

CURRENTS

Issue Number 35 • November 2013



U.S. Economic Sanctions Against Iran - Navigating Treacherous Waters

By: Hal Eren and Steven Pinter
Attorneys at The Eren Law Firm,
Washington, DC

This article has been redacted from its original longer, more comprehensive version for publication in print. The full version of this article is available at:

http://american-club.com/files/files/currents_35.pdf

Shipowners and vessels trading with Iran and their insurers face formidable challenges in understanding and complying with U.S. Iran economic sanctions laws.

The United States imposed the current sanctions against Iran beginning in 1995, and since then has constantly tightened and broadened the scope of the sanctions through the issuance of additional Presidential Executive Orders, the enactment of several statutes, and by the revision and issuance of relevant sanctions regulations. These laws are numerous, complex, and sometimes overlapping. In certain aspects they are also broadly worded and purposefully ambiguous to preserve maximum U.S. government flexibility for interpretation and, consistent with U.S. foreign policy and sanctions objectives, to discourage trade with Iran even where such trade is permissible under the laws of other countries.

Primary U.S. Iran sanctions laws apply to United States (U.S.) Persons, i.e., individuals or entities that are subject to the (traditional) general in personam jurisdiction of the United States, and to transactions that have a U.S. nexus. Secondary U.S. Iran sanctions have extraterritorial effect and apply to or impact non-U.S. Persons, i.e., individuals and entities that are outside of the jurisdiction of a State under traditional jurisdictional principles and to activities that have no U.S. nexus if such activity constitutes “sanctionable activity” under relevant U.S. Iran sanctions laws.

The United States recognizes the importance of the shipping and maritime insurance sector to its Iran sanctions objectives. U.S. Iran sanctions Executive Orders and legislation have therefore specifically targeted, among other activities involving Iran, the activities of shipowners and their insurers.

Violations of U.S. Iran sanctions laws by U.S. Persons or which have a U.S. nexus could lead to severe civil and criminal penalties. Contraventions of U.S. Iran sanctions by non-U.S. Persons or lacking a U.S. nexus could lead to the imposition of U.S. sanctions on non-U.S. Persons. For example, U.S. sanctions are required to be imposed against foreign shipowners, vessels and insurers for sanctionable activities which have no U.S. nexus as if these shipowners, vessels and insurers were the government of Iran or Iranian entities, the primary targets of U.S. economic sanctions against Iran.

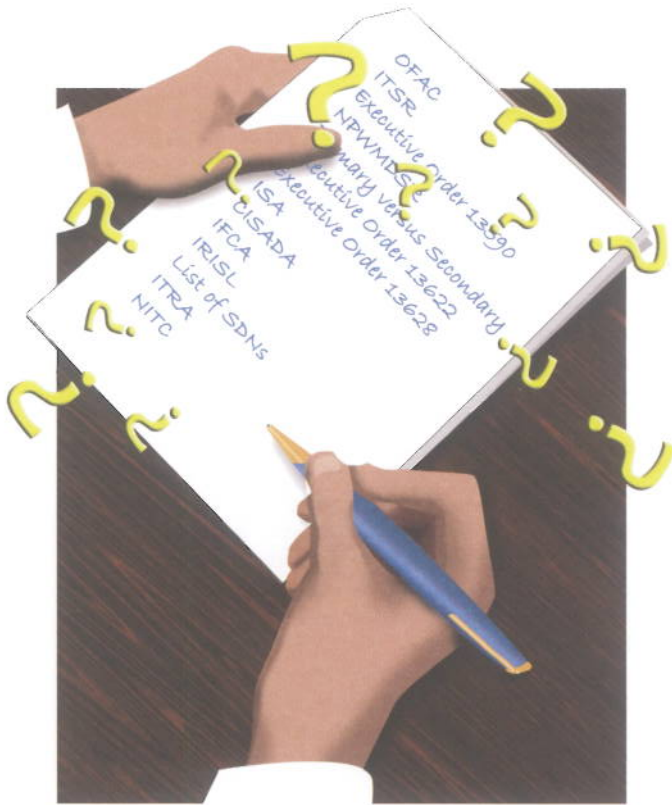
In this article, we provide a brief overview of the U.S. sanctions against Iran to aid shipowners trading with Iran and their insurers to reach a better understanding of how they can comply with U.S. Iran sanctions laws and avoid activity which may result in the imposition of U.S. penalties or sanctions against them.

