

# Article

## Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence

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## INTRODUCTION

There are many myths about the role of courts in foreign affairs and national security in Western democracies. Traditionally, courts and scholars in different jurisdictions have taken the view that executive action related to foreign affairs has unique attributes, making it ill-suited for review by unelected judges with limited institutional competence.<sup>1</sup> This approach has relied on a combination of functional considerations and concerns about the democratic legitimacy of judicial interference with inherently political foreign and security policies.

From a functional perspective, one common claim is that courts lack the necessary expertise to handle complex, fast-evolving, and sensitive foreign affairs and national security issues.<sup>2</sup> Another common claim is that judicial interference would slow down the Executive and compromise coherence and secrecy, which are essential to the conduct of foreign affairs.<sup>3</sup> Louis Henkin observed that there is a fundamental mismatch between the nature of the judicial process, which aims to produce relatively stable rules of general applicability in

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1. In the U.S. context, see, for example, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 183-98 (2d ed. 1986); ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 18 (2007) (“In emergencies, the judges have no sensible alternative but to defer heavily to executive action, and the judges know this.”); Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 *VA. J. INT’L L.* 507, 527-43 (2011); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 *IOWA L. REV.* 941 (2004); and Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 *YALE L.J.* 1170, 1204-07 (2007).

While other American scholars have generally acknowledged the tradition of increased judicial deference in foreign affairs and national security as a descriptive matter, they have argued in favor of judicial review in those areas. See, e.g., THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 146-48, 218-24 (1990); Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 *AM. J. INT’L L.* 805 (1989); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 *HARV. L. REV.* 1897 (2015); Anne-Marie Slaughter, *Are Foreign Affairs Different?*, 106 *HARV. L. REV.* 1980 (1993) (review of FRANCK, *supra*).

For other jurisdictions, see GEERT DE BAERE, *CONSTITUTIONAL PRINCIPLES OF EU EXTERNAL RELATIONS* 197 (2008) (“A survey of the world’s constitutional traditions suggests that courts tend not to get involved in substantive foreign policy decisions and leave the political institutions (normally the executive) a large margin of discretion, although the desirability and extent of this margin is open to discussion”); CAMPBELL MCLACHLAN, *FOREIGN RELATIONS LAW* 219-57 (2014) (covering four common law jurisdictions: Australia, Canada, New Zealand, and the United Kingdom); Eyal Benvenisti, *Judges and Foreign Affairs: A Comment on the Institut de Droit International’s Resolution on “The Activities of National Courts and the International Relations of Their State”*, 5 *EUR. J. INT’L L.* 423 (1994); Daphne Barak-Erez, *Broadening the Scope of Judicial Review in Israel: Between Activism and Restraint*, 3 *INDIAN J. CONST. L.* 118, 122-123 (2009); and Laura K. Donohue, *The Perilous Dialogue*, 97 *CALIF. L. REV.* 357, 385-89 (2009) (discussing deference to the executive on national security matters in the United States and the United Kingdom).

2. See, e.g., FRANCK, *supra* note 1, at 46-48; Charney, *supra* note 1, at 809-10; Posner & Sunstein, *supra* note 1, at 1205-06; Sitaraman & Wuerth, *supra* note 1, at 1936-38.

3. See, e.g., Sitaraman & Wuerth, *supra* note 1, at 1938-44.

a principled manner, and the flexibility and agility necessary for the conduct of foreign affairs.<sup>4</sup> Furthermore, some scholars have argued that there are simply no workable legal standards to apply to decisions related to inherently political foreign affairs and national security issues.<sup>5</sup>

The familiar democratic legitimacy argument has been that the conduct of foreign affairs invariably requires value judgments and the balancing of strategic interests.<sup>6</sup> The political branches of government, not courts, should be making these judgments because they are accountable to the public. Moreover, some scholars have warned that because the stakes in foreign affairs are often exceptionally high, courts risk confrontation with the other branches of government and even disobedience when judges weigh in on foreign affairs and national security.<sup>7</sup>

However, the traditional notion that foreign affairs and national security matters are uniquely inappropriate for judicial review has come under pressure in scholarly debates and, perhaps more importantly, in practice.<sup>8</sup> Since 9/11, courts on both sides of the Atlantic have adjudicated a growing number of foreign affairs and national security cases, as detainees, sanctioned entities, and other individuals claiming that they had been injured by foreign and security policies have sought judicial remedies.<sup>9</sup> The rising number of foreign affairs

4. Louis Henkin, *The Foreign Affairs Power of the Federal Courts*: Sabbatino, 64 COLUM. L. REV. 805, 826 (1964).

5. See, e.g., BICKEL, *supra* note 1, at 186. *But see* FRANCK, *supra* note 1, at 48-50; KOH, *supra* note 1, at 221-22 (criticizing this argument).

6. See, e.g., Posner & Sunstein, *supra* note 1, at 1206.

7. See, e.g., Benvenisti, *supra* note 1, at 426. *But see* FRANCK, *supra* note 1, at 50-60; KOH, *supra* note 1, at 221-22 (criticizing such arguments).

8. For scholarly critiques of foreign affairs “exceptionalism,” see FRANCK, *supra* note 1; KOH, *supra* note 1; and Charney, *supra* note 1. See also Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 396 (2010) (“[E]ven as the [U.S.] Supreme Court has stayed far from the center of the nation’s War on Terror policy, it has, through its jurisdictional and procedural rulings, cautiously extended the margins along which judicial power can operate.”); Aziz Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 226 (2009) [hereinafter Huq, *Against Exceptionalism*] (“[T]here is nothing *sui generis* about the behavior of courts in instances of national security exigency, or at least . . . the thesis of [national security] exceptionalism is overstated.”); Aziz Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887 (2012) (criticizing U.S. courts for relying on separation of powers doctrine in counterterrorism cases and arguing that courts should assess the legality of counterterrorism policies using ordinary doctrinal tools); Kim Lane Scheppele, *The New Judicial Deference*, 92 B.U. L. REV. 89 (2012) (analyzing the evolution of judicial deference in national security cases after 9/11); Sitaraman & Wuert, *supra* note 1 (documenting the process of normalization in the legal treatment of foreign affairs in the United States). *But see* Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away from “Exceptionalism”*, 128 HARV. L. REV. F. 294 (2015); Stephen I. Vladeck, *The Exceptionalism of Foreign Relations Normalization*, 128 HARV. L. REV. F. 322 (2015).

The tradition of increased judicial deference in foreign affairs and national security has come under pressure in other common law jurisdictions as well. See MCLACHLAN, *supra* note 1, at 219-232; Thomas Poole, *The Constitution and Foreign Affairs*, 69 CURRENT LEGAL PROBLEMS 143, 145 (2016) (discussing the United Kingdom and asserting that “courts are certainly handling more, and more significant, cases involving foreign affairs”).

9. See, e.g., Vanessa Baehr-Jones, *Mission Possible: How Intelligence Evidence Rules Can Save UN Terrorist Sanctions*, 2 HARV. NAT’L SEC. J. 447, 449 (2011) (“Lawsuits contesting [U.N. Security Council Resolution 1267] have been ongoing in the United States, Belgium, Italy, the Netherlands, Pakistan, Switzerland, and Turkey.”); Douglas Cantwell, *A Tale of Two Kadis: Kadi II, Kadi v. Geithner & U.S. Counterterrorism Finance Efforts*, 53 COLUM. J. TRANSNAT’L L. 652 (2015); Christina Eckes, *Common Foreign and Security Policy: The Consequences of the Court’s Extended Jurisdiction*,

cases adjudicated on the merits in different jurisdictions creates new opportunities for empirically-informed evaluations of how judicial decisions interact with foreign and security policies in practice.<sup>10</sup>

This Article offers an empirical inquiry into one such dynamic between courts and policymakers, through a case study of the Court of Justice of the European Union's (CJEU) targeted economic sanctions jurisprudence. It utilizes the large number of EU sanctions cases and the constant back-and-forth between EU policymakers and courts over sanctions to study the practical consequences of the CJEU's particular form of judicial intervention in foreign affairs—namely, due process review. In its assessment of procedural judicial review in the EU targeted sanctions context, this Article draws on theoretical predictions about the impact of procedural judicial review on policy.

For more than a decade now, EU courts have been conducting rigorous judicial review of hundreds of targeted sanctions imposed by the European Union against natural and legal persons in the framework of its Common Foreign and Security Policy (CFSP).<sup>11</sup> This review includes both sanctions imposed under the EU counterterrorism regimes and third-State sanctions targeting non-EU States.<sup>12</sup> In deciding sanctions cases, EU courts have walked a fine line between protecting designated persons and entities from arbitrary designation and overtly interfering with EU foreign policy. They have therefore consistently recognized the primacy of EU political institutions in foreign and security policymaking. When the courts struck down sanctions, they did so only on due process grounds, such as the European Union's failure to state the reasons supporting its decision to place a particular entity under sanctions or to provide sufficient evidence to substantiate those reasons. EU courts have explicitly left the door open for the Council of the European Union (the Council) to fix the identified procedural flaws and re-designate persons and entities that prevailed in court, if the Council finds that keeping them under sanctions is necessary in light of its policy goals.

The CJEU sanctions case law has attracted much scholarly attention,

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22 EUR. L.J. 492, 510 (2016) [hereinafter Eckes, *Consequences*] (“A general carte blanche for the executive in the field of foreign policy no longer exists in any of the [EU] Member States.”); Christina Eckes, *EU Restrictive Measures Against Natural and Legal Persons: From Counterterrorism to Third Country Sanctions*, 51 COMMON MARKETS L. REV. 869 (2014) [hereinafter Eckes, *EU Restrictive Measures*]; Maya Lester & Brian Kennelly, *Judicial Review of Sanctions Decisions: The Wrong Point in the Wrong Court with the Wrong Defendant?*, 18 JUDICIAL REV. 206 (2013) (discussing targeted sanctions cases in the United Kingdom); Cass R. Sunstein, *Judging National Security Post-9/11: An Empirical Investigation*, 2008 SUP. CT. REV. 269 (2008) (providing data on post-9/11 U.S. national security cases); Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 DRAKE L. REV. 1035, 1040 (2016) (“Even by conservative estimates, there have been hundreds of civil lawsuits brought over the past 14-plus years challenging some aspect of post-9/11 national security or counterterrorism policies.”); Huq, *Against Exceptionalism*, *supra* note 8 (analyzing post-9/11 detention cases in the United States); Poole, *supra* note 8.

10. See, e.g., Aziz Huq, *What Good is Habeas?*, 26 CONST. COMMENT. 385 (2010) (empirically studying the impact of the U.S. Supreme Court decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), on U.S. detention policy).

11. See *infra* Part II.

12. See EUR. COMM., EU RESTRICTIVE MEASURES (SANCTIONS) IN FORCE (Aug. 4, 2017), [https://eeas.europa.eu/sites/eeas/files/restrictive\\_measures-2017-08-04.pdf](https://eeas.europa.eu/sites/eeas/files/restrictive_measures-2017-08-04.pdf) [hereinafter LIST OF RESTRICTIVE MEASURES IN FORCE].

particularly in the aftermath of the *Kadi* litigation.<sup>13</sup> A significant number of scholars have debated the implications of the *Kadi* decisions for the relationship between the EU legal order and international law,<sup>14</sup> while other commentators have focused on the doctrinal aspects of CJEU decisions and the individual rights concerns arising from EU targeted sanctions practices.<sup>15</sup> This study approaches the CJEU case law from a more comprehensive empirical perspective. It focuses not just on courts but also on the interplay and dialogue between EU courts and policymakers.

The study relies on an original dataset I constructed that includes 204 decisions issued by EU courts between July 2009 and March 2017. The decisions reviewed the legality of individual financial sanctions imposed by the European Union in the framework of its Iran and Syria sanctions regimes. The study traces how the EU Council responded to judicial intervention, at both the particular and the general level. For each individual sanction that the courts struck down, the study collected data on two additional variables: whether the Council appealed the decision, and whether it reimposed the sanction in question after it was struck down. In addition to documenting the Council's specific reactions to each decision, the study explores how judicial intervention influenced the general criteria for imposing sanctions in the EU sanctions measures concerning Iran and Syria.

The findings of the empirical study suggest that judicial review had an impact on both substantive EU policy decisions and the Council's compliance with due process obligations. Although judicial annulment of sanctions ultimately did not change the situation of designated persons and entities in the majority of the cases in the dataset, sanctions were not reimposed in almost a third of the cases. This Article argues that the significant percentage of cases in which the Council did not reimpose sanctions struck down by the courts suggests that judicial review was successful in eliciting policymakers' preferences as to which individual sanctions were actually essential to achieving EU policy goals with regard to Iran and Syria, in eliminating excessive sanctions, and in encouraging the Council to adhere to more robust procedures before imposing sanctions.

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13. Joined Cases C-402/05 P & C-415/05 P, *Kadi v. Council*, 2008 E.C.R. I-6351 (Grand Chamber) (E.C.J.) [hereinafter *Kadi I*]; Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, *Comm'n v. Kadi*, EU:C:2013:518 (Grand Chamber) (E.C.J.) [hereinafter *Kadi II*]. *Kadi I* established that individual designations by the U.N. Security Council are subject to and must comply with the fundamental rights recognized in EU law. For discussion of *Kadi II*, see *infra* note 70 and accompanying text.

14. See, e.g., Grainne de Burca, *The European Court of Justice and the International Legal Order after Kadi*, 51 HARV. INT'L L.J. 1 (2010); Guy Harpaz, *Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the Kadi Dispute*, 14 EUR. FOREIGN AFF. REV. 65 (2009); N. Türküler Isiksel, *Fundamental Rights in the EU After Kadi and Al Barakaat*, 16 EUR. L.J. 551 (2010); Juliane Kokott & Christoph Sobotta, *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?*, 23 EUR. J. INT'L L. 1015 (2012).

15. See, e.g., EU SANCTIONS: LAW AND POLICY ISSUES CONCERNING RESTRICTIVE MEASURES (Iain Cameron ed., 2013) [hereinafter SANCTIONS: LAW AND POLICY]; CHRISTINA ECKES, EU COUNTER-TERRORIST POLICIES AND FUNDAMENTAL RIGHTS: THE CASE OF INDIVIDUAL SANCTIONS (2009); Federico Fabbrini, *Global Sanctions, State Secrets and Supranational Review: Seeking Due Process in an Interconnected World*, in *SECURITY, NATIONAL SECURITY AND THE VINDICATION OF CONSTITUTIONAL LAW* 284 (David Cole, Federico Fabbrini and Arianna Vedaschi eds., 2013); Eckes, *EU Restrictive Measures*, *supra* note 9.

The findings further suggest that procedural judicial review could successfully reconcile some degree of oversight of foreign policy and national security measures with institutional concerns that have long stood in the way of judicial review in those areas. By leaving substantive policy judgments to the EU Council while enforcing strict due process requirements, procedural review facilitated a dynamic of accountability without substantially hindering the Council's ability to achieve its policy goals.

It is important to emphasize at the outset that the argument here is not that courts should review executive and legislative acts in the areas of foreign affairs and national security. As the snapshot of the theoretical debate above demonstrates, whether this is a legitimate exercise of judicial power is a deeply contested normative question, and answering it is well beyond the scope of this Article. Rather, this Article aims to assess what happens when courts *do* weigh in. It provides an empirically-grounded analysis of how procedural judicial review of foreign affairs and national security measures actually operates in practice. While this analysis will likely not assuage the concerns of those who believe that courts simply lack democratic legitimacy to intervene in foreign affairs and national security matters, it does illuminate the extent to which functional limitations affect the ability of courts to handle such matters. It should therefore be of interest to both champions and skeptics of judicial review in foreign affairs and national security.

Parts I and II introduce the policy and judicial components of the case study—the EU foreign policymaking framework in the area of sanctions, and the main principles governing CJEU judicial review of sanctions. Part III explains the methodology of the empirical study and Part IV describes its findings. Based on the empirical findings, Part V then considers whether procedural review successfully balanced foreign policy interests, judicial competence, and individual rights.

## I. THE MAKING OF EU SANCTIONS

This Part provides the essential background to the empirical study at the heart of this Article. It begins with a brief overview of the constitutional framework for EU foreign and security policy under the EU treaties. It then describes the EU sanctions decision-making process, as well as the development and structure of the EU Iran and Syria sanctions regimes.

### *A. EU Foreign and Security Policy*

It is perhaps counter-intuitive to speak of an EU foreign policy, considering that the European Union is a supranational organization and that EU member States advance their own independent foreign and security policies. In practice, however, the European Union plays a significant role in conducting foreign policy on behalf of its member States. That role has been reinforced since the entry into force of the Treaty of Lisbon in December 2009.<sup>16</sup>

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16. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the

Post-Lisbon, the Treaty on European Union (TEU)<sup>17</sup> and the Treaty on the Functioning of the European Union (TFEU)<sup>18</sup> empower the European Union to develop and implement a common foreign and security policy (CFSP).<sup>19</sup> Article 21(2) of the TEU provides that, “The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations,” in order to promote a variety of policy goals from peace and security to economic development.<sup>20</sup> Article 24(1) of the TEU further provides that “The Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security . . . .”<sup>21</sup> The EU treaties thus confer wide-ranging powers upon the European Union in the area of foreign and security policy.

The mechanics of CFSP are complex. Many actors are involved in its making, including member States, the EU political organs, the Brussels bureaucracy, and, in some respects, the EU courts.<sup>22</sup> At the political level, two major decision-making bodies navigate CFSP. The European Council, which consists of the leaders of all member States, sets forth the strategic goals and priorities of the CFSP. The Council of the European Union (the Council) oversees the implementation of those general principles and hashes out the details of different policies with the help of its supporting bureaucracy.<sup>23</sup>

Of course, member States play a crucial role in shaping CFSP through their representatives in the political decision-making bodies. They also share the

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European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon]. The Treaty introduced reforms that further entrenched the role of the EU institutions in the area of CFSP. It created the European External Action Service (EEAS), and consolidated the authorities of the High Representative for Foreign Affairs and Security Policy, who is now the equivalent of a foreign minister. Christophe Hillion observes that “[CFSP] is a policy that is arguably more incorporated than ever within the EU constitutional order, as its definition and implementation are increasingly determined by the Union’s structures.” Christophe Hillion, *A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy*, in *THE EUROPEAN COURT OF JUSTICE AND EXTERNAL RELATIONS LAW - CONSTITUTIONAL CHALLENGES* 47, 47-48 (Marise Cremona & Anne Thies eds., 2014); *see also*, e.g., Deirdre M. Curtin & Ige F. Dekker, *The European Union from Maastricht to Lisbon: Institutional and Legal Unity Out of The Shadows*, in *THE EVOLUTION OF EU LAW* 155 (Paul Craig & Gráinne de Búrca eds., 2d ed. 2011); Piet Eeckhout, *The EU’s Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism*, in *EU LAW AFTER LISBON* 265 (Andrea Biondi et al. eds., 2012).

17. Consolidated Version of the Treaty on European Union, May 9, 2008, 2008 O.J. (C 115) 13 [hereinafter TEU].

18. Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

19. TEU, *supra* note 17, Title V, Chapter 2; TFEU, *supra* note 18, art. 2(4) (“The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.”).

