# SANCTIONS – GREATER CONGRESSIONAL OVERSIGHT NEEDED FOR COSTLY, INEFFECTIVE "GO-TO" POLICY

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## I. REDEFINING THE METRIC FOR SUCCESS

Over the last twenty years, the United States has frequently employed economic and financial sanctions, particularly unilateral, targeted sanctions as a "go-to" foreign policy and national security tool.

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Despite this governmental perspective, evidence suggests that such sanctions have largely failed to meet their stated policy objectives. Moreover, empirical analysis suggests sanctions are not cost-effective, and place an undue burden on the private sector, which is charged with implementing these policy choices.

One reason for this may be that over the past several decades, the U.S. Government has engaged sanctions for both substantive and public relations objectives. Over time, the merits of this policy focus have shifted squarely into the public relations arena. Quantifying data surrounding sanctions' effectiveness has largely been lacking, to the point that empirical analysis of sanction effectiveness is sparse. The U.S. Government has not provided any studies that show whether its sanctions work or show that sanctions consistently influence personal or agency behaviors of these foreign governments. Thus, the lack of granular policy analysis begs the question: Do sanctions work, or are they window dressing?

## II. A SHORT HISTORY OF THE U.S.' "GO-TO" FOREIGN POLICY TOOL

Nations have used economic sanctions as a foreign policy tool for thousands of years, starting with the Megarian Decree issued by ancient Athens in 432 BC.[1] In the 20th century, sanctions evolved from a tool of war by Allied nations during World War I to their current use as a foreign policy or national security tool to enforce a Western-dominated international order.[2]

Today, governments and international institutions, such as the United Nations, frequently impose financial or economic sanctions to penalize, coerce, or prevent governments, entities, or individuals from engaging in proscribed activities, including armed conflict, the development or proliferation of nuclear or ballistic weapons, terrorism, and drug trafficking.[3] Sanctions may also be employed to strengthen human rights or support regime change.[4]

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1. Philip Chrysopoulos, *How Economic Sanctions in Ancient Greece Backfired, Prolonging War*, GREEK REP. (Dec. 14, 2022), https://greekreporter.com/2022/12/14/sanctions-pericles-ancient-greece-war/.

2. *See* NICHOLAS MULDER, THE ECONOMIC WEAPON 112 (2022).

3. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-145, ECONOMIC SANCTIONS: AGENCIES ASSESS IMPACTS ON TARGETS, & STUDIES SUGGEST SEVERAL FACTORS TO CONTRIBUTE TO SANCTIONS' EFFECTIVENESS (2019) [hereinafter GAO, ECONOMIC SANCTIONS: ASSESS IMPACTS].

4. *See* Jonathan Masters, *What are Economic Sanctions*, COUNCIL ON FOREIGN RELS. (Aug. 12, 2019), https://www.cfr.org/backgrounder/what-are-economic-sanctions.

Depending on their purpose and scope, governments may impose targeted sanctions, which prevent transactions to and from specific persons or entities, or comprehensive sanctions. The latter includes embargoes and trade restrictions and prohibits commercial activity with an entire jurisdiction.[5] Sanctions may also include "foreign assistance reductions and cut-offs, export and import limitations, asset freezes, tariff increases, revocation of most favored nation (MFN) trade status, negative votes in international financial institutions, withdrawal of diplomatic relations, visa denials, cancellation of air links, and prohibitions on credit, financing, and investment."[6]

The United States, in particular, has increasingly used financial and economic sanctions as a "go-to" foreign policy and national security tool, leveraging the U.S. dollar's position as the world's dominant currency as a means to coerce other governments to change their behavior, and to penalize entities and individuals engaged in illicit activity.[7] After WWII, the U.S. restricted exports to the Soviet Union and its allies, passing the Export Control Act of 1949.[8] These sanctions were expanded after the Korean War and were further expanded until the end of the 20th century.[9]

Washington's use of sanctions began to increase exponentially in the 1970s as successive U.S. presidents exercised their legal authority under the International Emergency Economic Powers Act of 1977 (IEEPA) [10]—an extraordinarily broad and relatively unconstrained authority—to rapidly respond unilaterally and as part of multilateral coalitions to mitigate emerging and existing national security threats.[11] The statute enables the President to "investigate, . . . regulate, direct

5. *See* GAO, ECONOMIC SANCTIONS: ASSESS IMPACTS, *supra* note 3, at 1.

