



Ep. 1: U.S. Sanctions and Their Impact on Non-U.S. Businesses

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Jose Garriga:

Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

Economic sanctions. They can be wielded like a scalpel or like a club. They can be an instrument of policy, or themselves drive policy change.

In this episode, we'll be speaking about sanctions and their impact on non-U.S. businesses. I have with me today [Mac Fadlallah](#), [Jasper Helder](#) and [Wynn Segall](#), three partners in Akin Gump's [international trade practice](#), serving clients in Dubai, London, and Washington, D.C., respectively.

Besides spotlighting the global reach of the firm's trade practice, these three locations are pivotal to today's conversation. We'll be talking about the impact and implications of U.S. sanctions policy and regulations as seen from Europe and the Middle East, and from their point of origin.

Gentlemen, welcome to the podcast.

Wynn Segall:

Thank you.

Jose Garriga:

Let's start by looking at the big picture. Let's start with that. How does the Trump administration's use of sanctions as a policy tool differ from that of previous administrations?

Wynn Segall:

Thanks, Jose. I guess I'll take that question as a Washington-centric question to lead off. The Trump administration's fundamental theme, as is well known for U.S. international policy writ large, economic policy as well as foreign policy, is very much an America-first approach to things. That is true in terms of U.S. economic nationalism. It's true no less with sanctions than it is in other areas of international trade. What that is translated into, and what we're seeing play out in the U.S. approach to the use of sanctions as an instrument of foreign policy is a unilateral approach in which the United States and the administration are going it alone in issuing new sanctions measures and enforcing the U.S. approach to sanctions on the full range of programs the United States has, including sanctions on Russia, Iran, Venezuela, Cuba, and other countries, in a way that focuses on U.S. interests and is not coordinated and constrained in the same way we saw sanctions policy approached in the last administration.

Among other repercussions of that approach, we're seeing some unease, and a greater role in many cases through engagement with the administration in the U.S. Congress, where, in many cases, members of Congress are playing a supporting role in helping to define the U.S. approach to some countries, say Cuba for example, where members of Congress are helping to author the new approach to sanctions, or in other cases, as with Russia, where we see members of Congress considering new legislation to direct and constrain the approach that the administration takes, which just frames things in a very different way than we've seen previously. That has consequences, no doubt, from the perspective of other countries, and the regions where my colleagues are sitting.

Jose Garriga: To that point, Jasper, how is this playing in Europe?

Jasper Helder: Well, I think for one, as Wynn explained, there's this split, if you will, between the executive and Congress, which means that, I think, in Europe, several ... Let's put it like this. At the beginning of the Trump administration, and Trump administration making its mark in sanctions policy, I think there was a lot of confusion and surprise to see the direction, the intellectual direction, that the U.S. government was going. Bear in mind, we had well-coordinated sanctions programs on the European and the U.S. side in respect of Russia. Likewise, there was a significantly great coordination on the Iran sanctions, and, in particular, in the context of the nuclear deal, the Joint Comprehensive Program of Action [JCPOA].

That suddenly went out of the window, and I think it left a lot of European governments somewhat confused. I think the confusion has slowly changed into anger in the way these international arrangements have been cast aside to the favor of America-first unilateral sanctions programs. That anger has been replaced by, I would say, the European governments shrugging their shoulders and trying to come up with ways in which they can effectively protect European businesses to the unilateral influence of these unilateral programs.

I think it's fair to say that that's something we notice on a day-to-day basis where we interact with regulators in Europe on the member state, on a national level, but also on the European level. I think the hope of being able to coordinate any approaches towards, for example, the role of Russia in Middle Eastern conflict, or the role of Russia generally, has gone out of the window. So, I think there's a significant change at a policy level, and for companies, it becomes even harder, because the gap between what the U.S. allows you or does not allow you to do, versus what domestic rules here in Europe allow you to do, just becomes wider and wider, which necessitates a need for well-thought-through compliance programs, and a very well-thought-through approach to both sanctions programs, if you are a company with a global footprint.

Jose Garriga: That's a good point. Mac, you're based in the UAE, and you work extensively in the region. What's the view on the ground regarding ... I mean, you started off, you mentioned the Iran sanctions. What's your view? What's the view regionally regarding the topic?