TRADING WITH IRAN PRESENTS SIGNIFICANT LEGAL RISK

The U.S. sanctions against Iran are vigorously enforced. What provision of law applies and how it applies to a specific transaction or voyage is not always easy to discern. The U.S. government can broadly construe the Iran sanctions provisions to capture a variety of activities involving Iran. Many U.S. government sanctions determinations are not open to effective judicial review. The laws of other countries that govern their sanctions against Iran, for example those of the European Union, further complicate matters and add to compliance burdens. Consequently, trading with Iran and the insurance of such trade presents significant legal risks for shipowners and their insurers.

SHIPOWNERS AND INSURERS HAVE ADOPTED IRAN SANCTIONS EXCLUSIONS TO ACHIEVE COMPLIANCE

To guard against violations and contraventions of U.S. Iran sanctions laws and to avoid engaging in sanctionable activity, most U.S. as well as non-U.S. P&I and other insurers have adopted rules to exclude or stop coverage whenever coverage or performance could expose or present a risk of exposing the insurer to U.S. sanctions or penalties. Some shipowners have integrated clauses in charterparties excluding from the scope of charters voyages or other activities involving Iran that would constitute prohibited or sanctionable activity. However, these exclusionary rules still require difficult determinations and close judgment calls by shipowners and insurers as to whether a voyage involving Iran or coverage therefor is prohibited or sanctionable, or by a lower standard, if the voyage to or from Iran even presents a risk of being prohibited or sanctionable.



Out of abundance of caution and for fear of the risks associated with being wrong on the law, some insurers and shipowners, “throwing the baby out with the bathwater,” have excluded insurance coverage and voyages involving Iran all together.

U.S. IRAN SANCTIONS LAWS - TWO GENERAL CATEGORIES

U.S. economic sanctions against Iran are governed by U.S. laws that fall into two general categories, Primary Sanctions and Secondary Sanctions. The consideration of these laws in the two general categories simplifies understanding of the U.S. Iran sanctions program.

PRIMARY U.S. IRAN SANCTIONS

The laws and regulations governing Primary economic sanctions against Iran first came into force in 1995. Since then, they have undergone numerous amendments which have strengthened and broadened these sanctions.

Primary sanctions, with very few narrow exceptions such as for food and medical exports to Iran prohibit trade with Iran, investment in Iran, and block (freeze) the property (assets) of the Government of Iran and other Iranian sanctions targets. For example, unless authorized by the U.S. Treasury Department, the Iranian Transactions and Sanctions Regulations (the “ITSR”) and the underlying Executive Orders and statutes which the ITSR implements and codifies, prohibit U.S. Persons from exporting services to Iran, and engaging in any transaction in connection with goods destined to or from Iran. The ITSR also, among other things, prohibits U.S. Persons from approving, supporting or otherwise

facilitating a transaction between a foreign person and Iran if the transaction by the foreign person is a transaction that the U.S. Person is prohibited from engaging in. For example, the mere provision of coverage by a U.S. insurer for voyages to Iran (without any payment of claims thereunder) by a non-U.S. shipowner’s vessel constitutes prohibited facilitation, as well as a prohibited exportation of services to Iran.

Primary sanctions are expressed in terms of prohibitions and requirements with which U.S. Persons or transactions that have a U.S. nexus must comply. With few exceptions, the Primary sanctions are very comprehensive and they apply to U.S. Persons or to transactions that involve a U.S. Person or otherwise have a U.S. nexus. Primary sanctions that concern shipowners and insurers are governed by the ITSR, the Nuclear Proliferation and Weapons of Mass Destruction Sanctions Regulations (the “NPWMDSR”), and their underlying Executive Orders and statutes. The ITSR and the NPWMDSR are administered and enforced by the U.S. Treasury Department’s Office of Foreign Assets Control (“OFAC”). The Iranian Financial Sanctions Regulations (the “IFSR”), which are a hybrid of Primary sanctions and the Secondary sanctions, discussed in more detail below, as well as the ITSR and the NPWMDSR impact banks and other financial institutions serving shipowners and their insurers.

Under the Primary sanctions, or the ITSR and the NPWMDSR, the definition of U.S. Persons follows traditional jurisdictional principles. U.S. Persons are defined as U.S. citizens and U.S. permanent residents wherever located, persons (individuals and entities) located within the territory of the United States, entities organized under the laws of any jurisdiction in/of the United States, and the foreign branches of such entities.

