Art. 1(4) of Council Decision (CFSP) 2022/1909 of 6 October 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, [2022] OJ L 259I. (amending Article 4p of Council Decision 2014/512/CFSP).

[61] See Annex XXVIII to Council Regulation (EU) No 833/2014 (n. 21); Annex IX of Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, [2022] OJ L 229.

[62] Germany, Federal Foreign Office, Statement of the G7 and Australia on a price cap for seaborne Russian-origin crude oil, 2 December 2022, https://www.auswaertiges-amt.de/en/newsroom/news/g7-australia-price-cap-seaborne-russian-origin-crude-oil/2567026.

[63] See e.g., United States, Department of Treasury, 'OFAC Guidance on Implementation of the Price Cap Policy for Crude Oil and Petroleum Products of Russian Federation Origin', 3 February 2023, https://ofac.treasury.gov/media/931036/download?inline.

[64] United States, Department of Treasury, 'FACT SHEET: Limiting Kremlin Revenues and Stabilizing Global Energy Supply with a Price Cap on Russian Oil', 2 December 2022, https://home.treasury.gov/news/press-releases/jy1141.

[65] See e.g., J. Northam, 'Russia has amassed a shadow fleet to ship its oil around sanctions', NPR, 21 January 2023, https://www.npr.org/2023/01/21/1149745629/russia-oil-shadow-fleet-sanctions.

[66] See e.g., the 'oil price cap' section of the Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014 (n. 18), Question 6 ('the price cap no longer applies when the blending operations in a third country involving Russian origin petroleum products result in a tariff shift at 8 digit level, i.e., if the blending operation results in a difference between the 8 digits code of the input Russian petroleum product(s) and the output petroleum product'). See also the discussion on the 'nationality' of goods (or rather the lack thereof) in Section IV below.

[67] See e.g., the 'oil price cap' section of the Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014 (n. 18), Question 35; OFAC Guidance on Implementation of the Price Cap Policy for Crude Oil and Petroleum Products of Russian Federation Origin (n. 63), Section IV ('compliance').

Both the introduction of the price cap and the determination of the price per barrel proved highly controversial.[68] As to the latter, the challenge was to set the price at a level high enough to maintain an incentive for Russia to continue selling oil on the global markets, while substantially reducing it in order to limit Russian revenues used to fund its war effort. More generally, there was considerable doubt whether the initiative would meet its stated aim, especially as Russia threatened to reduce its volume of exports so as to increase prices, and warned that it would refuse to work with anyone abiding by the price cap.[69] Even if third States supposedly have an economic incentive to apply the price cap, it remained uncertain to what extent others would join or rather reject the initiative. In addition, the question remained to what extent Russia and third States would reconfigure supply chains to avoid reliance on service-providers from the Coalition States, and to what extent the Russian authorities and private operators would find ways to circumvent the measure.

At the time of writing, it appears premature to make a proper assessment as to the measure's success or failure, albeit early reports suggest that the oil price cap has taken a heavy toll on Russia's economy.[70] It is worth observing that a number of countries, such as Norway and Switzerland, have teamed up with the Price Coalition.[71] Yet, perhaps foreseeably, other countries, such as China and India, have opposed the measure. In its March 2023 Oil Market Report, the International Energy Agency notes how these two countries took in more than 70% of Russia's crude oil exports in February 2023[72] (presumably at strongly discounted prices). Moreover, Russia has reportedly responded to the oil price cap by developing its own 'shadow fleet', mostly by acquiring dozens of old tankers destined to be scrapped, so as to ship its oil without going through EU or UK intermediaries, borrowing a practice from the sanctions evasion playbook developed by Iran and Venezuela[73] (and raising concerns of maritime safety). Further, Russia has also engaged in providing sovereign insurance to bypass (mostly) UK shipping insurance companies, albeit strong doubts have been expressed as to whether this presents a viable alternative to the P&I Insurance market.[74] Some companies from States participating in the Price Cap Coalition may moreover have found ways to set up shop elsewhere. In March 2023, for instance, the *Financial Times* reported how a Swiss-based oil trader had stopped its Russian trading activity, only for that trade to be taken up by a near-identically named company in Dubai.[75] Even so, the International Energy Agency reported in March 2023 that Russian oil export revenues were dwindling, and had plunged 'another USD 2.7 bn to USD 11.6bn, down 42% on a year-ago'.[76] Meanwhile, according to some sources, freight costs had increased more than fivefold for Russian companies since

[68] See e.g. D. Wessel, 'The story behind the proposed price cap on Russian oil', Brookings, 5 July 2022, https://www.brookings.edu/blog/up-front/2022/07/05/the-story-behind-the-proposed-price-cap-on-russian-oil/.

[69] See e.g., EU sanctions on Russia: overview, impact, challenges (n. 51), 7; A. Stognei and D. Sheppard, 'Russia to cut oil output in response to price cap', Financial Times, 10 February 2023, https://www.ft.com/content/dc898690-653a-47f1-af56-b0216abd7dcd.

[70] J. Politi, A. Stognei, D. Brower, 'Russia's energy sector hit as Kremlin forced to increase tax', Financial Times, 8 May 2023, https://www.ft.com/content/f4b89276-efcf-4731-9ed3-7afea3be4c27; 'Russia's oil and gas budget revenues fell by almost 36% year over year in May', Reuters, 5 June 2023, https://www.reuters.com/markets/commodities/russias-oil-gas-budget-revenues-fell-by-almost-36-yy-may-2023-06-05/; United States, Department of Treasury, 'The Price Cap on Russian Oil: A Progress Report', 18 May 2023, https://home.treasury.gov/news/featured-stories/the-price-cap-on-russian-oil-a-progress-report.

[71] Kingdom of Norway, 'Norway has introduced a price cap on Russian oil', 8 December 2022, available at https://www.regjeringen.no/en/aktuelt/oil_price_cap/id2950407/; Switzerland, Swiss Federal Council, 'Ukraine: Switzerland adopts further sanctions', 16 December 2022, https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-92282.html.

[72] See International Energy Agency, 'Oil Market Report', March 2023 https://www.iea.org/reports/oil-market-report-march-2023.

[73] Northam (n. 65); EU sanctions on Russia: overview, impact, challenges (n. 51), 6.

[74] See e.g. Wessel (n. 68); See further, in connection with the EU's Iran sanctions: J. Saul, M. Neligan, 'Iran oil fears grow as insurance ban bites', Reuters, 14 November 2012, https://www.reuters.com/article/shipping-iran-insurance-idUKL5E8M8J8320121114.

[75] T. Wilson and D. Sheppard, 'Two companies, one trade: the switch that keeps Putin's oil flowing', Financial Times, 20 March 2023, https://www.ft.com/content/c99e8c04-ec5a-4e84-bae3-19fda48c661f.

[76] International Energy Agency, 'Oil Market Report' (n. 72), 3, 18.

the beginning of 2022, diminishing profit margins for Russian companies, with some estimating the cost for Russia of the ban on crude oil imports and the oil price cap at around EUR 160 million per day (and rising).[77]

While the impact of the price cap will only become apparent over time, Moscow has made it clear that it regards the measures as unfriendly and contrary to international law,[78] without, however offering much by way of further explanation, save perhaps for the claim that it runs counter to the rules of the World Trade Organization.[79] Inasmuch as the ban on the provision of insurance and other services were to be challenged before the WTO dispute settlement mechanism – Moscow has previously threatened to bring WTO proceedings over the sanctions against it, without, however, taking concrete steps[80] –, one might assume the EU would invoke the 'security exception', which is included e.g. in Article XIVbis GATS (a provision which Russia itself has claimed to be of an entirely self-judging character).[81] It appears safe to assume that the war on Europe's eastern border qualifies as a 'war or other emergency in international relations' in the sense of the latter provision. Having regard to the Panel report in DS512 – *Russia Measures in Transit*, the question could moreover be raised whether there is a 'plausible link' between the measures undertaken and the claimed security interests which the measures seek to protect.[82] A generous or expansive reading of that requirement would hold that any measure that seeks to restrict Russia's revenues and so restrict its capacity to fund the ongoing war, would meet that 'plausibility' test. The EU itself, however, appears to have set a higher bar in its intervention in case DS512. In particular, the EU argued that for purposes of assessing the necessity of a measure and the existence of reasonably available alternatives under the WTO security exceptions, one should 'ascertain whether the interests of third parties which may be affected were properly taken into account'.[83] In turn, one might argue that by setting the price cap at a level meant not to jeopardize the global oil market, the EU and its coalition partners have done precisely that and sought to find a balance between the desired objective and third State interests.