6. Richard N. Haass, *Economic Sanctions: Too Much of a Bad Thing*, BROOKINGS POL'Y BRIEF SERIES (June 1, 1998), https://www.brookings.edu/research/economic-sanctions-too-much-of-a-bad-thing/.

7. *See* John Letzing, *This is Why the US Dollar is a Potent Sanctions Weapon . . . 537or Now*, WORLD ECON. F. (June 1, 2022), https://www.weforum.org/agenda/2022/06/this-is-why-the-us-dollar-is-a-potent-sanctions-weapon-for-now/.

8. *See* Export Control Act of 1949, Pub. L. No. 11, 63 Stat. 2 (1949).

9. *See Embargoes and Sanctions—Cold War Sanctions*, Am. Foreign Rels., https://www.americanforeignrelations.com/E-N/Embargoes-and-Sanctions-Cold-war-sanctions.html (last visited Jan. 24, 2022).

10. *See* International Emergency Economic Powers Act of 1977, Pub. L. No. 95–223, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §§ 1701–1707).

11. *See* Brian O'Toole & Samantha Sultoon, *Sanctions Explained: How a Foreign Policy Problem Becomes a Sanctions Program*, ATL. COUNCIL (Sept. 22, 2019), https://www.atlanticcouncil.org/commentary/feature/sanctions-explained-how-a-foreign-policy-problem-becomes-a-sanctions-program/.

and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation" of property "in which any foreign country or a national thereof has any interest."[12] To use those authorities, the President must declare a "national emergency" based on an "unusual and extraordinary threat" to the national security, foreign policy, or economy of the United States.[13]

Additional presidential authorities to impose sanctions are derived from the National Emergencies Act (NEA)[14] to issue executive orders authorizing sanctions, the United Nations Participation Act of 1945,[15] and the Foreign Narcotics Kingpin Designation Act.[16] These authorities have been generally delegated to the appropriate agency, such as the Commerce Department or the Treasury Department's Office of Foreign Assets Control (OFAC).[17] Specifically, OFAC identifies and designates specific persons and entities to be sanctioned and issues binding directives on all individuals and entities within the U.S. jurisdiction.[18] The lists of sanctioned individuals or groups include Specifically Designated Nationals (SDNs), Non-SDN Menu-Based Sanctions, and Correspondent Account Payable-Through Account Sanctions (CAPTA).[19]

Initially, targeted and comprehensive sanctions imposed by the U.S. were used to promote human rights, impede nuclear proliferation, and destabilize unfriendly governments. After the terrorist attack on September 11, 2001, Washington revolutionized the use of targeted sanctions by leveraging the centrality of the U.S. dollar in the global financial system. U.S. financial institutions and corporations in their

12. 50 U.S.C. § 1702(a)(1)(B).

13. Elizabeth Goitein & Benjamin Waldman, *How the Russia Sanctions Work and What Congress Needs to Know*, BRENNAN CTR. FOR JUST. (Apr. 11, 2022), https://www.brennancenter.org/our-work/analysis-opinion/how-russia-sanctions-work-and-what-congress-needs-know.

14. *See* National Emergencies Act of 1976, Pub. L. No. 94-412, 90 Stat. 1255 (codified as amended at 50 U.S.C. §§ 1601–1651).

15. *See* United Nations Participation Act of 1945, Pub. L. No. 117-22, 136 Stat. 23 (codified as amended 22 U.S.C. § 287).

16. Foreign Narcotics Kingpin Designation Act, Pub. L. No. 106-120, 113 Stat. 1606, 1626–1636 (codified as amended 21 U.S.C. § 1901(b)).

17. *Office of Foreign Assets Control-Sanctions Programs and Information*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information (last visited Mar. 19, 2023); *Frequently Asked Questions,* U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/faqs/all-faqs (last visited Mar. 19, 2023).

