

**IMPLICATIONS OF SECONDARY
SANCTIONS ON THE SHIPPING INDUSTRY:
THE EXTRATERRITORIAL CRUNCH
RESHAPING INTERNATIONAL TRADE**

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INTRODUCTION

In recent years, the United States of America (U.S.) has expanded its economic sanctions regime. Part of that expansion includes secondary sanctions, which extend U.S. jurisdiction to parties and activities that are not directly connected to the U.S. This broadened scope of U.S. jurisdiction has exposed transnational companies and foreign individuals to a variety of penalties.¹ Scholars often question the legality of secondary sanctions because of their extraterritorial nature.² In line with this view, the international community has been largely opposed to the U.S. approach because it arguably infringes on the sanctity of sovereignty. The reimposition of secondary sanctions by the

1. Meredith Rathbone, et al., *Sanctions, Sanctions Everywhere: Forging a Path Through Complex Transnational Sanctions Law*, 44 GEO. J. INT'L L. 1055, 1070 (2013).

2. See, e.g., Mohamed S. Helal, *On Coercion in International Law*, 52 N.Y.U. J. INT'L L. & POL. 1, 107–08 (2019) (“Scholars argue that these measures are unlawful exercises of extraterritorial jurisdiction by the coercing state.”).

U.S. also raises issues regarding free trade, which has been the widely accepted global economic policy since World War II.³ As the U.S. increases its extraterritorial application of sanctions, the Office of Foreign Asset Control (OFAC) has cracked down on enforcement.⁴ OFAC has taken a more serious stance towards the shipping industry in the past two years in response to compliance concerns.⁵ The heightened compliance standards have created a variety of issues for private companies to navigate, including marine insurance, effective sanctions clauses, and due diligence.⁶

The first part of Section II of this paper will describe the differences between primary and secondary sanctions as well as some of the issues arising from the extraterritorial nature of secondary sanctions. The paper will then provide an overview of the development of the U.S. sanctions regime, including how it has expanded in scope with each statute building on its predecessor. This discussion will also introduce the more recent maritime advisories. Section III will analyze how the new wave of secondary U.S. sanctions could hinder the global push towards free trade. It will then go on to explore the compliance challenges that the shipping industry faces, which include restrictions on insurance, depth of due diligence, and sanctions clauses as a means of safeguarding against violations. This discussion will also touch on the current state of political affairs surrounding these issues. Finally, this paper will offer possible solutions to improve the function of the U.S. sanctions regime and provide more clarity for businesses that are exposed to regulation.

3. See generally ROBERT E. BALDWIN, *THE STRUCTURE AND EVOLUTION OF RECENT U.S. TRADE POLICY*, 10-12 (University of Chicago Press 1984) [hereinafter BALDWIN, *STRUCTURE AND EVOLUTION OF U.S. TRADE POLICY*] (describing the shift toward liberalized trade after WWII and the increase in support for that model globally).

4. See sources cited *infra* note 93 (explaining broadening scope of U.S. sanctions has led to increased enforcement by OFAC, especially after U.S. withdrawal from JCPOA).

5. See discussion *infra* Section II, Part D; See also *infra* note 93 (explaining that OFAC substantially increased enforcement actions starting in 2019). Typical enforcement actions include cargo seizures and placing vessels on the Specially Designated Nationals list. See, e.g., sources cited *infra* note 109; see also discussion *infra* Section II, Part C (providing full explanation of OFAC enforcement procedures).

6. Richard L. Kilpatrick, Jr., *Marine Insurance Prohibitions in Contemporary Economic Warfare*, 95 INT'L L. STUD. 272, 279-80, 295-97 (2019).