From a 'jurisdictional' perspective, the oil price cap would *prima facie* not appear to pose major problems. After all, it is merely a prohibition on service-providers established in the EU (and other coalition jurisdictions) to export the covered services. In other words, it constitutes a simple application of the 'nationality principle', and thus rests on a solid legal basis. However, there is more than meets the eye. Indeed, as in the case of SWIFT, it is clear that this is a case where the EU/G-7 are seeking to instrumentalise the crucial role of companies established in the relevant jurisdictions that offer critical goods or services and/or that have a dominant position in the relevant market – in this case, e.g., the provision of insurance and shipping services that underpin the global maritime trade. Relatedly, the restriction, notwithstanding that the trigger is linked to the (territorial) establishment of the company concerned, is clearly intended to have an extraterritorial reach. In fact – and this may be a difference with e.g., some of the restrictions on the provision of financial messaging services – the measure has an *exclusively* extraterritorial purpose and impact. This is so because the oil embargo already prevents maritime trade between the Russian Federation and the EU, so that there is nothing to insure, finance, or broker in this context to begin with. This is the reason why, in response to the question whether the price cap affects the import ban into the EU, the Commission FAQs respond in the negative, and assert that 'Article 3n [of Council Regulation 833/2014] and the price cap exemption concern the trade and transport of Russian crude oil and petroleum products to and between third countries *only*' (emphasis added). Put differently, unlike a so-called 'buyers' cartel', the price cap does not

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[77] EU sanctions on Russia: overview, impact, challenges (n. 51), 6.

[78] A. Marrow and V. Soldatkin, 'Putin bans Russian oil exports to countries that implement price cap', Reuters, 28 December 2022, https://www.reuters.com/business/energy/putin-bans-russian-oil-exports-countries-that-imposed-price-cap-decree-2022-12-27/.

[79] A. Hernandez, 'Russian to ban oil sales under price cap, Kremlin says', Politico, 4 December 2022, https://www.politico.eu/article/russia-to-ban-oil-sales-under-price-cap-kremlin-says/.

[80] Brussels Office of the UK Law Societies, 'Russia threatens to challenge trade sanctions at the WTO and is preparing retaliatory action of its own', 6 April 2022, https://www.lawsocieties.eu/latest-news/russia-threatens-to-challenge-trade-sanctions-at-the-wto-and-is-preparing-retaliatory-restrictions-of-its-own/6002266.article.

[81] See WTO, Dispute Settlement Body, *Russia – Measures Concerning Traffic in Transit*, Panel Report, WT/DS512/R, 5 April 2019, paras. 7.29-7.30.

[82] Ibid., at paras. 7.138-7.139.

[83] Ibid., at para. 7.43.

seek to set the maximum price at which participating countries would purchase Russian crude oil and petroleum products, but rather seeks to set the maximum price paid for Russian oil *by third States*.

It follows that, even if the measure relies on one of the traditional and most-established jurisdictional triggers, the oil price cap can be seen as tantamount to a 'secondary' sanction, broadly understood, and creates a tension with the earlier commitment (in the 1998 US-EU agreement) to refrain from imposing economic sanctions based on foreign policy grounds 'designed to make economic operators of [other States] behave in a manner similar to that required of its own economic operators'.[84] In conceptual and legal terms it may not be far removed from, for instance, a prohibition that prevents US financial institutions from offering correspondent banking services for transactions between a targeted State and its operators and companies in third States.

While some have suggested that the oil price cap undermines the EU's opposition to unlawful extraterritorial sanctions,[85] an important difference ultimately remains between the measure at hand and an array of US secondary sanctions. Indeed, one should not overlook the limited nature of the measure concerned, which is confined to denying third-State companies access to insurance, financing, trading services from EU operators 'only' in respect of trade in Russian oil products in excess of the oil price cap. Conversely, the same third-State companies can still purchase the services concerned in respect of any other business that does not involve Russian oil products, or that complies with the price cap. This stands in marked contrast to US secondary sanctions whereby third-State companies that trade with the primary sanctions target are entirely cut off from e.g., access to US correspondent banks, or are simply prohibited from importing into the United States. The repercussions for third-State companies that engage in trade which the respective measures seeks to curtail is in other words qualitatively different. At the same time, the EU's 11th sanctions package – focused on tackling sanctions evasion – has introduced another 'stick' for non-EU operators conducting business in disregard of the oil price cap. In particular, Decision (CFSP) 2023/1217 introduced a prohibition on access to EU ports for vessels engaged in ship-to-ship transfers where the authorities suspect that a vessel is transporting Russia crude oil or petroleum products purchased above the price cap.[86] The Decision emphasizes that the prohibition applies to all vessels, irrespective of their flag of registration (even if non-EU operators are not directly bound by the oil price cap under EU instruments). The wording of the legislation is not fully clear as to whether access would also be refused to vessels transporting Russian-origin oil products sold below the price cap fully outside the EU, or only to vessels seeking to bring such goods into the European Union.

More generally, the oil price cap illustrates how, confronted with large companies that are active globally, the territorial and nationality principles can be stretched to make jurisdiction 'ubiquitous'.[87] It fits a broader trend towards what Krisch has labelled 'unbound' jurisdiction, which escapes a simple territorial/extra-territorial dichotomy, and which moreover amplifies power imbalances between the few powerful countries that wield the capacity to set and implement rules 'for the world', and those States that are rather on the receiving end of such regulatory efforts.[88] As Farrell and Newman have noted, 'only those states that have physical or legal jurisdiction over hub nodes will be able to exploit the benefits of weaponized interdependence'.[89] Such network hubs of

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[84] Transatlantic Partnership on Political Cooperation between the United States and the European Union, 18 May 1998, https://www.govinfo.gov/content/pkg/WCPD-1998-05-25/pdf/WCPD-1998-05-25-Pg923.pdf, 2(h).

[85] D. Kiku and I. Timofeev, 'New Stage of EU Sanctions Policy: Extraterritorial Measures', Modern Diplomacy, 22October 2022, https://moderndiplomacy.eu/2022/10/22/new-stage-of-eu-sanctions-policy-extraterritorial-measures/.

[86] Art. 1(13) of Council Decision (CFSP) 2023/1217 of 23 June 2023 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, [2023] OJ L 159I, preambular paras. 29-30; Art. 1(10) of Council Regulation (EU) 2023/1214 of 23 June 2023 amending Regulation (EU) No 833/2014, [2023] OJ L 159 I, preambular paras. 31-32.

[87] R. Michaels, 'Global Problems in Domestic Courts', in S. Muller et al. (eds.), *The Law of the Future and the Future of Law* (Torkel Opsahl Academic Epublisher, 2011), p. 174.

[88] See N. Krisch, 'Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance' (2022) 33 European Journal of International Law 481.

[89] H. Farrell and A.L. Newman, 'Weaponized Interdependence: How Global Economic Networks Shape State Coercion' (2019) 44 *International Security* 42.

globalization 'are not scattered at random across the world', but are disproportionately located in the advanced industrial countries, in particular the United States and the European Union, as well as, increasingly, in China.[90] The trend towards 'unbound' jurisdiction is not limited to the sanctions domain and challenges us to rethink the existing rules on the exercise of jurisdiction under international law.[91]

4 Restrictions on the Import and Export of Goods from and to Russia

The restriction of trade in goods between Europe and Russia has become one of the main devices employed by the EU in its attempt to thwart Russia's war effort. Council Regulation (EU) 833/2014, adopted in the aftermath of Russia's unlawful annexation of Crimea in 2014, contains a series of export and import restrictions applicable to any individual or company subject to the jurisdiction of the EU. Whereas the cited regulation initially contained mostly export restrictions concerning e.g., cutting-edge technology, dual-use goods, or goods related to the energy and aviation industries, the regulation has received continuous addendums with every package of sanctions after the full-scale Russian invasion of Ukraine began in February 2022.

