

Extraterritorial reach of U.S. export controls and sanctions



Larry Christensen examines the extraterritorial exercise of jurisdiction in U.S. export controls and sanctions, the assertions used by U.S. agencies, and their possible limitations. Part one of a two-part article.

Under the various export controls and trade sanctions of the United States, the extraterritorial reach of such regulations, statutes, and theories of prosecution have long prescribed restrictions on the trade and financial transactions of other countries and created tensions between the United States and other countries, including its allies. At the very beginning of the Cold War, U.S. re-export controls became the essence of the U.S. export controls and sanctions system; that continues today.

The purposes of this article are to:

- 1) describe the five types of jurisdiction that the various agencies of the U.S. government exercise under the U.S. export controls and sanctions system;
- 2) describe recent statutory and regulatory changes affecting activities covered by these types or theories of jurisdiction;
- 3) provide examples of each type of jurisdiction;
- 4) describe the charging theories that extend the extraterritorial reach of U.S. regulations; and
- 5) discuss limits on jurisdiction.

The singular goal of this article is to describe a legal framework to review

and understand U.S. rules in terms of extraterritorial reach – it does not discuss all U.S. export controls, re-export controls, and sanctions. I hope this article will lift part of the shroud of confusion regarding the extraterritorial reach of U.S. export controls, including re-export controls and sanctions. In addition, this article will suggest the type of analysis the U.S. courts might undertake to determine what limits, if any, exist on U.S. re-export controls and sanctions.

Five types of jurisdiction

Various U.S. export control agencies exercise five types of jurisdiction. These types of jurisdiction are:

- 1) Citizenship jurisdiction
- 2) Territorial prescription
- 3) Territorial remedies and penalties
- 4) *Quasi in Rem* or re-export control list-based jurisdiction
- 5) Prescriptive jurisdiction that meets the effects test and the factors described in the rule of reason under the Restatement (Third) of the Foreign Relations Law of the United States ('Restatement (Third)').

Five prosecutorial tools that reach non-U.S. conduct

In addition to the five types of

jurisdiction exercised by policy-makers and rule-writers, prosecutors use five types of charging strategies and procedures. These also extend the extraterritorial reach of U.S. export controls and sanctions:

- 1) Causing,
- 2) Conspiracy,
- 3) Aiding and abetting,
- 4) Extradition and other means to obtain jurisdiction over the body, and
- 5) Enforcement of fines and forfeiture orders against assets in the United States.

Five limits on the reach of certain re-export controls and sanctions

There are limits on the extraterritorial reach of U.S. export controls, re-export controls, and sanctions. Each requires consideration and explanation:

- 1) Limits on the scope of the U.S. regulations based upon the meaning and scope of the regulations as opposed to the broad discretion in statutes to implement those regulations;
- 2) *De minimis* exclusions from the scope of the regulations;
- 3) Published technology and source code are outside the scope of certain rules;
- 4) The U.S. Constitution's requirement for fair notice and clarity in the text of prescriptions; and
- 5) U.S. Supreme Court's recognition of the rule of reason under the Restatement (Third).

To apply the rule of reason under the Restatement (Third), it is important to understand how the agencies utilize the above five types of asserted jurisdiction and five types of prosecutorial tools.

Overview of jurisdictional reach and common questions

One or more types of jurisdiction may apply to a given set of facts. Counsel advising clients must review the regulations to determine the types of jurisdiction exercised in the regulations and executive orders, the criminal and