Executive Order 13628 and the ITSR, in effect, extend the prohibitions and requirements of the ITSR to foreign entities owned or controlled by U.S. Persons, e.g., foreign subsidiaries of U.S. companies. Under the ITSR, an entity that is a U.S. Person can be held (vicariously) liable for violating the ITSR, if a foreign entity owned or controlled by that U.S. Person and established or maintained outside the United States engages in any transaction directly or indirectly with the Government of Iran or any person subject to the jurisdiction of that Government if that transaction would be prohibited for U.S. Persons under present U.S. Iran sanctions law.

Non-U.S. Persons can also violate the ITSR and the NPWMDSR if their transactions involving Iran have a U.S. nexus or if they cause a U.S. Person to violate the sanctions. In such an instance, i.e., with respect to a transaction involving Iran that also involves the United States or a U.S. person, the non-U.S. Person would be subject to specific U.S. jurisdiction (i.e., with respect to a transaction involving Iran and only if that transaction also involves the United States or a U.S. Person). For example, a funds transfer to the Government of Iran

continued from page 17

by a bank that is not a U.S. Person would be blocked if it were transferred through the United States or via the U.S. financial system (U.S. nexus). The non-U.S. bank could also be held liable for violating the ITSR or the NPWMDSR and a relevant Executive Order if it falsified payment instructions to obscure or hide the fact that funds being transferred through the United States were actually intended for the Government of Iran. A foreign trading company could cause a violation of the ITSR by inducing a U.S. company to export goods to a third country knowing that the goods are actually intended for Iran.

The penalties for violations of the ITSR and the NPWMDSR include substantial civil monetary penalties, and criminal penalties, which can include substantial monetary fines and/or imprisonment. Where U.S. law enforcement is unable to impose and enforce a civil and/or criminal penalty against a non-U.S. Person for a violation of the ITSR or the NPWMDSR, U.S. sanctions, i.e., prohibitions on dealings with the non-U.S. Person, may be imposed against that person.

For the requirements and prohibitions of the Primary sanctions against Iran to apply or to be implicated, the transaction and/or activity must involve a U.S. Person or have a U.S. nexus. Transactions and activities by non-U.S. Persons that do not involve U.S. Persons or which do not have a nexus to a U.S. Person or to the United States are outside of the jurisdictional reach of the ITSR and NPWMDSR, and thus would not implicate any prohibitions and requirements under these regulations or Primary sanctions. It is for this reason and, with the foreign policy goal of making the sanctions as tight and comprehensive as possible, that the United States maintains Secondary Iran Sanctions.

SECONDARY U.S. IRAN SANCTIONS

Laws and regulations governing Secondary sanctions against Iran are designed to apply to the activities of non-U.S. Persons, to transactions having no U.S. nexus, and to transactions and persons otherwise beyond

the traditional U.S. jurisdictional reach of the Primary sanctions. The Secondary sanctions have been viewed by some as a form of secondary boycott and as being impermissibly extra-territorial under public international law. In certain cases, the Secondary Iran sanctions may give rise to a conflict of laws.

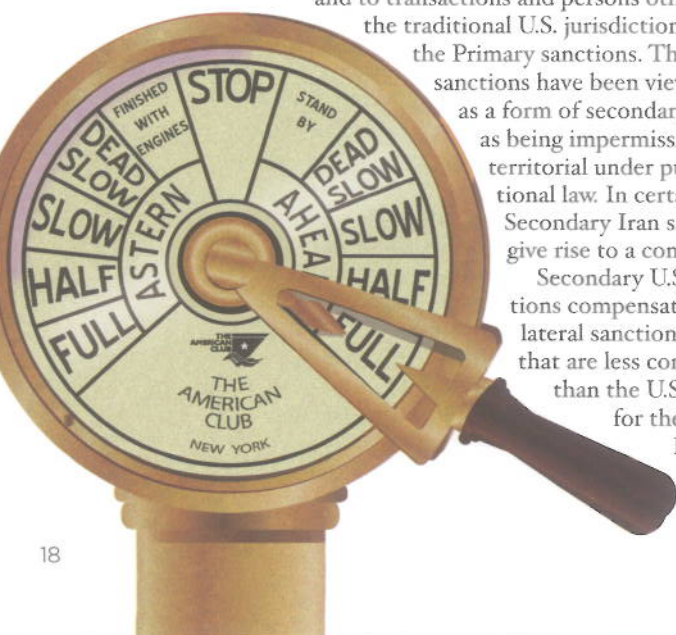
Secondary U.S. Iran sanctions compensate for multi-lateral sanctions against Iran that are less comprehensive than the U.S. sanctions, for the absence of Iran sanctions laws in some