18. Goitein & Waldman, *supra* note 13.

19. *Id*.

role as gatekeepers are responsible for ensuring the effectiveness of OFAC and other agencies' sanctions programs, including designations under the Kingpin Act.[20]

In his book, *Treasury's War: The Unleashing of a New Era of Financial Warfare*, former Deputy Assistant to the President and Deputy National Security Advisor for Combatting Terrorism Juan Zarate explained how the government intentionally fine-tuned its sanctions policy approach to one that outsources economic and financial sanctions to U.S. financial institutions and firms. "In Treasury, we realized that private-sector actors—most importantly, the banks—could drive the isolation of rogue entities more effectively than governments—based principally on their own interests and desires to avoid unnecessary business and reputational risk."[21]

Over the last two decades, U.S. authorities have used sanctions as their first response tool to respond to national security threats; the number of OFAC Sanctions Designations increased from 912 in 2000 to 9,421 in 2021, an increase of 933 percent, according to the U.S. Treasury Department.[22] The government has employed targeted sanctions aimed at individuals, entities, and countries as well as sanctions directed at a specified sector, or sectors, of a target's economy. Supplementary sanctions, also known as secondary sanctions, have also been imposed, targeting third-party actors doing business with, supporting, or facilitating targeted regimes, persons, and organizations.[23] The Biden Administration has continued the trend; "in 2021, the Treasury issued a total of 765 new designations with the majority (51 percent) pursuant to country-specific sanctions programs, mainly Belarus, Burma, China, and Russia, and 787 delistings with roughly 92 percent pursuant to thematic sanctions programs, mainly addressing drug trafficking."[24]

In the wake of Russia's invasion of Ukraine in February 2022, the United States, the European Union (EU), and other countries

20. David L. Hall & Dana Stepnowsky, *OFAC Sanctions: Costly but Effective,* 259 N.Y. L.J. 1,1 (2018) (available at https://g2bswiggins.wpenginepowered.com/wp-content/uploads/2019/09/39750_ofac-sanctions_cost-but-effective_nylj_d-stepnowsky-d-hall.pdf).

21. JUAN C. ZARATE, TREASURY'S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE 10 (2013).

22. U.S. DEP'T OF TREASURY, THE TREASURY 2021 SANCTIONS REVIEW (2021) [hereinafter 2021 SANCTIONS REVIEW]; *see also* MULDER, *supra* note 2, at 296.

23. GAO, ECONOMIC SANCTIONS: ASSESS IMPACTS, *supra* note 3.

24. Jason Bartlett & Euihyun Bae, *Sanctions by the Numbers: 2021 Year in Review*, CTR. FOR A NEW AM. SEC. (Jan. 13, 2022), https://www.cnas.org/publications/reports/sanctions-by-the-numbers-2021-year-in-review.

administered economic "shock and awe" against Moscow, enacting a series of severe financial and economic sanctions to stymie Russia's military progress in Ukraine while substantially increasing assistance to Kyiv.[25] The multi-prong sanctions effort imposed against the Russian government, including targeted financial sanctions aimed at Russian entities and individuals, are reminiscent of the sanctions framework imposed by the U.S. and allied nations during WWI.

Unlike the United States' initial unilateral sanctions program imposed in February 2014, which failed to deter Moscow from further aggression towards Ukraine, the U.S. joined more than thirty countries in February 2022 to enact identical or similar sanctions.[26] Over the past fourteen months, the U.S. and its allies have imposed several rounds of sanctions, which include a combination of targeted measures against oligarchs, Russian companies in many different economic sectors, and trade embargoes on specific Russian goods.[27]

## III. LACK OF GOVERNMENT ACCOUNTABILITY, OVERSIGHT IMPEDES ABILITY TO IMPROVE SANCTIONS PROGRAM

Given the complexity, costs, and risks associated with the myriad of sanctions imposed on Russia, one would expect that the Treasury Department and other federal agencies have conducted data-driven analysis, including risk impact analyses and cost-benefit analyses, to help assess the sanctions' effectiveness and efficacy. Unfortunately, this is highly unlikely. The U.S. Government has published few assessments that assess existing sanctions programs to date and has consistently failed to show that it has done any up-front analysis before imposing sanctions. Consequently, determining the degree in which sanctions levied against Russia will succeed as a foreign policy tool will likely prove difficult.

Indeed, this deficit was highlighted in Congressional testimony by the Wilson Center's Eric L. Olson in November 2017, specifically addressing the need for the federal government to conduct an analysis

25. *See* REBECCA N. NELSON, CONG. RSCH. SERV., IF12092, THE ECONOMIC IMPACT OF RUSSIA SANCTIONS 1 (2022).

