

Facilitating Humanitarian Aid Amid Sanctions

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The sanctions imposed against Russia after its 2022 invasion of Ukraine were historic in their scope and coordinated nature across multiple jurisdictions. These sanctions, however, posed the same challenge that had accompanied other wide-ranging sanctions programs in the past: ensuring that the sanctions did not impact the supply of food, medicines and medical devices, or otherwise trigger disastrous human consequences. Ensuring humanitarian aid to Ukraine became deeply important following the invasion, as the invasion itself created a massive need for humanitarian assistance within Ukraine and to Ukrainian refugees. Minimizing sanctions' impact on humanitarian assistance is also important to improve the situation of other heavily-sanctioned areas around the world, which have faced suffering where the large-scale presence of sanctions dissuades parties from the supply of essential humanitarian items and services to those areas. This Essay analyzes the efforts made by the United Nations, the European Union, the United States, and other jurisdictions following the imposition of the 2022 sanctions against Russia to help promote the continued flow of humanitarian aid to Ukraine and to improve the provision of humanitarian assistance around the world.

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I. INTRODUCTION

The economic response to the Russian invasion of Ukraine in early 2022 was massive. Numerous nations joined in the imposition of sanctions against individuals and entities both inside and outside Russia.¹ They did so to cut off portions of financial resources that could be used to further support and sustain Russia's war effort; to undercut political support for the invasion, particularly among influential oligarchs close to Putin's regime; and to make a symbolic statement about the importance of international law, the rule of law, and Ukraine's territorial sovereignty that had been violated by the Russian invasion.²

Yet this sanctions effort faced the same problem inherent to other sanctions regimes: ensuring that the imposition of sanctions does not trigger tragic humanitarian consequences. To counter that issue, the sanctioning jurisdictions created sanctions provisions with exemptions for goods, services, and funds for humanitarian activities, much as other sanctions regimes had been structured in the past.³ The sanctioning powers also issued guidance to clarify those humanitarian exemptions, and they modified existing legal frameworks to better facilitate humanitarian activities in other areas of the world also subject to sanctions.⁴ This Essay analyzes these measures taken by the coalition of

¹ Scott R. Anderson et al., *What Sanctions Has the World Put on Russia?*, LAWFARE (Mar. 4, 2022), <https://www.lawfaremedia.org/article/what-sanctions-has-world-put-russia> [<https://perma.cc/7E3R-BTJU>].

² See Press Release, U.S. Dep't of the Treasury, Treasury Prohibits Transactions with Central Bank of Russia and Imposes Sanctions on Key Sources of Russia's Wealth (Feb. 28, 2022), <https://home.treasury.gov/news/press-releases/jy0612> [<https://perma.cc/7Z7A-Z949>]; Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Kremlin Elites, Leaders, Oligarchs, and Family for Enabling Putin's War Against Ukraine (Mar. 11, 2022), <https://home.treasury.gov/news/press-releases/jy0650> [<https://perma.cc/UW9K-RYFB>]; Press Release, U.S. Dep't of the Treasury, U.S. Treasury Announces Unprecedented & Expansive Sanctions Against Russia, Imposing Swift and Severe Economic Costs (Feb. 24, 2022), <https://home.treasury.gov/news/press-releases/jy0608> [<https://perma.cc/AH5D-NW2G>]; Press Release, U.S. Dep't of the Treasury, U.S. Treasury Imposes Immediate Economic Costs in Response to Actions in the Donetsk and Luhansk Regions (Feb. 22, 2022), <https://home.treasury.gov/news/press-releases/jy0602> [<https://perma.cc/74MW-EYQU>].

³ See generally 31 C.F.R. § 589.250 (2022); Press Release, U.S. Dep't of the Treasury, Fact Sheet: Provision of Humanitarian Assistance and Trade to Combat COVID-19, U.S. EMBASSY IN VENEZ. (Apr. 16, 2020), <https://ve.usembassy.gov/fact-sheet-provision-of-humanitarian-assistance-and-trade-to-combat-covid-19/> [<https://perma.cc/SQM7-SXSA>] ("The sanctions programs administered by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) generally allow for legitimate humanitarian-related trade, assistance, or activity under existing laws and regulations.")

⁴ See, e.g., Caroline Crystal, *Landmark UN Humanitarian Sanctions Exemption Is a Massive Win but Needs More Support*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Mar. 20,

sanctioning nations to encourage the continued flow of humanitarian aid to Ukraine and around the world.

II. THE SANCTIONS IMPOSED IN RESPONSE TO RUSSIA'S 2022 INVASION OF UKRAINE AND HUMANITARIAN NEEDS

A. *The Sanctions Imposed Following Russia's Invasion of Ukraine*

Following the Russian invasion of Ukraine in early 2022, numerous rounds of sanctions, extensive in their scope, were imposed in coordination by multiple nations against targets mostly in Russia.⁵ Other sanctions targeted Belarus for its support of Russia, including through financial and military support.⁶ Later sanctions expanded to target more non-Russian parties who had supported the invasion in some way.⁷ Sanctioning jurisdictions included the European Union, the United States, the United Kingdom, Japan, South Korea, Canada, Australia, and others.⁸ The United Nations did not impose sanctions on Russia, although the United Nations does in fact impose sanctions and maintains multiple sanctions regimes against other targets, as for example against North Korea.⁹ United Nations sanctions, however, are implemented through resolutions of the

2023), <https://carnegieendowment.org/2023/03/20/landmark-un-humanitarian-sanctions-exemption-is-massive-win-but-needs-more-support-pub-89311> [<https://perma.cc/7SXR-DZPN>].

⁵ Stephen Cecchetti, Kermit L. Schoenholtz, & Richard Berner, *Russian Sanctions: Some Questions and Answers*, VOXEU (Mar. 21, 2022) <https://cepr.org/voxeu/columns/russian-sanctions-some-questions-and-answers> (on file with the *Ohio State Law Journal*).

⁶ Press Release, U.S. Dep't of the Treasury, U.S. Treasury Targets Belarusian Support for Russian Invasion of Ukr. (Feb. 24, 2022), <https://home.treasury.gov/news/press-releases/jy0607> [<https://perma.cc/7RBN-UNB7>]; Press Release, European Council, Belarus's Role in the Russian Military Aggression of Ukraine: Council Imposes Sanctions on Additional 22 Individuals and Further Restrictions on Trade (Mar. 2, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/03/02/belarus-role-in-the-russian-military-aggression-of-ukraine-council-imposes-sanctions-on-additional-22-individuals-and-further-restrictions-on-trade> (on file with the *Ohio State Law Journal*).

⁷ Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Iranian Persons Involved in Production of Unmanned Aerial Vehicles and Weapon Shipment to Russia (Sept. 8, 2022), <https://home.treasury.gov/news/press-releases/jy0940> [<https://perma.cc/B5U4-E4GK>].

⁸ CORY WELT, CONG. RSCH. SERV., IN11869, RUSSIA'S WAR AGAINST UKRAINE: OVERVIEW OF U.S. SANCTIONS AND OTHER RESPONSES 3 (2022).

⁹ Patrick Butchard, *The UN General Assembly Condemns Russia: But What Can It Actually Do?*, UK PARLIAMENT (Oct. 14, 2022), <https://commonslibrary.parliament.uk/the-un-general-assembly-condemns-russia-but-what-can-it-actually-do/> (on file with the *Ohio State Law Journal*); Thomas Dörfler, *The Effect of Expert Recommendations on Intergovernmental Decision-Making: North Korea, Iran, and Non-Proliferation Sanctions in the Security Council*, 36 INT'L RELS. 237, 237 (2022).

Security Council, of which Russia is a permanent member.¹⁰ As would be expected, Russia has vetoed on multiple occasions proposed Security Council resolutions condemning its invasion of Ukraine, and thus the United Nations has not imposed sanctions against Russia on this basis.¹¹

But even without the presence of United Nations sanctions, the sanctions implemented by the multiple jurisdictions mentioned have had far-reaching effects, both on their Russian targets themselves and on third parties around the world. The sanctions imposed by the United States have had a particularly wide-reaching impact, due to the widespread use of the dollar in world trade and as a global reserve currency.¹² The U.S. office in charge of sanctions administration and enforcement, the Office of Foreign Assets Control (OFAC) within the U.S. Department of the Treasury, has brought enforcement actions in the past for violations of the U.S. sanctions regulations by non-U.S. parties, based on their use of the U.S. dollar.¹³ Because U.S. dollar clearing and settlement activities very often involve U.S. financial institutions, the use of the U.S. dollar very commonly carries with it the application of U.S. sanctions extraterritorially (that is, in this context, to non-U.S. parties outside of the United States).¹⁴ Thus U.S. sanctions may prevent non-U.S. parties from engaging in U.S. dollar-denominated transactions with U.S.-sanctioned parties.

The broad effects of the 2022 sanctions are also due to the fact that a huge number of targets were named by multiple jurisdictions.¹⁵ So while Russia is technically not a comprehensively sanctioned jurisdiction in the same way that North Korea or Syria are, for example, sanctions affect a significant number of

¹⁰ John Langmore & Jeremy Farrall, *Can Elected Members Make a Difference in the UN Security Council? Australia's Experience in 2013–2014*, 22 GLOB. GOVERNANCE 59, 59 (2016).

