OFAC Facilitation:
Know It When You See It?

8 November 2012

ABA Section of International Law
Export Controls and Economic Sanctions Committee

Baker & McKenzie LLP / Fried, Frank, Harris, Shriver & Jacobson LLP /
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Washington, DC

Facilitation Overview
Outline

- A Little History
- Syria
- Burma/Myanmar
- Cuba
- Iran
- Sudan
- Expansion to Non-U.S. Persons?
- Summary

Libya 1 Sanctions Facilitation Prohibition

- “Except as authorized, no U.S. person may perform any contract in support of an industrial or other commercial or governmental project in Libya.” – LSR § 550.205
- Prompted by new approach to U.S. sanctions that no longer claimed jurisdiction over owned or controlled non-U.S. affiliates
Precursor to Current Facilitation Prohibition

“No person may order, buy, act as a broker or facilitator for, receive, conceal, store, use, sell, loan, dispose of, transfer, transport, finance, forward, or otherwise service, in whole or in part, any goods or services subject to the prohibitions of this part, with knowledge or reason to that a violation of this part . . . has occurred, is about to occur, or is intended to occur with resect to such goods or services” – Iranian Transactions Regulations, 31 C.F.R. § 560.202 (1988) [when the ITR primarily prohibited imports into the United States]

Limited Facilitation Prohibition Came Next

“The approval or facilitation by a United States person of the entry into or performance by an entity owned or controlled by a United States person of a transaction or contract (i) prohibited as to United States persons [in Executive Order 12959], or (ii) relating to the financing of activities prohibited as to United States persons . . . , or of a guaranty of another person’s performance of such transaction or contract” – Section 1(f) of Iran Executive Order 12959 (May 6, 1995)
Followed by Comprehensive Facilitation Prohibition

– “any approval, financing, facilitation, or guarantee by a United States person, wherever located, of a transaction by a foreign person where the transaction by that foreign person would be prohibited by this order if performed by a United States person or within the United States”
– Section 2(e) of Iran Executive Order 13059 (Aug. 19, 1997)
– Now found at Iranian Transactions and Sanctions Regulations, 31 C.F.R. § 560.208

Syria Sanctions Facilitation Prohibition

– “any approval, financing, facilitation, or guarantee by a United States person, wherever located, of a transaction by a foreign person where the transaction by that foreign person would be prohibited by this [order] if performed by a United States person or within the United States”
– Section 2(e) of Syria Executive Order 13582 (Aug. 17, 2011)
– Still to be codified in Syrian Sanctions Regulations, 31 C.F.R. Part 542
Burma/Myanmar Sanctions Facilitation Prohibition

“(a) 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.

(b) With respect to new investment in Burma, the prohibition against facilitation does not include the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology, unless such contract includes [characteristics of “new investment”]

– Burmese Sanctions Regulations, 31 C.F.R. § 537.205
– Now moot as a general matter?

Cuba Sanctions Facilitation Prohibition?

– No specific provision in Cuban Assets Control Regulations, 31 C.F.R. Part 515
– Inevitable aspect of blocking of Cuba by CACR § 515.201?
– Great Western Malting Co. (July 10, 2012)
  – CACR facilitation case?
  – Apparent violation was performing “various back-office functions for the sales by a foreign affiliate of non-U.S. origin barley malt to Cuba”
Iran Sanctions Facilitation Example 1

- “[A] prohibited facilitation or approval of a transaction by a foreign person occurs, among other instances, when a United States person:
  . . . Alters its operating policies or procedures, or those of a foreign affiliate, to permit a foreign affiliate to accept or perform a specific contract, engagement or transaction involving Iran or the Government of Iran without the approval of a United States person, where such transaction previously required approval by the United States person” – ITSR § 560.417(a)

Iran Sanctions Facilitation Example 2

- “Changes the operating policies and procedures of a particular affiliate with the specific purpose of facilitating transactions that would be prohibited by this part if performed by a United States person or from the United States” – ITSR § 560.417(c)
Iran Sanctions Facilitation Example 3

- “Refers to a foreign person purchase orders, requests for bids, or similar business opportunities involving Iran or the Government of Iran to which the United States person could not directly respond as a result of the prohibitions contained in this part” – ITSR § 560.417(b)
- New ITSR made no changes to §§ 560.208 or 560.417 – missed opportunity?