II. BACKGROUND

A. *Primary vs. Secondary Sanctions*

In contrast to secondary sanctions, primary sanctions have long been accepted as legitimate exercises of sovereign power amongst the international community.⁷ Traditional sanctions are the “deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade and financial relations with a target country in an effort to change the country’s policies.”⁸ These sanctions apply to transactions between the issuing country and the targeted country and are, therefore, restricted territorially.⁹ Primary sanctions are considered permissible because they are tied to a nation’s inherent sovereignty over its territory and people.¹⁰ Without a direct connection to the issuing state, the traditional justifications underlying sanctions no longer apply.

The extraterritorial nature of secondary sanctions challenges those traditional, territorial justifications behind economic restrictions against other countries. Secondary sanctions “subject foreign persons to sanctions for actions that they take wholly outside of U.S. jurisdiction.”¹¹ These measures essentially place U.S. trading partners in a position where they must choose to abstain from trading with the sanctioned state or risk relations with the U.S.¹² Although secondary sanctions are criticized for their extraterritorial reach, they may be considered legal under international law if there is enough of a connection between the conduct and the impact of that conduct on the sanctioning state to warrant prescriptive jurisdiction.¹³ Nonetheless, the expansion

7. Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT’L L. 905, 911–12 (2009).

8. Rathbone, et al., *supra* note 1, at 1057 (quoting Gary Hufbauer & Barbara Oegg, *A Short Survey of Economic Sanctions*, INST. FOR INT’L ECON. (Aug. 2001), <http://www.ciaonet.org/casestudy/hug01/>).

9. Samantha Sultoon & Justine Walker, *Secondary Sanctions’ Implications and the Transatlantic Relationship*, ATLANTIC COUNCIL (Sept. 2019), https://www.atlanticcouncil.org/wp-content/uploads/2019/09/SecondarySanctions_Final.pdf.

10. Meyer, *supra* note 7, at 951.

11. Rathbone, et al., *supra* note 1, at 1070.

12. Helal, *supra* note 2, at 103.

13. Meyer, *supra* note 7, at 908.

of U.S. jurisdiction through these sanctions has been controversial.¹⁴

The source of controversy stems from fundamental differences in how individual countries perceive the concept of extraterritoriality. The U.S. believes that the sanctions subjecting foreign entities to U.S. jurisdiction are not necessarily extraterritorial because they are designed merely to restrict access to the U.S. market.¹⁵ “While their effect may be aimed at foreign companies, the sanctions only impose legal duties on U.S. entities.”¹⁶ Other countries disagree with this conclusion and view extraterritorial economic restrictions as any measure that implicates foreign entities outside the issuing state and the targeted state.¹⁷ For the U.S., if there is a nexus of activity connecting the prohibited conduct to the U.S., it is enough to trigger sanctions.¹⁸ The countries that have imposed their own sanctions regimes against countries such as Iran tend to limit themselves to primary sanctions.¹⁹ Based on their differing perception of extraterritoriality, other countries, including many of the U.S.’ trading partners, believe that the U.S. has imposed “unjustified extraterritorial measures that infringed on their sovereign economic rights.”²⁰ Despite international backlash, the U.S. continues to employ broad economic sanctions claiming that they are not extraterritorial by definition.²¹

In addition to the extraterritorial argument, the U.S. justifies its expansive sanctions regimes on national security concerns.²² However, the U.S. record on endorsing secondary sanctions has been inconsistent. For example, when the Arab League imposed a boycott against Israel that had extraterritorial implications, the

14. Rathbone, et al., *supra* note 1, at 1070.

15. *Id.* at 1071.

16. *Id.*

17. Helal, *supra* note 2, at 85.

18. Rathbone, et al., *supra* note 1, at 1061.

19. Edward J. Krauland & Anthony Rapa, *Between Scylla and Charybdis: Identifying and Managing Secondary Sanctions Risks Arising from Commercial Relationships with Iran*, 15 BUS. L. INT’L 3, 4 (2014).

20. Rathbone, et al., *supra* note 1, at 1071.

21. Helal, *supra* note 2, at 103.

22. Meyer, *supra* note 7, at 909. Even under the guise of security, however, sanctions against third parties that deal with Iran are legally tenuous. *Id.* at 941.

