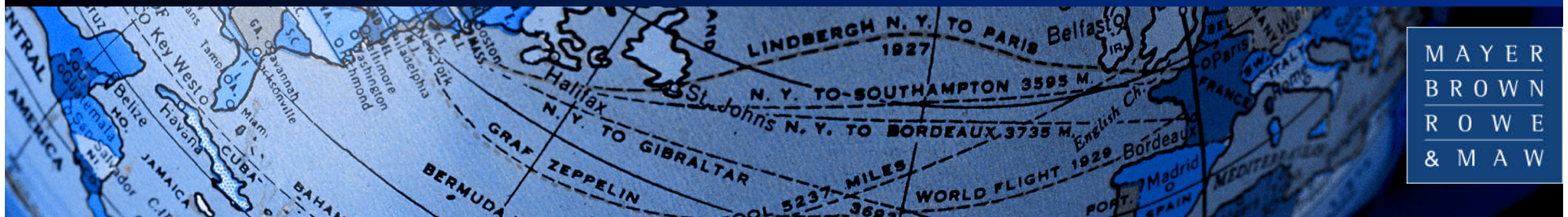


U.S. Sanctions: The New Trans-Atlantic Challenges

Dr. Günter Burghardt and Charles De Jager, Brussels
Thomas J. Delaney and Simeon M. Kriesberg, Washington

April 24, 2007

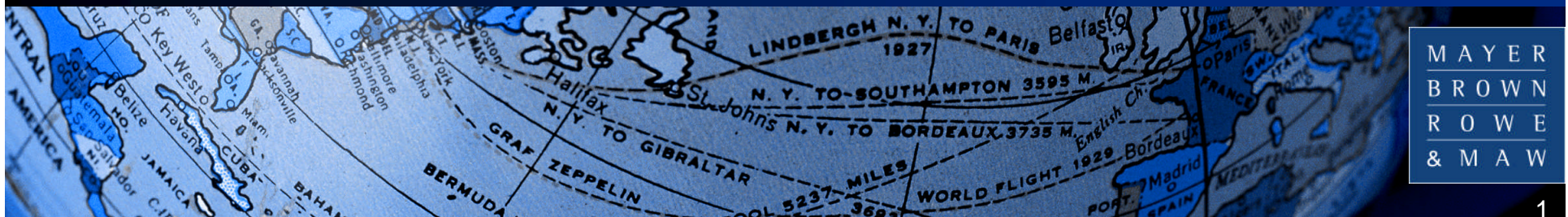
London



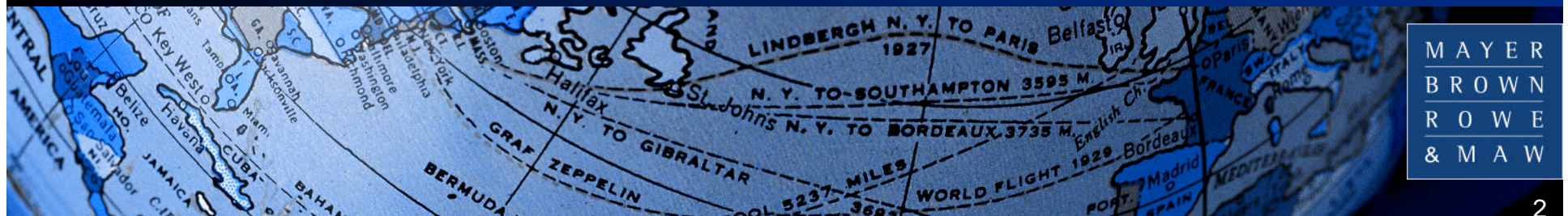
MAYER
BROWN
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U.S. Sanctions: The New Trans-Atlantic Challenges

- Overview: U.S. Sanctions and Trans-Atlantic Relations
- The Significance, Subjects, and Targets of U.S. Sanctions
- Current Enforcement Practices and Trends
- Parents, Subsidiaries, and the Prohibition against “Facilitation”
- Restrictions on Re-Exports and Deemed Re-Exports
- Effective Corporate Compliance Programmes
- Financial Services Under Scrutiny
- The EU’s Response to U.S. Sanctions
- Political Developments and the Repercussions on Sanctions



Overview: U.S. Sanctions and Trans-Atlantic Relations

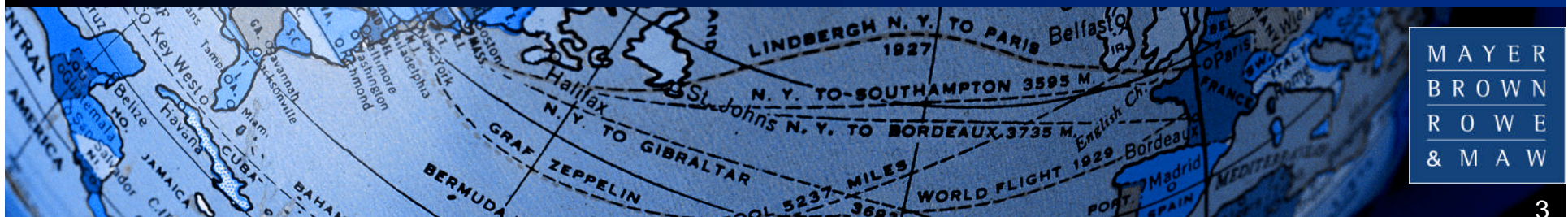


Overview:

U.S. Sanctions and Trans-Atlantic Relations

Controversies and Compromises

- Increasingly U.S. is resorting to sanctions to advance foreign policy objectives
- U.S. objectives do not always coincide with positions taken by the international community
- Divergence puts pressure on global organizations
- The question becomes whether to conform to the U.S. agenda and minimize reputational and regulatory risk in U.S. or to remain true to home country policies

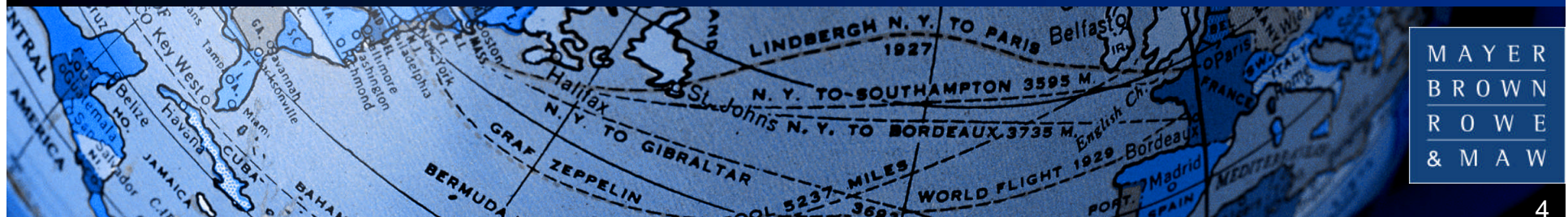


Overview:

U.S. Sanctions and Trans-Atlantic Relations

The North Korea Experience

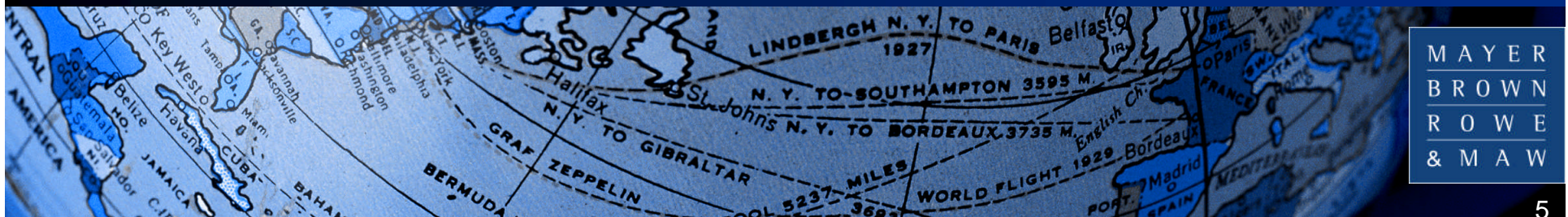
- North Korea rejects U.N. resolution concerning nuclear program
- U.S. threatens sanctions against Banco Delta Asia in Macau
- Deposits withdrawn and Macau freezes \$25 million in North Korean funds
- North Korea agrees to negotiate in return for having funds unfrozen