Mac Fadlallah: Sure. Thanks, Jose. You know, we do have Iran right in our backyard, and the close proximity to multiple U.S.-sanctioned countries and several U.S.-sanctioned parties in this region. It's a pretty dynamic one in that respect. From Dubai, we're advising companies, not just in the Middle East, but in Asia and Europe as well, on the extraterritorial application of U.S. law. The view has been that U.S. law is becoming more extraterritorial and not less. The rise of the so-called secondary sanctions is becoming more prevalent through the enactment of CAATSA [*Countering America's Adversaries Through Sanctions Act*], through the U.S. withdrawal from the JCPOA, and several other topics that we'll discuss today.

What we're seeing from the perspective of non-U.S. companies, and in the Middle East as well, is no longer concern of whether business conducted outside the United States has any U.S. nexus in order to render that business subject to U.S. sanctions law, like was the case in several of the big bank cases where transactions were conducted in U.S. dollars, but rather a broader view, and the need to take a fresh look at a company's business and determine whether the underlying conduct in which it engages is consistent with the objectives of U.S. sanctions programs, regardless of whether the business has any U.S. nexus.

As you can imagine from the perspective of a non-U.S. company, that's a tough pill to swallow and a very difficult thing to achieve as a matter of a compliance program. I expect we'll be seeing a lot more of that coming out of the Trump administration, in particular, where to have the entire world stand behind the objectives and not undermine the objectives of U.S. policy programs, and therefore more difficult and higher compliance burden as a result.

Jose Garriga:

Thank you, Mac. Yeah, let's just go back a little bit, and maybe we can take a deeper dive into some of these topics. Starting with Russia, Wynn, you've worked extensively on Russia sanctions for some years now. What can you tell us about where we are vis-a-vis Russia sanctions, and what listeners can expect upcoming?

Wynn Segall:

The U.S. sanctions program for Russia, as differentiated from the program we have for Iran, which is the comprehensive embargo, our sanctions on Russia are a list-based sanctions program. In other words, we don't impose blanket restrictions on trade with Russia and Russian companies, but we target specific individuals who are wealthy and maybe associated with extensive business interests and specific companies. So, it's a complex program. It's a program that also includes measures like sectoral sanctions, which impose a limited set of restrictions on some listed parties, as well as other sanctions listings which comprehensively restrict dealings. It's complex, and it's nuanced, and it's been that way from its inception in 2014, when the program was adopted following Russia's military incursions into Ukraine, and then annexation of Crimea.

Over the past several years, the nature of the sanctions listings and the particular listings that were adopted were somewhat limited in the magnitude and scope of their economic effect, and there was some frustration, not just recently, but even previously, during the last administration, the Obama administration. There was a lot of criticism by members of Congress of the way in which the U.S. approached the use of sanctions. Following the entry of the Trump administration, members of Congress acted on concerns with the way the program was being administered by adopting a new law, the CAATSA law, which Mac and Jasper have mentioned, which, it did a couple of things. One, it codified, as a matter of statutory law, the existing sanctions framework, so only an act of Congress would provide a basis on which a president could actually terminate or substantially change the existing sanctions program. And it imposed requirements for the identification of prominent Russian oligarchs, and of other mechanisms that were to support further and more aggressive targeting of Russian economic interests to essentially increase the strength of the program and its force and effect.

Beginning in the early period of CAATSA's implementation over the fall and through the early winter of this year, members of Congress were highly critical of the administration for not implementing its measures more forcefully. On April 6th, the administration announced the imposition of sanctions against a number of prominent Russian oligarchs with extensive business interests that actually had a market-moving impact with serious global economic ramifications, particularly in the mining and metals sector—the aluminum industry in particular—which actually moved things from a fairly limited impact to a very severe impact, not just on Russian economic interests, but on global markets,

that kind of moved the needle in almost an opposite direction and really had serious repercussions for U.S. business interests as well as European business interests in those sectors in particular.

The Trump administration actually made some very forceful and strong statements that were hostile to Russia at that time. More recently, we've seen a process of diplomatic engagement, including the summit meeting recently between President Trump and President Putin, which has actually created an opposite reaction politically in the United States and been a subject of great criticism by members of Congress, who are now discussing proposals for the implementation of additional new sanctions measures to force the administration to take a more aggressive approach and constrain the President's ability to waive or ease sanctions even further.