countries, and for the lax enforcement of sanctions laws in other countries. The U.S. sanctions against Iran go well beyond sanctions against Iran imposed under United Nations Security Council Resolutions. Secondary sanctions broaden U.S. sanctions against Iran by deterring trade with and investment in Iran by persons who are not required to comply with Primary sanctions. Primary sanctions already prohibit U.S. Persons from engaging in sanctionable activities. According to the United States, if non-U.S. Persons deal with Iran, they are bound by Iran sanctions laws directly applicable to them (to the extent there are any or they are enforced) as well as, in certain instances, to U.S. laws governing Secondary sanctions against Iran.

Under the Secondary sanctions, the U.S. government has defined certain activity involving Iran by non-U.S. Persons as "sanctionable activity" that will lead to the imposition of U.S. sanctions against the non-U.S. Person engaging in such activity. As noted above, non-U.S. Persons are not subject to traditional general U.S. in personam jurisdiction. They are outside the United States and usually beyond the reach of U.S. law enforcement authorities and traditional law enforcement methods and processes, and their transactions or activities lack a U.S. nexus or connection. Consequently, the imposition of sanctions or the potential imposition of sanctions operates to effectively regulate the behaviour of non-U.S. Persons, vis-à-vis Iran, as if they were U.S. Persons. Secondary sanctions are an effective substitute for and compliment to the Primary sanctions and to traditional civil and criminal penalties that cannot always be readily enforced against non-U.S. Persons. If a non-U.S. Person contravenes laws governing Secondary sanctions, instead of paying a civil fine or being subject to criminal penalty, the non-U.S. Person may instead face U.S. sanctions.

Secondary sanctions, once imposed, are expressed in terms of prohibitions with which U.S. Persons must comply vis-à-vis an individual or entity against which sanctions have been imposed. The sanctions imposed under laws governing the Secondary sanctions can range from the mild sanctions that prohibit the grant of U.S. export licenses or U.S. Exim bank credits to the sanctioned person, to the more draconian sanction that requires the freezing of assets and that exclude the sanctioned party from virtually all business with the United States and U.S. Persons. These latter sanctions can essentially cause all the prohibitions and requirements of the kind found in the ITSR or the NPWMDSR to apply to transactions by U.S. Persons with or involving the sanctioned person.

The sanctions imposed under the Secondary sanctions also usually mean the inclusion of the sanctioned person on a U.S. sanctions blacklist -- the OFAC List of Specially Designated Nationals (SDNs) and Blocked Persons. In effect, to one degree or another, persons sanctioned under laws governing the Secondary sanctions become sanctions targets themselves as if they were, for example, the Government of Iran. The



status of being a U.S. sanctions target has a very negative impact on the sanctions target's ability to do business with the United States and with U.S. companies. As a practical matter, it also negatively impacts the sanctions target's ability to do business with other countries and non-U.S. companies because there is a risk that sanctions may be imposed against these non-U.S. companies for dealing with U.S. sanctions targets, or there is a perception and fear that this may happen. A non-U.S. Person targeted by the United States suffers great reputational damage and as a further practical matter, experiences difficulty doing business worldwide. Furthermore, lifting sanctions imposed on an entity is very difficult and, in some cases, not possible until there is a change in U.S. Iran policy and all or a substantial portion of sanctions against Iran are lifted. In sum, the stigma and the negative consequences that flow from being included on a U.S. blacklist cannot be overstated.

The first U.S. Iran sanctions law falling within the Secondary sanctions category is the Iran Sanctions Act of 1996 (the "ISA"). Under ISA, certain investments in Iran's oil sector by non-U.S. Persons may lead to the imposition of sanctions. ISA was amended and greatly expanded by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of July 2010 ("CISADA"). Subsequent to ISA and CISADA, in 2010 there have been more than eight (8) separate additional statutes, Executive Orders and implementing regulations expanding the number, scope and kinds of activities which may lead to sanctions against non-U.S. and non-Iranian persons engaging in such activity. The most recent law within the Secondary sanctions category was enacted on January 2, 2013, the Iran Freedom and Counter-Proliferation Act of 2012, (the "IFCA"), part of the National Defense Authorization Act for 2013.