Overview: U.S. Sanctions and Trans-Atlantic Relations

The Iran Experience

- Iran continues to resist international pressure
- U.S. patience wearing thin
- U.K. likely to support more aggressive measures
- Dollar remains the currency for oil transactions
- From U.S. perspective, despite failure of sanctions to date, Iran appears to be a good candidate for N. Korea treatment

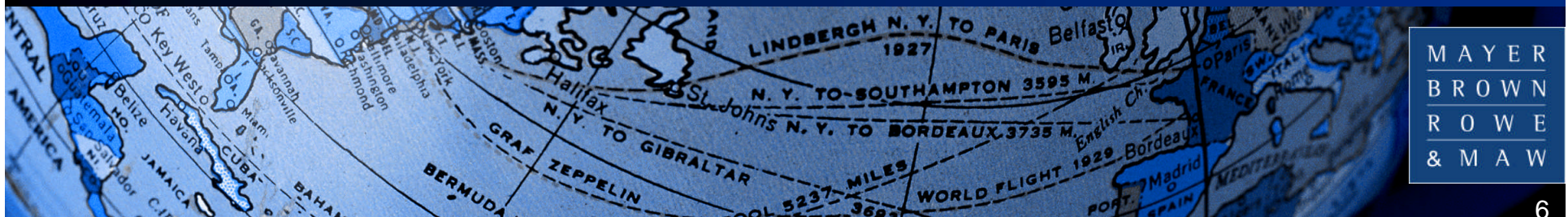


Overview:

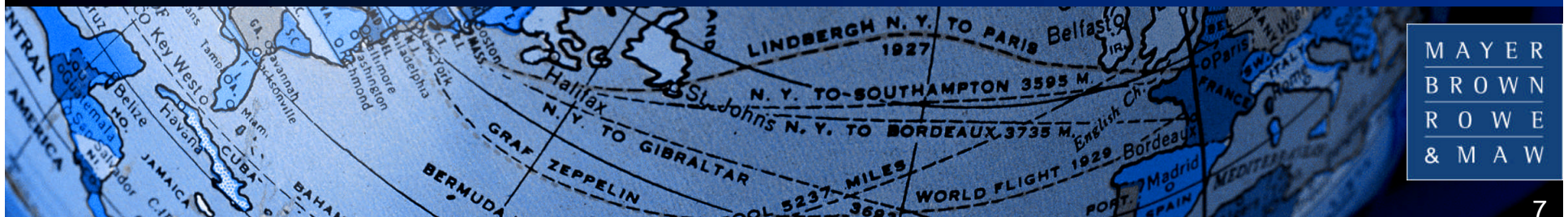
U.S. Sanctions and Trans-Atlantic Relations

The EU Perspective

- The EU favors a multilateral approach to sanctions
- The stark economic consequences of the U.S. unilateral approach are deplored
- EU resistance to the U.S. approach may be deemed partly responsible for changes in the U.S. approach
- More dialogue is required between governments to avoid leaving companies in the crossfire



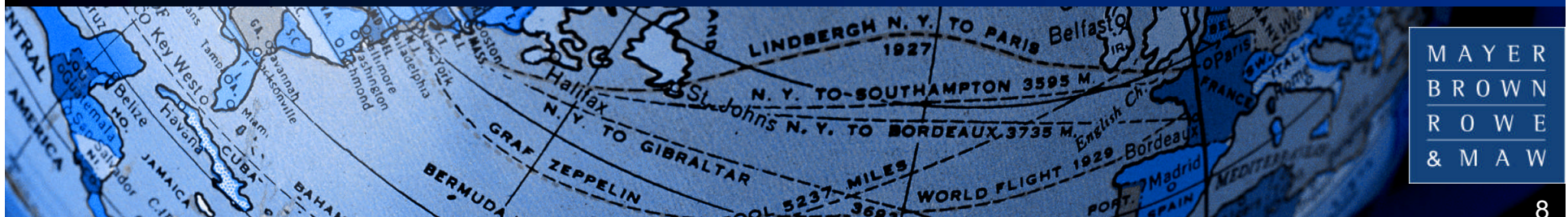
The Significance, Subjects, and Targets of U.S. Sanctions



The Significance, Subjects, and Targets of U.S. Sanctions

Significance

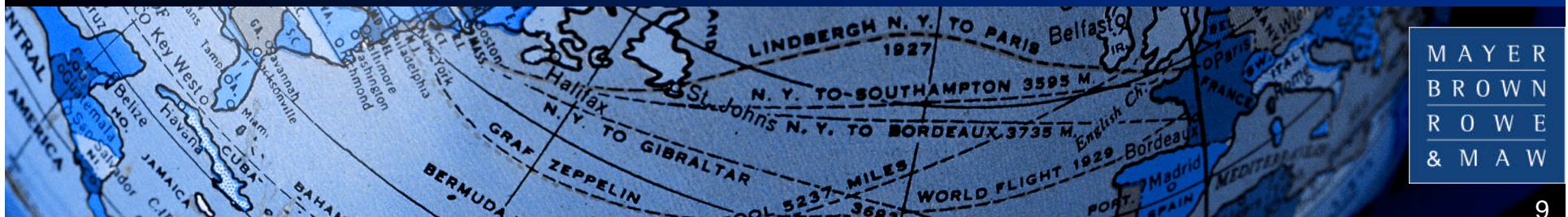
- Aggressive Enforcement against Non-U.S. Parties
- Substantial Penalties
- Complications in Commercial Relationships with U.S. Suppliers and Customers



The Significance, Subjects, and Targets of U.S. Sanctions

Subjects

- U.S. Citizens, U.S. Residents, Persons in United States
- Entities Organized under U.S. Law or with Principal Business in United States or Controlled by U.S. Nationals
- U.S.-Owned Subsidiaries Abroad (re Cuba, North Korea)
- Transactions into the U.S. Market (Cuba-Origin Raw Materials)
- Transactions from the U.S. Market (Manufacturing in Europe for Known Embargoed End-Users)
- Non-U.S. Investors in Cuba and Iran

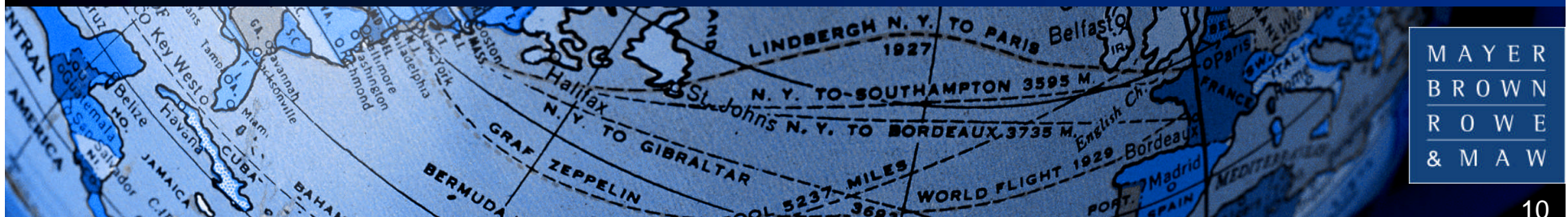


The Significance, Subjects, and Targets of U.S. Sanctions

Targets

- Countries (Comprehensive) (Cuba, Iran, Sudan, Syria)
- Countries (Limited) (Burma/Myanmar, North Korea)
- Regimes (Balkans, Belarus, Congo, Cote d'Ivoire, Iraq, Liberia, Palestinian Authority, Zimbabwe)
- Entities and Individuals (Narcotics Traffickers, Terrorists, WMD Proliferators, Specially Designated Nationals)
- Other: Diamond Trading, Iran Freedom Support Act

Licenses and Exceptions



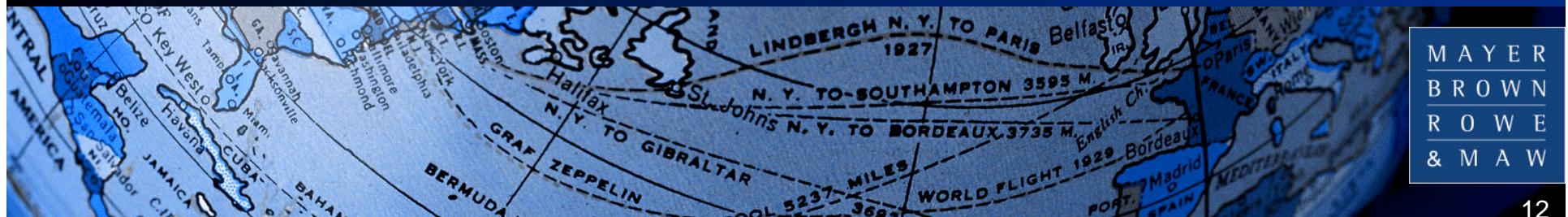
Current Enforcement Practices and Trends



