

the decision to adopt the agenda item, but that statement was not explicitly incorporated into the COP's decision.<sup>33</sup> (3) Who will receive the assistance from the fund? All developing countries or only those that are "particularly vulnerable to the adverse effects of climate change"? The decision seems to suggest the latter. (4) What can the funds be used for? The decision refers generally to "responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, especially in the context of ongoing and ex post (including rehabilitation, recovery and reconstruction) action."<sup>34</sup> (5) How are the amounts to be calculated? How is loss and damage to be assessed?<sup>35</sup> (6) How will payments be made and monitored?<sup>36</sup>

COP27 President Shoukry ended the conference by saying that its accomplishments were a "testament to our collective will . . . that multilateral diplomacy still works."<sup>37</sup> But aside from the successful adoption of the loss and damage fund, COP27 was criticized for not adopting proposals to phase out all fossil fuels and to make more ambitious commitments for reducing emissions.<sup>38</sup> COP27 did, however, prevent backsliding, including, importantly, on "the long-term global goal to hold the increase in the global average temperature" by reiterating COP26's decision (which moved slightly beyond the wording of the Paris Agreement) to "resolve[] to pursue efforts to limit the temperature increase to 1.5 °C" above pre-industrial levels.<sup>39</sup>

#### INTERNATIONAL ECONOMIC LAW

### *The Treasury Department Implements Security Council Resolution Establishing a Humanitarian Carveout for UN Sanctions*

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The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) has issued two rules implementing UN Security Council Resolution 2664's humanitarian carveout from the asset freeze provisions of UN sanctions.<sup>1</sup> Acting on December 20, 2022, eleven

<sup>33</sup> See text at note 17 *supra*.

<sup>34</sup> Funding Arrangements, *supra* note 2, para. 1.

<sup>35</sup> See Kurukulasuriya, Jackson, Kammila, Abidoye, Jegillos & Chachibaia, *supra* note 27.

<sup>36</sup> See *id.*

<sup>37</sup> UN Climate Press Release, *supra* note 29.

<sup>38</sup> See Sarah Kaplan, *COP27 Leaves World on Dangerous Warming Path Despite Historic Climate Fund*, WASH. POST (Nov. 20, 2022), at <https://www.washingtonpost.com/climate-environment/2022/11/20/cop27-climate-conference-deal-fund/>; Evan Halper, Timothy Puko & Sarah Kaplan, *U.N. Negotiators Reach Deal to Help Vulnerable Nations with Climate Disasters*, WASH. POST (Nov. 20, 2022), at <https://www.washingtonpost.com/climate-environment/2022/11/19/cop27-climate-conference-summit-deal/>.

<sup>39</sup> Paris Agreement, *supra* note 12, Art. 2(1)(a); Decision 1/CP.26, para. 16, in Report of the Conference of the Parties on Its Twenty-Sixth Session, Held in Glasgow from 31 October to 13 November 2021, UN Doc. FCCC/CP/2021/12/Add.1 (2021), at [https://unfccc.int/sites/default/files/resource/cp2021\\_12\\_add1E.pdf](https://unfccc.int/sites/default/files/resource/cp2021_12_add1E.pdf) [<https://perma.cc/U48M-UQPS>]; Sharm el-Sheikh Implementation Plan, *supra* note 1, para. 4; see also Brad Plumer, David Gelles & Lisa Friedman, *A Clash Over Degrees: How Hot Should Nations Allow the Earth to Get?*, N.Y. TIMES (Nov. 16, 2022), at <https://www.nytimes.com/2022/11/16/climate/cop27-global-warming-1-5-celsius.html>.