20. TEU, *supra* note 17, art. 21(2).

21. TEU, *supra* note 17, art. 24(1).

22. *See infra* Part II.

23. TEU, *supra* note 17, art. 26. The Council is comprised of ministerial-level representatives from each member State meeting in different configurations according to the subject-matter. One of these configurations, the Foreign Affairs Council (FAC), is the political organ in charge of EU external action. The FAC is chaired by the High Representative for Foreign Affairs and Security Policy and is staffed by several working groups in Brussels, led by the Committee of Permanent Representatives of the Governments of the Member States (COREPER). *See* Council Decision 2009/937/EU of Dec. 1, 2009, 2009 O.J. (L 325) 35 (EU) (adopting the Rules of Procedure of the EU Council).

burden of implementing EU policies within their domain.<sup>24</sup> Member States submit initiatives and proposals to the Council, thereby influencing its agenda.<sup>25</sup> EU institutions depend on member States, particularly in areas in which policy relies heavily on intelligence and investigative capabilities, such as counterterrorism, non-proliferation, and sanctions.<sup>26</sup> The European Union primarily relied on information from one or more of the member States as the basis for imposing individual sanctions against persons and entities in the cases surveyed for this study.

### *B. Sanctions Decision-Making*

Sanctions, or restrictive measures, are the most significant coercive tool available to the European Union in the CFSP area. While the European Union has no common military force or intelligence service, it is one of the world's major economic powers. It can therefore exert substantial influence through economic means. The European Union has invoked the sanctions tool extensively and increasingly in recent years.<sup>27</sup> According to the latest EU List of Restrictive Measures in Force, the European Union has CFSP sanctions in force against no fewer than thirty-six States, as well as against al-Qaeda, the Islamic State in Iraq and the Levant (ISIL), and other "foreign terrorist organisations."<sup>28</sup> Most of the CFSP-related legal instruments the Council adopts are related to sanctions, as are most of the CFSP court cases.<sup>29</sup> Sanctions therefore take up a large chunk of the EU foreign policymaking process and consume substantial resources.

EU CFSP sanctions can be derivative (implementing U.N. Security Council Resolutions) or autonomous (imposed independently by the European Union). They can target States as such (third-State sanctions), specific sectors and industries within States, or natural and legal persons (individual or "targeted" sanctions). EU third-State sanctions regimes often combine different categories of sanctions.<sup>30</sup>

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24. TEU, *supra* note 17, art. 26(3). Article 24(3) also imposes an obligation on member States to "support the Union's external and security policy actively and unreservedly" and "refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations."

25. *Id.* art. 30(1).

26. See, e.g., Christina Eckes, *Sanctions Against Individuals – Fighting Terrorism Within the European Legal Order*, 4 EUR. CONST. L. REV. 205, 208 (2008) [hereinafter Eckes, *Sanctions*]; Christina Eckes, *Decision-Making in the Dark? Autonomous EU Sanctions and National Classification*, in SANCTIONS: LAW AND POLICY, *supra* note 15, at 177 [hereinafter Eckes, *Decision-Making*].

27. See Eckes, *EU Restrictive Measures*, *supra* note 9, at 872-73; Dina Esfandiary, *Assessing the European Union's Sanctions Policy: Iran as a Case Study 2* (EU Non-Proliferation Consortium, Non-Proliferation Paper No. 34, Dec. 2013), <http://www.nonproliferation.eu/web/documents/nonproliferationpapers/dinaesfandiary52b41ff5cbaf6.pdf> ("In recent years, the EU's use of coercive measures has increased exponentially."). See generally Stefan Lehne, *The Role of Sanctions in EU Foreign Policy*, CARNEGIE EUROPE (Dec. 14, 2012), <http://carnegieeurope.eu/publications/?fa=50378> (describing the expansion of the European Union's use of sanctions).

28. See LIST OF RESTRICTIVE MEASURES IN FORCE, *supra* note 12.

29. See Eckes, *EU Restrictive Measures*, *supra* note 9, at 873.

30. For example, the Iran and Syria sanctions measures combined country, sector-wide, and individual sanctions. See *infra* Sections I.C, I.D.

Imposing EU sanctions typically requires Council decisions and regulations. Sanctions measures are prepared in cooperation among member States, the High Representative for Foreign Affairs and Security Policy, and the Brussels bureaucracy. Their adoption depends on the political will of the twenty-eight States currently voting in the Council.<sup>31</sup> Although the sanctions adoption process may appear rather cumbersome considering the number of participants with diverging interests and the politics involved, the various EU sanctions regimes are flexible, and changes occur relatively often. In order to stay effective and relevant, sanctions lists must be amended and updated to reflect developments in policy, to keep up with efforts to circumvent sanctions, to incorporate new information, and to comply with legal requirements.<sup>32</sup>

The European Union imposes individual sanctions against persons or entities based on rules and criteria predetermined by the Council in its decisions and regulations establishing a particular sanctions regime. The Council now administers numerous lists of designated natural and legal persons subject to such restrictions as travel bans that prohibit admission to EU member States; EU-wide asset freezes that deny designated persons access to assets within EU jurisdiction; and prohibitions against providing certain services.<sup>33</sup>

### C. EU Iran Sanctions

At its prime, the Iran sanctions regime was the most comprehensive in EU

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31. The process is typically initiated by a proposal from member States or the High Representative. The Council's supporting bureaucracy, the Political and Security Committee (PSC) and geographical working groups, then discuss the proposal in detail. A legal drafting group (RELEX) reviews the proposal. Finally, COREPER and the Council approve the sanctions proposal by unanimously adopting a Council decision. TEU, *supra* note 17, arts. 29, 31(1). Council decisions implementing existing decisions may be adopted by a qualified majority. TEU, *supra* note 17, art. 31(2). As explained *infra* in note 33, in some cases the Council must also adopt regulations in order to implement certain types of sanctions provided for in its decisions. See *Adoption and Review Procedure for EU Sanctions*, EUROPEAN COUNCIL & COUNCIL OF THE EU, <http://www.consilium.europa.eu/en/policies/sanctions/adoption-review-procedure> [hereinafter *Adoption Procedure*]; Francesco Giumelli, *How EU Sanctions Work: A New Narrative*, EU INST. FOR SECURITY STUD. 10-12 (May 2013), [https://www.iss.europa.eu/sites/default/files/EUISSFiles/Chaillot\\_129.pdf](https://www.iss.europa.eu/sites/default/files/EUISSFiles/Chaillot_129.pdf). The EEAS also plays a role in sanctions coordination and preparation. See Eckes, *EU Restrictive Measures*, *supra* note 9, at 884.

32. See Eckes, *EU Restrictive Measures*, *supra* note 9, at 873 ("In the four years since the entry into force of the Treaty of Lisbon, the EU has adopted countless legal instruments, imposing, amending, or repealing targeted sanctions."); LIST OF RESTRICTIVE MEASURES IN FORCE, *supra* note 12 (chronicling the frequent changes in the EU sanctions regimes).

33. See *Consolidated List of Sanctions*, EUROPEAN EXTERNAL ACTION SERVICE, [https://eeas.europa.eu/topics/sanctions-policy/8442/consolidated-list-of-sanctions\\_en](https://eeas.europa.eu/topics/sanctions-policy/8442/consolidated-list-of-sanctions_en) (last visited Nov. 10, 2018). It is important to note that travel bans are implemented by EU member States, while individual asset freezes and other economic measures are implemented through Council regulations. See *Adoption Procedure*, *supra* note 31. The legal basis for Council regulations imposing sanctions, post-Lisbon, is Article 215 of the TFEU, and the sanctions are adopted by a qualified majority. See Case C-130/10, *European Parliament v. Council*, EU:C:2012:472 (Grand Chamber) (E.C.J.) (confirming that Article 215 of the TFEU is the legal basis for all CFSP individual economic sanctions post-Lisbon). Article 215 replaced Articles 301, 60, and 308 of the Treaty Establishing the European Community (TEC), which governed EU restrictive measures pre-Lisbon. It clarified, in accordance with pre-Lisbon practice, that the EU authority to use restrictive measures extends not only to third States but also to individuals and non-State actors. See generally, Marise Cremona, *EU Competence, 'Smart Sanctions', and the Kadi Case*, 28 Y.B. EUR. L. 559 (2009) (surveying the pre-Lisbon legal environment concerning individual sanctions and the changes the Treaty introduced).

sanctions history, and it played a crucial role in the overall EU policy on Iran.<sup>34</sup> Iran has been under international scrutiny over its nuclear program since 2002 due to suspicions that it had engaged in nuclear development for military purposes. The international community addressed the issue through diplomacy, followed by international sanctions. For almost a decade between December 2006 and January 2016, Iran was subject to international sanctions aimed at curtailing its nuclear and ballistic missile programs in order to force Iran into negotiations towards a long-term settlement of the nuclear issue. The Iran nuclear sanctions consisted of U.N. Security Council sanctions as well as bilateral efforts led by the United States and the European Union.<sup>35</sup>

The European Union was responsible for a large portion of the international sanctions against Iran. Between 2007 and 2010, the European Union implemented three U.N. Security Council Iran resolutions, without significantly adding to U.N. sanctions through autonomous EU measures.<sup>36</sup> The sanctions imposed during that period focused on Iran's proliferation activities and arms trade, alongside designations of individual persons and entities. The year 2010 marked a shift in EU Iran sanctions policy. The Security Council adopted Resolution 1929 that year, which paved the way for far more aggressive sanctions compared to those in previous resolutions. For the first time, the Security Council recognized the link between revenue Iran derives from its energy sector and the funding of its nuclear proliferation activities. The Security Council also called upon States to limit cooperation with Iran's financial sector.<sup>37</sup>

Subsequently, the European Union adopted autonomous measures that went considerably beyond the U.N. Security Council framework. The new EU sanctions imposed in late 2010 included additional restrictions on trade in dual-use goods and technology with Iran; restrictions on trade and investment in key equipment and technology for the Iranian oil and gas industry; restrictions on Iranian investment in the uranium mining and nuclear industry; restrictions on transfers of funds to and from Iran; restrictions concerning the Iranian banking sector; restrictions on Iran's access to EU insurance and bonds markets; and restrictions on providing certain services to Iranian ships and cargo aircraft. The new EU sanctions measures also expanded the list of designated persons and entities under the EU Iran sanctions regime.<sup>38</sup> After 2010, the European Union

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34. See SANCTIONS AGAINST IRAN: A GUIDE TO TARGETS, TERMS AND TIMETABLES (Gary Samore ed., 2015), <https://www.belfercenter.org/sites/default/files/files/publication/Iran%20Sanctions.pdf>.

35. *Id.*, at 3-11; S.C. Res. 1929 (June 9, 2010); S.C. Res. 1835 (Sept. 27, 2008); S.C. Res. 1803 (Mar. 3, 2008); S.C. Res. 1747 (Mar. 24, 2007); S.C. Res. 1737 (Dec. 27, 2006); S.C. Res. 1696 (July 31, 2006). Resolutions 1696 and 1835 did not impose any sanctions.

36. See Council Regulation 423/2007 of Apr. 19, 2007, 2007 O.J. (L 103) 1 (EC), *repealed by* Council Regulation 961/2010 of Oct. 25, 2010, 2010 O.J. (L 281) 1 (EU) [hereinafter Council Regulation 961/2010]; Council Common Position 2007/140/CFSP of Feb. 27, 2007, 2007 O.J. (L 61) 49 (EU) (implementing Security Council Resolution 1737), *amended by* Council Common Position 2007/246/CFSP of Apr. 23, 2007, 2007 O.J. (L 106) 67 (EU) (implementing Security Council Resolution 1747), *repealed by* Council Decision 2010/413/CFSP of July 26, 2010, 2010 O.J. (L 195) 39 (EU) [hereinafter Council Decision 2010/413/CFSP].

37. S.C. Res. 1929, *supra* note 35, pmbl., ¶¶ 21-24.

38. Immediately following the adoption of Security Council Resolution 1929 in June 2010, the European Council invited the FAC to adopt measures to implement the Resolution, "as well as

further updated and expanded its Iran nuclear and proliferation-related sanctions, both those targeting different sectors within Iran and those targeting Iranian persons and entities.<sup>39</sup>

However, the EU nuclear sanctions against Iran were relaxed pursuant to the Joint Comprehensive Plan of Action (JCPOA), concluded in July 2015.<sup>40</sup> Under the JCPOA, Iran agreed to a series of concessions concerning its nuclear program in return for sanctions relief.<sup>41</sup> Subsequently, on January 16, 2016, known as JCPOA “implementation day,” the United States and the European Union lifted most of the sanctions imposed in connection with Iran’s nuclear program, subject to a snap-back mechanism to be triggered if Iran reneges on its commitments. Some proliferation-related sanctions, however, were kept in place. In addition, the JCPOA did not affect non-nuclear sanctions, such as EU human rights sanctions against Iran. On implementation day, 331 persons and entities designated over Iran’s nuclear program—the vast majority of the individual Iran sanctions—were removed from the sanctions list.<sup>42</sup> While the United States pulled out of the JCPOA in May 2018 and reimposed nuclear sanctions lifted in the framework of the agreement, the European Union remains committed to the JCPOA and has not revoked related sanctions relief.<sup>43</sup>

#### D. EU Syria Sanctions

The European Union first imposed sanctions against Syria in 2011 to

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accompanying measures . . . . These should focus on the areas of trade, especially dual use goods and further restrictions on trade insurance; the financial sector, including freeze of additional Iranian banks and restrictions on banking and insurance; the Iranian transport sector, in particular the Islamic Republic of Iran Shipping Line (IRISL) and its subsidiaries and air cargo; key sectors of the gas and oil industry . . . and new visa bans and asset freezes especially on the Islamic Revolutionary Guard Corps (IRGC).” Council Conclusions EUCO 13/10 of June 17, 2010, Annex II (Declaration on Iran) 14 (EU), [http://ec.europa.eu/eu2020/pdf/council\\_conclusion\\_17\\_june\\_en.pdf](http://ec.europa.eu/eu2020/pdf/council_conclusion_17_june_en.pdf). In line with these guidelines, the Council subsequently adopted Council Decision 2010/413/CFSP and Council Regulation 961/2010.

39. See, e.g., Council Decision 2012/635/CFSP of Oct. 15, 2012, 2012 O.J. (L 282) 58 (EU); Council Decision 2012/152/CFSP of Mar. 15, 2012, 2012 O.J. (L 77) 18 (EU); Council Decision 2012/35/CFSP of Jan. 23, 2012, 2012 O.J. (L 19) 22 (EU) [hereinafter Council Decision 2012/35/CFSP]; Council Decision 2011/235/CFSP of Apr. 12, 2011, 2011 O.J. (L 100) 51 (EU).

40. The text of the JCPOA was annexed to S.C. Res. 2231 (July 20, 2015).

41. Iran already enjoyed modest sanctions relief pursuant to the interim JPOA agreement. See Joint Plan of Action, Nov. 24, 2013, [http://eeas.europa.eu/archives/docs/statements/docs/2013/131124\\_03\\_en.pdf](http://eeas.europa.eu/archives/docs/statements/docs/2013/131124_03_en.pdf).

42. Council Decision 2015/1863/CFSP of Oct. 18, 2015, 2015 O.J. (L 274) 174 (EU); Council Regulation 2015/1861 of Oct. 18, 2015, 2015 O.J. (L 274) 1 (EU); Council Implementing Regulation 2015/1862 of Oct. 18, 2015, 2015 O.J. (L 274) 161 (EU) [hereinafter Council Implementing Regulation 2015/1863] (delisting 331 Iranian persons and entities). See also EUROPEAN EXTERNAL ACTION SERVICE, INFORMATION NOTE ON EU SANCTIONS TO BE LIFTED UNDER THE JOINT COMPREHENSIVE PLAN OF ACTION (JCPOA) 6-7, 17-20 (Jan. 23, 2016), [http://eeas.europa.eu/archives/docs/top\\_stories/pdf/iran\\_implementation/information\\_note\\_eu\\_sanctions\\_jcpoa\\_en.pdf](http://eeas.europa.eu/archives/docs/top_stories/pdf/iran_implementation/information_note_eu_sanctions_jcpoa_en.pdf); Press Release, U.S. Department of the Treasury, Implementation Day Statement (Jan. 16, 2016), [https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/jcpoa\\_implementation.aspx](https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/jcpoa_implementation.aspx); Press Release 12/16, Council of the European Union, Iran: Council Lifts all Nuclear-related Economic and Financial EU Sanctions (Jan. 16, 2016), <http://www.consilium.europa.eu/en/press/press-releases/2016/01/16-iran-council-lifts-all-nuclear-related-eu-sanctions/>.

43. See Elena Chachko, *Trump Withdraws from the Iran Nuclear Agreement: What Comes Next*, LAWFARE (May 8, 2018), <https://www.lawfareblog.com/trump-withdraws-iran-nuclear-agreement-what-comes-next>.

address the violent repression of civilian protests in the country.<sup>44</sup> As the situation in Syria continued to deteriorate, the European Union extended and updated those sanctions from time to time, reiterating that it would continue imposing sanctions against the Assad regime and its supporters for as long as the repression continues.<sup>45</sup>

Similar to the Iran sanctions regime, EU sanctions against Syria consist of both sector-wide measures and individual designations. This includes an oil embargo and additional restrictions on Syria's energy sector; an arms embargo; a ban on the provision of equipment that could be used for internal repression; restrictions on trade in luxury goods and precious metals; restrictions on financing certain enterprises in Syria and infrastructure projects; and other restrictions on financial cooperation and trade.<sup>46</sup> In contrast to the Iran sanctions regime, however, all EU Syria sanctions are autonomous sanctions. The Security Council has thus far failed to impose sanctions against the Assad regime. As of May 2018, 259 persons and 67 entities have been designated under the Syria sanctions regime.<sup>47</sup>

## II. CJEU JUDICIAL REVIEW OF CFSP SANCTIONS

The previous Part outlined the EU CFSP decision-making framework and explained the process of imposing sanctions, zeroing in on the Iran and Syria sanctions regimes. This Part turns to the role of the CJEU courts—specifically the General Court (GC) and the Court of Justice (CJEU). It explains the constitutional sources of CJEU jurisdiction to review EU sanctions and the doctrine EU courts have developed in related case law. It then describes the procedural reforms in the EU sanctions process introduced in response to early CJEU targeted sanctions decisions.

### A. Jurisdiction

Article 275 of the TFEU explicitly provides that the CJEU “shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.”<sup>48</sup> The Treaty therefore codifies the traditional approach that courts

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44. Council Decision 2011/273/CFSP of May 9, 2011, 2011 O.J. (L 121) 11 (EU); Council Regulation 442/2011 of May 9, 2011, 2011 O.J. (L 121) 11 (EU); *see also Fact Sheet, The EU and the Crisis in Syria*, EUROPEAN EXTERNAL ACTION SERVICE (Sep. 24, 2018), [https://eeas.europa.eu/headquarters/headquarters-homepage/22664/eu-and-crisis-syria\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/22664/eu-and-crisis-syria_en).

