



WITA 2020 Virtual Intensive Trade Seminar



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Emergency Powers

- Trading with the Enemies Act
 - Generally only applies in war time
- IEEPA
 - Broadly invoked to allow Presidential action
 - Used to extend the lapsed Export Administration Act many times
- National Emergencies Act



Authority

- International Emergency Economic Powers Act (“IEEPA”)
- Export Administration Regulations (“EAR”)
- Arms Export Control Act (“AECA”)



Relevant Agencies

- Treasury
 - Office of Foreign Assets Control/OFAC
- Commerce
 - Bureau of Industry and Security/BIS
- State
 - Directorate of Defense Trade Controls/DDTC
- Others, e.g. DOD, nuclear agencies, etc.



Categories of Goods

- Military, law enforcement and first responders
- Dual use
 - Civilian and military use
- Purely commercial
 - End use/end user restrictions
- Economic sanctions
 - License required



Specific Controls

- Nuclear
- Chemical or biological
- Military/defense
- Dual use
- Sensitive technology



Exports

- Export Administration Act
- Atomic Energy Act
- Arms Export Control Act
- Chemical/biological weapons
- Drug kingpins
- Specially designated nationals
- Debarred parties

Broad Economic Sanctions

- Cuba
- Iran
- North Korea
- Sudan
- Syria
- Transit and transshipment hubs - enhanced red flags - Hong Kong, Iraq, Singapore and the United Arab Emirates.



Goals

- Influence a country to change its policy
- Punish a country for its policy
- Demonstrate opposition to the country's policy to a wider audience, often the enactor's domestic citizenry.



Government Activities

- Covert action
- Military intervention
- Diplomatic activity
- Economic activity

Forms of Economic Sanctions

- Freeze diplomatic relations
- Halt military aid/economic assistance
- Prohibit private persons from selling goods or technology or providing services to foreign entities or governments
- Prohibit facilitation of the sale of goods or technology or the providing of services by private individuals.



Exercise of Foreign Policy

- Impose economic sanctions on countries or individuals/entities
- Require pre-approval of the transfer of specific commodities and transactions through licensing requirements

Sanctions' American Origin

- The initial imposition of economic sanctions was in 1765 during the American Revolutionary War when British products were sought to be barred from importation as a means to retaliate against the Crown for the Stamp Act taxes imposed on the colonies.



U.S. - Round Two

- The Stamp Act was repealed, and replaced between 1767 and 1770 with the various Townshend Acts, which taxed the salaries of colonial governors and judges plus placed duties on glass, lead, paints, paper and tea imported into the colonies.
- The colonists again boycotted, which led to the Boston Tea Party



Even Earlier

- Pericles' decree in 432 B.C. to limit the entry of Megaran products into the markets of Athens in response to Megara's territorial expansion efforts and the kidnapping of three (3) women.
- This could have been one reason for the Peloponnesian War.



Key Considerations

- Stemming nuclear proliferation
- Promoting human rights
- Fighting terrorism
- Resolving expropriation claims
- Destabilizing a regime



Iran Example

- 1979 to 1981
- Hostage situation with embassy employees
- Iran was getting ready to move its money out of the U.S.
 - \$12 billion in assets seized



South Africa Example

- Sanctions were focused on ending apartheid.
- In 1985, U.S. banks decided to not roll-over short term loans.
- South Africa shut down its banks and defaulted on its international loans.

IEEPA - Emergency

- President is authorized to deal with any unusual or extraordinary threat, which has its source in whole or substantial part outside the U.S., to the national security, foreign policy, or economy of the U.S., if the President declares a national emergency with respect to the threat.



Examples of National Emergency

- Terrorist violence
- Foreign narcotics trafficking
- Weapons of mass destruction
- Threats to regional security
- Deterioration of a country's security
- Actions of transnational criminal organizations



Non-Emergency Situations

- Bilateral foreign assistance
- Low interest credit
- Loan guarantees - ExIm Bank, OPIC
- Special insurance programs
- Fishing rights
- Port access
- Aircraft landing rights
- Passports



Scope of Controls

- Reexports by foreign buyer of U.S. origin goods or technology.
- Reexports of U.S. origin parts even if rolled up into foreign made goods.
- Reexports of foreign origin goods which are products made from U.S. technology.
- Di minimis rule – 10%? Higher?



Reach of Sanctions

- Individual or entity named – property is blocked, U.S. persons are prohibited from doing business with them.
- Secondary impact – American company has an ownership interest in the foreign seller - 50+% v. >5%.
- Foreign parent with American subsidiary.



Broad Parameters

- Prohibitions on U.S. persons-
 - Transactions with sanctioned country
 - Facilitation of transactions by non-US persons that would be prohibited if undertaken by U.S. persons
 - Transactions undertaken anywhere in the world if involves U.S. origin goods and/or U.S. banking channels and/or U.S. dollars.



Impact Beyond the U.S.

- Many of the recent cases involved multi-million dollar fines where the U.S. and European regulators joined forces and the settlement was universal in nature
 - e.g. Banking institutions or payment processors and Iran sanctions



Nuclear Controls

- Multilateral Controls
- United Nations resolutions / policy statements
- Individual countries implement and enforce

Shift in Focus

- In the 1990's, the U.S. started to shift from sanctions on countries to more targeted sanctions against individuals and entities, e.g. travel bans and asset freezes
- President adds names to the Specially Designated Nationals List
- Moved from unilateral to multilateral and back to unilateral - where do we go from here?



Sources of Enforcement

- Presidential Executive Orders
- Congressional laws
- Agency regulations
- Most sanctions programs now exclude food and medicine, and also permit news and information exchanges



Extraterritorial Impact

- Limitations on trading with foreign entities necessarily has an impact outside the U.S.
- Leads to conflicting requirements
- Blocking statutes
 - Cuba
 - Arab League



Blocking Statutes

- U.K. Protection of Trading Interests Act of 1980
- Canadian Foreign Extraterritorial Measures Act
- Mexican Law to Protect Trade and Investment from Foreign Laws that Contravene International Law
- EU Council Resolution 2271/96



How it works in the real world!



Penalties

- Fines
- Civil forfeiture
- Reputational damage
- Shareholder lawsuits
- Debarment
- Denial of government contracts
- Cancellation/denial of export licenses
- Criminal convictions





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