¹¹ Ved P. Nanda, *Power Shift: The UN Security Council Has Lost Its Clout*, 55 CASE WESTERN RESV. J. INT'L L. 287, 306–09 (2023).

¹² See generally DANIEL MCDOWELL, BUCKING THE BUCK (2023).

¹³ See, e.g., Press Release, U.S. Dep't of the Treasury, Settlement Agreement Between the U.S. Department of the Treasury's Office of Foreign Assets Control and CSE Global Ltd. and CSE TransTel Pte. Ltd. (July 27, 2017), <https://ofac.treasury.gov/recent-actions/20170727> [<https://perma.cc/72TD-CPSQ>].

¹⁴ Susan Emmenegger & Florence Zuber, *To Infinity and Beyond: U.S. Dollar-Based Jurisdiction in the U.S. Sanctions Context*, 2 SWISS REV. BUS. & FIN. MARKET L., 114, 114 (2022); Christine Abely, *Causing a Sanctions Violation with U.S. Dollars: Differences in Regulatory Language Across OFAC Sanctions Programs*, 48 GA. J. INT'L & COMP. L. 29, 63 (2019).

¹⁵ Press Release, U.S. Dep't of the Treasury, Targeting Key Sectors, Evasion Efforts, and Military Supplies, Treasury Expands and Intensifies Sanctions Against Russia (Feb. 24, 2023), <https://home.treasury.gov/news/press-releases/jy1296> [<https://perma.cc/5UFG-9L2S>] (“Since February 2022, Treasury has implemented more than 2,500 sanctions in response to Russia’s war of choice.”).

economic activities pertaining to Russia.¹⁶ Where sanctions are as extensive in nature as they are with respect to Russia, they can give rise to the occurrence of overcompliance and de-risking (described in further detail herein), which can affect the flow of goods, services, and funds for humanitarian purposes in a country subject to significant sanctions, such as Russia.¹⁷

B. *The Need for Continued Humanitarian Aid*

Humanitarian aid is urgently required in Ukraine. Russia's invasion of Ukraine has caused massive human suffering. As of January 2023, the U.N. Office for the Coordination of Humanitarian Affairs estimated that at least 17.6 million people were in need of humanitarian assistance, including 6.3 internally displaced people (IDPs).¹⁸ Many of the sanctioning nations have pledged millions in humanitarian aid to Ukraine.¹⁹ Some of this aid has come in the form of contributions to international organizations like the World Bank's Ukraine Relief, Recovery, Reconstruction and Reform Trust Fund.²⁰ Other donor-recipient organizations include the Disasters Emergency Committee, and Red

¹⁶ Susan Hannah Allen, *The Uncertain Impact of Sanctions on Russia*, 6 NATURE HUM. BEHAV. 761, 761 (2022) (“Critics note that as targeted sanctions pile up, however, they begin to look more and more like damaging comprehensive sanctions.”).

¹⁷ See *infra* Part III.

¹⁸ U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFFS., HUMANITARIAN NEEDS OVERVIEW: UKRAINE 2023 5 (2023), <https://reliefweb.int/report/ukraine/ukraine-humanitarian-needs-overview-2023-december-2022-enuk> [<https://perma.cc/AS5S-VDWR>] [hereinafter U.N. OCHA].

¹⁹ See, e.g., U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFFS., KOREA TO SEND HUMANITARIAN AID TO UKRAINE (Dec. 11, 2022), <https://reliefweb.int/report/ukraine/korea-send-humanitarian-aid-ukraine> [<https://perma.cc/KX4R-DTZK>]; UK FOREIGN, COMMONWEALTH & DEV. OFF., UK GOVERNMENT'S HUMANITARIAN RESPONSE TO RUSSIA'S INVASION OF UKRAINE (updated Feb. 10, 2023), <https://www.gov.uk/government/publications/uk-governments-humanitarian-response-to-russias-invasion-of-ukraine-facts-and-figures/uk-governments-humanitarian-response-to-russias-invasion-of-ukraine-facts-and-figures> (on file with the *Ohio State Law Journal*) (“The UK is providing £220 million of humanitarian assistance.”); *Economic, Humanitarian and Development Assistance, and Security and Stabilization Support – Russia's Invasion of Ukraine*, GOV'T OF CAN. (Sept. 5, 2023), https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/crisis-crisis/ukraine-dev.aspx?lang=eng#a2 [<https://perma.cc/8LXT-SAHP>] (“Since January 2022, Canada has allocated \$352.5 million in humanitarian assistance to respond to the humanitarian impacts of Russia's invasion in Ukraine and neighboring countries.”).

²⁰ Press Release, World Bank, Japan Contributes \$471 Million to World Bank in Support of Ukraine Relief Efforts (Apr. 21, 2023), <https://www.worldbank.org/en/news/press-release/2023/04/21/japan-contributes-us-471-million-to-the-world-bank-in-support-of-ukraine-relief-efforts> [<https://perma.cc/YPX9-G3KU>].

Cross and U.N. agencies.²¹ According to the United Nations, almost three hundred organizations were contributing to the humanitarian response in Ukraine as of June 2022.²²

Nor is the need for humanitarian aid limited to Ukraine. Humanitarian assistance is also required in Russia itself. The invasion has created new humanitarian needs for Ukrainian refugees located outside of Ukrainian territory. As of July 2022, the United Nations reported that about 1.4 million Ukrainian refugees were located in Russia.²³ Another 9,800 more were located in Belarus, another heavily-sanctioned country.²⁴ Further, the same humanitarian needs that existed in Russia before the 2022 invasion of Ukraine continue to require aid. For example, since before the invasion, Doctors Without Borders worked to combat drug-resistant tuberculosis in Russia, and also partnered with local organizations to address infectious diseases.²⁵

Ensuring an adequate supply of humanitarian aid in Ukraine and Russia is challenged by numerous obstacles. The military campaign itself hinders the safe provision of aid.²⁶ The sanctions imposed to respond to the Russian invasion of Ukraine, even though they did not prohibit the supply of humanitarian aid to Ukraine or Russia, also pose an obstacle to the continued flow of humanitarian aid to the region. This is because the presence of broad sanctions in a particular area may discourage regulated parties from engaging in activities, like the provision of humanitarian aid, that are exempted from the prohibitions.²⁷

III. OVERCOMPLIANCE AND DE-RISKING

The presence of sanctions can stifle the supply of humanitarian aid when parties become concerned about complying with those sanctions. This is especially true when sanctions are broader in nature and enforcement is stringent, raising the probability and potential cost of sanctions violations. In such situations, regulated parties may choose to minimize their sanctions compliance risk by over-complying with existing sanctions.

²¹ UK FOREIGN, COMMONWEALTH & DEV. OFF., *supra* note 19.

²² *Ukraine: Four Months After Russian Invasion, Humanitarian Needs Intensify*, UN NEWS (June 30, 2022), <https://news.un.org/en/story/2022/06/1121702> [<https://perma.cc/KJ7R-GYEV>].

²³ *How Many Ukrainian Refugees Are There and Where Have They Gone?*, BBC (July 4, 2022), <https://www.bbc.com/news/world-60555472> [<https://perma.cc/JF9P-ZL7A>].

²⁴ *Id.*

²⁵ *Russia*, MÉDECINS SANS FRONTIÈRES, <https://www.msf.org/russia> [<https://perma.cc/63SJ-T4CN>].

²⁶ *See Ukraine: Four Months After Russian Invasion, Humanitarian Needs Intensify*, *supra* note 22.

²⁷ Francesco Giumelli, *The Role of For-Profit Actors in Implementing Targeted Sanctions: The Case of the European Union*, in SECURITY PRIVATIZATION 123, 135 (Oldrich Bures & Helena Carrapico eds., 2018).

Overcompliance is the concept that organizations and other parties often take measures that go beyond what is required to conform to regulatory prohibitions such as sanctions.²⁸ De-risking refers to decisions (generally, referring specifically to those made by financial institutions) on the basis of reducing regulatory risk (including sanctions risk but often focused on anti-money laundering and terrorist financing issues), even beyond what is legally required.²⁹ Parties may engage in overcompliance and de-risking for various reasons. These include avoiding risk and minimizing their costs of compliance by engaging in a wholesale withdrawal from business with sanctioned parties or sanctioned regions rather than engaging in detailed analysis to understand the scope of the sanctions restrictions and how their operations interact with sanctions obligations.³⁰ They may also be concerned that sanctions provisions will change in the future, such that their existing operations will run afoul of future sanctions regulations.³¹ Parties may therefore choose to align their current operations in such a way that they will not face future disruptions should new sanctions be enacted.³²

Overcompliance and de-risking have been observed with respect to a number of heavily-sanctioned regions.³³ De-risking by financial institutions has notable consequences. When financial institutions engage in de-risking activities, they pass on their broader interpretation of sanctions prohibitions across wide segments of the economy, given their systemic importance in

²⁸ Emmanuel Breen, *Corporations and US Economic Sanctions: The Dangers of Overcompliance*, in RESEARCH HANDBOOK ON UNILATERAL & EXTRATERRITORIAL SANCTIONS 256, 256 (Charlotte Beaucillon ed., 2021).