Current Enforcement Practices and Trends

OFAC's "New" Approach

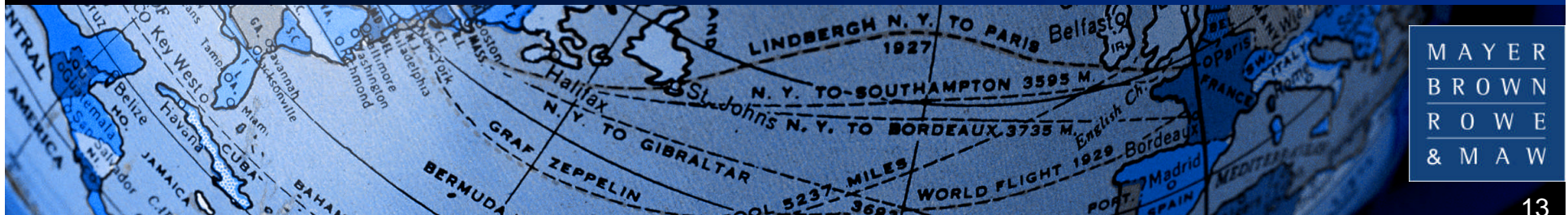
- Announced January 2006
- Immediately Applicable to Banks
- Indicative of Future Enforcement Practices with Respect to SEC/CFTC-Regulated Entities and to Non-Financial Sectors (e.g., Importers/Exporters, Software Makers, e-Commerce)



Current Enforcement Practices and Trends

Elements of the New Approach

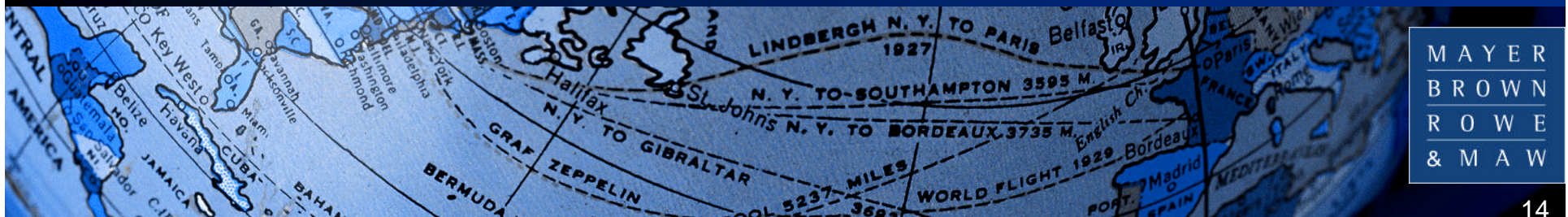
- Emphasis on Internal Compliance Program Tailored to Entity's Risk Profile (Size, Business Volume, Customer Base, Product Lines)
- Consideration of Violations over Period of Time, Taking into Account the Entity's Compliance Record, Evaluations by Other Regulatory Agencies, and Evidence of Systemic Compliance Deficiencies



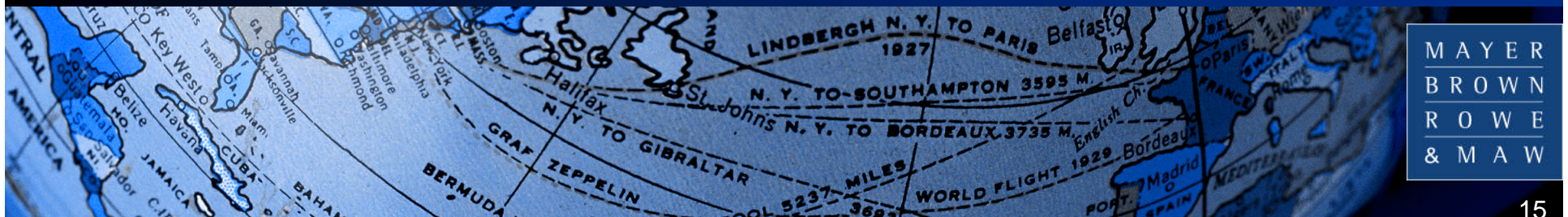
Current Enforcement Practices and Trends

The Crack-Down on Iran

- OFAC's Tightening of Access to U.S. Banking System
- Congressional Initiatives:
 - Renewal of Iran Freedom Support Act
 - Reconsideration of the Exception for Foreign Subsidiaries of U.S. Companies
 - Restrictions on Investments by U.S. Pension Plans



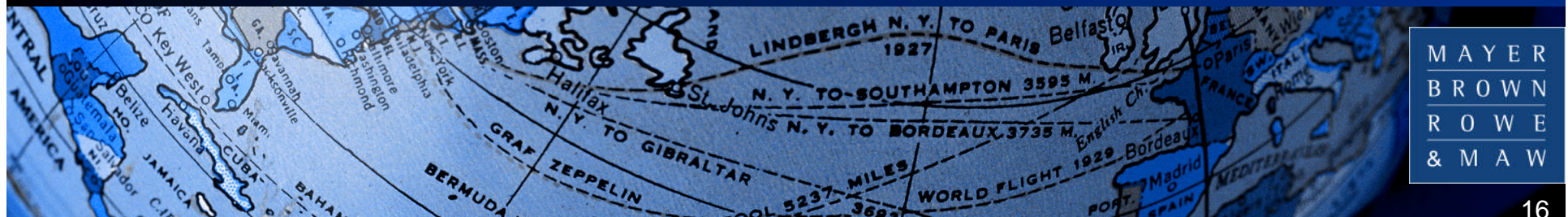
Parents, Subsidiaries, and the Prohibition against “Facilitation”



Parents, Subsidiaries, and the Prohibition against “Facilitation”

Key Issues for Parents and Subsidiaries

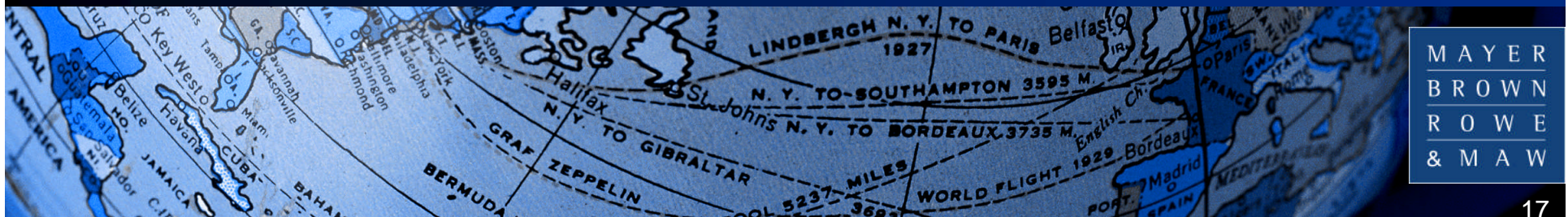
- All Subsidiaries Organized in the United States or with Principal Business in the United States, regardless of Ownership, are Subject to U.S. Sanctions Laws
- All Non-U.S. Subs of U.S. Parents are Subject to Cuba and North Korea Embargoes (but Note Foreign Blocking Statutes)
- Non-U.S. Parents and Subs with U.S. Directors or Management must Prevent their Participation in Sanctions-Related Transactions



Parents, Subsidiaries, and the Prohibition against “Facilitation”

“Facilitation” and Subsidiary Operations

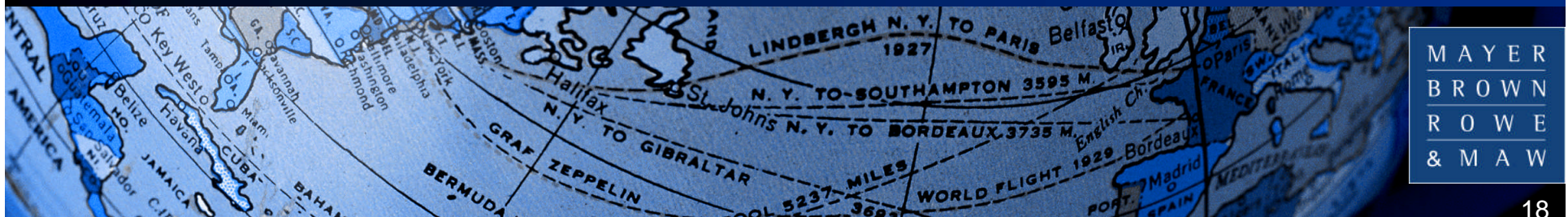
- U.S.-Owned Subsidiaries must Avoid Facilitation of Sanctions-Related Transactions by U.S. Parents, including Referral of Business, Authorization, Financing, Guaranteeing, Insuring, Designing of Goods, or Management
- U.S. Parents and Their Subs may not Alter Policies and Procedures to Accommodate Sanctions-Related Transactions
- U.S. Nationals in Non-U.S. Subs or Non-U.S. Companies are Subject to Facilitation Restrictions