<sup>1</sup> See U.S. Dep't of the Treasury Press Release, *Treasury Implements Historic Humanitarian Sanctions Exceptions* (Dec. 20, 2022), at <https://home.treasury.gov/news/press-releases/jy1175> [<https://perma.cc/WQ48->

days after the resolution's adoption on December 9, the United States was the first country to take this step. The resolution, co-drafted by the United States and Ireland, was adopted following years of concern, expressed within the Council and broadly by states, international organizations, international officials, and non-governmental organizations, regarding the "unintended consequences of . . . sanctions regimes on humanitarian activity necessary to support basic human needs."<sup>2</sup>

Although sanctions, as recent Council resolutions have noted, "are not intended to have adverse humanitarian consequences for the civilian population," they do.<sup>3</sup> Risk-averse "[f]inancial actors and other service providers [concerned with potentially running afoul of sanctions] may impose additional conditions, increase their costs or simply refuse to provide the requested goods and services, thereby inhibiting the delivery of humanitarian assistance."<sup>4</sup> In other circumstances, "[s]anctions can make it harder for humanitarian agencies to engage and transact with listed individuals or entities that hold significant control over the lives of entire populations."<sup>5</sup> And in yet other situations, "when ministries and departments are run by listed individuals, sanctions aimed at political movements and figures can limit the provision of social services and economic stability."<sup>6</sup> Because of the legal jeopardy that the complicated patchwork of rules and licenses creates for agencies, financial institutions, and others involved, sanctions can prevent humanitarian assistance from being delivered, impede and delay such assistance, and create compliance-related costs for providers.

Until Resolution 2664's adoption, humanitarian exceptions to asset freezes in UN sanctions were ad hoc and differed in their operation.<sup>7</sup> Standing exceptions, which do not require prior approval, were incorporated into Somalia, Afghanistan, and Haiti sanctions, in the first two cases years after their creation and in the last with its establishment in

[WCES8](#) [hereinafter Treasury Dep't Press Release]; SC Res. 2664 (2022) [hereinafter Resolution 2664]; Addition of General Licenses to OFAC Sanctions Regulations for Certain Transactions of Nongovernmental Organizations and Related to Agricultural Commodities, Medicine, Medical Devices, Replacement Parts and Components, or Software Updates for Medical Devices, 87 Fed. Reg. 78,484 (Dec. 21, 2022) [hereinafter NGOs and Other Transactions Rule]; Addition of General Licenses for the Official Business of the United States Government and Certain International Organizations and Entities and Updates to the 50 Percent Rule Interpretive in OFAC Sanctions Regulations, 87 Fed. Reg. 78,470 (Dec. 21, 2022) [hereinafter USG and IOs Rule].

<sup>2</sup> U.S. Dep't of the Treasury, The Treasury 2021 Sanctions Review 5 (2021), at <https://home.treasury.gov/system/files/136/Treasury-2021-sanctions-review.pdf> [<https://perma.cc/YDP3-PJ36>] [hereinafter 2021 Sanctions Review]; see also, e.g., General Issues Relating to Sanctions: Preventing Their Humanitarian and Unintended Consequences, UN Doc. S/PV.8962 (Feb. 7, 2022) [hereinafter SC Debate on Sanctions]; Compendium: High Level Review of United Nations Sanctions 34 (Nov. 2015), at [www.onpcsb.ro/pdf/HLR\\_Compendium\\_2015.pdf](http://www.onpcsb.ro/pdf/HLR_Compendium_2015.pdf) [<https://perma.cc/ZCP3-QKMU>] ("Standing exemptions for humanitarian actors should be adopted"); Impact of Measures to Address Terrorism and Violent Extremism on Civic Space and the Rights of Civil Society Actors and Human Rights Defenders: Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, paras. 21–22, 73(f), UN Doc. A/HRC/40/52 (2019).

<sup>3</sup> See, e.g., SC Res. 2371, pmb. para. 5 (2017); SC Res. 2582, pmb. para. 7 (2021).

<sup>4</sup> Security Council Debate on Sanctions, *supra* note 2, at 3 (statement of Under-Secretary-General for Political and Peacebuilding Affairs Rosemary DiCarlo).

<sup>5</sup> *Id.* at 5 (statement of Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Martin Griffiths).

