

**A PRACTICAL GUIDE TO INTERNATIONAL
SANCTIONS LAW AND LORE:
MAMAS, DON'T LET YOUR CHILDREN
GROW UP TO BE SANCTIONS LAWYERS**

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The subtitle of my remarks, “Mamas, don’t let your children grow up to be sanctions lawyers,” should not be interpreted as conveying a lack of professional gratitude or appreciation. To the contrary, the law and lore of economic sanctions has been a part of my private practice experience since 1979, when U.S. economic sanctions were first imposed against the government of Iran,¹ at a time when literally hundreds of U.S. companies were transacting business in or with Iran.² It has been my privilege to work with many fine lawyers and business people

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1. See Exec. Order No. 12,170, 3 C.F.R. 457 (1979), *reprinted in* 50 U.S.C. § 1701 (2003); *see also* Iranian Assets Control Regulations, 31 C.F.R. § 535 (2008) (originally enacted in 1979).

2. See Hooman Estelami, *A Study of Iran’s Responses to U.S. Economic Sanctions*, 3 MIDDLE EAST REV. INT’L AFFS. 51, 52–54 (1999), <http://meria.idc.ac.il/journal/1999/issue3/jvol3no3in.html> (explaining that the United States was Iran’s number-one trading partner in 1978).

over the past thirty years on sanctions matters—including not a few in this room.

What I do hope to impress upon you is that compliance with (and interpretation of) U.S. economic sanctions laws and regulations is uniquely fraught with reputational and legal risk. Even if all of one's interactions with Cuba, Iran, and the Sudan are expressly permitted by the relevant Treasury Department regulations or by Treasury Department licenses, one nonetheless can be subject to criticism by well-organized and influential interest groups and be subpoenaed to testify before hostile Congressional Committees, to the consternation of shareholders and boards of directors.

Second, this area of the law is very much rules-based rather than principles-based,³ and there are important differences among the several sanctions programs.⁴ The U.S. government's interpretations of the sanctions generally do not establish binding precedents⁵ and can shift rapidly with the political winds.⁶ Also, well-crafted arguments that a particular transaction is not prohibited by the sanctions can be negated overnight by publication of an amendment to the Treasury Department's regulations without further notice or comment.⁷

3. See R. Richard Newcomb, Dir. of Office of Foreign Assets Control, *Office of Foreign Assets Control*, in 857 PLI/COMM 653, 732 (Dec. 2003) (noting that President George W. Bush used the "rule-based international order that is crucial to the peace and prosperity of the United States" as a justification for imposing sanctions related to the importation of diamonds from Liberia) (quoting Exec. Order No. 13,213, 66 Fed. Reg. 28,829 (May 22, 2001)); cf. Donald P. Harris, *The Honeymoon is Over: The U.S.–China WTO Intellectual Property Complaint*, 32 FORDHAM INT'L L.J. 96, 186–87 (2008) (noting the world trading system and trade agreements, as a whole, are "rules-based").

4. See U.S. Dept. of Treas., Sanctions Program Summaries, <http://www.ustreas.gov/offices/enforcement/ofac/programs/> (last visited Apr. 10, 2010) (listing all current sanctions and providing the specifics of each country's sanctions program).

5. See Tracy J. Chin, *An Unfree Trade in Ideas: How OFAC's Regulations Restrain First Amendment Rights*, 83 N.Y.U. L. REV. 1883, 1890 n.40 (2008) ("Interpretative letters are nonbinding, situation-specific rulings issued by OFAC to interested parties to give guidance on whether OFAC will interpret certain activities as either authorized or unauthorized by a trade embargo program.").

6. See, e.g., Terence J. Lau, *Triggering Parent Company Liability Under United States Sanctions Regimes: The Troubling Implications Of Prohibiting Approval and Facilitation*, 41 AM. BUS. L.J. 413, 427 (2004) (explaining how the U.S. embargo against Cuba shifts with successive Presidents).

7. See, e.g., Cuban Assets Control Regulations, 70 Fed. Reg. 37, 9225 (Feb. 25,

Third, the penalties for sanctions violations have increased dramatically: Civil penalties are \$250,000 per violation, or twice the value of the transactions; and criminal penalties are \$1 million per violation and/or twenty years imprisonment.⁸ The Treasury Department's Office of Foreign Assets Control and the Department of Justice have been very aggressive in bringing enforcement actions in the past two years.⁹

Finally, especially in the civil enforcement arena, courts give great deference to the executive branch's interpretation of its economic sanctions regulations because of its underlying national security and foreign policy purposes.¹⁰ As one of my law partners says, the government wins all ties and starts out with as many strokes as it wants.

Since 1794, the U.S. government has issued economic sanctions against nations and persons taking actions and pursuing policies deemed harmful to the interests of the United States.¹¹ Until the past century, economic sanctions were issued in wartime or as a response to hostilities.¹² More recently, economic sanctions have become entrenched foreign policy tools, utilized in cases of nations and persons supporting terrorism, proliferating weapons of mass destruction, violating human rights, and trafficking drugs.¹³

2005) (to be codified at 31 C.F.R. pt. 515) (publishing the new Treasury Department regulations on Feb. 25, 2005 with an effective date of Feb. 22, 2005).

8. 50 U.S.C. § 1705 (2006).

