

Resisting (US) Sanctions: A Comparison of Special Purpose Vehicles, Blocking Statutes and Countermeasures

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Abstract

Trade-restricting unilateral sanctions could face resistance from the targeted states and other states and regional organizations whose trade or non-trade interests are affected by the sanctions. This is particularly true in response to sanctions by the United States, which imposes secondary sanctions affecting actors from a broad range of third states. States resist such sanctions through judicial and non-judicial methods. This paper looks at three non-judicial methods states increasingly take in response to sanctions – special purpose vehicles, blocking statutes, and countermeasures – and provides an analysis of the international law issues pertaining to each method. Based on this analysis, the paper offers a comparative assessment of the potential usefulness and legal limitations of these methods in resisting undesirable foreign sanctions.

1. Introduction

As the frequency and intensity of usage of unilateral sanctions by major global powers increases, so has legal resistance to such measures in various states. The resistance takes both judicial and non-judicial avenues. Judicially, states and economic actors challenge the validity and applicability of foreign sanctions in domestic courts and in the courts of the sanctioning state. There is also increasing state practice of resistance to foreign sanctions through legislative (non-judicial) mechanisms that empower domestic economic operators and impose costs on foreign state and economic operators. This paper analyses three such legal resistance mechanisms: the establishment of special purpose vehicles (SPVs), adoption of blocking statute, and imposition of countermeasures.

Legal resistance to foreign sanctions could sometimes involve state-approved circumvention or evasion of those sanctions. However, resistance measures have in equal measure been developed to mitigate negative impacts of sanctions on non-sanctioned areas of commerce. This is true particularly with respect to trade in humanitarian goods such as food and medicine, which are nearly always exempted from sanctions but nonetheless become severely restricted in reality.¹ The negative impact of sanctions also at times lasts longer than intended, evidence suggesting that there is no automatic rebounding of commerce after the lifting of sanctions, further necessitating resistance or alternative measures.²

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¹ Erica Moret, 'Life and Death: NGO Access to Financial Services in Afghanistan', Norwegian Refugee Council, January 2022, available at https://www.nrc.no/globalassets/pdf/reports/life-and-death/financial-access-in-afghanistan_nrc_jan-2022.pdf.

² Esfandyar Batmanghelidj and Nicholas Mulder, 'Lifting Sanctions Isn't as Simple as It Sounds', *Foreign Affairs*, 15 April 2019; Tristan Kohl, 'In and Out of the Penalty Box: U.S. Sanctions and Their Effects on International Trade' in Peter A.G. van Bergeijk, *Research Handbook on Economic Sanctions*, Edward Elgar, 2021, 388-410;

Legal resistance to foreign sanctions is found in both Western and non-Western states, China and Russia being the leading states in the latter category. Prominent Western resistance legislation has come from the European Union (EU), and to a lesser extent Canada. There is, however, a major difference between Western and non-Western resistance to foreign sanctions. The Western resistance is driven by discontent at extraterritorial (secondary) sanctions adopted by the United States,³ whereas non-Western resistance responds to both secondary and primary sanctions. Given that there is greater Western convergence on sanctions policy in general, resistance to US sanctions in the EU, Canada and other Western states only arises marginally. Non-Western resistance, on the other hand, emanates from broader political divergence with sanctioning Western powers, and is a reflection of the intensifying geo-economic rivalry.

SPVs, blocking statutes, and countermeasures serve varying functions in resisting foreign sanctions. Each of these mechanisms have been individually discussed in the literature. This paper builds on that conversation by providing a comparative analysis of the relative usefulness and legal limitations of each mechanism in resisting foreign sanctions. The comparison focuses on the compatibility of each mechanism with relevant international legal obligations of states, in particular in relation to anti-money laundering and countering terrorism financing (AML/CTF) obligations, and the advantages and disadvantages for economic operators within the resisting states.

2. Special Purpose Vehicles

In the context of sanctions, the prominent example of SPVs is the Instrument for Supporting Trade Exchanges (INSTEX), established by European states to facilitate trade in legitimate trade that was curtailed by the re-imposition of US sanctions on Iran in 2018.⁴ The record of INSTEX in enabling European economic operators resist US sanctions is largely unimpressive. However, there are certain conditions under which SPVs like INSTEX hold promise as resistance mechanism to foreign sanctions.

2.1. General Issues

Unlike blocking statutes and countermeasures, SPVs are not unilateral measures but require a two-way (or multilateral) cooperation to set up, and in this sense require broader consensus. This reduces individual states' freedom of action in deploying SPVs tracking their foreign policy preferences. Setting up SPVs requires establishment of legal entities on either side of the trading parties - e.g. INSTEX in Europe and Special Trade and Finance Instrument (STFI) in Iran – that serve as clearing houses for transactions. The EU also expressed that INSTEX is open for participation to 'other partners in the world'.⁵ States including China, Russia, India, Turkey, South Korea and Japan

Esfandiyar Batmanghelidj, and Erica Moret. 'The Hidden Toll of Sanctions: Why Washington Must Reckon With the Devastating Inflation Its Policies Cause', *Foreign Affairs*, 17 January 2022.

