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Due Process & Economic Sanctions

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Due Process & Economic Sanctions



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Wake Forest University – November 11, 2022

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Personal Introduction

- > 25 years as international lawyer, mainly international trade and investment
- Started career at US Treasury, long experience at top global firms
- Former law professor
- Current focus mainly sanctions (OFAC) and investment reviews (CFIUS)
- Boutique firm with international focus



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No person shall ... be deprived of life, liberty, or property, without due process of law....

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Summary

- ▣ Due process issues re imposing and removing sanctions
- ▣ Due process should be robust
- ▣ Other due process considerations

This talk is only a summary.
It does not substitute for obtaining proper legal advice.

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Sanctioned Persons & Due Process

Part 1

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OFAC Overview

- ▣ Treasury's Office of Foreign Assets Control
- ▣ Main statute – IEEPA
 - ▣ International Emergency Economic Powers Act
- ▣ Main targets today
 - ▣ Cuba, Iran, North Korea, Russia & 3 regions of Ukraine, Syria, Venezuela. +Nicaragua moving up?
 - ▣ **SDN List and 50% Rule**
- ▣ Details vary widely and can change without notice

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Two Main Types of Sanctions

Primary Sanctions

- ▣ Violations punished by criminal prosecution and civil penalties
- ▣ Mainly restrict activities by US persons, but with important applications to non-US persons
- ▣ Targets may be states or **specific persons**
 - ▣ **SDN List**

Secondary Sanctions

- ▣ Economic "sticks" to encourage 3d-country companies to avoid business with sanctioned countries and persons
 - ▣ Often "menu-based"
- ▣ Biggest "stick": Asset freeze and near-total bar on doing business with US
 - ▣ **SDN List**

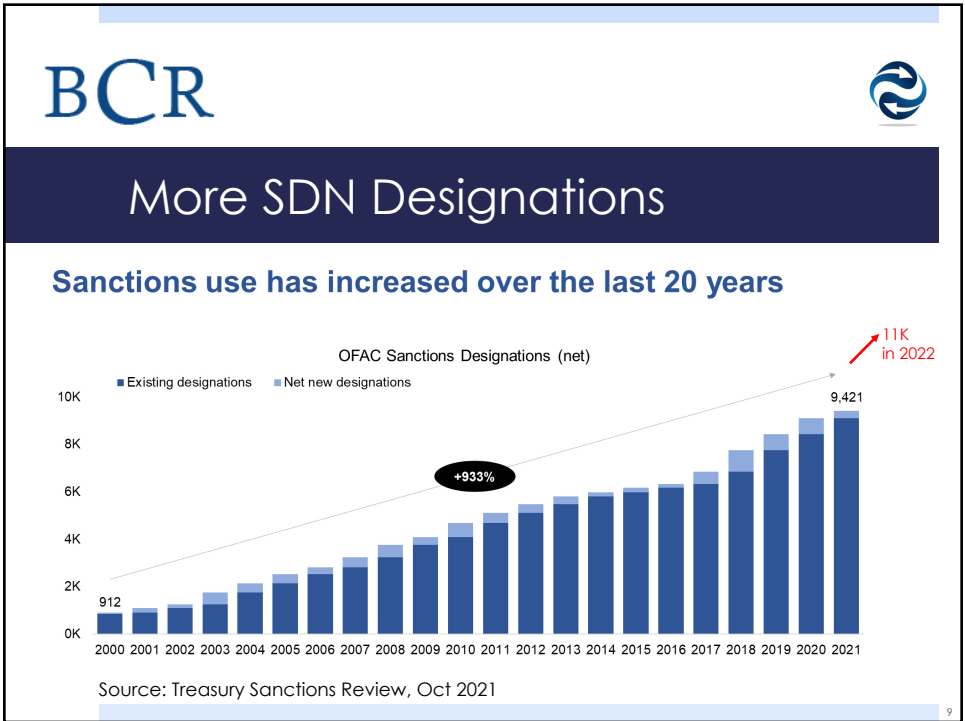
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Specially Designated Nationals and Blocked Persons (SDNs)