26. Press Release, White House, Briefing Room, Fact Sheet: United States, European Union, and G7 to Announce Further Economic Costs on Russia (Mar. 11, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/11/fact-sheet-united-states-european-union-and-g7-to-announce-further-economic-costs-on-russia/.

27. *Id*.

on of the effectiveness and costs related to sanctions associated with the Kingpin Act.[28]

> The time is right to request a full, objective, and data-driven evaluation of the act's effectiveness. It has been nearly 17 years since it has been first implemented. So it is time to do a cost-benefit analysis and to find out if the act is as effective as anecdotes might suggest it is. And we all have good and positive anecdotes about its effectiveness, but it is time for a broad analysis and evaluation. Questions that must be answered include whether the Kingpin Act is effectively dismantling criminal organizations or simply splitting them up and fragmenting them.[29]

Two years later, the General Accountability Office (GAO) addressed the federal government's lack of in-depth analysis on sanctions effectiveness more broadly in its 2019 report on economic sanctions.[30] The report highlighted that the Departments of Treasury, State, and Commerce, which are responsible for implementing, monitoring, and enforcing sanctions imposed by the United States, "do not analyze sanctions' overall effectiveness in achieving broader U.S. policy goals or objectives, such as whether the sanctions are advancing the national security and policy priorities of the United States, according to Treasury officials."[31]

Agency officials told GAO analysts conducting the assessment that there is no policy or requirement for the thirteen agencies to assess the effectiveness of sanctions programs in achieving foreign policy or national security goals.[32] The agencies rely primarily on analysis conducted by the U.S. Intelligence Community (IC) agencies, including Treasury's Office of Intelligence and Analysis and State's Bureau of intelligence and Research.[33] However,

> According to officials of the Office of the National Director of Intelligence, assessing sanctions' effectiveness in

28. 31 C.F.R. § 598.206 (2023).

29. *Examining the Effectiveness of the Kingpin Designation Act in the Western Hemisphere: Hearing Before the H. Comm. on Foreign Affs., Subcomm. on the W. Hemisphere*, 115th Cong. 2 (2017) (statement of Eric L. Olson, Deputy Director, Latin American Program, Senior Advisor, Woodrow Wilson Center) [hereinafter Olson, *H. Comm. Statement*].

30. U.S. GOV'T ACCOUNTABILITY OFF., EXAMINING EFFECTIVENESS OF KINGPIN DESIGNATION ACT IN W. HEMISPHERE 12 (2020) [hereinafter GAO, EXAMINING EFFECTIVENESS OF KINGPIN DESIGNATION ACT].

31. *Id.*

32. *Id.*

33. *Id.*

> achieving policy goals inherently requires assessing the manner in which U.S. sanctions are executed, which they said is beyond the legal and policy authorities of the U.S. Intelligence Community. As a result, any analysis done by the Intelligence Community does not assess whether sanctions are meeting policy goals.[34]

Agencies are also not required to conduct a risk impact analysis (RIA) and cost-benefit analysis (CBA) before new sanctions are imposed. Sanctions are viewed differently than regulations. Components of federal agencies with regulatory responsibilities are required under Executive Order 12866[35] and Circular A-4[36] to "determine the nature and significance of the underlying problems the government seeks to address and devise alternative solutions before the regulations are issued."[37] Normally, RIAs include assessments of the costs and benefits of the regulation and of alternatives, as well as a cost-effectiveness analysis and distributional analysis.[38]

It is also unlikely that the Federal Government can conduct thorough RIAs or CBAs on its sanctions programs at this time, due to the way agencies collect and report information on their expenditures related to sanctions implementation, management, and enforcement. One GAO assessment published in March 2020 on government funding related to economic sanctions suggests that some of the thirteen federal agencies and their sub-units that have been allocated funds for sanctions implementation and enforcement do not break out the costs associated with administering and enforcing the various sanctions programs in their budgets.[39] These agencies include the Departments of Treasury, Commerce, State, Energy, Justice, and Defense, and a myriad of U.S. financial regulators, such as the Securities and Exchange Commission.[40]

Moreover, the GAO has found in two assessments that the agencies submit incomplete expenditure information in reports that must

34. *Id.* at 18 n.21.

35. Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

36. Circular A-4, Regulatory Analysis, 68 Fed. Reg. 58,366 (Oct. 9, 2003).

37. *Id.*

38. *Id.*

39. U.S. GOV'T ACCOUNTABILITY OFF., ECONOMIC SANCTIONS: TREASURY AND STATE HAVE RECEIVED INCREASED RESOURCES FOR SANCTIONS IMPLEMENTATION BUT FACE HIRING CHALLENGES 73 (2020) [hereinafter GAO, ECONOMIC SANCTIONS: TREASURY AND STATE INCREASED RESOURCES].

40. *Id*. at 73–75.

be submitted to Congress under IEEPA, NEA, and the Kingpin Act.[41] For example:

> [A]ccording to State's most recent NEA reports, no specific State expenditures were directly attributable to the exercise of authorities conferred by the declaration of a national emergency under the NEA during the reporting period. In previous reviews, we [GAO] and Treasury's Office of Inspector General have found weaknesses in the consistency and timeliness of OFAC reports mandated by the Kingpin Act and the TSRA, respectively.[42]

Because agencies do not complete RIAs before implementing new sanctions, policymakers tend to minimize the direct and indirect costs associated with sanctions programs both for the government and the private sector. At a minimum, the total annual cost of implementing and enforcing sanctions based on an estimated total cost of labor for the roughly 1,000 civil servants needed to implement and enforce sanctions imposed by the United States equals about $239 million based on reports by the GAO and other U.S. Government information.[43] The costs associated with purchasing and maintaining the necessary open-source data and software needed to identify and mitigate risks related to sanctioned countries, entities, and individuals cannot be gleaned based on public information. These datasets and analytic tools are essential to be able to investigate individuals and their criminal networks and evaluate if the networks have been dismantled.

In comparison, financial institutions and multinational corporations spend tens of billions of dollars each year to meet sanctions-related requirements and cover the costs of penalties for failing to adhere to U.S. sanctions.[44] One survey published by LexisNexis Risk

41. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-112, COUNTERNARCOTICS: TREASURY REPORTS SOME RESULTS FROM DESIGNATING DRUG KINGPINS, BUT SHOULD IMPROVE INFORMATION ON AGENCIES' EXPENDITURES 25–34 (2019).

42. GAO, ECONOMIC SANCTIONS: TREASURY AND STATE INCREASED RESOURCES, *supra* note 39, at 27–28.

43. One rough estimate for the total cost of implementing and enforcing sanctions could be calculated based on an estimated total cost of labor for the roughly 1,000 civil servants needed to implement and enforce sanctions imposed by the United States equals about $239 million based on a study by the 2020 GAO and a review of other U.S. Government information. Adapted from the methodology used by U.S. Government contractors to calculate labor rates. The estimated total direct and indirect cost of 1,000 DC-based FTE at the GS-13 Step 3 salary standard government contractor formula equals $119,482 multiplied by 2 to factor in benefits, taxes, G&A, and overhead.

44. *See* Kerry B. Contini & Meghan Hamilton, *Annual Increase in Civil Monetary Penalties for US Treasury, State, and Commerce Departments*, BAKER

Solutions estimates U.S. financial institutions spent $45.9 billion on financial crimes compliance in 2022, which includes but is not limited to spending on sanctions monitoring and other anti-money laundering (AML) and combatting the financing of terrorism (CFT) programs.[45] This figure includes personnel, training, and technology costs associated with compliance, as well as the cost to purchase key datasets and watchlists. The cost of compliance at U.S. financial institutions only continues to rise. LexisNexis estimates an increase of 14.8 percent in 2022 alone due in part to greater screening for politically exposed persons and sanctions against Russia, including targeted blocking sanctions and trade and export restrictions.[46] Failure to comply is also expensive; in 2022, OFAC fined sixteen companies nearly $43 million in civil penalties.[47]

## IV. THE BLUNTEST TOOL IN THE POLICY TOOLBOX

Despite policymakers' perception that sanctions have a high rate of efficacy and effectiveness, numerous academic and government assessments published since 1990 have concluded that the effectiveness of economic and financial sanctions is mixed. Most indicate that sanctions fail to meet their stated objectives.[48]

Some empirical studies focusing on sanctions suggest that sanctions failed to meet their intended objectives or change their targets' behavior in about fifty-nine to ninety-five percent of the time.[49] For

MCKENZIE (Feb. 14, 2022), https://sanctionsnews.bakermckenzie.com/annual-increase-in-civil-monetary-penalties-for-us-treasury-state-and-commerce-departments-4/.