U.S. opposed it.²³ In contrast, the U.S. has actively pursued its own secondary sanctions against Iran starting in the 1990s, claiming that primary sanctions were not enough to achieve national security goals.²⁴ The U.S. dramatically shifted its sanctions strategy in 1996 after Iran successfully negotiated around the U.S. to develop offshore drilling with a French company.²⁵ Conoco Philips, the original partner for the project, withdrew from the contract due to concerns about U.S. measures prohibiting companies from managing or financing oil development in Iran.²⁶ Iran was able to circumvent the U.S. and move ahead with the project anyway.²⁷ In response to this, the U.S. strengthened the existing sanctions in order to better achieve its foreign policy objectives in Iran.²⁸ The full background and development of the U.S. sanctions regime is described in Part III. The U.S. policy change alarmed the international community and prompted many countries to implement measures that would counteract U.S. laws.²⁹

Several countries enacted blocking statutes in retaliation against the U.S. for imposing broader sanctions that threatened international trade.³⁰ Although the United Kingdom had a blocking statute in place before the extraterritorial expansion of sanctions against Iran, many other countries followed suit in response to the U.S. stance towards Iran.³¹ These statutes were designed to bar compliance with U.S. sanctions if the conduct adversely impacted the blocking country's ability to trade.³² Blocking statutes reflect the international attitude towards the use of secondary sanctions, which the United Nations (UN)

23. Rathbone, et al., *supra* note 1, at 1070.

24. *Id.* at 1069–70.

25. *Id.* at 1084.

26. *Id.* at 1083.

27. *Id.* at 1084.

28. *Id.*

29. *Id.* at 1070.

30. *Id.*

31. *Id.* at 1071.

32. *Id.* at 1070.

reiterated by criticizing the unilateral, extraterritorial actions taken by the U.S.³³

When the U.S. adopted a more aggressive sanctions strategy that allowed for extraterritorial application, it moved away from the accepted multilateral approach approved by the UN.³⁴ The status of secondary sanctions in the context of international law is uncertain.³⁵ While many scholars consider these measures to be illegal, others argue that there may be a need for extraterritorial sanctions with limits.³⁶ “The conventional wisdom holds that secondary sanctions are an impermissible ‘extraterritorial’ extension of U.S. jurisdiction that impinges on the rights of neutral states to regulate their own citizens and companies.”³⁷ As discussed above, the problem with these restrictions is the basis of jurisdiction. The U.S. points to national security as a justification for employing secondary sanctions, but without a “terrinnational”³⁸ connection to the U.S., this position is tenuous.³⁹ Broader international cooperation is the preferred strategy and the U.S. is largely alone in its endorsement of secondary sanctions.⁴⁰ When the Trump Administration reimposed secondary sanctions against Iran following the withdrawal from the Joint Comprehensive Plan of Action (JCPOA), the U.S. broke from the established UN approach

33. *Id.* at 1072–73.

34. Brian Egan & Meredith Rathbone, *Coping with the U.S. Secondary Sanctions Tsunami*, WORLD ECR, 16, <https://www.steptoe.com/images/content/1/3/v2/138504/SecondarySanctionsTsunami-WorldECR.pdf> (last visited Aug. 17, 2021) (emphasizing that the unilateral action by the U.S. was a departure from the UN’s approach).

35. Meyer, *supra* note 7, at 932.

36. *Id.* at 909.

37. *Id.* at 932–33.

38. Terrinnational is a term coined by Jefferey A. Meyer to mean the following: of a combination of territorial and national jurisdiction. *See* Meyer, *supra* note 7.

39. CHRISTOPHER A. CASEY, ET AL., CONGR. RSCH. SERV., R45618, THE INTERNATIONAL ECONOMIC EMERGENCY POWERS ACT: ORIGINS, EVOLUTION, AND USE, 18–19 (2020) (explaining that in the wake of the Iranian Hostage Crisis in 1979, President Carter and every U.S. President since has relied on IEEPA to impose broad economic restrictions on Iran); *see* Helal, *supra* note 2, at 108 (suggesting that the legality of secondary sanctions is not certain because there is less of a traditional jurisdictional connection between the actor and the sanctioning state).