Links and notes

- ¹ Civil penalties will be imposed against the U.S. person who owns or controls the non-U.S. entity that violates, attempts to violate, conspires to violate or causes a violation of the prohibition, unless the U.S. person divests or terminates its business with the foreign entity on or before February 6, 2013 (180 days from enactment).
- ² Executive Order 13,608, 'Prohibiting Certain Transactions and Suspending Entry into the United States of Foreign Sanctions Evaders with Respect to Iran and Syria,' 77 Fed. Reg. 26409 (May 1, 2012).
- ³ National Defense Authorization Act for Fiscal Year 2012 (the "NDAA 2012"), H.R. 1540, § 1245 (2011) (signed into law December 31, 2011).
- ⁴ Blocking Property of the Government of Iran and Iranian Financial Institutions, Exec. Order No. 13599, 77 Fed. Reg. 6659 (February 8, 2012) (announced February 5, 2012).
- ⁵ Iran Sanctions Act of 1996, as amended, 50 U.S.C. § 1701 note (1996) (originally enacted as the Iran and Libya Sanctions Act ("ILSA"), Pub. L. No. 104-172, 110 Stat. 1541 (1996). The name of the law was changed in 2006 through the Iran Freedom Support Act, Pub. L. No. 109-293, 120 Stat. 1344 (2006)).]
- ⁶ Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, 124 Stat. 1312 (2010) (signed into law July 1, 2010).
- ⁷ P.L. 104-114, 110 Stat. 785, 22 U.S.C. 6021-6091.

civil enforcement strategies, and the potential limits on the reach of the rules created by the rules themselves and the two sources of limits the courts may impose.

Several examples of common conversations between outside counsel and in-house counsel illustrate the appropriate analysis and multiple dimensions of good answers to the simple question, 'Do these rules apply to my company and me outside the United States?'

First, the general counsel of your European client calls you in Europe and asks whether U.S. export controls and sanctions apply to its non-U.S. operations. It is not a U.S. corporation. You cannot responsibly answer this question with a simple 'yes' or 'no' and without gathering more information. For example, you first describe the five theories of jurisdiction and the five enforcement strategies. You may also respond:

'Whether U.S. export controls apply to a non-U.S. corporation is not the sole relevant question in determining the U.S. exercise of jurisdiction in export controls and sanctions. We are in Europe and your corporation is organized under laws of an EU Member State. Nevertheless, list-

U.S. content is below a certain level, although there is no such *de minimis* rule under the ITAR (International Trafficking in Arms Regulations).

- The U.S. government may impose remedies and penalties on you within the territory of the United States for a breach outside of the United States, such as prescribed dealing with Iran. At the stroke of a pen, and with no procedural due process, the U.S. government may 'designate' you and your company for violating a prescriptive rule and thereby make it a violation of U.S. rules for other firms to deal with you, i.e., a type of individual person or single company embargo.
- The U.S. Department of Justice ('DOJ') may seek your extradition to the United States and, if you travel to the United States, an arrest warrant may await you.
- If you are in the petroleum industry, the U.S. State Department may ask you to withdraw from Iran or refrain from dealing in refined petroleum, from developing Iranian petroleum resources, or from purchasing oil from Iran even though there is no U.S.-origin item, no U.S.-origin service, no U.S. person, and no U.S.

- If your company is a subsidiary of a U.S. corporation, your company is a U.S. person for purposes of adhering to U.S. laws that restrict almost all trade with Cuba. Moreover, you may not deal with Iran if your U.S. parent corporation or any other U.S. person has approved or facilitated the transaction, even if the transaction only involves trade outside U.S. territory.
- Under a statute passed in August of 2012, your parent corporation in the United States will be liable for civil fines if your company engages in any trade with Iran of the type prohibited by a U.S. person. In effect, the rule-makers will regulate you in the same way they regulate a U.S. person, except the U.S. will impose a civil penalty on your parent company in the United States. Under the new statute, the U.S. agencies are not required to regulate your competitor to the same degree because your competitor is not owned or controlled by a U.S. corporation. However, the U.S. agencies have the statutory authority to control your competitor in the same fashion.
- There is no short, one-dimensional answer to your question. I need a lot more information.'

After this 'short' explanation and before you request the necessary information, your client's head is already spinning. She asks whether the U.S. government always exercises the five means of jurisdiction fully. You respond,

'Fortunately, no. The precise scope of the U.S. export controls depends on U.S. agency jurisdiction, classification of the items, the level of U.S. content, the origin of services, the destination, the name and identity of the parties to the transaction, whether any parties or banks in the transaction are designated by the United States, the end use of the items, use of U.S. banks, use of the U.S. payment system, and dealing of all kinds with certain parties.'