In this context, a series of import restrictions have been imposed upon goods deemed as essential for the economy of Russia,[92] with the purpose of diminishing its trading revenues and ultimately curtail its capacity to wage war. At the time of writing, some of the products banned from being imported into European territory included crude oil, refined petroleum products, steel, iron, gold, coal, vehicles, wood, cement, seafood, liquor, etc. According to the European Commission, the prohibitions in force equated to 58% of imports coming from the Russian Federation in 2021, translating into a loss of potential import revenue of over 91 billion euros since February 2022.[93] As will be explored below, although import restrictions primarily aim to prevent EU economic operators from trading with Russia, with every passing package of sanctions adopted, the design of some restrictive measures has increasingly focused on discouraging third countries, and their economic operators, from continuing to import items from Russia that have already been banned from entering Europe. The rationale behind this strategy is self-evident, it constitutes an attempt by the EU to diminish the risk of trade backfilling thereby increasing the effectiveness of its import restrictions.

A standard provision contained within Council Regulation 833/2014 establishes that it shall be prohibited to purchase, import, or transfer, directly or indirectly, a certain good or product into the territory of the EU. Trade law obligations aside, no eyebrows are significantly raised by the extent of such measures. However, in the case of certain essential items, including oil or petroleum products, coal, steel, iron, and gold, the EU also forbids the import or purchase of these items from third countries if they *originate* in Russia or were *exported* from the latter.[94] The implementation of an import prohibition based on whether an item has been exported or originates in Russia is certainly broad enough to have a considerable impact on the conduct of third states' economic operators, whose decision-making will be partly influenced on whether, and to what extent, their exporting revenues depend on being able to export the cited goods to Europe.

Although significant differences persist between Europe and the US regarding the implementation of autonomous sanctions, a discernible trend has started to emerge from each new package of restrictive measures adopted by Europe against Russia. Notably, certain measures incorporated in the most recent sanctions packages resemble or closely align with the secondary practices developed by the US over the last four decades. For instance, particularly

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[90] Ibid., 56-7.

[91] But see R. O'Keefe, 'Cooperative National Regulation to Secure Transnational Public Goods: A Reply to Nico Krisch' (2022) 33 *European Journal of International Law* 515.

[92] Council of the European Union, 'EU sanctions against Russia explained', last updated 26 June 2023, https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/.

[93] Ibid.

[94] Art. 3g of Council Regulation (EU) No 833/2014 (n. 21) (emphasis added).

striking are the measures resulting from the 7th and 8th sanctions packages, which forbid the import of iron, steel, and gold products that have undergone further processing in a third country, but still incorporate iron, steel, or gold exported from or originating in Russia.[95]

Furthermore, there is currently no explicit provision within the EU specifying whether a de minimis threshold applies to third-state products incorporating goods from Russia. Consequently, the effect of this provision is magnified since products containing as little as e.g., 5% of Russian steel are equally prohibited, irrespective of the proportion used. The 11th package of sanctions has further tightened the prohibition by imposing an additional obligation on EU importers to provide evidence regarding the country of origin of iron and steel inputs used in third-country processing. [96]

In the same light, an additional provision that significantly amplifies the scope of import restrictions recently imposed by Europe is found in the fifth package of sanctions adopted in April 2022. Article 3(I) stipulates that '[i]t shall be prohibited to purchase, import, or transfer, directly or indirectly, goods that generate significant revenues for Russia, thereby enabling its actions to destabilize the situation in Ukraine, as listed in Annex XXI, into the Union if they originate in Russia or are exported from Russia.' The sweeping nature of this restriction is remarkable, as it effectively empowers Europe to prohibit the importation of goods from third countries solely based on their prior importation from Russia, irrespective of their nature and which, according to the internal assessment of the EU, provided Russia with an economic lifeline.[97]

Shifting our focus to export controls or restrictions, as outlined earlier, Europe currently forbids the export of various products that could potentially aid Russia in its war effort or help sustain its economy. These restrictions have been periodically updated across eleven packages of sanctions implemented by Europe so far, and they currently include dual-use goods and technology, items which might contribute to Russia's military and technological enhancement, firearms, ammunition, luxury goods, among several others. According to the European Commission, the value of exports subject to restrictive measures amounts to nearly 44 billion euros.[98] In order to minimize the risk of circumvention of the export controls currently in force, Europe has also forbidden the transit via the territory of Russia of dual use-goods and other goods and technology that have the potential to enhance Russia's military and technological capabilities or contribute to the development of its defense and security sector.[99]

Export restrictions or controls strictly targeting the trading relations taking place between economic operators subject to the territorial or national jurisdiction of the EU and Russia are not particularly problematic from a jurisdictional standpoint (even if they highlight an interesting debate concerning potential breaches of WTO obligations arising from the aforesaid measures, and the possible justification that Europe could advance based on the security exceptions contained in Article XXI of GATT). Nevertheless, EU export controls appear to have entered a new era of extraterritoriality with the adoption of the 11th package of sanctions on June 23, 2023. In the months coming after the Russian invasion of Ukraine, and subsequent to the adoption of the initial packages of sanctions in 2022, Europe became aware of an anomalous surge in exports of banned goods to third countries, mainly States in the Caucasus and Central Asia regions, that ultimately end up in Russia.[100] Consequently, the

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[95] Ibid., Arts. 3g and 3o.
[96] Council Regulation (EU) 2023/1214 (n. 86), para. (12).
[97] Art. 3i of Council Regulation (EU) No 833/2014 (n. 21).
[98] EU sanctions against Russia explained (n. 92).
[99] This includes items specifically designed for use in the aviation or space industry, as well as jet fuel and fuel additives.
[100] A. Weisskopf, 'Kazakhstan: Small businesses profit from Russia sanctions', DW, 18 May 2023, https://www.dw.com/en/kazakhstan-small-businesses-profit-from-russia-sanctions/a-65663621; B. Moens, L. Kijewski and S. Lynch, 'EU targets Central Asia in drive to stop sanctioned goods reaching Russia', Politico, 8 May 2023, https://www.politico.eu/article/eu-aims-central-asia-sanction-circumvention-russia-war/; G. Gavin and S.A. Aarup, 'Leaking Russia sanctions send floods of cash to ex-Soviet countries', Politico, 26 April 2023, https://www.politico.eu/article/lithuania-russia-vladimir-putin-stop-turning-blind-eye-to-back-doors-for-russian-trade-top-diplomat-tells-eu/.

primary concern that Europe sought to address through the adoption of the 11th package of sanctions was circumvention through re-exportation, as reported by several media outlets before its adoption.[101]

Considering this scenario, the most significant measure introduced by the 11th package of sanctions pertains to the anti-circumvention mechanism incorporated into Council Regulation (EU) No 833/2014, enabling the EU to list third countries 'that have been identified by the Council as having *systematically* and *persistently* failed to prevent the sale, supply, transfer or export to Russia of goods and technology'[102]. As stipulated in Article 12f, once a third country is listed 'it shall be prohibited to sell, supply, transfer or export, directly or indirectly, goods and technology as listed in Annex XXXIII, whether or not originating in the Union, to any natural or legal person, entity or body in the third country specified'.[103] Annex XXXIII exclusively includes dual-use goods and sensitive technology, as well as items with the potential to bolster Russia's military, technological, or industrial capabilities. Moreover, the Annex encompasses items that contribute to the development of Russia's defense and security sector, enhancing its capacity for waging war.[104] The final two conditions for the inclusion of goods in Annex XXXIII are as follows: firstly, these goods must already be subject to an export prohibition from the EU to Russia under Council Regulation 833/2014, and secondly, they must pose a persistent and significant risk of being sold, supplied, transferred, or exported from third countries to Russia after their initial sale, supply, transfer, or export from the Union.

Whereas the EU specifically establishes that the provision described above is applicable as 'exceptional last-resort measures',[105] to be enforced only after the Union's prior outreach and assistance to the concerned country have failed, the anti-circumvention mechanism, in practical terms, operates as a form of sanctioning the re-exportation of goods from third countries into Russia. Essentially, Europe is warning third states that failure to align their trading choices in accordance with EU restrictive measures could subject them to an export ban on certain sensitive goods. Consequently, the cited measures could be categorized as extraterritorial export controls, a type of sanction that Europe has strongly criticized when it experienced similar measures imposed by the US in the past.