³ Jonathan Hackenbroich, Filip Medunic and Pawel Zerka, 'Tough Trade: the Hidden Costs Economic Coercion', European Council on Foreign Relations, Policy Brief ECFR/431, February 2022; Deepak Raju, 'Proposed EU Regulation to Address Third Country Coercion – What is Coercion?' *EJIL: Talk!*, 6 January 2022. On reach of US sanctions, see Zachary Goldman and Alina Lindblom, 'The US Position and Practice with Regards to Unilateral and Extraterritorial Sanctions: Reimagining the US Sanctions Regime in a World of Advanced Technology', in Charlotte Beaucillon (ed.) *Research Handbook on Unilateral and Extraterritorial Sanctions*, Edward Elgar 2021, 70-89.

⁴ Alexandria ter Avest, 'An Attempt to Negate Iranian Sanctions: How Special Purpose Vehicles May be the EU's Last Hope to Keep the JCPOA Alive' *23 North Carolina Banking Institute* (2019) 181.

⁵ Remarks by High Representative of the Union for Foreign Affairs and Security Policy, Federica Mogherini, following a Ministerial Meeting of E3/EU 2 and Iran, 24 September, 2018, available at <https://eeas>.

had expressed interest to participate.⁶ As such, SPVs could grow into becoming a broader web of barter with multiple jurisdictions.⁷ In fact, it is suggested that SPV participation could also include the foreign sanctioning state as well. To the extent that sanctioning states exempt humanitarian trade from the purview of their restrictions, participation in humanitarian SPVs could provide the sanctioning state opportunity to demonstrate its political commitment to alleviating the civilian impact of sanctions.

The participation of the sanctioning state, however, raises the question as to why SPVs are even needed with respect to transactions that are not covered by the foreign sanction. The answer lies in the practice of financial sector de-risking that leads to massive restriction or disruption of financial services with respect to a sanctioned jurisdiction, as was the case in Iran, despite specific sectors or activities in that jurisdiction being exempt from sanctions. In other words, humanitarian and other exemptions are not always translated into practice due to increasing regulatory risk-averse tendencies of financial institutions. As a result, even humanitarian organizations face difficulty moving funds into sanctioned jurisdictions. In other cases, particularly for small and medium scale businesses, the complexity of the procedures for obtaining requisite licenses from the sanctioning state discourages them from engaging with sanctioned jurisdictions.

The restriction of humanitarian trade is not an isolated issue in Iran, but affects sanctioned jurisdictions around the world. In this regard, a trade law issue may arise: other sanctioned states that are members of the World Trade Organization (WTO) could claim the same SPV facilities and if denied, challenge it as a violation of the most-favoured-nation (MFN) treatment principle under the GATT. This could be applicable, for example, in the context of current sanctions on Russia in connection with the invasion of Ukraine. Should Russia demand participation in the EU's INSTEX (or access to a similar SPV) for humanitarian trade, it could be a question whether (i) the facilitation of SPV is a favourable treatment under the WTO rules and – assuming the EU would not be willing to extend that facility to Russia – (ii) whether Russia could rightly argue its denial is a discrimination. At the moment, as the INSTEX is applicable only with respect to Iran, Russia's MFN argument would not be sustainable on grounds that Iran is a developing country and not a member of the WTO. The potential issue, however, remains relevant as WTO-member great powers and large economies are also increasingly being subjected to sanctions.

Another question is whether SPVs such as INSTEX would be required to comply with third countries' sanctions. INSTEX claims that as an EU-based entity, it is prohibited from complying with third-party sanctions in general.⁸ It is indeed not obliged to comply with US and other sanctions, but wouldn't it be expected to comply with non-Iran related US sanctions that become relevant to a particular INSTEX-facilitated transaction? For example, if an Iran-EU medical equipment trade involves an EU company (imagine a company like Siemens that is involved in both medical and energy fields) that is listed under US sanctions in connection with Nordstream II. It could be questionable whether INSTEX could disregard such sanction and continue to facilitate the trade. As INSTEX is disconnected from the US dollar, non-compliance with US sanctions may not be consequential. However, such sanctions

europa.eu/headquarters/headquarters-homepage/51040/remarks-hrvp-mogherini-following-ministerial-meeting-e3eu-2-and-iran_en.

⁶ Ellie Geranmayeh and Manuel Lafont Rapnouil, 'Meeting the Challenge of Secondary Sanctions', European Council on Foreign Relations, Policy Brief ECFR/289, June 2019, p 8, available at https://ecfr.eu/wp-content/uploads/4_Meeting_the_challenge_of_secondary_sanctions.pdf.

⁷ Peter E. Harrell, 'Trump's Use of Sanctions Is Nothing Like Obama's', *Foreign Policy*, 5 October 2019.

⁸ INSTEX financial crime compliance policy, available at <https://instex-europe.com/info-fcc/>

could still pose a problem and INSTEX might be inclined to observe them in order not to draw negative attention from US authorities.

Lastly, can SPVs such as INSTEX be expanded beyond humanitarian trade to serve as broader mechanisms of sanctions resistance between like-minded states? For example, could the development needs of sanctioned territories be met through SPVs with trading partners? Expanding the reach of SPVs beyond sanctions-exempt areas is risky as participants could be subject to secondary sanctions. Nevertheless, as we are recently witnessing continuation of trading relations with sanctioned states through non-dollar payments,⁹ undertaking such trade via SPVs now seems a less risky possibility.