<sup>6</sup> *Id.*

<sup>7</sup> The resolution does not apply to sanctions other than asset freezes. On occasion, the Council has created humanitarian exceptions, in specific circumstances, to flight bans (SC Res. 748, para. 4(a) (1992); SC Res. 1333, para. 11 (2000)), travel bans (SC Res. 2140, para. 16(a) (2014)), bans on insurance or re-insurance for vessels (SC Res. 2397, para. 11 (2017)), and arms embargos (SC Res. 2293, para. 3(c) (2016)).

October 2022.<sup>8</sup> Case-by-case exceptions, in which requests must be submitted to and then approved by the relevant Council committee, were applied in the DPRK, ISIL (Da'esh) and Al Qaeda, and Yemen sanctions programs.<sup>9</sup>

Adopted under Chapter VII of the Charter, Resolution 2664 provides a broad carveout<sup>10</sup> to “the obligations imposed on Member States to freeze the funds and other financial assets or economic resources of individuals, groups, undertakings, and entities designated” by the Council or its sanctions committees.<sup>11</sup> Specifically, it permits:

the provision, processing or payment of funds, other financial assets, or economic resources, or the provision of goods and services necessary to ensure the timely delivery of humanitarian assistance or to support other activities that support basic human needs by the United Nations, including its Programmes, Funds and Other Entities and Bodies, as well as its Specialized Agencies and Related Organizations, international organizations, humanitarian organizations having observer status with the United Nations General Assembly and members of those humanitarian organizations, or bilaterally or multilaterally funded non-governmental organizations participating in the United Nations Humanitarian Response Plans, Refugee Response Plans, other United Nations appeals, or OCHA-coordinated humanitarian “clusters,” or their employees, grantees, subsidiaries, or implementing partners while and to the extent that they are acting in those capacities, or by appropriate others as added by any individual Committees established by this Council within and with respect to their respective mandates<sup>12</sup>

A default rule, the resolution applies to “all future asset freezes imposed by or renewed by [the] Council,” except for the ISIL (Da'esh) and Al Qaeda sanctions regime,<sup>13</sup> for which the carveout will lapse after two years absent a renewal.<sup>14</sup> The resolution explicitly displaces the standing humanitarian exceptions incorporated into the Haiti and Somalia sanctions, but it keeps the Afghanistan one in effect.<sup>15</sup> The resolution requests that humanitarian aid providers “use reasonable efforts to minimize the accrual of any benefits prohibited by sanctions . . . including by strengthening risk management and due diligence strategies and processes.”<sup>16</sup> It tasks the UN Emergency Relief Coordinator and the Council’s sanctions committees, working with each other and with member states and providers, to assist with and monitor the implementation of the resolution, including “any diversion of funds or economic resources by” designated individuals or entities.<sup>17</sup> It also emphasizes that “sanctions are an important

<sup>8</sup> See SC Res. 1916, para. 5 (2010) (Somalia); SC Res. 2615, para. 1 (2021) (Afghanistan); SC Res. 2653, para. 10 (2022) (Haiti).

<sup>9</sup> See SC Res. 2397, para. 25 (2017) (DPRK); SC Res. 2610, para. 84(a) (2021) (ISIL (Da'esh) and Al Qaeda); SC Res. 2511, para. 3 (2020) (Yemen).

<sup>10</sup> Other terms are used on occasion, including “exception” and “exemption.”

<sup>11</sup> Resolution 2664, *supra* note 1, para. 1; UN Press Release, Adopting Resolution 2664 (2022), Security Council Approves Humanitarian Exemption to Asset Freeze Measures Imposed by United Nations Sanctions Regimes (Dec. 9, 2022), at <https://press.un.org/en/2022/sc15134.doc.htm> [<https://perma.cc/KGX6-RWRH>].

<sup>12</sup> Resolution 2664, *supra* note 1, para. 1.