This environment shaping U.S. sanctions policy is certainly a source of great uncertainty and risk for business interests, and it poses serious challenges in terms of how companies approach their compliance programs, how they approach transactions, and, whether it's trade deals or corporate transactions, challenges in terms of conducting diligence, in terms of developing deal terms and conditions to protect against substantial uncertainty and changes in law in the future, and also uncertainty, I think, from the perspective of U.S. allies as to what direction and what path the U.S. may take in the future.

Jasper, you've already spoken a bit about this, but certainly the divergence in the U.S. and the European approach in this area is interesting. I'm sure you have perspective as well on that.

Jasper Helder:

Yeah, thanks for that, Wynn. Yeah, I think with Russia, as I said, it was a well-coordinated approach. I think on the European side, it's important to understand that, as you say, the recent designations under CAATSA, the economic ripple effect of that stone in the pond demonstrated itself extensively in Europe. Now, in Europe, the dynamics are slightly different in that a lot of companies that were ultimately owned or controlled by a number of those designated oligarchs provide a lot of jobs and are significant players in national economies in Europe. The same goes for a number of those designated Russian banks, which, particularly in Central and Eastern European countries, are significant players in local and regional financial markets.

I'd say on the European side, on the one hand, clearly there is still a disapproval of the annexation of Crimea. There was a short moment of, I would say, extensive and solidified common perspective on Russia's role after the disaster with flight MH17 over Ukraine. That resulted in a flurry of activity and sanctions being adopted in the context of a couple of months. Since then, we haven't seen a lot of development. So, on the European side, that can be explained because, as I said, several Russian parties, and Russia generally, is a significant economic partner for many European countries. As Trump quite crudely stated, Germany and other European countries are pretty much dependent on energy from Russia, and there are significant infrastructural projects in execution phase in the energy sector, pipeline projects that are important to European markets as well.

Whilst these sanctions on the European side are designed to target Russia, target significant economic activity, I would say, Jose, to your introduction, the attempt is more to wield a scalpel that makes precise cuts where they affect the Russian economy but, by the same token, does not impact on Europe's interdependency or interrelationship in the economy with Russia. I think the stone that was thrown in the pond literally by the CAATSA designations that caused some ripples, my guess is that, on the European side, we're not going to see much development either by way of enhancing sanctions or by

releasing them. There is increased frustration about the lack of clarity that's perceived here to exist on the U.S. side, where Congress, and this is the European view, Congress appears to be pushing harsher and harsher sanctions on Russia, whereas, at the same time, the summit meeting between the Russian and the U.S. presidents appear to suggested a thaw in the U.S.-Russian relationship, at least at an executive level, that many European governments find hard to fathom and cannot reconcile with the attitude of Congress.

So, again, confusion, but likewise, I would say Europe is quite determined to take its own view here. That view is driven by two major factors. On the one hand, there is the condemnation of Russia's aggressive role on the global stage, but, by the same token, there is a strong realization that Europe has much to lose by way of economic interdependency on Russian markets.

Jose Garriga:

That's interesting. Thank you, Jasper. A reminder, listeners, that we're here today with Mac Fadolallah, Jasper Helder and Wynn Segall, talking about sanctions.

Mac, going back to something you'd said earlier, let's talk about Iran a little bit. President Trump has been critical about the U.S. relationship to Iran, its involvement with the JCPOA. What is the latest developments regarding Iran sanctions?

Mac Fadolallah:

Well, President Trump and candidate Trump before him were extremely critical of the JCPOA, calling it lots of colorful things: the worst deal ever negotiated, something he would tear up his first day in office, et cetera. He didn't quite tear it up his first day in office, but I think most people would say that he did fulfill his promise of getting the United States out of that deal.

What President Trump did, interestingly, and technically from a legal perspective, was not a formal snapback under the terms of the JCPOA. Instead, what President Trump did is he unilaterally withdrew the United States from an executive agreement that his predecessor had agreed to, while keeping that agreement technically intact. The JCPOA is still in force between Iran and the European countries, as well as Russia and China, that entered into the agreement with Iran, but the United States has announced that it has withdrawn from an agreement that really has no withdrawal provisions other than formal snapback. So it's a little bit of a confusing state of affairs.

But effectively, what the U.S. seems to be trying to do is to have its cake and eat it too by keeping Iran bound by the terms of that agreement and, at the same time, reimposing the sanctions that were the incentive for Iran to enter into it. So far, that seems to be working. It's still a very new, very developing situation, since President Trump only announced it on May 8th, 2018.