She responds, 'I see. Understanding the U.S. exercise of extraterritorial jurisdiction is just the start for the analysis.' She is correct.

Whether U.S. export controls apply to a non-U.S. corporation is not the sole relevant question in determining the U.S. exercise of jurisdiction in export controls and sanctions.



based U.S. re-export controls and sanctions prescribe your conduct related to 1) U.S.-origin commodities, software, technology and services; 2) certain end uses (for example, re-export for a nuclear, missile, or chemical and biological weapons ('CBW') end use); 3) certain end-users (retransfer in country or re-export to a U.S. designated party); and 4) certain destinations (re-export to certain countries depending on the item's agency jurisdiction and classification on the U.S. export control lists called the Commodity Classification List ('CCL') and the United States Munitions List ('USML')).

- List-based re-export controls may not apply to your conduct if the

conduct whatsoever in your business with Iran. If you refuse, the U.S. government may designate you as a restricted party, prohibit your access to the U.S. dollar payment system and U.S. banking, and impose other sanctions within the territory of the United States.

- Although your company is usually not defined to be a U.S. corporate person, each employee who is a U.S. person remains a U.S. person and subject to U.S. export controls. Thus, for example, if your U.S. expatriate employee approves or facilitates third-country trade with Iran, your non-U.S. company has just incurred vicarious liability for the conduct of your U.S. person employee.

For another example: your Asian client has a similar discussion with you and then asks, 'If I understand how the U.S. regulators exercise each of the five types of jurisdiction, will that describe the limits of prosecutors' authority?' You answer,

'No. Prosecutors can and do extend the extraterritorial reach of the regulations by using three theories of liability and two enforcement strategies in U.S. courts that reach non-U.S. persons, such as you and your company.'

Your Middle-East client has a similar discussion with you and out of some considerable sense of frustration and dismay asks, 'What other actions do U.S. regulators pursue to further their policies, which currently include putting economic pressure on the government of Iran to change its intentions to develop nuclear weapons?'

Over the last few years, the U.S. Treasury Department has actively encouraged money-centre banks of

- 2) *De minimis* exclusions from the scope of the regulations, and
- 3) Published technology and source code.

However, the ITAR requires prior approval for defence services even if the services are to be provided with technology in the public domain.

Your European client calls again with an exasperated tone and asks, 'What is next and will this ever end?' You may answer:

- '1) Some of the provisions of the Iran Threat Reduction and Syria Human Rights Act of 2012 ('ITRA') will require the Executive Branch to issue regulations. The U.S. Congress is unlikely to pass additional sanctions legislation during the rest of 2012. However, Congress may prohibit the U.S. Department of Defense from contracting with companies that choose to trade with U.S.-embargoed countries, even if that trade is licensed by another U.S.

Branch share a strongly held belief that, along with the United States, the rest of the world should impose sufficient economic pressure on Iran so that the people of Iran will cause their regime to reverse its unacknowledged plans to produce weapons-grade nuclear fuel or develop a nuclear weapon. Over the last two years, the United States government has taken several steps to increase the U.S. sanctions on Iran, and this entailed the reach of U.S. rules into the economies of other countries.

Significant new sanctions statute in 2012: ITRA

On 10 August 2012, the Iran Threat Reduction and Syria Human Rights Act of 2012 ('ITRA') became law. In addition to imposing numerous new sanctions measures against Iran and its Revolutionary Guard Corps (the 'IRGC'), ITRA amended and expanded existing U.S. sanctions targeting Iran, notably ISA (Iran Sanctions Act), CISADA (The Comprehensive Iran Sanctions, Accountability, and Divestment Act) and section 1245 of the NDAA (National Defense Authorization Act) 2012. ITRA also imposes sanctions and additional measures relating to human rights abuses in Iran and Syria.