2.2. Financial Crime Compliance

From the perspective of financial crime compliance, SPVs may create a more centralized system of trade that brings greater visibility to supervisory and law enforcement bodies of the jurisdictions involved – but at the same time create vulnerability. As all relevant SPV transactions will be cleared through a single governmental agency (in the case of EU-Iran trade INSTEX and STFI) appropriate screening can be ensured. However, SPVs also pose a financial crime vulnerability as they specifically operate in high-risk jurisdictions, create a single point of failure, and fragment the international trade chain. SPVs are meant to overcome financial problems faced in sanctioned territories, which are inherently high risk in terms of sanctions evasion. Moreover, sanctioned jurisdictions could also be high risk in terms of money laundering, terrorism financing, and predicate offences such as corruption and organized crime. In addition, the fact that all transactions are cleared through a single governmental body (such as INSTEX and STFI), possibly even without involvement of financial institutions, means that there is only one line of defence to undertake due diligence and all other financial crime compliance checks. Furthermore, in terms of the chain of trade, SPVs fragment cross-border trade into two separate segments confined to the two respective jurisdictions where one side would have less visibility to the other. The economic actors and ultimate beneficiary owners on one side would have interaction only with the SPV clearing house on their side of the trade. This means there is a portion of the trade dealt with entirely within the exporting state, and another portion of the same trade dealt with entirely within the importer's state. The cross-border financial interaction would only take place between the clearing houses in certain intervals. This arrangement potentially creates a blind spot for the corresponding parties in either side of the transaction in terms of undertaking due diligence on their counterparts, and they will be relying heavily on the line of defence provided by the SPV entity.

In apparent recognition of the heightened financial crime risk involved in SPVs, INSTEX has adopted enhanced due diligence policies and controls. It has a policy of attaching a 1-5 year 'cooling' period before designating politically exposed persons (PEPs) as ex-PEPs, and in some cases it would classify individuals as 'lifetime PEPs'. Its policy also requires compliance with the full range of EU/UK/UN sanctions regimes¹⁰ and industry good practice.¹¹ It also shows the weight given to financial crime compliance issues that two out of the 5 top executives of the entity are focused on compliance

⁹ E.g. Srijonee Bhattacharjee, 'India-Russia Explore a Rupee-Rouble Payment Scheme to Bypass War', *Aljazeera*, 31 March 2022.

¹⁰ Excluding US or any other non-UN third party sanctions regimes.

¹¹ In particular, the Wolfsberg Group set of principles and guidance, available at <https://www.wolfsberg-principles.com/wolfsberg-group-standards>.

(Chief Compliance Officer and Know Your Customer/KYC/ Head), and has a ‘sanctions and sensitive countries and parties’ policy and 10 other financial crime compliance policies in place.¹²

The single point of failure in SPV trade means that one side would rely on the clearing house of the other side undertaking its financial crime obligations seriously, as there is limited cross-visibility. In the Iran case, INSTEX had problems with its Iranian counterpart’s (STFI) inability to ‘satisfy financial transparency requirements’.¹³ As Iran has been in default of its commitments under the Financial Action Task Force standards, third countries could be hesitant to participate in the SPV.

3. Blocking statutes

Blocking statutes aim to curb and remedy the consequences of compliance with an undesirable foreign sanction. The EU, Canada, Russia, and China have blocking statutes. The key features shared in several blocking statutes include prohibition of compliance with undesirable foreign sanctions (such as by restricting or refusing business transactions), non-recognition and non-enforcement of judgments (including administrative decisions) arising out of foreign sanctions, stipulation of a reporting obligation, and claw-back right for economic operators.¹⁴

3.1. General Issues

Some blocking statutes have more expansive prescriptions than the ‘standard’ package mentioned above. For example, Russian draft blocking rules¹⁵ criminalize ‘assisting a foreign state to impose sanctions’ against Russia by way of providing information or advice to the hostile state, which could be characterized as an expanded version of the Canadian prohibition against cooperation in discovery and evidence requests from a foreign tribunal pertaining to Canadian defendants.¹⁶ The assistance prohibition under the proposed Russian law seems to have a limited applicability (it is applicable against measures affecting Russian citizens) but its enforcement concerns not only economic operators but also the wider public, including civic actors, researchers, journalists and so forth.

Blocking statutes can also vary from jurisdiction to jurisdiction in terms of their scope of application. The EU blocking statute (Regulation 2271/96¹⁷), for example, has a more circumspect scope of application, which is not coextensive with traditional scope of states’ jurisdiction under international

¹² INSTEX financial crime compliance policy, available at <https://instex-europe.com/info-fcc/>

¹³ Tom Ruys and Cedric Ryngaert, ‘Secondary Sanctions; A Weapon Out of Control? The International Legality of, and European Responses, to US Secondary Sanctions’ *British Yearbook of International Law* (2020), 1-116, p104; European External Action Service, Chair’s Statement Following the 28 June 2019 Meeting of the Joint Commission of the Joint Comprehensive Plan of Action, 28 June 2019, available at https://eeas.europa.eu/headquarters/headquarters-homepage/64796/chairs-statement-following-28-june-2019-meeting-joint-commission-joint-comprehensive-plan_en; Joint statement by the E3 Foreign Ministers, 31 January 2019, available at <https://instex-europe.com/about-us/founding-statement/>

¹⁴ Liesbeth Truyens, and Stefaan Loosveld, ‘The EU Blocking Regulation: navigating a diverging sanctions landscape’, 30(9) *International Company and Commercial Law Review* (2019), 490-501.

¹⁵ Russia does not have a self-standing blocking statute, but a legislation under parliamentary deliberation (Bill No 464757-7 On Amendments to Criminal Code of the Russian Federation 2018) contains a blocking provision. See, James Lindop and Monika Zejden-Erdmann, ‘Hold on To Your Hats: Russia Moves on Counter-Sanctions’, Eversheds Sutherland, 18 May 2018, available at https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Competition_EU_and_Regulatory/russian-counter-sanctions-bill-180518.