²⁹ See TRACEY DURNER & LIAT SHETRET, UNDERSTANDING BANK DE-RISKING AND ITS EFFECTS ON FINANCIAL INCLUSION 2 (Nov. 2015), <https://www.globalcenter.org/resource/understanding-bank-de-risking-and-its-effects-on-financial-inclusion/> [<https://perma.cc/95CH-DLDP>].

³⁰ Tristan Kohl, *Unilateral and Extraterritorial Sanctions Symposium: Extraterritorial Sanctions—Overcompliance and Globalization*, OPINIO JURIS (Mar. 2, 2022), <https://opiniojuris.org/2022/03/02/unilateral-and-extraterritorial-sanctions-symposium-extraterritorial-sanctions-overcompliance-and-globalization/> [<https://perma.cc/S92J-G7S8>].

³¹ See Pierre-Hugues Verdier, *Sanctions Overcompliance: What, Why, and Does It Matter?*, 48 N.C. J. INT'L L. 471, 472–73 (2023).

³² See, e.g., Barry Bozeman & Derrick M. Anderson, *Public Policy and the Origins of Bureaucratic Red Tape: Implications of the Stanford Yacht Scandal*, 48(6) ADMIN. & SOC'Y 736, 742 (2014) (citing Barry Bozeman & Leisha DeHart-Davis, *Red Tape and Clean Air: Title V Air Pollution Permitting Implementation as a Test Bed for Theory Development*, 9 J. PUB. ADMIN. RSCH. & THEORY 141 (1999) (discussing Title V Air Quality Act Amendment regulations)) (“Overcompliance was due to a lack of clarity of specific rules but it was also due in part to a fear of the sanctions anticipated as emanating from a rapidly changing and more restrictive regulatory environment.”).

³³ JOSEPH DAHER, INVISIBLE SANCTIONS: HOW OVER-COMPLIANCE LIMITS HUMANITARIAN WORK ON SYRIA 13 (2020), https://impact-csr.org/reports/Invisible_Sanctions_IMPACT_EN.pdf [<https://perma.cc/C2ER-HWRL>].

facilitating transactions and their large number of customers.³⁴ Thus while sanctions programs may allow certain activities in practice, parties may find themselves unable to actually carry out those activities where, for example, their financial institutions prevent transactions with certain parties or entire regions wholesale in the name of de-risking.³⁵

Overcompliance may be even more likely to occur where secondary sanctions have been made possible and seem likely to be imposed.³⁶ The United States has been the most prominent user of secondary sanctions in recent history.³⁷ Secondary sanctions are those sanctions that are imposed against targets outside of a sanctioning nation's jurisdiction, generally based on their support of targets subject to existing sanctions.³⁸ While the activities of these targets made subject to secondary sanctions may have been entirely legal under the law of both their home country and under U.S. sanctions law, they can be made subject to the harsh consequences of U.S. sanctions based on their support of sanctioned targets.³⁹ Thus the possibility of being made subject to secondary sanctions themselves dissuades parties from non-sanctioning countries to engage even in legal activities with parties subject to U.S. sanctions.⁴⁰

³⁴ DURNER & SHETRET, *supra* note 29, at 3 (discussing closure of financial institutions creating “a ripple effect on financial access for the individuals and populations served by” those institutions).

³⁵ See, e.g., Stuart Gordon, *The Risk of De-Risking: The Impact of Counterproductive Financial Measures on the Humanitarian Response to the Syrian Crisis*, CONFLICT RSCH. PROGRAMME BLOG (Mar. 20, 2019), https://eprints.lse.ac.uk/102025/1/crp_2019_03_20_the_risk_of_de_risking_the_syrian.pdf [<https://perma.cc/7YHE-YL2E>]; U.S. DEP'T OF THE TREASURY, *AMLA: THE DEPARTMENT OF THE TREASURY'S DE-RISKING STRATEGY* 38 (Apr. 2023), https://home.treasury.gov/system/files/136/Treasury_AMLA_23_508.pdf [<https://perma.cc/7M2C-BBSU>] (“De-risking can make it harder for [non-profit organizations], including international development and humanitarian organizations, to carry out activities critical to the provision of legitimate humanitarian assistance or other activities that support basic human needs in affected communities.”).

³⁶ See Tom Ruys & Cedric Ryngaert, *Secondary Sanctions: A Weapon Out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, 0 BRITISH Y.B. INT'L L. 1, 16 (2020).

³⁷ See generally Patrick C.R. Terry, *Enforcing U.S. Foreign Policy by Imposing Unilateral Secondary Sanctions: Is Might Right in Public International Law?*, 30 WASH. INT'L L.J. 1 (2020).

³⁸ *What are Secondary Sanctions?*, DOW JONES, <https://www.dowjones.com/professional/risk/glossary/sanctions/secondary-sanctions/> [<https://perma.cc/UC5A-LQDM>]; see, e.g., Terry, *supra* note 37, at 7.

³⁹ See *What are Secondary Sanctions?*, *supra* note 38; Terry *supra* note 37, at 7.

⁴⁰ Press Release, U.N. Off. of the High Comm'r for Hum. Rts., *Over-Compliance with Secondary Sanctions Adversely Impacts Human Rights of Millions Globally*: UN Expert (Sept. 14, 2022), <https://www.ohchr.org/en/press-releases/2022/09/over-compliance-secondary-sanctions-adversely-impacts-human-rights-millions> [<https://perma.cc/7UJ7-HF4J>]; see also Verdier, *supra* note 31, at 485.

For example, the secondary sanctions imposed by the United States against Iran seem likely to have spurred overcompliance.⁴¹ The U.S.'s Iranian sanctions program contains sweeping prohibitions and has been subject to unpredictable regulatory change.⁴² After the Joint Comprehensive Plan of Action (JCPOA), the Obama administration removed U.S. secondary sanctions against parties doing business with Iran (but retained primary sanctions against Iranian targets themselves); secondary sanctions were once again made possible after President Trump withdrew from the JCPOA.⁴³ Trump's successor, President Biden, did not immediately cause the United States to re-join the JCPOA, thus leaving the secondary sanctions in place as of the time this Essay was written.⁴⁴ Overcompliance appears to be the result of these primary and secondary sanctions; for example, the Iranian Thalassemia Society has alleged that sanctions have chilled the supply of medical supplies to Iran.⁴⁵

Overcompliance with sanctions provisions imposes negative effects on the regions where sanctions have been imposed. The United Nations Special Rapporteur on unilateral coercive measures, Alena Douhan, has expressed her concern that overcompliance with sanctions worldwide, and de-risking by financial institutions, has resulted in negative impacts like "undermin[ing] economic development and foster[ing] impoverishment."⁴⁶ To study the issue,

⁴¹ See, e.g., Press Release, U.N. Off. of the High Comm'r for Hum. Rts., Iran: Unilateral Sanctions and Overcompliance Constitute Serious Threat to Human Rights and Dignity—UN Expert (May 19, 2022), <https://www.ohchr.org/en/press-releases/2022/05/iran-unilateral-sanctions-and-overcompliance-constitute-serious-threat-human> [<https://perma.cc/3U8W-RGSP>].

⁴² See generally *Timeline of U.S. Sanctions*, U.S. INST. OF PEACE (June 6, 2023), <https://iranprimer.usip.org/resource/timeline-us-sanctions> (on file with the *Ohio State Law Journal*); Tara Sepehri Far, "Maximum Pressure: US Economic Sanctions Harm Iranians' Right to Health," HUM. RTS. WATCH (Oct. 29, 2019), <https://www.hrw.org/report/2019/10/29/maximum-pressure/us-economic-sanctions-harm-iranians-right-health> [<https://perma.cc/3U9H-7EN6>].

⁴³ See *President Trump Withdraws the U.S. from the Iran Deal and Announces the Reimposition of Sanctions*, 112 AM. J. INT'L L. 514, 514 (2018).

⁴⁴ See David E. Sanger, Lara Jakes, & Farnaz Fassihi, *Biden Promised to Restore the Iran Nuclear Deal. Now It Risks Derailment*, N.Y. TIMES (July 31, 2021), <https://www.nytimes.com/2021/07/31/us/politics/biden-iran-nuclear-deal.html> (on file with the *Ohio State Law Journal*); *Comments: Biden & U.S. Officials on Iran in 2023*, U.S. INST. OF PEACE (Aug. 10, 2023), <https://iranprimer.usip.org/blog/2023/jan/23/comments-biden-us-officials-iran-2023> [<https://perma.cc/ADG9-HH3K>].

⁴⁵ See generally *Complaint, Iran Thalassemia Soc'y v. Off. of Foreign Assets Control*, No. 3:22-CV-01195, 2023 WL 3224798 (D. Or. May 1, 2023); Murtaza Hussain, *Children are Dying Because Companies Are Too Scared to Sell Medicine to Iran*, INTERCEPT (June 12, 2023), <https://theintercept.com/2023/06/12/iran-sanctions-medicine/> [<https://perma.cc/8X9X-569C>].

