

Maritime Law Association of Singapore

U.S. Embargoes and Sanctions – Knowing and Navigating the Changing Field in International and Cross-Border Deals

June 15, 2016

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U.S. Economic Embargoes - Part of Complex Regulatory Environment

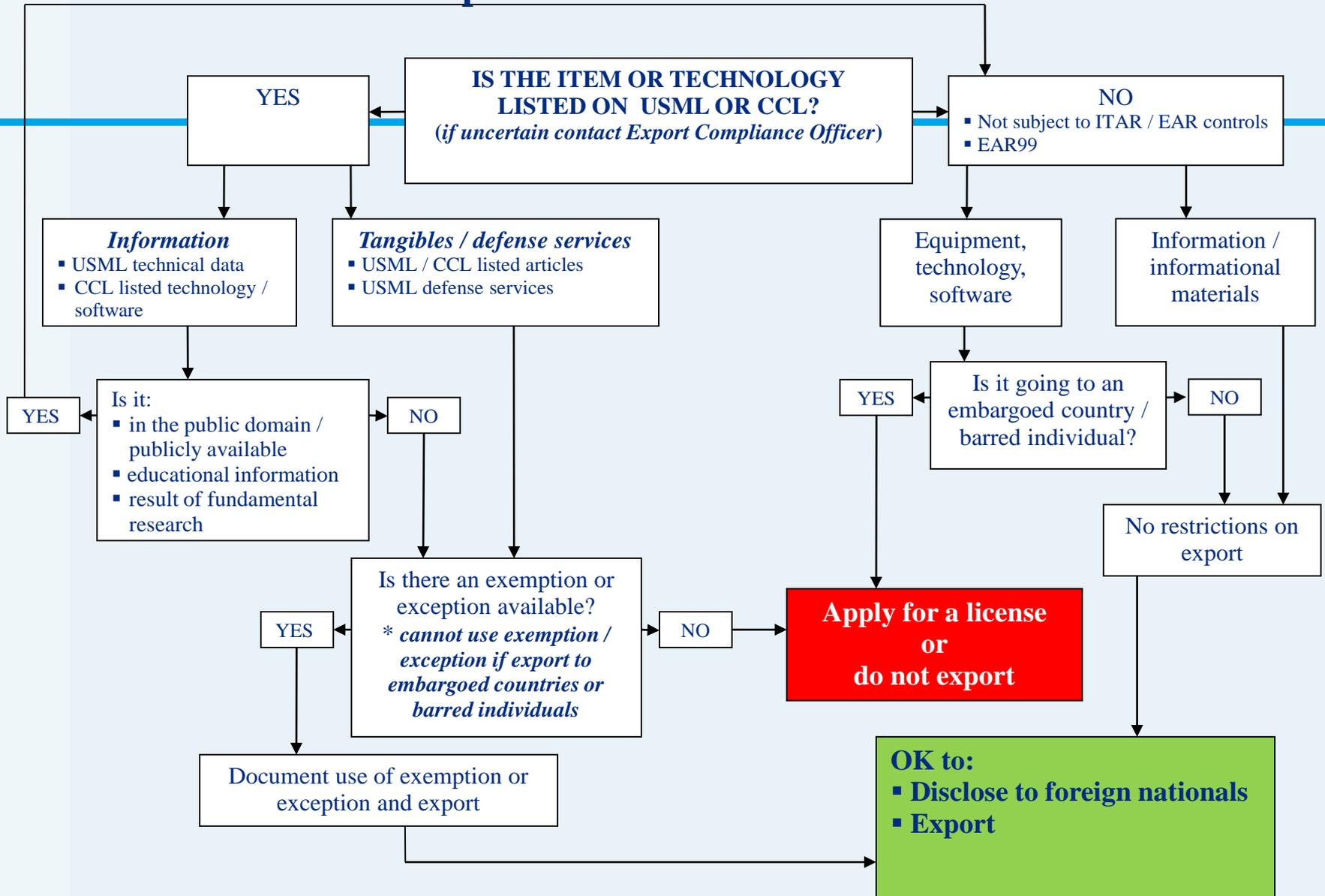
- U.S. Treasury Department Office of Foreign Assets Controls (OFAC)
 - Principal agency administering country embargos
 - Administers the Special Designated Nationals (SDN) list
- U.S. Department of Commerce Bureau of Industry and Security (BIS)
 - Governs export and re-export of most U.S.-origin goods to embargoed countries
- U.S. Department of State
 - Responsible for certain extraterritorial sanctions on Iran
 - Responsible for aircraft, engines, parts deemed to be “Defense Articles”
- U.S. Customs and Border Protection
 - Import/export clearance