Sudan Sanctions Facilitation Prohibition

- “the facilitation by a United States person, including but not limited to brokering activities, of the exportation or reexportation of goods, technology, or services from Sudan to any destination, or to Sudan from any location, is prohibited” – Sudanese Sanctions Regulations, 31 C.F.R. § 538.206, based on Section 2(c) of Sudan Executive Order 13067 (Nov. 3, 1997)
- “the performance by any United States person of any contract, including a financing contract, in support of an industrial, commercial, public utility, or governmental project in Sudan is prohibited” – SSR § 538.207
Sudan Sanctions Facilitation Example 1

“The prohibition contained in § 538.206 against facilitation by a United States person of the exportation or reexportation of goods, technology, of services between Sudan and any destination (including the United States) bars any unlicensed action by a U.S. person that assists or supports trading activity with Sudan by any person. Facilitation of a trade or financial transaction that could be engaged in directly by a U.S. person or from the United States consistent with the prohibitions, general licenses and exemptions contained in this part is not prohibited” – SSR § 538.407(a)

Sudan Sanctions Facilitation Example 2

“Activity of a purely clerical or reporting nature that does not further trade or financial transactions with Sudan or the Government of Sudan is not considered prohibited facilitation. For example, reporting on the results of a subsidiary’s trade with Sudan is not prohibited, while financing or insuring that trade or warranting the quality of goods sold by a subsidiary to the Government of Sudan constitutes prohibited facilitation” – SSR § 538.407(a)
Sudan Sanctions Facilitation Example 3

“To avoid potential liability for U.S. persons under this part, a U.S. parent corporation must ensure that its non-U.S. subsidiaries act independently of any U.S. Person with respect to all transactions and activities relating to the exportation or reexportation of goods, technology or services between Sudan and any other location including but not limited to business and legal planning; decision making; designing, ordering or transporting goods; and financial, insurance and other risks” – SSR § 538.407(b)

Sudan Sanctions Facilitation Example 4

“No U.S. person may change its policies or operating procedures, or those of a foreign affiliate or subsidiary, in order to enable a foreign entity owned or controlled by U.S. persons to enter into a transaction that could not be entered into directly by a U.S. person or from the United States” – SSR § 538.407(c)
Sudan Sanctions Facilitation Example 5

“No U.S. person may refer to a foreign person purchase orders, requests for bids or similar business opportunities involving Sudan or the Government of Sudan to which the U.S. person could not directly respond as a result of the prohibitions contained in this part” – SSR § 538.407(d)

Expansion to Non-U.S. Persons?

– Executive Order 13608 (May 1, 2012) targets “Foreign Sanctions Evaders” that undermine U.S. sanctions targeting Iran and Syria
– Section 1(a)(ii) of Executive Order 13608 targets those who “facilitate deceptive transactions” where the identity of Iranian or Syrian parties are withheld or obscured from other parties or regulatory authorities
– Not yet enforced by OFAC
Examples of Prohibited U.S. “Facilitation”

- Sale or supply of product/services/technology
- Purchasing
- Importing
- Approvals or directions
- Negotiation/drafting/review of commercial terms, contracts
- Financing, bank guarantees, warranties
- Referral of business or orders to non-U.S. Persons
- Certain forms of IT support/access
- Strategizing business
- Changing policies or procedures to enable transactions
- Other support (e.g., technical, credit review, legal support)

Panel 1 - Facilitation: Are There Boundaries?
Triggering Parent Company Liability Under U.S. Sanctions Regimes

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Who is Affected?