⁴⁶ *Guidance Note on Overcompliance with Unilateral Sanctions and its Harmful Effects on Human Rights*, OFF. OF THE HIGH COMM'R FOR HUM. RTS. (June 24, 2022), <https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures/resources->

she requested input from parties such as NGOs, compliance bodies, banks and banking agencies, and others as to the effects of sanctions, sanctions penalties, and overcompliance with sanctions.⁴⁷ The resulting submissions came from states including Iran, Russia, and Belarus, and from a variety of organizations including NGOs.⁴⁸ The DPRK International Federation of Red Cross and Red Crescent Societies stated that “[s]uppliers and service providers have shown reluctance or have refused to provide goods and services as they are related to a sanctioned country. This has caused the procurement process to become more complex and goods to be more expensive. It also has quality implications as there are fewer suppliers to choose from.”⁴⁹

Other nonprofit groups have reported difficulties in operating in sanctioned areas as well. A report discussed how “[i]n the case of the Syrian Network for Human Rights (SNHR),” a bank in France “refused to open an account because the members of the board of directors were Syrians.”⁵⁰ A survey conducted for that report found that at least six NGOs (and twelve in a different survey) “saw their bank accounts closed without justifications.”⁵¹ A report of the Charity and Security Network cited banking difficulties faced by U.S. non-profit organizations operating abroad, such as delayed fund transfers, requests for additional or unusual documentation, and account closures.⁵²

IV. HUMANITARIAN AID IN UKRAINE AND RUSSIA IN LIGHT OF SANCTIONS

Given the likelihood that the presence of broad sanctions in a region results in overcompliance and de-risking, it has become particularly important for the nations sanctioning Russia to take steps to promote the continued flow of humanitarian aid to Ukraine and elsewhere in the region.

unilateral-coercive-measures/guidance-note-overcompliance-unilateral-sanctions-and-its-harmful-effects-human-rights [<https://perma.cc/64TQ-5KAZ>].

⁴⁷ ALENA F. DOUHAN, OFF. HIGH COMM’R FOR HUM. RTS., CALL FOR INPUT TO REPORTS ON “SECONDARY SANCTIONS, CIVIL AND CRIMINAL PENALTIES FOR CIRCUMVENTION OF SANCTIONS REGIMES, AND OVER-COMPLIANCE WITH SANCTIONS” AND “UNILATERAL SANCTIONS IN THE CYBER WORLD” (July 2022), <https://www.ohchr.org/en/calls-for-input/2022/call-input-reports-secondary-sanctions-civil-and-criminal-penalties> [<https://perma.cc/2EB4-AAAN>].

⁴⁸ Alena Douhan (Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights), Secondary Sanctions, Overcompliance and Human Rights, A/78/196 (Sept. 4, 2023).

⁴⁹ *Id.*

⁵⁰ DAHER, *supra* note 33, at 27.

⁵¹ *Id.*

⁵² SUE E. ECKERT, KAY GUINANE, & ANDREA HALL, FINANCIAL ACCESS FOR U.S. NONPROFITS 39–41 (Feb. 2017), [https://charityandsecurity.org/system/files/FinancialAccessFullReport_2.21%20\(2\).pdf](https://charityandsecurity.org/system/files/FinancialAccessFullReport_2.21%20(2).pdf) [<https://perma.cc/3PK2-PVPU>].

Following the imposition of sanctions against Russia, concerns about overcompliance and de-risking arose.⁵³ Banks in Europe sought guidance from E.U. authorities about particulars of the sanctions restrictions.⁵⁴ Compliance was made more difficult by the fact that, especially early in the sanctions response, the sanctions restrictions enacted by various jurisdictions including the United Kingdom, the European Union, and the United States did not always match each other exactly.⁵⁵ Following Russia's invasion of Ukraine, numerous companies stopped doing business in or with Russia or left the country.⁵⁶ Reputational risk was also a major source of operational change, as the Russian invasion and presence of sanctions may have led companies to stop doing business with Russia for fear of reputational harm, even if they were still permitted to carry out certain types of activities in Russia.⁵⁷

Humanitarian aid seems likely to be particularly chilled in the comprehensively sanctioned regions of Ukraine. These include Crimea, which has been subject to comprehensive sanctions imposed by the United States since Russia's invasion of the peninsula in 2014.⁵⁸ They also include Donetsk and Luhansk regions, which were made subject to U.S. comprehensive sanctions on February 21, almost immediately after Russia's recognition of those regions (as the so-called DNR and LNR) as independent in the days leading up to the general invasion of Ukraine.⁵⁹ These are regions with humanitarian needs that

⁵³ RANDALL A. MIKKELSEN, ALEXANDER ROBSON, RACHEL WOLCOTT, BRETT WOLF & TODD EHRET, THOMSON REUTERS, *THE FOG OF SANCTIONS: GLOBAL BANKS AND BUSINESSES FACE UNPRECEDENTED CHALLENGES IN APPLYING MEASURES AGAINST RUSSIA* 12 (2022), <https://www.thomsonreuters.com/en-us/posts/wp-content/uploads/sites/20/2022/07/Russia-Sanctions-White-Paper-2022.pdf> [https://perma.cc/TZD7-S29R].

⁵⁴ Martin Arnold & Sam Fleming, *Banks Push Brussels for Clarity to Avoid 'Over-Compliance' with Sanctions on Russia*, FIN. TIMES (Apr. 7, 2022), <https://www.ft.com/content/a2fcd6e9-6b1a-4bd8-b035-047eb0791a94> (on file with the *Ohio State Law Journal*).

⁵⁵ *Id.*

⁵⁶ *Over 1,000 Companies Have Curtailed Operations in Russia—But Some Remain*, YALE SCH. OF MGMT. (Aug. 10, 2023), <https://som.yale.edu/story/2022/over-1000-companies-have-curtailed-operations-russia-some-remain> [https://perma.cc/P58B-YXDT]; cf. Simon Evenett & Niccolò Pisani, *Less Than Nine Percent of Western Firms Have Divested from Russia* 2, 6–7 (Dec. 20, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4322502 [https://perma.cc/MR8L-GD6L]; Douglas Busvine, *Western Firms Say They're Quitting Russia. Where's the Proof?*, POLITICO (Feb. 28, 2023), <https://www.politico.eu/article/western-firm-quit-russia-proof-sanctions-war-ukraine/> (on file with the *Ohio State Law Journal*).

⁵⁷ Clara Hudson, *Reputational Concerns Mount as US Companies Reconsider Russia*, BLOOMBERG L. (June 15, 2022), <https://news.bloomberglaw.com/esg/reputational-concerns-mount-as-us-companies-reconsider-russia> [https://perma.cc/M3VA-5LB9].

⁵⁸ Exec. Order No. 13,685, 79 Fed. Reg. 77357 (2014); Peter A.G. van Bergeijk, *Sanctions Against the Russian War on Ukraine: Lessons from History and Current Prospects*, 56 J. WORLD TRADE 571, 581 (2022).

⁵⁹ Exec. Order No. 14,065, 87 Fed. Reg. 10293 (2022).

existed before Russia's 2022 invasion, due to the fighting with Russian-backed separatists that has been ongoing in those areas since 2014.⁶⁰ The Kherson and Zaporizhzhia regions of Ukraine were comprehensively sanctioned by the E.U. after Russia annexed those areas, along with the Donetsk and Luhansk regions, after sham referendums on joining Russia were conducted in all four areas.⁶¹

These comprehensive sanctions are much different in nature than the targeted sanctions imposed against individual Russian targets. The comprehensive sanctions imposed by the United States with respect to the Donetsk and Luhansk regions, for example, prohibit new investment in those areas.⁶² They also prohibit the exportation, re-exportation, sale, or supply, directly or indirectly, of any goods, services, or technology from the United States or by a U.S. person to those areas.⁶³ In these comprehensively sanctioned regions of Russia where sanctions restrictions are nearly all-encompassing, the provision of humanitarian aid seems more likely to be chilled.⁶⁴

As previously discussed, secondary sanctions have been an important mechanism for overcompliance in sanctioned areas such as Iran where secondary sanctions have been readily imposed.⁶⁵ But primary sanctions, not secondary ones, initially seemed to be the most important lever of potential overcompliance with respect to the Ukraine/Russia-related sanctions. At the beginning of the sanctions response against Russia, the large number of nations imposing their own primary sanctions meant that a large number of entities around the world were subject to the restrictions imposed by primary sanctions.⁶⁶ Overcompliance by regulated parties would thus theoretically result from their attempts to reduce their legal exposure to primary sanctions. This was also true because secondary sanctions were not a prominent feature of the initial sanctions response.⁶⁷

⁶⁰ Kieran Guilbert, *NGOs Juggle Emergency Aid, Development Planning as Ukraine War Rages*, DEVEX (June 7, 2022), <https://www.devex.com/news/ngos-juggle-emergency-aid-development-planning-as-ukraine-war-rages-103407> (on file with the *Ohio State Law Journal*); Mansur Mirovalev, *Donetsk and Luhansk: What You Should Know About the 'Republics'*, AL JAZEERA (Feb. 22, 2022), <https://www.aljazeera.com/news/2022/2/22/what-are-donetsk-and-luhansk-ukraines-separatist-statelets> [<https://perma.cc/AN33-PWGN>].

⁶¹ Council Regulation 2022/1903, art. 1, 2022 O.J. (L 259 I) 2 (EU).