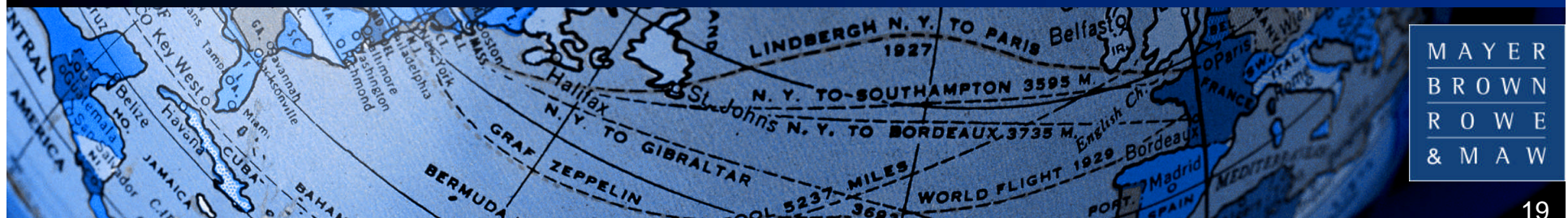
Parents, Subsidiaries, and the Prohibition against “Facilitation”

“Facilitation” in Practice

- Set in Stone: Authority and Policies of Non-U.S. Subs
- The Parent’s Back-Office: Warranties, Insurance, Invoices
- Recusals: U.S. Directors of Non-U.S. Companies



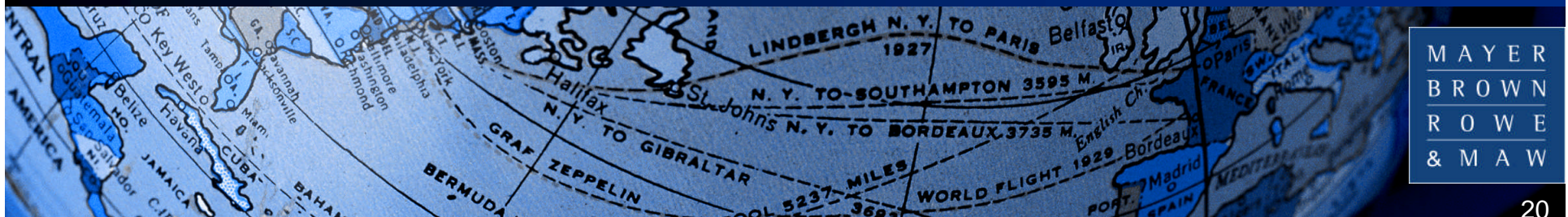
Export Controls: Restrictions on Re-Exports and Deemed Re-Exports



Export Controls: Restrictions on Re-Exports and Deemed Re-Exports

General Principles

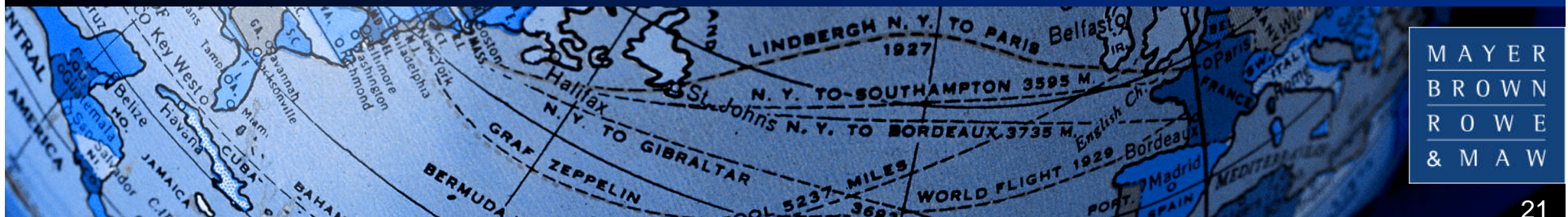
- U.S. Sanctions and U.S. Export Controls Overlap in Many Situations
- U.S. Export Controls Apply to U.S.-Origin Goods, Software, and Technologies regardless of Participation of U.S. Persons



Export Controls: Restrictions on Re-Exports and Deemed Re-Exports

Restrictions on Re-Exports

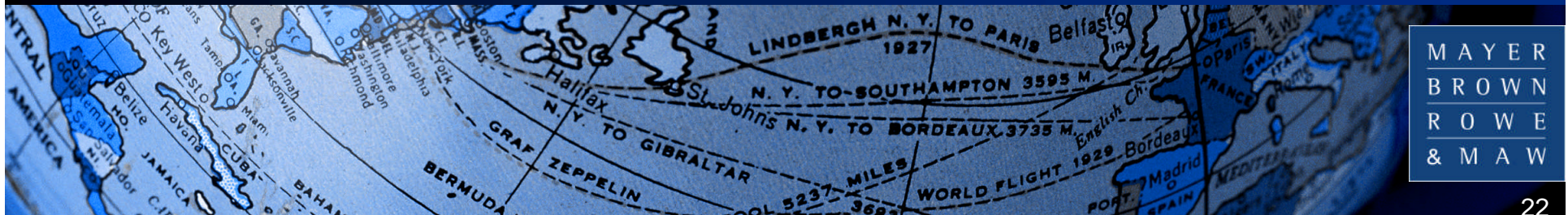
- Physical Shipments of U.S.-Origin Goods
- Shipments of European-Made Goods with U.S.-Origin Components, Software, or Technology
- Goods in Inventory versus Specific Orders



Export Controls: Restrictions on Re-Exports and Deemed Re-Exports

Restrictions on Deemed Re-Exports

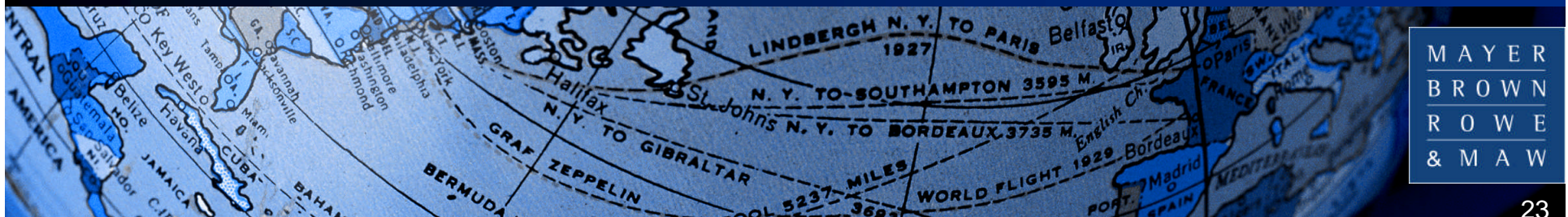
- The Definition of “Deemed” Exports and Re-Exports
- Changes in the Works?