40. *See* Rathbone, et al., *supra* note 1, at 1074.

towards nuclear containment in Iran and implicated entities belonging to member states in process.⁴¹

B. *Cumulative Development of the Sanctions Regime Against Iran*

The economic sanctions against Iran that are in place today reflect the evolution of U.S. foreign policy goals. With the Executive Branch at the helm, the scope of U.S. sanctions continued to expand as traditional economic restrictions proved ineffective in slowing the development of Iran's energy and nuclear capabilities.⁴² The acts described below are cumulative, meaning the sanctions regime in place today is an incredibly complex web of rules spanning decades.⁴³ Companies face difficulties in successfully navigating this system that can change overnight through Executive Orders and OFAC actions.⁴⁴

1. *Carter-Era Sanctions*

In the wake of the Iranian Hostage Crisis, the Executive Branch led the sanctions efforts.⁴⁵ The President used executive orders combined with the International Emergency Economic Powers Act (IEEPA) to impose sanctions until Congress intervened with the Iran and Libya Sanctions Act in 1996.⁴⁶

2. *The Iran and Libya Sanctions Act (ILSA 1996)*

The ILSA targeted foreign investment in Iran's petroleum industry and the development of Iran's nuclear weapons

41. Robbie Gramer, et al., *U.S. Isolated at U.N. as Push to Ramp Up Pressure on Iran Fails*, FOREIGN POLY (Sept. 21, 2020, 3:05 PM), <https://foreignpolicy.com/2020/09/21/us-isolated-un-iran-snapback-sanctions-trump-pompeo/>.

42. KENNETH KATZMAN, CONG. RSCH. SERV., RS 20871, IRAN SANCTIONS, 38–39 (2020).

43. Raj Bhala, *Fighting Iran with Trade Sanctions*, 31 ARIZ. J. INT'L & COMPAR. L. 251, 264–66 (2014).

44. Kilpatrick, *supra* note 6, at 295 (noting that sanctions often change rapidly as a result of geopolitical developments, which creates compliance ambiguities for companies).

45. Bhala, *supra* note 43, at 256.

46. *Id.* at 267.

program.⁴⁷ The ILSA marked a step towards the broader secondary sanctions in place today because it included “foreign person” in its language.⁴⁸ This addition expanded the existing sanctions to third parties that dealt with the petroleum industry in Iran.⁴⁹ The ILSA also attempted to incentivize other countries to join the sanctions protocols and penalized those who did not comply by limiting their ability to invest within the U.S.⁵⁰ However, due to significant backlash from key U.S. trading partners, the U.S. did not routinely enforce the statute.⁵¹

3. *ILSA Extension Act (2001)*

The ILSA Extension Act lowered the amount of investment in Iran needed to trigger individual sanctioning.⁵² It also imposed more reporting requirements on the Executive Branch.⁵³ Lastly, and most interestingly, it announced that the U.S. would take into consideration the opinions of its allies, notably Israel and the Gulf Arab states, in deciding whether to terminate sanctions.⁵⁴ This demonstrated a possible attempt to make the economic restrictions more compatible with regional powers, but those states, predictably, were for the most part supportive of the U.S. measures.⁵⁵

4. *Iran Freedom Support Act (IFSA 2006)*

IFSA repealed the sanctions against Libya and allowed the President to waive sanctions against certain parties on a case-by-

47. *Id.* at 268; see Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541.

48. Bhala, *supra* note 43, at 256; see Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541, § 9, 14.

49. Bhala, *supra* note 43, at 269.

50. *Id.* at 275.