It is fair to say that the legal foundations for some of the import and export restrictions described above remain highly contested. While there is a plausible argument under international law to justify the prohibition of indirect exports (referring to goods that transit through a third country, but which are ultimately destined for the sanctioned state in their original form),[106] Europe's prohibition on importing products that have undergone processing into a different item in a third country, solely due to the utilization of Russian steel, iron, or gold during their processing or manufacturing stages contradicts Europe's own traditional stance on this matter. For example, when the US adopted the Helms-Burton Act in 1996, Europe responded by asserting that it cannot 'accept the immediate impact of the legislation on the trade interests of the EU by prohibiting the entry of its sugars, syrups and molasses into the US, unless the former certifies that it will not import such products from Cuba.'[107] According to Europe, such import restrictions 'would appear unjustifiable under GATT 1994 and would appear to violate the general principles of international law and sovereignty of independent states'.[108] As a matter of fact, one only needs to examine the opening paragraphs of the EU Blocking Statute, adopted in response to the extraterritorial reach of the US sanctions regimes imposed against Cuba, Iran, and Libya, to reveal the contradicting nature of

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[101] S. Fleming and H. Foy, 'Brussels eyes export curbs to close Russian sanctions loophole', Financial Times, 28 April 2023, https://www.ft.com/content/ca35ecf4-a5bd-4ff2-906e-10988a87a1ee; 'Factbox: EU targets sanctions circumvention with 11th package against Russia', Reuters, 23 June 2023, https://www.reuters.com/world/eu-targets-sanctions-circumvention-with-11th-package-against-russia-2023-06-23/.

[102] Council Decision (CFSP) 2023/1217 (n. 86) (emphasis added).

[103] Art. 12f of Council Regulation (EU) No 833/2014 (n. 21).

[104] See further list of goods included in the Annex, https://finance.ec.europa.eu/system/files/2023-06/230623-list-economically-critical-goods_en.pdf.

[105] Council Decision (CFSP) 2023/1217 (n. 86).

[106] Ruys and Ryngaert (n. 37).

[107] European Union, 'Demarches Protesting the Cuban Liberty and Democratic Solidarity (Libertad) Act' (1996) 35 *ILM* 398.

[108] Ibid.

some of Europe's latest import and export restrictions compared to its previous opposition to measures of a similar character imposed by the United States. Remarkably, the 1996 instrument was adopted to tackle foreign regulations which 'purport to regulate activities of natural and legal persons' subject to the jurisdiction of a Member State.'[109]

The ultimate crux of the matter lies in whether EU sanctions against Russia aim to regulate the conduct of companies or individuals subject to the jurisdiction of third states. In a similar manner to the oil price cap examined above, a nationality or territorial connection can be identified, enabling the EU to justify its import restrictions under customary international law. Europe could easily contend that it is merely instructing economic operators subject to its jurisdiction not to import certain products from Russia. Indeed, while it could be argued that import restrictions imposed against Russia have a strong 'terrinational' nexus,[110] the underlying extraterritorial command aimed at companies operating in third states becomes evident in the case of the most sweeping measures described earlier. In other words, it could be well-argued that the import restrictions adopted by Europe not only intend to regulate the transactions of those subject to its jurisdiction but also seek to govern, or at the very least influence, the trading patterns of companies or individuals abroad. Throughout this Chapter, it has been explained how this influence is exercised through the instrumentalization of EU market access, a technique borrowed from the US sanctions playbook and recently integrated into Europe's toolbox as a means of preserving its open strategic autonomy.

With regards to export controls or restrictions, up until before the 11th package of sanctions, Europe had not implemented measures that could be regarded as problematic from a jurisdictional standpoint. However, the recent adoption of an anti-circumvention mechanism, which arguably relies on extraterritorial export controls, can be *prima facie* characterized as a change of paradigm for European restrictive measures. It is worth noting that according to the EU, the anti-circumvention measures implemented do not amount to an exercise of extraterritorial jurisdiction, as Europe is not directly asking foreign operators to comply with its restrictive measures.[111] This justification is, at the very least, peculiar, and starkly challenges Europe's previous position on the subject.

After the US withdrawal from the JCPoA, and subsequent re-imposition of secondary sanctions against Iran, Europe decided to reinvigorate the Blocking Statute by updating its annex, adding further US provisions to the list of extraterritorial legislation the instrument is intended to counter. Among these addendums, the Blocking Statute included the following provision of the Iranian Transactions and Sanctions Regulations: 'the reexportation from a third country, directly or indirectly, by a person other than a United States person, of any goods, technology, or services that have been exported from the United States is prohibited, if: [u]ndertaken with knowledge or reason to know that the reexportation is intended specifically for Iran or the Government of Iran; and [t]he exportation of such goods, technology, or services from the United States to Iran was subject to export license application requirements'.[112] Thus, the ensuing contradiction between the anti-circumvention mechanism and Europe's previous position is plain to see. At their core, export restrictions that target transactions between third states and the target state, in this case Russia, amount to an exercise of extraterritorial jurisdiction.[113] In the event this exercise of extraterritorial jurisdiction is not founded on a substantial connection between the sanctioning entity,

[109] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, [1996] OJ L 309/1 (hereafter EU Blocking Statute).
[110] J. Meyer, 'Second Thoughts on Secondary Sanctions' (2009) 30 University of Pennsylvania Journal of International Law 905, 908.
[111] European Commission, 'Questions and answers on the 11th package of restrictive measures against Russia', 23 June 2023, https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_3449.
[112] Annex of the EU Blocking Statute (n. 109); See further United States, Iranian Transactions and Sanctions Regulations, 31 CFR, § 560.205.
[113] Ruys and Ryngaert (n. 37), 20; See further C. Ryngaert, 'Extraterritorial Export Controls (Secondary Boycotts)' (2008) 7 Chinese Journal of International Law 625.

in this case the EU, and the economic agents involved in the transaction, these measures can easily enter the realm of secondary sanctions.

An additional concerning aspect arising from the recent widening of the scope of import and export restrictions adopted by the EU relates to the conformity with international law of exercises of jurisdiction grounded on goods retaining their nationality after being exported to third countries. As aforementioned, back in 1982 Europe denounced the Soviet pipeline embargo adopted by the US with the intention to impede the construction of a gas pipeline running from the Soviet Union to Europe. This embargo included provisions that intended to prohibit foreign companies or individuals from exporting 'products containing U.S.-origin parts and from re-exporting U.S.-origin oil and gas-related machinery, even if already located abroad at the time sanctions were applied.'[114] Europe strongly condemned these export restrictions, asserting that 'goods and technology do not have any nationality and there are no known rules under international law for using goods or technology situated abroad as a basis of establishing jurisdiction over the persons controlling them.'[115]

Whereas Europe is not expressly claiming to be exercising jurisdiction on this basis, the latest export restrictions implemented with the anti-circumvention mechanism seem to entertain the notion that goods retain their nationality or 'identity' even after their exportation from a Member State. This would allow Europe to maintain jurisdiction over such goods, regardless of their location, thereby enabling the exercise of its regulatory influence to impose trade limitations on their subsequent movement into other countries. In the case of import restrictions, some of the measures adopted by Europe targeting products already processed in a third country but containing Russian goods arguably operate under the same logic, with goods retaining an autonomous nationality despite no longer being present in the sanctioned country. However, as Europe expressly claimed in the aftermath of the US Soviet pipeline embargo of 1982,[116] goods do not retain a residual nationality of their own and thus cannot be used to justify a subsequent exercise of jurisdiction under the personality or nationality principle.[117] Put differently, customary international rules on jurisdiction do not recognize the nationality of goods as a genuine or substantial connection allowing states to exercise jurisdiction once these have reached a third country.

From a geopolitical perspective, the adoption of extraterritorial export controls may ultimately alienate some of Europe's allies and other dominant actors such as China. During a press conference early May 2023, the Chinese Foreign Ministry Spokesperson addressed the existing reports suggesting that Europe was on the verge of sanctioning seven Chinese companies for selling equipment to Russia, [118] declaring that China 'firmly oppose[s]illegal sanctions or long-arm jurisdiction.'[119] The potential ramifications have not gone unnoticed by some EU Member States, including Germany, which allegedly expressed its discomfort with signing off the earlier drafts of the 11th package of sanctions due to their far-reaching scope. The EU ostensibly attempted to soften the blow for third countries and their economic operators by watering down the content of the anti-circumvention mechanism contained in the 11th package of sanctions. [120] Although early reports suggested that Europe was looking into the possibility of adopting a broad extraterritorial export control, directly prohibiting third countries from re-exporting any goods banned from being directly exported to Russia, the anti-circumvention mechanism was ultimately presented as a measure of *ultima ratio*, only to be employed in cases circumvention remains

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[114] See Busby (n. 2), 639.