9. See Richard R. Newcomb & David W. Mills, *New OFAC Economic Sanctions Enforcement Guidelines*, Feb. 4, 2009, <http://www.dlapiper.com/new-ofac-economic-sanctions-enforcement-guidelines> (noting the Office of Foreign Assets Control ("OFAC") had a new "aggressive enforcement posture" since 2006); *Compliance News: OFAC Shifting Focus to Bigger Cases, Penalties as Agency Acclimates to New Powers*, FORTENT, Aug. 13, 2009, <http://www.fortent.com/news/compliance-news-item.php?item=39> (explaining the dollar amount levied by OFAC in 2009 was three times more than in 2008).

10. See generally Jonathan I. Chaeney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT'L L. 805 (1989) (explaining levels of deference courts afford the executive branch concerning foreign affairs); see also *Chevron v. NRDC*, 467 U.S. 837 (1984).

11. See Daniel W. Fisk, *War, Embargo or Nothing: U.S. Sanctions in Historical Perspective*, Global Dialogue (2000), <http://www.worlddialogue.org/content.php?id=99>.

12. Dr. Kern Alexander, *The Impact of Economic Sanctions*, June 2006, available at <http://www.parliament.uk/documents/upload/Alexander,%20Kern%2020060629.doc>.

13. DIANNE E. RENNACK & ROBERT D. SHUEY, CRS REPORT FOR CONGRESS,

Contrary to the belief of many in the client community, economic sanctions are not an invention of U.S. government bureaucrats.¹⁴ The first recorded use of economic sanctions was in 432 B.C., when officials in Athens denied traders from the state of Megara access to Athens' harbor and its marketplace.¹⁵

I suspect that even in 400 B.C. the question was raised whether economic sanctions were effective in achieving the underlying policy goals, that is: Do economic sanctions discourage or change the undesirable conduct or policies of the targeted nation or group? There is no clear answer. A key factor is whether the sanctions are unilateral or multilateral. Unilateral sanctions seem to have very limited influence on the target country's leadership;¹⁶ on the other hand, multi-lateral sanctions, such as the recent round of sanctions targeting Iranian banks and financial institutions, typically have greater impact.¹⁷

There are three comprehensive U.S. government sanctions schemes currently in force against countries. These sanctions are against Iran, Sudan (excluding Southern Sudan), and Cuba.¹⁸ The Cuban sanctions have been in place since 1962 and are the most restrictive, having been issued under the Trading with the Enemy Act, which was passed during World War I.¹⁹

ECONOMIC SANCTIONS TO ACHIEVE U.S. FOREIGN POLICY GOALS: DISCUSSION AND GUIDE TO CURRENT LAW (1997), <http://www.au.af.mil/au/awc/awcgate/crs/97-949.pdf>.

14. See M. Shane Smith, *Sanctions: Diplomatic Tool, or Warfare by Other Means?*, Apr. 2004, <http://www.beyondintractability.org/essay/sanctions/> (explaining that sanctions have existed for thousands of years).

15. See Michael Paulson, *History of U.S. Sanctions Shows Most Haven't Worked*, SEATTLE POST-INTELLIGENCER, May 11, 1999, at 6.

16. Justin D. Stalls, *Economic Sanctions*, 11 U. MIAMI INT'L & COMP. L. REV. 115, 127 (2003).

17. *Id.*

18. Greta Lichtenbaum, *New Enforcement Guidelines for Violations of U.S. Economic Sanctions Laws Are Latest Indication of Aggressive Enforcement By the Office of Foreign Assets Control*, MONDAQ BUSINESS BRIEFING, Nov. 30, 2009.

19. See Timeline, Cuba Study Group, http://www.cubastudygroup.org/index.cfm?FuseAction=Subjects.View&Category_id=10 (last visited Apr. 10, 2010) ("The U.S. embargo on Cuba is the single most restrictive policy of its kind."); U.S. Rice Producers, *2009 Information on U.S. Cuban Embargo 1* (2009), available at http://www.usriceproducers.com/files/207_2009%20Information%20on%20US%20Cuban%20Embargo.pdf.

Prior comprehensive economic sanctions regimes that have been lifted—although export and other restrictions under separate U.S. laws may still apply—include those against Vietnam, the former Yugoslavia, Iraq, Libya, and Cambodia.²⁰

Limited sanctions regimes, that is, sanctions that prohibit some but not all commerce with targeted countries, are currently in place with respect to Syria, Burma (or Myanmar), and North Korea.²¹ The George W. Bush Administration had a strong preference away from programs aimed at countries and instead promulgated sanctions programs that more narrowly targeted individuals, governments, and entities, or so-called “Blocked Persons” and “Specially Designated Nationals” (“SDNs”), that specifically acted against U.S. interests.²² Historically, the SDN list consisted of entities owned or controlled by a sanctioned country and individuals such as government officials acting on behalf of a sanctioned country.²³

20. See generally Richard C. Bilder & John Ellicot, *Book Review: United States Economic Sanctions: Theory and Practice*, 96 AM. J. INT'L L. 1009, 1009 (2002).