¹⁶ Ivan N. Timofeev, ‘Unilateral and extraterritorial sanctions policy: the Russian dimension’ in Charlotte Beaucillon (ed.) *Research Handbook on Unilateral and Extraterritorial Sanctions*, Edward Elgar 2021, p 106.

¹⁷ As amended by Delegated Regulations (EU) 2018/1100 of 6 June 2018 and 2018/1101 of 3 August 2018.

law or even the scope of the EU's own sanctions legislations.¹⁸ The Regulation does not apply to all natural and legal persons in EU territory and to nationals and EU-incorporated entities anywhere in the world (active nationality principle), let alone the more controversial components of jurisdiction under international law, i.e. the 'passive nationality principles' that attaches jurisdiction to non-nationals abroad that affect the interests of nationals, the 'protective principle' to protect the security of the state, or the 'effects doctrine' where the interests of a state are affected by a conduct outside of its territory.¹⁹ Branches of US corporations operating in the EU are not covered by the Regulation. With regard to natural persons, it is not clear if the Regulation applies to EU nationals that reside outside of the EU.²⁰ Non-EU nationals that are present in the EU, but do not have their legally established residence there, are excluded from the coverage of the Regulation – unless they are acting in a "professional capacity", however that phrase is interpreted. Even non-EU nationals that are resident (not only present) in the EU are excluded from the Regulation if at the relevant time for the application of the Regulation they are present in their non-EU country of nationality. Here the law, unlike public law rules on jurisdiction, makes a distinction between residence and presence. The Chinese blocking statute also shows similar circumscribed scope as it is applicable only for 'citizens, legal persons or other organizations of China'.²¹

Question remains, however, as to the true purpose of blocking statutes: whether they aim to protect economic operators from the effects of undesirable foreign sanctions or to counteract the foreign sanction itself and its objectives. The former is limited and economic, the later is elusive and political. There is some blurring of lines in policy discourse in this regard. The origin of early blocking statutes as responses to trade restrictive measures,²² and continuing discourse of 'trading interests',²³ suggests the purely economic roots of the instrument. However, blocking statutes' increased deployment in response to various types of targeted sanctions (not only trade-restricting measures) and in national security contexts indicates their use as instruments of economic statecraft broadly.²⁴ This holds true both in Western and non-Western states.

The recent Chinese blocking statute,²⁵ for example, provides a blank slate to the executive organ in charge of implementing the statute – a 'Working Mechanism' within the Ministry of Commerce – in determining which foreign sanctions fall under the purview of the statute. In making its determinations, the Working Mechanism is guided by considerations of whether the foreign sanction, in addition to economic impacts, violates 'international law and fundamental principles of international relations' and China's 'national sovereignty, security, and development interests'.²⁶

¹⁸ Financial Markets Law Committee, 'US Sanctions and the EU Blocking Regulation', London, June 2019, section 3.51.

¹⁹ Cedric Ryngaert, *Jurisdiction in International Law*, Oxford University Press (2nd ed, 2015).

²⁰ Financial Markets Law Committee (2019), above note 18, section 3.54 & 3.60-61.

²¹ Jingru Wang, 'Can China's New "Blocking Statute" Combat Foreign Sanctions?', *Conflict of Laws.net*, 30 January 2021.

²² Peter Glossop, 'Canada's Foreign Extraterritorial Measures Act and U.S. Restrictions on Trade with Cuba', 32(1) *International Lawyer* (2018), 93-118, p 96.

²³ E.g. UK's retained EU blocking regulation and amendment are collectively referred to officially as 'Protection of Trading Interests Legislation'; South Africa's Protection of Businesses Act 99 of 1978.

²⁴ Australia's Foreign Evidence Act (1994) authorizes blocking only for purposes of 'preventing prejudice to Australia's security' (art. 41); Singapore's Evidence (Civil proceedings in Other Jurisdictions) Act applies blocking provisions when an act 'prejudices Singapore's security' (section 5(3)).

²⁵ China Ministry of Commerce, Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures, of 9 January 2021.

²⁶ Wang (2021), above note 21.

Canada's blocking statute – the Foreign Extraterritorial Measures Act (FEMA)²⁷ – is also targeted towards not only trade-restricting extraterritorial sanctions,²⁸ but also sanctions deemed to undercut international law and Canada's national interest in the broader sense of those terms, including proposed or threatened foreign sanctions. The FEMA allows blocking measures against foreign trade law or provision deemed 'contrary to international law or international comity', harmful to 'significant Canadian interests' and 'infringe its sovereignty'.²⁹ The phrase 'significant interests' appears to be a reference to commercial interests. However, it signifies a broader set of interests, beyond commerce. The proof for this is that the statute contains a separate provision concerning foreign measures that affect Canada's 'trade or commerce' interests. The 'contrary to international law' ground in theory allows Canada to block foreign sanctions that do not directly affect its trade interests, which is more expansive than in all the other cases of blocking statutes discussed (EU, Russia, China). A problem would arise here if the other state justifies its sanctions under another international law regime, as it is often done. For example, the US could adopt sanctions purported to be in furtherance of the Financial Action Task Force's financial crime regime, a UN security regime (e.g. on Iran), or international human rights norms (e.g. on Cuba).