⁶² Exec. Order No. 14,065, 87 Fed. Reg. 10293 (2022).

⁶³ *Id.*

⁶⁴ See Emanuela-Chiara Gillard, *Sanctions Must Not Prevent Humanitarian Work in Ukraine*, CHATHAM HOUSE (May 30, 2022), <https://www.chathamhouse.org/2022/05/sanctions-must-not-prevent-humanitarian-work-ukraine> (on file with the *Ohio State Law Journal*).

⁶⁵ See *supra* Part III.

⁶⁶ See *Russia Can Count on Support from Many Developing Countries*, ECON. INTEL. UNIT (Mar. 30, 2022), <https://www.eiu.com/n/russia-can-count-on-support-from-many-developing-countries/> (on file with the *Ohio State Law Journal*).

⁶⁷ Agathe Demarais, *Russia Sanctions: 10 Lessons and Questions for What Comes Next*, FOREIGN POL'Y (Feb. 24, 2023), <https://foreignpolicy.com/2023/02/24/russia-sanctions-war-ukraine-lessons-putin-energy-gas-oil/> [<https://perma.cc/S7FS-ZNEX>].

This may change, however. As secondary sanctions are increasingly employed by the nations sanctioning Russia, overcompliance may be triggered by a fear of entities being made subject to secondary sanctions.⁶⁸ Such entities may be located in countries like China and India, which did not impose their own primary sanctions to respond to Russia's invasion of Ukraine.⁶⁹ Secondary sanctions were imposed by the United States against parties supporting the Russian invasion of Ukraine increasingly during the latter half of 2022 and into 2023.⁷⁰ And even the European Union, historically opposed to the use of secondary sanctions, was (as of May 2023) reportedly considering imposing secondary sanctions against certain Chinese firms for their support of the Russian invasion.⁷¹ Thus secondary sanctions might play a larger role in the future with respect to overcompliance concerns.

A. Other Humanitarian Effects

Of course, it must be remembered that the humanitarian effects of the invasion and the sanctions following it were not limited to Ukraine or Russia alone. The events of 2022 also had significant effects on the prices of food, fertilizer, and fuel in other parts of the world.⁷² Food supply and prices were also challenged by other factors in recent years, including causes attributable to

⁶⁸ Press Release, U.N. Off. of the High Comm'r for Hum. Rts., *supra* note 40.

⁶⁹ Joe McDonald, *China's Russia Dealings Irk US, but Don't Breach Sanctions*, ASSOCIATED PRESS (June 1, 2022), <https://apnews.com/article/russia-ukraine-putin-china-united-states-8c2466d549f6d082d0295cf0efb635d9> [<https://perma.cc/GPA3-ASK5>]; Peter Piatetsky, *What Are Countries Doing to Counter Russia's War?*, CASTELLUM.AI (Mar. 22, 2023), <https://www.castellum.ai/insights/which-countries-are-taking-action-on-ukraine> [<https://perma.cc/CT5E-HJPX>].

⁷⁰ *Russian Harmful Foreign Activities Sanctions*, U.S. DEP'T OF THE TREASURY: OFF. OF FOREIGN ASSETS CONTROL (Sept. 30, 2022), <https://ofac.treasury.gov/faqs/1091> (on file with the *Ohio State Law Journal*); Press Release, U.S. Dep't of the Treasury, Treasury Imposes Swift & Severe Costs on Russia for Putin's Purported Annexation of Regions of Ukraine (Sept. 30, 2022), <https://home.treasury.gov/news/press-releases/jy0981> [<https://perma.cc/D78P-KFKW>]; Press Release, White House, Statement from President Biden on Russia's Attempts to Annex Ukraine Territory (Sept. 30, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/30/statement-from-president-biden-on-russias-attempts-to-annex-ukrainian-territory/> [<https://perma.cc/C8MN-997G>] ("The United States, together with our Allies and partners, are announcing new sanctions today . . . [that] will impose costs on individuals and entities—inside and outside of Russia—that provide political or economic support to illegal attempts to change the status of Ukrainian territory.").

⁷¹ Andy Bounds, *Brussels Plans Sanctions on Chinese Companies Aiding Russia's War Machine*, FIN. TIMES (May 7, 2023), <https://www.ft.com/content/dc757bea-d7eb-487b-b5d1-1d4360cfb9d5> (on file with the *Ohio State Law Journal*).

⁷² Kibrom A. Abay et al., *The Russia-Ukraine War: Implications for Global and Regional Food Security and Potential Policy Responses*, 36 GLOB. FOOD SEC. 1, 1 (2023).

the climate crisis, the effects of the pandemic, and other factors like animal disease outbreaks.⁷³

Before the invasion, Russia was a major exporter of the world's fertilizer and materials used to manufacture fertilizer.⁷⁴ Despite exemptions in the 2022 sanctions to allow for the sale and shipment of fertilizer, the invasion itself and possible overcompliance with the sanctions disrupted the regular supply and prices of fertilizer worldwide.⁷⁵ By December 2022, fertilizer prices had risen.⁷⁶ So too did food prices rise around the world, especially the price of wheat.⁷⁷

IV. PROMOTING HUMANITARIAN AID

Recognizing the presence of overcompliance and third-party effects of the sanctions and the resulting need to facilitate humanitarian aid in comprehensively sanctioned regions, the United Nations and the sanctioning nations announced a number of measures beginning in 2022 to help address this problem. They also issued clarification and guidance for regulated parties about the nature and scope of the sanctions. As discussed below, these efforts were intended to allow parties to better understand their compliance obligations and to carry out humanitarian activities more easily in in both Ukraine and other sanctioned regions around the world. They were also intended to improve the situation around the world with respect to food and fertilizer.

⁷³ See, e.g., Hallie Gu, *China's Latest Battle with African Swine Fever to Push Up Prices*, BLOOMBERG (Mar. 17, 2023), <https://www.bloomberg.com/news/articles/2023-03-17/china-s-latest-battle-with-african-swine-fever-to-push-up-prices> (on file with the *Ohio State Law Journal*). See generally MAXIMILIAN KOTZ, FRIDERIKE KUIK, ELIZA LIS, & CHRISTIANE NICKEL, *THE IMPACT OF GLOBAL WARMING ON INFLATION: AVERAGES, SEASONALITY AND EXTREMES 1* (Eur. Cent. Bank, Working Paper No. 2821, 2023); ORG. FOR ECON. CO-OPERATION & DEV., *FOOD SUPPLY CHAINS AND COVID-19: IMPACTS AND POLICY LESSONS* (June 2020), <https://www.oecd.org/coronavirus/policy-responses/food-supply-chains-and-covid-19-impacts-and-policy-lessons-71b57aea/> (on file with the *Ohio State Law Journal*).

⁷⁴ Patti Domm, *A Fertilizer Shortage, Worsened by War in Ukraine, Is Driving Up Global Food Prices and Scarcity*, CNBC (Apr. 6, 2022), <https://www.cnbc.com/2022/04/06/a-fertilizer-shortage-worsened-by-war-in-ukraine-is-driving-up-global-food-prices-and-scarcity.html> [<https://perma.cc/9EUZ-KT6N>].

⁷⁵ Joseph Glauber & David Laborde, *How Sanctions on Russia and Belarus are Impacting Exports of Agricultural Products and Fertilizer*, INT'L FOOD POL'Y RSCH. INST. (Nov. 9, 2022), <https://www.ifpri.org/blog/how-sanctions-russia-and-belarus-are-impacting-exports-agricultural-products-and-fertilizer> [<https://perma.cc/G9T5-HW83>].

⁷⁶ See *How a Donation of Fertilizers for Countries in Africa Comes Not a Minute Too Soon*, WORLD FOOD PROGRAMME (Dec. 9, 2022), <https://www.wfp.org/stories/how-donation-fertilizers-countries-africa-comes-not-minute-too-soon> [<https://perma.cc/8GBP-SPK2>].

⁷⁷ See generally Mohammad Fazle Rabbi, Tarek Ben Hassen, Hamid El Bilali, Dele Raheem, & António Raposo, *Food Security Challenges in Europe in the Context of the Prolonged Russian-Ukrainian Conflict*, 15 SUSTAINABILITY 4745, 1–2 (2023).

A. Promoting Humanitarian Aid: The United Nations

In December 2022, the U.N. Security Council adopted Resolution 2664 (2022) (referred to within this Essay as “the Resolution” or “the U.N. Resolution”), which created an exemption for humanitarian aid to asset freezes imposed by the United Nations.⁷⁸ This action did not directly impact any of the sanctions imposed against Russia following its 2022 invasion of Ukraine, since the United Nations did not adopt any sanctions against Russia due to Russia’s presence on the Security Council.⁷⁹ But this action showed a clear recognition of the Security Council to address the issue of effectively supplying humanitarian aid to sanctioned regions, and the measure does apply to those sanctions frameworks adopted by United Nations.⁸⁰ So too did the adoption of the resolution affirm the importance of establishing a default exemption that would not require the extended time or uncertainty associated with the procurement of individual licenses.⁸¹ The President of the International Committee of the Red Cross, Mirjana Spoljaric, hailed the passage of the resolution, and urged Member States of the United Nations to adopt similar provisions with respect to their own domestic sanctions frameworks.⁸²

And indeed, as described further herein, various states did, in fact, implement measures to incorporate the terms of the Resolution into their own domestic law so as to amend the provisions of their national sanctions (or in the case of the European Union, adopted by Council Decision which would then be implemented by the Member States) even beyond those directly corresponding to sanctions adopted by the United Nations.⁸³ The adoption of the Resolution,

⁷⁸ Press Release, Security Council, Adopting Resolution 2664 (2022), Security Council Approves Humanitarian Exemption to Asset Freeze Measures Imposed by U.N. Sanctions Regimes, U.N. Press Release SC/15134 (Dec. 9, 2022), <https://press.un.org/en/2022/sc15134.doc.htm> [<https://perma.cc/3QLK-GS8X>].