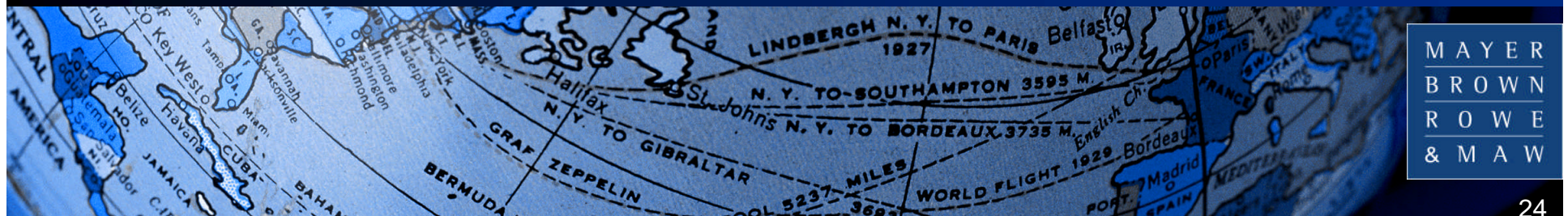
Export Controls: Restrictions on Re-Exports and Deemed Re-Exports

Special Situations

- Export Controls on Outsourcing Transactions
- Exception for Encrypted Software Sent to Foreign Subsidiaries of U.S. Companies
- Successor Liability in Mergers and Acquisitions



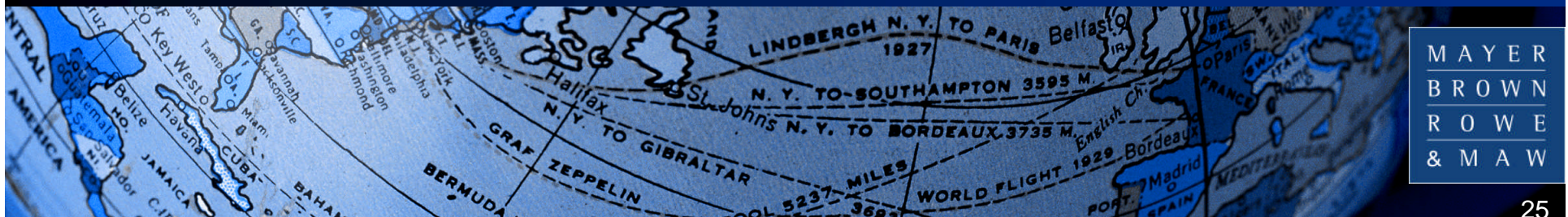
Effective Corporate Compliance Programmes



Effective Corporate Compliance Programmes

Importance of an Effective Compliance Programme

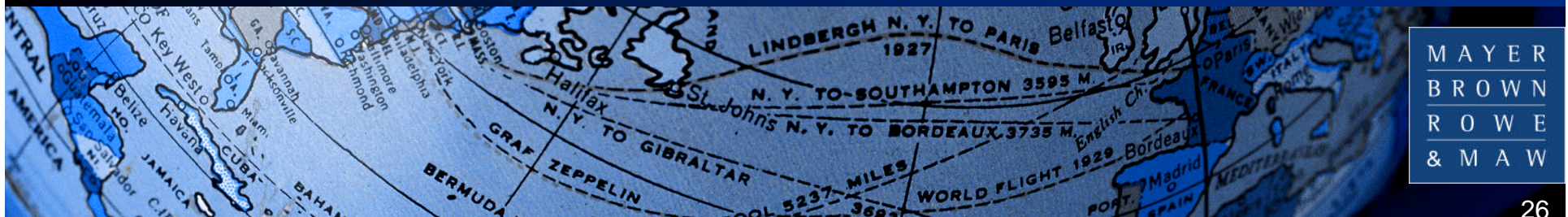
- Preventive Medicine with Respect to Possible Violations
- Mitigating Consideration in Event of Violation: “Two Worlds”



Effective Corporate Compliance Programmes

Key Elements

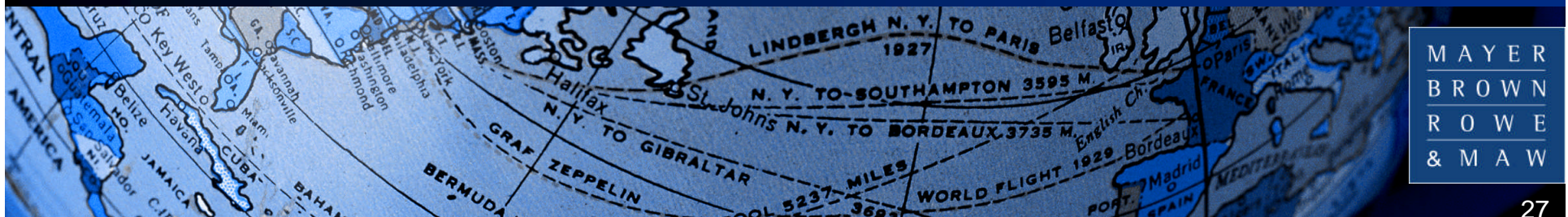
- Culture of Compliance
- Written Compliance Policy
- Designated Implementation Responsibility
- Specific Compliance Measures (e.g., Screening Procedures, Guidelines for U.S. Persons, Export/Re-Export Controls on U.S. Goods/Technology)
- Periodic Training Programs and Ready Access to Legal Advice



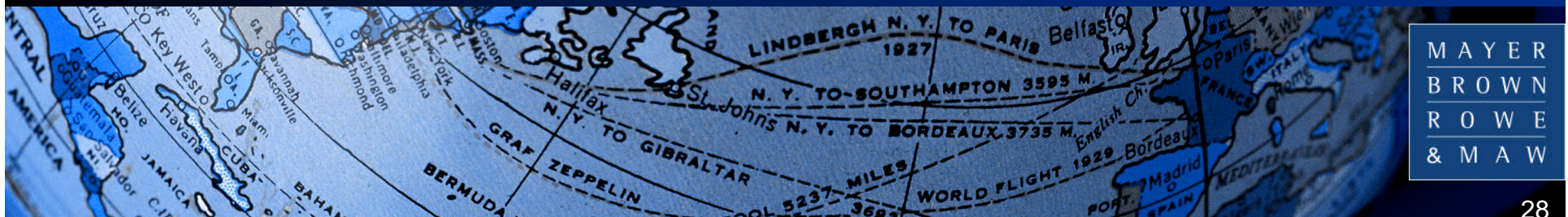
Effective Corporate Compliance Programmes

Key Elements (cont'd)

- Periodic Self-Certification of Compliance
- Maintenance of Compliance Records
- Application of Disciplinary Measures
- Periodic Internal and External Compliance Audits
- Periodic Adjustment Based on Current Risk Assessment



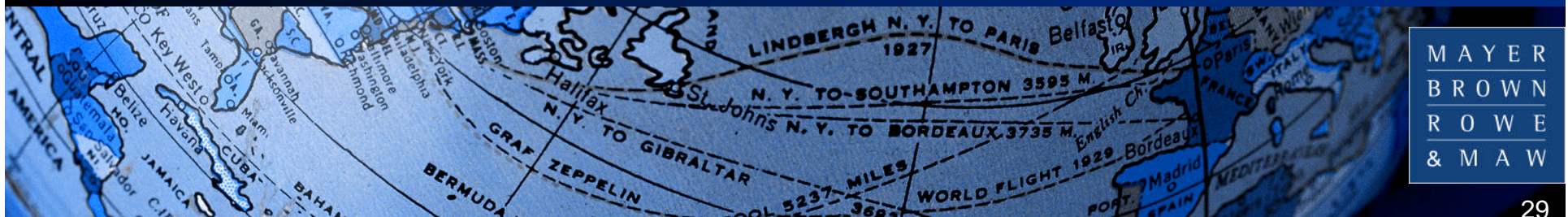
Financial Services Under Scrutiny



Financial Services Under Scrutiny

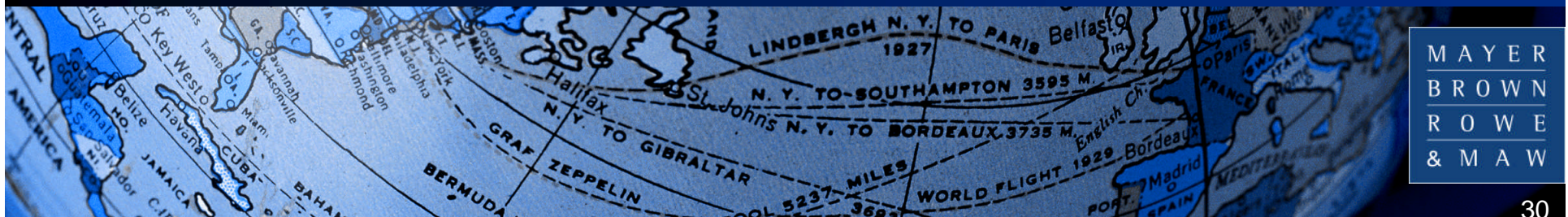
Overview

- Increased Coordination Between OFAC and Bank Regulators
 - June 2005 FFIEC BSA/AML Examination Manual
 - January 2006 OFAC Sanctions Procedures for Banking Institutions
- ABN AMRO: High Profile Enforcement Case Draws Attention to International Operations
- Trend Toward Adoption of U.S.–Compliant Global Sanctions Policies