In contrast, the EU blocking statute is primarily couched in economic and financial terms, and less in geo-political terms. But the recognition that sanctions are geo-political tools, not merely trade, seems to have permeated EU policy discourse.³⁰ This has led to the realization that the EU blocking statute (and sanctions regimes in general) is an inadequate tool in contemporary economic statecraft, and a proposal for a new 'Anti-Coercion Instrument'³¹ (ACT) is currently floated by the Commission. The ACT more explicitly draws on geo-political discourse, beyond commercial interests. It also adopts the Canadian approach of defending sovereignty broadly, and responding to *threatened* foreign sanction as well.³²

3.2. Conflict with Mutual Legal Assistance Obligations

One problematic aspect of blocking statutes is reconciling the non-recognition and non-cooperation rule with states' mutual legal assistance (MLA) obligations under other international regimes, most notably the FATF's anti-financial crime regime.³³ The FATF Recommendations require states to offer each other prompt and effective cooperation in executing sanctions-like measures (assets freeze and

²⁷ Foreign Extraterritorial Measures Act (R.S.C., 1985, c. F-29).

²⁸ The FEMA does not clearly state extraterritoriality in its operative paragraphs, but Regulatory Impact Analysis Statement accompanying the legislation exhibits understanding that the reference is to measures that are considered unlawful extraterritorial sanctions. See, Glossop (2018), above note 22, p 104.

²⁹ FEMA, above note 27, section 2 and 5.

³⁰ Tobias Stoll et al, *Extraterritorial Sanctions on Trade and Investments and European responses*, Study requested by the Committee on International Trade (INTA) of the European Parliament, 2020, p. 33. See also to this effect, Truyens and Loosveld (2019), above note 19, pp. 490-501. Referring to a 'Catch-22 situation' economic operators face, See Anthonius de Vries, 'Council Regulation (EC) No 2271/96 (the EU Blocking Regulation)', 26(8) *Int'l Bus. Lawyer* (1998), p. 345.

³¹ EU Commission, Proposal for Regulation of the European Parliament and of the Council on the Protection of the Union and its Member States from Economic Coercion by Third Countries, document 2021/0406 (COD), available at https://trade.ec.europa.eu/doclib/docs/2021/december/tradoc_159958.pdf.

³² Commentary on the ACT, Freya Beatens and Marco Bronckers, 'The EU's Anti-Coercion Instrument: A Big Stick for Big Targets' *EJIL: Talk!*, 19 January 2022, available at <https://www.ejiltalk.org/the-eus-anti-coercion-instrument-a-big-stick-for-big-targets/>

³³ Similar obligations are also established with respect to countering terrorism (financing) by UN Security Council Resolution 1373(2001) and other Resolutions.

seizure) with respect to terrorism financing, money laundering, and *predicate offences*.³⁴ Predicate offence is defined by each state but the bottom line is stated as serious offences or those carrying a maximum penalty of more than one year imprisonment (or a minimum of six months' imprisonment for states that have minimum penalty system). It also includes offenses falling under the FATF's designated categories of offences, which incorporate a wide variety of criminal offences, including those commonly subject to sanctions such as corruption, serious human rights violations, security-related crimes, and finance-related crimes.³⁵

An MLA request in pursuit of a financial crime investigation or prosecution could be based on a sanction designation. That is, the MLA request by the judicial or administrative bodies of a requesting state could have been invoked to enforce that state's sanctions or the sanctions of a regional organization where the receiving state is not a member. The sanctions, in turn, could be adopted to help the investigation or prosecution of a financial crime. When the MLA request is wholly or partly for the enforcement of a foreign sanction, the receiving state may find it difficult to refuse cooperation as the request is also justified by another international legal commitment, i.e. the FATF regime.

As per the EU blocking statute, cooperation would not be granted to requests grounded on unlawful extraterritorial sanctions, unless the request is based also on other legal grounds than just the sanctions.³⁶ In other words, if the MLA request is at least partly based on legal ground other than the contested sanction, the prohibition does not apply. A question remains to what extent this prohibition would not be merely superficial resistance to foreign sanctions, as the sanctioning state could easily find another (partial) legal basis for the MLA request. This would be particularly true where the sanctioning state could base its MLA request on a predicate offence undergirding the sanctions, instead of the sanctions directly. When the EU member state's objection is not just regarding the specific foreign sanctions listings but regarding the validity of the underlying policy objective or purported predicate offence as well, cooperating with an MLA request would be problematic even if the request is not exclusively grounded on the sanction, hence is not barred by the blocking statute.

In this regard, the proposed ACT³⁷ could be interesting as it aims to respond to all sanctions that encroach upon EU sovereignty, hence could provide legal basis to reject MLA requests that are even partially based on sanctions the EU objects to. As the ACT takes a more politically active position of defending the 'sovereign choices' of the Union and its members, it could be designed to fend off not only direct but also indirect foreign manoeuvres to solicit EU cooperation on sanctions enforcement. The proposal in its current form, however, does not include legal and criminal justice non-cooperation measures.

3.2. Financial Crime Compliance

Blocking statutes' incorporation of non-recognition and non-enforcement rules technically provides broader legal tools of resistance against undesirable foreign sanctions, compared to SPVs. But practically these provisions are not quite useful with respect to US sanctions as the US Treasury's OFAC does not need foreign judicial assistance to recover fees when enforcing its rules against non-compliant economic actors. It often does so through settlement procedures directly with economic operators, which often willingly comply due to fear of punishment and OFAC's incentive of 25-50%

³⁴ FATF Recommendations 38 & 40.