- The term U.S. person means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States. – Burma, Sudan, Darfur, Western Balkans, Belarus, Cote D’Ivoire, Congo, Iraq, Lebanon, Libya, North Korea, Somalia, Sudan, Syria, Yemen, Zimbabwe
- Generally, IEEPA-based regimes do not apply to foreign-organized corporations, partnerships, or other entities including those owned or controlled by U.S. companies
Who is Affected?

• The term *person subject to the jurisdiction of the United States* includes:
  – Any individual, wherever located, who is a citizen or resident of the United States;
  – Any person within the United States as defined in § 515.330;
  – Any corporation, partnership, association, or other organization organized under the laws of the United States or any State, territory, possession, or district of the United States; and
  – Any corporation, partnership, association, or other organization, wherever organized or doing business, that is owned or controlled by persons specified in paragraphs (a) and (c) of this section. 31 C.F.R. § 515.329 (Cuba)

• TWEA-based regime

Who is Affected?

• The term *person subject to the jurisdiction of the United States* includes:
  – Any person wheresoever located who is a citizen of the United States;
  – Any person actually within the United States;
  – Any corporation organized under the laws of the United States or of any state, territory, possession, or district of the United States; and
  – Any partnership, association, corporation, or other organization wheresoever organized or doing business which is owned or controlled by persons specified in paragraph (a), (b), or (c) of this section. 31 C.F. R. § 535.329 (Iran).

• Former IEEPA regime, now IEEPA + ITRSHRA (2012).
Facilitation: Burma

• 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. 31 C.F.R. § 537.205

• Divestiture of the shares in such an entity to a foreign person – otherwise constituting the facilitation of that foreign person’s investment in Burma – is authorized under general license... 31 C.F.R. § 537.412

Facilitation: Burma

• The foreign subsidiary of a U.S. company wishes to bid on a project to develop a coal mine in Burma. The U.S. parent cannot approve, supervise, guarantee or otherwise be involved in the foreign subsidiary’s investment in this project. – OFAC Overview
Facilitation: Iran

- With respect to § 560.208, a prohibited facilitation or approval of a transaction by a foreign person occurs, among other instances, when a United States person:
  - Alters its operating policies or procedures, or those of a foreign affiliate, to permit a foreign affiliate to accept or perform a specific contract, engagement or transaction involving Iran or the Government of Iran without the approval of the United States person, where such transaction previously required approval by the United States person and such transaction by the foreign affiliate would be prohibited by this part if performed by a United States person or from the United States;
  - Refers to a foreign person purchase orders, requests for bids, ...
  - Changes the operating policies and procedures of a particular affiliate with the specific purpose of facilitating transactions that would be prohibited by this part if performed by a United States person or from the United States. 31 C.F.R. § 560.417

Iran Changes the Game

- Section 4 of the Order prohibits an entity owned or controlled by a U.S. person and established or maintained outside the United States (a “foreign subsidiary”) 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, if that transaction would be prohibited by certain Executive orders prohibiting trade and other dealings with, and investment in, Iran and blocking the Government of Iran and Iranian financial institutions, or any regulation issued pursuant to the foregoing, if the transaction were engaged in by a United States person or in the United States. Civil penalties for the foreign subsidiary’s violation shall be applied to the U.S. parent company to the same extent that they would apply to a U.S. person for the same conduct. (OFAC Guidance/FAQ)
Facilitation: Sudan

• Except as otherwise authorized, the facilitation by a United States person, including but not limited to brokering activities, of the exportation or reexportation of goods, technology, or services from Sudan to any destination, or to Sudan from any location, is prohibited. 31 C.F.R. § 538.206

Facilitation: Sudan

• The prohibition contained in § 538.206 against facilitation by a United States person of the exportation or reexportation of goods, technology, or services between Sudan and any destination (including the United States) bars any unlicensed action by a U.S. person that assists or supports trading activity with Sudan by any person. Facilitation of a trade or financial transaction that could be engaged in directly by a U.S. person or from the United States consistent with the prohibitions, general licenses and exemptions contained in this part are not prohibited. Activity of a purely clerical or reporting nature that does not further trade or financial transactions with Sudan or the Government of Sudan is not considered prohibited facilitation. For example, reporting on the results of a subsidiary's trade with Sudan is not prohibited, while financing or insuring that trade or warranting the quality of goods sold by a subsidiary to the Government of Sudan constitutes prohibited facilitation. 31 C.F.R. § 538.407(a)
Facilitation: Sudan