45. Press Release 762/16, Council of the European Union, Declaration by the High Representative on Behalf of the EU on the Situation in Aleppo, (Dec. 9, 2016), <http://www.consilium.europa.eu/en/press/press-releases/2016/12/09/hr-declaration-aleppo/>.

46. *See* Council Decision 2013/255/CFSP of May 31, 2013, 2013 O.J. (L 147) 14 (EU) (consolidated version as amended); Council Regulation 36/2012 of January 18, 2012, 2012 O.J. (L 16) 1 (EU) (consolidated version as amended).

47. *See* Press Release 284/18, Council of European Union, Syria: EU Extends Sanctions against the Regime by One Year (May 28, 2018), <http://www.consilium.europa.eu/en/press/press-releases/2018/05/28/syria-eu-extends-sanctions-against-the-regime-by-one-year>.

48. *See also* TEU, *supra* note 17, art. 24(1) (“The Court of Justice of the European Union shall not have jurisdiction with respect to [provisions governing CFSP], with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as

should largely stay out of foreign and security policy. However, Article 275 of the TFEU provides for two exceptions to this rule.<sup>49</sup> The CJEU has jurisdiction to police the separation of competences within the European Union in the area of CFSP. It also has jurisdiction to “rule on proceedings . . . reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of” the TEU provisions governing the CFSP.<sup>50</sup> The CJEU is thus empowered to adjudicate challenges brought by natural or legal persons contesting the legality of individual sanctions the European Union imposes in the CFSP context. Applications challenging sanctions are generally considered by the GC in the first instance, with appeal to the CJEU.<sup>51</sup>

Since the early 2000s, many natural and legal persons designated under various EU sanctions regimes have taken advantage of the availability of judicial review and challenged their listing before the EU courts.<sup>52</sup> To illustrate the significance of this phenomenon, in February 2013, a total of 117 cases regarding restrictive measures were pending before the EU courts, most concerning autonomous EU sanctions. At the time, approximately twenty percent (240) of the 1,200 individual listings under the different EU sanctions regimes were being challenged before the courts.<sup>53</sup> The flow of applications to the GC challenging individual designations has continued since 2013, as this Article demonstrates. The sheer volume of litigation has been a serious challenge for EU policymakers,

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provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.”).

49. TFEU, *supra* note 18, art. 275. See also TFEU, *supra* note 18, art. 218(11), which creates a role for the CJEU in reviewing international agreements the EU negotiates. For discussion of the role of the CJEU in CFSP post-Lisbon, see Eckes, *Consequences*, *supra* note 9.

50. TFEU, *supra* note 18, art. 275. It is important to note that the Treaty of Lisbon only clarified the scope of CJEU jurisdiction over individual restrictive measures. EU courts already decided individual restrictive measures cases before it came into force in 2009. *See, e.g.*, Case T-256/07, People’s Mojahedin Organization of Iran (PMOI) v. Council, 2008 E.C.R. II-03019 (Seventh Chamber) (E.C.J.); Case C-266/05, Sison v. Council, 2007 E.C.R. I-01233 (First Chamber) (E.C.J.); Case T-228/02, Organisation des Modjahedines du Peuple d’Iran (OMPI) v. Council, 2006 E.C.R. II-04665 (Second Chamber) (E.C.J.); *Kadi I*, *supra* note 13; *see also* Hillion, *supra* note 16, at 50; Eckes, *EU Restrictive Measures*, *supra* note 9, at 880-83.

51. The GC replaced the Court of First Instance after the entry into force of the Treaty of Lisbon.

52. See the cases cited at *supra* note 50; *see also Kadi II*, *supra* note 13; Case C-330/15 P, Tomana v. Council, EU:C:2016:601 (First Chamber) (E.C.J.); Case C-200/13 P, Council v. Bank Saderat Iran, EU:C:2016:284 (Fifth Chamber) (E.C.J.); Case C-176/13 P, Council v. Bank Mellat, EU:C:2016:96 (Fifth Chamber) (E.C.J.); Case C-605/13 P, Anboubia v. Council, EU:C:2015:248 (Grand Chamber) (E.C.J.); Case C-585/13, P Europäisch-Iranische Handelsbank AG v. Council, EU:C:2015:145 (Fifth Chamber) (E.C.J.); Case C-348/12 P, Council v. Kala Naft, EU:C:2013:776 (Fifth Chamber) (E.C.J.); Case C-280/12 P, Council v. Fulmen, EU:C:2013:775 (Fifth Chamber) (E.C.J.); Case C-417/11 P, Council v. Bamba, EU:C:2012:718 (Third Chamber) (E.C.J.); Case C-376/10 P Tay Za v. Council, EU:C:2012:138 (Grand Chamber) (E.C.J.); Case C-380/09 P, Melli Bank PLC v. Council, EU:C:2012:137 (Grand Chamber) (E.C.J.); Case C-548/09 P, Bank Melli Iran v. Council, 2011 E.C.R. I-11381 (Grand Chamber) (E.C.J.); Case C-27/09 P, France v. People’s Mojahedin Organization of Iran (PMOI), 2011 E.C.R. I-13427 (Grand Chamber) (E.C.J.). All the EU General Court decisions collected for this study regarding Iran and Syria individual sanctions are listed in the data file, available at <https://digitalcommons.law.yale.edu/yjil/vol44/iss1/1/> [hereinafter the data file].

53. See Council of Europe, Comm. of Legal Advisers on Public Int’l Law (CAHDI), U.N. Sanctions and Respect for Human Rights in the European Union I (March 2013), [http://www.coe.int/t/dlapil/cahdi/Source/un\\_sanctions/European%20Union\\_UN\\_Sanctions\\_2013\\_EN.pdf](http://www.coe.int/t/dlapil/cahdi/Source/un_sanctions/European%20Union_UN_Sanctions_2013_EN.pdf); *see also* Eckes, *Consequences*, *supra* note 9, at 500-501.

but since designated persons and entities have an express treaty right to judicial review, there is little the Council can do to avoid litigation altogether.

### *B. Standard of Review*

In reviewing individual sanctions the EU courts have repeatedly declared that they “must . . . ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order.”<sup>54</sup> In practice, however, this “full review” has been limited to the procedural aspects of EU measures imposing individual sanctions. Although applicants have often argued that their designation violated the proportionality requirement under EU law or challenged the legality of listing criteria, when the courts struck down individual sanctions, they only did so on due process grounds. The courts have not delved into substantive questions, such as whether designating a particular person or entity is necessary as a matter of policy, or what the criteria for imposing sanctions within a particular EU regime ought to be.<sup>55</sup> They have given virtually absolute deference to the EU Council when it came to the sanctions policies underlying individual designations, recognizing that the Council “must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments.”<sup>56</sup>

While the Council enjoyed substantial deference on the policy front, judicial scrutiny of its compliance with due process requirements in individual designations has been rigorous and arguably intrusive.<sup>57</sup> The EU courts have reviewed whether the Council adhered to a set of procedural requirements

54. *Kadi II*, *supra* note 13, ¶ 97.

55. See HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN UNION, EU JUSTICE SUB-COMMITTEE, CORRECTED ORAL EVIDENCE: THE LEGALITY OF SANCTIONS 22-23 (Oct. 11, 2016), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/eu-sanctions/oral/41152.pdf> [hereinafter HOUSE OF LORDS HEARING]. Michael Bishop, a senior legal adviser at the EU Council Legal Service, testified: “[T]he court is not the arbiter of whether a person should be listed, or whether it is right or proper to list someone. It does not rule in a general way like that. This is a policy decision for the Council to make.” *Id.* at 23.

56. *Kala Naft*, *supra* note 52, ¶¶ 120; see also, e.g., Case T-390/08, *Bank Melli Iran v. Council*, EU:T:2009:401, ¶¶ 35-38 (Second Chamber) (E.C.J.); Joined Cases T-246/08 & T-332/08, *Melli Bank PLC v. Council*, EU:T:2009:266, ¶¶ 44-46 (Second Chamber) (E.C.J.); *OMPI*, *supra* note 50, ¶ 159; *Sison*, *supra* note 50, ¶ 33.

In several cases the courts rejected attempts by applicants to challenge general provisions in sanctions measures, as opposed to specific designations. See, e.g., Joined Cases T-14/14 & T-87/14, *Islamic Republic of Iran Shipping Lines (IRISL) v. Council*, EU:T:2017:102 (First Chamber) (E.C.J.) [hereinafter IRISL II] (dismissing the application of IRISL and several other companies for the annulment, *inter alia*, of the criteria that served as the basis for their relisting); Case T-160/13, *Bank Mellat v. Council*, EU:T:2016:331 (First Chamber) (E.C.J.) (dismissing Bank Mellat’s action for the annulment of general provisions restricting financial ties with Iran); Case T-67/12, *Sina Bank v. Council*, EU:T:2014:348 (First Chamber) (E.C.J.) (dismissing Sina Bank’s challenge to the criteria for individual EU designations under the Iran sanctions regime). For discussion of the IRISL litigation see *infra* note 75 and the accompanying text, and *infra* Section IV.E.

57. According to Koen Lenaerts, the current President of the CJEU, the CJEU has employed a similar approach in contexts other than sanctions, in order to improve the decisions of the EU political branches without second guessing their policy choices. See Koen Lenaerts, *The European Court of Justice and Process-oriented Review*, 31 Y.B. EUR. L. 2, 3 (2012) (“[J]udicial deference in relation to ‘substantive outcomes’ has been counterbalanced by a strict ‘process review.’”); see also Eckes, *Consequences*, *supra* note 9, at 517.

derived from two fundamental rights within the EU legal order: the right of defense and the right of effective judicial protection.<sup>58</sup> The burden is on the Council to demonstrate that it complied with those requirements in a given case. In the sanctions context, the right of defense encompasses the right to be heard and the right to have access to the file containing the evidence supporting a particular designation, subject to confidentiality considerations. The right of effective judicial protection includes the obligation to state reasons and to provide a solid factual basis to support those reasons, which the courts could then review.<sup>59</sup>

The obligation to state reasons is enshrined in Article 296 of the TFEU<sup>60</sup> as well as specific Council decisions and regulations imposing sanctions.<sup>61</sup> According to CJEU case law, the purpose of this obligation is to provide the party adversely affected by an EU act with sufficiently specific information to enable them to challenge that act before an EU court.<sup>62</sup> Reasons must be provided simultaneously with the act (at the latest), in the absence of compelling interests related to the security of the European Union or of its member States or the conduct of their international relations.<sup>63</sup> The EU courts have upheld sanctions if they found that at least one of the reasons provided by the Council was sufficiently detailed and substantiated.<sup>64</sup>

What constitutes a sufficient statement of reasons? How detailed must it be? According to the EU courts, that depends on the particular circumstances of each case.<sup>65</sup> Even a short statement of reasons could suffice, as long as it demonstrates that the listed person or entity in fact satisfies the listing criteria under the relevant sanctions measures. For the most part, the statements of reasons provided by the Council for Iran and Syria sanctions have been very brief—no longer than a paragraph.<sup>66</sup>

Given the contextual approach of the EU courts, it is difficult to detect patterns in their statement-of-reasons assessments, although the case law provides some guidance. For instance, the courts have held that the Council may not list an individual based only on their position in a listed entity, without making an independent case against that individual.<sup>67</sup> In other cases, the courts have maintained that mere restatement of the listing criteria is akin to providing

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58. Charter of Fundamental Rights of the European Union, arts. 41, 47, Oct. 26, 2012, 2012 O.J. (C 326) 391. TEU, *supra* note 17, art. 6(1) ascribes to the Charter the same “legal value” as the Treaties.

59. *See, e.g., Kadi II, supra* note 13, ¶¶ 99-100, 119-23.

60. TFEU, *supra* note 18, art. 296.

61. For example, see art. 36(3) of Council Regulation 961/2010, *supra* note 36.

62. *See, e.g., Kadi II, supra* note 13, ¶ 100.

63. *See, e.g., OMPI, supra* note 50, ¶¶ 138-41, 148.

64. *See, e.g., Kadi II, supra* note 13, ¶ 130; *Fulmen, supra* note 52, ¶ 64.

65. *See Fulmen, supra* note 52, ¶ 63; *Kadi II, supra* note 13, ¶ 102; *Bamba, supra* note 52, ¶ 53.

66. The reasons for each designation appear alongside the identifying information of the listed persons and entities in the annexes of Council decisions and regulations. The data file, *supra* note 52, contains all of the statements of reasons, original and amended, that the Council had provided for the persons and entities included in the dataset.

67. *See, e.g., Case T-66/12, Sedghi v. Council*, EU:T:2014:347, ¶ 69 (First Chamber) (E.C.J.); *Case T-58/12, Nabipour v. Council*, EU:T:2013:640, ¶ 107 (Fourth Chamber) (E.C.J.); *Joined Cases T-42/12 & T-181/12, Bateni v. Council*, EU:T:2013:409, ¶¶ 64-66 (Fourth Chamber) (E.C.J.).

no reasons at all.<sup>68</sup> But they have not been consistent in applying this rule. For example, the CJEU upheld the listing of the Central Bank of Iran only because it “provides financial support to the Government of Iran,” although that statement of reasons merely quoted one of the listing criteria in the Iran measures. A central bank, the Court held, necessarily provides financial support to the government it serves, and therefore the Council did not have to provide any additional reasons or evidence to support its designation.<sup>69</sup>

The courts have generally not accepted the Council’s statements of reasons at face value. They have required the Council to provide supporting evidence and reviewed whether the Council had committed an “error of assessment” in determining that the evidence satisfies the listing criteria. The scope of the obligation to disclose evidence relied on in listing decisions was famously fleshed out in *Kadi II*. The CJEU held that while EU authorities are not required to produce *all* of the evidence underlying the reasons for a designation, the evidence provided must be sufficient to support those reasons. It also recognized that overriding security considerations might justify limiting the scope of disclosure, so that the Council would only be required to provide the designated person or entity with a summary conveying the essence of the classified material.<sup>70</sup> In practice, however, the courts have not placed much stock in the Council’s recurring argument that it should not be required to produce classified evidence. When the Council was not able to share such evidence, the courts only considered the information before them, which often resulted in the annulment of the sanctions at issue.<sup>71</sup>

For instance, in *Council v. Fulmen*, the CJEU upheld the annulment of the listing of an Iranian company and its director for their involvement in the installation of electrical equipment at the Qom/Fordow facility in Iran, a clandestine Uranium enrichment facility exposed in 2009.<sup>72</sup> The Council, backed by France and the United Kingdom, argued that it could not disclose the evidence supporting the designation, provided to it by a member state, because the evidence was classified. The Council further argued that as a general matter, it should not be expected to provide evidence of the involvement of a designated entity in nuclear proliferation, considering the clandestine nature of that type of activity.<sup>73</sup> The Court rejected these arguments, upholding the GC’s holding that

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68. See Case T-53/12, *CF Sharp Shipping Agencies v. Council*, EU:T:2012:578, ¶ 38 (Fourth Chamber) (E.C.J.); Case T-421/11, *Qualitest FZE v. Council*, EU:T:2012:122, ¶ 33 (Fourth Chamber) (E.C.J.); *OMPI*, *supra* note 50, ¶ 143.

69. Case C-266/15, *Central Bank of Iran v. Council*, EU:C:2016:208 (Second Chamber) (E.C.J.).

70. *Kadi II*, *supra* note 13, ¶¶ 122-29.

71. See, e.g., Case T-181/13 *Sharif University of Technology v. Council*, EU:T:2014:607, ¶¶ 54-55, 68-74 (Seventh Chamber) (E.C.J.); Case T-155/13 *Zanjani v. Council*, EU:T:2014:605, ¶¶ 68-74 (Seventh Chamber) (E.C.J.); Case T-8/11 *Bank Kargoshaei v. Council*, EU:T:2013:470, ¶¶ 114-17 (Fourth Chamber) (E.C.J.); Case T-110/12 *Iranian Offshore Engineering & Construction Co. v. Council*, EU:T:2013:411, ¶¶ 51-56 (Fourth Chamber) (E.C.J.); Case T-13/11 *Post Bank Iran v. Council*, EU:T:2013:402, ¶¶ 126-30 (Fourth Chamber) (E.C.J.); Case T-12/11 *Iran Insurance Company v. Council*, EU:T:2013:401, ¶¶ 122-26 (Fourth Chamber) (E.C.J.); Joined Cases T-439/10 & T-440/10 *Fulmen v. Council*, EU:T:2012:142, ¶¶ 98-101 (Fourth Chamber) (E.C.J.); *Bank Mellat*, *supra* note 52, ¶¶ 115-16.

72. *Fulmen*, *supra* note 52.

73. *Fulmen*, *supra* note 71, ¶¶ 100-01; *Fulmen*, *supra* note 52, ¶¶ 42-51.

the fact that the evidence was classified did not absolve the Council of the obligation to substantiate its case against Fulmen and its director.<sup>74</sup>

In another case, *Islamic Republic of Iran Shipping Lines (IRISL) v. Council*, the GC annulled sanctions against IRISL and seventeen other companies on grounds of manifest error of assessment of the evidence.<sup>75</sup> The Council initially listed IRISL based on two criteria: involvement in nuclear proliferation and helping listed entities evade sanctions. After the Court found that the reasons the Council provided for the listings under the second criterion were too vague, it went on to assess the facts supporting the listing based on IRISL's involvement in nuclear proliferation. The Council rested its case on three incidents in which IRISL had transported military material in contravention of Security Council resolutions, arguing based on those incidents that there was a serious risk of IRISL transporting nuclear or missile-related materials as well. The Court held that the evidence provided by the Council did not support the claim that IRISL was involved in *nuclear* proliferation. The Court once again rejected the Council's assertion that it could not identify specific shipments of material linked to nuclear proliferation due to the clandestine nature of such activities.<sup>76</sup>

The recurring issue of treatment of classified material in sanctions cases motivated reforms in the CJEU Rules of Procedures, at the initiative of the EU courts, in order to put in place special procedures for considering confidential evidence.<sup>77</sup> The new rules came into force in July 2015, but the provision regarding confidential evidence has yet to be invoked by an EU member State due to concerns that the new procedures do not allow sufficient protection of classified material.<sup>78</sup> The provision therefore did not play a role in the cases reviewed for this study.

The implication of the due process-oriented approach of the EU courts is that the Council is not barred from acting against a person or an entity whose listing the courts struck down. The Council may choose to correct the procedural flaw that the courts had identified by providing new reasons or more evidence and then relist the person or entity in question.<sup>79</sup> The courts have generally

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74. *Fulmen*, *supra* note 52, ¶¶ 77-83.

75. Case T-489/10, *Islamic Republic of Iran Shipping Lines v. Council*, EU:T:2013:453 (Fourth Chamber) (E.C.J.) [hereinafter IRISL].

76. *Id.* ¶¶ 63-67.

77. Rules of Procedure of the General Court of Apr. 4, 2015, art. 105, 2015 O.J. (L 105) 1, 37 (EU). Article 105 of the rules regulates “[t]reatment of information or material pertaining to the security of the Union or that of one or more of its Member States or to the conduct of their international relations.” See also Maya Lester, *Draft European Court Rules Propose Secret Hearings*, EUR. SANCTIONS (Apr. 6, 2014), <https://europeansanctions.com/2014/04/06/draft-european-court-rules-for-secret-hearings>; Maya Lester, *UK Europe Minister Says New EU Closed Procedures Are Part of Adapting to “New Jurisprudential Reality” After Kadi*, EUR. SANCTIONS (Apr. 3, 2015), <https://europeansanctions.com/2015/04/03/uk-europe-minister-says-new-eu-closed-procedures-are-part-of-adapting-to-new-jurisprudential-reality-after-kadi>.

