

# Season 2- Episode 1

**Olga Torres:** Thanks for joining us today. My name is Olga Torres and I'm the Managing Member of Torres Trade Law, an international trade and national security law firm. Today we're joined by Erich Ferrari, an economic sanctions and expert controls attorney based out of Washington, DC. Thank you for joining us, Erich.

**Erich Ferrari:** Thanks for having me, Olga. Glad to be here.

**Olga Torres:** Delighted to have you. We have really good questions for you, and I know you're the leading attorney, in terms of suing OFAC. So, we really want to hear your insight into some of these cases, if you can share.

**Erich Ferrari:** Sure.

**Olga Torres:** So the topic of discussion today is mainly about the role of courts in the US in reviewing OFAC decisions. And I know there's a new trend where we're seeing more lawsuits against OFAC, which, you know, a "new trend." But I want to say that you were probably one of the first attorneys that started back in the day, like my mother-in-law says back in the olden days when it was basically a bit of a taboo to sue the agency.

**Erich Ferrari:** Right.

**Olga Torres:** So I want to hear all about that. But in terms, of the number of lawsuits that, you know, if we still look at the number of lawsuits, it's still not a high number, on any given year. So the trend is changing and we know that typically people do not necessarily want to sue OFAC because courts have a highly differential standard. And they will only reverse decisions that OFAC made, if OFAC was arbitrary and capricious and that's a very high standard. You know, when I think of arbitrary and capricious, I think of my one-year-old and my three-year-old. So very high standard to meet, but we see that some of the recent changes that we're seeing in some of the cases, especially with you. I have questions on, for example, delisting cases. Where OFAC rather the responding in court ends up quickly removing the person from the list and whether we can treat those as actual successful outcomes. And I guess if I was listed and all of a sudden, I get delisted, I would treat it as such, even if the court didn't mandate the agency.

So, with that, I guess I'll get started and I would love to for people to hear about your background and how you got started in economic sanctions law.

**Erich Ferrari:** Sure, absolutely. So, and I'm very excited to talk about this topic because as you and I discussed before, not that I love suing OFAC, but I love talking about lawsuits involving OFAC. So, I'll leave it at that. I got started in sanctions right after 9/11. I was going to law school right after 9/11 and I knew I wanted to do something in national security law and at that time it was either you defend detainees in Guantanamo Bay or you go to the Jag Corp and prosecute detainees in Guantanamo Bay. I wasn't really interested in that but I was kind of, you know, researching cases that were coming up in the national security context, around that time. There was obviously a lot of litigation and a lot of stuff going on, and I came across this case, Holy Land Foundation, which if I remember correctly, was an organization out of the Northern District of Texas, is where I believe you are. So, I read this case and I read all about this agency, the Office of Foreign Assets Control. And I went to my boss at the time, because I was a research fellow at the Center for Terrorism Law at that time. And I went to my boss at that time, and I said, Hey, what do you know about this O F A C? I didn't even know to call, right? I was like, what do you know about the O F A C? And he's like, what are you talking about? And I said, well, there's this Treasury Department agency, they do something called sanctions where they put these restrictions on people and freeze their assets. And I've tried to research it online. Everyone's acting like it's just regular kind of commercial law, but it really seems like national security law to me, and I think it could be a big deal. In this new paradigm we find ourselves in which at that time we were calling the War on Terror. And I said, I want to focus my research on this. And he said, sure, knock yourself out. And so flash forward, I just started trying to consume everything I could on OFAC and US sanctions. And it wasn't until I met a lawyer who was actually a federal criminal defense lawyer from Houston who had some OFAC delisting cases that he brought me on board to help out with right after I graduated law school.

**Olga Torres:** So he was already doing a little bit of, I guess, delisting work?

**Erich Ferrari:** He was doing criminal law and some of that involved representing narcotics traffickers.

**Olga Torres:** Ah, interesting.

**Erich Ferrari:** And so there were these like ancillary issues like getting put on the OFAC list in addition to being under a criminal investigation or being prosecuted for federal crimes. And so it was kind of like part and parcel of the

work. So my first ever cases were dealing with two persons who had been designated under the Kingpin Act. And from there I kind of learned like, okay, well this is how this delisting process works. But I also learned there's so much more to practicing OFAC, right? There's compliance work and there's licensing and there's civil enforcement, and all that sort of stuff. And I went to him, this is probably the late 2000's, maybe 2008? Yeah, probably around 2008 and I said, Hey, you know, there's more to OFAC than the SDN list, right? There's all this other work we could be doing. And his position was understandable, which is, hey, this is a defense law firm, you know, I don't want to stray too far away from that. And so I started my own firm in 2009 to do different types of OFAC work, compliance licensing and that sort of thing. And here we are.