• To avoid potential liability for U.S. persons under this part, a U.S. parent corporation must ensure that its foreign subsidiaries act independently of any U.S. person with respect to all transactions and activities relating to the exportation or reexportation of goods, technology, or services between Sudan and any other location including but not limited to business and legal planning; decision making; designing, ordering or transporting goods; and financial, insurance, and other risks. 31 C.F.R. § 538.407(b)

Facilitation: Sudan

• No U.S. person may change its policies or operating procedures, or those of a foreign affiliate or subsidiary, in order to enable a foreign entity owned or controlled by U.S. persons to enter into a transaction that could not be entered into directly by a U.S. person or from the United States pursuant to this part. 31 C.F.R. § 438.407 (c).
Facilitation: Sudan

• No U.S. person may refer to a foreign person purchase orders, requests for bids, or similar business opportunities involving Sudan or the Government of Sudan to which the United States person could not directly respond as a result of the prohibitions contained in this part. 31 C.F.R. § 538.407(d)

Implications & Questions

• Sudanese regulations are most expansive on approval and facilitation, but do they apply to the other regimes?
• The “changing policies” prohibition in Iranian regime require scienter (where such transaction previously required the approval of a U.S. person or with the specific purpose of facilitating) but Sudanese regs (which are older) do not contain similar language, so does it apply to other regimes?
Implications & Questions

- Sources of clarification are not helpful:
  - Prior enforcement
  - Case law
  - Interpretive rulings
- OFAC takes the view that interpretive sections apply to all sanctions regimes.
- U.S.-based companies should assume that approval and facilitation prohibitions apply to all sanctions regimes, and that interpretive guidelines offered by OFAC is equally applicable to all sanctions regimes.

How Independent?

- Entity isolation may not be enough under inchoate criminal theories such as conspiracy, attempt, or evasion.
- U.S. expats cannot remove themselves, either by direction or sua sponte or policy, from a transaction that would otherwise be legal by a foreign subsidiary.
- Changing policies prohibition means U.S. companies have no incentive to go beyond what sanctions require, which is exactly contrary to what sanctions should achieve.
- Back office and shared functions (Treasury, Insurance, etc) are OK if “purely clerical” but problematic if specific to a prohibited transaction.
- Legal advice and export compliance programs also problematic as they may constitute approval or facilitation.
Reform?

- Greater transparency i.e. BIS
- Eliminate approval and facilitation – the only behavior chilled has been attempts by companies to follow the law.
- Inchoate crimes (attempt – substantial step, or conspiracy and overt act)
- Adopt common language and interpretations
- Expand legal services exemption
- Allow a review and veto process for U.S. parent companies on legal or public relations grounds
- Establish safe harbor provisions

A Safe Harbor

- A blanket prohibition on trade with sanctioned countries by foreign subsidiaries is problematic from a business perspective and legal perspective (blocking legislation)
- Modifying a policy once it is passed could be unpermitted approval or facilitation
- OFAC should permit the following safe harbor:
  - Foreign subsidiaries and affiliates may trade with sanctioned countries if legal under applicable law. All such proposed transactions must be sent to [US Parent] for review. [US Parent] may veto any such proposed transaction on legal or public relations grounds.
- This safe harbor would clarify obligations while meeting the intent and letter of US trade sanctions.
Are There Limits on Extraterritorial Reach of U.S. Export Controls and Sanctions?
Constitutional Requirement for Fair Notice and Clarity
Restatement (Third) of the Foreign Relations Law of the United States

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November 8, 2012

Summary of Jurisdiction Theories of Extraterritorial Reach of U.S. Export Controls and Sanctions
The Three Fives of Extraterritorial Reach