TREACHEROUS WATERS

Given the present number, breadth, and complexity of U.S. laws governing U.S. sanctions against Iran, their vigorous enforcement, a relatively high risk exists that a transaction or activity in the maritime transportation sector involving Iran or an Iranian entity will implicate U.S. Iran sanctions prohibitions. Ambiguities in the law, the exercise of U.S. sovereign prerogative, and the reality that U.S. government foreign policy determinations are either not reviewable by a court or, where reviewable, given a high level of deference increase this risk.

As noted above, U.S. sanctions laws against Iran are cumulative and provide for comprehensive prohibitions on U.S. Persons and for the imposition of sanctions against a wide range of non-U.S. Persons trading with Iran, even for transactions taking place wholly outside of the United States.

Legal determinations as to whether a transaction is permitted or is a prohibited or sanctionable activity are very fact-sensitive. They also need to take into account the U.S. government policy context in which specific issues arise. Readers are therefore urged to exercise a

high degree of caution and due diligence and to obtain expert guidance related to their activities involving Iran in order to help ensure that they avoid the imposition of sanctions as well as violations of the law. Judgments as to whether and how sanctions may apply to or impact a certain transaction or activity involving Iran should be made on a case-by-case basis.

With respect to voyages to and/or from Iran, U.S. shipowners and their U.S. insurers must consider and be mindful of U.S. Iran sanctions laws, such as the ITSR and the NPWMDSR, that are directly applicable to them. Non-U.S. shipowners and non-U.S. insurers must be mindful of and carefully navigate through Iran sanctions laws such as those of the European Union, the laws of countries that have implemented United Nations-mandated sanctions against Iran directly applicable to them, as well as U.S. sanctions laws falling within the Primary and/or Secondary sanctions category, even if their activity involving Iran is wholly outside of the United States and has no U.S. nexus.

The Eren Law Firm is an economic sanctions and corporate law boutique based in Washington, DC. The Firm's clients from around the world include banks and financial institutions; insurance, reinsurance and other financial services companies; natural resource extraction companies, industrial companies, marine and air transportation companies; shipowners; sovereign governments; foreign state enterprises; and individuals.

Mr. Eren and Mr. Pinter of the Firm served at the U.S. Treasury's Office of Foreign Assets Control (OFAC), the U.S. government agency that administers and enforces U.S. economic sanctions, for a combined 25 years. Since entering private law practice, respectively 11 and 10 years ago, they have devoted and continue to devote most of their time in private practice to economic sanctions issues and matters. A significant area of their practice deals with economic sanctions issues facing shipowners and maritime insurers.

This article does not constitute legal advice. It is not intended to create, and the receipt of it does not constitute an attorney-client relationship.

¹ Statutes (legislation), Presidential Executive Orders, and regulations.

² In some cases, such as those implicating the Iran Sanctions Act of 1996 ("ISA") (prior to its amendment by CISADA (see, below)), laws of another jurisdiction such as those of the European Union prohibited entities located within their jurisdiction from complying with the provisions of ISA and blocked ISA from taking effect within the EU.

**AMERICAN STEAMSHIP OWNERS MUTUAL
PROTECTION & INDEMNITY ASSOCIATION, INC.**

SHIPOWNERS CLAIMS BUREAU, INC., MANAGER

SHIPOWNERS CLAIMS BUREAU, INC.

One Battery Park Plaza, 31st Floor
New York, New York 10004 U.S.A

TEL +1.212.847.4500

FAX +1.212.847.4599

WEB www.american-club.com

SHIPOWNERS CLAIMS BUREAU (UK), LTD.

London Liaison Office
New London House - 1st Floor
6 London Street
London EC3R 7LP U.K.

TEL +44.20.7709.1390

FAX +44.20.7709.1399

SHIPOWNERS CLAIMS BUREAU (HELLAS), INC.

51 Akti Miaouli - 4th Floor
Piraeus 185 36 Greece

TEL +30.210.429.4990.1.2.3

FAX +30.210.429.4187.88

SCB MANAGEMENT CONSULTING SERVICES, LIMITED

Room 1803 - Hongyi Plaza
288 Jiujiang Road
Shanghai 200001 China

TEL +86.21.3366.5000

FAX +86.21.3366.6100

EMAIL claims@scbmcs.com

Hopewell Centre, 51/F, Unit 5132
183 Queens Road East, Wan Chai
Hong Kong China

MOBILE +852.6752.1488

TEL +852.3602.3083

FAX +852.3602.3111