³⁵ FATF Recommendations, 2012, Glossary.

³⁶ Ruys & Ryngaert (2020), above note 13, p 84.

³⁷ See above, note 31.

discount on penalties in case of cooperation.³⁸ Moreover, OFAC and other US law enforcement authorities are able to recover penalties for sanctions violations from the US correspondence accounts of any foreign financial institutions.³⁹

Corporate settlements with OFAC (or other regulators) often arise in response to violations of broader financial crime compliance rules, and not only sanctions violations in isolation. This creates a problematic situation where blocking statutes establish strict non-compliance rules. The EU blocking statute, for example, prohibits compliance with designated US sanctions both *directly* and *indirectly*. Canadian FEMA also prohibits any act or omission in compliance with a designated foreign sanction, regardless of that act or omission being undertaken *not exclusively* for purposes of compliance with the sanction.⁴⁰ In such cases, a difficult situation arises when a seemingly US sanctions-compliant decision of economic actors (an act prohibited by blocking statutes) is intertwined with broader measures of compliance with financial integrity rules. Distinguishing an act of compliance with US sanctions is ambiguous when undertaken, for example, as part of a risk-based assessment of money laundering compliance, which is not only required by national law but also by international rules.⁴¹ The imposition of US sanctions against a particular jurisdiction could be assessed by an economic actor as a factor that raises the risk for financial integrity when operating in the sanctioned jurisdiction or with actors associated with that jurisdiction. In fact, economic actors increasingly incorporate contractual clauses (sanctions clauses or Ultra-High-Risk Country (UHRC) clauses) that enable them to react to risk dynamics (i.e. in terms of exposure to financial crime) including those instigated by sanctions.⁴²

Overall, from the perspective of economic actors, blocking statutes are onerous mechanisms that put the burden of resisting foreign sanctions on private actors. Such statutes often follow the approach of punishing economic actors for complying with a foreign sanction, instead of empowering them to resist such sanctions.⁴³ Recent amendment to the EU blocking statute has provided a certain safety valve by allowing economic actors to continue to comply with the foreign sanction if the damage resulting from non-compliance to such sanction is significant to them or the EU economy. Other blocking statutes, for example Canada's, do not have similar exceptions.

The claw-back provision in blocking statutes empowers economic actors by enabling them to sue their private counterparties for damages resulting from the later's compliance with a proscribed foreign sanction. This provision is only applicable with respect to private/commercial enforcers, but there is theoretical possibility to expand it to cover the sanctioning state as well. Ordinarily this move would not be possible as states have immunity before judicial bodies of other states. But increasingly we see legislations that defy this understanding. For example, the US and Canadian Justice for Victims of Terrorism Act (JASTA) provide private victims legal recourse against another

³⁸ Daniel Ventura, 'Contemporary Blocking Statutes and Regulations in the Face of Unilateral and Extraterritorial Sanctions', in *Research Handbook on Unilateral and Extraterritorial Sanctions*, Charlotte Beaucillon (ed.), Edward Elgar, 2021, 221-238.

³⁹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, section 319(a).

⁴⁰ Foreign Extraterritorial Measures (United States) Order, 1992, section 6.

⁴¹ See further Financial Markets Law Committee (2019), above note 18, para 3.

⁴² Ruys & Ryngaert (2020), above note 13, p 90; *Mamancochet Mining Limited v Aegis Managing Agency Ltd & Others*, [2018] EWHC 2643. Note: some jurisdictions provide 'due respect' to special difficulties faced by economic operators that have to abide by conflicting sanctions regimes, see Advocate General's Opinion in Case C-124/20 *Bank Melli Iran, Aktiengesellschaft nach iranischem Recht v Telekom Deutschland GmbH*, footnote 22.

⁴³ *Ibid* (Ruys & Ryngaert).

state by lifting the later's immunity. It is not clear to what extent similar logic could be transposed to damages arising from foreign sanctions.⁴⁴ Scholars express scepticism on whether this approach is possible.⁴⁵ Others, however, reckon that such move, even though prima facie unlawful under international law, could be justified as a lawful countermeasure if it could be demonstrated that the foreign sanction is prior violation of international law, particularly a peremptory norm of international law.⁴⁶

4. Countermeasures

Countermeasures encompass a wide swath of possible actions states can take in response to a wrongful conduct by another state. Countermeasures in response to a foreign sanction do not necessarily entail symmetrical measures of reciprocity. They could also come in various asymmetrical forms, including measures that do not relate to the type of original sanctions or targeting actors that are not involved in or responsible for the original sanctions. As such, countermeasures free up the sanctioned state for creative responses, including asymmetric responses, as opposed to blocking measures that are tied to the original sanction. Sanctioned states can also selectively target the other state without necessarily trapping their own economic actors in the process, for example by imposing targeted sanctions against governmental entities.

A typical countermeasure to foreign sanctions is to adopt sanctions against the sanctioning state – a counter-sanction. China's Counter Foreign Sanctions Law (CFSL), which established an "Unreliable Entity List," is a prominent example in this regard.⁴⁷ The law targets, under article 2(2), foreign entities and individuals that suspend normal transactions with or discriminate against Chinese natural or legal persons in violation of 'normal market transaction principles'. The counter-measure consists of travel, work, trade and investment restrictions in China (art 10). In addition, a fine of 'the corresponding amount' could be imposed against such entity.