- Five types of U.S. regulations prescribe conduct in other countries
- Five types of prosecution strategies extend the extraterritorial reach of those regulations
- Five types of limitations may apply

Article re Legal Structure of U.S. Extraterritorial Reach

- Purposes:
  - Lift some of the shroud of confusion regarding the multiple means of extraterritorial reach
  - Provide a legal framework for analysis of regulations and statutes
  - Discuss potential limits
- This PPT has more questions re the Restatement (Third) I will raise in yet another article
Five types of regulations prescribe conduct

1. Citizenship jurisdiction (where ever located)
2. Territorial jurisdiction
3. Territorial remedies (State Dept. basis for CISADA orders),
4. *Quasi in Rem* or reexport control list-based jurisdiction, and
5. Prescriptive jurisdiction that meets the effects test or universal concern test of the Restatement (Third) of the Foreign Relations Law of the United States (“Restatement (Third)”)

Five types of prosecution strategies that extend the extraterritorial reach of regulations

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

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
   - License exceptions and general licenses are not loopholes
   - They are law that defines outer reaches of license requirements
2. *De minimis* exclusions from the scope of the regulations
3. Published technology and source code are outside the scope of certain rules (Issues remain with uncertainty from OFAC under Berman Amendments and impact of the First Amendment)
4. The U.S. Constitution’s requirement for fair notice and clarity in the text of prescriptions
5. U.S. Supreme Court’s recognition of the rule of reason under the Restatement (Third)

Fair Notice and Clarity
Substantive Due Process under the Fifth Amendment to the United States Constitution
Fair notice and clarity in the text of prescriptions

• Substantive due process under the Due Process clause of the Fifth Amendment to the United States Constitution
• The standard or standards:
  ▪ Ordinary person standard
• 2012 Supreme Court opinions re fair notice and clarity
  ▪ Fox v FCC
  ▪ Christopher v Smithkline Beecham
• Limits apply domestically, to prescriptions on U.S. persons, and (in my opinion) to extraterritorial reach over non-U.S. persons

Fox v FCC and Christopher v Smithkline Beecham

• 2012 decisions of the U.S. Supreme Court
• Court overruled an FCC administrative fine
• Court overruled Department of Labor interpretation of wage and hour law
The constitutional standard per *Fox v FCC*

- Under the Due Process clause of the Fifth Amendment to the United States Constitution a statute or regulation must have sufficient clarity to provide “a person of ordinary intelligence fair notice of what is prohibited. . .”

The two constitutional purposes of fair notice and clarity per *Fox v FCC*

“Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.”
Constitutional standard per *Christopher v Smithkline Beecham*

- Agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires

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Lessons of *FCC v Fox News* and *Christopher v Smithkline Beecham*

- The Constitutional remedy is not limited to:
  - Criminal charges
  - Free speech
- The Court has long warned against:
  - Unfair surprises to the regulated parties, and
  - Related retroactive application in a practical sense
- Inconsistent guidance and lack of guidance may each be the basis for a Constitutional challenge
- The Court favors “notice and comment” (think of ECR and control list rewriting as a positive)
Deference to national security and foreign policy functions of the Executive Branch

- Courts’ level of deference to the Executive Branch?
  - At some point on a spectrum of vagueness and absence of guidance, a national security or foreign policy rule may be held unconstitutionally vague as applied
  - The *Pulungan* decision of the Seventh Circuit stands for the proposition that judicial deference for national security and foreign policy based prescriptions is not absolute

Is there a conflict among the Circuits?

- Does Ninth Circuit decision in *U.S. v Lee* stand for the proposition that exporters are subject to a duty to inquire if there is doubt? Does it stand for an extraordinary person test for exporters or for reexporters? What if there is no source of guidance such as refusal of DDTC to give a CJ decision to a reseller?

- The First Circuit in *Lachman* “specially designed” met the Fifth Amendment standard but only with proof of actual intent in a criminal case under the EAR.