In that announcement, he announced also 90 and 180-day wind-down periods, ending on August 6th and on November 4th of this year, 2018. A lot of the work that we have been doing is advising companies on the dos and don'ts during those wind-down periods, how OFAC apparently has left the door open for some very limited new business to be conducted during those so-called wind-down periods under certain conditions, what the dos and don'ts are, and what companies need to do in order to be in compliance by the end of the wind-down period.

What will happen, at least as of November 5th, 2018, is the sanctions situation with respect to Iran will return to the status quo ante before the JCPOA and its predecessor, the JPOA, were ever negotiated, which means that U.S. sanctions on Iran will return to their height of what they were. On top of that, President Trump has promised more actions to come, including, most recently, in his famed all-caps tweet directed at Iranian President Rouhani, saying that Iran will experience consequences the likes of which very

few have ever seen. When we think of sanctions as a policy tool that is really intended to inflict pain on a target without the use of force, we can easily imagine how sanctions will be one of the first places that President Trump's administration will turn in order to fulfill that promise he's made over Twitter.

I expect that that'll happen through a variety of measures, some formal legal measures that will be taken through new sanctions, designations, and otherwise, but also some measures that aren't exactly written down in law, through stepped-up enforcement and other measures that we expect to see from Washington. On that point, I'd love to hear Wynn's thoughts as well, to get the Washington view of what we expect.

Wynn Segall:

Well, certainly. From a Washington perspective, notwithstanding whatever disagreement or dissonance there may be with respect to U.S. policy on Russia, when it comes to Iran, some members of Congress certainly were critical of the administration's approach to JCPOA, but there is a broad and general consensus in the U.S. Congress, and, I think, more broadly in the United States, that supports a tough and aggressive approach to Iran on Iran sanctions policy. The horizon for U.S. sanctions and U.S. policy on Iran I think will be pretty clear in the direction that it's moving now for some time to come, notwithstanding the differences that creates and the divergence that it opens up with our close allies in Europe. That's the horizon, I think, from here.

Jose Garriga:

Speaking of Europe—thank you, Wynn—the EU, its leadership, and EU leaders individually, have all come in to say that, despite the United States' withdrawal, that they fully expect to remain engaged with the JCPOA. Jasper, what can you tell us about what the EU is doing going forward, and perhaps bringing in the concept of the stating of the blocking regulation?

Jasper Helder:

Thanks, Jose. Yes, Europe has watched in dismay as the U.S. withdrew from JCPOA. Bear in mind, Europe is not at all supportive of Iran and its foreign policies. To the contrary. But I think the nuclear deal and Europe's participation in that were very much driven by pragmatism. There's very strong intelligence that suggests that Iran, at the time the deal was struck, was roughly three to four to six months away from what is called the break point, where you actually have been able, as a potential nuclear state, to weaponize fissile materials to a degree that you do have a portable weapon that you can integrate into a long-range missile.

Europe is not siding with Iran. But I think the approach that Europe has taken is a different one. Fine, we get Iran to commit to drop their nuclear program. In return, we will release the sanctions so that they have an opportunity to economically develop again. That's the approach. So, strong disagreement, but that doesn't mean that Iran is a trusted partner. Far from it. So, there's clearly a rejection of walking away from the nuclear deal.

In that context, an initial response, and as I said before, I think that that response was more prompted by disbelief, surprise, and anger. A primary response from Jean-Claude Juncker on the European Union side was, "Let's reinvigorate the blocking rule." It's a rule that essentially prohibits European companies to comply with extraterritorial U.S. sanctions against Cuba and against Iran. That statute has not been updated since 1996. It refers to a couple of American sanctions laws, but it doesn't capture all of the laws that relate to the U.S.'s current sanctions and the reinstatement thereof against Iran.

That has been updated. The updated version is going to enter into effect on August 6th, and it does a couple of things. Where European companies' interests are affected by extraterritorial application of U.S. sanctions, they must report to the Commission. That has never been done in the past, even though, in relation to Cuba, we have advised

quite a few companies in situations where their interests were affected. The companies chose not to report, and I'll get to why that is later. Secondly, as I said, it makes it a criminal offense under the laws of many member states—but not all, because not all have taken that additional step in addition to the blocking rule—makes it a criminal offense to comply with the U.S. sanctions against Cuba and now also Iran.