78. Letter from Rt. Hon. Baroness Anelay of St. Johns DBE, Minister of State, Foreign & Commonwealth Office, to Lord Boswell of Aynho, Chair of the House of Lords Select Committee on European Union (Apr. 6, 2017), <http://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/Brexit/GovresptoEUsanctionslistingrpt.pdf>, at 3 [hereinafter U.K. Response Letter].

79. See, e.g., *PMOI*, *supra* note 50, ¶¶ 65, 75 (“It is apparent from the case-law that, when a measure has been annulled for formal or procedural defects . . . the institution concerned is entitled to

suspended the effects of sanctions annulments to allow the Council to appeal to the CJEU or to reimpose the sanctions, recognizing that immediate annulment would compromise their effectiveness.<sup>80</sup> Moreover, as the GC remarked in *IRISL*, the Council can amend listing criteria if it finds that existing criteria do not allow it to act as it believes necessary to achieve its policy goals.<sup>81</sup>

### C. Early Reforms

In response to judicial annulments of sanctions on due process grounds in early EU counterterrorism sanctions cases, the EU Council introduced reforms to improve the procedures for imposing individual sanctions in order to comply with the standards set forth by the courts.<sup>82</sup> Prior to those reforms, there were hardly any procedural safeguards in place in the EU designation process.<sup>83</sup> The

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adopt afresh an identical measure, this time observing the formal and procedural rules in question . . .”). The case law allows the Council substantial flexibility with regard to relisting decisions. For instance, the GC has held that in relisting a person or an entity, the Council may use a different criterion but rely on essentially the same factual basis that supported their original designation. Such relistings could be lawful even if the facts the Council relied on in the relisting measures predate the original designation. *See, e.g.*, Case T-346/15, *Bank Tejarat v. Council*, EU:T:2017:164, ¶¶ 29, 36-39 (First Chamber) (E.C.J.); *IRISL II*, *supra* note 56, ¶¶ 112-117; Case T-89/14, *Export Development Bank of Iran v. Council*, EU:T:2016:693, ¶ 71 (First Chamber) (E.C.J.); Case T-207/15, *National Iranian Tanker Company (NITC) v. Council*, EU:T:2016:471, ¶¶ 40-68 (First Chamber) (E.C.J.).

80. *See, e.g.*, *Bank Tejarat*, *supra* note 79, ¶ 29; Case T-400/10, *Hamas v. Council*, EU:T:2014:1095, ¶ 145 (Second Chamber) (E.C.J.); Case T-565/12, *NITC v. Council*, EU:T:2014:608, ¶ 77 (Seventh Chamber) (E.C.J.) (finding immediate invalidation of the sanctions against the applicant would jeopardize the effectiveness of a potential Council decision to relist, by allowing the applicant to remove assets from EU jurisdiction). Unless the GC explicitly states otherwise in its judgment, the effects of annulled sanctions are maintained until the end of the period during which the Council may appeal to the CJEU (two months plus a grace period of ten days from the notification of the judgment). If the Council appeals, the sanctions remain in place until the CJEU rules on appeal. *See* TFEU, *supra* note 18, art. 264; Consolidated Version of Protocol (No. 3) on the Statute of the Court of Justice of the European Union, arts. 45, 56, 60, Sept. 5, 2008, 2018 O.J. (C 115) 210-29 (EU).

81. *IRISL*, *supra* note 75, ¶ 64: “[I]f the Council is of the opinion that the applicable legislation does not enable it to intervene in a sufficiently effective manner in order to combat nuclear proliferation, it is open to the Council to amend it in its role as legislator—subject to a review of lawfulness by the Courts of the European Union—so as to extend the situations in which restrictive measures may be adopted.” The Council went on to amend the listing criteria and relist *IRISL* and most of the other companies. The GC dismissed *IRISL*’s challenge to its relisting along with the other companies, reiterating that the Council is entitled to amend listing criteria in order to relist a person or an entity that had previously prevailed in court. *See IRISL II*, *supra* note 56, ¶¶ 79-85, 93-94, 193-195.

82. *See* Council of the European Union Press Release C/07/158, *EU Terrorist List—Adoption of New Consolidated List* (June 29, 2007), [http://europa.eu/rapid/press-release\\_PRES-07-158\\_en.htm](http://europa.eu/rapid/press-release_PRES-07-158_en.htm) (“[I]mprovements have been agreed regarding the listing and de-listing procedures concerning those on the EU terrorist list, in the light of the Court of First Instance’s ruling . . . in the *OMPI* case.”); Council of the European Union doc. 10826/1/07, *Fight Against the Financing of Terrorism—Implementation of Common Position 2001/931/CFSP* (June 21, 2007) (elaborating on the due process measures to be taken). *See also* Eckes, *Sanctions*, *supra* note 26, at 218 (“In reaction to the CFI’s criticism in *OMPI*, the Council introduced a number of procedural safeguards to the adoption procedure of individual sanctions . . . . These requirements set out by the Council seem to address directly the CFI’s points of criticism in *OMPI* and *Sison*.”).

83. *See* HOUSE OF LORDS HEARING, *supra* note 55, at 1-2, 10, 19. *See*, in particular, the testimony of Maya Lester. *Id.* at 19 (“[T]he early [sanctions] cases concerned a regime in which no reasons at all were given and there was no notification that you were on a blacklist . . . . The first you might hear about it was when you suddenly discovered that you could not withdraw money.”). *See also* HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN UNION, *THE LEGALITY OF EU SANCTIONS* (11TH REPORT OF SESSION 2016-17) 3 (Feb. 2, 2016), <https://www.publications.parliament.uk/pa/ld201617/ldselect/1deucom/102/102.pdf>, [hereinafter HOUSE OF LORDS REPORT].

Treaty of Lisbon itself responded to early sanctions litigation by inserting a provision into the TFEU that provides that EU measures imposing sanctions “shall include necessary provisions on legal safeguards.”<sup>84</sup>

In the framework of those procedural reforms, the Council undertook to issue notices to designated persons and entities about the measures taken against them and to provide them with reasons. The Council also created procedures to allow designated persons and entities to file observations and to request that their listing be reconsidered. Furthermore, the Council developed a mechanism for considering listing proposals from member States and entrenched periodic review of sanctions lists. Consequently, EU sanctions regimes are typically reviewed at least once a year,<sup>85</sup> and sanctions measures now contain provisions requiring the Council to issue notices and provide statements of reasons to designated persons and entities.<sup>86</sup> The EU Council has circulated several documents over the years outlining guidelines for adopting and implementing sanctions that address due process issues, among other things.<sup>87</sup>

### III. METHODOLOGY

The previous Parts of the Article explore the decision-making framework on both the judicial and policy side of the EU sanctions equation. The next Parts turn to the empirical study of the dynamic between the two sides. Part III describes the methodology of the study and explains the dataset. Part IV will present the key findings of the empirical study in three main categories: case outcomes and appeals; post-invalidation relisting and related litigation; and changes in the listing criteria in the Iran and Syria sanctions regimes throughout the research period.

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84. See TFEU, *supra* note 18, art. 215(3). See also Declarations Annexed to the Final Act of the Intergovernmental Conference Which Adopted the Treaty of Lisbon, Declaration on Articles 75 and 215 of the TFEU, May 9, 2008, 2008 O.J. (C 115) 335, 346 (EU). The Declarations address due process in the context of restrictive measures: “The Conference recalls that the respect for fundamental rights and freedoms implies, in particular, that proper attention is given to the protection and observance of the due process rights of the individuals or entities concerned. For this purpose and in order to guarantee a thorough judicial review of decisions subjecting an individual or entity to restrictive measures, such decisions must be based on clear and distinct criteria. These criteria should be tailored to the specifics of each restrictive measure.” *Id.*

85. See HOUSE OF LORDS HEARING, *supra* note 55, at 10 (Matthew Findlay).

86. See, e.g., Council Regulation 267/2012 of March 23, 2012, art. 46, 2012 O.J. (L 88) 1 (EU) [hereinafter Council Regulation 267/2012] (concerning restrictive measures against Iran).

87. See Council of the European Union, Restrictive Measures (Sanctions)—Update of the EU Best Practices for the Effective Implementation of Restrictive Measures, Doc. 10254/15 (June 24, 2015); Council of the European Union, Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy—New Elements, Doc. 9068/13 (April 30, 2013); Council of the European Union, Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy, Doc. 11205/12 (June 15, 2012); Council of the European Union, Restrictive Measures (Sanctions)—Update of the EU Best Practices for the Effective Implementation of Restrictive Measures, Doc. 8666/1/08 REV1 (April 24, 2008); Council of the European Union, Basic Principles on the Use of Restrictive Measures, Doc. 10198/1/04 REV1 (June 7, 2004); Council of the European Union, Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy, Doc. 15579/03 (Dec. 3, 2003).

### A. The Dataset

The dataset constructed for this study consists of 204 individual decisions delivered by the GC between July 9, 2009, and March 22, 2017.<sup>88</sup> To the best of my knowledge, it includes *all* the available GC sanctions decisions reviewing designations concerning Iran’s nuclear program and the Syrian crisis from the first decision in July 2009 to the time of writing.

I selected those two sanctions regimes for several reasons. First, both the Iran nuclear issue and the Syrian crisis were at the top of the EU foreign policy agenda—indeed, at the top of the global agenda—when the EU courts considered related sanctions cases. The nature of the issues allows us to assume that the policy stakes were salient to judges as they ruled on the validity of sanctions imposed under those regimes. Second, the two regimes implicate very different policy interests: the Iran sanctions were aimed at curbing nuclear proliferation, while the Syria sanctions were largely motivated by human rights concerns. The difference between the EU policy objectives for the two regimes allows us to evaluate whether judicial decisions and the Council’s responses are generally consistent across different policy areas. Finally, the Iran sanctions regime was chosen because it had generated the largest number of cases at the time of selection.

In all of the cases in the dataset, the EU courts reviewed the legality of individual economic sanctions against natural and legal persons. The standard of review was as outlined in Section II.B of this paper. The applied doctrine and judicial rhetoric were generally consistent across Iran and Syria cases. All of the sanctions reviewed were autonomous EU sanctions, meaning that there was no parallel U.N. Security Council designation.<sup>89</sup> The primary respondent was the EU Council.

Of the 204 individual decisions in the dataset, 176 pertain to Iran and 28 pertain to Syria.<sup>90</sup> Most of the applicants in Syria cases were either prominent businesspeople or others said to have close ties with the Assad regime. Applicants in the Iran cases belonged primarily to the energy, banking, insurance, and shipping sectors, as detailed in Table 1.

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88. The terms “decision” or “case” as defined for the purposes of this study refer to the outcome concerning *each person* or *entity* that had challenged their designation. The cases of several applicants were sometimes considered in the framework of a single judgment.

89. Note that I did not omit cases involving EU Iran or Syria sanctions that had parallel Security Council designations from the dataset. To the best of my knowledge, there were simply no such cases. All of the relevant cases of which I am aware involved autonomous EU sanctions.

90. The Iran decisions were issued by the first (71 cases, 41% of Iran cases), second (4, 2%), fourth (62, 35%) and seventh (39, 22%) chambers of the GC. The Syria cases were decided by the sixth (4 cases, 14% of Syria cases), seventh (21, 75%) and ninth (3, 11%) chambers. It is important to note, however, that the composition of each chamber changed during the research period.

**Table 1 – Iran sanctions by sector**

Sector	Number of applicants
Energy	41 (28%)
Banking	27 (18%)
Insurance	2 (1%)
Shipping	73 (50%)
Other	4 (3%)
<b>Total (unique applicants)<sup>91</sup></b>	<b>147 (100%)</b>

A few clarifications are in order regarding the dataset. First, the dataset only includes cases in which the courts issued judgments on the merits of applications for the annulment of the reviewed sanctions.<sup>92</sup> Second, the dataset excludes a few cases pertaining to Iran human rights and counterterrorism sanctions.<sup>93</sup> Those categories of sanctions are not governed by the same set of Council decisions and regulations that governed the Iran nuclear sanctions during the research period, and they serve different policy objectives.<sup>94</sup>

91. This table reflects only “unique” applicants. The Syria cases were brought by twenty-two unique applicants. A number of the applicants in the dataset challenged their designation before the EU courts more than once. Those repeat challenges will be discussed further in Sections IV.A and IV.D.

92. Cases resolved without a judgment on the merits of an application for annulment of a designation were excluded from the dataset because they did not involve an assessment by the courts of the legality of the sanctions at issue. *See, e.g.*, Case T-543/11, *Ghreiwati v. Council*, EU:T:2012:337 (Sixth Chamber) (E.C.J.). During the proceedings before the GC in *Ghreiwati*, the Council removed the applicant, designated under the Syria sanctions regime, from the list of designated persons. The applicant subsequently informed the GC that there was no longer a need to adjudicate, and the GC therefore issued an order to dismiss the case. *See also* Case T-328/14, *Jannatian v. Council*, EU:T:2016:86 (Seventh Chamber) (E.C.J.) (dismissing a claim for damages resulting from a designation based on request of applicant and absence of need to adjudicate); Case T-263/12, *Kala Naft v. Council*, EU:T:2014:228 (First Chamber) (E.C.J.) (ordering dismissal on the ground that the action was “manifestly lacking any foundation in law”); Case T-569/12, *Marouf v. Council*, EU:T:2014:701 (Ninth Chamber) (E.C.J.) (ordering dismissal based on the applicant’s request to discontinue the proceedings); Case T-550/11, *Assad v. Council*, EU:T:2012:266 (Sixth Chamber) (E.C.J.) (correcting an error in identification of a Syrian individual as a family member of Assad). According to one assessment, in 86 cases before November 2014, applications for annulment of sanctions across all policy areas (i.e., not just in Iran and Syria cases) have been withdrawn or removed from the court register. *See Eckes, Consequences, supra* note 9, at 501 n.43.

93. *See, e.g.*, *OMPI, supra* note 50; *PMOI, supra* note 50. Note that these terrorism cases were decided prior to the research period. *See also* the first Iranian human rights decisions, delivered in December 2015, Case T-273/13, *Sarafraz v. Council*, EU:T:2015:939 (Second Chamber) (E.C.J.) and Case T-274/13, *Emadi v. Council*, EU:T:2015:938 (Second Chamber) (E.C.J.).

94. The EU counterterrorism sanctions regime is different from third-State regimes like the Iran and Syria sanctions regimes because it typically requires a designation by a competent national authority or the U.N. Security Council prior to a listing at the EU level. *See, e.g.*, *Hamas, supra* note 80. The Council’s policy discretion over counterterrorism designations is therefore significantly more constrained by the decisions of national authorities compared to its discretion over third-State regimes. However, ISIL and al-Qaeda are relatively recent exceptions to this policy. In September 2016, the European Union introduced new measures that allow the Council to designate individuals with ties to those groups without having to rely on a previous designation by a competent authority. *See* Maya Lester, *EU Introduces EU Autonomous ISIL/al-Qaeda Sanctions*, EU SANCTIONS BLOG (Sept. 20, 2016), <https://europeansanctions.com/2016/09/20/eu-introduces-eu-autonomous-isil-al-qaeda-sanctions>. Due to the differences in the legal authorities of the Council and the subject matter between the terrorism regime and third-State sanctions, terrorism-related cases were excluded from the dataset. Similarly, the EU’s Iran human rights sanctions, first imposed in 2011, are governed by a different set of Council decisions and regulations than the nuclear

Finally, due to the implementation of the JCPOA, most of the EU Iran nuclear sanctions were lifted in January 2016. Nevertheless, between January 2016 and early 2017, the EU courts continued to issue decisions on—and strike down—Iran nuclear and proliferation-related sanctions imposed prior to the entry into force of the JCPOA. They have applied the same due process doctrine in those cases as they did before the signing of the agreement.<sup>95</sup> While the continued consideration of essentially moot cases might seem puzzling, the EU courts have consistently held that designated persons and entities have an interest in a ruling on the legality of their designation, even if they are no longer subject to sanctions.<sup>96</sup> The implementation of the JCPOA therefore did not seem to affect the reasoning of the courts, at least not overtly. It did, however, affect the data on relisting in the cases decided after the July 2015 signing of the JCPOA. The relisting option in most of those cases was rendered moot because the sanctions in question were either lifted or about to be lifted when the courts issued their decisions.<sup>97</sup> This was accounted for in the data.

### B. Data

The study collected two types of data: information about key parameters of the judicial decisions in the dataset and information about policymakers' responses to these decisions. For each judicial decision, the study recorded the bottom-line result, by applicant (dismissed/struck down/partially struck down); whether the decision was appealed to the CJEU, distinguishing between appeals filed by the Council and appeals filed by the applicants;<sup>98</sup> and whether the text of the decision indicates that the Council relied on confidential material, to assess the extent to which classification issues played a role in the Council's decision making.

On the policy side, the study traced the Council's response to decisions striking down sanctions at two levels: the particular sanction reviewed in each case and the general listing criteria in the Iran and Syria sanctions regime. First,

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and proliferation-related sanctions. See *EU Restrictive Measures against Iran*, EUROPEAN COUNCIL & COUNCIL OF THE EU, <http://www.consilium.europa.eu/en/policies/sanctions/iran> (last visited Nov. 10, 2018). Therefore, the two Iran human rights cases decided to date, *supra* note 93, were also excluded from the dataset.

95. See e.g., *IRISL II*, *supra* note 56; Case T-436/14, *Neka Novin Co., Private Joint Stock v. Council*, EU:T:2017:142 (First Chamber) (E.C.J.); Case T-418/14, *Sina Bank v. Council*, EU:T:2016:619 (First Chamber) (E.C.J.); Joined Cases T-423/13 & T-64/14, *Good Luck Shipping LLC v. Council*, EU:T:2016:308 (Second Chamber) (E.C.J.); *Bank Saderat Iran*, *supra* note 52; *Bank Mellat*, *supra* note 52; Case T-539/14, *North Drilling v. Council*, EU:T:2015:871 (Seventh Chamber) (E.C.J.); Case T-161/13, *First Islamic Investment Bank v. Council*, EU:T:2015:667 (First Chamber) (E.C.J.); Case T-45/14, *HTTS and Bateni v. Council*, EU:T:2015:650 (Seventh Chamber) (E.C.J.); Case T-121/13, *Oil Pension Fund Investment Co. v. Council*, EU:T:2015:645 (Seventh Chamber) (E.C.J.); Case T-5/13, *Iran Liquefied Natural Gas Co. v. Council*, EU:T:2015:644 (Seventh Chamber) (E.C.J.); Case T-158/13, *Iran Aluminum Co. (Iralco) v. Council*, EU:T:2015:634 (Second Chamber) (E.C.J.).