⁷⁹ Colum Lynch, *Russia’s Actions Fuel Calls for U.N. to Rein in Security Council Veto Power*, FOREIGN POL’Y (Mar. 1, 2022), <https://foreignpolicy.com/2022/03/01/russia-ukraine-war-un-security-council-veto/> [<https://perma.cc/93MB-5NWP>].

⁸⁰ See Glauber & Laborde, *supra* note 75.

⁸¹ See *infra* notes 110–14 and accompanying text (describing a typical licensing program in the context of sanctions).

⁸² Mirjana Spoljaric, President, Int’l Comm. of the Red Cross, Speech at the Side Event in New York on Humanitarian Carve Outs for UN Sanctions Regimes: The Impact and Implementation of Resolution 2664 (May 24, 2023), <https://www.icrc.org/en/document/humanitarian-carveouts-un-sanctions-implementation-uns-c-resolution2664> [<https://perma.cc/6G36-V4S6>].

⁸³ See *infra* Part IV.D; Press Release, Council of the EU, Statement by the High Representative on Behalf of the EU on the Alignment of Certain Countries Concerning Restrictive Measures in Order to Insert Provisions on a Humanitarian Exemption (Apr. 24, 2023), <https://www.consilium.europa.eu/en/press/press-releases/2023/04/24/statement-by-the-high-representative-on-behalf-of-the-eu-on-the-alignment-of-certain-countries-concerning-restrictive-measures-in-order-to-insert-provisions-on-a-humanitarian-exemption-31-march/> (on file with the *Ohio State Law Journal*).

for example, mirrored the establishment of a general license for humanitarian aid by the U.K.'s sanctions authority, the Office of Financial Sanctions Implementation (OFSI), described in further detail below.⁸⁴ Similarly, in the United States, OFAC in December 2022 revised and added general licenses to reflect the humanitarian exemption established within the Resolution.⁸⁵

The United Nations also coordinated the creation of the Black Sea Grain Initiative.⁸⁶ The agreement, involving Ukraine, Turkey, and Russia, was signed in July 2022.⁸⁷ It allowed shipments of grain, food, and fertilizer from certain Ukrainian ports through a safe maritime corridor.⁸⁸ Shipments began in August 2022.⁸⁹ According to the U.S. Agency for International Development, the deal doubled the amount of wheat shipped to least developed countries between August and September 2022.⁹⁰ A report by United Nations Conference on Trade and Development found that the Black Sea Grain Initiative and a related memorandum of understanding signed between the United Nations and Russia in July 2022 “helped to bring down the cost of food, stabilize global markets and keep them open.”⁹¹ The deal was renewed, as of the time of the writing of this Essay in May 2023, for sixty days.⁹²

B. Promoting Humanitarian Aid: The United States

The United States, which already contained an exemption for humanitarian aid within its Ukraine/Russia-related sanctions program, took further action to standardize that exemption across multiple other sanctions programs. Within the United States, sanctions against Russia are imposed pursuant to multiple OFAC sanctions programs.⁹³ The most significant of these programs with respect to

⁸⁴ See *infra* Part IV.D.

⁸⁵ Press Release, U.S. Dep't of the Treasury, Treasury Implements Historic Humanitarian Sanctions Exceptions (Dec. 20, 2022), <https://home.treasury.gov/news/press-releases/jy1175> [<https://perma.cc/D4VG-WZTC>].

⁸⁶ *The Black Sea Grain Initiative: What It Is, and Why It's Important for the World*, U.N. CONF. ON TRADE & DEV. (Sept. 23, 2022) <https://unctad.org/news/black-sea-grain-initiative-what-it-and-why-its-important-world> [<https://perma.cc/5X58-GWBM>].

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ U.S. AGENCY FOR INT'L DEV., THE BLACK SEA INITIATIVE 1 (Nov. 2022), https://www.usaid.gov/sites/default/files/2022-12/Black_Sea_Grain_Initiative_Fact_Sheet_November_2022.pdf [<https://perma.cc/H2ZF-55QF>].

⁹⁰ *Id.* at 2.

⁹¹ U.N. CONF. ON TRADE & DEV., A TRADE HOPE: THE IMPACT OF THE BLACK SEA GRAIN INITIATIVE 2 (Mar. 2023), <https://unctad.org/a-trade-hope-2> [<https://perma.cc/L2XQ-FL5C>].

⁹² Kevin Liffey, *Russia Confirms Black Sea Grain Deal Renewed for Two Months, Says 'Distortions' Remain*, REUTERS (May 17, 2023), <https://www.reuters.com/world/europe/russia-confirms-black-sea-grain-deal-renewed-two-months-2023-05-17/> [<https://perma.cc/3ERB-4AEZ>].

⁹³ See generally 31 C.F.R. §§ 500–599 (2022).

Russian targets are the Ukraine/Russia-related sanctions⁹⁴ and the Russian Harmful Foreign Activities Sanctions Regulations.⁹⁵ The Ukraine/Russia-related sanctions program places sanctions on parties designated for various reasons.⁹⁶ Such bases for sanctions designations under this program include, for example, having engaged in “[a]ctions or policies that undermine democratic processes or institutions in Ukraine,” having engaged in “[a]ctions or policies that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine,” having “asserted governmental authority over any part or region of Ukraine without the authorization of the Government of Ukraine,” being “an official of the Government of the Russian Federation,” operating in sectors of the Russian economy including the energy, financial services, or defense sectors, and numerous others.⁹⁷ The program also contains various prohibitions such as that against the making of certain types of investment in Crimea and in certain sectors of the Russian economy.⁹⁸ (There are numerous other prohibitions contained within this sanctions program besides those described here).

Russian targets are also sanctioned via other sanctions programs, including the Magnitsky Act Sanctions,⁹⁹ the Global Magnitsky Act Sanctions,¹⁰⁰ the Cyber-Related Sanctions,¹⁰¹ the Foreign Interference in U.S. Election Sanctions,¹⁰² the Transnational Criminal Organizations Sanctions.¹⁰³ Other OFAC sanctions programs have been created to cover a variety of geographic areas, like those imposed against Cuba, North Korea, Iran, and others.¹⁰⁴ Parties may also be sanctioned by OFAC via a number of programs created for other reasons, like the Non-Proliferation Sanctions, the Rough Diamond Trade Controls, the Chinese Military Companies Sanctions, and others.¹⁰⁵

The Ukraine/Russia-related sanctions regulations contain provisions exempting the provision of humanitarian aid from its prohibitions, and similar provisions generally appear in other sanctions programs applicable to Russian targets as well. Nongovernmental organizations are permitted to export and reexport services to Crimea that would otherwise be barred by the comprehensive trade embargo imposed by the U.S with respect to that region,

⁹⁴ See 31 C.F.R. § 589.201 (2022).

⁹⁵ See 31 C.F.R. § 587 (2022).

⁹⁶ 32 C.F.R. § 589.201 (2022).

⁹⁷ *Id.*

⁹⁸ 31 C.F.R. §§ 589.202–06 (2022).

⁹⁹ 31 C.F.R. § 584 (2022).

¹⁰⁰ 31 C.F.R. § 583 (2022).

¹⁰¹ 31 C.F.R. § 578 (2022).

¹⁰² 31 C.F.R. § 579 (2022).

¹⁰³ 31 C.F.R. § 590 (2022).

¹⁰⁴ *Sanctions Programs and Country Information*, U.S. DEP’T OF THE TREASURY, <https://ofac.treasury.gov/sanctions-programs-and-country-information> [<https://perma.cc/K9RC-Q2EN>].