**Olga Torres:** That's how it all started. You mentioned, you know, delisting's, and it must be interesting, at least from a criminal lawyer perspective because of the lack of transparency from OFAC, right? In making some of these designations. Oftentimes you hear parties telling you, I had no idea I was going to get listed and I found out because someone that morning told me they're not going to pay me, or, you know, I'm not going to do business with them anymore. And we know that OFAC does that because sometimes it's impossible to get evidence from certain countries, for example or because we're trying to protect assets that we may have. But we do have the delisting process, the administrative process, which I know you do a lot of that as well, just trying to get the person delisted with OFAC themselves. Can we talk about the listing process, the administrative, the listing process with OFAC? I know a lot of the work that you do, you've represented also high profile SDN, especially designated nationals. So how does that work for people that are not familiar?

**Erich Ferrari:** Sure. So, there's an administrative process as you indicated, and there's a procedure that's set out by a Regulation 31 CFR 501.807, and what it says is that the designated person or the person seeking unblocking can present information and arguments, and supporting evidence, as to why either one, there's an insufficient basis for the designation, right? Meaning OFAC made some mistake factually or legally. Or two, they can assert that there's been a change in circumstances such that the original circumstances which gave rise to the designation no longer apply. And then as a sub-component of that, the regulation allows for designated persons to propose remedial measures, which “comma” if adopted “comma” would negate the basis of designation. Now, it was very precise in my language there, and there's a reason why. It's because once you get into the administrative delisting process, depending on which pathway you, or actually, regardless of which pathway you take, OFAC questions tend to broaden the scope of both, you know, what they originally designated the person for. The original circumstances giving rise to the designation or to the arguments that you're making to them. And so part of this

process that's so interesting is this tug and pull between ourselves and OFAC saying, okay, this is our argument. We are proposing remedial measures that we will adopt to negate the basis of the designation. And then them coming with some other question that's not related to your remedial measures. And then you have to make the determination, do I respond to this question? How do I respond to it? Am I opening a door to a new line of inquiry? How long is this going to drag out? So, it's a very simple process that has a lot of nuance to it and complexities to it. And it takes OFAC forever to process those positions.

**Olga Torres:** Yeah, it takes years. At what point, I mean, I know cases can be two, three years and you're still dealing with them and they send you another questionnaire and you respond to a new questionnaire and you're trying to respond as much as you can without opening up the, you know, like you said, the doors to a lot of other areas. At what point do we think, okay, it's been enough. You know, we haven't received commentary from them or we haven't received questions in the meantime. We we're still in this list. Like at what point do parties, well first of all, have you ever had a situation where the party says, skip the admin process? Like, we just want to sue direct. I don't think I've heard that happening a whole lot. But I was wondering if you've heard of that.

**Erich Ferrari:** Oh yeah. We have some clients who are like, I didn't do what they said I did. I don't want to sit around and wait for several years for them to consider my arguments. I want a court to hear it. I don't necessarily recommend that. For most clients, if they have potential constitutional rights or if there's some strange thing about the designation, then maybe we consider it. But you got to remember, a court is going to review the case based on the information that was in the agency's possession at the time they made the decision.

So you can't just go into court and then start making your arguments about why the agency's wrong, because the court won't consider that information. They'll just consider, okay, this is what OFAC had in front of it at the time, it made its decision and we're not going to substitute our judgment for OFAC, but we're going to be able, we're going to review the record to see if we can understand how they connected their the evidence to their decision.

**Olga Torres:** And that's super interesting because, and that makes sense, that's sort of what I thought you would say. It's interesting because we hear so much that cases where OFAC doesn't even provide the administrative record, right? So parties are scrambling to figure out, okay, I got listed. And I'm assuming in many instances, and perhaps even the majority of the instances, parties know why they got listed, right. But especially if you did something wrong. But in many other instances, you may be thinking, okay, I'm reading a press release.

The press release can have certain reasons that may or may not apply to me, especially when they have press releases that list a bunch of different people at once. And in those cases where they don't release, the administrative record parties are wondering, why did I get listed? What's the specific reason? And, and it becomes so important because how can you provide remedial measures if you may not even know fully the reason of your own listing, right. And have you had situations where, okay, that's a alone enough reason why we, if we request the administrative record and we don't get the administrative record, is, that alone enough reason to try to sue OFAC?