96. See e.g., *Sedghi*, *supra* note 67, ¶¶ 33-42.

97. See Council Implementing Regulation 2015/1863, *supra* note 42 (EU Implementation Day delisting catalogue); cf. S.C. Res. 2231, *supra* note 40, JCPOA Annex II, Attachment 1 (listing persons and entities slated for delisting by the EU and annexing it to the JCPOA).

98. Note that if the CJEU overruled the GC on appeal, the case result data reflect the final outcome of the proceedings for each case, post-appeal. The CJEU overruled the GC in only one case in the dataset. See *Kala Naft*, *supra* note 52.

the study examined what happened to the sanctions the courts had struck down in the aftermath of judicial intervention. For every sanction struck down, it recorded whether the Council relisted or maintained the listing of the person or entity in question. In addition, the study collected all the statements of reasons the Council provided for the sanctions challenged in the cases in the dataset and compared them with the amended reasons it used to relist or maintain the listing of persons and entities that had their sanctions annulled by the courts. The information about delisting and relisting and the statements of reasons were obtained from EU Council decisions and regulations published regularly in the EU Official Journal.<sup>99</sup> The data from EU decisions and regulations was supplemented with publicly available information, such as blogs that track EU sanctions.<sup>100</sup>

Importantly, the Council decisions and regulations often clearly stated that a certain person or entity was being removed from the sanctions list or relisted with a new statement of reasons pursuant to a GC or CJEU decision (on appeal). It was therefore fairly simple to establish causality between court decisions and subsequent Council policy decisions.

At the broader level, the study traced the changes made by the Council to the listing criteria in both the Iran and Syria sanctions regimes in order to assess the impact of judicial review on policy beyond particular designations.

#### IV. FINDINGS

##### A. Case Results

Perhaps contrary to conventional wisdom about judicial deference in foreign affairs, the EU courts struck down sanctions in 126 of the 204 individual

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99. Regarding Iran, see Council Implementing Regulation 2017/77 of Jan. 16, 2017, 2017 O.J. (L 12) 24 (EU); Council Implementing Regulation 2016/603 of Apr. 18, 2016, 2016 O.J. (L 104) 8 (EU) [hereinafter Council Implementing Regulation 2016/603]; Council Implementing Regulation 2015/2204 of Nov. 30, 2015, 2015 O.J. (L 314) 10 (EU); Council Implementing Regulation 2015/1863, *supra* note 42; Council Implementing Regulation 2015/549 of Apr. 7, 2015, 2015 O.J. (L 92) 12 (EU); Council Implementing Regulation 2015/230 of Feb. 12, 2015, 2015 O.J. (L 39) 3 (EU); Council Implementing Regulation 1202/2014 of Nov. 7, 2014, 2014 O.J. (L 325) 3 (EU); Council Implementing Regulation 397/2014 of Apr. 16, 2014, 2014 O.J. (L 119) 1 (EU); Council Implementing Regulation 1361/2013 of Dec. 17, 2013, 2013 O.J. (L 343) 7 (EU) [hereinafter Council Implementing Regulation 1361/2013]; Council Implementing Regulation 1203/2013 of Nov. 26, 2013, 2013 O.J. (L 316) 1 (EU) [hereinafter Council Implementing Regulation 1203/2013]; Council Implementing Regulation 1154/2013 of Nov. 15, 2013, 2013 O.J. (L 306) 3 (EU); Council Implementing Regulation 1264/2012 of Dec. 21, 2012, 2012 O.J. (L 356) 55 (EU); Council Implementing Regulation 709/2012 of Aug. 2, 2012, 2012 O.J. (L 208) 2 (EU); Council Regulation 267/2012, *supra* note 86.

Regarding Syria, see Council Implementing Regulation 2016/1996 of Nov. 15, 2016, 2016 O.J. (L 308) 3 (EU); Council Implementing Regulation 2016/840 of May 27, 2016, 2016 O.J. (L 141) 30 (EU); Council Implementing Regulation 2015/828 of May 28, 2015, 2015 O.J. (L 132) 3 (EU); Council Implementing Regulation 2015/108 of Jan. 26, 2015, 2015 O.J. (L 20) 2 (EU); Council Implementing Regulation 1105/2014 of Oct. 20, 2014, 2014 O.J. (L 301) 7 (EU); Council Implementing Regulation 1013/2014 of Sept. 26, 2014, 2014 O.J. (L 283) 9 (EU); Council Implementing Regulation 578/2014 of May 28, 2014, 2014 O.J. (L 160) 11 (EU).

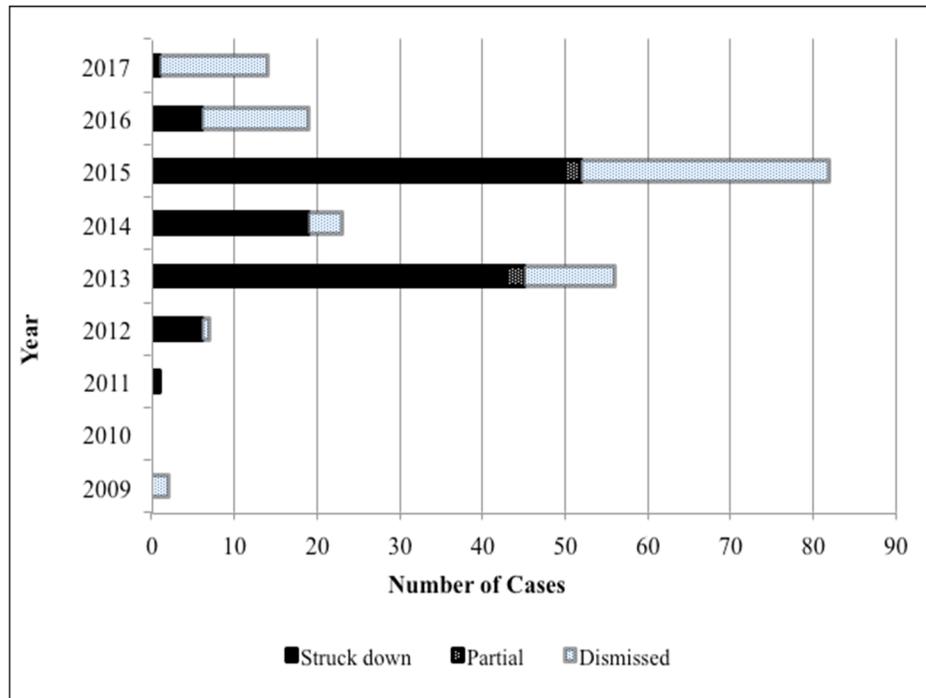
100. The “European Sanctions” blog, by Maya Lester and Michael O’Kane, was a particularly valuable source of information. Lester represented applicants before the GC and CJEU in many targeted sanctions cases. See Maya Lester & Michael O’Kane, EUR. SANCTIONS, <https://europeansanctions.com> (last visited Nov. 10, 2018).

cases in the dataset, or sixty-two percent of all reviewed sanctions. In an additional four cases (two percent of the cases in the dataset), the courts struck down the original measures designating the applicant but upheld later measures maintaining that applicant on the sanctions list.<sup>101</sup> In other words, sanctions were struck down in whole or in part in sixty-four percent of the cases in the dataset. Challenges to sanctions were dismissed in full in only thirty-six percent of the cases. Table 2 summarizes the case results, and Figure 1 describes the distribution of the decisions throughout the research period.

**Table 2 – Case Results**

	<b>Iran</b>	<b>Syria</b>	<b>Total</b>
<b>Sanction struck down</b>	112 (63%)	14 (50%)	126 (62%)
<b>Challenge dismissed</b>	61 (35%)	13 (46%)	74 (36%)
<b>Partially struck down</b>	3 (2%)	1 (4%)	4 (2%)
	176 (100%)	28 (100%)	204 (100%)

101. Case T-579/11, *Akhras v. Council*, EU:T:2015:97 (Seventh Chamber) (E.C.J.); Case T-434/11, *Europäisch-Iranische Handelsbank v. Council*, EU:T:2013:405 (Fourth Chamber) (E.C.J.); Case T-495/10, *Bank Saderat PLC v. Council*, EU:T:2013:142 (Fourth Chamber) (E.C.J.); *First Islamic Investment Bank*, *supra* note 95.

**Figure 1 – Case Results by Year**

Importantly, the percentage of sanctions struck down is significantly higher if we only consider the first round of litigation for each applicant, excluding second and third challenges. Second and third challenges are defined here as challenges brought by an applicant that had previously challenged their designation and received a judgment on the merits. The dataset contains thirty-three second challenges and two third challenges (out of a total 204 individual GC decisions).<sup>102</sup> Additional repeat challenges were not included in the dataset

102. For Iran second and third challenges, see *Bank Tejarat*, *supra* note 79; *IRISL II*, *supra* note 56 (IRISL and ten other companies); Case T-65/14, *Bank Refah Kargaran v. Council*, EU:T:2016:692 (First Chamber) (E.C.J.); *Export Development Bank of Iran*, *supra* note 79; *Sina Bank*, *supra* note 95 (third Sina Bank challenge); *National Iranian Tanker Company (NITC)*, *supra* note 79; Case T-63/14, *Iran Insurance Company v. Council*, EU:T:2016:264 (First Chamber) (E.C.J.); Case T-68/14, *Post Bank Iran v. Council*, EU:T:2016:263 (First Chamber) (E.C.J.); *Good Luck Shipping*, *supra* note 95; Case T-52/15, *Sharif University of Technology v. Council*, EU:T:2016:254 (Seventh Chamber) (E.C.J.); *North Drilling*, *supra* note 95; *HTTS*, *supra* note 95 (third challenge for applicant HTTS, second challenge for applicant Bateni); Case T-95/14, *Iranian Offshore Engineering & Construction Co. v. Council*, EU:T:2015:433 (Seventh Chamber) (E.C.J.); Case T-563/12, *Central Bank of Iran v. Council*, EU:T:2015:187 (First Chamber) (E.C.J.); *Sina Bank*, *supra* note 56; *Joined Cases T-35/10 & T-7/11, Bank Melli Iran v. Council*, EU:T:2013:397 (Fourth Chamber) (E.C.J.); Case T-128/12, *HTTS v. Council*, EU:T:2013:312 (Fourth Chamber) (E.C.J.); Case T-492/10, *Melli Bank PLC v. Council*, EU:T:2013:80 (Fourth Chamber) (E.C.J.).

For Syria second challenges, see Case T-153/15, *Hamcho v. Council*, EU:T:2016:630 (Seventh Chamber) (E.C.J.) (applicants Mohamad Hamcho and Hamcho International); Case T-154/15, *Jaber v. Council*, EU:T:2016:629 (Seventh Chamber) (E.C.J.); Case T-155/15, *Kaddour v. Council*, EU:T:2016:628 (Seventh Chamber) (E.C.J.); Case T-790/14, *Hassan v. Council*, EU:T:2016:429 (Seventh Chamber) (E.C.J.); Case T-443/13, *Makhlouf v. Council*, EU:T:2016:27 (Seventh Chamber) (E.C.J.).

because they were still pending at the time of writing.<sup>103</sup> The results of second and third challenges will be further discussed in Section IV.D. Looking only at the first round of litigation for each applicant, the courts struck down sanctions in whole or in part in seventy-three percent of the cases, fully dismissing only twenty-seven percent of the challenges.

**Table 3 – Case Results Excluding Second/Third Challenges**

	Iran	Syria	Total
<b>Sanction struck down</b>	105 (71%)	14 (64%)	119 (71%)
<b>Challenge dismissed</b>	39 (27%)	7 (32%)	46 (27%)
<b>Partially struck down</b>	3 (2%)	1 (4%)	4 (2%)
	147 (100%)	22 (100%)	169 (100%)

Before proceeding, a note is in order regarding the Council's reliance on classified material in making the designations included in the dataset. The designations reviewed in the dataset cases were based on proposals from member States, sometimes relying on classified material that those member States were unwilling to share with the applicant or the courts (and perhaps not even with other EU member States). An indication that the Council relied on confidential material or encountered probative challenges related to such material was found in forty-seven (twenty-seven percent) of the Iran cases and in one of the Syria cases—about twenty-four percent of all the individual cases in the dataset.

### *B. Appeals*

Turning to appeals, the findings indicate that the Council rarely appealed GC decisions striking down sanctions. Of a total of 126 sanctions struck down, the Council filed only five appeals (four percent)—all in Iran cases.<sup>104</sup> The Council's last appeal was filed in April 2013, although the GC has decided many cases since then.<sup>105</sup> This suggests that, in the cases in which it decided to relist

103. See, e.g., Case T-332/15, *Ocean Capital Administration v. Council*, action brought June 16, 2015, 2015 O.J. (C 294) 76-77 (EU) (thirty-two applicants, case pending). Two Syria cases that were pending at the time of writing, and therefore not included in the dataset, were recently decided. In both cases the GC upheld the relisting of the individuals in question. See Case T-408/16, *HX v. Council*, EU:T:2018:355 (Fifth Chamber) (E.C.J.); Case T-461/16, *Kaddour v. Council*, EU:T:2018:316 (Fifth Chamber) (E.C.J.).

104. See *Fulmen*, *supra* note 52 (concerning two applicants: Fulmen and its manager); *Kala Naft*, *supra* note 52; *Bank Mellat*, *supra* note 52; *Bank Saderat*, *supra* note 52. Note that the Council sometimes filed cross-appeals in response to appeals brought by the applicants. Here I consider only the appeals the Council itself had initiated.

105. The last Iran appeal filed by the Council was *Bank Saderat*, *supra* note 52, decided on April

or maintain the listing of persons and entities that prevailed in court, the Council preferred taking relatively swift unilateral action over exhausting its options through the judicial process. Moreover, the CJEU dismissed all but one of the Council's appeals. In *Council v. Kala Naft*, the CJEU set aside a GC decision to strike down sanctions against an Iranian company for trading in oil and gas equipment that could be used for Iran's nuclear program.<sup>106</sup>

### C. Relisting

The success rate of individuals who challenged their designation under the Iran and Syria sanctions regimes is impressive—seventy-three percent in first challenges and sixty-four percent overall. But their victories were often short-lived. As we have seen, the Council was free to relist persons and entities that had successfully challenged their designation, because the courts struck down sanctions only on due process grounds. The Council could reimpose the sanctions after addressing the procedural flaws the courts had identified. In many cases, it did just that.

The Council relisted persons and entities that had their sanctions annulled by the courts in fifty-seven percent of the cases. The relisting included sixty-seven relistings of Iranian entities and individuals and five relistings of Syrian entities and individuals, out of a total of 126 individual sanctions that were struck down by the EU courts. An additional five percent of the designated persons and entities that had won in court—four Iranian entities and two Syrian persons—were maintained on the lists by measures the Council adopted during the judicial proceedings, which fell outside the scope of the judgments. Therefore, persons and entities that won in court were either relisted or kept on the sanctions lists in sixty-two percent of the cases.

At the same time, the Council did not relist applicants that won in court in thirty-two percent of the 126 cases in which sanctions were struck down, representing thirty-three Iran cases and seven Syria cases. Note that these numbers probably underestimate the number of individual sanctions eliminated in the shadow of judicial review. The cases resolved without a judgment on the merits of an application for annulment—which were not included in the dataset—highlight this possibility. In a number of those cases, the Council removed designated persons and entities from the sanctions list during the judicial proceedings, before a judgment on the merits could be issued.<sup>107</sup>

The remaining six percent of the cases, representing eight Iranian persons and entities, are cases decided after July 2015 pertaining to persons and entities covered by the JCPOA. As previously mentioned, the relisting option in those cases became irrelevant in light of the signing of the JCPOA in July 2015 and its

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21, 2016. Bank Saderat was among the entities that were to remain subject to EU sanctions after JCPOA Implementation Day. Although the CJEU upheld the GC's judgment striking down the Bank's designation, the Council amended the statement of reasons for the Bank shortly before the judgment was delivered and it remained listed until October 2016. See Council Implementing Regulation 2016/603, *supra* note 99.

106. See *Kala Naft*, *supra* note 52.

107. See, e.g., *Ghreiwati*, *supra* note 92; *Assad*, *supra* note 92.

subsequent implementation in January 2016. Since the sanctions in question were either lifted or about to be lifted when the courts decided those cases, a concrete decision on relisting in response to the judicial decisions was arguably no longer necessary. Those cases are therefore categorized as inconclusive in Table 4, which summarizes the data regarding relisting.

**Table 4 – Relisting**

	Iran	Syria	Total
<b>Total struck down</b>	112 (100%)	14 (100%)	126 (100%)
<b>Relisted</b>	67 (60%)	5 (36%)	72 (57%)
<b>Maintained</b>	4 (4%)	2 (14%)	6 (5%)
<b>Not relisted</b>	33 (29%)	7 (50%)	40 (32%)
<b>Inconclusive</b>	8 (7%)	0 (0%)	8 (6%)

In addition to the data about the number of relistings, the study compared the amended statements of reasons the Council provided in relisting measures to the original statements of reasons that supported the sanctions that the courts annulled.<sup>108</sup> For the most part, the amended statements of reasons added little or no information about the specific “sanctionable” behavior in which the designated person or entity had engaged. In many cases, the Council simply amended the listing criteria or provided reasons based on different criteria than those it had originally relied on. This practice is discussed in greater depth in Section IV.E.

#### *D. Second and Third Challenges*

As previously mentioned, the dataset contains thirty-five repeat-challenges by applicants who previously challenged their designation and received a decision on the merits—thirty-three second challenges and two third challenges. Additional repeat challenges were still pending at the time of writing.<sup>109</sup> In three of those thirty-five cases, the courts dismissed both the first and the second challenge. In thirty-two cases, persons and entities that *won* in the first round of litigation challenged the Council’s decision to relist or maintain them on the sanctions lists. Of those thirty-two cases, five involved an applicant winning a

108. For the full text of all the statements of reasons, original and amended, see the data file, *supra* note 52.

109. See *supra* note 103 (citing cases).

second challenge. In two cases, applicants won a third challenge. In the remaining twenty-five cases, however, the courts dismissed second challenges. Annex II to this Article summarizes the results of the repeat challenges.<sup>110</sup>

### *E. Expanding Listing Criteria*

The findings presented thus far relate to the Council's particular decisions concerning each individual sanction that the EU courts struck down. But the Council's response to the judicial decisions during the research period was not limited to particular individual sanctions. The Council also amended the listing criteria in both the Iran and Syria sanctions regimes. Annex I to this Article documents these amendments.

In the case of Iran, the criteria for imposing autonomous individual EU sanctions initially required a direct link to nuclear or missile proliferation. That standard was difficult for the Council to satisfy.<sup>111</sup> The Council often argued in court that it could not provide concrete evidence to support listings based on involvement in proliferation because of the "clandestine nature of nuclear proliferation activities." The Council's inability to present evidence often resulted in the courts striking down the challenged sanctions.<sup>112</sup>

The Council expanded the listing criteria under the Iran sanctions regime several times since the adoption of the first nuclear sanctions measures in 2007.<sup>113</sup> In addition to persons and entities involved in nuclear or missile proliferation, the amended criteria targeted those who violated the Iran sanctions or assisted others in doing so; members of the Islamic Revolutionary Guard Corps; entities owned or controlled by IRISL; entities acting on its behalf or providing it services; and other related persons and entities. Arguably the most significant expansion occurred in early 2012, when the Council added the criterion of providing "support, such as material, logistical or financial support, to the Government of Iran."<sup>114</sup>

The Council expanded the listing criteria for persons and entities under the Syria sanctions regime as well. The original EU Syria sanctions measures concerning the violent repression of civilians by the Assad regime, adopted in May 2011, targeted "persons responsible for the violent repression against the civilian population in Syria."<sup>115</sup> Later on, the Council added "persons and entities benefiting from or supporting the regime" and their associates. In October 2015, the Council expanded the criteria once again, this time specifying more precisely which categories of persons and entities should be listed. The current criteria

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110. This table is also available digitally at <https://digitalcommons.law.yale.edu/yjil/vol44/iss1/1/>.