51. See Rathbone, et al., *supra* note 1, at 1085.

52. Bhala, *supra* note 43, at 278.

53. With the ILSA Extension Act, Congress mandated that the President report on three questions: (1) were the sanctions achieving their national security objectives; (2) what effect did the sanctions have on humanitarian in Iran, a country in which a sanctioned person is located, or other countries; and (3) what impact did the sanctions have on other American security and economic interests. *Id.*

54. *Id.*

55. *Id.*

case basis.⁵⁶ However, it tightened sanctions in several ways. For example, it allowed the President to launch an investigation for the purpose of imposing sanctions on someone involved in the Iranian petroleum industry.⁵⁷ In addition, prior to IFSA there were relatively straightforward ways that Iran could pursue terminations of the sanctions against it.⁵⁸ IFSA made that process more difficult.⁵⁹ IFSA also changed the language from “foreign person” to “person,” further expanding the U.S.’s extraterritorial reach beyond primary sanctions.⁶⁰

5. *Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA 2010)*

Under President Obama, the U.S. underwent its largest expansion of secondary sanctions since ILSA with the passage of CISADA.⁶¹ CISADA initiated a trade embargo that prohibited the importation of Iranian goods to the U.S. and, vice versa, prohibited the exportation of U.S. goods to Iran.⁶² Although there were some exceptions permitting humanitarian goods to reach Iran, this Act was the most serious step taken to curb the development of weapons of mass destruction (WMDs) in Iran and to stop state-sponsored terrorism.⁶³ CISADA also authorized asset freezes and added humanitarian rights as a third goal to the sanctions regime.⁶⁴ In addition, the Act implicated “shipping services,” which, for the first time, pulled the maritime industry directly into the scope of the sanctions regime.⁶⁵ The property provision also impacted shipping.⁶⁶ For example, the language implicated third-party insurers purely for their association with

56. *Id.* at 280; see Iran Freedom Support Act, H.R. 282, 109th Cong. § 201, 203 (2006).

57. *Id.* at 281.

58. *See id.* at 276–77, 281.

59. *Id.*

60. *Id.* at 283–84.

61. Rathbone, et al., *supra* note 1, at 1086.

62. Bhala, *supra* note 43, at 286–87.

63. *See* Rathbone, et al., *supra* note 1, at 1087–88.

64. Bhala, *supra* note 43, at 276, 292.

65. *Id.* at 291.

66. *Id.* at 296–97 (noting that property provision barred “transferring, withdrawing, transporting, importing, or exporting” property).

a vessel that had been connected somehow to a prohibited Iranian industry through a transaction or voyage.⁶⁷ However, CISADA offered some relief to insurers that exercised due diligence in enforcing these policies.⁶⁸

6. *Iran Threat Reduction and Syria Human Rights Act (2012)*

The Iran Threat Reduction and Syria Human Rights Act served to further strengthen CISADA by closing loopholes and specifying more types of private business conduct that were subject to sanctions.⁶⁹ Until this point, the shipping industry had been largely insulated from the effects of U.S. sanctions, unless companies were dealing with the Iranian energy sector. This act placed more restrictions on certain types of transactions and made it more difficult to insure cargo.⁷⁰ In addition, Congress clarified CISADA's due diligence requirement for parties shipping petroleum products. While a "controlling beneficial owner" had to have actual knowledge that their vessel was being used to ship petroleum connected to Iran, the standard was lower for all other parties involved in the transaction or voyage.⁷¹ For all other parties, constructive knowledge would be enough to trigger sanctions.⁷² This new measure broadened exposure for the entire shipping industry and raised further questions about how much due diligence would be necessary to avoid sanctions.⁷³

7. *Iran Freedom and Counterproliferation Act (2012)*

This legislation targeted shipping in broader terms by including anyone connected to Iranian shipping and ports.⁷⁴ While shipping had already been affected by previous legislation,

67. *Id.* at 297.

68. *Id.* at 291.

69. *Id.* at 311–13.

70. *Id.* at 326.

71. *Id.* at 318.

