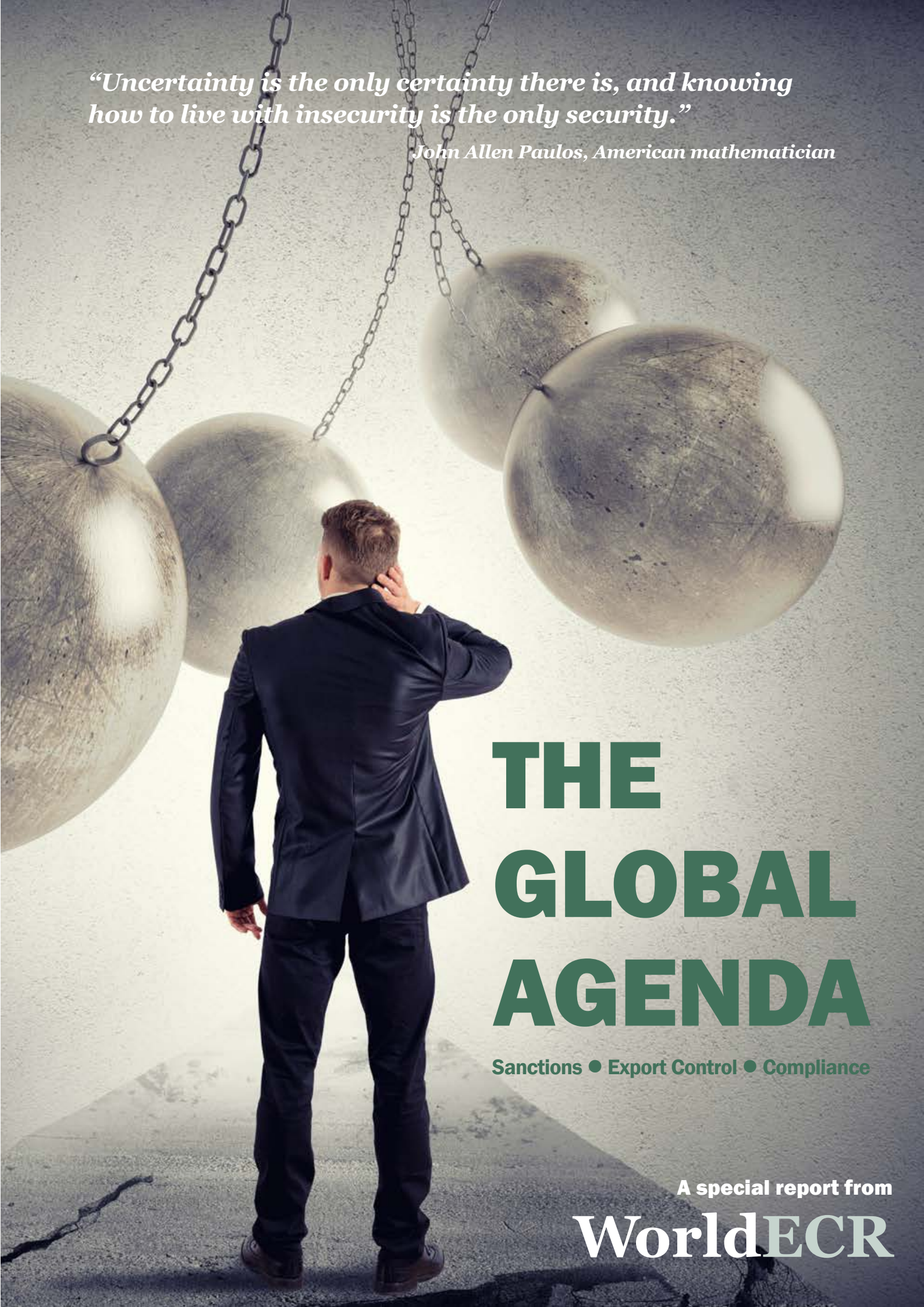

"Uncertainty is the only certainty there is, and knowing how to live with insecurity is the only security."