Many national governments have realized that this is a very crude instrument, and it doesn't do much to protect European companies that have invested heavily in Iran. So, besides those blocking regulations, and probably more importantly, you see other initiatives coming up. For example, the European Investment Bank that is looking into possibilities to provide financial support for European companies that continue to do business in Iran. Likewise, the French legislature is debating proposals for national regulations that would protect and seek to protect and alleviate the burden imposed by U.S. sanctions on French companies that do business in Iran. All of that may be helpful, and these may be strong political signals on a day-to-day, feet-on-the-ground kind of basis, where we work with most of our clients. Increasingly, what you see is a choice either to do business with Iran and run particularly a U.S. secondary sanctions risk, or, alternatively, choose not to do business in Iran.

Getting to that secondary sanctions risk, I think that's something that has become a much more significant influence generally over the past one to two years in U.S. sanctions policy, because, even as a European business, you can conduct your transactions completely outside the scope of application of American law. You do not involve American suppliers, American products, American dollars, American financial institutions. But if you do that, that doesn't mean you're exempt or you're protected against secondary sanctions, where the U.S. would say, "Your transactions are countering my foreign policy objective, and, for that purpose, I make you, European company, a sanctioned party itself, and subject to restrictions."

The Trump administration indicated in increasing frequently, but also with increasing forceful statements, that it would yield the weapon of secondary sanctions. I think that that's a game-changer, and for many European companies, where, in the past, you could mitigate your exposure and your risk by just making sure your transactions were not subject to U.S. jurisdiction, that consideration clearly is changing. We've seen large companies with very large investments in Iran withdraw. PSA, the French automotive concern. We have seen Total withdrawing from Iran. We have seen significant shipping lines stopping services into Iran. I think the companies that will continue to do business with Iran are more likely to be companies that have less of a global footprint, less of a footprint that exposes them to this secondary sanctions risk. So, potentially, a lot of medium-sized and smaller enterprises that will seek the benefit from this national and European protection legislation.

Jose Garriga:

That's interesting. It really is a series of game-changing situations and decisions being made, primarily driven by the U.S. government. Let's go around the table, just to wrap up. What should listeners' key takeaways be? It's a volatile situation. It's a situation that can change with a tweet. That's perhaps unprecedented in U.S. trade history. But what should listeners' key takeaways be regarding the sanctions situation and doing business in these countries and regions?

Wynn Segall:

Just in broad terms, we're in an environment with U.S. sanctions which has a high degree of uncertainty, in which the United States is carving out a unilateral path that, in many cases, will diverge from the approach that U.S. allies are taking in other places. This creates an environment which poses both legal, business and financial risk for companies that are operating on the global stage and intersecting those markets affected by U.S. sanctions that, with extraterritoriality and secondary sanctions, they simply need to factor into their business planning and their compliance program in

order to navigate a balanced path that takes into account these parallel areas of risk, as well as the opportunity and gaps in non-U.S. law, to balance the way they approach these different risks against the business opportunities they see for themselves. But it requires, importantly, very good diligence and KYC [*know your customer*] to understand who they're dealing with, and a smart approach to negotiating terms and conditions and protections for themselves in the way they do business.

Jasper Helder: I couldn't agree more. As I said, secondary sanctions risk is something that more and more companies are factoring in. It's just not enough to distance yourself from U.S. jurisdiction.

Mac Fadlallah: Yeah, and I have to agree with all of that. Secondary sanctions have kept us quite busy in Dubai, and I'd say long gone are the days where non-U.S. companies can rely on the fact that they are non-U.S. companies in order to do business in U.S.-sanctioned countries. Now, does that mean that all business that a company may conduct in Iran, for example, is restricted? No. There is legally permissible business, and business that is consistent with U.S. sanctions programs that can be done in U.S.-sanctioned countries. But the key takeaway that I'd give, particularly to the non-U.S. companies, is if you are seeking to do business in these countries, that is all the more reason to ensure that you have stronger and more robust compliance programs, compliance controls, and that you're getting the right advice. The fact that you are a non-U.S. company, or that you may be a non-U.S. company, does not help you. It's becoming a smaller factor into this analysis, and it really increases the burden on companies making the decision to do business with a country to ensure that they're not harming themselves and their business interests everywhere.

Jose Garriga: Thank you, Mac, Jasper and Wynn for joining us today and for sharing your insights on this topic. It couldn't be more top of mind, I'm sure, for many in the global business community. This has been, I think, an excellent presentation and overview on this topic.

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Until next time.

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