72. *Id.*

73. *See id.*

74. *Id.* at 340.

the Iranian Freedom and Counterproliferation Act heightened compliance standards.⁷⁵

8. *The Joint Comprehensive Plan of Action (JCPOA 2016)*

U.S. economic sanctions were intended, in part, to stop Iran's development of WMDs, and in 2015 the United Nations Security Council (UNSC) member states, along with Germany and the European Union, were finally able to take substantive steps in achieving that goal with the JCPOA.⁷⁶ Under the JCPOA, Iran agreed to cooperate with oversight protocols and regulation of its nuclear projects in exchange for sanctions relief.⁷⁷ In accordance with the agreement, the U.S. lifted secondary sanctions against Iran, but maintained its primary sanctions on direct U.S. trade with Iran.⁷⁸ When it was adopted, the JCPOA was viewed as a landmark deal and a significant step forward in curbing Iran's nuclear proliferation.⁷⁹ However, in 2018 the Trump Administration formally withdrew the U.S. from the JCPOA in effort to persuade Iran to renegotiate the terms of the deal.⁸⁰ All countries that are party to the JCPOA were strongly opposed to the U.S. withdrawal and forceful reimplementation of secondary sanctions.⁸¹ The Trump Administration vigorously enforced these new sanctions, which was a shift from prior administrations.⁸² While President Biden has pledged to rejoin the JCPOA, the

75. See Iran Freedom and Counterproliferation Act, 22 U.S.C. §8803(a) (2012) (describing Congress's findings and concerns with respect to the shipping and energy industries). The statute's sweeping language indicates that Congress viewed these sectors as a means of facilitating nuclear proliferation, thus requiring conduct-specific sanctions. See *id.*

76. Kali Robinson, *What is the Iran Nuclear Deal?*, BACKGROUNDER, COUNCIL ON FOREIGN RELATIONS (Aug. 18, 2021), <https://www.cfr.org/backgrounder/what-iran-nuclear-deal>.

77. *Id.*

78. KATZMAN, *supra* note 42, at 39.

79. Robinson, *supra* note 76.

80. *Id.*

81. KATZMAN, *supra* note 42, at 42.

82. Ami Daniel, *When it Comes to Sanctions, Grey is the New Normal*, WINDWARD (July 11, 2019), <https://windward.ai/blog/steering-clear-of-sanctions/> (emphasizing remarks from a former senior sanctions official about the heightened attention to enforcement of sanctions regulations).

process of re-entering that agreement and whether it can be done at all remain unclear.⁸³

C. Implementation and Enforcement

OFAC, an arm of the U.S. Department of the Treasury, is responsible for implementing the sanctions legislation described above.⁸⁴ OFAC's official mission is to administer and enforce "the economic and trade sanctions based on U.S. foreign policy and national security goals."⁸⁵ Congress has consistently delegated the power to implement sanctions to the Executive Branch through the IEEPA, the Trading with the Enemy Act (TWEA), and the Export Administration Act (EAA).⁸⁶ Thus, OFAC has accrued substantial power and flexibility in enforcing U.S. economic sanctions.

The sanctions against Iran are comprehensive, providing OFAC with a wide range of implementation options.⁸⁷ Iran is subject to both geographic and targeted sanctions.⁸⁸ Geographic sanctions are aimed at entire governments, while targeted sanctions restrict trade with specific entities or individuals.⁸⁹ Entities, individuals, and organizations that have violated sanctions or have engaged in sanctionable conduct, such as terrorism or WMD development, are placed on the Specially Designated Nationals list (the SDN list).⁹⁰ Property, which includes ships, may also be designated.⁹¹ In addition to these measures, OFAC has broad ability to block financial transactions

83. See *The Presidential Candidates on the Iran Nuclear Deal*, COUNS. ON FOREIGN RELATIONS, (July 30, 2019, 8:00 AM), <https://www.cfr.org/article/presidential-candidates-iran-nuclear-deal> (summarizing President Biden's position on the JCPOA); see also discussion *infra* note 177.