<sup>13</sup> See SC Res 1267 (1999); SC Res. 1989 (2011); SC Res. 2253 (2015).

<sup>14</sup> See Resolution 2664, *supra* note 1, paras. 2, 4.

<sup>15</sup> See *id.*, para. 4.

<sup>16</sup> *Id.*, para. 3.

<sup>17</sup> *Id.*, paras. 5–6.

tool under the Charter of the United Nations in the maintenance and restoration of international peace and security.”<sup>18</sup> Perhaps signaling its intention to broaden the humanitarian carveout beyond asset freezes, the Council requested a report from the UN secretary-general “on unintended adverse humanitarian consequences of Security Council sanctions measures, including travel ban and arms embargo measures” and asked that he include “recommendations on ways to minimize and mitigate such unintended adverse consequences including via the promulgation of additional standing exemptions to such measures.”<sup>19</sup> Linda Thomas-Greenfield, U.S. permanent representative to the United Nations, explained the need for the resolution: “the humanitarian community . . . shared that United Nations sanctions still need to be addressed to ensure that unintentional, second-order impacts do not impede their work. They asked for a clear, standard carveout of humanitarian assistance and activities to meet basic human needs for all United Nations sanctions regimes.”<sup>20</sup>

The resolution received near-unanimous support in the Council, with a single abstention (India) and no dissenting votes. Ireland’s Minister for Foreign Affairs Simon Coveney said, “We are happy that we have struck a balance between responding effectively to the concerns that humanitarian actors have consistently and clearly raised for several years, while ensuring that there are safeguards against aid diversion. With this Resolution, we diminish the unintended consequences of sanctions, without diminishing UN sanctions themselves.”<sup>21</sup> Russian Deputy Permanent Representative Anna Evstigneeva also expressed approval of the resolution but reiterated Russia’s objection to unilateral sanctions as “an intrusion on Council prerogatives [that] undermine[s] the norms and institutions of international law.”<sup>22</sup> Geng Shuang, China’s Deputy Permanent Representative, emphasized that the resolution “must not lead to the perpetuation and permanent adjustment of some sanctions mechanisms that should have been adjusted long ago.”<sup>23</sup> India’s Deputy Permanent Representative Ruchira Kamboj expressed concern that the resolution did not do enough to prevent “terrorist groups taking full advantage of such humanitarian carveouts and making a mockery of sanctions regimes,” including by “reincarnating themselves as humanitarian organizations and civil-society groups precisely to evade such sanctions.”<sup>24</sup> Concerns regarding diversion of aid to ISIL and Al Qaeda were reportedly an impediment during the resolution’s negotiation.<sup>25</sup>

Humanitarian providers lauded the Council’s decision. Mirjana Spoljaric Egger, president of the International Committee of the Red Cross, said that the resolution “means better

<sup>18</sup> *Id.*, pmb. para. 3.

<sup>19</sup> *Id.*, para. 7.

<sup>20</sup> UN Doc. S/PV.9214, at 2 (Dec. 9, 2022) [hereinafter Verbatim Record].

<sup>21</sup> Irish Dep’t of Foreign Affairs Press Release, Ireland and US Lead on Landmark UN Security Council Resolution (Dec. 9, 2022), at <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2022/december/ireland-and-us-lead-on-landmark-un-security-council-resolution.php> [<https://perma.cc/U7ZH-ZFVY>].

<sup>22</sup> Verbatim Record, *supra* note 20, at 6.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 8.