21. See Embassy of the United States for Damascus, Syria, U.S. Trade and Financial Sanctions Against Syria, <http://damascus.usembassy.gov/sanctions-syr.html> (last visited Apr. 10, 2010) (limiting sanctions to “goods containing more than 10% U.S.-manufactured component parts to Syria,” as well as to certain Syrian citizens, financial institutions and entities); David S. Cloud, *Bush Imposes More Sanctions Against Myanmar*, N.Y. TIMES, Oct. 19, 2007, available at <http://www.nytimes.com/2007/10/20/world/americas/20iht-19endprexy.7972120.html?emc=eta1> (limiting sanctions to individual top military officials and entities closely associated with the regime); Edith M. Lederer, *UN Security Council Imposes Limited Sanctions on North Korea, Which Vows More Missile Tests*, ASSOCIATED PRESS, July 16, 2006, available at <http://www.globalpolicy.org/component/content/article/202/42426.html> (banning U.N. member states from “selling material or technology for missiles or weapons of mass destruction to North Korea, and from receiving missiles, banned weapons or technology from [North Korea].”).

22. See generally Exec. Order No. 13382, 70 Fed. Reg. 38,567 (July 1, 2005) (authorizing targeted financial sanctions against individuals and entities providing support to proliferation networks similar to those concerned with terrorist networks); see also Patricia McNerney, U.S. Principal Deputy Asst. Sec’y of State for Int’l Sec. and Nonproliferation, Combating WMD Proliferation Support Networks: Financial and Economic Sanctions (Apr. 18, 2007), available at <http://foreignaffairs.house.gov/110/mcn041807.htm> (noting that the United States has applied the SDN designation to individuals and entities in order to combat terrorist networks in the Middle East and proliferation networks in North Korea, Syria, and Iran).

23. See U.S. Dept. of Treas., Office of Foreign Assets Control: SDN LIST, <http://www.treas.gov/offices/enforcement/ofac/sdn/sdnlist.txt> (last visited Apr. 10, 2010)

The SDN list now includes entities and persons individually determined to be involved in terrorist activities, terrorism financing, and drug trafficking, even though their country of location may not be subject to country sanctions.²⁴ U.S. persons may not engage in dealings with SDNs, and transactions with SDNs are blocked.²⁵ The Middle East and Latin America are key areas of SDN risk where persons and entities on the SDN list may be operating reputable businesses.²⁶

Hence, persons and entities from such diverse countries as Cuba, Columbia, the Balkans, Burma, Cote D'Ivoire, Democratic Republic of the Congo, the former Yugoslavia, Iran, Iraq, Liberia, Sudan, Syria, and Zimbabwe are now on the SDN list.²⁷ For instance, although there is no general blocking order or asset freeze applicable to all property of the Iranian government and its affiliated entities,²⁸ many Iranian entities, including banks and vessels, are on the SDN list because of their involvement in activities related to weapons of mass destruction and terrorism.²⁹

“Economic sanctions” in their classic and broadest form refer to prohibitions on U.S. persons “doing business” on, in, or with

(stating that the publication “is designed as a reference tool providing actual notice of actions by OFAC with respect to Specially Designated Nationals and other persons (which term includes both individuals and entities) whose property is blocked, to assist the public in complying with the various sanctions programs administered by OFAC.”).

24. Memorandum from Roland E. Smith, Dir. of Office of Examination, to The Chief Executive Officer of All Farm Credit System Institutions, Specially Designated Nationals and Blocked Persons (Mar. 13, 2003), *available at* <http://www.fca.gov/apps/infomemo.nsf/> (follow link to Specially Designated Nationals and Blocked Persons).

25. *Id.*

26. *See generally* R. Richard Newcomb, *Coping with U.S. Export Controls*, 733 PLI/COMM 169, 202, 250–51 (Dec. 1995) (giving examples of Latin American and Middle Eastern countries that currently have SDNs).

27. OFFICE OF FOREIGN ASSETS CONTROL, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS (Mar. 1, 2010) <http://www.ustreas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf>.

28. *Id.*

29. *See id.*, *see also* CarrieLyn Donigan Guymon, *The Best Tool for the Job: The U.S. Campaign to Freeze Assets of Proliferators and Their Supporters*, 49 VA. J. INT'L L. 849, 850 (2009) (noting that as part of the U.S. anti-terrorism and nonproliferation efforts, many Iranian entities have had their assets blocked and frozen).

specific countries, their governments, and state-owned or -controlled enterprises.³⁰ These trade embargo sanctions are typically accompanied by blocking orders or asset freezes, which require U.S. persons, companies, and banks to freeze and turn over to the U.S. government all assets and property owned by the government and state-owned or -controlled enterprises in the target nation.³¹

Such laws prohibit transactions, payments, and dealings that would be perfectly lawful if conducted with another party. Economic sanctions regimes prohibit virtually all exports of U.S. goods, services, and technology to a targeted country, regardless of whether such exports independently violate the Export Administration Act or the International Trafficking in Arms Regulations.³² They also forbid all direct and indirect payments to the target country's government officials, political parties, and national company executives, even if such payments are permitted by the Foreign Corrupt Practices Act.³³

With the notable exception of Cuba, modern sanctions regimes rely upon the President's authority under the International Emergency Economic Powers Act of 1976 ("IEEPA") "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat."³⁴

Ironically, the IEEPA was passed by Congress in 1976, in the aftermath of Vietnam and Watergate,³⁵ partly to circumscribe and clarify the President's peacetime authority in

30. See Thihan Myo Nyun, *Feeling Good or Doing Good: Inefficacy of the U.S. Unilateral Sanctions Against the Military Government of Burma/Myanmar*, 7 WASH. U. GLOBAL STUD. L. REV. 455, 464 (2008).