Financial Services Under Scrutiny

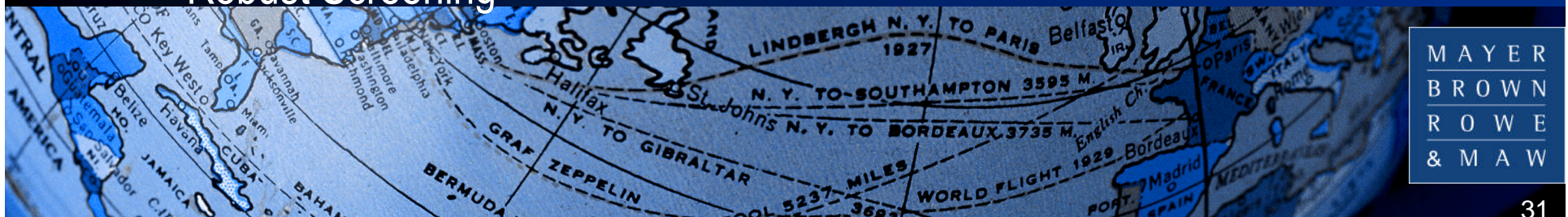
- Two Areas of Risk:
 - Violation may result from failure to implement a sufficiently robust programme of compliance in light of business risk
 - Even without violations, absence of a programme can result in regulatory penalty



Financial Services Under Scrutiny

FFIEC Examination Manual

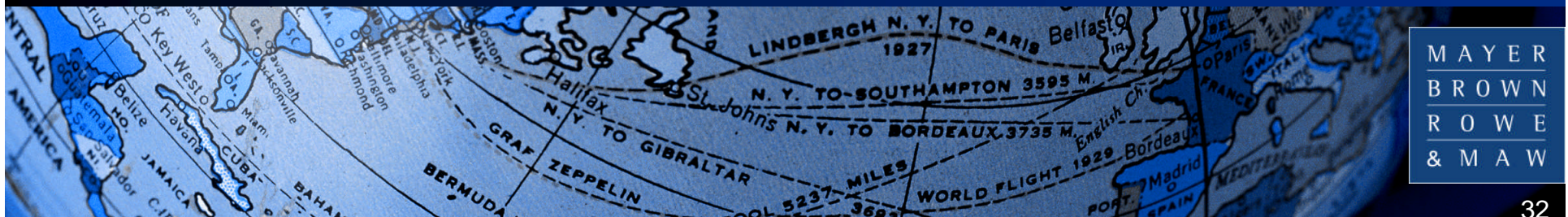
- OFAC Compliance Programme Required
- Risk Based
 - Dependent upon product lines, customer base, nature of transactions, and identification of high risk areas
 - Potential High Risk Products
 - International funds transfers
 - Payable through accounts
 - NRA accounts
 - International private banking
 - Cross-border ACH
 - Overseas branches and affiliates
 - Commercial Letters of Credit
 - Transactional electronic banking
 - Foreign correspondent accounts
 - Robust Screening



Financial Services Under Scrutiny

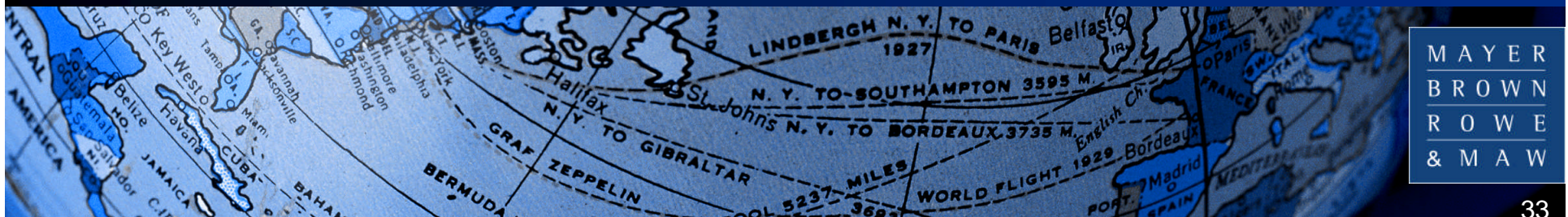
OFAC Requirements for Banks

- Risk-Based Compliance Programme
- Risk Matrix “Best Practices”
 - Risk fully assessed by management based on customer base and product lines and communicated throughout organization
 - BoD approved programme that includes policies, procedures, controls, and information systems consistent with risk profiles
 - Staffing levels sufficient to execute programme
 - Accountability for OFAC compliance clearly defined and enforced, including designation of a qualified OFAC officer



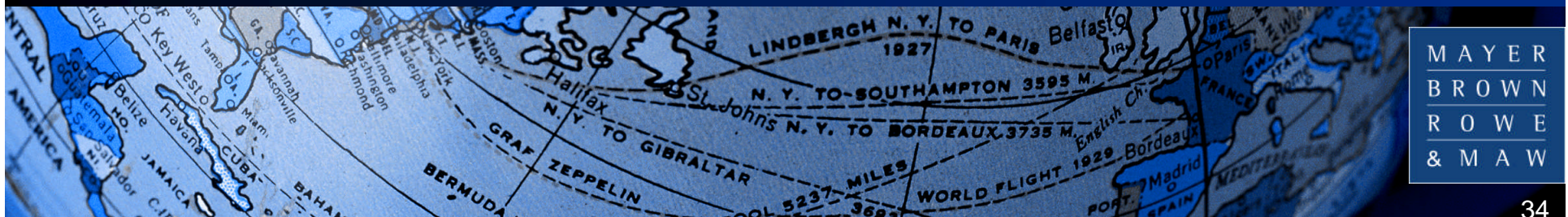
Financial Services Under Scrutiny

- OFAC Enforcement Criteria
 - Nature of Apparent Violations Over Period of Time
 - The number of accounts or transactions improperly handled
 - Responses to administrative subpoenas (if any)
 - Number of transactions blocked or rejected
 - History
 - Institution's examination/compliance record
 - Comparison with similarly situated institutions
 - Circumstances Surrounding Apparent Violation
 - Indications of reckless disregard
 - Information Provided by Institution to OFAC
 - Voluntary disclosures not counted as such if another institution also is required to file a report.
 - Corrective Measures Taken By Institution



Financial Services Under Scrutiny

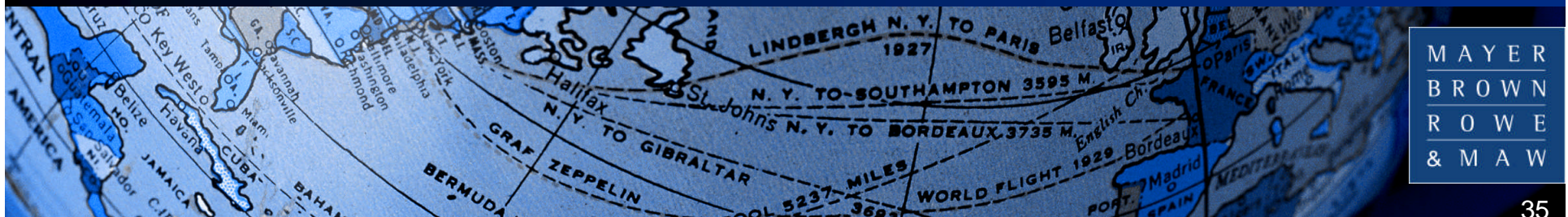
- Focus on Global Banks Doing Business in United States
- Recognition that OFAC sanctions do not apply to business conducted by branches/affiliates of foreign banks based outside of U.S.
 - Does not end the analysis
- Concern that dollar transactions may be structured through U.S. affiliates to avoid U.S. sanctions (e.g., “cover payments”)
 - U.S. affiliates have relationships with sanctioned parties but engaged in U.S. business in the name of the affiliate w/o identifying beneficiary