45. *Answer Escalating Cost and Regulatory Pressures with Insights from Our 2022 Study*, LEXISNEXIS, https://risk.lexisnexis.com/insights-resources/research/true-cost-of-financial-crime-compliance-study-for-the-united-states-and-canada (last visited Mar. 19, 2023). LexisNexis projected $45.9 billion in spending for 2022 based on survey responses from U.S. financial institutions. *Id.*

46. *Id.* at 6, 9.

47. *Civil Penalties and Enforcement Information*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/civil-penalties-and-enforcement-information (last visited Mar. 19, 2023).

48. *See, e.g.*, Gary Clyde Hufbauer & Megan Hogan, *How Effective are Sanctions Against Russia?*, PETERSON INST. FOR INT'L ECONS. (Mar. 16, 2022), https://www.piie.com/blogs/realtime-economic-issues-watch/how-effective-are-sanctions-against-russia (arguing that the effectiveness of sanctions against Russia for invading Ukraine is mixed and sanctions had failed to rehabilitate Russia). Other studies cited in the bibliography use alternative methodologies and show success rates ranging from five to forty percent.

49. Kimberly Ann Elliott, *Evidence on the Costs and Benefits of Economic Sanctions,* PETERSON INST. FOR INT'L ECONS. (Oct. 23, 1997),

example, Kimberly Ann Elliott, former visiting fellow at the Peterson Institute of International Economics, told Congress in October of 1997 that between 1970 and 1990, unilateral U.S. economic sanctions achieved foreign policy goals in only 13 percent of the cases where they have been imposed.[50] Similar studies have demonstrated that 5–40 percent of sanctions regimes only worked in part, though not necessarily fully achieving their stated goals. By the mid-2010s the average efficacy of sanctions had dropped below 20 percent.[51]

Indeed, even the GAO suggested in two reports, one in 1992 and the aforementioned 2019 report, that sanctions are not a panacea and their effectiveness is mixed.[52] According to the 1992 report by the GAO:

> Sanctions can be imposed to serve multiple goals. The measures are more successful in achieving the less ambitious and often unarticulated goals of (1) upholding international norms by punishing the target nation for unacceptable behavior and (2) deterring future objectionable actions. However, they are usually less successful in achieving the most prominently stated goal of making the target country comply with the sanctioning nation's stated wishes. Thus, excessive expectations are often formed about what sanctions can achieve.[53]

Recent studies are more positive about the effectiveness and efficacy of targeted sanctions, where in 2016, a study by Elizabeth Rosenberg and her colleagues at the Center for New American Security, concluded financial sanctions were more effective than the results

https://www.piie.com/commentary/testimonies/evidence-costs-and-benefits-economic-sanctions#note2.

50. *Id.*

51. *See id.*; Kiril Rogov, *Understanding Sanctions Properly*, WILSON CTR. (July 29, 2022), https://www.wilsoncenter.org/blog-post/understanding-sanctions-properly; Agathe Demarais, *The End of the Age of Sanctions? How America's Adversaries Shielded Themselves*, FOREIGN AFFS. (Dec. 27, 2022), https://www.foreignaffairs.com/united-states/end-age-sanctions (arguing that rogue nations have begun to harden their states against US sanctions through bilateral currency swaps, developing non-Western payment systems, and using digital currency).

52. U.S. GOV'T ACCOUNTABILITY OFFICE, ECONOMIC SANCTIONS: EFFECTIVENESS AS TOOLS OF FOREIGN POLICY 2, 4, 5, 21 (1992) [hereinafter GAO, ECONOMIC SANCTIONS: EFFECTIVENESS AS TOOLS]; GAO, EXAMINING EFFECTIVENESS OF KINGPIN DESIGNATION ACT, *supra* note 30, at 19.