[115] European Community, 'Comments of the European Community on the Amendments of 22 June 1982 to the U.S. Export Regulations', 12 August 1982, 21 *ILM* 891, 894.

[116] Ibid.

[117] Ruys and Ryngaert (n. 37), 20

[118] A. Bounds, 'Brussels plans sanctions on Chinese companies aiding Russia's war machine', Financial Times, 8 May 2023, https://www.ft.com/content/dc757bea-d7eb-487b-b5d1-1d4360cfb9d5.

[119] China, Ministry of Foreign Affairs of the People's Republic of China, 'Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference, 8 May 2023, https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/202305/t20230508_11073476.html.

[120] A. Nardelli, 'EU Moves Closer to New Russia Sanctions After Proposals Weakened', Bloomberg, 1 June 2023, https://www.bloomberg.com/news/articles/2023-06-01/eu-moves-closer-to-new-russia-sanctions-after-proposals-weakened.

substantial and systemic, exclusively upon 'countries whose jurisdiction is demonstrated to be at a continuing and particularly high risk of being used for circumvention', and only after bilateral or multilateral cooperation fails.[121]

In the end, while cracking down on circumvention has clearly become a priority for Europe and its allies at the G-7,[122] it remains to be seen how far Europe is willing to go in order to enforce upon third countries its own restrictive measures against Russia. Either way, despite the many safeguards and guarantees that Europe may offer third countries regarding the exceptional nature of its anti-circumvention mechanism, in the future, it will become increasingly difficult for the EU to continue claiming the unlawfulness of extraterritorial export controls implemented by other States. Despite the exceptional nature of the crisis originated by the Russian invasion of Ukraine, the precedent could certainly be used against the EU.

All things considered, it is safe to conclude that some of the import and export restrictions adopted by Europe, in the wake of the Russian aggressive war against Ukraine, operate in an analogous way to secondary sanctions, primarily in the form of market access restrictions,[123] as they essentially compel non-European companies to choose between maintaining their normal trade flows with Europe or continue trading with Russia, at the cost of being unable to export certain goods into the EU. The conformity of secondary access restrictions with the customary rules governing the exercise of jurisdiction by states is a highly contested subject under international law. Regardless of whether these measures, which at most would qualify as an exercise of indirect extraterritorial jurisdiction, may or may not contravene customary rules, they certainly constitute a striking departure from Europe's traditional position on the matter.

5 Levering Financial Sanctions and Criminal Prosecution to Curb Circumvention

As sanctions have become ever more far-reaching and complex, so have the efforts to evade and circumvent them. Indeed, as Demarais aptly describes in her monograph *Backfire*, the evolution of sanctions, including the move from *primary* to *secondary* sanctions, is the result of a constant cat-and-mouse game between the sanctioning States and the targeted States, companies and individuals, the latter seeking to conceal activities or exploit loopholes in the sanctions framework.[124] In a similar vein, Farrell and Newman note how targeted States may attempt to isolate themselves from weaponized networks, or to reshape networks to minimize their vulnerabilities.[125] With the unprecedented response to Russia's aggression against Ukraine, sanctions evasion also seems to be at its peak.

In response, as indicated above, sanctioning States have stepped up efforts to coordinate their implementation and enforcement efforts, and to share information. Confronted with increasing attempts to find loopholes in the existing sanctions, the EU has taken other measures in response. As explained in the previous section, novel sanctions packages have added further substantive prohibitions, for instance, prohibiting the transit through Russia of EU exported dual use goods and technology, in order to avoid evasion of existing prohibitions. At the same time, as the present section will illustrate, the EU has also addressed circumvention more directly, revising existing instruments and adding new ones.

Pro memorie, EU instruments imposing restrictive measures have long included a clause that prohibits 'to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent' those

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[121] Council Regulation (EU) 2023/1214 (n. 86).
[122] Group of 7 (G7), 'G7 Leaders' Statement on Economic Resilience and Economic Security' 20 May 2023, https://www.consilium.europa.eu/media/64501/g7-statement-on-economic-resilience-and-economic-security.pdf.
[123]Ruys and Ryngaert (n. 37), 11-16.
[124] See Demarais (n. 15), 15.
[125] Farrell and Newman (n. 89), 76.

measures.[126] In *Afrasiabi*[127] the Court of Justice of the EU explained that such clauses cover activities which, even if not entailing a direct infringement of the measure at hand, nonetheless 'have the object or effect, direct or indirect, of frustrating the prohibition' concerned. Furthermore, the terms 'knowingly' and 'intentionally' 'imply cumulative requirements of knowledge and intent, which are met where the person participating in an activity having such an object or such an effect deliberately seeks that object or effect or is at least aware that his participation may have that object or that effect and he accepts that possibility'.[128]

Notwithstanding the broad interpretation by the CJEU, reliance on the existing anti-circumvention clause was deemed insufficient to ensure effective and uniform implementation of EU sanctions in view of the increasing complexity of sanction evasion schemes. This led the Council of the EU to expand the relevant clause in Regulation (EU) No 269/2014 by adding a requirement on the part of blacklisted persons and entities to report within a given timeframe funds or economic resources within the jurisdiction of a Member State belonging to, owned, held or controlled by them, to the competent national authority, and to cooperate with the latter authority in the verification of such information.[129] Failure to comply would be tantamount to circumvention.[130] By the same token, the Council strengthened obligations for EU operators to report on funds and economic resources of designated persons and entities.[131]

Another marked development – with repercussions beyond the sanctions against Russia – has been the addition of the violation of EU restrictive measures – including by way of prohibited circumvention – to the list of 'EU crimes' under Article 83(1) TFEU.[132] This measure was inspired by the highly inconsistent enforcement of EU restrictive measures by the competent national authorities of the Member States, as well as the fragmented nature of relevant national legislation.[133] Indeed, in spite of positive trends, judicial proceedings related to the violation of EU sanctions have so far remained few and far between. The scope of relevant offences and concomitant penalty systems moreover differ substantially across Member States, with some only applying administrative fines for infractions. The introduction of this novel 'EU crime' was accompanied by two further legislative initiatives. The first is the drafting of a proposed Directive on asset recovery and confiscation, which aims at strengthening the capabilities of national authorities to trace and identify, freeze and manage property that constitutes the proceeds or instrumentalities of certain criminal activities, including violations of EU restrictive measures, and to provide for the confiscation of those instrumentalities and proceeds following a final criminal conviction (as well as in specific cases where a conviction for a specific crime is not possible).[134] This process originated well before the Russian invasion of Ukraine and fits in the broader fight against organised crime, corruption and money-laundering. Still, the desire to strengthen the enforcement of EU sanctions against Russia, and in particular the prospect of confiscating frozen assets of Russian oligarchs found to be in breach of e.g. the abovementioned

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[126] E.g., Art. 12 of Council Regulation (EU) No 833/2014 (n. 21).
[127] CJEU, Afrasiabi, Judgment, Case No. C-72/11, ECLI:EU:C:2011:874, 21 December 2011,
[128] Ibid., paras. 66-68.
[129] Art. 1(4) of Council Regulation (EU) 2022/1273 of 21 July 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, [2022] OJ L 194.
[130] Ibid.
[131] Ibid., Article 1(3).
[132] Council Decision (EU) 2022/2332 of 28 November 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) TFEU, [2022] OJ L308.
[133] See European Commission, Proposal for a directive of the European parliament and of the council on the definition of criminal offences and penalties for the violation of Union restrictive measures, COM(2022) 684 final, 2 December 2022, 1-4; European Union Agency for Criminal Justice Cooperation, 'Prosecution of Sanctions (Restrictive Measures) Violations in National Jurisdictions: A Comparative Analysis', December 2021, https://www.eurojust.europa.eu/sites/default/files/assets/genocide_network_report_on_prosecution_of_sanctions_restrictive_measures_violations_23_11_2021.pdf.
[134] European Commission, Proposal for a Directive of the European Parliament and of The Council on asset recovery and confiscation, COM(2022) 245 final, 25 May 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0245.

reporting obligation (and their potential use for post-war reconstruction efforts in Ukraine), proved an important catalyst to move the legislative train forward.