- ▣ US persons (and sometimes foreign subsidiaries) are prohibited from virtually all dealings with SDNs – except with an OFAC license
- ▣ Assets blocked
- ▣ May be designated for numerous reasons
- ▣ Sanctions apply to entities 50% or more owned by SDNs
 - ▣ Direct or indirect, single or cumulative
- ▣ Can be designated as SDN for engaging in significant transactions with some SDNs, including Russia-related SDNs
 - ▣ Families too

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SDNs in the United States

- 72 SDNs
 - 59 entities
 - 12 individuals
 - 1 aircraft
- But wait, there's more:
 - The 50% Rule**
 - Citgo has >5000 employees & contractors, 3 refineries, 6 pipelines, >4000 branded gas stations
 - All depend on OFAC license



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Salah v Treasury, Complaint (2012)

- ▣ US citizen in Illinois
- ▣ Pled guilty in Israel to aiding Hamas when legal in US
- ▣ Needed OFAC licenses to work, shop, get medical care
 - ▣ A "living license"
 - ▣ Generally granted, but with problems
- ▣ Denied licenses to donate to charity and travel to Mecca
- ▣ Lasted 17 years – ended same day OFAC had to respond to his complaint



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Listing Process


- ▣ Wide discretion "to further the President's geopolitical goals" (*Deripaska v Yellen*)
- ▣ Administrative process
 - ▣ May consider press reports, hearsay, classified information
 - ▣ "Reason to believe" standard
 - ▣ Confidential evidentiary memorandum
- ▣ No advance notice
 - ▣ *Matthews v Eldridge*

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OFAC Can Make Mistakes




Alessandro Bazzoni



"I thought it was a joke"

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Delisting Process

- ▣ Wide discretion again, part of foreign policy again
- ▣ Administrative procedure
- ▣ "Petitioners must establish that delisting is appropriate...."
 - ▣ Typically prove mistake or change of behavior
- ▣ No deadline - often takes years
- ▣ May be multiple rounds of questions
- ▣ May be politically sensitive
 - ▣ CAATSA requires advance notice to Congress

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Litigation vs OFAC

- 106 cases since 2000:
 - Mean <5 cases pa, median is 4 cases pa
 - Surge 2018-20 (12, 17, 14 cases)
 - Reversion to the mean in 2021-22 (4, 7 cases)

- Many cases concern delistings
 - Major issues include:
 - Delay
 - Access to evidentiary record
 - Chevron+ deference

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Due Process in SDN Cases

Some access to record

- OFAC argued that press release provided "sufficient information from which [the SDN] could guess OFAC's reasons"
- No - "the opportunity to guess at the factual and legal bases for a government action does not substitute for actual notice of the government's intentions."

But limited


No disclosure of classified evidence because "extreme importance of maintaining national security" outweighed concerns that "use of undisclosed information will violate due process because of the risk of error."

May give summary instead, or show record to the court *ex parte*.

Al Haramain Islamic Fdn v Treasury, 9th Cir. 2011

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Other Examples

Epsilon Electronics (DC Cir 2017)


- ▣ Won APA, lost DP
- ▣ Partially overturned \$4MM penalty because OFAC failed to consider some evidence adequately
- ▣ Judge Silberman would have overturned whole “confusing, indeed mystifying, decision”

ExxonMobil (ND Tex 2019)

- ▣ Won DP for lack of fair notice about scope of prohibition
 - ▣ Fact intensive
- ▣ Overturned \$2MM penalty
- ▣ Did not rule on the scope of the prohibition against exporting services

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Due Process Should be Robust

Part 2


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US v Verdugo-Urquidez (1990)


Plurality



- [A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country
- That text [4th Amendment], by contrast with the Fifth and Sixth Amendments, extends its reach only to "the people"

"The right of the people to be secure...."

Concurrence



- I cannot place any weight on the reference to "the people" in the Fourth Amendment as a source of restricting its protections.
- I do not mean to imply, and the Court has not decided, that persons in the position of the respondent have no constitutional protection.... All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant.