**Erich Ferrari:** It has been in the past, I would say, my thinking in, at the end of 2022 going into 2023. I used to be very frustrated that we don't have the record. We requested it, oh, it's been a year. OFAC hasn't turned it over. Now I'm like, okay, this is the game we're playing, and so I'm going to go off of your summary in the press release, and I'm going to prepare remedial measures based on what you've said in the press release, and I know what you've accepted from other parties. I know it's certifications and its audits and it's reporting requirements, and so I'm going to marry those two. I'm going to take what you've done for other SDNs in the past in terms of what we call terms of removal agreement, meaning the memorializing, the remedial measures as acceptable, and in exchange there'll be a delisting. I'll take those and then I will assess what in addition to those we need, or how do we need to modify those to deal with the specific allegations and findings in the press. Because if you request the administrative record, there's three ways you can really get it. One, you can ask OFAC for it, average processing time is about 18 months. You can file a Freedom of Information Act request for it, average processing time is about two and a half years. Or you can file a lawsuit against OFAC, challenging the designation, and as part of the lawsuit, OFAC will turn over the record to you. You usually get that within three to five months. But you have to go through the trouble of filing a lawsuit and the expense there, you know, just to get a record.

And guess what? Oftentimes the record is mostly redacted and you're not getting much in the record beyond what's in the summary or in the press release, which summarizes the basis of the designation. So, you know, I now view it almost as an advantage. Okay, well, OFAC you've narrowed the issues for us in this process through your summary in the press release, and that's what we're going to address in the delisting process. Those are the

**Olga Torres:** Those are the remedial measures that will take, unless you tell us otherwise, basically.

**Erich Ferrari:** Exactly, yeah.

**Olga Torres:** That, that makes sense. What about, you know, parties that if you're not listed, but let's say you're in a risky destination. And you know, you're a large company, you're hearing your government is not getting along with the US government, you're seeing more parties getting designated. What would you recommend those people do to avoid getting to that position where, okay, now I have to defend it after the fact. I mean, we know that you're not going to get a notice, right? You're not going to be invited to appear before you get listed. So is there something that they can do proactively to try to manage that risk in addition to what we, you know, you mentioned compliance programs and awareness training and things like that, but is there something else that they could be doing in advance?

**Erich Ferrari:** Yeah, sure there is. And look, as part of a good compliance program, you should be monitoring for adverse media reporting, right? So, you should be taking a look to see, you know, who's writing what about you. And clients often are, but they're always looking at it from the point of view as, oh, people are writing bad stuff about us, let's send them a cease and desist letter, or we're going to sue them. But as part of a sanctions compliance program, we actually want to be looking at is, are these parties alleging publicly that I'm involved, or my company is involved in sanctionable conduct? Right, because guess what, most of the reporting that OFAC relies on that you will get to see is open-source reporting from NGOs, from major media publications, sometimes from blogs.

And so you need to be taking a look and saying, okay, what are people saying about me? And does that information, could that information be used by OFAC to place me on a sanctions list? Okay, so that's, that's part one, right? Which is identifying. Then you have to assess it, okay. What is the likelihood then I get put on the list? Well, there's a report that I have a joint venture with this sanctioned Russian company. Okay, that's potentially providing support and services too, or acting for on behalf of an SDN, right? So, then you assess it to determine, okay, there's a, there's a probability I could be a derivative designee in the future for having this relationship, or whatever the circumstances might be.

And then you have to make the risk calculation, okay? Which is, do I go to OFAC before I get sanctioned or do I go to the State Department in some instances before I get sanctioned and state to them, Hey, I know there's open source reporting on us. It's either one wrong or two, it's outdated, or three, we are addressing it by adopting the following proactive measures.

So, I talked about remedial measures. I call these proactive measures because you're putting yourself on the radar. All right. And do you want to put yourself on the radar? Maybe depending.

**Olga Torres:** It must be also scary. I would think our approach to the government in the U.S. we do approach the government a lot more than in other countries. Like, you know, when I deal with attorneys from other countries, sometimes it, what is a VSD? Like you're submitting a what, you're confessing to the government.

**Erich Ferrari:** Yeah.

**Olga Torres:** Or you know, even in this cases, like reaching out to a foreign government. Right, in case they may think of listing you in a black list. It seems scary, but it sounds like it does happen or should happen more anyway.

**Erich Ferrari:** Yeah. Well, and I tell clients this all the time, the delisting process is not, or this process of going to OFAC beforehand is not defense work. It's OFAC compliance work because as you eloquently pointed out at the beginning. They get all the deference. They have all the information, their standards, although they say they have a very rigorous process, the standard is whether they have a reasonable cause to believe you meet the criteria. It's a low standard, right? So, what we're doing, the delisting process is not really challenging the facts.