84. Court E. Golumbic & Robert S. Ruff III, *Leveraging the Three Core Competencies: How OFAC Licensing Optimizes Holistic Sanctions*, 38 N.C. J. INT'L L. & COM. REG. 729, 769 (2013).

85. *Id.*

86. *Id.*

87. *Id.* at 770 n.227.

88. See *id.* at 770–71.

89. *Id.* at 733–34.

90. Rathbone, et al., *supra* note 1, at 1058–59.

91. Treas. Reg., OFAC Iranian Transactions and Sanctions Regulations, 31 C.F.R. app. § 5 (2018).

involving designated entities or individuals, such as the Iranian Revolutionary Guard Corps.⁹² As the U.S. sanctions regime has broadened in scope, especially after its withdrawal from the JCPOA, OFAC has steadily increased enforcement for violations.⁹³

OFAC uses civil and criminal penalties as one of its primary enforcement mechanisms.⁹⁴ When OFAC believes that a violation has occurred, the agency will send a pre-penalty notice, marking a 30-day period in which the respondent has the opportunity to establish that there was no breach.⁹⁵ If the suspected violation has not been resolved, then OFAC will send a formal penalty notice stating the amount due and the payment deadline.⁹⁶ The respondent may then appeal the penalty in federal court.⁹⁷ With the expansion of secondary sanctions and the sweeping measures of CISADA, the private sector saw a dramatic increase in penalties.⁹⁸ Between 2006 and 2008, OFAC imposed penalties amounting to around \$48.56 million.⁹⁹ In contrast, OFAC brought fewer actions between 2009 and 2011, but imposed penalties totaling \$1.064 billion.¹⁰⁰ This demonstrates that OFAC has the ability to control the severity with which sanctions are implemented. The shipping industry in particular faces heightened scrutiny as OFAC continues to crack down with the reimposition of secondary sanctions.¹⁰¹

92. Golumbic & Ruff, *supra* note 84, at 761.

93. Aiysha Hussain & Timothy O'Toole, *Sanctions and Export Controls Enforcement Trends*, in INTERNATIONAL COMPARATIVE LEGAL GUIDE: SANCTIONS 2020 21, 21 (Roberto J. Gonzalez & Rachel M. Fiorill eds., Glob. Legal Grp. 2019), https://www.millerchevalier.com/sites/default/files/resources/Reprints/ICLG_Sanctions-and-Export-Controls-Enforcement-Trends.pdf.

94. Golumbic & Ruff, *supra* note 84, at 772.

95. *Id.* at 773.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 773–74.

100. *Id.* at 774.

101. Jonathan Saul, et al., *U.S. Sanctions Advisory Raises Hurdles for Global Maritime Industry*, REUTERS (May 27, 2020, 11:22 AM), <https://www.reuters.com/article/us-usa-sanctions-maritime/u-s-sanctions-advisory-raises-hurdles-for-global-maritime-industry-idUSKBN2332LG>.

D. Maritime Compliance

Concerned about compliance within the shipping industry, OFAC issued a series of maritime advisories, outlining best practices to help avoid a vessel designation on the SDN list.¹⁰² An SDN designation makes it impossible for a ship to call on U.S. ports and could complicate its registration with the flag country.¹⁰³ These advisories placed an unprecedented burden on foreign companies by requiring heightened due diligence regarding the parties involved in every transaction, voyage, and shipment.¹⁰⁴

The OFAC advisories issued to the shipping community have been the source of much confusion.¹⁰⁵ Although they put the industry on notice of the seriousness of sanctions violations, the advisories have created uncertainty about how much of a connection or even suspicion of a connection to Iran is needed to trigger sanctions or a vessel designation.¹⁰⁶ Compliance has become difficult not only because the requirements themselves have become more stringent, but also because exercising due diligence to discover connections to Iran is complicated.¹⁰⁷ For example, if designated Iranian nationals own more than 50% of a company that is somehow involved in a transaction, the other companies participating in that transaction would be liable.¹⁰⁸ Ascertaining whether a company registered in Oman under Omani nationals is truly owned in majority by individuals connected to Iran is no small task. Shipping transactions often involve several parties and it is unclear what level of due diligence

102. Timothy Gardner, et al., *U.S. Issues Maritime Advisory on Sanctions for Ship Owners, Insurers*, INS. J., (May 15, 2020), <https://www.insurancejournal.com/news/national/2020/05/15/568732.htm>.