OVERLAPPING JURISDICTION – APPARENT AUTHORIZATION BY ONE AGENCY MAY NOT MEAN IT IS LEGAL

Overview: Regulators, Regulations, Controls

	Regulator	Regulations	Controls
Defense Exports	DDTC Department of State, Directorate of Defense Trade Controls	ITAR International Traffic in Arms Regulation, 22 C.F.R. Parts 120-130	USML (U.S. Munitions List)
Commercial Exports	BIS Department of Commerce, Bureau of Industry and Security	EAR Export Administration Regulations, 15 C.F.R. Parts 730-774	CCL (Commerce Control List) EAR99
Economic Sanctions	OFAC Department of Treasury, Office of Foreign Assets Control	Executive Orders OFAC Regulations, 31 C.F.R. Parts 500-599 UN Sanctions	SDN List / Embargoes (Sanctioned Persons / Destinations)

Export Control Flowchart



Sanctions Overview

- Embargoes or Economic Sanctions
 - Used as a tool of foreign policy
 - Two approaches
 - Comprehensive embargo
 - List approach – designated individuals or entities
- Each program / list is different
 - Each instituted at a particular time, with particular foreign policy goals
 - Cannot extrapolate the rules from one program to another

Sanctions Overview

- U.S. embargoes and economic sanctions
 - U.S. foreign policy
 - National security goals
 - Economic policy
 - UN sanctions
- Against:
 - Targeted foreign countries and regimes
 - Terrorists and international narcotics traffickers
 - Persons engaged in the proliferation of weapons of mass destruction (WMD)
 - Other threats to U.S. national security
- Administered by the Departments of Treasury (OFAC) or Commerce (BIS)



Sanctions Overview

- Comprehensive embargoes: Cuba, Iran, North Korea, Sudan, Syria
- Limited embargoes: *e.g.*, Balkans, Belarus, Burma, Cote d'Ivoire, DRC, Iraq, Lebanon, Liberia, Libya, Magnitsky Sanctions, Somalia, Russia, Yemen, Zimbabwe
- Specially Designated National (“SDN”) List

Sanctions - Who Must Comply

- U.S. citizens / permanent residents
- U.S. companies and organizations
- Foreign branches of U.S. firms – anywhere in the world
 - In the case of Cuba and Iran sanctions – foreign subsidiaries of U.S. firms
- All persons and entities physically in the United States
- In certain cases, everyone /everywhere

Iran Sanctions

- We are now five months in the new twilight of partial U.S. sanctions on Iran
 - Enormous interest in doing business with Iran across sectors
 - However, given the heightened sanctions compliance, in particular by financial institutions, compliance concerns are significant
- Different impact for:
 - U.S. Persons
 - Foreign subsidiaries of U.S. companies
 - Other non-U.S. entities



JCPOA Impact on U.S. Persons

- U.S. Persons

- With limited exceptions, U.S. Persons remain largely prohibited from engaging in transactions related to Iran
- In general U.S. banks cannot process transactions related to Iran (no “U” turn or dollar clearing transactions)
 - RUMOR REGARDING RETURN OF “U” TURNS”
- U.S. persons cannot “facilitate” transactions with Iran by third-country entities
- U.S. persons cannot provide goods or services to Iran



- What Can U.S. Persons Do?