Russia has a comparable legislation, the Special Economic Measures Act,⁴⁸ which stipulates measures including trade restrictions, prohibition of financial services, tariff change, denial of air and sea access, travel restrictions and withdrawal from international cooperation agreements.⁴⁹ The measures would apply not only against specifically designated persons and entities, but also on entities owned 25% or more by the designated persons and entities.⁵⁰ This gives the counter-sanction a much wider scope of application compared to original (US) sanctions, which follow the 50% rule. Russia also has another legislation titled 'Counter Measures for Hostile Actions of the United States and Other Foreign States',⁵¹ which provides for measures including restriction on import and export of goods and raw material originating from hostile state or manufactured by hostile state's entities, restrictions on governmental contracts, and restrictions on participation in

⁴⁴ Ibid, p 87.

⁴⁵ E.g. Marco Longobardo, 'State Immunity and Judicial Countermeasures', 32(2) *European Journal of International Law* (2021), 457–484.

⁴⁶ E.g. Daniel Franchini, 'State Immunity as a Tool of Foreign Policy: The Unanswered Question of *Certain Iranian Assets*' 60(2) *Virginia Journal of International Law* (2020), 433-486.

⁴⁷ Legislation available at

<http://english.mofcom.gov.cn/article/policyrelease/questions/202009/20200903002580.shtml>. See further, Elina Chen, 'What Does China's Lack of Response to U.S. Entity List Sanctions Mean for its Counter Foreign Sanctions Law?', *Columbia Journal of Transnational Law: The Bulletin*, 19 Nov 2021.

⁴⁸ Federal Law No 81 of 2006, amended in 2019.

⁴⁹ Timofeev (2021), above note 16, p 105; Richard Connolly, *Russia's Response to Sanctions. How Western Economic Statecraft is Reshaping Political Economy in Russia* (Cambridge University Press 2018).

⁵⁰ Ibid (Timofeev), p 106.

⁵¹ Federal Law No 127-FZ of 2018.

privatization. This legislation also bestows upon the President a wide power to adopt any measures 'deemed appropriate'.⁵² So far this legislation has only been activated to impose an import-restriction counter-sanction against Ukraine in 2018.

In asymmetrical countermeasures, entities or persons that are not responsible for the original sanction could be impacted. These targets are 'drawn into', as it were, a conflict between the original sanctioning and the responding states. Examples could be Chinese counter-sanctions targeting European academics, parliamentarians, and members of the EU Council's Political and Security Committee in response designation of Chinese governmental entities under the EU's Global Human Rights sanctions regime in 2021. Another recently emerging dimension of asymmetrical countermeasures is measures against foreign investments, including freezing and potentially confiscation. Discussions along this line are occurring in connection with the invasion of Ukraine. The spectre of investment countermeasures is particularly raised due to recent initiatives in Western parliaments for the adoption of expropriation sanctions.⁵³ Measures against foreign investment are bound to face direct and indirect expropriation and other challenges (such as non-discrimination, fair and equitable treatment) under international investment law regimes.⁵⁴ A most obvious legal challenge would be the compatibility of measures against the private sector in retaliation for states' conduct.⁵⁵ As private actors are not necessarily responsible for state conduct, countermeasure against private investment that is not in some way linked to the original sanctioning government would be problematic. Sanctions themselves are increasingly targeting private investment. For example, EU, the US and UK have frozen the investments of Russian billionaires in their countries in response to the invasion of Ukraine. Such measures, however, could be distinguished from the former type as in such cases the targets themselves are connected with the state's act and fulfil a sanctions designation criteria, e.g. providing support to the Russian government. When a sanctioned state freezes assets for simply belonging to investors from the sanctioning state, such countermeasure fails to demonstrate the element of legal responsibility.

The use of countermeasures is directly governed by general international law rules, particularly with respect to proportionality, limitations on the type of measures, pre-conditions and timing for deployment, and triggers for the termination of countermeasures. While international law rules on state responsibility lay down the rules and pre-conditions for countermeasures in general, trade-based countermeasures are further subject to the WTO special regime (*lex specialis*), which stipulates mandatory prior-notification and dispute settlement procedures before the invocation of countermeasures. In comparison, blocking statutes and SPVs are less governed by international law as they primarily fall within states' territorial jurisdiction. Instead, they are only affected by international law to the extent that their application comes in contact with other international law norms – for example, if a blocking statute stipulates provisions that violate the immunity of other states or if an SPV mechanism is used to bypass a UN Security Council sanction.

The limits on the types of measures that can be taken as countermeasures is a matter that needs further clarification. The established understanding is that states can adopt any countermeasures as

⁵² Timofeev (2021), above note 16, p 105.

⁵³ Senate of Canada, Bill S-217 (First Reading, November 24, 2021), available at <https://www.parl.ca/DocumentViewer/en/44-1/bill/S-217/first-reading>.