31. Samuel D. Porteous, *Targeted Financial Sanctions*, Internal Development Research Center Homepage, http://www.idrc.ca/en/ev-124494-201-1-DO_TOPIC.html (last visited Apr. 10, 2010).

32. Lichtenbaum, *supra* note 18.

33. John G. Despriet & William V. Hearnburg, Jr., *Doing Business With the Enemy*, TRUST THE LEADERS, Spring 2003.

34. International Emergency Economic Powers Act, 50 U.S.C. § 1701(a)(2006).

35. *See id.*

the international economic arena.³⁶ Nonetheless, in the 1981 case of *Dames & Moore v. Regan*, a unanimous U. S. Supreme Court upheld the authority of President Carter under IEEPA to nullify judicial attachments against Iranian government assets that predated the imposition of the Iran Assets Control Regulations in 1979.³⁷ The *Dames & Moore* court expressly reserved on the issue of whether the exercise of IEEPA authority could constitute a “taking” of property requiring just compensation.³⁸

The takings issue has been looked at many times in many contexts, yet no cases have been successfully litigated. Furthermore, when confronted by legal challenges to Treasury Department’s interpretations of its economic sanctions regulations, U.S. courts apply the principles of *Chevron v. NRDC*.³⁹ Under *Chevron*, the courts almost always defer to the executive branch’s intended meaning when interpreting statutes and regulations pertaining to Article II foreign policy authority.⁴⁰

In the economic sanctions arena, the asserted position of the Office of Foreign Assets Control (“OFAC”) typically prevails in the civil context. In the event that counsel is successful in convincing OFAC, the Justice Department, or a court, that the regulations do not prohibit the client’s course of dealing, one should not be surprised if the regulations are nevertheless amended to clearly prohibit such conduct in the future.

I will not attempt to outline the particular and peculiar aspects of each sanctions regime. It would be imprudent for me and a disservice to you if I did so. Each set of regulations is unique, and the same set of facts can lead to different outcomes or conclusions. I will, however, try to highlight some material differences and issues.

36. See S. Rep. No. 95–466, at 2 (1977), reprinted in 1977 U.S.C.C.A.N. 4540, 4541; Harold Hongju Koh, Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran–Contra Affair, 97 Yale L.J. 1255, 1263–64 (1988).

37. 453 U.S. 654 (1981).

38. *Id.* at 688 n.14.

39. 467 U.S. 837 (1984).

40. See generally *id.*

First, all economic sanctions regimes claim jurisdiction over “U.S. persons,” a term that includes all U.S. companies, employees of U.S. companies, U.S. citizens, U.S. permanent resident aliens, persons *inside* the United States, and branch offices of U.S. companies.⁴¹

Cuban sanctions also reach foreign-owned and controlled entities of U.S. persons.⁴² Mergers and acquisitions lawyers must pay attention; if a U.S. company buys a foreign company that does any business with Cuba, and if that Cuban business is not terminated or spun-off *before* the closing, then the U.S. buyer is immediately in violation of the Cuban Assets Control Regulations and the Trading With the Enemy Act⁴³—not a report you want to make to the board of directors. With some careful structuring, including using special purpose vehicles incorporated offshore and managed by non-U.S. persons, the company, if necessary, can wait until after closing to divest businesses or contracts with Iran or the Sudan,⁴⁴ but *not* those with Cuba.⁴⁵

When is a foreign entity owned or controlled by a U.S. person for purposes of being subject to the Cuban sanctions? When is an entity owned or controlled by the government of Cuba, Iran, or the Sudan for purposes of the prohibitions on doing business with such entities? Historically, OFAC has said it applies the “control” test of the Securities and Exchange

41. Cuban Democracy Act, 22 U.S.C. § 6010 (2000).

42. 31 C.F.R. § 515.329 (2003).

43. See U.S. DEPT. OF TREAS., OFFICE OF FOREIGN ASSETS CONTROL, CUBA: WHAT YOU NEED TO KNOW ABOUT U.S. SANCTIONS AGAINST CUBA 14 (2009), *available at* <http://www.ustreas.gov/offices/enforcement/ofac/programs/cuba/cuba.pdf>; see also Trading With the Enemy Act (TWEA), 50 U.S.C. § 5 (1917).

44. See *Smith International to Pull Out of Iran, Sudan*, REUTERS, Mar. 1, 2010, *available at* <http://uk.reuters.com/article/idUKN0111654520100301>. (noting that a Houston-based oil services company was “actively pursuing termination of all its activities in Iran and Sudan” and that the two countries (along with Syria) accounted for 1% of its 2009 profit through non-U.S. subsidiaries).

45. See Thomas W. Wälde, *Managing the Risk of Sanctions in the Global Oil & Gas Industry: Corporate Response Under Political, Legal and Commercial Pressures*, 36 Tex. Int'l L.J. 183, 201 (2001) (noting that even if a U.S. company kept discreet contractual links with a “sanction-breaker” Cuban subsidiary with no assets or interests in the United States, U.S. foreign policy is a “significant political risk,” and the United States is likely to pursue U.S. companies with even the slightest link to Cuba).