- Travel to Iran (never prohibited)
- New favorable licensing policy for the sale or lease of civil passenger aircraft, parts, and related services
- Licensing import of Iranian-origin foodstuffs and carpets



JCPOA Impact on Foreign Subsidiaries of U.S. Companies

- In 2012, U.S. primary sanctions extended to non-U.S. entities “owned or controlled” by U.S. persons
- New OFAC General License H allows such foreign subsidiaries to engage in transactions with Iran consistent with the JCPOA
- A number of restrictions remain:
 - No dealings in U.S. dollars
 - No dealings with SDNs
 - No export/reexport of U.S. goods



JCPOA Impact on Non-U.S. Companies

- What are “Secondary Sanctions”?
- What Secondary Sanctions were removed?
 - Export/import of petroleum/petroleum products, petrochemicals
 - Dealings with Iranian shipping, shipbuilding, energy industry
 - Most sanctions on foreign financial institutions for engaging in “significant financial transactions”
- Secondary Sanctions remaining in force:
 - Approximately 200 SDNs remain designated
 - “Foreign Sanctions Evaders” Executive Order remains in place
 - Sanctions with respect to certain goods (nuclear end-use/sensitive technologies)
- Primary Sanctions impacts on transactions with “U.S. nexus”

What Are the U.S. Sanctions Implications in Carrying Petroleum Products/Petrochemicals from Iran?

- Scenario: Singapore flagged vessel carrying crude oil from Iran to a third-country (similar analysis for most products)
- Considerations:
 - What currency is the transaction and charter party payments being made in?
 - Would time-charter payments in USD breach U.S. sanctions?
 - How are banks reviewing transactions?
 - Is the vessel U.S.-built (or otherwise subject to U.S. export jurisdiction)?
 - Unlikely if tanker
 - Some oil rigs, survey vessel may be subject to U.S. export jurisdiction
 - Iranian crude cannot be shipped to the U.S.
 - Comingling of Iranian product with third-country product could potentially “taint” product for resale to the U.S.

Are There Any Restrictions on Our Vessels Calling on Iran and Then Entering the U.S.?

- There is no 180-day rule, as there is for Cuba
- U.S. Coast Guard Marine Security Advisory 1-16
 - If the vessel has visited Iran in last five port calls, it must have implemented specific security protocols while in Iran
 - Failure to have documented those could result in delay or denial of entry
 - USCG may place requirements on vessel while in U.S. port (e.g., armed guards)
- Visa Waiver Program Improvement & Terrorist Travel Prevention Act of 2016
 - If you travel to Iran, Iraq, Syria, Sudan, you will be ineligible to enter the U.S. under the VWP
 - Limited waivers available
 - Notwithstanding VWP issue, most crewmembers will enter the U.S. under a C1 or D visa so this shouldn't be an issue
- Other potential taint?
 - More companies outside the core maritime trade are using vessel tracking software
 - You may get query in follow-on transaction asking for details regarding transactions with Iran

Is There Any Involvement by U.S. Persons?

- Involvement of U.S. Persons
 - Are any of the entities U.S.-owned or controlled?
 - Are there any U.S. Persons involved (U.S. citizen officers, U.S. brokers?)
- Is my vessel subject to any loans, covenants that prohibit operations to Iran?
 - Not only vessel mortgage but loan facilities
 - Involvement of U.S. private equity markets in ship ownership
- Potential issue with coverage by U.S. insurers/reinsurers
 - U.S. insurers cannot cover most risk related to Iran
 - Mitigated somewhat by General License H (with respect to foreign subsidiaries)
- Special reporting still exists for companies publically traded in the U.S.
 - Reporting more onerous for foreign private issuers

What If There Is Letter of Credit from an Iranian Bank on the OFAC 13599 List?

- What is the 13599 List?
 - These are Government of Iran owned entities removed from the SDN list
 - Generally U.S. Persons still obligated to block the property of the Government of Iran
 - Foreign Subsidiaries of U.S. companies and non-U.S. persons can do business with these entities (no secondary sanctions)
- What are the practical implications?
 - These entities will show up on your, and your bank's, screening software
 - Your policies/procedures and representations to third parties may prohibit you from doing business with persons identified on any sanctions list

What Are the Risks of Inadvertently Dealing with an SDN?

- Secondary sanctions still apply to approximately 200 Iranian entities
 - Iranian Revolutionary Guard Corp (IRGC)
 - Tidewater
 - Any entity owned or controlled by an SDN
- Risks include:
 - You could be sanctioned by OFAC if your company provides material support, goods, services or financial support to an SDN
 - Non-U.S. insurer may refuse to cover a loss if a SDN is involved
 - Non-U.S. bank may refuse to process non-USD transfer because of potential involvement of SDN
- Can you call on Bandar Abbas?
 - Yes – OFAC FAQ addresses this issue



How Much Diligence is Enough for this Transaction?