111. See HOUSE OF LORDS HEARING, *supra* note 55, ¶ 23 (noting that EU courts were comfortable with broader listing criteria, such as "providing support to the Government of Iran," than with specific criteria involving nuclear proliferation, which is more difficult to prove).

112. See section II.B; see also, e.g., IRISL, *supra* note 75, ¶ 63; Sharif University of Technology, *supra* note 71, ¶¶ 54, 63-75; Iran Insurance, *supra* note 71, ¶ 126; Fulmen, *supra* note 71, ¶ 101.

113. See *infra* Annex I.

114. Council Regulation 267/2012, *supra* note 86, art. 23(2)(d); see also Council Decision 2012/35/CFSP, *supra* note 39, recital 13 and arts. 1(6), 1(7).

115. See *infra* Annex I.

include prominent businesspeople operating in Syria, members of the Assad or Makhlouf families, government ministers, senior military officials, intelligence officials, and those involved in chemical weapons proliferation.<sup>116</sup>

Were these amendments to the listing criteria in both the EU Iran and Syria sanctions regimes a result of judicial intervention? While the Council's particular relisting decisions discussed above were often explicitly tied to specific judicial decision, measures amending listing criteria did not specifically state whether the amendments were being made in response to judicial intervention. The text of the amending measures, standing alone, therefore does not fully reveal the purpose of the amendments. It appears, however, that the Council's motivation in making the amendments was a combination of a policy interest in applying more pressure on Iran and Syria in light of various developments and a secondary interest in reducing the likelihood of further judicial annulments of sanctions.

The policy reasons for the criteria expansions have been explained in the amending measures. For instance, when the Council decided to add the "support to the Government of Iran" criterion to the Iran measures, it reiterated "its serious and deepening concerns over the nature of Iran's nuclear programme," and explained that it was going to introduce additional sanctions to "severely [affect] the Iranian financial system, in the transport sector, in the energy sector, [and to take] measures against the Iranian Revolutionary Guard Corps (IRGC), as well as in other areas."<sup>117</sup> The listing criteria expansion was part of a broader escalation in EU sanctions against Iran, beginning with the adoption of U.N. Security Council Resolution 1929 in 2010.<sup>118</sup> Similarly, when the EU Council amended the Syria listing criteria in 2015, it explained why targeting the categories of persons and entities introduced in the amendment was necessary to prevent the Syrian regime from circumventing sanctions and to weaken its power centers.<sup>119</sup>

At the same time, expanding listing criteria also reduces the risk of judicial intervention in sanctions, because the broader the listing criteria, the easier it should be for the Council to satisfy due process requirements concerning reasons and evidence.<sup>120</sup> The GC alluded to this in noting that the Council is free to amend listing criteria if it has trouble lawfully listing a person or an entity that should be subject to sanctions under the existing ones.<sup>121</sup> In some cases, a direct link can be drawn between judicial decisions, criteria amendments, and subsequent relistings.

The *IRISL* case, discussed in Section II.B, is a telling example. The GC struck down the designation of IRISL and a number of its subsidiaries in September 2013 on grounds of error of assessment of the evidence. The GC

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116. See Council Decision 2015/1836/CFSP of Oct. 12, 2015, 2015 O.J. (L 266) 75 (EU) [hereinafter Council Decision 2015/1836/CFSP]; Council Regulation No. 2015/1828 of Oct. 12, 2015, 2015 O.J. (L 266) 1 (EU).

117. See Council Decision 2012/35/CFSP, *supra* note 39, recitals 5, 13.

118. See *supra* Section I.C.

119. See Council Decision 2015/1836/CFSP, *supra* note 116, pmb1.

120. See HOUSE OF LORDS HEARING, *supra* note 55, at 29 (Michael Bishop, Senior Legal Advisor, EU Council Legal Service, Council of the European Union).

121. See *supra* note 81.

found that the fact that IRISL violated Security Council resolutions by transporting military equipment does not prove that it had engaged in *nuclear* proliferation, as required by the criterion based on which it was designated. Almost immediately thereafter, in October 2013, the Council amended the listing criteria under the Iran sanctions regime, extending the criteria to persons and entities that have themselves violated Security Council resolutions and EU decisions concerning Iran.<sup>122</sup> In November 2013, the Council relisted IRISL and its subsidiaries with new statements of reasons based on the sanctions violation criterion.<sup>123</sup> IRISL was now listed for being “involved in the shipment of arms-related materiel [sic] from Iran in violation [of UNSCR 1747]. Three clear violations were reported to the U.N. Security Council Iran Sanctions Committee in 2009.”<sup>124</sup> As the reader may recall, the Council relied on the same three violations as evidence in its unsuccessful defense of the previous listing of IRISL and the others under the earlier version of the listing criteria. This suggests that it expanded the designation criteria, at least in part, in order to avoid having to produce new evidence to support the designation of IRISL. This strategy worked: in February 2017, the GC dismissed a second IRISL challenge to its relisting based on the new criterion.<sup>125</sup>

In a number of other cases, the Council relisted persons and entities based on the broad criterion of “providing support to the Government of Iran,” after the courts struck down their designation based on more specific criteria such as involvement in nuclear proliferation or circumventing sanctions. The courts largely upheld designations based on this criterion, indicating that to the extent the Council was trying to make sanctions more immune to judicial review by relying on broad criteria, it has successfully done so.<sup>126</sup>

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122. See Council Decision 2013/497/CFSP of Oct. 10, 2013, 2013 O.J. (L 272) 46 (EU); Council Regulation 971/2013 of Oct. 10, 2013, 2013 O.J. (L 272) 1 (EU).

123. See Council Decision 2013/685/CFSP of Nov. 26, 2013, 2013 O.J. (L 316) 46 (EU); Council Implementing Regulation 1203/2013, *supra* note 99.

124. Council Decision 2013/685/CFSP, *supra* note 123, at 47. The other companies were listed as entities owned or controlled by IRISL.

125. *IRISL II*, *supra* note 56.

126. It is important to note that while the CJEU upheld the criterion of “providing support to the government of Iran,” Case C-266/15 interpreted it as covering only activity “which, regardless of any direct or indirect link established with nuclear proliferation, is capable, by its quantitative or qualitative significance, of encouraging that proliferation.” Case T-563/12 (*Central Bank of Iran*), *supra* note 102, ¶ 66 (upholding the designation), *appeal dismissed* Case C-266/15, *supra* note 69); see also Case T-578/12, *National Iranian Oil Company v. Council*, EU:T:2014:678, ¶¶ 119-120 (Seventh Chamber) (E.C.J.) (upholding the designation), *appeal dismissed* Case C-440/14 P, *National Iranian Oil Company v. Council*, EU:C:2016:128 (Grand Chamber) (E.C.J.); *Sharif University of Technology*, *supra* note 102 (upholding the designation), *appeal dismissed* Case C-385/16 P *Sharif University of Technology v. Council*, EU:C:2017:258)). This interpretation notwithstanding, the courts have largely upheld sanctions based on this criterion. See *Bank Tajerat*, *supra* note 79; *Export Development Bank of Iran*, *supra* note 79; *National Iranian Tanker Company (NITC)*, *supra* note 79; Case T-435/14 *Tose'e Ta'avon Bank v. Council*, EU:T:2016:531 (First Chamber) (E.C.J.); Case C-459/15 P *Iranian Offshore Engineering & Construction v. Council*, EU:C:2016:646 (Ninth Chamber) (E.C.J.); Case T-9/13 *National Iranian Gas Company v. Council*, EU:T:2015:236 (First Chamber) (E.C.J.); Case T-10/13 *Bank of Industry & Mine v. Council*, EU:T:2015:235 (First Chamber) (E.C.J.); *Iran Insurance Company*, *supra* note 102; *Post Bank Iran*, *supra* note 102; *Bank Refah Kargaran*, *supra* note 102. But see *Sina Bank*, *supra* note 95; *Oil Pension Fund Investment Co.*, *supra* note 95; *North Drilling*, *supra* note 95 (striking down listings based on the criterion of support to the government of Iran); *National Iranian Tanker Company (NITC)*, *supra* note 80.

Similar to the Iran criteria amendments, the Council's measures introducing the new Syria listing criteria did not explicitly tie the changes to judicial decisions. But the new criteria codified grounds for designation that the Council had relied upon under the previous criteria. Even before the new criteria were introduced, the Council listed Syrian individuals for being prominent businesspeople in Syria or belonging to the Assad family, and the courts have upheld listings on those grounds in a number of cases.<sup>127</sup> It is possible that the Council sought to clarify the Syria listing criteria to further immunize future listings from judicial intervention.

There is some evidence that this strategy worked in the Syria context just as it did in the Iran nuclear context. For example, the reasons for the designation of Syrian businessman HX were amended in May 2016, after the introduction of new criteria specifying prominent businesspeople in Syria in October 2015. The reasons were amended shortly before the June 2016 GC judgment striking down HX's original designation for lack of evidence. HX therefore remained listed based on the new reasons notwithstanding the judgment. HX subsequently lost his second challenge against his relisting based on the new reasons. The Court held that under the 2015 criteria, being a prominent businessman in Syria merits designation without any further reasons or evidence.<sup>128</sup> This again suggests that relisting based on new criteria did help the Council avoid judicial invalidation of sanctions it previously failed to defend.

These substantive changes in the structure of the Iran and Syria sanctions regimes during the research period should be considered in the context of previous reforms induced by judicial review in early sanctions cases decided prior to the research period (described in Section II.C of this Article). Early judicial review of individual EU sanctions encouraged the EU Council to put in place systemic procedural safeguards in the designation process.

#### *F. Summary*

The main findings of the empirical study can be summarized as follows. The rate of individual EU Iran and Syria sanctions that the EU courts struck down in whole or in part on due process grounds was very high (seventy-three percent in first challenges and sixty-four percent overall). The results of second and third challenges, however, are more positive from the point of view of the Council; it successfully defended the vast majority of the sanctions (twenty-five out of thirty-two sanctions) that the courts had previously struck down. Policymakers pushed back in response to the judicial decisions by relisting many of the persons and entities that won in court. Sixty-two percent of the persons

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127. See Maya Lester, *EU Expands Criteria for Including People in Syria Sanctions*, EUROPEAN SANCTIONS BLOG (Oct. 16, 2015), <https://europeansanctions.com/2015/10/16/eu-expands-criteria-for-including-people-in-syria-sanctions/>.

128. See Case T-723/14 HX v. Council, EU:T:2016:332 (Fifth Chamber) (E.C.J.); HX, *supra* note 103. Similarly, the reasons for the listing of Syrian applicant Haswani were amended pursuant to the new criteria, before the GC judgment striking down his original designations was issued. Here, too, the judgment did not cover the new measures and Haswani remained listed. In light of the amended reasons and the different criteria, it is plausible that the new designation would fare better in the next round of litigation. See Case T-231/15 Haswani v. Council, EU:T:2017 (Seventh Chamber) (E.C.J.).

and entities whose designation the courts struck down remained listed in the aftermath of judicial intervention. At the same time, the Council did not reimpose thirty-two percent of the annulled sanctions, and more sanctions were probably eliminated in the shadow of judicial review. Finally, the Council expanded listing criteria in both the Iran and Syria sanctions regimes, at least in part to reduce the risk of further judicial intervention.

## V. PROCEDURAL REVIEW IN FOREIGN AFFAIRS

The EU courts applied a due process model in reviewing targeted sanctions. They focused on the Council's compliance with procedure while giving it practically absolute deference with regard to the substance of its sanctions policy. It therefore may be helpful to assess the findings about the impact of judicial review on policy in the CJEU case study against familiar theoretical claims about procedural judicial review of legislative and administrative action. The goal here is not to provide a comprehensive account of process-oriented theories of judicial review or to answer the deeply contested normative question of what the judicial role in foreign affairs ought to be. Rather, the more modest aim here is to explore what the CJEU case study may teach us about how the procedural model of judicial review works in practice in the areas of foreign affairs and national security.

### A. Procedural Judicial Review

Procedural theories of judicial review of legislative or administrative action direct courts to focus on the process that produced a particular substantive outcome instead of the outcome itself.<sup>129</sup> They suggest that by rigorously

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129. Perhaps the most influential theories of procedural judicial review were famously articulated by Alexander Bickel and John Hart Ely in the U.S. constitutional context. See BICKEL, *supra* note 1, at 175 (describing how courts “can avoid constitutional adjudication without causing hardship to litigants, by resort to special rules of procedure or to techniques of statutory construction, or both”); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73-74, 87-88 (1980) (advocating “a participation-oriented representation-reinforcing approach to judicial review”); see also WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 336-342 (1988) (describing various legal process theories); Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1958-1962 (2011) (critiquing the resistance to judicial review of the legislative process); Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1587 (2001) (describing nine types of structural rules that “[facilitate] a judicial ‘remand’ of a challenged program for reevaluation by nonjudicial government employees”); William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L. J. 1279, 1283 (2005) (outlining “conditions under which judicial review can facilitate the operation of our pluralist democracy by lowering the stakes of politics”) [hereinafter Eskridge, *Pluralism*]; Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 200 (1976) (examining the meaning of due process in lawmaking in the context of judicial review); Patricia Popelier, *Preliminary Comments on the Role of Courts as Regulatory Watchdogs*, 6 LEGISPRUDENCE 257 (2012) (considering process-oriented review in the context of judicial oversight of regulatory reform); Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CALIF. L. REV. 919, 922-923, 940-946 (1989) (reviewing ESKRIDGE & FRICKEY *supra*); Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 4 (2008) (arguing that courts should “raise the costs to government decisionmakers of enacting constitutionally problematic policies rather than attempting to designate certain government actions . . . as impermissible”); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C. R.-C. L. L. REV. 269, 269

enforcing procedural requirements, courts can compel policymakers to take a second look at their decisions and consider them more carefully, without prejudging policy outcomes or substituting policymakers' judgment with their own.<sup>130</sup> In this manner, procedural review facilitates dialogue and collaboration between courts and policymakers, through which courts indirectly help improve substantive decisions.<sup>131</sup> In Alexander Bickel's words, procedural review is one of the techniques for "eliciting answers, since so often they engage the Court in a Socratic colloquy with the other institutions of government and with society as a whole concerning the necessity for this or that measure . . . ."<sup>132</sup>

In addition to motivating policymakers to correct substantive errors ex post, judicially-imposed procedures also encourage greater diligence in policymaking and implementation ex ante. They affect policymaking beyond the particular measures under judicial review. Stringent procedural requirements, the argument goes, screen out certain policies and measures that infringe on legally-protected values, because they raise the enactment costs of such policies or measures. Heightened enactment costs incentivize policymakers to abandon certain measures if they find that their benefits from a policy standpoint do not justify the additional enactment costs. At the same time, procedural review preserves policymakers' ability to act when they find that the benefits of certain policies and measures are worth the extra effort.<sup>133</sup>

The main advantage highlighted by supporters of procedural judicial review is that it offers a way for courts to discipline policymakers without

(1975) (arguing for "structural due process" as a category of constitutional limitation that focuses "on the structures through which policies are both formed and applied, and formed in the very process of being applied."). For a recent overview of proceduralism in American legal theory, see Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1826-29 (2016). For discussion of procedural judicial review in the European Union that draws on American theories of procedural judicial review, see *Lenaerts*, *supra* note 57.

130. See, e.g., Stephenson, *supra* note 129, at 32 ("The conventional justification for constitutionally or judicially imposed procedural requirements is that they increase accuracy by correcting mistakes ex post and by encouraging government decisionmakers to be more thoughtful and careful ex ante."); *Lenaerts*, *supra* note 57, at 15-16 ("Process review" increases judicial scrutiny over the decision-making process of the EU institutions. However, it prevents the [CJEU] from intruding into the realm of politics . . . . Whilst 'process review' shows due deference to the expertise and higher institutional capacities of policymakers, it may be the only way of judicially enforcing principles that have a clear political nature . . . ."); see also Aziz Z. Huq, *The Institution Matching Canon*, 106 NW. U. L. REV. 417, 455 (2012) (describing a version of procedural judicial review that focuses on the identity of the decision-maker as allowing "expression of judicial skepticism without the strong medicine of irredeemable invalidation").

131. See ESKRIDGE & FRICKEY, *supra* note 129, at 341-42; Bar-Siman-Tov, *supra* note 129, at 1954-58; Coenen, *supra* note 129, at 1582-83, 1868-69; *Lenaerts*, *supra* note 57, at 4.

132. BICKEL, *supra* note 1, at 70-71.

133. See Stephenson, *supra* note 129, at 25 ("[C]ourts can improve the constitutional performance of government policymaking institutions by conditioning judicial approval of certain constitutionally problematic policies on the government's willingness to undertake activities that raise the costs of enacting those policies. Doing so screens out government actions with benefits that are low relative to their constitutional and other social costs, while allowing the government to take action with relatively high social benefits."). Compare this to the argument that even sporadic and limited judicial consideration of national security cases creates an "observer effect" that screens out national security policies the executive predicts are unlikely to survive judicial review. This "observer effect" has an impact on policy beyond the particular issue the courts have considered. Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827 (2013).

delving into politically or morally controversial issues, circumventing problems of institutional competence and democratic legitimacy. Moreover, as John Hart Ely once observed, procedural review “involves tasks that courts, as experts on process and (more important) as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials.”<sup>134</sup> Procedural judicial review gives policymakers leeway to choose their preferred course of action as long as they comply with procedural requirements.<sup>135</sup> In other words, the procedural approach promises “depoliticization through proceduralism.”<sup>136</sup> Procedural review therefore seems particularly appealing in the foreign affairs and national security context, in which the political stakes and the cost of judicial error are often high, and the institutional competence of courts is more limited than usual due to secrecy and information issues.<sup>137</sup>

Critics of procedural legal theories have been skeptical about their attempt to segregate law from politics, and procedure from substance. Procedural judicial review, they have argued, necessarily relies on substantive assumptions about what process is due and what values and goals that process aims to promote, be it individual rights (as in the CJEU case), epistemic correctness, democratic representation, or public welfare.<sup>138</sup>

134. See ELY, *supra* note 129, at 88. *But see* Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890 (2016) (challenging the view that courts have an advantage over policymakers regarding procedural issues).

135. As Eskridge and Frickey observed in the constitutional context, procedural models of judicial review “(supposedly) [ha]ve the virtue of vesting ultimate policy responsibility with the legislature—it can control the ultimate resolution of the dispute if it jumps through the right hoops.” ESKRIDGE & FRICKEY, *supra* note 129, at 342.