<sup>25</sup> See *Sanctions: Vote on Resolution Establishing a Standing Humanitarian Carve-out to UN Sanctions Regimes*, SECURITY COUNCIL REP., WHAT’S IN BLUE (Dec. 9, 2022), at <https://www.securitycouncilreport.org/whatsinblue/2022/12/sanctions-vote-on-resolution-establishing-a-standing-humanitarian-carve-out-to-un-sanctions-regimes.php> [<https://perma.cc/ZBQ2-9JPE>].

services for communities, such as medical care, drilling of wells for clean drinking water, or visits to people detained in conflict.”<sup>26</sup> Jan Egeland, secretary general of the Norwegian Refugee Council explained that “[o]ver compliance and derisking by the private sector and some donors, as well as threats of criminalisation, all linked with sanctions, have for years hampered the aid sector’s ability to provide timely assistance to communities. The passing of this resolution is a major step toward undoing this harm and bringing much-needed clarity and predictability for humanitarian organisations operating in contexts impacted by sanctions.”<sup>27</sup> And Vanessa Jackson, CARE International’s UN representative in New York, predicted that “this decision . . . will significantly reduce the legal, administrative and practical impediments that these sanctions have generated for humanitarian action.”<sup>28</sup>

On December 20, 2022, the United States implemented Resolution 2664 through two OFAC rules that “issued or amended general licenses . . . to ease the delivery of humanitarian aid and ensure a baseline of authorizations for the provision of humanitarian support across many sanctions programs.”<sup>29</sup> According to Deputy Secretary of the Treasury Wally Adeyemo, “[t]he general licenses . . . reflect the United States’ commitment to ensuring that humanitarian assistance and related trade continues to reach at-risk populations through legitimate and transparent channels, while maintaining the effective use of targeted sanctions.”<sup>30</sup> The licenses are consistent with Treasury’s 2021 Sanctions Review<sup>31</sup> and extend OFAC’s “longstanding policy . . . to use its licensing authority to support humanitarian relief efforts.”<sup>32</sup>

The two final rules cover four categories of general licenses. In one rule, OFAC amended multiple sanctions programs to include “general licenses authorizing certain transactions of nongovernmental organizations and certain transactions related to the provision of agricultural commodities, medicine, medical devices, replacement parts and components, or software updates [for personal, non-commercial use].”<sup>33</sup> Authorized NGO transactions comprise those that are “ordinarily incident and necessary to” noncommercial activities that “directly benefit the civilian population . . . including . . . : humanitarian [projects] to meet basic human needs; democracy building; education; noncommercial development projects directly benefiting civilians; environmental and natural resource protection; and

<sup>26</sup> See International Committee of the Red Cross Press Release, ICRC Applauds UN Security Council’s Adoption of a Resolution Protecting Humanitarian Activities (Dec. 9, 2022), at <https://www.icrc.org/en/document/icrc-applauds-un-security-councils-adoption-resolution-protecting-humanitarian-activities> [<https://perma.cc/97JS-FGNZ>].

<sup>27</sup> Norwegian Refugee Council Press Release, New UN Security Council Humanitarian Exemption to Sanctions Will Help Save Lives (Dec. 9, 2022), at <https://www.nrc.no/news/2022/december/new-un-security-council-humanitarian-exemption-to-sanctions-will-help-save-lives> [<https://perma.cc/9NWP-49FT>].

<sup>28</sup> CARE International, Press Release, CARE International Welcomes Historic UN Security Council Decision Today on Humanitarian Exemption Across All UN Sanctions Regimes (Dec. 9, 2022), at <https://www.care.org/news-and-stories/press-releases/care-international-welcomes-historic-un-security-council-decision-today-on-humanitarian-exemption-across-all-un-sanctions-regimes> [<https://perma.cc/Y69W-G98W>].

<sup>29</sup> Treasury Dep’t Press Release, *supra* note 1.

<sup>30</sup> *Id.*

<sup>31</sup> See 2021 Sanctions Review, *supra* note 2, at 5.

<sup>32</sup> U.S. Dep’t of the Treasury, Guidance Related to the Provision of Humanitarian Assistance by Not-For-Profit Non-Governmental Organizations 1 (Oct. 17, 2014), at [https://home.treasury.gov/system/files/126/ngo\\_humanitarian.pdf](https://home.treasury.gov/system/files/126/ngo_humanitarian.pdf) [<https://perma.cc/R2E5-DGHZ>].