- Transactions related to Iran should be subject to enhanced diligence, but how much diligence is enough?
 - Screening the direct parties to the transaction is a de facto minimum
 - Time charterer, Iranian broker, consignee, order party on bill of lading
 - Where information is not readily apparent (e.g., who is Iranian purchaser), follow up queries may be required
 - Many third party screening services have sophisticated tools
- How to approach compliance/diligence issues:
 - Contemporaneous records
 - Can never eliminate all risk & standard checklist - approach has its benefits and dangers
 - Train business people to spot risk – make clear that a “red flag” doesn’t mean the transaction is dead!
 - Contractual representations are not due diligence

Is My Company a “U.S. Person, or “Owned or Controlled” by a U.S. Person?

- Is a non-U.S. company with subsidiaries in the U.S. a U.S. Person?
- Are we “owned or controlled” by U.S. Persons?
 - Do(es) the U.S. person(s)
 - Hold 50%+ equity interest by vote or value
 - Hold majority of seats on the board of directors
 - Otherwise controls the actions, policies, or personnel decisions of the entity?
 - Ambiguity in definition (unclear it applies to Cuba sanctions)

What Can the U.S. Parent Do Vis-à-vis Its Foreign Subsidiary?

- Under New OFAC General License H, U.S. parent can:
 - Take initial steps to alter policies and procedures to allow foreign subsidiary to trade generally with Iran
 - Provide training to subsidiary on compliance with sanctions laws
 - Can allow foreign subsidiary to use passive automated systems
- Cannot facilitate specific transactions by the foreign subsidiary with Iran
- Can a U.S. company make structural changes, such as creating a new foreign subsidiary specifically to do business in Iran?

What Can U.S. Citizens Working Abroad Do?

- Does my U.S. citizen director need to resign from the foreign subsidiary?
 - OFAC guidance regarding recusal
 - May not work if U.S. citizens are required for any action
- What can our U.S. citizen compliance officer do?
 - Can help develop protocols and training for sanctions/export control compliance (what about other compliance areas?)
 - Can review KYC information on specific transactions
 - Cannot participate in commercial aspects of transactions

Ukraine-Related Sanctions – Phase I

- Executive Orders Giving OFAC Designation Authority under the Ukraine-Related Sanctions Program:
 - E.O. 13660 of March 6, 2014
 - E.O. 13661 of March 16, 2014
 - E.O. 13662 of March 20, 2014
 - E.O. 13685 of December 19, 2014

Ukraine-Related Sanctions – Phase I

- All **property and interests in property** that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any U.S. person are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.
- The **making of any contribution or provision of funds, goods, or services** by, to, or for the benefit of any person whose property and interests in property are blocked.
- The **receipt of any contribution or provision of funds, goods, or services** from any person whose property and interests in property are blocked.
- Any **transaction that evades or avoids**, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions.
- The prohibition on **dealing in property and interests in property** of a person blocked under these EOs is the **same as in every other OFAC sanctions program**.

Ukraine-Related Sanctions – Phase II: Sectoral Sanctions

Executive Order 13662 published on March 20, 2014:

- Directive 1 (as amended) – Financial Services Sector
- Directive 2 (as amended) – Energy Sector
- Directive 3 – Defense and Related Materiel Sector
- Directive 4 – Energy Sector

Ukraine-Related Sanctions – Phase II: Sectoral Sanctions

- **Directive 1:** prohibits transactions by U.S. persons or in the United States involving prohibited **new debt** (i.e., **>30 days** maturity) and **new equity** of a subject person.
- **Directive 2:** prohibits transactions by U.S. persons or in the United States involving prohibited **new debt** (i.e., **>90 days** maturity) of a subject person.
- **Directive 3:** prohibits transactions by U.S. persons or in the United States involving prohibited **new debt** (i.e., **>30 days** maturity) of a subject person.

Ukraine-Related Sanctions – Phase II: Sectoral Sanctions

- **Directive 4:** prohibits the provision, exportation, or reexportation, directly or indirectly, from the United States or by a U.S. person, of **goods, services (except for financial services), or technology** in support of **exploration or production** for certain **deepwater, Arctic offshore, or shale projects** that have the potential to produce oil and that involve a subject person.

