

Summary of the Presentation:
The US Iran Embargo: Which Japanese Company Must Comply with It?
Some New Challenges for Japanese Companies
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We want to demonstrate: We are currently dealing with new and heightened risks of extra-territorial application of US embargoes with the result that the number of Japanese companies possibly affected by the US Iran embargo is higher than normally assumed. Besides some clear cases there are several grey areas for which legal opinions will be of help. We will propose three steps the Japanese companies should take in order to tackle the risks.

Some literature is available on extra-territorial effects of US embargoes¹. But very recently, in the context with the US trying to strictly enforce the Iran embargo (with the feeling, that some of the EC Member States are too liberal in their trade with Iran), the US government introduced new possibilities in order to extend the scope of application of unilateral US embargoes to persons or companies who were not affected before. These recent measures included:

- an extended definition of the “US Person”, covering also those persons/companies who were never affected before,
- an extended use of “related persons” and of “aiding and abetting”, in order to be able to impose sanctions also against companies, which are no “US Persons” and which are only somehow related to an “US Person”²,
- or even imposing political pressure with the intention that also non-US Persons should comply with the US Iran embargo³.

The Case: The Japanese exporting company Domo Corp. is a 100% subsidiary of the Domo International Ltd. in the UK, which is listed at the New York Stock Exchange. The daily business of the Domo International Ltd. is conducted by the US citizen Mr. America, being one of the CEOs, but with the function of the managing director among the CEOs. Mr. America is at the same time also active for the Japanese companies, and he can give instructions concerning export activities to the Domo Corp. The Domo Corp. wants to send several machines via China to Iran. Is the Domo Corp. prevented from this export to Iran under the US Iran embargo, or does the US embargo not matter for this case?

Summary:

Currently there are new and heightened risks of the extraterritorial application of US embargoes, based on recent attempts of “extension of US Persons” (like “de facto US Persons”). Clearly prohibited would be if a Japanese company exports US goods to Iran or Japanese goods with listed US components (value 10%) to Iran (§ 560.205 ITR), or if a Japanese company, which is a foreign branch of an US company, would export anything to Iran (§ 560.204 ITR). But the grey areas are starting when the Japanese company is not a branch but a subsidiary, or if the CEO of the Japanese company is US citizen, green card holder or giving export instructions from the US territory, or if there is large management influence from the US company, or if the main supplier is an “US Person” – thus the number of possibly affected Japanese companies is higher than normally assumed, since substantial management influence may be sufficient to trigger the legal requirement to comply with unilateral US embargoes.

Decisive for the legal analysis, which non-US company must comply with US embargoes, are the concepts of control and of deviation, and in addition also of the “aiding and abetting” and “related person”. If an US citizen or a similar “US Person” is managing director giving export instructions to a

¹ Cf. Malloy, *Economic Sanctions and US Trade*, Boston 1990, at pp. 577-580: “The contemporary sources of economic sanctions authority are in principle statutorily defined... However in the practice of US jurisprudence of economic sanctions there are no meaningful legal limits to the extra-territorial application of economic sanctions”.

² Cf. Hohmann, Ausweitung der „US Person“ auf deutsche Firmen mit US-Einfluss, in: *US-Exportbestimmungen* 2/2008, at pp.28-30.

³ Cf. Hohmann, In der Haftungsfalle: Deutsche Unternehmen und US Embargos, in: *Legal Success* No. 3, at p. 19, lawyer magazine in: *Handelsblatt* of 27 March 2008. Cf. also Clark, 20 *University Pennsylvania Journal of International Economic Law* 61 (1999) at 1 et seq., especially at pp.12-13, who mentions Treasury guidance against the US vehicle manufacturer Fruehauf to prevent shipment of busses by its French subsidiary.

Japanese export company, he has efficient control over the export activities of this company, and he personally is not allowed to deviate from the embargo provisions; this has legal impacts on the status of the company, since the functions of this managing director, being an US Person, and of the company can no longer be separated. In such case, the Japanese exporting company should be treated as if it were an "US Person" ("factual US Person"). This means, that this Japanese company should not export anything to Iran. Similarly are the consequences in cases, in which US companies have large management influence on the Japanese export company, and possibly also cases, in which the main supplier of the Japanese exporting company is "US Person", because of the concept of deviation and of "aiding and abetting". In such cases, only a thorough legal analysis will come to clear results whether such Japanese export company must comply with the US Iran embargo.

As attorneys with some experience we are proposing that possibly affected Japanese companies should take the following 3 steps:

- (1) Step 1: They should be aware of this new and heightened risk of non-compliance with US embargoes, especially in that possibly affected companies should have a precise legal analysis at their disposal of their export risk, whether they are legally affected, and of the minimization measures to be taken.
- (2) Step 2: If they are legally not required to comply with US embargoes they should nevertheless voluntarily comply with a few parts of US embargoes – but only those parts not hurting them -, in order to avoid bad media reputation and bad campaigning against them.
- (3) Step 3: In addition they should try (1) either to convince METI to enact a legal instrument or to take similar measures (incl. WTO panel procedure against the US) in order to protect Japanese companies (it should be studied, whether EC Regulation 2271/96 will be a useful example for this purpose) or (2) to continue co-operation measures, like diplomatic talks (started by CISTEC) with the US in order to limit as far as possible extra-territorial application of US embargoes, for which the current time fits perfectly because of a) economic crisis – esp. of the US – and an awareness of the impact of economic damages, b) request of BIS of 5 January 2009 for public comments on extra-territorial application of embargo measures and c) some Japanese voluntary measures (cf. Step 2) would encourage the US additionally to restrict the extra-territorial application of US embargoes. Maybe, the co-operation measures have more chances of success.