ITRA section 218 – liability for non-U.S entities owned or controlled by U.S. parent

Perhaps the most far-reaching new sanction imposed by ITRA requires that, on or before 9 October 2012, the president must prohibit non-U.S. entities owned or controlled by U.S. persons from knowingly engaging in any transaction directly or indirectly with the government of Iran or any person subject to the jurisdiction of the government of Iran that would be prohibited by orders or regulations issued under the International Emergency Economic Powers Act ('IEEPA') if the transaction were engaged in by a U.S. person or in the United States. This will end the potential for a U.S. corporation to allow its owned or controlled non-U.S. entities to be independent of approval or facilitation by a U.S. person regarding commercial activities in Iran. This provision does not directly impose penalties upon a non-U.S. subsidiary by defining it to be a U.S. person, as does the U.S. sanctions regime related to Cuba. The impact of ITRA will be quite similar, however⁴.

As a practical matter, the regulations



The ITAR requires prior approval for defence services even if the services are to be provided with technology in the public domain.

other countries to refrain from making payments to Iran and receiving payments from Iran. This arm-twisting of certain money-centre banks combined with sanctions over Iran by certain other countries has had a substantial impact on the ability of non-U.S. firms to get paid for lawful trade with Iran.

Your South American client asks, 'Are there any limits on the reach of U.S. export rules?' You may answer,

'There are three regulatory limits, a Constitutional requirement of clarity, and potential application of rules of reason under the Restatement (Third) of the Foreign Relations Law of the United States.'

The three regulatory limits of most significance are:

- 1) Limits on the scope of the U.S. regulations based upon the meaning of the regulations as opposed to the broad discretion in statutes to implement those regulations,

government agency.

- 2) As for the Executive Branch, there is no doubt that enforcement will continue in the sanctions and export control arena with Iran and China the highest priorities.
- 3) There is some potential the Office of Foreign Assets Controls ('OFAC') will propose a major revision of the Iranian Transactions Regulations.
- 4) Unless Iran convinces the U.S. that it has changed its plans to enrich uranium to weapons grade levels, we can expect more 'creative' sanctions with more extraterritorial reach in order to put more economic pressure on the economy of Iran. One goal of U.S. sanctions is to cause the people of Iran to convince their government to change policy. Another U.S. goal for sanctions is to reduce the risk of armed conflict.'

Recent changes in the exercise of extraterritorial jurisdiction

The U.S. Congress and Executive

implementing section 218 will likely require non-U.S. corporations owned or controlled by a U.S. firm to obtain an OFAC licence for re-exports to Iran of EAR99 items and other items not currently subject to list-based controls under the Iranian Transactions Regulations ('ITR'). Moreover, section 218 does not expressly exclude medicine, medical devices, and agricultural products. It is also unclear whether the implementing regulations will apply the current *de minimis* exclusion from the scope of the ITR. For non-U.S. firms that do not have a history of licensing with OFAC, the provision may substantially interrupt certain re-export supply chains for medicine, medical products, and food. OFAC requires months of review time for such licence applications.

Section 218 of ITRA is an exercise of citizenship jurisdiction. As a practical matter, it will have a significant impact on the conduct of certain non-U.S.

days whether to impose sanctions under the ISA, CISADA, or any other applicable U.S. laws relating to sanctions with respect to Iran.

This is likely a territorial exercise of jurisdiction. It imposes a precondition on a non-U.S. corporation to reap the benefits of trading its shares or ADRs in a U.S. exchange. However, a party may make the argument that it is an exercise over non-U.S. conduct and must be justified under the effects doctrine.