Financial Services Under Scrutiny

The Case of ABN AMRO

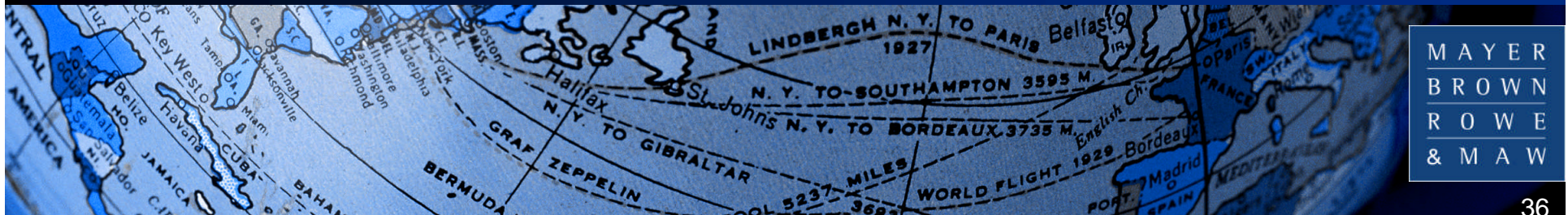
- Inadequate risk management and legal review procedures
- Overseas branch developed “special procedures” for funds transfers, check clearing, and letters of credit transactions that were designed and used to circumvent OFAC compliance systems in U.S.
- Many such transactions were permissible (e.g., U-turns) but were conducted in an impermissible way
- Special procedures should have been reviewed for compliance with U.S. law



Financial Services Under Scrutiny

Filters May Not Provide Adequate Assurance

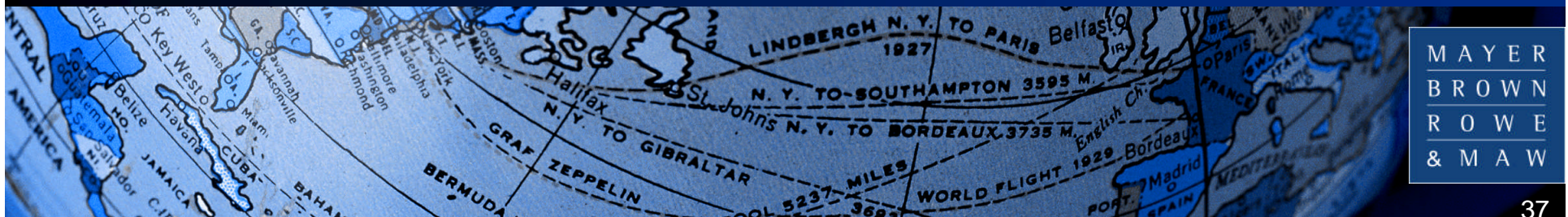
- Filters effective when transaction parties are identified
- Less effective when parties may not be identified
 - Cover Payments
 - Omnibus Accounts
 - Securities held in street name



Financial Services Under Scrutiny

Adoption of U.S. Compliant Global Sanctions Policies

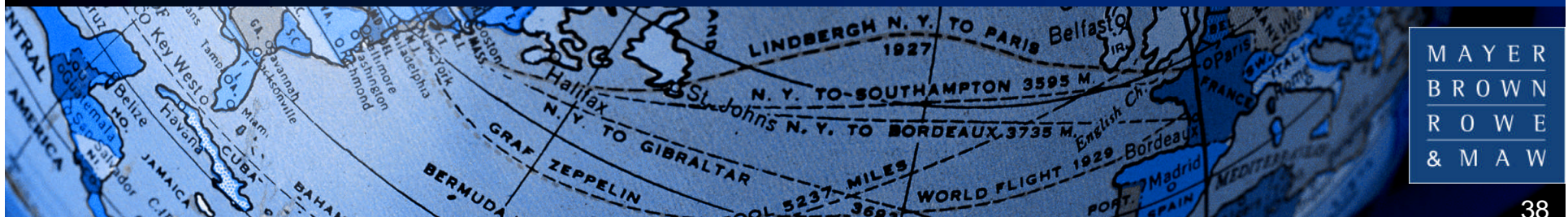
- Rather than attempting to insulate U.S. operations alone, foreign banks with U.S. operations moving to global compliance programs
- Parties subject to U.S. sanctions not served in any jurisdiction, even where legal
- Recent reports of large banks exiting Iranian business (early exit can have benefits)



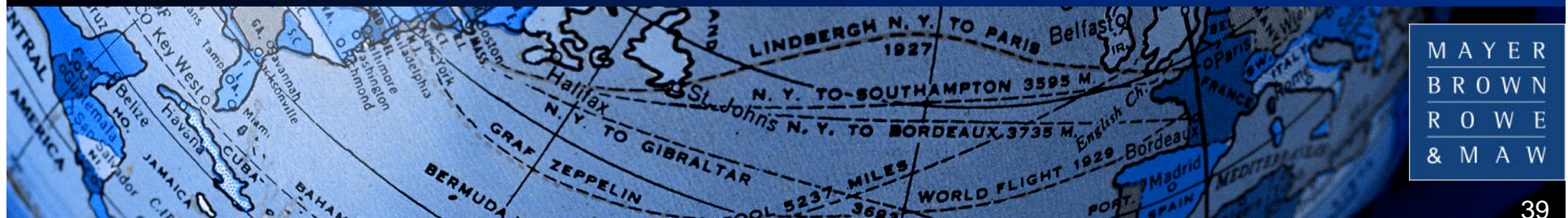
Financial Services Under Scrutiny

Issues to Watch

- Iran Sanctions
 - Sanctions likely to be heightened
 - U-turns disallowed?
 - Develop exit strategy
- Palestinian Authority Accounts
 - Application of Sanctions to New Coalition Government
 - Consider exit strategy



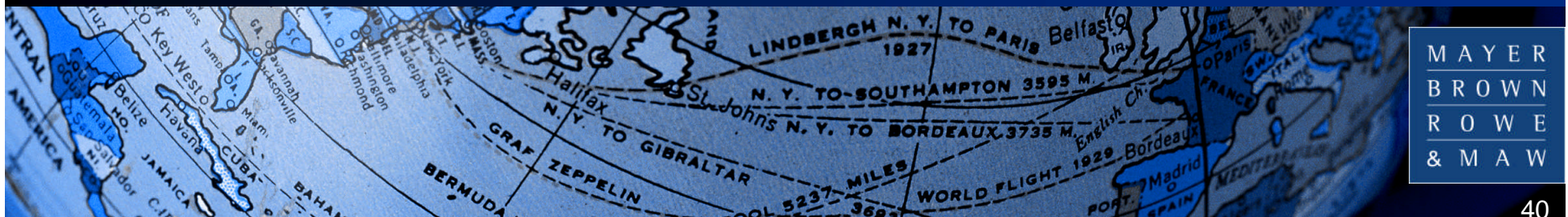
The EU's Response to U.S. Sanctions



The EU's Response to U.S. Sanctions

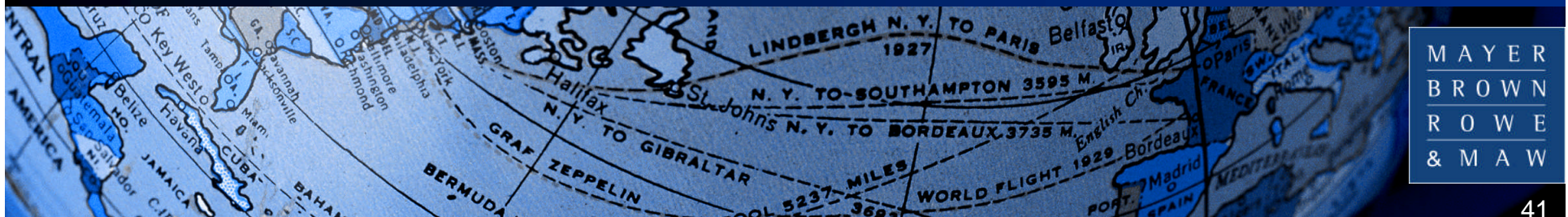
Overview of EU Practice

- “Restrictive Measures” are imposed either on an autonomous EU basis or by implementing UNSC Resolutions
- May target third-country governments, non-state entities and individuals, including terrorist groups and terrorists
- May consist of financial restrictions, restrictions on admission, trade sanctions (arms embargoes or other import and export bans), suspension of cooperation and diplomatic sanctions