136. Kessler & Pozen, *supra* note 129, at 1826.

137. For examples of process-oriented approaches in the area of national security see, e.g., Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQ. L. 1 (2004) (demonstrating that U.S. courts have in fact applied procedural review in emergencies); Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661 (2009) (arguing that U.S. courts have conditioned deference in the national security context on the executive’s compliance with procedural requirements); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47 (2004) (defending a judicial minimalism approach to national security cases that focuses on procedural requirements such as congressional authorization and hearing rights); Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. 1 (2006). See also Huq, *supra* note 130, at 455; Stephenson, *supra* note 129, at 19-22 (suggesting that resort to a judicial technique that would raise enactment costs for constitutionally problematic policies instead of ruling on their substantive legality is particularly useful when policymakers have better information about the expected outcomes of a certain policy than the reviewing court).

138. See, e.g., Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) (“[I]t is not difficult to show that the constitutional theme of perfecting the processes of governmental decision is radically indeterminate and fundamentally incomplete. The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values—the very sort of theory the process-perfecters are at such pains to avoid.”); Eskridge, *Pluralism*, *supra* note 129, at 1291 (discussing cases that exemplify that even Ely’s process-oriented theory requires assessment of substantive values); Lenaerts, *supra* note 57 (“[D]etractors of structuralism argue that it is difficult, if not impossible, to draw the dividing line between ‘substantive’ and ‘structural’ matters.”), at 2; Kessler & Pozen, *supra* note 136, at 1828-29 (“Today’s leading public law theories depart from the old legal process in acknowledging the normativity of legal decisionmaking and accepting that ‘no issues are simply ‘procedural.’” (quoting Eskridge & Peller, *The New Public Law Movement*, 89 MICH. L. REV. 707, 762-3 (1991))); Rodriguez, *supra* note 129, at 943-944 (“[T]he radical critique of the legal process movement stressed the contingent nature of law and legal reasoning, challenging, as did the Realists, the attempt to separate law from politics.”).

Moreover, procedural theories of judicial review rely on empirical assumptions that might not be correct. There is no guarantee that simply making policymakers think again or raising the costs of enacting a certain measure would produce different—much less better—substantive outcomes.<sup>139</sup> Policymakers' motivation to stay the course is particularly strong when they deem a certain measure important from a policy or political standpoint, even if its substantive legality is questionable.<sup>140</sup> The chances that they would abandon their original policy choice in those cases are low because policymakers have strong incentives to make a serious effort to meet procedural requirements. With this in mind, the claim that any policy choice policymakers adopt after reviewing a measure on “remand” from the courts should receive judicial deference clearly raises some difficulties.

In other words, forcing policymakers to go through the decision-making process again or to comply with stringent procedural requirements could prove to be no more than a waste of bureaucratic and political resources that does nothing to affect substantive policy outcomes.

The opposite might also be true. Procedural review could in practice circumscribe the substantive options available to policymakers, sometimes without any serious judicial consideration of their initial position.<sup>141</sup> This might be because the political circumstances that made the first act of the political branches possible have changed, especially if a replacement act would require legislation or a collaborative process that depends on political or bureaucratic good will. Alternatively, a replacement measure might not be attainable because the political branches cannot meet procedural requirements for practical reasons. In the foreign affairs and national security context, for example, striking down a measure for lack of a factual basis could make it difficult for policymakers to replace it, if it means sharing classified material or obtaining information that is not in their possession.

Moreover, if courts correctly predict the outcome of a do-over, they could deploy procedural review strategically to achieve the substantive outcome they prefer under the radar, eschewing public criticism and accountability. Although judicial predictions about the prospects of a measure rejected on procedural grounds might not be correct, there is still something for courts to gain from

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139. For discussion of empirical evidence supporting the claim that process influences policy outcomes, see Bar-Siman-Tov, *supra* note 129, at 1929 (“Indeed, regardless of one’s view of what constitutes good process or good policy, one thing that has been repeatedly proven by theoretical, experimental, and empirical studies is that legislative procedures and rules have a crucial impact on policy outcomes.”). But to say that process influences policy is not to say that process improves policy. See, e.g., Stephenson, *supra* note 129, at 32 (“[T]here is room for disagreement about how effective the sorts of procedures mandated by courts actually are in improving substantive accuracy.”).

140. Cf. Stephenson, *supra* note 129, at 6 (“[I]f the government would still enact a given policy in the face of substantial additional enactment costs, the probability that the policy serves significant government interests is likely to be higher.”).

141. See Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2793-97 (2003) [hereinafter Tushnet, *Alternative Forms*]; Mark Tushnet, *Subconstitutional Constitutional Law: Supplement, Sham, or Substitute?*, 42 WM. & MARY L. REV. 1871, 1871 (2001) [hereinafter Tushnet, *Subconstitutional*] (“In practice, however, what appears to be a provisional invalidation based on subconstitutional law turns out to be—and, indeed, might be expected at the moment of decision to be—a final, unrevisable decision.”).

procedural review. It allows them to delay and possibly avoid engagement with controversial questions while keeping the option to address them available, if and when the case reaches the courts again. Thus understood, procedural review is merely a sham—a means to disguise judicial interference with substance.<sup>142</sup>

What did procedural judicial review of EU individual sanctions accomplish in the CJEU case study, according to the empirical evidence? Was it successful in promoting the interests it set out to protect, namely, the individual rights of designated persons and entities? Or did it pointlessly burden other EU institutions with additional bureaucracy? Did judicial review preclude any policy options? The analysis that follows approaches this question from two perspectives: a narrow perspective that evaluates the impact of each individual judicial decision on the EU Council's policy choices; and a wider one that explores the broader implications of the interaction between EU courts and policymakers over time.<sup>143</sup>

### *B. CJEU Procedural Review—The Narrow Perspective*

From a narrow perspective, it would appear at first glance that judicial review has been largely ineffective in changing the situation of persons and entities designated under the EU Iran and Syria sanctions regimes. In almost two-thirds of the cases in the dataset in which the EU courts struck sanctions down, the persons and entities in question remained subject to sanctions despite judicial intervention.<sup>144</sup>

To be sure, the Council did not ignore or overtly defy the courts in reimposing annulled sanctions. The courts explicitly anticipated and recognized the possibility of relisting in their judgments. The Council, on its part, adopted new decisions and regulations, provided new statements of reasons, and sometimes produced additional evidence for the annulled sanctions that it decided to reimpose. In amending listing criteria to make relistings possible, the Council acted on the GC's invitation. On the face of it, the Council's actions were in line with what the courts have required it to do. The courts only took issue with the Council's compliance with due process, not its substantive decisions regarding whom to include in the sanctions lists.

Yet, in many cases, the changes the Council made in relisting measures following court decisions appear to be superficial. The Council often relied on either broad or tailor-made listing criteria, which are all but immune to judicial scrutiny according to CJEU case law, to address gaps in justification and evidence that the courts had identified. Expanding the listing criteria made it easier for the Council to satisfy the evidentiary requirements of the courts without providing more specific reasons or new evidence to justify a listing and without compromising classified information. The Council often relisted persons

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142. Tushnet, *Subconstitutional*, *supra* note 141, at 1872-76.

143. For a similar application of “static” and “dynamic” frameworks of analysis see Huq, *supra* note 130, at 452-65.

144. A recent report by the U.K. House of Lords European Union Committee expressed concern that the Council's relisting practice “gives rise to a perception of injustice, namely that there is no effective remedy against sanctions listings.” See HOUSE OF LORDS REPORT, *supra* note 83, at 3.

and entities under different criteria based on the same or very similar facts that supported their previously annulled designation. This practice is clearly reflected in the comparison between original and new statements of reasons the Council provided upon relisting.<sup>145</sup>

These findings about the Council's relisting practices suggest that while the Council did go through the motions to comply with the judicial decisions, its responses to the decisions did not reflect a serious effort to fix the flaws the courts had identified. Thus interpreted, the empirical findings challenge the theory that procedural judicial review affected substantive policy outcomes or disciplined policymakers by making them more sensitive to individual rights in this case. If this account is correct, it also supports the claim that courts cannot rein in the political branches in the high-stakes areas of foreign affairs and national security.

However, a deeper look reveals that this skeptical interpretation of the empirical findings overlooks important ways in which judicial review did affect policy in the case study. It would be wrong to conclude that judicial review had no bearing on the EU Council's substantive policy decisions regarding individual sanctions, or its compliance with due process requirements as interpreted by the EU courts.

### *1. Substantive Policy*

Let us begin with substantive policy. The empirical findings show that the Council did not reimpose about one-third of the sanctions the courts struck down. Additional sanctions were likely lifted in the shadow of judicial review.<sup>146</sup> In other words, a substantial number of the sanctions were eliminated in the process of judicial review. This fact suggests that, as procedural judicial review theories predict, the process of reconsideration precipitated by judicial review led the Council to forgo sanctions that it concluded were less important and central than others in the general scheme of its Iran and Syria sanctions policies.<sup>147</sup> It could be that the Council decided not to relist because judicial review made it pay more attention to a particular designation that it did not carefully consider when the person or entity in question was first included in the sanctions lists. Alternatively, the Council may have concluded that a particular sanction was dispensable because it was no longer necessary, or because the costs of going through the bureaucracy and policy coordination required to produce a new designation,<sup>148</sup> and the prospect of having to defend it in court,<sup>149</sup> outweighed its value in light

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145. See *supra* Section IV.C.

146. See *supra* note 108 and accompanying text.

147. A recent response from the U.K. Government to a parliamentary report on the legality of EU sanctions is consistent with the findings of this study, and suggests that judicial annulment of sanctions did precipitate genuine reconsideration of their necessity: "The Government does not agree that the relisting practice renders the judgment of the General Court inconsequential. In many cases, an annulment by the General Court . . . will result in the complete removal of sanctions against an individual or entity. The UK, and the rest of the Council, takes the decisions of the Court very seriously, and will not move to re-list without good reason." See U.K. Response Letter, *supra* note 78, at 2.

148. See *supra* Part I.

149. See *supra* Part II.

of EU policy goals. The Council's relisting patterns, according to this explanation, were its "revealed preference" as to which sanctions it viewed as truly necessary from a policy perspective.<sup>150</sup>

This reading of the findings admittedly entails a degree of speculation. The observational tools this study employed cannot paint the full picture of the Council's decision-making process in each case. Another way to understand the Council's relisting patterns is that the Council sometimes decided not to relist, not because it concluded that the entity in question was not important from a policy perspective, but because it could not mobilize its complex decision-making apparatus to adopt new measures or because it failed to find a way to satisfy the courts' evidentiary requirements without sharing classified material. Yet there are reasons to doubt that the option of relisting in those cases was blocked by such practical obstacles.

First, the Council adopts new sanctions instruments relatively often. Although mobilizing the entire EU Council policy apparatus is certainly no simple task,<sup>151</sup> it does not require an extraordinary effort on the part of the Council. What is more, the Council's relisting decisions and regulations surveyed for this study at times specifically mentioned persons and entities the Council decided *not* to relist pursuant to an EU court decision, alongside those the Council did decide to relist. This suggests that its decisions not to relist were deliberate choices rather than bureaucratic omissions.

Second, only twenty-four percent of the cases in the dataset contained indications that the Council encountered classified material issues in connection with challenged designations, suggesting that it is possible that problems related to confidential evidence are not as widespread as they may appear.<sup>152</sup> Furthermore, the Council relisted persons and entities several times after arguing that there were classified material issues in the first round of litigation, relying on broader listing criteria that are easier to satisfy without sharing new, sensitive evidence.<sup>153</sup> This indicates that the Council has managed to find ways around the problem of classified evidence. As we have seen, the Council could—and did—circumvent classification problems by expanding listing criteria.

So far, we have considered the effects of judicial review on substantive policy decisions *ex post*. It is possible, however, that judicial review also had an *ex ante* effect on sanctions decisions, by encouraging the Council to avoid imposing certain individual sanctions in the first place or to unilaterally delist persons and entities that have not challenged their designation in court. This screening effect, predicted by procedural review theory,<sup>154</sup> might occur if the Council concludes that a certain designation would not survive judicial scrutiny.

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150. The term "revealed preference" is borrowed from the classic work of Paul Samuelson in economics. See, e.g., Paul A. Samuelson, *Consumption Theory in Terms of Revealed Preference*, 15 *ECONOMICA* 243 (1948).

151. See *supra* Part II.

152. See *supra* Part IV.

153. See entries for *IRISL, Iranian Offshore Engineering, Sorinet Commercial Trust Bankers, Babak Zanjani, Sharif University, Central Bank of Iran, and Bank Tajerat* in the data file, *supra* note 52.

154. See *supra* note 133.

This study collected data about sanctions that *have* been reviewed by the EU courts. Therefore, it does not allow for robust conclusions regarding the existence or extent of ex ante screening by the Council in the shadow of judicial review. Nevertheless, if ex ante screening did occur, it would only reinforce the argument that judicial review helped eliminate excessive sanctions without really blocking any policy options. Such an effect would mean that judicial review in the case study eliminated even more individual sanctions than the data reveal. As for policy costs, the analysis concerning the Council's ability to reimpose sanctions it believes are important enough from a policy perspective seems to apply equally to ex ante decisions to impose or maintain individual sanctions.

## 2. Compliance with Due Process in Individual Designations

In addition to the impact judicial review had on the Council's substantive policy choices in the case study, judicial review also appears to have at least somewhat improved its compliance with the due process requirements set out in CJEU case law in individual listing decisions. The empirical evidence suggests a learning curve in the Council's practices. Over time, the Council seems to have internalized notification requirements and the obligation to state reasons. While in the early cases in the dataset courts often annulled sanctions on grounds of failure to state reasons, the later cases generally turned on the issue of evidence.<sup>155</sup>

The outcomes of second and third challenges also reflect a learning curve in the Council's compliance with due process. Those cases are instructive because they tell us how the EU courts themselves have assessed the Council's compliance with due process in do-overs of sanctions decisions. The Council successfully defended twenty-five out of thirty-two designations that the courts previously struck down.

Of course, this is not a perfect track record. In five second challenges, the EU courts annulled sanctions for a second time. In an additional two cases, pertaining to the Iranian shipping company HTTS and Sina Bank, the GC even struck down the applicants' designations for a third time.<sup>156</sup> In its third HTTS decision the GC was clearly displeased with the Council's handling of the company's repeated designations. It did not suspend the annulment of the sanctions as it normally does, and it ordered the Council to pay the applicants' costs.<sup>157</sup> In addition, one could argue that the Council's success on repeat challenges is due to its reliance on broader, easier to satisfy listing criteria rather than to better procedural standards.<sup>158</sup>

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155. On this point, see the testimony of Maya Lester, who represents applicants in EU sanctions cases: "Things are a lot better, in that there is now notification and there are now basic reasons . . . [T]he focus of the court has now become not so much, 'Are the reasons vague or not vague?'—although there is still some of that—but, 'Is there any foundation for the reasons that you have given?'" HOUSE OF LORDS HEARING, *supra* note 55, at 19; *see also* HOUSE OF LORDS REPORT, *supra* note 83, at 10, 27.

156. *See supra* Section IV.E.

157. *See HTTS, supra* note 95, ¶¶ 66-67.

158. *See* HOUSE OF LORDS HEARING, *supra* note 55, at 25 (Maya Lester).

Still, there is evidence to suggest that at least some of the Council's success on repeat challenges can be attributed to improvements in the quality of listing proposals and the evidence on which they rely.<sup>159</sup> Both the Council and individual member States have worked to improve the quality of the evidence supporting listing proposals, including greater reliance on open source material that can be shared with the designated person or entity.<sup>160</sup> Taken together with the Council's success rate on repeat challenges, these measures indicate that the Council has learned and improved its practices with respect to individual due process rights as a result of judicial intervention.

Importantly, the Council's learning curve seems to extend beyond the Iran and Syria cases, as a senior Council legal adviser remarked:

[T]he trend in the Council improving its record before the courts has got much better . . . [I]n 2012, 2013 and 2014 the Council was still losing twice as many cases as it won, which is not good at all. In 2015 that trend was reversed; the Council won more than twice as many cases as it lost. The same applies for 2016.<sup>161</sup>

In sum, the empirical evidence suggests that procedural judicial review in the CJEU sanctions case study compelled EU policymakers to genuinely revisit their substantive sanctions policy decisions and raise procedural standards. What emerges is a collaborative policymaking process, in which courts oversee compliance with individual procedural rights in listing practices while leaving the substantive policy judgments—deciding the fate of each sanctioned person or entity and the content of the listing criteria—to the EU Council. Although judicial review imposed substantial bureaucratic burdens on the Council, those burdens did not definitively preclude any policy options.

### C. CJEU Procedural Review—The Wider Perspective

Judicial review has influenced EU sanctions policies beyond individual designation decisions in at least one important way. The Council responded to early sanctions cases by introducing systemic procedural safeguards in its listing practices, which practically did not exist prior to judicial intervention.<sup>162</sup>

But the posture of the EU courts in sanctions cases could potentially affect EU sanctions policies in subtle and likely unintended ways, by changing the incentive structure of EU policymakers. The practice of rigorous judicial review and frequent annulments of individual sanctions imposes substantial bureaucratic burdens on the Council, considering the volume of sanctions

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159. See HOUSE OF LORDS HEARING, *supra* note 55, at 29 (Michael Bishop) (“I must insist that at least half of the reason for the improved success rate is definitely an improvement in the quality of the listing proposal and the information that accompanies it. I have seen that. It is clear.”); HOUSE OF LORDS REPORT, *supra* note 83, at 27 (“[A]ll witnesses agree that the quality of sanctions listings has improved, with reasons for listing being better defined and substantiated.”).

160. See HOUSE OF LORDS HEARING, *supra* note 55, at 10-11; HOUSE OF LORDS REPORT, *supra* note 83, at 3, 17-18; U.K. Response Letter, *supra* note 78.

161. HOUSE OF LORDS HEARING, *supra* note 55, at 20 (Michael Bishop); see also *id.* at 1-2 (Paul Williams, Director for Multilateral Policy, U.K. Foreign and Commonwealth Office) (“The reasons for annulling have evolved, but the Council's practice . . . has also evolved, such that, although a couple of years ago the Council was losing significantly more cases than it won, in 2015 the Council won 30 cases and lost 15.”).

162. See *supra* Section II.C.

litigation and the significant resources the Council has dedicated to maintaining the various EU sanctions regimes. These bureaucratic costs might encourage the European Union to move away from targeted individual sanctions to country or sector-wide sanctions, which fall outside the purview of EU courts. This could substantially increase potential harm to individual rights. The bureaucratic costs of maintaining the sanctions regimes might also have a chilling effect on the European Union's resort to sanctions in its foreign and security policy.

Furthermore, EU courts have rewarded broad listing criteria. They have upheld listings based on the broad criterion of "providing support to the Government of Iran," while making it difficult for the Council to defend listings based on more precisely tailored criteria, such as involvement in nuclear proliferation and sanctions circumvention.<sup>163</sup> They have thus facilitated a hydraulic mechanism, through which the Council has remedied procedural flaws in individual listings by relying on broad listing criteria.