¹⁰⁵ *Id.*

so long as such services are made in support of specified not-for-profit activities.¹⁰⁶ These include activities to meet basic human needs (like those concerning “drought and flood relief; food, nutrition, and medicine distribution; the provision of health services; assistance for vulnerable populations . . . and environmental programs); democracy building (as in support of the “rule of law, citizen participation, government accountability, universal human rights and fundamental freedoms, access to information, and civil society development projects”); education; “non-commercial development projects directly benefiting the Crimean people” (as for the prevention of :infectious disease and promoting maternal/child health, and clean water assistance”); and “activities to support environmental protection.”¹⁰⁷

Also authorized are transactions for the conduct of the official business by the United States Government by its employees, grantees, or contractors.¹⁰⁸ So too are authorized transactions that are for the official business of specified international organizations by its employees, grantees, and contractors.¹⁰⁹ These organizations include the United Nations (including its Programmes, Funds, and Other Entities and Bodies, as well as its Specialized Agencies and Related Organizations); the International Centre for Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA); the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group (IDB Group), and any fund entity administered or established by those entities; and the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies.¹¹⁰

In April 2022, OFAC issued Russia-related General License (GL) 27, which permitted certain transactions in support of nongovernmental organizations’ activities that would otherwise be prohibited by the Russian Harmful Foreign Activities Sanctions Regulations, so long as the only involvement of sanctioned persons was by way of the involvement of financial institutions sanctioned pursuant to Executive Order 14024.¹¹¹ Similarly, following the announcement of the U.N. Resolution, the United States implemented the aims of the Resolution through the issuance of general licenses, which were intended to better facilitate humanitarian aid across multiple sanctions programs administered by OFAC.¹¹² Within the framework of U.S. sanctions programs, general licenses pursuant to each program provide authorization for the

¹⁰⁶ 31 C.F.R. § 589.520 (2022).

¹⁰⁷ *Id.*

¹⁰⁸ 31 C.F.R. § 589.510 (2022); 31 C.F.R. § 589.214(e) (2022).

¹⁰⁹ 31 C.F.R. § 589.511 (2022).

¹¹⁰ *Id.*

¹¹¹ U.S. DEP’T OF THE TREASURY, 31 CFR § 587, GEN. LICENSE NO. 27 (2022), <https://ofac.treasury.gov/media/922211/download?inline> [<https://perma.cc/PFL6-Y67F>].

¹¹² Press Release, U.S. Dep’t of the Treasury, *supra* note 85.

activities described within those licenses.¹¹³ These authorizations eliminate the need for parties to seek specific licenses from OFAC, which require approval from the agency after the submission of an application.¹¹⁴ Instead, setting up categories of permitted activities by way of general licenses creates regulatory transparency and administrative ease in allowing those activities.¹¹⁵ OFAC, among other actions, added a general license to multiple sanctions programs to authorize the official business of the U.S. government and international organizations, which were already in place, with respect to the Ukraine/Russia-related sanctions regulations but which were added with respect to other sanctions programs including the Magnitsky and Global Magnitsky programs.¹¹⁶

OFAC also took actions following the imposition of the Ukraine/Russia-related sanctions to clarify compliance obligations of regulated parties in order to encourage the provision of humanitarian aid. For example, in April 2022 OFAC issued a general license authorizing some activities by NGOs in Russia and Ukraine.¹¹⁷ It also issued a fact sheet regarding its authorizations for NGO activities, agricultural commodities, medicine, and medical devices, emergency medical services, international organizations, and other areas.¹¹⁸ At that same time, Treasury Secretary Yellen spoke at an event with the Finance Ministers of Germany and Indonesia (in their capacities as the finance chairs of the G7 and the G20).¹¹⁹ She spoke about the need for international financial institutions to “help mitigate the global fertilizer shortage” and “increase investments in agricultural capacity and resilience to boost domestic food production.”¹²⁰

Similarly, in July 2022, OFAC issued a fact sheet “to further clarify that the United States has not imposed sanctions on the production, manufacturing, sale, or transport of agricultural commodities (including fertilizer), agricultural

¹¹³ Keith Stolte, *OFAC: Hands Off Intellectual Property Rights.*, 4 J. INTEL. PROP. L. 25, 33 (1996); *What is a License?*, U.S. DEP’T OF THE TREASURY (June 16, 2016), <https://ofac.treasury.gov/faqs/74> [<https://perma.cc/WH47-J3J4>].

¹¹⁴ *See id.*

¹¹⁵ *See, e.g.*, Stolte, *supra* note 113, at 39 (describing how the absence of general license created confusion and increased costs in Yugoslavia).

¹¹⁶ Addition of General Licenses for the Official Business of the United States Government and Certain International Organizations and Entities, 87 Fed. Reg. 78470 (Dec. 21, 2022).

¹¹⁷ Press Release, U.S. Dep’t of the Treasury, Fact Sheet: U.S. Treasury Issues Fact Sheet on Food and Humanitarian Sanctions Authorizations (Apr. 19, 2022), <https://home.treasury.gov/news/press-releases/jy0722> [<https://perma.cc/8SKN-3JFV>].

¹¹⁸ Press Release, U.S. Dep’t of the Treasury, Fact Sheet: Preserving Agricultural Trade, Access to Communication, and Other Support to Those Impacted by Russia’s War Against Ukraine (Apr. 19, 2022), <https://ofac.treasury.gov/media/922206/download?inline> [<https://perma.cc/E25X-68HT>].

¹¹⁹ Janet Yellen, Secretary, U.S. Dep’t of the Treasury, Remarks at Treasury’s “Tackling Food Insecurity: The Challenge and Call to Action” Event (Apr. 19, 2022), <https://home.treasury.gov/news/press-releases/jy0721> [<https://perma.cc/9E2L-QRGF>].

¹²⁰ *Id.*

equipment, or medicine relating to [Russia].”¹²¹ It also described the general license in place with respect to agricultural commodities, agricultural equipment, medicine, and medical devices.¹²² The United States in June 2022 also urged nations to ask for guidance if they faced difficulties in importing food or fertilizer from Russia.¹²³

In July 2023, OFAC and OFSI issued a joint fact sheet “[t]o provide additional clarity” on the scope of sanctions relevant to humanitarian assistance and food security.¹²⁴ Both OFAC and OFSI noted that they prioritized humanitarian license applications.¹²⁵

C. Promoting Humanitarian Aid: The European Union

In April 2022, the E.U. introduced exceptions to the restrictive measures in place responding to Russia’s invasion of Ukraine.¹²⁶ Under those exceptions, the E.U.’s humanitarian partners like the International Committee of the Red Cross and U.N. Specialized Agencies were exempted from sanctions prohibitions insofar as the activities at issue were exclusively humanitarian.¹²⁷ Export controls were also made subject to exemptions for certain types of humanitarian organizations for exclusively humanitarian purposes where such exports would otherwise be prohibited to the Donetsk and Luhansk regions.¹²⁸ Finally, other organizations could also request similar derogations from the export controls and other restrictive measures for humanitarian activities in Ukraine.¹²⁹

In its round of sanctions announced in December 2022, the E.U. implemented a measure intended to ease the sale and shipment of fertilizers

¹²¹ Press Release, U.S. Dep’t of the Treasury, Food Security Fact Sheet: Russia Sanctions and Agricultural Trade (July 14, 2022), <https://ofac.treasury.gov/media/924341/download?inline> [<https://perma.cc/LWT3-CFMN>].

¹²² *Id.*

¹²³ Michelle Nichols, *U.S. Urges Countries to Reach Out if Having Issues with Russian Food, Fertilizer Exports*, REUTERS (June 22, 2022), <https://www.reuters.com/world/europe/us-urges-countries-reach-out-if-having-issues-with-russian-food-fertilizer-2022-06-22/> [<https://perma.cc/77AW-73VQ>].

¹²⁴ U.S. DEP’T OF THE TREASURY, HUMANITARIAN ASSISTANCE AND FOOD SECURITY FACT SHEET: UNDERSTANDING UK AND U.S. SANCTIONS AND THEIR INTERCONNECTION WITH RUSSIA (June 28, 2023), <https://ofac.treasury.gov/media/931946/download?inline> [<https://perma.cc/7HV2-WCKT>].

¹²⁵ *Id.*

¹²⁶ Press Release, Council of the EU, EU Introduces Exceptions to Restrictive Measures to Facilitate Humanitarian Activities in Ukraine (Apr. 13, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/04/13/eu-introduces-exceptions-to-restrictive-measures-to-facilitate-humanitarian-activities-in-ukraine/> (on file with the *Ohio State Law Journal*).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

from Russia.¹³⁰ Specifically, that sanctions package contained a derogation which allowed Member States to unfreeze assets of those sanctioned individuals who “held a prominent significant role in international trade in agricultural and food products, including wheat and fertili[z]ers, prior to their listing” as subject to sanctions.¹³¹ The measure had been controversial; Poland and Lithuania had opposed the measure, which was promoted by France, Germany, the Netherlands, Belgium, Spain, and Portugal.¹³²

The E.U. also addressed questions from regulated parties and clarified means by which guidance could be sought. For example, the E.U. provided a statement that humanitarian providers could seek guidance from their national competent authority as to the scope of E.U. sanctions with respect to Russia.¹³³

In March 2023, the European Council created a humanitarian exemption to asset freeze measures across U.N. sanctions regimes, giving effect to the Resolution previously adopted by the United Nations.¹³⁴

D. Promoting Humanitarian Aid: The United Kingdom

The United Kingdom created a standard exemption for the provision of humanitarian aid to Ukraine. Specifically, in July 2022, OFSI introduced a general license “to ensure the timely delivery of humanitarian assistance activity in relation to the conflict in Ukraine.”¹³⁵ The OFSI general license, as OFAC’s

¹³⁰ Susannah Savage, Bartosz Brezeziński, Barbara Moens & Jacopo Barigazzi, *EU Agrees to Ease Russia Fertilizer Curbs After Row, Angering Ukraine*, POLITICO (Dec. 15, 2022), <https://www.politico.eu/article/fertilizer-row-holds-up-eu-latest-russia-ukraine-war-sanctions-package-famine-food-supplies> (on file with the *Ohio State Law Journal*).