The EU's Response to U.S. Sanctions

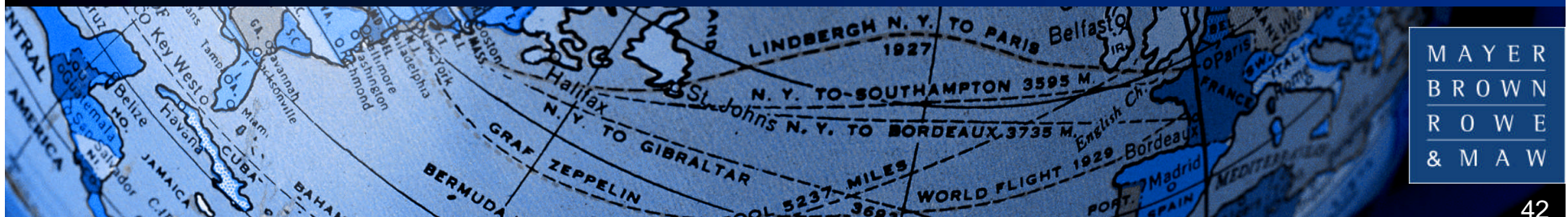
- Economic and Financial Restrictive Measures
- Broad measures with unduly high economic and humanitarian impacts must be avoided. Targeted measures preferred.
 - Must freeze all funds and economic resources of the targeted persons and entities
 - Prohibition on making funds available directly or indirectly to or for the benefit of the targeted persons and entities
- Must be respected by all persons and entities doing business in the EU (both EU and non-EU nationals) and by EU Member States' companies when doing business outside the EU



The EU's Response to U.S. Sanctions

Legal Bases for EU Restrictive Measures

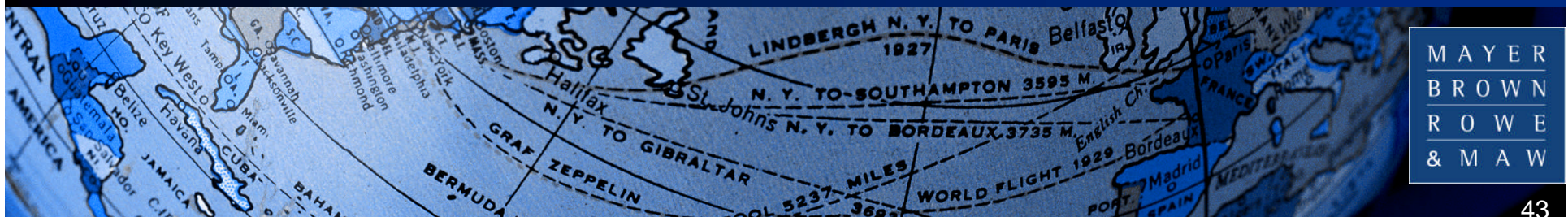
- Will depend on the exact nature of the restrictive measures and the areas or targets they cover
- May require adoption of a Common Position by unanimity or a Council Regulation by either qualified majority or unanimity – necessarily more of a compromise than under US practice
- The measures adopted have direct effect in the Member States
- Application and enforcement by EU Member States' competent authorities (need for cooperation and best practices) and the Commission



The EU's Response to U.S. Sanctions

The EU Blocking Statute

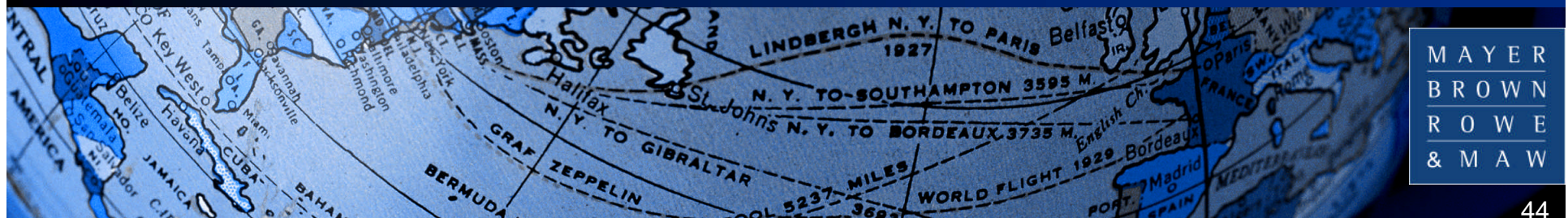
- In response to extraterritorial effects of Helms-Burton Act and ILSA, EU enacted a Blocking Statute forbidding compliance
- The EU threatened WTO dispute settlement proceedings but an understanding was reached between the EU and the U.S.
- The understanding established, *inter alia*, renewable waiver of provisions with extraterritorial effect and resulted in a standstill



The EU's Response to U.S. Sanctions

Blocking Statute and Understanding in Practice

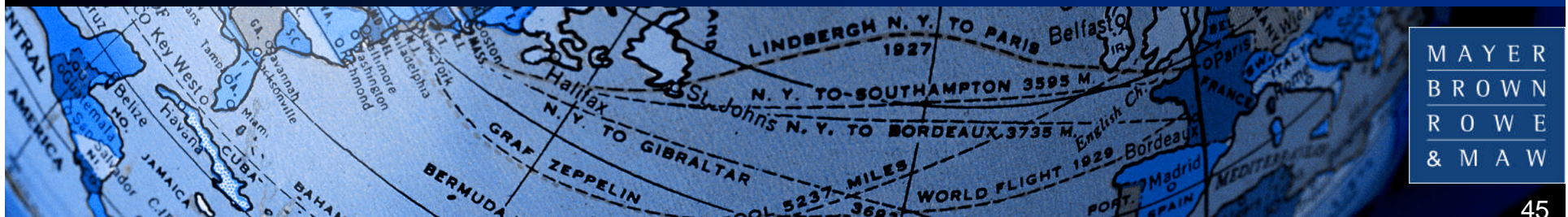
- The Blocking Statute is not entirely dormant, especially for EU subsidiaries of U.S. companies
- Commission continues to receive Article 2 notifications from affected companies and may investigate
- Despite possibility of obtaining derogation under Article 5, none has been granted and none likely will



The EU's Response to U.S. Sanctions

Blocking Statute and Understanding in Practice (cont'd)

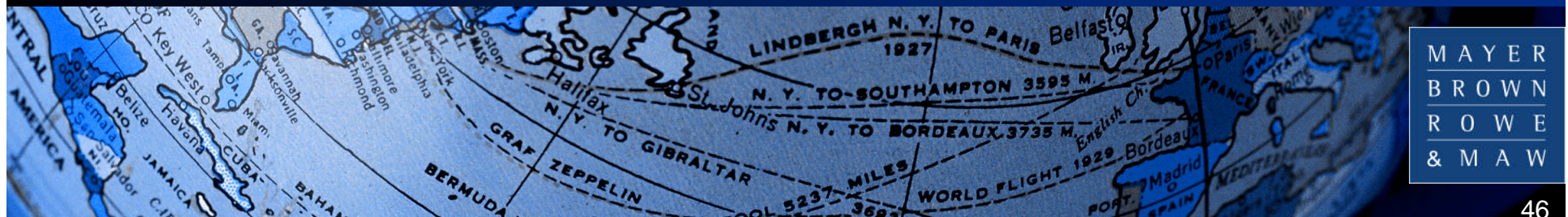
- Affected EU companies may turn to Commission or EU Member States' competent authorities
- Certain EU Member States' competent authorities have better contacts with U.S. counterparts than does Commission
- Internal guidelines may constitute infringement of the Blocking Statute if, by virtue of their wording and application, they may be construed to order EU subsidiaries to comply with U.S. rules



The EU's Response to U.S. Sanctions

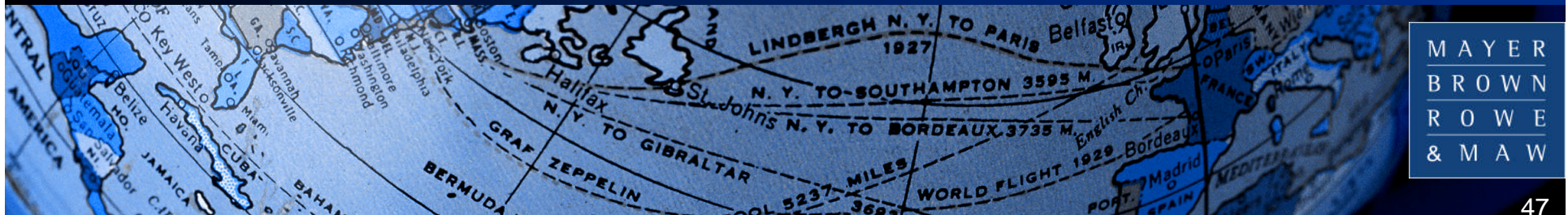
Conclusion: Dual EU Response

- Preference for multilateral approach
- Principled stance against U.S. extraterritorial reach



Repercussions on U.S. Sanctions Policy of Recent Political Developments in the United States and Europe

A Panel Discussion



U.S. Sanctions: The New Trans-Atlantic Challenges

Q&A