The second related legislative initiative is the drafting of a proposed Directive defining criminal offences and penalties for the violation of EU restrictive measures.[135] This instrument indeed identifies a range of acts that are regarded as violations, while adding that inciting, aiding and abetting relevant offences will equally be punishable as a criminal offence. This list specifically includes several forms of 'circumvention', such as the concealment of funds or economic resources owned, held or controlled by a designated person or entity, and which should be frozen pursuant to EU restrictive measures, by their transfer to a third party; the concealment of their ownership, or; non-compliance with the obligations to report information on funds or economic of designated persons and entities and cooperate with the competent national authorities. The instrument further provides for effective, proportionate and dissuasive penalties for natural persons as well as legal persons, and sets forth the position that, in cases of concealment, the relevant funds or economic resources must be regarded as 'proceeds of crime' for purposes of the abovementioned Directive on asset recovery and confiscation.[136] Member States are required to establish jurisdiction over the criminal offences concerned when they are committed in whole or in part in their territory; on board of any aircraft or vessel under their jurisdiction; by one of their nationals or habitual residents, or one of their officials acting in official duty.[137] The same holds true where an offence is committed 'for the benefit of a legal person which is established on [their] territory' or for the benefit of a legal person 'in respect of any business done in whole or in part on [their] territory.'[138]

A further measure that was adopted specifically in the context of the EU sanctions against Russia, concerns the introduction, as part of the eighth sanctions package, of a new listing criterion aimed at deterring sanctions circumvention.[139] In particular, natural or legal persons, entities or bodies can henceforth become the object of financial sanctions and/or travel bans when they 'facilitate infringements of the prohibition against circumvention' laid down in the various EU instruments imposing sanctions against Russia. This is a remarkable extension of the pre-existing listing criteria, which primarily focussed on high-profile individuals, particularly Russian officials and others with close ties to the Kremlin, as well as persons and entities involved in economic sectors providing a substantial source of revenue for the Russian Federation. The new criterion is unlikely to raise eyebrows in Luxembourg, as the EU courts have mostly refrained from considering substantive questions such as when the designation of an individual is necessary in terms of the ends pursued or whether the listing criteria have been drawn up in an appropriate manner (even if the introduction of broader listing criteria has triggered calls for a greater level of judicial oversight).[140] An interesting potential application of the new listing criterion arose in February 2023 as the EU was considering sanctions against SUN Ship Management, a Dubai-based shipping company suspected of helping Russia circumvent restrictions on oil exports, after taking over the fleet of oil tankers from Russian state-owned company Sovcomflot.[141] The company was effectively designated, albeit not on the basis of the new listing criterion, but rather on account of the fact that, through its parent company Sovcomflot, it was active in a sector providing a substantial source of revenue to the Russian government.[142]

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[135] Proposal for a directive of the European parliament and of the council on the definition of criminal offences and penalties for the violation of Union restrictive measures (n. 133).

[136] Ibid., preambular para. 15 and Article 10.

[137] Ibid., Article 11.

[138] Ibid.

[139] Council Decision (CFSP) 2022/1907 of 6 October 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, [2022] OJ L 259.

[140] See e.g., N. Moran, 'Judicial scrutiny and EU sanctions against individuals', Verfassungsblog, 20 December 2022, https://verfassungsblog.de/judicial-scrutiny-and-eu-sanctions-against-individuals/.

[141] J. Hanke Vela, 'EU to mull sanctions on Dubai shipper suspected of running Russian tanker fleet', Politico, 14 February 2023, https://www.politico.eu/article/eu-sanction-dubai-russia-tanker-fleet-oil-export/.

[142] Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, [2014] OJ L 78, Annex I (List of natural and legal persons, entities and bodies referred to in Article 2), Entry 209.

What to make of the foregoing? Again, some have been quick to argue that the EU is increasingly copying from the US secondary sanctions playbook and is itself adopting measures which it has consistently regarded as unlawful.[143] Accusations of double standards loom large. The measures introduced since the Russian invasion of Ukraine are indeed reminiscent of the long-standing practice of the United States designating individuals and companies, not for any actual involvement in human rights violations, WMD proliferation activities, or ties to authoritarian regimes, but rather on the sole account of their trading with the primary sanctions target. The OFAC list of designated persons (the 'SDN list') contains numerous individuals and entities expressly 'subject to secondary sanctions'.[144] The list includes, for example, numerous Chinese and Russian entities.[145] The efforts to step up the enforcement of breaches of EU restrictive measures, including acts of 'circumvention', are in turn reminiscent of the US practice of prosecuting non-US persons on the basis of the so-called 'causation theory'. As Emmenegger and Zuber explain in their chapter elsewhere in this volume, this controversial theory implies that a foreign entity that 'causes' a US person to violate US sanctions – e.g., by using a US correspondent bank to execute a sanctioned transaction – submits itself to US jurisdiction.[146]

As before, however, one might argue that qualitative differences remain between the EU and the US approach. Thus, when it comes to criminal prosecution, Emmenegger and Zuber observe how US authorities have given the 'causation theory' broad application, and how OFAC's enforcement actions reveal that it is not essential for the foreign entity to 'trick' a US person into violating US sanctions.[147] Instead, non-US financial institutions have been accused of 'causing' a violation of US sanctions even when they were unaware that US-dollar denominated transactions were transiting through the US financial system.[148] In comparison, the proposed EU Directive on the definition of criminal offences and penalties for the violation of EU restrictive measures[149] appears rather narrower in scope, at least when it comes to the criminal prosecution of acts of circumvention. As mentioned, Article 3(2)(h) of the draft Directive mostly confines circumvention to the concealment of information related to assets within the European Union that are, or ought to be frozen, under applicable EU restrictive measures, or the failure to comply with procedural obligations to report or provide information to the national authorities. By contrast, merely 'causing' an EU person to act contrary to the EU's restrictive measures would not appear to come within the scope of the draft Directive, even having regard to its extension to the 'inciting, aiding and abetting' of offences (Article 4). This is so because EU restrictive measures traditionally assert that actions by natural or legal persons shall not give rise to any liability on their part 'if they did not know, and had no reasonable cause to suspect, that their actions would infringe' the restrictive measures concerned,[150] and absent an original breach of EU measures, it would appear impossible to establish a case of incitement or aiding and abetting of such breach. It remains to be seen, however, whether the draft Directive will undergo further changes, and how its provisions will be interpreted and applied in practice and case-law.

As far as 'secondary' designations of foreign nationals and companies are concerned, important differences could also be said to remain between the EU and US approaches. Thus, while the US goes beyond the listing of 'sanctions

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[143] Kiku and Timofeev (n. 85), J. Dunin-Wasowicz, 'Op-Ed: "The Long Arm of EU Sanctions" by Jan Dunin-Wasowicz', EU Law Live, 25 October 2022, https://eulawlive.com/op-ed-the-long-arm-of-eu-sanctions-by-jan-dunin-wasowicz/.

[144] See United States, Department of the Treasury, Office of Foreign Assets Control, 'Sanctions List Search', https://sanctionssearch.ofac.treas.gov/.

[145] See e.g., J. Lillis, 'U.S. slaps secondary sanctions on Uzbekistan firm', Eurasianet, 29 June 2022, https://eurasianet.org/us-slaps-secondary-sanctions-on-uzbekistan-firm.

[146] See Cross-Ref Chapter by Emmenegger and von Mutzenbecher.

[147] See Cross-Ref Chapter by Emmenegger and von Mutzenbecher.

[148] See Cross-Ref Chapter by Emmenegger and von Mutzenbecher (where the authors discuss the newly established 'correlation theory').

[149] Proposal for a directive of the European parliament and of the council on the definition of criminal offences and penalties for the violation of Union restrictive measures (n. 133).

[150] Art. 10 of Council Regulation (EU) No 833/2014 (n. 21).

evaders'[151] and also imposes asset freezes on persons and entities that engage in 'significant transactions' with the primary sanctions target, the new listing criterion added to the EU sanctions against Russia as part of the 8th sanctions package speaks only of persons and entities that 'facilitate infringements of the prohibition against circumvention'. At the same time, while, at first sight, it would only appear to cover sanctions evaders and their facilitators, on closer scrutiny, the difference with US 'secondary' designations may be less broad than one might think. This is so in light of the broad construction of the circumvention clause in the abovementioned *Afrasiabi*[152] judgment of the CJEU. Indeed, pursuant to the CJEU's interpretation, circumvention may take place whenever activities have the 'effect', even if 'indirectly', of 'frustrating' the prohibition concerned, and a person is 'aware' that his or her participation may have that effect, and 'accepts' that possibility. At least theoretically then, the abovementioned listing criterion could also be cast very broadly to restrict third-State operators from trading with the primary sanctions target (or to deter such trade in the first place).