Commission which considers both actual and effective control.⁴⁶ A dominant minority shareholder, one with more than 25% voting power, is generally presumed to have control.⁴⁷ A non-dominant minority shareholder can be found to have control through negative covenants, super-majority provisions, and rights to approve material transactions.⁴⁸

In a bit of a catch 22, U.S. economic sanctions against Cuba expressly apply to foreign subsidiaries of U.S. companies.⁴⁹ The European Union and Canada, however, prohibit compliance with the U.S. trade embargo against Cuba by entities incorporated in those jurisdictions⁵⁰ and further require local subsidiaries to report instances where the U.S. parent directs compliance with U.S.–Cuba sanctions.⁵¹ Similarly, Mexico prohibits compliance by Mexican companies, including subsidiaries of U.S. companies, with any U.S. embargo.⁵²

On a practical note, U.S. citizens are permitted to travel to Iran and the Sudan—although not on business—but not to

46. See Cindy G. Buys, *United States Economic Sanctions: The Fairness of Targeting Persons from Third Countries*, 17 B.U. Int'l L.J. 241, 254–55 (1999) (noting several different ways in which a country could be controlled by a U.S. person if that U.S. person did not own 100% of the company).

47. See Mary L. Moreland, “Foreign Control” and “Agreement” Under ICSID Article 25(2)(B): Standards for Claims Brought by Locally Organized Subsidiaries Against Host States, CURRENTS: INT’L TRADE L.J. 18, 20 (2000) (describing several factors taken into consideration to determine control).

48. See *id.* (stating that a finding of control is a broad and flexible concept that takes many factors into consideration).

49. FRESHFIELDS BRUCKHAUS DERINGER, US ECONOMIC SANCTIONS AGAINST CUBA, BRIEFING SUMMARY 1 (May 2009), available at <http://www.freshfields.com/publications/pdfs/2009/may09/25778.pdf>.

50. Harry Clark, *Dealing With U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 20 U. PA. J. INT’L ECON. L. 61, 81–87 (1999); Paul Burns, *Canada: U.S. Embargo Against Cuba—The Canadian Response*, NATIONAL LAW CENTER FOR INTER-AMERICAN FREE TRADE, 1996, <http://www.natlaw.com/pubs/spcacu1.htm> (“The Order makes it an offence for Canadian corporations to comply with the U.S. legislation.”).

51. Paul Burns, *Canada: U.S. Embargo Against Cuba—The Canadian Response*, NATIONAL LAW CENTER FOR INTER-AMERICAN FREE TRADE, 1996, <http://www.natlaw.com/pubs/spcacu1.htm> (“[I]f a Canadian subsidiary receives any communications from its U.S. parent with respect to the U.S. legislation restricting trade with Cuba, the Canadian subsidiary is required to notify the Attorney General of Canada of such communications.”).

52. Clark, *supra* note 50, at 86–87.

Cuba.⁵³ Yes, there are travel agents in Mexico, Canada, and elsewhere that organize tours of Cuba for U.S. citizens,⁵⁴ and some members of your family or a friend will know someone who has been there and had a great time. Don't go. Don't let your friends or family go; in most circumstances it is against the law.⁵⁵ The Treasury Department is no longer inclined to give you a pass,⁵⁶ and the chances of being caught are not remote.⁵⁷ Your bank and/or credit card company will report you if their sophisticated software sees any transaction in or with Cuba, including payments for medical expenses, hotel upgrades, or rescheduled travel.⁵⁸ I will leave it to your conscience whether you encourage your least favorite colleague to visit Havana.

Perhaps the most difficult issue deals with the prohibition on U.S. persons approving, financing, guaranteeing, or otherwise "facilitating" transactions in or with the embargoed country through a non-U.S. third party. Such transactions would be prohibited if the transacting party were a U.S. person.⁵⁹

The older sanctions regimes that applied to foreign subsidiaries of U.S. companies led to contentious disputes between the United States and its allies,⁶⁰ particularly in the

53. Vince Gawronski, *Vacationing in Cuba—Not if You Are Gringo! Our Asinine Cuba Policy: Long Overdue for Change*, PINE MAGAZINE, Jan. 8, 2007, <http://www.pinemagazine.com/site/article/vacationing-in-cuba--not-if-you-are-gringo-361>.

54. See Americans Traveling to Cuba, http://www.forcuba.com/f_amer.htm (noting that among other countries, U.S. citizens can book tours to Cuba through countries such as Mexico and Canada) (last visited Apr. 10, 2010).

55. See 31 C.F.R. §§ 515.201, 515.420 (2003) (prohibiting air travel to Cuba and the receipt of goods or services in Cuba).

56. See U.S. DEPT. OF TREAS., *supra* note 43 (outlining specific eligibility requirements for a license to travel to Cuba).

57. See *id.* (noting the extensive regulatory scheme and enforcement of travel).

58. See *id.*

59. See 31 C.F.R. § 537.205(a)(2010) ("Except as otherwise authorized, U.S. persons, wherever located, are prohibited from approving, financing, facilitating, or guaranteeing a transaction by a person who is a foreign person where the transaction would be prohibited if performed by a U.S. person or within the United States.").