⁵⁴ Anne van Aaken, 'International Investment Law and Decentralized Targeted Sanctions: An Uneasy Relationship', Columbia FDI Perspectives N.o. 164; available at: <http://ccsi.columbia.edu/files/2013/10/No-164-van-Aaken-FINAL.pdf>

⁵⁵ Alexandros-Cătălin Bakos, 'Economic sanctions in International Investment Arbitration', *Jus Mundi*, available at <https://jusmundi.com/en/document/wiki/en-economic-sanctions-in-international-investment-arbitration>.

long as those do not violate peremptory norms, human rights and humanitarian obligations, and diplomatic protections.⁵⁶ As the interpretation of whether a particular action violates these norms and obligations is not a determinate matter, there is a possibility to adopt seemingly limitless countermeasures. In this regard, sanctions that summarily expel financial institutions of a country, including national reserve/central banks, from the global financial system raise ambiguity. As such measures by definition cut a country off of foreign currency, and foreseeably harm the economy as a whole, it is questionable whether they can be considered lawful in light of the human right impact they could entail. An example is, as the global bank messaging system SWIFT is based within the EU, if the EU (and its allies and partners) cut off all Chinese financial institutions from SWIFT to counteract a Chinese sanction. Existing practice of expulsion from the financial system exercised by major sanctioning states appears to suggest that such measures would also be valid as counter-sanctions. However, objection to such practices, particularly coming from states in the Global South, suggests that countermeasures should not be construed as limitless – that although measures may formally not violate peremptory norms or human rights and humanitarian obligations, appreciation of their practical impact should also inform the assessment of their legality.

5. Conclusion

Resisting extraterritorial sanctions is a subject of interest no longer in non-Western states only, but also in traditionally sanctioning Western states, including the EU. As sanctions increasingly become tools of geo-political competition, so has resistance to them evolved to mean much more than protection of commercial interests. In this sense, the deployment of special purpose vehicles, blocking statutes and countermeasures serves to resist foreign sanctions that not only restrict trade but also erode states' sovereignty and violate international law broadly.

Although these three tools of resistance cannot be neatly ranked in terms of the level of political escalation or confrontation their deployment represents, some differentiation among them is observable: while SPVs can be least confrontational, countermeasures represent the other end of the spectrum, with blocking statutes occupying the middle ground. The only currently operating SPV, the EU-Iran INSTEX, was established to facilitate trade in humanitarian goods, an area that is not technically subject to (but affected by) US sanctions. There is also in theory a possibility to involve the sanctioning state itself in the SPV arrangement. As such, SPVs can be platforms of cooperation, instead of confrontation. Countermeasures, on the other hand, are by definition unfriendly as they represent a positive act of hostility against a sanctioning state. They also bring state-to-state confrontation at the centre. Blocking statutes occupy the middle ground by mandating passive actions of non-compliance and non-cooperation with foreign sanctions. These measures push the state to the background and place economic actors to the frontline of the resistance to foreign sanctions, and thereby privatize the burden of politically undesirable foreign sanctions.

While SPVs such as INSTEX require states to assume the central responsibility for facilitating trade, and blocking statutes shift that burden to private economic actors, countermeasures are flexible instruments giving states more control to creatively respond to sanctions without necessarily burdening themselves or cornering their private sector into a dilemma. States can use countermeasures in whatever way that maximizes the political or material impact they seek, including asymmetrical measures that do not necessarily correspond with the type of sanctions

⁵⁶ International Law Commission, 'Articles on Responsibility of States for Internationally Wrongful Acts', (2001), art 50.

adopted by the other state. As states often seek to target whatever object they deem to be a pressure point for the other state, countermeasures could unfortunately involve action against foreign actors that are not responsible or directly involved in the foreign sanction.

The flexibility states enjoy in deploying countermeasures, however, is tempered by the fact that, unlike SPVs and blocking statutes, the exercise of countermeasures is directly subject to international law. International rules on state responsibility regulate the preconditions for and content of countermeasures, which require the fulfilment of certain procedural safeguards and the preservation of certain rights and privileges beyond the reach of countermeasures. The utilization of SPVs and blocking statutes, on the other hand, is not systematically dealt with under international law and largely falls within the domestic jurisdiction of states, except when their application impacts specific international law regimes, e.g. WTO rules.

The deployment of the three mechanisms raises various legal questions, in particular, with respect to their fit with the global trade regime led by the WTO and anti-financial crime regime led by the FATF. A particular trade issue raised is if the facilitation of special purpose vehicles amounts to a favourable treatment and whether other sanctioned WTO members could claim access to it based on the most favoured nation treatment principle. With respect to anti-financial crime rules, challenges include to what extent states can continue to uphold their obligations of mutual legal assistance and due diligence while resisting foreign sanctions and associated requests for cooperation. More broadly, international law regimes that demand ever freer cooperation (FATF) and trade (WTO) present challenge for states wishing to resist sanctions, as such resistance measures involve restricting cooperation and trade. In this regard, SPVs stand out among the other instruments of resistance as they allow states to resist sanctions while also expanding, not restricting, international cooperation and trade.

Lastly, as the role of sanctions global geopolitical contest continues to rise, a pertinent issue to compare the three instruments would be to what extent they could be deployed to react to threatened foreign sanctions, i.e. sanctions not yet adopted. As reflected in the recent draft EU Anti-Coercion Instrument, the need for nimble instrument of statecraft that can serve to deter possible foreign economic coercion is gaining more recognition. In this regard, blocking statutes seem to have advantage over SPVs and countermeasures. SPVs, as shown in the setting up of INSTEX, can be a cumbersome mechanism that cannot be set up quickly. Whereas countermeasures are also legally not suitable for pre-emptive measures as international rules on state responsibility require the prior existence of a wrongful conduct by the other state to trigger countermeasures. On the other hand, blocking statutes could be enacted subject to a state's internal legal system only and some of their juridical components, such as the obligation to not comply with a foreign sanction and to deny cooperation and recognition, could come into effect instantly.