John Allen Paulos, American mathematician

THE GLOBAL AGENDA

Sanctions ● Export Control ● Compliance

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Coping with the US secondary sanctions tsunami

US secondary sanctions seek to target and restrict the activities of non-US persons. Meredith Rathbone and Brian Egan explain how best to deal with them.

US secondary sanctions are designed to discourage non-US persons from doing business with a sanctions 'target' disfavoured by the US government for national security or foreign policy reasons. 'Targets' can be specific individuals, entities, or organisations (for example, designated narcotics traffickers), sectors of an economy (for example, the Russian 'frontier' oil exploration and production sector), or business activity (for example, trading North Korean coal).

No US nexus – such as a connection to the US financial system, US economy, or US person – is required to trigger US secondary sanctions restrictions. Given the lack of a US jurisdictional nexus, secondary sanctions do not 'prohibit' conduct by a non-US person or impose fines or similar penalties on a non-US person for 'violations'. Instead, those engaging in activity that is 'sanctionable' are potentially subject to restrictions on access to the US economy, ranging from targeted (for example, prohibitions on US government export assistance) to extensive (for example, placement on the Specially Designated Nationals list).

US secondary sanctions are not new. The Iran and Libya Sanctions Act of 1996 included secondary sanctions related to significant investments in Iran or Libya's petroleum industries. Since 9/11, numerous Presidential executive orders authorise restrictions against those who provide material or other support to various Specially Designated Nationals.

But over the past decade, the US Congress has dramatically expanded the scope of secondary sanctions. Between 2010 and 2013, Congress passed four secondary sanctions laws on Iran alone. Most recently, the 'Countering Americas Adversaries Through Sanctions Act' ('CAATSA') identified dozens of additional categories of Russia, North Korea, and Iran-related activity for secondary sanctions. The US executive branch – traditionally lukewarm to secondary sanctions for foreign policy reasons – also has been more willing to impose these restrictions in recent years. Even more dramatically, an ongoing prosecution of a former Turkish bank executive in New York may reflect a willingness by US prosecutors to seek criminal penalties for secondary sanctions 'evasion'.

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Companies outside the United States often ask what they should do to reduce risks related to US secondary sanctions. Understanding those risks can be daunting. The sanctions 'triggers' – for example, a 'significant' or 'material" 'investment' or other business activity with a sanctions target – are unclear, often by design. The interpretation or application of these triggers may vary based on a number of factors, from the identity of the sanctions target and the applicable restrictions, to the identity and nationality of the non-US person who may be subject to secondary sanctions restrictions.

One also needs to assess how aggressive the US government might be in implementing the secondary sanctions under consideration. OFAC and the State Department exercise substantial discretion and frequently appear to make decisions in a 'black box'. It is important to consider whether it is better to approach OFAC or the State Department to raise questions or discuss contemplated transactions up front, or to be prepared to defend a company's actions against possible secondary sanctions measures after the fact.

The policy consequences of secondary sanctions should also be part of an informed risk-management calculation. Use of secondary sanctions by the US government is not 'cost-free'. US secondary sanctions present significant foreign policy issues – particularly when they are propounded unilaterally, without the support of the UN Security Council or US allies. The run-up to the passage of CAATSA saw EU objections to proposed secondary sanctions on Russian gas export pipelines, leading Congress to amend the law to require this sanction be implemented 'in coordination with allies of the US'. Overuse of secondary sanctions could lead countries to decide to avoid the US economy altogether, or encourage closer cooperation between US rivals. And there is the practical reality of sanctions implementation – with dozens of sanctions programmes, the US government may not have the resources to aggressively implement them across the board, even for 'mandatory' secondary sanctions passed by Congress.

What to do in response to this 'tsunami' of US secondary sanctions? Don't exasperate over what appears to be an indiscernible morass. The specific language of relevant sanctions provisions should be reviewed and analysed; factors relating to the discretion of those administering these sanctions can be identified and evaluated; 'costs' on both sides of the ledger should be considered; documenting the rationale for a course of action will help mitigate risks; and engagement with government officials may be appropriate in some circumstances.

All of these factors are susceptible to an informed assessment. Internal or external experts can help make reasonable and defensible risk assessments and lead to informed management decisions.

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