60. Benjamin H. Flowe, Jr. & Ray Gold, *The Legality of US Sanctions*, 2 GLOBAL DIALOGUE (2000), available at <http://www.worlddialogue.org/content.php?id=98>.

context of building the Soviet Union National Gas Pipeline to Europe.⁶¹

Consequently, as a matter of policy, the Libyan sanctions imposed in 1986 applied only to U.S. persons and not to their foreign subsidiaries.⁶² One result of that was the five U.S. oil companies that conducted their Libyan operations through U.S. subsidiaries had to suspend their Libyan operations⁶³ while two other U.S. companies using foreign subsidiaries continued their operations.⁶⁴ The second result was that many thoughtful U.S. companies organized their overseas operations (which might become subject to future U.S. sanctions) as foreign entities with independent substance and authority—leading the so-called “foreign subsidiary exemption” to modern sanctions.⁶⁵

In 1995, the Clinton Administration imposed a new set of comprehensive sanctions against Iran.⁶⁶ The administration placed the sanctions in response to criticism prompted by the signing of an offshore development agreement between the state oil company of Iran and a major U.S. oil company.⁶⁷ These sanctions were imposed despite the fact that the administration had been extensively briefed on the negotiations in the months prior to signing.⁶⁸ Because a foreign subsidiary of the U.S. company had signed the contract with Iran, the Clinton White House asked the U.S. parent to help craft an executive order and regulations that would prevent the foreign subsidiary from obtaining—from the U.S. parent—the means for performing its

61. *Id.*; see 47 Fed. Reg. 27,250 (June 24, 1982).

62. Bernard Gwertzman, *U.S. Oil Companies May be Exempted From Libya Curbs*, N.Y. TIMES, Jan. 31, 1986, at A1.

63. *Id.* (“Occidental Petroleum Corporation, Conoco, Inc., the Marathon Oil Company, the Amerada Hess Corporation and W.R. Grace & Company.”).

64. Robert D. Hershey, Jr., *U.S. Trade with Libya Continues*, N.Y. TIMES, Dec. 9, 1986, at D1.

65. *Id.*

66. J. Jennings Moss, *Clinton to Block Oil Deals With Iran; Conoco Cancels \$1 Billion Oil Pact*, WASH. TIMES, Mar. 15, 1995, at A3.

67. *Id.*

68. Editorial, *When Trade and Foreign Policy Collide*, WASH. TIMES, Mar. 20, 1995, at A18; see Agis Salpukas, *Iran Signs Oil Deal With Conoco; First Since 1980 Break With U.S.*, N.Y. TIMES, Mar. 7, 1995, at A1 (“[Clinton] Administration officials said Conoco had informed them that they were planning a deal with Iran.”)

contract without the new sanctions having to directly prohibit conduct by foreign entities.⁶⁹ The thought was that performance of the contract by the foreign subsidiary would require assistance from its “sister” subsidiaries, assistance that would need to be “facilitated” by the common U.S. parent; therefore such facilitation should be prohibited.⁷⁰ Therein lies the provenance of “facilitation”—hardly a legal term of art at the time.

The reach of prohibited “facilitation” has expanded in the past fourteen years to not only effectively close the “foreign subsidiary” loophole for all but the most adventurous U.S. companies,⁷¹ but also to prevent U.S. companies from indirectly facilitating, financing, or approving transactions between non-affiliated third parties and embargoed countries.⁷² An example of the reach of prohibited “facilitation” was seen in the Initial Public Offering of Petro China Corporation, whose parent, China National Petroleum Corporation, had operations in the Sudan.⁷³ The U.S. underwriters in that transaction were careful to create a “tracing proceeds” structure such that all proceeds from the offering were spent on Petro China’s domestic operations and not on dividends to its parent which might facilitate the parent’s operations in the Sudan.⁷⁴

Another “facilitation” issue is presented by refinery, pipeline, or similar joint ventures where a non-U.S. party proposes to refine, handle, or transport crude oil or products from Iran, the Sudan, or even Cuba, and the U.S. party “co-venturer” has no direct authority to prevent such use, yet continues to fund its share of cash calls.⁷⁵ One recurring

69. See Moss, *supra* note 66.

70. See, e.g., GIBSON, DUNN, & CRUTCHER LLP, OFAC SANCTIONS: OVERVIEW AND UPDATE 19–21, 26–30 (2010) <http://www.gibsondunn.com/publications/documents/webcastslidesofacsanctions201.pdf>.

71. See *id.*

72. See *id.* at 18, 22.

73. Erica Fung, *Regulatory Competition in International Capital Markets: Evidence from China in 2004–2005*, 3 N.Y.U. J. L. & BUS. 243, 265, 272 (2006).

74. *Id.* at 272–73.

75. See Office of Foreign Assets Control [OFAC], *Participation by U.S. Person in Project with Libyan Ownership*, at 2, OFAC Interpretive Ruling 030428-FACRL-L1-01 (Apr. 28, 2003), available at <http://www.ustreas.gov/offices/enforcement/ofac/rulings/>

corporate governance issue is whether a U.S. company representative on a European or other foreign company's board of directors engages in prohibited "facilitation" if he/she votes against a proposed transaction with Iran, but their presence at the meeting is necessary for a required quorum.⁷⁶ These are but a few examples of how economic sanctions issues can emerge in transactions and investments that, at their core, did not initially have anything to do with an embargoed country, but which can place U.S. companies and their representatives between the proverbial rock and a hard place.