Some clients want to do that, that's their choice. What we really recommend is, okay, look, you're going to have to accept this is what they believe about you. How are we going to address it so that they believe that's no longer the case. Whether it was true at any point. If we fight them on that, we'll be in this process forever and you end up losing.

**Olga Torres:** That's very interesting. It's more like you give up on that and you just focus on it doesn't matter that conduct wouldn't exist even if it was true. Right, anymore?

**Erich Ferrari:** Well, think about it this way. And this is, remember this is all born of years of banging my head against the wall. I've seen every argument OFAC is going to make, maybe not everyone, but I've seen a lot of them. And here's what they do. They say, have you ever engaged in narcotics trafficking? And you say, no, because how are you supposed to prove you never engage in narcotics trafficking.

**Olga Torres:** Like proving a negative.

**Erich Ferrari:** Right? And you can't see their evidence. And they have a DEA report where somebody told somebody that you engaged in are a drug dealer and you won't see it. And so OFAC's like, well, I have your blanket denial, and I have this DEA report which names you as somebody who's identified as being a drug dealer. So therefore, your representation's not credible. You haven't backed it up with anything to rebut what we have in our report and since, and we call these negative credibility determinations. Since you're not credible on this issue, you can't be trusted about anything you're saying, and therefore you're denied. This is a game that OFAC plays. They ask you these broad sweeping questions when you don't know what information they have in their hand, and you say no, and they say, okay, well then, you're obviously lying to us, we can't believe anything you're saying. Can't believe your remedial measures, your change of circumstances, anything.

**Olga Torres:** So how will you answer that question then? Like you would just ignore and just say, we're no longer dealing in direct trafficking. Or what would be an example of a remedial measure at that point? If you don't want to address the facts?

**Erich Ferrari:** I would object to the question as being vague in nature or as irrelevant to what we presented in our petition for removal, meaning our remedial measures. But to the extent OFAC has a concern, you should understand that from now on, we'll be giving you annual audits. The results of annual audits, we have adopted compliance policies and procedures. We have installed a compliance officer. We're under these certifications and reporting requirements. Right and that's why I say this is OFAC delisting work. OFAC challenges are actually compliance work.

**Olga Torres:** Right and I can see that it would be very powerful, for example, if a party got listed and already came in saying, we already have a compliance firm in place. Like, not like we are re remediating after I got listed, but actually you listed me, but look at everything I already had. Have you ever had that situation happen?

**Erich Ferrari:** Oh, we have. And here's what OFAC says, well, of course your audits aren't going to catch illicit narcotic laundering, right?

**Olga Torres:** Nefarious activities.

**Erich Ferrari:** The whole idea behind money laundering is to avoid scrutiny from, you know, financial regulators and auditors and that sort of person, you know, or those sorts of persons. So, yeah, we've had companies do that in the past, and, we've received that exact response from OFAC. You know, that audits won't catch the illicit laundering.

**Olga Torres:** But at least you're trying.

**Erich Ferrari:** Yeah, and it gives you things that you can do. Like, so for example, okay, the audit's not sufficient.

How about we remove the signatories of the accounts and make them independent third parties, right. Who OFAC can vet, right? Or we'll remove directors, we'll change over the board, or this executive will resign.

**Olga Torres:** And those are the kinds of examples that we're looking for, right? Like examples of change in behavior by the party.

**Erich Ferrari:** Right.

**Olga Torres:** Yeah, that makes sense. So, what I'm hearing is probably better for companies to be proactive if possible. And there are ways for companies to monitor, right? Like whether there's rumors that you maybe get listed or that you did something that could be enough for the agency to pay attention and start digging more on your activities.

And okay, so we are in the delisting process, and it's been a few years and we've done everything we can, and we have not heard back from OFAC. Are there any risks of suing OFAC, you know, could, what else can they do at that point? If you've done everything you can, you've implemented remedial measures. Is that the next step? I mean, going for a lawsuit, or do we just wait indefinitely?

**Erich Ferrari:** Everyone has to make that call on their own. It really depends on the circumstances of the case and what's going on. So I basically have a system where, you know, if I haven't heard anything in three months, I check back in with a general reconsideration email and say, hey, any updates? We haven't received any questions. Remember, OFAC gives you 90 days to respond to a questionnaire. An OFAC guidance on its website says you'll get questions usually within about 90 days. Okay? So, and it's usually three to six months, you hear your first. Six months go by, no response from OFAC. I now escalate to the person that I understand to be the assistant director. Nine months go by with no engagement from OFAC. I will then escalate typically to the associate

director, sometimes to OFACs chief counsel. And then if it's been a year and no one's responding, we're not getting any questions, there's no movement, I basically draft a lawsuit and I send it over and I'm like, guys, this is why we believe there's unreasonable delay under the administrative procedure act. We don't want to file this.