Additional financial sanctions under ITRA

ITRA imposes a number of new sanctions aimed at financial institutions by amending CISADA and the NDAA 2012. Certain prescriptions apply to non-U.S. financial institutions directly, and these constitute an exercise of jurisdiction under the effects doctrine. Other requirements for U.S. financial institutions relate to their correspondent banks outside the

ITRA: further reading

ITRA is a complex statute largely beyond the scope of this article. For more details on ITRA and the schedule for implementing regulations, see:

New Legislation Expands U.S. Sanctions Against Iran:

<http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=86402>

New Law Targets Human Rights, Network Surveillance, and Information Freedoms in Iran and Syria:

<http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=86502>

person subject to the Iran or Syria sanctions. Such transactions are defined as 'any transaction where the identity of any person subject to United States sanctions concerning Iran or Syria is withheld or obscured from other participants in the transaction or any relevant regulatory authorities'. The executive order also prohibits transactions involving individuals and entities owned or controlled by, or acting or purporting to act on behalf of, any foreign individual or entity committing any of the acts described in the order.

The executive order covers any non-U.S. individual or entity engaged in any of the acts described in the order, regardless of whether that person is subject to U.S. jurisdiction. However, the order limits the scope of prohibited transactions and dealings by those individuals and entities to those subject to U.S. jurisdiction. Specifically, the executive order prohibits transactions and dealings in or related to:

- 'any goods, services, or technology in or intended for the United States' and
- 'any goods, services, or technology provided by or to United States persons, wherever located.'

The evaders executive order is a territorial remedy exercise of jurisdiction in so far as it denies entry into the United States. It is an exercise of the effects theory of jurisdiction to the extent the implementing regulations (a) will subject non-U.S. parties to fines for breach of the prescriptions and (b) to the extent the designation of a non-U.S. person on an evaders list entail restrictions on other non-U.S. persons from dealing with a designated evader.



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subsidiaries of U.S. firms. It will enable civil prosecutors to impose fines on the parent company. Under this economic pressure, a U.S. corporation will have an incentive to govern the actual conduct of its subsidiaries and other owned or controlled non-U.S. entities in connection with Iran rather than leaving them independent.

SEC reporting under ITRA

ITRA also amends the Securities Exchange Act of 1934 to compel issuers required to file annual or quarterly reports to disclose and provide separate notice of detailed information regarding certain activities of the issuer or its affiliates that are sanctionable under the ISA or certain provisions of CISADA or involve blocked persons or the government of Iran.

Many non-U.S. corporations list their shares or American depository receipts ('ADRs') on U.S. stock exchanges. If the notice includes indications of a violation, the SEC must transmit the notices to the president and certain Congressional committees, and the president must undertake an investigation and determine within 180

United States. For example, the new regulations require domestic financial institutions maintaining a correspondent account or payable-through account for foreign financial institutions to implement due diligence procedures, conduct audits, or implement other measures to ensure that the foreign financial institutions do not engage in sanctionable activity. This is an exercise in citizenship jurisdiction. The U.S. government imposes an obligation on the U.S. person to change or cause the behaviour of its private sector business partner.

Executive Order 13,608

As of 12 May 2012, Executive Order 13,608² authorizes the treasury secretary to prohibit a broad range of transactions and dealings involving non-U.S. individuals and entities that have violated, attempted or conspired to violate, or caused a violation of the existing U.S. sanctions against Iran or Syria. It also authorizes the secretary to prohibit transactions and dealings involving foreign individuals and entities that have 'facilitated deceptive transactions' for or on behalf of any

The executive order will prohibit a non-U.S. person from withholding or obscuring the identity of a person subject to U.S. sanctions on Iran and Syria from other parties to a transaction. The implementing regulations likely will create a duty on the part of a non-U.S. firm to disclose the identity of ultimate consignee, the ultimate end use, and the ultimate destination. A non-U.S. direct importer from the United States would no longer be able to remain silent about its re-export customer. This, too, is an exercise of jurisdiction under the effects doctrine.