The regulatory and enforcement environment has become less sympathetic to those who are caught in such dilemmas. The U.S. view of Iran and its ongoing nuclear weapons program may or may not be solely responsible, but there have been very few Iranian licenses granted by OFAC in the past five years.⁷⁷ Indeed, the OFAC resources currently devoted to civil enforcement substantially surpass those of only five years ago.⁷⁸ The Justice Department has similarly been active on the criminal enforcement front.⁷⁹ In 2007, the Justice Department launched the National Export Enforcement Initiative, which increased training and coordination among agencies involved in export control enforcement.⁸⁰ Though they were initially export control related, economic sanctions related prosecutions have

li051503.pdf (acknowledging the facilitation prohibition).

76. See Stanley J. Marcuss, *Grist for the Litigation Mill in U.S. Economic Sanctions Programs*, 30 *LAW & POL'Y BUS.* 501, 523 (1999).

77. Farhad Alavi and Nema Milaninia, *Providing Humanitarian Assistance to Iran Under Current OFAC regulations*, July 2008, <http://www.iaba.us/publications/Working%20Document%201%20OFAC%20Regulations%20and%20Humanitarian%20Assistance.pdf>.

78. See WILLIAM B. HOFFMAN, DAVIS POLK & WARDWELL LLP, *RECENT ENFORCEMENT DEVELOPMENTS AND NEW TRENDS UNDER THE OBAMA ADMINISTRATION* (2009), http://www.amcham.de/fileadmin/user_upload/Policy/FinancialServices/FinServ_2009/OFAC_Recent_Enforcement_Developm.pdf.

79. See Michael Jacobson, *Cracking Down on Iran's Illicit Trade*, *REAL CLEAR WORLD*, Aug. 22, 2009, http://www.realclearworld.com/articles/2009/08/22/cracking_down_on_irans_illicit_trade_97087.html.

80. Press Release, Fed. Bureau of Investigation, U.S. Dep't of Justice, *More than 145 Defendants Charged in National Export Enforcement Initiative During Past Fiscal Year* (Oct. 28, 2008), *available at* <http://www.fbi.gov/pressrel/pressrel08/exportenforcement102808.htm>.

continued to grow as prosecutors have become more familiar with economic sanctions.⁸¹

The recent \$350 million criminal fine and deferred prosecution agreement against Lloyds TSB shows that the U.S. government will impose significant criminal penalties on financial institutions. The Lloyds fine also acts as a wake-up call for U.S. entities that may have become overly confident in sanctions compliance.⁸² Lloyds engaged in “transaction stripping,” causing U.S. banks to unknowingly provide services to Iranian and Sudanese accounts and persons.⁸³ As a result, Lloyds was charged with violation, evasion, and avoidance of the prohibitions for providing services to Iran.⁸⁴

The Lloyds matter appears to be part of a broader U.S. enforcement initiative involving U.S. and non-U.S. financial institutions, as the Justice Department reported that nine other banks remain under investigation.⁸⁵

In a recent criminal case involving the Iranian petroleum sector, the individual owners of a U.S. company were sentenced to five years of probation, fined \$250,000, and ordered to forfeit \$218,583 for conspiracy to export controlled engineering software used to design offshore oil and gas facilities to Iran.⁸⁶ The company’s Brazilian agent received a thirteen-month

81. See Wendy L. Wysong et al., *When is Enough, Enough? The Unforeseen Risks of U.S. Economic Sanctions and Export Controls on Financial Institutions*, in 910 PLI/COMM 415, 417, 419, 438 (Dec. 2008) (noting that the U.S. Department of Justice has declared enforcement its top priority and has worked to train prosecutors with the agencies in charge of overseeing export controls); see also *Export Controls and Economic Sanctions Update*, Sidley Austin LLP, U.S. Defense Contractor to Pay \$100 Million Penalty and Face Criminal Conviction for Export Violations (Apr. 17, 2007) (noting that a U.S. Attorney prosecuting a violation of economic sanctions sought a harsh sentence because he “[intended] to ‘send a clear message that illegally exporting [the United States] most important secrets will be prosecuted and punished’”).

82. Memorandum from Skadden, Arps, Slate, Meagher, & Flom LLP & Affiliates, *Lloyds TSB Bank plc Enters Into Deferred Prosecution Agreements Concerning Noncompliance With U.S. Sanctions Laws* (Jan. 16, 2009).

83. See *id.*

84. *Id.*

85. *Id.*

86. Daniel O. Hill, Statement Before the Committee on Banking, Housing and Urban Affairs, United States Senate 6 (Oct. 6, 2009), available at http://www.bis.doc.gov/news/2009/Daniel_o_hill_final_testimony_banking.pdf.

sentence for marketing, supporting, and training services in Iran.⁸⁷

As never before, the eyes and ears of the U.S. government are focused on Iran and on those doing business with Iran.

In closing, permit me to briefly speculate about sanctions policy under the Obama Administration.