**Olga Torres:** Hold on, on you're saying you would send them a copy?

**Erich Ferrari:** Yeah.

**Olga Torres:** That's interesting.

**Erich Ferrari:** Yeah, to set out the factual allegations. Because remember they've got a lot of stuff going on there, right. So the sanctions investigator knows what's going, but you know, if you're sending a draft complaint to the council or to the associate director or to the deputy director or the director, they might not necessarily be briefed on the allegations, or I'm sorry, on the facts yet. And so those factual allegations present your viewpoint of what's happened in the case, right? Because maybe that wasn't briefed up to them. Maybe they're not really sure what's going on. So, we just set everything out. I sent the complaint to them, and I say, hey guys, you know, we feel we have a claim. How do we want to resolve this?

You know, if it's been a year and a client has paid me money, I can't say you got to sit in your chair and wait. They'll get around to when they get around to it. Because putting someone on the OFAC list is not just hurting them, it's a company, it hurts all those employees. We have clients whose family members have been offboarded, people who worked for them in the past have been offboarded. The repercussions are so huge and all of that comes back to the client. So, I can't just sit there on my hands for four years and be like, well, you know, they'll get to it when they get to it. Just sit there and be patient, you know?

**Olga Torres:** Right. I mean, and what you're telling me, it sounds, in a way, it almost kind of reminds OFAC, hey, we're still here, right? Because they probably have so many different petitions and everybody's on the same boat. It sort of makes a top priority if it, you know, a complaint comes to their desk. A draft complaint. Um, okay, well this is interesting, let's pay attention to this one. Have you had any situations where it backfires to sue OFAC?

**Erich Ferrari:** I am trying to think. I really don't think so. I mean, look, the clients on the list?

**Olga Torres:** Yeah like what are they going to do? Re-add them to the list?

**Erich Ferrari:** Yeah, I mean, I think there's been cases where OFAC has done this a few times. They will sit on it, sit on it, sit on it, we'll bring the lawsuit, they'll rescind the designation and then simultaneously redesignate them for something else.

**Olga Torres:** Yeah, I think I've seen that.

**Erich Ferrari:** Yeah. So, they do that. I won't say frequently, but they've done it a few times to us. But you know what? At least we have a decision, and now we have their new concern we can address.

**Olga Torres:** Yeah, so basically what happens in those cases, they look back at the facts and they think, okay we don't have enough bases, basically for designation, but ha, aha, I have another reason now. And then, we designate right away.

**Erich Ferrari:** Right. So OFAC is looking at it and they're like, okay, well the basis for designation is extinguished, right? Maybe there was a corporate ownership you divested from, or whatever, right? But then they find something else in the course of their investigation, they're like, well, we can't take them off the list because now we have information of this other activity that would, that is sanctionable and that requires them to stay. You know, do you want to find that out in 18 months or do you want to find that out in four years? Right.

**Olga Torres:** Right. Yeah, and at least you now know what else you need to address.

**Erich Ferrari:** Right and I just want to make sure it's clear. Like I'm not banging my fist on the table writing these nasty emails to OFAC. It's all very kind of friendly and objective. It's just like, you guys, I know you have moved this fast in other similar cases. All I'm asking here is that you move at the same pace with respect to this particular client. Sometimes they can, sometimes they can't.

**Olga Torres:** And, and somebody told me it may have been you, I don't know. I don't remember, but I think somebody told me. In some cases people are like, oh my God, you're going to sue OFAC. And actually I've had OFAC call and say, oh, that's good that you sued because now we can look at it.

**Erich Ferrari:** Right.

**Olga Torres:** And that it actually kind of internally somehow it helps either because it brings it up, you know, like top of their inbox if you will. Or they just are able to allocate more resources to it.

In terms of compliance programs and things like that, is it different for foreign companies than U.S. companies. I mean, we, in terms of foreign companies, we will be dealing with assessing mainly, I guess controlling risks, right? Like if you're paying with U.S. currencies, for example, or currency, or trying to assess your U.S. persons, if you have U.S. person employees, like what would be your main recommendation in terms of compliance for foreign persons?