Importantly, the 'jurisdictional gap' between the US and EU approach was further reduced as a result of the EU's 11th package of sanctions against Russia, adopted in June 2023. Indeed, apart from adding several Chinese and other third-country (non-Russian) economic operators to the list of entities thought to support Russia's defence and security sector, and to whom no dual-use goods and other sensitive items can be exported,[153] the relevant EU instruments add a new and broad listing criterion. In particular, persons or entities (including non-EU persons and entities) can henceforth be subject to financial sanctions, not only when they 'facilitate infringements of the prohibition against circumvention' (as discussed above), but also when 'otherwise significantly frustrating' EU sanctions against Russia.[154]

An earlier draft of the relevant provision reportedly provided for the listing of natural or legal persons *re-exporting EU goods to Russia from third countries*.[155] This language would have been at odds with the traditional premise that goods do not possess a 'nationality', and that States cannot lawfully exercise jurisdiction on the basis of such (inexistent) nationality (see further Section IV above). It would also have been diametrically opposed to the EU's earlier condemnation of unlawful extraterritorial sanctions, and the specific denunciation of similar measures in the EU Blocking Statute.[156]

While the language that was ultimately adopted in the 11th package drops the reference to the re-exportation of EU goods, it remains – at least potentially – extremely broad in scope. Ironically, the wording chosen ('*significantly* frustrating…') evokes the label of a 'significant transaction' or 'significant financial transaction', which is used as a trigger for secondary sanctions by OFAC.[157] At face value then, it is difficult to see what separates the new EU

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[151] Cf. OFAC also publishes a 'Foreign Sanctions Evaders (FSE) List'. See United States, Department of the Treasury, Office of Foreign Assets Control, 'Consolidated Sanctions List (Non-SDN Lists)', last updated 19 May 2023, https://home.treasury.gov/policy-issues/financial-sanctions/consolidated-sanctions-list-non-sdn-lists/foreign-sanctions-evaders-fse-list.

[152] *Afrasiabi* (n. 127).

[153] Council Decision (CFSP) 2023/1217 (n. 86). The Annex lists 'natural or legal persons, entities or bodies [that] contribute to Russia's military and technological enhancement or to the development of Russia's defence and security sector. They include natural or legal persons, entities or bodies in third countries other than Russia.' The Annex lists a number of entities from China, Armenia, Uzbekistan, Syria, Iran and the UAR; See also Annex I of Council Regulation (EU) 2023/1214 (n. 86).

[154] Art. 1 of Council Regulation (EU) 2023/1215 amending Regulation (EU) No 269/2014, [2023] OJ L 159; Art. 1(2) of Council Decision (CFSP) 2023/1218 of 23 June 2023 amending Decision 2014/145/CFSP, [2023] OJ L 159.

[155] Based on informal discussions with officials involved in the negotiation of the 11th sanctions package.

[156] Annex of the EU Blocking Statute (n. 109). One of the US prohibitions that features in the Annex to the EU Blocking Statute as an unlawful exercise of extraterritorial jurisdiction reads as follows: 'Required compliance: Not to reexport any goods, technology, or services that (a) have been exported from the USA and (b) are subject to export control rules in the USA, if the export is made knowing or having reason to know that it is specifically intended for Iran or its Government'.

[157] See e.g., United States, Department of the Treasury, Office of Foreign Assets Control, Frequently Asked Questions, '671. How are the terms "significant transaction or transactions; significant financial services; significant financial transactions" interpreted for purposes of correspondent or payable-through account sanctions set forth in section 2 of E.O. 13871?', 6 August 2019, https://ofac.treasury.gov/faqs/671.

listing criterion from certain US secondary sanctions. Reportedly, the new listing criterion was never meant to target pure 'back-filling' – that is, the sale of non-EU goods from third countries to Russia to supplant pre-existing trade between the EU and the Russia Federation – but only the premeditated re-export to Russia of sanctioned goods purchased from the EU in the first place.[158] Some of the preambular language does suggest a cautious approach. Thus, according to the preamble of Council Regulation (EU) 2023/1215, '[i]ndications of cases of frustrating the Union's restrictive measures could include, inter alia, the fact that the main activity of a third country operator consists of purchasing restricted goods in the Union that reach Russia, the involvement of Russian persons or entities at any stage, the recent creation of a company for purposes related to restricted goods reaching Russia, or a drastic increase in the turnover of a third country operator involved in such activities.'[159] While these 'indications' suggest a certain *recul* in the application of the new listing criterion, the fact remains that it is preambular language only, whereas the actual listing criterion itself could be construed far more broadly – and may thus also have a broader deterrent effect, akin to that stemming from US secondary sanctions. It is noted in the margin that the operation of the listing criterion is not confined to trade with Russia in dual-use goods or sensitive equipment (that might support its war effort), but potentially extends to the 'frustration' of the full range of EU sanctions, including restrictions on the import of oil, iron, steel, etc.

The foregoing observations again raise the question whether, and under what circumstances, 'anti-evasion' – as it is labelled by Joanne Scott – can serve as a valid trigger for the exercise of a State's jurisdiction[160] - both within and without the sanctions domain. Some have argued in favour, suggesting that, as a free-standing basis of jurisdiction, anti-evasion may confer jurisdictional validity on a narrow set of unilateral extraterritorial sanctions implemented to prevent the circumvention of the sanctions regime.[161] It has even been argued that a narrow anti-evasion principle may paradoxically decrease the extraterritorial extension of sanctions regimes by preventing the gaps which secondary sanctions otherwise seek to deter.[162] The validity of anti-evasion as a free-standing trigger nonetheless remains uncertain,[163] and concerns of jurisdictional overreach should not be lightly dismissed.

Notwithstanding the CJEU's approach in *Afrasiabi*, the Council has hitherto refrained from applying the new listing criterion in a broad manner to curtail trade between third States and the primary sanctions target. It is submitted that, as a new instrument in the jurisdictional toolbox, anti-evasion should be used with caution and should be construed narrowly. It should indeed be used at most to catch artificial behaviour 'designed' to evade obligations under EU law – as opposed to 'innocent' commercial transactions with a legitimate counterparty.[164]
An overly extensive interpretation of anti-circumvention/anti-evasion clauses would not only be difficult to justify inter alia from a jurisdictional perspective or in light of the principle of legal certainty, but would also create problems for the interpretation and application of contractual obligations and *force majeure* clauses in commercial disputes, possibly putting *bona fide* economic operators between a rock and a hard place. Thus, as da Silveira and Ryngaert explain in their contribution to this volume, some case-law suggests that a party must undertake 'reasonable efforts' so as to avoid failing within the scope of sanctions or to overcome their consequences, to ensure that it can perform its contractual obligations vis-à-vis a counterparty.[165] Yet, what amounts to 'contractual creativity' to some, may risk being seen as 'circumvention' by others.

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[158] Based on informal discussions with officials involved in the negotiation of the 11th sanctions package.
[159] Council Regulation (EU) 2023/1215 (n. 154), preambular para. 4.
[160] See Section II above.
[161] A.S. Nagel, 'Unilateral Extraterritorial Sanctions: The Search for a Jurisdictional Justification under International Law' (2023) 8 *The London School of Economics Law Review* 368.
[162] Ibid., 391.
[163] Consider, for instance the following recommendation by the UN Special Rapporteur on Unilateral Coercive Measures in a report dated 15 July 2022 (UN Doc. A/HRC/51/33): "Sanctioning States should refrain from threats of secondary sanctions or criminal or civil penalties for the circumvention of sanctions regimes as they are illegal under international law."
[164] Nagel (n. 161), 392; Scott (n. 36), 1359.
[165] Cross-Ref.