First, President Obama is apparently very serious about relaxing, if not removing, U.S. economic sanctions against Cuba.⁸⁸ Those sanctions have been a fundamental tenet of U.S. foreign policy since they were first imposed by President Kennedy.⁸⁹ There are three barriers to removing those sanctions, in addition to the truism that sanctions are much more difficult to lift than to impose. First, the Cuban sanctions are now embedded in statute in the Helms–Burton Act, are strongly supported in Florida and parts of New Jersey, and will require a major expenditure of political capital by the President to obtain passage of legislation to lift them.⁹⁰ Second, the ever-closer relationship between Venezuela and Cuba is a complicating factor. Although Venezuela is not a likely sanctions target because of U.S. oil needs, it is doubtful that the United States will do Venezuela’s allies any favors.⁹¹ Third, because the current Cuban regime does not want the sanctions lifted for fear of loss of control, no cooperation from Havana is unlikely.⁹²

With respect to the Obama Administration’s “new” Iran approach, the initial response by the Iranian government has

87. Richard Rainey, *Jefferson Parish Businessmen Plead Guilty to Selling Software to Iran, Sentenced to Halfway House*, THE TIMES-PICAYUNE, Aug. 8, 2008, available at http://www.nola.com/news/index.ssf/2008/08/Jefferson_parish_businessmen_p.html.

88. Claire Suddath, *A Brief History of U.S.Cuba Relations*, TIME, Apr. 15, 2009.

89. *Id.*

90. See BROOKINGS PROJECT, *CUBA: A NEW POLICY OF CRITICAL AND CONSTRUCTIVE ENGAGEMENT*, 6, 13 (2009)(describing the long term, yet difficult, goal of convincing Congress to reverse sanctions legislation).

91. See Cesar Alvarez & Stephanie Hanson, *Venezuela’s Oil Based Economy*, BACKGROUND, Feb. 9, 2009, <http://www.cfr.org/publication/12089/> (describing Cuba–Venezuela ties and how the United States and Venezuela are mutually dependent on each other for oil transactions).

92. See Amy Goodman, *Bill Clinton on Sanctions Against Cuba*, DEMOCRACY NOW, Nov. 8, 2009 (Cuba wants to keep the sanctions because it can blame its problems on the United States).

not indicated any willingness to stand down its nuclear weapons program.⁹³ The unclassified and controversial National Intelligence Estimate published in late 2007 states that although Iran continues its effort to produce highly-enriched weapons grade uranium and perfect intercontinental missiles capable of delivering a nuclear warhead, it has “suspended” its warhead design work.⁹⁴ The Israelis publicly disagreed with this last conclusion, and many observers feel that the three assessments, taken together, do not make sense.⁹⁵

Just this week, a group of senior Democratic Congressmen called upon the President to impose stiff sanctions against foreign countries that do business with Iran, including their banks, insurance companies, energy companies, shippers, and refinery equipment sellers.⁹⁶ Given the successful efforts of the last administration in placing pressure on the Iranian economy by isolating Iranian banks from the dollar-denominated banking system,⁹⁷ it is unlikely that the current sanctions will be relaxed until and unless Iran stops its enrichment program. When the U.S. military option is off the table, sanctions will nevertheless remain.

The situation in Darfur will seemingly require multilateral military intervention to stop the government-sanctioned

93. See Editorial, *Iran's Waiting Game for Obama*, CHRISTIAN SCI. MONITOR, Feb. 3, 2009, at 8.

94. Dafna Linzer & Joby Warrick, *U.S. Finds that Iran Halted Nuclear Arms Bid in 2003*, WASH. POST, Dec. 4, 2007, at A01.

95. See Steven Erlanger, *Iran is Still a Nuclear Threat, Israel Tells U.S. Military Chief*, N.Y. TIMES, Dec. 11, 2007, at A12, see also Michael Abramowitz & Ellen Knickmeyer, *As Bush Heads to Mideast, Renewed Questions on Iran; Israeli, Arab Leaders Doubt U.S. Resolve*, WASH. POST, Jan. 7, 2008, at A12 (noting that many Middle Eastern governments were “confused”). Recently, CIA Director Leon Panetta has indicated that the 2007 report is no longer considered valid. See *This Week: Leon Panetta* (ABC television broadcast June 27, 2010) (noting that he (Panetta) believed that Iran has continued to work on nuclear weapon design research).

96. See Daniel Goldstein, *Senate Iran Vote Pressures Vitol's SPR Deal: Group*, PLATTS OILGRAM NEWS, Apr. 7, 2009, at 11.

97. See Glenn R. Simpson, *U.S. Effort to Isolate Iran Gains Ground as European Bank Restrictions Take Hold*, WALL ST. J., Jan. 10, 2007, at A3 (noting that another European bank had bowed to U.S. pressure and stopped handling dollar transactions for Iran).

genocide. The sanctions imposed on the Sudan will likely remain as long as the atrocities continue.

The most likely near-term test of the Obama administration's sanctions policy could well be in the context of a radical government seizing power in Yemen, Pakistan, or a similar country under indigenous terrorist pressure.⁹⁸ I am confident that the President's advisers believe that sanctions are not a great tool, but when faced with a perceived new terrorist threat to the American homeland, being accused of doing nothing is not an attractive option.

I wish the President well as he plays a most difficult hand.

98. Since these remarks were given, the imposition of additional U.N. sanctions against Iran looks much more likely to occur in the near term as well.