**Erich Ferrari:** So, I actually think their compliance programs, depending on industry and regions where they operate, need to go above and beyond even where the U.S. programs are. Here's the reason why. U.S. programs are primarily looking at whether or not prohibitions are going to be triggered because they're civil and criminal penalties, very important, but you can also have civil and criminal penalties as a foreign entity, right. Because you could cause a U.S. person to engage in violation. And that could just be, you could send a Euro payment that City London processes as a foreign branch of a U.S. bank and find yourself in a sanctions conspiracy for doing that, a violation conspiracy. But you also then need to assess, am I engaged in conduct that's derivative, right?

So derivative meeting derivative designation criteria. So, you need to know who your counterparties are, who you're dealing. And almost that old adage, you don't need to know who your customer's customer is. You kind of do in 2020, kind of do, yeah, 2023. And then beyond that, you have to think about it. Am I operating it?

Am I going to be deemed to be operating in a sector that's sanctionable or you know, some sort of industry that's sanctionable. Am I going to be viewed as engaging in significant transactions where there's a program that has secondary sanction risk. So actually, the irony of this whole thing is that the foreign companies who for a long time thought, well, you know, we don't deal in U.S. dollars, we don't really need a compliance program. You actually need a more rigorous compliance program than even your U.S. counterparts do in certain cases.

**Olga Torres:** If you had to think of like assign a percentage of at least listing large, sophisticated companies, would you say that most large sophisticated companies have, let's not just even say just OFAC, but just sanctions generally.

I mean, Europe has sanctions firms, Canada, every country has its own. Are you seeing more of that now, especially nowadays, I suppose, with Russia? Are you seeing more of those companies develop their compliance programs, or are you still seeing that there's just that learning curve until they get designated? They're like, ah, I think I needed a compliance program. Like, yeah. If you had to sign a percentage, what would you say that percentage is?

**Erich Ferrari:** Yeah, I don't know if I can assign a percentage, and I think it would depend on what region of the world you're operating in. I think, you know, we have a lot of clients in Africa. I think they're far behind in terms of adopting compliance policies and procedures. Europe, much farther along, right. Middle East, getting much farther along, and I would say across the board, you know, it's increased more and more companies are having sanctions compliance programs.

**Olga Torres:** There's just more awareness in general, right?

**Erich Ferrari:** Yeah. I mean, you can't turn on the news in today and not hear about sanctions somewhere. Iran, Russia, Syria, North Korea, everything's sanctions all the time, corruptions, you know, Magnitsky sanctions. So, yeah, it's definitely increased. But yeah, there's still companies you'd be surprised that don't have.

**Olga Torres:** I mean like, same in the U.S., right?

**Erich Ferrari:** Yeah.

**Olga Torres:** You'll see companies that you're like, you don't have, or like you, you are this big and you have one person head of your entire compliance program.

**Erich Ferrari:** Yeah.

**Olga Torres:** So, that's interesting. I meant to ask you, so I'm going to go back to lawsuits. I meant to ask you this question. In those cases, especially in, because I've seen you do it, in cases where you sued OFAC and rather than answering in court, they just delisted. Why do you think that is?

**Erich Ferrari:** I think that once they were able to do a deep dive into the facts, they just realized that they don't have ongoing conduct, they don't have any recent evidence to support that the basis for designation still exists. And so why

take, why roll the dice in court and potentially lose and create bad law for yourself, you know, if you don't have the facts.

**Olga Torres:** Right, so basically, I don't want to take the risk. I'm not seeing anything factually that supports my designation. Don't want to waste my time with it.

**Erich Ferrari:** It also depends on who it is. If it's like, if it's a tier two designee who's designated for providing support and services, or it's a company that was formally owned by someone, why? What policy objective is being advanced? Now, if it's someone who's, you know, designated under the Russia program, and that's very hot right now, it's going to get a lot of attention if you remove someone. The considerations shift. Cause a lot of this is about optics and how it impacts the overall policy that the U.S. is trying to project.

**Olga Torres:** Well, I can imagine currently as of now, right, it would be very difficult, especially with respect to Russia.

**Erich Ferrari:** Right. I got to say one thing on that Olga, because this has been driving me crazy. Which is there were three delisting under the Russia program this year that it happened very quickly and they were all of financial institutions and they happened, they were subsidiaries of sanctioned Russian financial institutions and there was changes in ownership, right. But those happen within, one happened within 35 days. Another one happened within like 60, between 65, 70 days. The other one was 105 days. The reason I know this is because, you know, we're obviously representing people designated under that program and their cases have impending for a long time. And you know, the line we get back as well, you know, is a very lengthy and complex process. I'm like, is it because you took this bank off in 35 days and this other bank off in 60 days? So, it's interesting how you know where's the line.