CISADA remedies since 2010

Over the last two years for the first time, a U.S. president has used statutory authority under the Iran Sanctions Act ISA⁵, as amended by CISADA⁶, to provide sanctions on non-U.S. parties dealing in the Iranian energy sector via non-U.S. conduct. ITRA expanded the number of sanctions available to the president under the ISA from nine to 12 and increased the number of sanctions

United States, and conduct that is outside the United States. To the extent any remedy is imposed outside the territory of the United States, such will be an exercise of jurisdiction under the effects doctrine.

One theme of the recent U.S. sanctions policy has been to make it more difficult to get paid for third-country trade with Iran with regulations and by jawboning non-U.S. money-centre banks. Recently, the Society for Worldwide Interbank Financial Telecommunication ('SWIFT') announced that it will no longer provide wire transfers to and from Iran. This will further constrict the ability of companies to do business in and with Iran.

What is next?

This election year in the United States has already resulted in Congress enacting mandatory economic sanctions rather than authorizing the Executive Branch to apply and adjust them as circumstances demand. This is

Restrictions on crude oil payment involving the CBI

As of 31 December 2011, Congress gave the president additional authority when it amended ISA to permit sanctions against banks that engage in payments to or from the Central Bank of Iran related to exports of Iranian crude oil.³ The president made findings necessary under the statute and signed an executive order permitting the imposition of such sanctions.⁴ The statute and executive order permit such sanctions against a joint venture of non-U.S. parties who engage in sanctionable conduct.

force. The U.S. government understands that multilateral controls are significantly more effective than unilateral, symbolic controls. However, several major economies are governed by regimes that are not yet prepared to join the coalition against Iran. For corporations in those countries, the crossfire may well include conflicts of law that are difficult to resolve. If Iran does not change its behaviour, the U.S. Executive Branch and Congress will look for new and more forceful sanctions both to convince Teheran to restrain its nuclear programme and to avoid war. The next developments in sanctions policy of the United States will be the promulgation of regulations by the Executive Branch required under several provisions of ITRA.

Over the last two years, the U.S. has implemented new and novel exercises of jurisdiction that extend deeply into the economies of other countries and their nationals. It is important to recognize that U.S. export controls, re-export controls, and sanctions rules have long applied in various ways to prescribe defined conduct in other countries. While focusing on new developments, it is essential to examine the extraterritorial reach of longstanding export, re-export, and sanctions regulations. In the second part of this article, I will look at those longstanding rules and theories of jurisdiction.



A non-U.S. direct importer from the United States would no longer be able to remain silent about its re-export customer.

he or she must impose from three to five once the president finds sanctionable conduct.

The most severe of potential order provisions remain the 2010 provisions for the denial of access to the U.S. banking system and the U.S. Dollar payment system. The State Department has the authority to impose these sanctions, and even the unspoken threat of these sanctions provides the State Department with powerful leverage to convince a non-U.S. firm to agree to pull out of Iran or otherwise refrain from dealing with Iran.

The U.S. State Department orally indicates this is an exercise of U.S. territorial remedy jurisdiction. However, there is the risk the designation of parties under the ISA will impose restrictions on other non-U.S. parties from dealing with the non-U.S. party subject to an order of the president. This would be an exercise of jurisdiction under the effects doctrine. The ISA sanctionable conduct captures non-U.S. parties, engaged in conduct outside of the territory of the

another chapter in the centuries-old debate concerning how much discretion the Congress should delegate to the president under the international commerce clause of the constitution. These sanctions are strong political messages popular with many members of Congress. In some respects, they are also reminiscent, however, of sanctions mandated under the Helms-Burton Act⁷ (involving Cuba), and the 'pipeline' sanctions of the early 1980s (against the Soviet Union), which amounted to secondary boycotts that ultimately proved unenforceable and unacceptable to U.S. allies. U.S. and non-U.S. corporations may find themselves in the crossfire, especially in countries that do not share the U.S. view of the threat from Iran.

The U.S. Executive Branch is striving to maintain and expand a coalition of nation states that will impose similar sanctions on Iran. The stakes are high. Export controls and sanctions are on a foreign policy spectrum of tools that run from diplomacy to export controls to military

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