53. GAO, ECONOMIC SANCTIONS: EFFECTIVENESS AS TOOLS, *supra* note 52 at 2.

from older studies would suggest.[54] They found that sanctioned countries do not suffer significant lost economic growth or greater inflation, but do face significantly elevated levels of political risk, lower economic investment, and higher levels of corruption.[55] Another study by the State Department in 2018 on the economic impact of targeted sanctions imposed by the U.S. and E.U. against Russia found targeted sanctions against Russian companies or associated companies had a significant impact.[56] A targeted firm "lost about one-third of its operating revenue, over one-half of its asset value, and about one-third of its employees relative to their non-sanctioned peers."[57]

In 2021, Treasury announced the results of a review that it said was intended "to ensure that economic and financial sanctions remain an effective tool of U.S. national security and foreign policy now and in the future."[58] Treasury stated it did not include an assessment of the efficacy and effectiveness of the thirty-seven existing sanctions programs, 12,000 SDN designations and nearly 3,000 delistings administered and enforced by OFAC to determine whether economic and financial sanctions are, in fact, effective.[59] Rather, Treasury focused on how it could improve its sanctions policy framework and make operational, structural, and procedural changes that could improve Treasury's ability to use sanctions.[60] Addressing a collateral issue, postpones at best, and denies at worst, the main thrust of sanctions analysis: is the sanction ordered effective in achieving its purpose?

## V. DETERMINING IF SANCTIONS WORK

Given the Executive Branch's reluctance to conduct comprehensive, data-driven reviews of the efficacy of existing sanctions, Congress may need to force the issue as part of its oversight of U.S. sanctions policy. This issue was alluded to in a Congressional Research Service paper published in December 2022 on *The Economic Impact*

54. ELIZABETH ROSENBERG, ET AL., CTR. FOR A NEW AM. SEC., THE NEW TOOLS OF ECONOMIC WARFARE: EFFECTS AND EFFECTIVENESS OF CONTEMPORARY U.S. FINANCIAL SANCTIONS (2016).

55. *Id.* at 3.

56. Mark Stone, *The Response of Russian Security Prices to Economic Sanctions: Policy Effectiveness and Transmission*, (U.S. Dep't of State, Working Paper No. 2017-02, 2016).

57. Daniel P Ahn & Rodney Ludema, *Measuring Smartness: Understanding the Economic Impact of Targeted Sanctions* (U.S. Dep't of State, Working Paper No. 2017-01, 2016).

58. 2021 SANCTIONS REVIEW, *supra* note 22, at 3.

59. *Id*.

60. *Id*. at 4–7.

*of Russia Sanctions*.[61] Some key questions noted by the author that need to be addressed highlighted in the CRS paper include:

- What is the ultimate goal of sanctions on Russia?
- Are the sanctions advancing the United States and allies towards these goals?
- Are decision-makers in Russia responsive to economic pressure?
- Are more sanctions needed?
- Under what conditions should sanctions be lifted?
- How long can the United States sustain multilateral cooperation on sanctions?
- What would be the consequences of weakened cooperation?
- Should the United States provide economic support to U.S. companies and industries affected by sanctions?
- How should the United States engage with countries increasing economic engagement with Russia?
- Should Congress codify sanctions implemented through executive orders?[62]

Congress could ensure that administrations answer these questions by holding the agencies accountable and enforce existing statutory requirements that mandate the Treasury Department and other agencies report their expenditures related to sanctions. Congress could also amend IEEPA, NEA, and the Kingpin Act to require the Executive agencies report additional information related to the intended sanction's efficacy, effectiveness, and costs on an annual basis. Currently, administrations must notify Congress why the President believes sanctions are a necessary response to counter an extraordinary threat.[63] The administration is not required to provide information on sanctions' objectives, risks, costs to the private sector, or their likely unintended consequences.[64]

A good start would be to require administrations to include RIAs with consistent information on the agencies' expenditures in their annual reports for each targeted and comprehensive sanction program. The reports should include a clear articulation of objectives and

61. *See* NELSON, *supra* note 25.
62. *Id.* at 2.
63. *See* 50 U.S.C. § 1703 (IEEPA congressional notice provision).
64. *See id.*; *see generally* Andrew Boyle, *Reigning in the President's Sanction Powers*, BRENNAN CTR. FOR JUST. (Aug. 4, 2021), https://www.brennancenter.org/our-work/analysis-opinion/reining-presidents-sanctions-powers.

information on how the Treasury Department would measure success or failure, including metrics to monitor the sanctions' performance over time.