**Olga Torres:** Can you remind me, do those, so you said Russia, would those be, would those require the congressional approval to remove?

**Erich Ferrari:** No, they're not covered executive orders. So, these are 14024 designations, not the 13 660, 661, 662, 685.

**Olga Torres:** So, what about the latter? I know there's at least one that I know of. I think it was.

**Erich Ferrari:** EN+.

**Olga Torres:** Yes. And so, we did get Congress to approve. Have, do you know of any other ones?

**Erich Ferrari:** Not under, no, not that I can think of offhand, I don't think there has been any. It's not even an approval, right, it's a notification.

**Olga Torres:** Notification, yeah.

**Erich Ferrari:** It's a notification requirement.

**Olga Torres:** And if you're notifying Congress, but they're not approving, I suppose they just want to know, because all of this happened because of Trump, right. I mean, the impression that he could try to assist Russia in some kind of way. So I guess they received the notification, but they don't have to approve it. Do you think that the notification alone would have some kind of chilling effect? Like people wouldn't even want to request some or that the listings will be so much slower because now they have to notify Congress?

**Erich Ferrari:** Oh, it's a hundred percent, It's on the agency's mind and it's on the client's minds who are challenging, right. Which is, well, you know what, like I don't think I should be on the list. I think I have a good argument, but I know the U.S. Congress isn't going to care about the legal merits. They're going to care about the politics and, and how

**Olga Torres:** The optics.

**Erich Ferrari:** Yeah, and the optics, right.

**Olga Torres:** But then what can they do if they're not approving? Pressure the agency backdoor?

**Erich Ferrari:** No. I mean, no, it's not. You can't really pressure the agency backdoor. I mean, if you want to still pursue de-listing, notwithstanding that notification requirement, just have to put forward the best argument you can. And if, like, in the case of EN+ if you have solid remedial measures that can justify de-listing and that can be used to show congress, hey, we achieved an objective here, right. That's the other piece about remedial measures too, is.

**Olga Torres:** We show that it works, that whatever action I took I've changed.

**Erich Ferrari:** Exactly right.

**Olga Torres:** Because it's not supposed to punish, right. The whole point of it. I saw you like, oh, whatever.

**Erich Ferrari:** Yeah, it's not supposed to, but I mean there's debate on that too, internally, but public facing U.S. government's line is, this is to compel a change in behavior. Whose behavior? The government of Russia or the person seeking delisting? Supposed to be the latter, but.

**Olga Torres:** Yeah, because I mean, how would that person have any impact on their own government? Right. Much more than you and I on our own. Interesting, okay. So.

In terms of cases against OFAC, what would you say is a case like the most important case that showed, okay, there could be, even if it was not a delisting or any kind of action that showed that OFAC was, you know, that the course were pushing back a little bit on one of their,

**Erich Ferrari:** Yeah, so it's probably Exxon. The Exxon case.

**Olga Torres:** And that's for a US person.

**Erich Ferrari:** That's for a US person. Exxon, in, again, in your district, right? The northern District of Texas.

**Olga Torres:** We are very litigious people.

**Erich Ferrari:** Yeah, I like that. I should move down there and bring some lawsuits. But it's actually a case that wasn't against OFAC. It was those two, Chinese communist military company cases. The Xiaomi, I think, and Lou Kong Technologies.

**Olga Torres:** Are you talking about a different case?

**Erich Ferrari:** Yeah, I'm talking about different cases.

**Olga Torres:** Yeah. Oh, okay.

**Erich Ferrari:** Yeah, these were motions for preliminary injunction. Remember, they had designated some Chinese companies as CCMC's. The Department of Defense actually designated them.

**Olga Torres:** When was this case?

**Erich Ferrari:** This was I want to say 2020.

**Olga Torres:** Oh, so it's recent.

**Erich Ferrari:** Yes. It's pretty recent. And what was really interesting there is now this is not OFAC doing the record, this is the Department of Defense.