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Agency for Int'l Development v. Open Society (2020)



- [L]ong settled as a matter of American constitutional law that foreign citizens outside US territory do not possess rights under the US Constitution
- [B]edrock principle[] of American law
- Cites include Boumediene, Hamdi (Scalia dissent), Verdugo-Urquidez, Eisentrager, "US Const., Preamble"


Dissent



- That sweeping assertion is neither relevant to this case nor correct on the law.
- The majority's blanket assertion about the extraterritorial reach of our Constitution does not reflect the current state of the law.... [T]his Court has studiously avoided establishing an absolute rule that forecloses that protection in all circumstances.

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OFAC Cases Denying Due Process

- Erich Ferrari:
 - Fulmen v. OFAC* (DDC 2020) “opened the flood gates and provided a path for other courts to follow in denying constitutional rights to SDNs contesting their OFAC designations”
- Examples include Rakhimov, Bazzi, Deripaska
 - No substantial connections
- I have not yet seen OFAC cases following *AID*

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Is this the law today?



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Thor Heyerdahl

“Borders? I have never seen one. But I have heard they exist in the minds of some people.”

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Ex Parte Milligan (1866)





The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection **all classes of men**, at all times and under all circumstances.



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Due Process is a Human Right

Art 8 - Everyone has the **right to an effective remedy by the competent national tribunals** for acts violating the fundamental rights granted him by the constitution or by law.

Art 10 - Everyone is entitled in **full equality to a fair and public hearing by an independent and impartial tribunal**, in the determination of his rights and obligations and of **any criminal charge** against him.

Art 11.1 - Everyone charged with a **penal offence** has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had **all the guarantees necessary for his defence**.

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US-Iran Treaty of Amity (1955-2018)

Art III.2 - Nationals and companies of either High Contracting Party shall have **freedom of access to the courts of justice** and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that **prompt and impartial justice be done**. Such access shall be allowed, in any event, upon **terms no less favorable than those applicable to nationals** and companies of such other High Contracting Party or of any third country....

Art IV.1 - Each High Contracting Party shall at all times accord **fair and equitable treatment** to nationals and companies of the other High Contracting Party ... [and] shall **refrain from applying unreasonable or discriminatory measures** that would impair their legally acquired rights and interests....

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Less Due Process in the US?

- Yassin Kadi designated in multiple jurisdictions based on allegations related to financing terrorism
- Successfully appealed to European Court of Justice
- Also delisted by UN
- Argued that the US courts should consider “vindication” elsewhere into account for his challenge to the sufficiency of OFAC’s evidence
- “[T]hese decisions may have been reached under different standards of proof or review, which further undermines any persuasiveness they would have.” (Kadi v Geithner, DDC 2012)



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Other Due Process Considerations

Part 3

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Certain Legal Services are Licensed

- ▣ Legal advice and counseling on the requirements of and compliance with US laws, unless given to facilitate sanctioned transactions
- ▣ Representation of defendants in US cases
- ▣ Initiation and conduct of US cases
- ▣ Representation before US court or agency re: imposition, administration, or enforcement of US sanctions
- ▣ Legal services in any other context in which prevailing US law requires access to legal counsel at public expense

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Payment for Legal Services


Authorized from funds originating outside the United States, provided that the funds do not originate from:

- ▣ A source within the United States;
- ▣ Any source, wherever located, within the possession or control of a U.S. person; or
- ▣ Any [blocked] individual or entity, other than the [client]

Common but not universal, and some variations exist

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Legal Services scorecard

- ▣ Good and valuable
- ▣ Positive trends
- ▣ Supplemented by helpful attitude by Licensing Office

But

- ▣ Some inconsistencies
- ▣ Reports, including engagement letters
- ▣ Some problems with trust funds
- ▣ Increasing challenges with **bank derisking**

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Private Sector Challenges

- ▣ Derisking
- ▣ Lack of access to information
- ▣ Compliance databases



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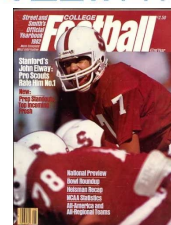
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Sandra Cortez v Trans Union

- US citizen in Colorado could not buy a car because of an OFAC alert on her credit report
 - Told to wait for FBI
- TransUnion had not disclosed the alert to her in advance, and did not move promptly to fix it
- Ongoing problems, including with her landlord
- \$50K compensatory damages and \$100K punitive under Fair Credit Reporting Act
 - Down from \$750K by jury – Due Process!

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Thank you!

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