- In *Pulungan*, the Seventh Circuit applies the ordinary citizen standard in a criminal case where the prosecutor declined to put on evidence beyond the witnesses conclusion of agency or commodity jurisdiction, and the prosecutor asked the judge to take away a mixed question of law and fact (agency jurisdiction) from the jury.
Restatement (Third) in General

The question under the Restatement (Third) and its rule of reason

Will U.S. courts put any limits on the authority of the U.S. Government agencies that implement U.S. reexport controls and sanctions that reach into the economy of another country?

If yes, what will the limiting principles be?

Is the rule of reason a constitutional limit on the foreign commerce clause, a common law principle, case law based upon multiple sources, or something else?
The Restatement (Third) provides factors for courts to consider

Caveat: The courts have not yet subjected any specific provision of U.S. reexport controls or sanctions to analysis under the Restatement (Third) and its rule of reason.

The U.S. Supreme Court has applied the rule of reason of the Restatement (Third) to private antitrust litigation.

Why even consider the Restatement (Third)?

In two opinions, Justice Breyer and Justice Scalia invoked the rule of reason under the Restatement (Third) in civil antitrust cases against non-U.S. defendants.


The support of the rule of reason in the Restatement (Third) by Justices Breyer and Scalia by itself is sufficient reason for the export control bar and the U.S. Government to take note of the eight factors.

In a comment to the Directorate of Defense Trade Controls, the American Bar Association ("ABA") Section of International Law has recognized the relevance of the rule of reason in the Restatement (Third) to export controls and sanctions.
Section 403(2) of the Restatement (Third)

- Entitled “Limitations on Jurisdiction to Prescribe”
- Requires U.S. courts to evaluate eight factors in determining whether a given exercise of extraterritorial jurisdiction to prescribe the conduct is reasonable
- In connection with a particular extraterritorial provision of U.S. export control and sanctions laws, each of the following eight factors should be taken into consideration to determine reasonableness

Restatement (Third)
The Eight Factors, and Questions Relevant to Each Factor
Questions under factor (a)

“(a) The link of the activity to the territory of the regulating state [United States], i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;”

• Does the effects test for prescriptions on non-U.S. parties engaged in non-U.S. contact fail without “substantial, direct, and foreseeable” negative consequences?
• What is the nexus between the policy prescriptions and the substantial effects of the prescribed conduct abroad in the territory of the U.S. and is it sufficient?
• What if the policy does not achieve its initial purpose after many years?
• Does the “link” to the foreseeable negative consequences require as chance of success for the stated goal?

Questions under factor (b)

“(b) The connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;”

• What is the impact of rules on brokering by non-U.S. persons?
• If the parties and the conduct have no connection to the U.S, what interests of the United States are sufficient to prescribe conduct aboard?
• What U.S. interests are sufficient to prescribe conduct if the sole remedies are imposed in the U.S. territory only?
• Who has the “principle responsibility” for the regulated activity and what impact does that have on charging theories of causing, aiding and abetting, and the outer reaches of conspiracy, including a bath tub conspiracy?
• What impact does this have on a charging “facilitation” of third country trade?
Question under factor (c) and the “generally accepted” factor

“(c) The character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted.”

• How will a court determine and measure the “importance” of a prescription to the U.S.?

• Courts will likely conclude a unilateral control is not a “generally accepted” regulation of the prescribed activity.

Questions under factor (d)

“(d) The existence of justified expectations that might be protected or hurt by the regulation;”

• Is the “justified expectations” criteria met when a non-U.S. person exports or imports something that is not restricted by his government and is not obviously a technology the ordinary person knows is used to make lethal items?

• Is the factor met when the host country does not participate in an embargo designed by the U.S. to impose pressure on a target country’s population and thereby cause them to rise up and change the abhorrent policy of their government?
Questions under factor (e)

“(e) The importance of the regulation to the international political, legal, or economic system;”

• What is the “international political, legal, or economic system”?

• How will a court determine the importance of the regulation to the international political, legal, or economic system?