The incentive structure the EU courts have created could paradoxically expose more individuals to sanctions—the opposite of what the courts probably aimed to achieve. It raises the concern that procedural judicial review ultimately had damaging ripple effects, even if it did help to improve the Council's compliance with due process requirements in particular designations and to weed out non-essential sanctions.

These concerns, however, seem to be exaggerated. For the moment, there is little sign that judicial review has chilled the European Union's resort to sanctions. Of course, the existence or absence of a chilling effect is difficult to gauge, since we do not know how the Council would have acted absent the restraints of judicial review. That being said, the European Union has only expanded its use of sanctions in the decade or so since the early CJEU individual sanctions decisions, even in the face of persistent judicial intervention.<sup>164</sup>

There are also reasons to doubt that judicial review in the case study truly exposed more individuals to sanctions. While it is true that the Council often relied on the criterion of "support to the Government of Iran" to remedy procedural flaws in individual designations, that criterion was not merely a tool for the Council to fend off EU courts. Its inclusion in the Iran sanctions regime was motivated by independent and arguably legitimate policy reasons, as part of a broader push by the United States and the European Union to increase pressure on Iran.<sup>165</sup>

Moreover, broad listing criteria have costs that reduce the appeal of expending criteria for purely instrumental reasons—that is, for the sole purpose of avoiding judicial annulment of sanctions. Unnecessarily broad criteria (from a policy perspective) deter legitimate and desirable behavior, increase the compliance costs EU persons and companies are forced to incur to avoid sanctions violations, and are bound to draw the ire of affected industries within the European Union. Such criteria expansions might also have adverse effects on

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163. *See supra* note 111.

164. *See supra* Section I.B.

165. *See supra* Section IV.E.

the success of EU policy concerning the target States or entities. It is possible to imagine scenarios in which too much economic pressure might prove counterproductive. In other words, the costs of excessively broad criteria counterbalance the incentives to expand criteria created by the courts.

Finally, the Council's frequent resort to broad listing criteria was, at least in part, due to the absence of procedures for considering classified material in EU courts. The lack of sufficient safeguards to ensure confidentiality has pushed policymakers to rely on broad criteria to avoid having to share classified information with the courts and the designated persons and entities. Broad listing criteria are not a necessary outcome of procedural judicial review that account for the need for confidentiality in the area of foreign affairs and national security.<sup>166</sup> It would be interesting to see how the new CJEU procedures concerning classified material, if and when put to use, might affect the dynamic between EU courts and policymakers in the future.<sup>167</sup>

The EU courts, for their part, have signaled to the Council that its policy leeway is not limitless.<sup>168</sup> Although the courts have rejected proportionality claims and challenges to the legality of certain listing criteria in the cases reviewed in this study, the possibility that they would invalidate sanctions on those grounds if the Council exhibited bad faith in its sanctioning practices remained on the table. The prospect of such potential judicial intervention served as a further indirect constraint on policymakers and as a safeguard against abuse.

#### CONCLUSION

This Article offers an empirical study of the dynamic between EU courts and policymakers in one category of foreign and security matters. It assesses the effects of the procedural model of judicial review that the courts have employed. Although this case study does not advance any robust normative conclusions, it does shine new light on the debate about the role of courts in foreign affairs and national security and the interplay between policy and procedure more broadly.

The empirical findings suggest that while judicial review did not change the situation of the majority of the persons and entities that have sought judicial remedy, it *was* successful in eliciting policymakers' preferences, eliminating excessive sanctions, and encouraging the EU Council to adhere to more robust procedures before sanctions are imposed. At the same time, the CJEU's due process approach preserved the Council's autonomy in designing and implementing substantive policy, giving due deference to its expertise in the area of foreign and security policy. Procedural review therefore facilitated a dynamic

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166. *Cf.* *Kadi v. Geithner*, 42 F. Supp. 3d 1 (D.D.C. 2012) (dismissing a challenge to the designation of Kadi under the U.S. Specially Designated Global Terrorist (SDGT) program, after reviewing the classified record).

167. For a discussion of the potential implications of the introduction of the Closed Material Procedure on targeted sanctions litigation in the EU courts, see HOUSE OF LORDS HEARING, *supra* note 55, at 11.

168. *See supra* note 126. In interpreting the broad criterion of providing support to the government of Iran, the EU courts signaled that there might be limits to the Council's power to expend designation criteria. *Id.*

of accountability without substantially hindering policymakers' ability to achieve their policy goals.

## ANNEX I

*The Evolving Listing Criteria***A. Iran (2007-JCPOA)**

	<b>Measure</b>	<b>Criteria</b>
April 2007	Council Regulation 423/2007 of Apr. 19, 2007, art. 7, 2007 O.J. (L 103) 1 (EC)	2. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex V shall be frozen. Annex V shall include natural and legal persons, entities and bodies, not covered by Annex IV [Sanctions implementing UNSC resolutions], who, in accordance with Article 5(1)(b) of Common Position 2007/140/CFSP, have been identified as: <ul style="list-style-type: none"> <li>(a) being engaged in, directly associated with, or providing support for, Iran's proliferation-sensitive nuclear activities, or</li> <li>(b) being engaged in, directly associated with, or providing support for, Iran's development of nuclear weapon delivery systems, or</li> <li>(c) acting on behalf of or at the direction of a person, entity or body referred to under (a) or (b), or</li> <li>(d) being a legal person, entity or body owned or controlled by a person, entity or body referred to under (a) or (b), including through illicit means.</li> </ul>
October 2010	Council Regulation 961/2010 of Oct. 25, 2010, art. 16, 2010 O.J. (L 281) 1 (EU)	2. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex VIII shall be frozen. Annex VIII shall include the natural and legal persons, entities and bodies, not covered by Annex VII [Sanctions implementing UNSC resolutions], who, in accordance with Article 20(1)(b) of Council Decision 2010/413/CFSP, have been identified as: <ul style="list-style-type: none"> <li>(a) being engaged in, directly associated with, or providing support for Iran's proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems by Iran, including through involvement in the procurement of prohibited goods and technology, or being owned or controlled by such a person, entity or body, including through illicit means, or acting on their behalf or at their direction;</li> <li>(b) being a natural or legal person, entity or body that has assisted a listed person, entity or body to evade or violate the</li> </ul>

		<p>provisions of this Regulation, Council Decision 2010/413/CFSP or UNSCR 1737 (2006), UNSCR 1747 (2007), UNSCR 1803 (2008) and UNSCR 1929 (2010);</p> <p>(c) being a senior member of the Islamic Revolutionary Guard Corps or a legal person, entity or body owned or controlled by the Islamic Revolutionary Guard Corps or by one o[r] more of its senior members;</p> <p>(d) being a legal person, entity or body owned or controlled by the Islamic Republic of Iran Shipping Lines (IRISL).</p>
March 2012	<p>Council Regulation 267/2012 of Mar. 23, 2012, art. 23, 2012, O.J. (L 88) 1 (EU)</p>	<p>2. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex IX shall be frozen. Annex IX shall include the natural and legal persons, entities and bodies who, in accordance with Article 20(1)(b) and (c) of Council Decision 2010/413/CFSP, have been identified as:</p> <p>(a) being engaged in, directly associated with, or providing support for Iran's proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems by Iran, including through involvement in the procurement of prohibited goods and technology, or being owned or controlled by such a person, entity or body, including through illicit means, or acting on their behalf or at their direction;</p> <p>(b) being a natural or legal person, entity or body that has assisted a listed person, entity or body to evade or violate the provisions of this Regulation, Council Decision 2010/413/CFSP or UNSCR 1737 (2006), UNSCR 1747 (2007), UNSCR 1803 (2008) and UNSCR 1929 (2010);</p> <p>(c) being a member of the Islamic Revolutionary Guard Corps or a legal person, entity or body owned or controlled by the Islamic Revolutionary Guard Corps or by one of more of its members, or natural or legal persons acting on their behalf;</p> <p>(d) being other persons, entities or bodies that provide support, such as material, logistical or financial support, to the Government of Iran, and persons and entities associated with them;</p> <p>(e) being a legal person, entity or body owned or controlled by the Islamic Republic of Iran Shipping Lines (IRISL), or acting on their behalf.</p>
August 2012	<p>Council Regulation 708/2012 of</p>	<p>Same as March 2012, amending criterion (e):</p> <p>(e) being a legal person, entity or body owned or controlled by the Islamic Republic of Iran Shipping Lines</p>

	Aug. 2, 2012, art.1, 2012 O.J. (L 208) 1 (EU)	(IRISL), or a natural or legal person, entity or body acting on their behalf.
December 2012	Council Regulation 1263/2012 of Dec. 21, 2012, art. 1(11), 2012 O.J. (L 356) 34 (EU)	Article 23 [of Regulation 267/2012, March 2012] is amended as follows: (a) in paragraph 2, points (c) and (d) are replaced by the following: “(c) being a member of the Islamic Revolutionary Guard Corps or a legal person, entity or body owned or controlled by the Islamic Revolutionary Guard Corps or by one or more of its members, or natural or legal persons acting on their behalf or providing insurance or other essential services to them; (d) being other persons, entities or bodies that provide support, such as material, logistical or financial support, to the Government of Iran and entities owned or controlled by them, or persons and entities associated with them;”
October 2013	Council Regulation 971/2013 of Oct. 10, 2013, art. 1, 2013 O.J. (L 272) 1 (EU)	Article 23(2) of Regulation (EU) No 267/2012 is amended as follows: (a) Point (b) is replaced by the following: “(b) being a natural or legal person, entity or body that has evaded or violated, or assisted a listed person, entity or body to evade or violate, the provisions of this Regulation, Council Decision 2010/413/CFSP or UNSCR 1737 (2006), UNSCR 1747 (2007), UNSCR 1803 (2008) and UNSCR 1929 (2010).” (b) Point (c) is replaced by the following: “(c) being a member of the Islamic Revolutionary Guard Corps (IRGC) or a legal person, entity or body owned or controlled by the IRGC or by one or more of its members, or a natural or legal person, entity or body acting on their behalf, or a natural or legal person, entity or body providing insurance or other essential services to IRGC, or to entities owned or controlled by them or acting on their behalf.” (c) Point (e) is replaced by the following: “(e) being a legal person, entity or body owned or controlled by the Islamic Republic of Iran Shipping Lines (IRISL), or a natural or legal person, entity or body acting on its behalf, or a natural or legal person, entity or body providing insurance or other essential services to IRISL, or to entities owned or controlled by it or acting on its behalf.”
October 2015 (JCPOA regulation)	Council Regulation 2015/1861 of Oct. 18,	(Adding listing criteria in light of the JCPOA) The following Article is added: Article 23a 1. All funds and economic resources belonging to,

	2015, art. 1(13), 2015 O.J. (L 274) 1 (EU)	<p>owned, held or controlled by the persons, entities and bodies listed in Annex XIII shall be frozen. Annex XIII includes the natural and legal persons, entities and bodies designated by the U.N. Security Council in accordance with paragraph 6(c) of Annex B to UNSCR 2231 (2015).</p> <p>2. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex XIV shall be frozen. Annex XIV shall include the natural and legal persons, entities and bodies who, in accordance with Article 20(1)(e) of Council Decision 2010/413/CFSP, have been identified as:</p> <p>(a) being engaged in, directly associated with, or provided support for, Iran's proliferation-sensitive nuclear activities undertaken contrary to Iran's commitments in the JCPOA or the development of nuclear weapon delivery systems by Iran, including through the involvement in procurement of prohibited items, goods, equipment, materials and technology specified in the statement set out in Annex B to UNSCR 2231 (2015), Decision 2010/413/CFSP or the Annexes to this Regulation;</p> <p>(b) assisting designated persons or entities in evading or acting inconsistently with the JCPOA, UNSCR 2231 (2015), Decision 2010/413/CFSP or this Regulation;</p> <p>(c) acting on behalf or at the direction of designated persons or entities; or</p> <p>(d) being a legal person, entity or body owned or controlled by designated persons or entities.</p>
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### B. Syria

	Measure	Criteria
May 2011	Council Regulation 442/2011 of May 9, 2011, arts. 4-5, 2011 O.J. (L 121) 1 (EU)	<p>Article 4:</p> <p>4(1). All funds and economic resources belonging to, owned, held or controlled by the natural or legal persons, entities and bodies listed in Annex II shall be frozen.</p> <p>Article 5:</p> <p>5(1). Annex II shall consist of a list of natural or legal persons, entities and bodies who, in accordance with Article 4(1) of Decision 2011/273/CFSP, have been identified by the Council as being persons and entities responsible for the violent repression against the civilian population in Syria, and natural or legal persons and entities associated with them.</p>
September	Council	Article 5(1) [of Regulation 442/2011] is replaced by the

2011	Regulation 878/2011 of Sept. 2, 2011, art 1(3), 2011 O.J. (L 228) 1 (EU)	<p>following:</p> <p>1. Annex II shall consist of a list of natural or legal persons, entities and bodies which, in accordance with Article 4(1) of Decision 2011/273/CFSP, have been identified by the Council as being persons responsible for the violent repression against the civilian population in Syria, persons and entities benefiting from or supporting the regime, or persons and entities associated with them;</p>
January 2012	Council Regulation 36/2012 of Jan. 18, 2012, arts. 14-15, 2012 O.J. (L 16) 1 (EU)	<p>[Annexes II and IIa to the Regulation contain the lists of persons and entities subject to an asset freeze]</p> <p>(a) Annex II shall consist of a list of natural or legal persons, entities and bodies who, in accordance with Article 19(1) of Decision 2011/782/CFSP, have been identified by the Council as being persons or entities responsible for the violent repression against the civilian population in Syria, persons and entities benefiting from or supporting the regime, and natural or legal persons and entities associated with them, and to whom Article 21 of this Regulation shall not apply;</p> <p>(b) Annex IIa shall consist of a list of entities which, in accordance with Article 19(1) of Decision 2011/782/CFSP, have been identified by the Council as being entities associated with the persons or entities responsible for the violent repression against the civilian population in Syria, or with persons and entities benefiting from or supporting the regime, and to which Article 21 of this Regulation shall apply.</p>

October 2015	Council Regulation 2015/1828 of Oct. 12, 2015, art 1, 2015 O.J. (L 266) 1 (EU)	<p>Regulation (EU) No 36/2012 is amended as follows:</p> <p>(1) In Article 15, the following paragraphs are added:</p> <p>1a. The list in Annex II shall also consist of natural or legal persons, entities and bodies who, in accordance with Article 28(2) of Council Decision 2013/255/CFSP (*), have been identified by the Council as falling within one of the following categories:</p> <p>(a) leading businesspersons operating in Syria;</p> <p>(b) members of the Assad or Makhoul families;</p> <p>(c) Syrian Government Ministers in power after May 2011;</p> <p>(d) members of the Syrian Armed Forces of the rank of “colonel” or the equivalent or higher in post after May 2011;</p> <p>(e) members of the Syrian security and intelligence services in post after May 2011;</p> <p>(f) members of the regime-affiliated militias;</p> <p>(g) persons, entities, units, agencies, bodies or institutions operating in the chemical weapons proliferation sector;</p> <p>and natural or legal persons and entities associated with them, and to whom Article 21 of this Regulation does not apply.</p>
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## ANNEX II

*Second and Third Challenges*

Sanctions Regime	Applicant <sup>169</sup>	Result – 1 <sup>st</sup> challenge	Relisted?	Result – 2 <sup>nd</sup> challenge	Relisted?	Result – 3 <sup>rd</sup> challenge
1. Iran	Melli Bank PLC	Dismissed	--	Dismissed	--	--
2. Iran	Bank Melli Iran	Dismissed	--	Dismissed	--	--
3. Iran	HTTS	Struck down	Yes	Struck down	Yes	Struck down
4. Iran	Bateni	Struck down	Yes	Struck down	ID**	--
5. Iran	Sina Bank	Struck	Yes*	Struck	Yes	Struck

169. See the cases cited *supra* note 102.

		down		down		down
<b>6. Iran</b>	Central Bank of Iran	Struck down	Yes*	Dismissed	--	--
<b>7. Iran</b>	Iranian Offshore Engineering & Construction Co	Struck down	Yes	Dismissed	--	--
<b>8. Iran</b>	North Drilling	Struck down	Yes	Struck down	ID	--
<b>9. Iran</b>	Sharif University of Technology	Struck down	Yes	Dismissed	--	--
<b>10. Iran</b>	Iran Insurance Company	Struck down	Yes	Dismissed	--	--
<b>11. Iran</b>	Post Bank Iran	Struck down	Yes	Dismissed	--	--
<b>12. Iran</b>	Good Luck Shipping	Struck down	Yes	Struck down	ID	--
<b>13. Iran</b>	NITC	Struck down	Yes	Dismissed	--	--
<b>14. Iran</b>	Export Development Bank of Iran	Struck down	Yes	Dismissed	--	--
<b>15. Iran</b>	Bank Refah Kargaran	Struck down	Yes	Dismissed	--	--
<b>16. Iran</b>	IRISL	Struck down	Yes	Dismissed	--	--
<b>17. Iran</b>	Hafize Darya Shipping Co.	Struck down	Yes	Dismissed	--	--
<b>18. Iran</b>	Khazar Sea Shipping Lines Co.	Struck down	Yes	Dismissed	--	--
<b>19. Iran</b>	IRISL Europe GmbH	Struck down	Yes	Dismissed	--	--
<b>20. Iran</b>	Qeshm Marine Services & Engineering Co.	Struck down	Yes	Dismissed	--	--
<b>21. Iran</b>	Irano Misr Shipping Co.	Struck down	Yes	Dismissed	--	--
<b>22. Iran</b>	Safirán Payam Darya Shipping Co.	Struck down	Yes	Dismissed	--	--
<b>23. Iran</b>	Marine Information Technology Development Co.	Struck down	Yes	Dismissed	--	--
<b>24. Iran</b>	Rahbaran Omid Darya Ship Management Co.	Struck down	Yes	Dismissed	--	--

<b>25. Iran</b>	Hoopad Darya Shipping Agency	Struck down	Yes	Dismissed	--	--
<b>26. Iran</b>	Valfajr Shipping Co.	Struck down	Yes	Dismissed	--	--
<b>27. Iran</b>	Bank Tejarat	Struck down	Yes	Dismissed		
<b>28. Syria</b>	Samir Hassan	Struck down	Yes	Dismissed	--	--
<b>29. Syria</b>	Mohammad Makhlof	Dismissed	--	Dismissed	--	--
<b>30. Syria</b>	Mohamad Hamcho	Struck down	Yes	Dismissed	--	--
<b>31. Syria</b>	Hamcho International	Struck down	Yes	Dismissed	--	--
<b>32. Syria</b>	Khaled Kaddour	Struck down	Yes	Dismissed	--	--
<b>33. Syria</b>	Aiman Jaber	Struck down	Yes	Dismissed	--	--

\* Maintained. Sina Bank and the Central Bank of Iran are not “clean” examples of post-decision relisting. At the time the courts decided their first challenges they had already been relisted by the Council, but the relisting measures fell outside the scope of the judgments for procedural reasons. The second round of litigation covered those later measures although they were already in place when the first decisions were delivered.

\*\* Sanctions lifted on JCPOA implementation day, rendering the decision whether to relist moot.

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