¹³¹ *Questions and Answers: Tenth Package of Restrictive Measures Against Russia*, EUR. COMM’N (Feb. 25, 2023), https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_1187 [<https://perma.cc/P8TC-X442>].

¹³² Alexandra Brzozowski, *EU Breaks Fertiliser Deadlock, Approves Ninth Russia Sanctions Package*, EURACTIV (Mar. 13, 2022), <https://www.euractiv.com/section/europe-s-east/news/eu-breaks-fertiliser-deadlock-approves-ninth-russia-sanctions-package/> [<https://perma.cc/QDF9-UL8X>].

¹³³ EUR. UNION, HUMANITARIAN AID, https://finance.ec.europa.eu/system/files/2023-02/faqs-sanctions-russia-humanitarian-aid_en.pdf [<https://perma.cc/HXY2-UPKN>].

¹³⁴ Council Decision 2023/338, art. 1, 2023 O.J. (L 47) 51. *See also* Press Release, Council of the EU, Humanitarian Action: EU Introduces Exemptions to Sanctions to the Delivery of Assistance (Mar. 31, 2023), <https://www.consilium.europa.eu/en/press/press-releases/2023/03/31/humanitarian-action-eu-introduces-exemptions-to-sanctions-to-facilitate-the-delivery-of-assistance/> (on file with the *Ohio State Law Journal*).

¹³⁵ HIS MAJESTY’S TREASURY, GEN. LICENSE: HUMANITARIAN ACTIVITY, INT/2022/1947936 (2022), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1164027/General_Licence_INT-2022-1947936.pdf [<https://perma.cc/7VWU-RR2D>]; *see also* Off. of Fin. Sanctions Implementation, *OFSI Issues Humanitarian Activity General License Under Russia Sanctions Regime*, GOV.UK (July 7, 2022),

general licenses functioned, served as pre-clearance for activities specified in the license and so eliminated the need to apply for and wait for an individual license from OFSI.¹³⁶ As with similar measures adopted such as by the United States, the presence of a general license reduced the administrative burden for those supplying humanitarian assistance.

E. Sanctions and Certain Russian Charitable Organizations

While in most cases the sanctioning nations sought to facilitate the efforts of humanitarian organizations, certain charitable organizations in Russia have been sanctioned by Ukraine for their alleged support of the Russian war effort or for their role in the kidnapping of Ukrainian children.¹³⁷ In February 2023, Ukraine implemented sanctions against the Russian Red Cross and other organizations including Home for Mommy, Gulfstream, and the Russian Humanitarian Mission.¹³⁸ Ukraine likely sanctioned the Russian Red Cross for allegedly “reducing Russian costs of war,” based on its alleged support for the Russian military, including purported support for their families and fundraising for military items.¹³⁹

V. CONCLUSION

Despite the measures taken by the United Nations and the sanctioning nations, issues of overcompliance and de-risking in heavily sanctioned regions are likely to persist. U.S. sanctions programs for comprehensively sanctioned

<https://ofsi.blog.gov.uk/2022/07/07/ofsi-issues-humanitarian-activity-general-licence-under-russia-sanctions-regime/> [https://perma.cc/V6P4-LS93].

¹³⁶ See *id.*

¹³⁷ See, e.g., Stéphanie Maupas, *Russian Policy of Deporting Ukrainian Children Under Investigation by ICC*, LE MONDE (Mar. 5, 2023), https://www.lemonde.fr/en/international/article/2023/03/05/russian-policy-of-deporting-ukrainian-children-under-investigation-by-icc_6018196_4.html (on file with the *Ohio State Law Journal*); *Along the Sanctioned Persons: Yakimova Viktoria Vyacheslavovna*, WAR & SANCTIONS (2022), <https://sanctions.nazk.gov.ua/en/sanction-person/25706/> [https://perma.cc/5VJE-64HM]; “*Help*” for Abducted Orphans: How Russia Adopts Children from Ukraine, SPRAVDI (Apr. 5, 2022), <https://spravdi.gov.ua/en/help-for-abducted-orphans-how-russia-adopts-children-from-ukraine/> (on file with the *Ohio State Law Journal*).

¹³⁸ Hanna Shtepa, *Ukraine Introduces Three New Sets of Sanctions Against Persons Contributing to the Russian Aggression Against Ukraine*, BAKER MCKENZIE (Feb. 28, 2023), <https://sanctionsnews.bakermckenzie.com/ukraine-introduces-three-new-sets-of-sanctions-against-persons-contributing-to-the-russian-aggression-against-ukraine> [https://perma.cc/3P3P-5XCE].

¹³⁹ See Tom Norton, *Fact Check: Is Red Cross Funding Families of Mobilized Russians?*, NEWSWEEK (Oct. 26, 2022), <https://www.newsweek.com/fact-check-red-cross-funding-families-mobilized-russians-1754605> [https://perma.cc/4EAV-LZLR].

regions have long contained humanitarian exemptions.¹⁴⁰ Yet those legal provisions have not prevented the humanitarian harms that have resulted in Iran and elsewhere.¹⁴¹

Certainly, the measures taken by the United Nations and the sanctioning nations to improve the provision of humanitarian aid in sanctioned areas are commendable. Clarifying the available legal exemptions for humanitarian aid and taking steps to encourage the provision of such aid within existing regulatory sanctions structures are helpful for parties to understand their compliance obligations. Other actions should be taken to that end. Alexandra Francis, for example, has proposed that BIS “provide a license exception for any humanitarian activities authorized by OFAC.”¹⁴² This would reduce the compliance burden on parties seeking to provide humanitarian assistance by excusing those parties from seeking a license where OFAC already provides a humanitarian exemption.

Yet despite these attempts, overcompliance and de-risking seem to be a fundamental feature of sanctions programs.¹⁴³ Where the potential profit to be made in a heavily-sanctioned region is low, and the legal and reputational risks and probability of a potential sanctions violation are high, overcompliance may be an economically efficient decision for a regulated entity to make. Pierre-Hugues Verdier suggests that this equation might be modified were sanctioning governments to take measures, such as the provision of subsidies, to encourage regulated parties to facilitate humanitarian transactions.¹⁴⁴

Absent some such subsidy or other input to change behavior, a sanctioning power thus must take into account the probable overcompliance, and its chilling effect on humanitarian aid, when enacting sanctions. So too must it be recognized that economic disruption is often a goal of economic sanctions, and at a fundamental level cannot be deployed without economic harm to civilians.¹⁴⁵ The mass enactment of sanctions on a large scale must be reserved for the most egregious cases, where the economic weapon of sanctions is to be used in a context similar to where military action might be considered in its place.

¹⁴⁰ See Stephen P. Marks, *Economic Sanctions as Human Rights Violations: Reconciling Political and Public Health Imperatives*, 89 AM. J. PUB. HEALTH 1509, 1510–11 (1999).

¹⁴¹ See generally HUM. RTS. WATCH, “MAXIMUM PRESSURE” US ECONOMIC SANCTIONS HARM IRANIANS’ RIGHT TO HEALTH (Oct. 2019), <https://www.hrw.org/report/2019/10/29/maximum-pressure/us-economic-sanctions-harm-iranians-right-health> [<https://perma.cc/Y5DH-Z9VJ>].

¹⁴² Alexandra Francis, *Ukrainian Symposium—The Impact of Sanctions on Humanitarian Aid*, LIEBER INST. (Jan. 27, 2023), <https://lieber.westpoint.edu/impact-sanctions-humanitarian-aid/> [<https://perma.cc/5NPX-Q3LP>].

¹⁴³ See *supra* Part II.

¹⁴⁴ Verdier, *supra* note 31, at 496–97.

¹⁴⁵ Jessica Whyte, *The Opacity of Economic Coercion*, LPE PROJECT BLOG (June 21, 2023), <https://lpeproject.org/blog/the-opacity-of-economic-coercion/> [<https://perma.cc/E872-6URP>].

Such is the case of the sanctions enacted after Russia's invasion of Ukraine, where Russia violated Ukraine's territorial sovereignty.¹⁴⁶ This violation of international law calls for some sort of response such as the enactment of sanctions that did in fact occur. As such, the technical adjustments made by the United Nations and the sanctioning powers to the mechanics of their sanctions programs likely represent the best possible way to ameliorate the impact of sanctions on the provision of humanitarian aid to Ukraine, Russia, and the region, with the possible addition of the strategies identified by Francis and Verdier to further promote and facilitate humanitarian aid. In other contexts, the provision of humanitarian aid might be best ensured by examining whether sanctions are the appropriate policy decision in the first instance.

¹⁴⁶ Press Release, Council of the EU, Ukraine's Territorial Integrity, Sovereignty and Independence: EU Renews Individual Restrictive Measures for Six Months (Mar. 13, 2023), <https://www.consilium.europa.eu/en/press/press-releases/2023/03/13/ukraine-s-territorial-integrity-sovereignty-and-independence-eu-renews-individual-restrictive-measures-for-six-months/> (on file with the *Ohio State Law Journal*).