Questions under factor (f)

“(f) the extent to which the regulation is consistent with the traditions of the international system;”

• Are the traditions of the international system demonstrated solely by the international regimes and treaties, or also by similar but not identical approaches to resolve or mitigate national security or foreign policy challenges?

• What of trade by a national of a country that does not support an embargo or denial objective? Will a defendant from a cooperating country be held to a higher standard than a defendant from a non-cooperating country? Such would stand reexport controls on their head.
Questions under factor (g)

“(g) The extent to which another state may have an interest in regulating the activity; and”

• How will judges evaluate an interest of another country in regulating the activity?

• Does that interest include an interest not to restrict its trade and finance?

Does that interest include an interest not to restrict its trade and finance?

“(h) The likelihood of conflict with regulation by another state.”

• What evidence will be relevant to a court’s determination of likelihood of conflict between U.S. regulations and regulation by another nation or the absence of regulations by another nation?
  ▪ A non-U.S. Government’s advice to its national?
  ▪ Absence of a prescription by a non-U.S. government?
  ▪ Statements of officials reported in the press?

• Blocking statutes are likely not the only means to establish likelihood of conflict
Universal jurisdiction to define and punish certain offenses

Restatement (Third) addresses “jurisdiction to define and prescribe punishment” for offenses of “universal concern” to the “community of nations” including piracy and certain acts of terrorism.

• Examples probably include OFAC’s Somalia sanctions program (which targets piracy offshore Somalia, among other things) and OFAC’s blocking of assets of designated global terrorists.

• What is the outer reach of universal concern?

• Is a U.S. policy in conflict with another country’s policy most likely not of universal concern?

• Do United Nations resolutions serve to establish “universal concern” and does the absence of a supporting United Nations resolution establish a given U.S. policy is not of universal concern?

Restatement (Third)
Relevance to the U.S. Government, Courts, and Litigators
Questions certainly remain

The Restatement (Third) is a rule of reason with eight factors without a formulaic means to apply it.

To my knowledge, courts have not applied the Restatement (Third) to any element of U.S. export controls and sanctions.

Very few challenges will reach the courts given the large number of charges settled.

Relevance to the U.S. Government

The most important and most difficult challenge for the U.S. State Department is the creation of a multilateral approach for a given export control requirement or sanctions requirement among the nations that supply the goods, services, and financing the United States seeks to deny the regulated parties.

In the United States, political imperatives may require permanent symbolic export controls or sanctions prescriptions, but those will be most at risk under the rule of reason.
Relevance to the U.S. Government (cont.)

U.S. interests are at their lowest ebb when a regulation is unilateral and U.S. officials are not actively engaged in diplomacy to make the U.S. prescription multilateral.

It is in the national security and foreign policy interests of the United States to consider the eight factors of the rule of reason in developing regulations and in shaping multilateral strategies that will meet the rule of reason and that are therefore enforceable.

Relevance to litigators and courts

The U.S. export control bar, prosecutors, and courts should now consider seriously whether and under what circumstances the Restatement (Third) imposes limiting principles on the policies, prescriptions, and the degree of nexus between those policies and those prescriptions under U.S. export controls, reexport controls, and sanctions as applied extraterritorially.

Challenges are more likely to be mounted first in criminal cases against individuals.

If criminal court opinions develop the rule of reason and if it is a limiting factor, then challenges will be mounted in administrative proceedings that seek to impose business-ending denials of export or import privileges and in denial of essential business licenses.
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Panel 2 - OFAC Alumni Speak
## Panel 2: OFAC Alumni Speak

- **Bill Hoffman**
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- **John Pisa-Relli** (Moderator)
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  - Former OFAC Senior International Program Liaison, Compliance Officer and Licensing Officer

## Panel Questions

1. What are the top 1-3 risks that facilitation creates for otherwise compliance-intending enterprises?

2. If you had the power to compel OFAC to do anything in particular in connection with the way it administers facilitation prohibitions, what would it be?

3. Audience questions?