6 Concluding Observations

This final chapter has put the spotlight on the Russia-Ukraine war as a major test case in the sanctions domain. While the conflict remains ongoing at the time of writing, and new sanctions packages are being periodically adopted, it is safe to affirm that the conflict is in various ways unique. An impressive coalition of States, including the US and the EU, have indeed proceeded to undertake unprecedented sanctions, exerting maximum pressure on Russian political, military and business leaders to put an end to the aggression against Ukraine. In parallel, the pre-existing feud between the EU and the US over the imposition of far-reaching secondary sanctions against countries such as Cuba and Iran appears to have subsided (at least temporarily), making way for growing cooperation and consultation over the sanctions against Russia.

Meanwhile, sanctioning States have been confronted with a second feature which is unique to the case at hand, viz. the fact that the sanctions are not directed against a proverbial 'small fish', but rather against a permanent member of the UN Security Council, one of the larger economies in the world with close diplomatic and trading ties around the globe, and, importantly, the biggest oil and gas producer worldwide. Several major countries, including China, India, Brazil, and South Africa, have declined to join the coalition of sanctioning States. This has, for instance, enabled Russia to (at least partially) supplant lost trade in oil with the EU with additional sales to China and India. Even for the United States, Russia has proven to be 'too big' a target to have recourse to its most far-reaching secondary sanctions, such as by threatening third-State companies purchasing gas or oil from Russia with exclusion from the US market or financial market, or by threatening with asset freezes. As such, the situation demonstrates the limits of the potential and utility of secondary sanctions, even for a superpower such as the United States.

Conversely, within Europe, the long-held suspicion of extraterritorial and secondary sanctions has somewhat waned in light of the strong desire to offer a powerful rebuke to Moscow and support Ukraine in the face of Russian aggression. Indeed, as the present chapter has revealed, the desire to halt Russian aggression and the concomitant need to battle sanctions circumvention, has driven the European Union towards the stretching of its jurisdictional boundaries when it comes to the adoption of unilateral sanctions. Striking examples that were discussed above include the prohibition for EU companies to provide services (insurance, shipping,...) with regard to the transportation of Russian oil to non-EU countries where the price per barrel exceeds the G-7 oil price cap; the prohibition to import into the EU processed iron, steel and gold products that incorporate iron, steel or gold originating in Russia; the threat of prohibiting the exportation of dual-use goods and other sensitive items to countries that fail to act against such goods coming from the EU being shipped to the Russian Federation, or; the threat of financial sanctions against non-EU persons that 'significantly frustrate' EU sanctions against Russia.

These and other examples illustrate how the EU is increasingly instrumentalizing access to the EU market as well as the dominant role of certain EU-based companies in international trade and finance (think of SWIFT, or Greek shipping companies) to give extraterritorial effect to its restrictive measures, and how the EU is stretching the territorial and nationality principles (as triggers for the exercise of jurisdiction) to tackle perceived sanctions circumvention.

Against this background, it is difficult to escape the impression that the EU is increasingly moving in the direction of adopting the very extraterritorial and secondary sanctions it once denounced. Indeed, several of the measures are difficult to square with the EU discourse condemning US extraterritorial sanctions, as reflected inter alia in the EU Blocking Statute.

To put the latest rounds of EU sanctions on par with the earlier rounds of US secondary sanctions against e.g. Cuba and Iran goes a bridge too far. The EU institutions have indeed sought to walk a fine line so as to increase the impact of EU sanctions without opening the door to some of the most far-reaching secondary sanctions. Thus, for some sanctions with extraterritorial reach, the repercussions for non-EU operators remain rather circumscribed. For instance, a non-EU company that ships oil from Russia to a third country in disregard of the oil price cap is not banned from access to the EU market and EU-based service providers as a whole, but only in respect of the

specifically targeted transactions. For other measures, such as the threat of financial sanctions against non-EU persons 'significantly frustrating' EU sanctions, or the threat of banning the export of dual-use goods and sensitive items to non-EU countries that serve as a springboard for the transit of such goods to Russia, the relevant EU instruments emphasize the exceptional, 'last resort' nature of the measures concerned – even if such reservations take the form of preambular language only and may thus provide limited comfort to non-EU operators.

Another potential difference with earlier US secondary sanctions against Iran and Cuba concerns the fact that there is broad agreement that the full-scale Russian invasion of Ukraine that began early 2022 constitutes a manifest breach of the prohibition on the use of force, amounting to an act of 'aggression', as was also confirmed on multiple occasions by the UN General Assembly.[166] As such, as observed in the chapter of Stefano Silingardi, it could be said to trigger the obligation enshrined in Article 41(1) of the ILC's Articles on State Responsibility for States to cooperate to bring an end to this breach through lawful means. It could be argued that this makes secondary sanctions against Russia more easily justifiable. At the same time, it is worth recalling that the same Articles on State Responsibility insist that countermeasures can in principle only be taken *against* a State responsible for the prior wrongful act.[167]

Be that as it may, the growing contradiction between the current European position concerning sanctions against Russia and the historical position Europe has held in relation to US secondary sanctions in the past cannot be ignored, and will make it more tenuous for the EU to maintain its vocal opposition to US secondary sanctions in future years. This may not constitute a major problem at a time when the two sides are closely aligned and united in their effort to curb Russian aggression. Yet, the 'America first' approach of the late Trump administration serves as a sobering reminder that such alignment may not persist indefinitely.

More generally, the latest rounds of sanctions against the Russian Federation – not only by the EU, but also by the US and other G-7 countries, or, for instance, by the various countries aligning themselves with the EU sanctions policy[168] – may serve as an important precedent pushing the boundaries for the exercise of State jurisdiction, including for foreign policy purposes. Of course, customary international law does not change overnight, but requires a sufficient generality in terms of State practice and *opinio juris*, and presupposes that States not participating in the practice concerned, have the time and opportunity to respond and express their legal views (in support or in opposition of the practice concerned). Still, in a field as murky and ambiguous as the customary law of jurisdiction, the potential precedential impact of the latest rounds of far-reaching sanctions should not be downplayed. In an era of growing geo-economic rivalry and economic statecraft, marked by calls for 'decoupling' or 'derisking', it is easy to see expanding jurisdictional practices spill-over to other fields such as export control law, or being copied by a country such as China. In this sense, sweeping jurisdiction can easily become a double-edged sword.

Above, it was already flagged how some of the latest sanctions adopted by the EU against Russia fit a broader trend towards 'unbound' jurisdiction, which escapes a simple territorial/extra-territorial dichotomy, and which

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[166] See Aggression against Ukraine (n. 13); Humanitarian consequences of the aggression against Ukraine, UNGA Res. ES-11/2, UN Doc. A/RES/ES-11/2, 24 March 2022; Humanitarian consequences of the aggression against Ukraine, UNGA Res. ES-11/2, UN Doc. A/RES/ES-11/2, 24 March 2022; Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations, UNGA Res. ES-11/4, UN Doc. A/RES/ES-11/4, 12 October 2022.

[167] Art. 49(1) of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA with Commentaries), Annex to UNGA Res. A/56/83, UN Doc. A/RES/56/83, 12 December 2001, 130. Note the Commentary clarifies that countermeasures 'may not be directed against States other than the responsible State', but do acknowledge that 'indirect or collateral effects' on third States or other third parties 'cannot be entirely avoided'.

[168] See e.g., Council of the European Union, 'Statement by the High Representative on behalf of the European Union on the alignment of certain third countries with Council Decision (CFSP) 2023/1217 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine', 13 July 2023, https://www.consilium.europa.eu/en/press/press-releases/2023/07/13/statement-by-the-hr-on-behalf-of-eu-on-the-alignment-of-certain-third-countries-with-council-decision-cfsp-2023-1217-concerning-restrictive-measures-in-view-of-russia-s-actions-destabilising-the-situation-in-ukraine/.

amplifies power imbalances between the powerful countries that wield the capacity to set rules 'for the world', and those States that are rather on the receiving end of such regulatory efforts.[169] Such trend calls for a broader reappraisal of the customary limits on the exercise of jurisdiction especially in administrative matters, having regard to the main variables at hand (e.g. who are the direct addressees of the measure concerned?; does the measure aim at producing an effect extraterritorially or not?; how and where does the enforcement of the measure take place?). Perhaps then, the time has come for the International Law Commission (ILC) to sink its teeth into the issue. And if not the ILC, the *Institut de Droit international* or the International Law Association, as the two seminal professional associations of international lawyers, could provide a viable alternative to shed further light on the outer limits of State jurisdiction.

[169] See further Krisch (n. 88).