<sup>33</sup> NGOs and Other Transactions Rule, *supra* note 1, at 78,484.

disarmament, demobilization, and reintegration programs and peacebuilding.”<sup>34</sup> In the other rule, OFAC “amend[ed] its regulations in multiple sanctions programs to add, amend, or update general licenses authorizing official business of the United States government and official business of certain international organizations and entities.”<sup>35</sup> For NGOs and IOs, the licenses generally do “not authorize funds transfers initiated or processed with knowledge or reason to know that the intended beneficiary of such transfers is a person blocked.”<sup>36</sup> To the extent that a general license does not apply, specific licenses may be issued. The two rules go beyond Resolution 2664’s provisions to cover many U.S. sanctions programs that operate outside of the Security Council framework.<sup>37</sup> The general licenses established by the new rules are similar to the humanitarian licenses OFAC previously established for specific sanctions programs, such as those for Crimea and Venezuela.<sup>38</sup> The new rules apply only to OFAC sanctions and have no effect on those administered by other agencies, such as the Department of Commerce.

NGOs welcomed the new rules. Kate Phillips-Barrasso, vice president of Global Policy and Advocacy for MercyCorps, said, “It literally almost feels surreal to me, as an advocate who’s been working on this for the better part of a decade. I keep having to almost pinch myself. It is a life-and-death issue in some cases and they have been told about the problem for years and they took a major step forward in trying to resolve it.”<sup>39</sup> Though the new general licenses provide reason for optimism, financial institutions will need to move away from their inclination toward sanctions “overcompliance” for the humanitarian carveout to have meaningful effect.<sup>40</sup>

*President Biden Issues Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States*

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On September 15, 2022, President Joseph R. Biden, Jr. issued Executive Order 14,083 on “Ensuring Robust Consideration of Evolving National Security Risks by the Committee on

<sup>34</sup> U.S. Dep’t of the Treasury, Supplemental Guidance for the Provision of Humanitarian Assistance 3 (Feb. 27, 2023), at [https://home.treasury.gov/system/files/126/supplemental\\_ngo\\_humanitarian.pdf](https://home.treasury.gov/system/files/126/supplemental_ngo_humanitarian.pdf) [<https://perma.cc/F6JP-4TYW>].

<sup>35</sup> USG and IOs Rule, *supra* note 1, at 78,470.

<sup>36</sup> *See, e.g.*, NGOs and Other Transactions Rule, *supra* note 1, at 78,485 (adding 31 CFR 539.506(c)).

<sup>37</sup> For current U.S. sanctions programs, see U.S. Dep’t of the Treasury, Sanctions Programs and Country Information, at <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information> [<https://perma.cc/P5KS-FMK3>].

<sup>38</sup> *See, e.g.*, Certain Transactions in Support of Nongovernmental Organizations’ Activities in the Crimea Region of Ukraine, 31 CFR 589.520; Office of Foreign Assets Control, General License No. 29, Certain Transactions Involving the Government of Venezuela in Support of Certain Nongovernmental Organizations’ Activities Authorized (Aug. 5, 2019), at [https://home.treasury.gov/system/files/126/venezuela\\_gl29.pdf](https://home.treasury.gov/system/files/126/venezuela_gl29.pdf) [<https://perma.cc/8FC5-BQSK>].

<sup>39</sup> Kylie Atwood, *Treasury Department to Roll Out New Policy to Make Global Humanitarian Support Easier*, CNN (Dec. 20, 2022), at <https://www.cnn.com/2022/12/20/politics/treasury-department-humanitarian-support/index.html> [<https://perma.cc/MKY5-P5FG>].

<sup>40</sup> *See* Daniel Flatley, *Treasury Officials Warn Banks Over Sanctions Compliance Overkill*, BLOOMBERG (Jan. 6, 2023), at <https://www.bloomberg.com/news/articles/2023-01-06/treasury-officials-warn-banks-against-sanctions-overcompliance>.