Note: interpretations of terms under the directives (e.g., debt) are **not necessarily as expansive** as under broader prohibitions (e.g., property, interest).

Ukraine-Related Sanctions – Phase III: Crimea Sanctions

- Any **new investment in Crimea** by a U.S. person
- The **importation into the United States**, directly or indirectly, of any goods, services, or technology **from Crimea**
- The **exportation, reexportation, sale, or supply**, directly or indirectly, from the United States or by a U.S. person, of any goods, services, or technology **to Crimea**
- Any **approval, financing, facilitation, or guarantee by a U.S. person** of a transaction by a foreign person where the transaction would be prohibited if performed by a U.S. person or within the U.S.
- **OFAC designation authority**: persons deemed to be either **operating in Crimea** *or* a **leader of an entity operating in Crimea**

Ukraine-Related Sanctions – Phase III: Crimea Sanctions

- General License 4
 - Authorizes the exportation and reexportation of agricultural commodities, medicine, medical supplies, and replacement parts to Crimea
- General License 5
 - Authorized transactions necessary to wind down operations involving Crimea (*expired February 1, 2015*)
- General License 6
 - Authorizes personal, non-commercial remittances involving Crimea
- General License 7
 - Authorizes the operation of certain accounts for individuals ordinarily resident in Crimea
- General License 8
 - Authorizes transactions relating to telecommunications and mail

Myanmar

- May 18, 2016 – OFAC Amendments to Further Ease Sanctions
 - Restrictions removed from several Myanmar banks
 - Extended the previously temporary General License for transactions incident to imports and exports to or from Myanmar
 - Restrictions removed from seven state-owned enterprises
 - New General License for ‘maintenance’ of U.S. persons living in Myanmar
 - State Department rumored to be raising the reporting threshold to \$5M

Myanmar

- Opens up transactions with or through almost all banks in Myanmar
- Permanent extension of General License 20, which chiefly allows payment for use of the port and other government charges for moving goods in and out of Myanmar, including Asia World, which owns toll roads, airports, hotels, electric companies, etc.
- State – Reporting required for investment of \$5,000,000 or more in Burma, or investment in Burma's oil & gas sector

Cuba

- Cargo vessel may now go from the U.S. to Cuba and then on to a third country, as long as it is not bringing U.S. goods to Cuba that are not authorized to be exported to Cuba
- However:
 - Ownership cannot be transferred to the Cubans
 - The vessel can stay in Cuba for no more than 14 days

Penalties & Enforcement

- **Civil Penalties (Statutory Maximums):**

- \$65,000 Trading With the Enemy Act
- \$250,000 International Emergency Economic Powers Act (or the greater of twice the value of the transaction)
- \$1,075,000 Foreign Narcotics Kingpin Designation Act

- Generally 30< civil penalty / settlements per year

- Median Penalty \$98,000 FY 13, \$175,000 FY 12

- Does not include money laundering cases involving DOJ where penalties can be hundreds of millions to \$1.9 billion

Top Five Ways the U.S. Government Learns of a Potential Violation

1. Disgruntled (former) employee (or spouse)
2. Competitor who seeks advantage or to “level the playing field”
3. Stopped at the border by Customs for improperly completed paperwork
4. Your company is mentioned in someone else’s Voluntary Disclosure
5. Information listed in your Automated Export System (“AES”) filing – AES has become a powerful enforcement tool

Questions



About the Presenters



Ron Oleynik practices the area of international trade regulation. His experience includes a broad range of industrial security, customs, export and international trade matters. In the area of U.S. export control, Mr. Oleynik counsels a broad range of clients on licensing, compliance, and enforcement issues under the export control regimes of the departments of State, Commerce and Treasury. In the area of industrial security, Mr. Oleynik has been involved in a significant percentage of all foreign investment review proceedings before the Committee on Foreign Investment in the United States (CFIUS), and is one of the leading practitioners in the area of foreign direct investment in the U.S. defense industry under the U.S. regulations regarding Foreign Ownership, Control and Influence (FOCI).

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Practice

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