**Olga Torres:** Ah, okay.

**Erich Ferrari:** It wasn't yet against OFAC, it was Department of Defense, but it was a sanctions action under a sanction related executive order. And the court found the agency's reasoning to be faulty because they said that it's likely that they are doing something, right. So, the agency basically said it's likely that they meet this definition because they're likely engaged, or I'm sorry, that they, they meet this designation because they're likely supporting the Chinese military just because of the industry they're in and the profile of the business. And the court said, the court pushed back and said, hey, you can't speculate, right? If you guys are just going to speculate on whether or not the company meets the designation criteria, that's insufficient. And this is a really important point. When you're challenging delisting or you're trying to bring your clients into compliance, which is to look at, don't attack the agency's facts, because the court doesn't care. The court's going to side with them on the facts and is not going to substitute their judgment. We have to attack the agency's reasoning. All right. Is the agency making leaps of logic in coming to their decision? Is the agency speculating? Has the agency connected all the dots, basically? And if you think they haven't connected some dots, that's where you, the basis of your judicial challenge on a designation or a denial action occurs, right.

**Olga Torres:** Very interesting. I don't think I've read that case. I'm going to go look it up.

**Erich Ferrari:** Yeah, they were right back to back like within a couple months of each other.

**Olga Torres:** And that's interesting because it's basically not involving OFAC, it's like a DOD, but then it's underlying, I guess there's an OFAC decision.

**Erich Ferrari:** Well, there wasn't a OFAC decision. It was a sanctions related executive order, just an administered by a different agency. It was administered by the Department of Defense.

**Olga Torres:** I see.

**Erich Ferrari:** But it's same

**Olga Torres:** But you could still try to see, right? Yeah. I see. Have you been able to use that in any of your cases?

**Erich Ferrari:** Yeah, we've brought it up. We've brought it up. I don't think in any cases that have been resolved yet. I don't know if we brought it up in Lopez Bay? I don't think so.

**Olga Torres:** Okay any horror stories representing clients? Any interesting stories that you have?

**Erich Ferrari:** Well, from the client side?

**Olga Torres:** Yeah. I mean from just practicing economic sanctions and litigation.

**Erich Ferrari:** There hasn't been any horror stories recently. There are a couple shady spots when I was a younger attorney that I found myself in. I don't want to really go into that. But no, I mean, look, you know, someone from OFAC asked me once, they're like, aren't you scared to meet all these people? And I'm like, I'm not scared of them. I go meet with them and everyone's, you know, nice and respectful and listening to me. I come into meetings with you guys and everyone's staring daggers at me, you know, and super kind, you know, this standard government, you know?

**Olga Torres:** Right.

**Erich Ferrari:** Very under cold and not giving any reaction and just saying, okay, we'll take it. So, you know, that's not so scary to go in and talk to the folks at OFAC a lot of times. No, I think horror stories, I'd say from the other side, which is just the shifting bases of designations, like right where you think you've done everything. That, okay, we got, the client was on board, willing to do all the right stuff, you know, we're going to have a successful case here. And then OFAC just switch it up on you and say, oh no, they're actually designated for this now. Or, you know, we have one case where they've, the guy's been challenging for like seven years and he's been, had a designation rescinded simultaneously, re-designated. Then in the middle of litigation, they changed the basis of the designation again. and then we went through, we addressed everything and then denied him again. And they basically said, well, you sold

these goods to this organization, which is also sanctioned, and you haven't provided any proof that that organization no longer uses the goods. And since you don't have any proof, they're not using those goods still, even though you sold it 10 years ago. That's ongoing support to that organization.

**Olga Torres:** Because they have the product.

**Erich Ferrari:** Yeah. So, I mean, imagine like you're working at the Radio Shack down the street and someone comes in and buys a microphone stand from you, and that was 10 years ago. And they're like, well, you didn't show us they're not using the microphone stand anymore. So, you're continuing to provide support to them. So, you know, I don't know, you know, there's stories, little stories like that where it's just very frustrating.

**Olga Torres:** Do you foresee any new actions by the agency in terms of for, especially if there's more litigation against them where maybe they change some of that approach and where they can see parties really have changed in behavior or is it just all politics?

**Erich Ferrari:** It's a lot of politics. I don't think it's all politics. I know that they're making a good faith effort to reassess how they've been doing things, whether they're doing things the right way. I know the folks who are involved in the, on the treasury side in that process, and I think they're all going into it you know, in good faith and really trying to review how things are going on.

Here's the problem. Everything is a political football now, right? We're in such a highly, you know, bifurcated political landscape that if you do anything, the other side is going to jump all over you. So, oh, you took this SDN off the list? Well, look, the Biden is, you know, doing favors for whatever country or, oh, you took, you know, this SDN company off the list. Oh, that's because you're in the pocket of that company, you know, it's, you can't do anything. Right.

**Olga Torres:** No. Well, thank you so much for your time today and it was great catching up with you and I hope to see you sometime soon when I'm in DC and enjoy the holidays.

**Erich Ferrari:** You too.