## VI. DEVISING NEW OPTIONS

Requiring administrations to develop and track metrics to monitor the success or failure of each designation or sanctions program is essential. The use of metrics—such as changes in GDP of the target country, the number of Suspicious Activity Reports filed with FinCEN, or the amount of assets seized for each designated individual or entity—would enable agencies and Congress to make better informed judgements. Moreover, metrics would enable policymakers to determine if a sanctions action is too risky or costly to the U.S. economy, allies, or the target. For example, the use of metrics may help agencies determine why unilateral and multilateral sanctions levied against North Korea over the past two decades have failed to hinder Pyongyang's ability to gain funds to develop nuclear weapons and ballistic missile capabilities.[65] This is also true for sanctions targeting individuals and entities; as the Woodrow Wilson Center's Eric Olson stated before Congress in 2017, "[q]uestions that must be answered include whether the Kingpin Act is effectively dismantling criminal organizations or simply splitting them up and fragmenting them."[66]

In addition to metrics, Congress could require the Treasury Department and other agencies to consider alternatives, or whether there are other existing policy tools that could be amended to meet foreign policy or national security goals more effectively. Devising new or adapting existing tools will be necessary as illicit actors develop new ways to evade sanctions in a rapidly evolving traditional finance and crypto ecosystems.

For example, an alternative approach to disrupt foreign governmental practice is to rethink what is an asset, and to employ vigorous civil "in rem" summary forfeiture actions against specific targets. Summary asset forfeiture is an underemployed tool that could achieve measurable results for succeeding administrations and illustrate value up front and in real time if amended. The mechanism employed is the "in rem" or civil forfeiture process. In the Asset Forfeiture Policy Manual (2021) the definition of a complex asset is set forth as "vessels

65. Kelsey Davenport, *Chronology of U.S. North Korean Nuclear and Missile Diplomacy*, ARMS CONTROL ASS'N (last reviewed Apr. 2022), https://www.armscontrol.org/factsheets/dprkchron.

66. Olson, *H. Comm. Statement, supra* note 29.

in excess of 1 million dollars are considered complex assets that require prior notification and consultation with the Money Laundering and Asset Recovery Section (MLARS)."[67] This definition is woefully inadequate to today's asset accumulation mechanics and practices. For instance, while seizing a yacht may make for great television, seizing the processes (computer networks) or premises (commercial real estate titles or leases contracts) through which the yacht was purchased represent a significant disruption to the targeted individual or agency.

In rem seizure practice does not have to be conducted hand-in-hand with criminal investigation. It may proceed on its own, and in many cases, it is a precursor to criminal investigation. The leads and individuals identified by the forfeiture practice often result in criminal prosecutions. Significantly, in rem forfeiture could be accomplished initially without alerting the target until after the property has been taken. Concurrently, understanding the role of civil forfeiture in determining what is an available asset to be seized would enhance measurable policy objectives.

The outsourcing of traditional governmental activities to third parties, particularly in the expansion of money laundering and terrorist financing by foreign governments, has required internet assets and neo-capital banking assets that do not fall squarely within the definition of complex assets.[68] Real property, bank accounts, and commercial proceeds are only some of the materials that are employed by foreign governments for hiding, financing, or protecting sources and operations.[69] As evidenced by the fall of FTX, entire billion-dollar multi-national businesses operate and proliferate in virtual spaces.[70] Moreover, they are capable of non-traditional bill paying practices and vendor agreements through the aggressive use of chatroom money or cryptocurrency transfers.

67. U.S. DEP'T OF JUST., ASSET FORFEITURE POLICY MANUAL 4 (2021).

68. *Id.* at 1.

69. Brenda Medina, *Are Oligarchs Hiding Money in U.S. Real Estate? Ownership Information is a Missing Link, Research Says*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 1, 2022), https://www.icij.org/investigations/panama-papers/are-oligarchs-hiding-money-in-us-real-estate-ownership-information-is-a-missing-link-research-says/.

70. Press Release, SEC, SEC Charges Samuel Bankman-Fried with Defrauding Investors in Crypto Asset Trading Platform FTX (Dec. 13, 2022) (available at https://www.sec.gov/news/press-release/2022-219).

## CONCLUSION

Greater Congressional oversight that forces federal agencies to better manage existing and new sanctions programs will ensure that the benefits and impact of the most recent targeted and comprehensive sanctions are worth the downside risks to the global economy and rising compliance costs for the U.S. private sector. A plethora of empirical studies by academia and the government indicate that sanctions' effectiveness as a foreign policy tool is mixed, at best, and there is ample room to improve the way administrations use them to penalize illicit actors or countries or change their behavior to align with U.S. interests.