103. Greg Miller, *U.S. Sanctions Target Greek Tankers Loaded with Venezuelan Crude*, AM. SHIPPER (June 2, 2020) <https://www.freightwaves.com/news/us-targets-greek-tankers-carrying-venezuelan-crude>.

104. Saul, et al., *supra* note 101.

105. Gardner, et al., *supra* note 102.

106. Krauland & Rapa, *supra* note 19, at 5.

107. *Id.*

108. Miller, *supra* note 103.

is required to absolve U.S. penalties if a mistake is made in researching a particular party.¹⁰⁹

The issuance of the maritime advisories marked a shift in the severity of enforcement within the shipping industry. As the advisories warned, there was a rise in enforcement actions in 2019.¹¹⁰ In one of the most high-profile cases, the U.S. seized the oil onboard four Greek-owned vessels headed for Venezuela in August 2020.¹¹¹ This was purportedly the largest seizure of Iranian oil to date.¹¹² OFAC justified this action based on the oil's connection to the Iranian National Guard, which is a designated terrorist organization.¹¹³ In response to this incident, Iranian military officials boarded the *Wila* in the Gulf of Oman supposedly in search of the seized oil.¹¹⁴ However, Iran claimed that it was simply an act of retaliation against the U.S. for enforcing secondary sanctions.¹¹⁵ These events demonstrate the consequences that shipping companies face for violations as well as the diplomatic repercussions of the new sanctions protocols.

III. ANALYSIS

The cumulative development of secondary sanctions has expanded the reach of U.S. law and is beginning to reshape global business as a result. Although the impact that this expansion has on free trade remains unclear, it undoubtedly poses a threat to the liberal trade policies that have developed since World War

109. Gardner, et al., *supra* note 102 (discussing the legal confusion over federally issued guidelines intended to explain how ship owners and insurers may avoid sanctions penalties).

110. Hussain & O'Toole, *supra* note 93, at 21 (explaining that following the U.S. the withdrawal from the JCPOA, the number of enforcement actions increased under the newly reimposed secondary sanctions).

111. Lara Jakes & Eric Schmitt, *In Diplomatic Doubleheader, U.S. Seizes Iranian Fuel From Ships Headed to Venezuela*, N.Y. TIMES, (Aug. 14, 2020), <https://www.nytimes.com/2020/08/14/world/middleeast/trump-iran-venezuela-fuel-tankers.html>.

112. *Id.*

113. *Id.*; see also U.S. Dep't of Treasury, OFF. OF FOREIGN ASSET CONTROL, SPECIALLY DESIGNATED NATIONALS LIST (Mar. 5, 2021).

114. Jakes & Schmitt, *supra* note 111.

115. *Id.*

II.¹¹⁶ The speed with which the regulations can change creates instability in the global business landscape and raises questions about what companies are expected to do in order to avoid sanctions.¹¹⁷ The maritime industry in particular faces a high degree of uncertainty even though companies and insurance providers have begun developing internal measures to cope with the rapidity of change.¹¹⁸ Given the uncertainty that the U.S. sanctions regime has created, the U.S. should take steps to minimize the impact on trade and provide clear guidelines for companies that, in good faith, try to comply. This would not only benefit businesses, but it would help protect the institutions that facilitate free trade.

A. *Free Trade Fissures*

The United States' pervasive sanctions regime threatens to undermine the free trade policies that the global community has established collectively. Liberal economic thinkers have championed free trade as the ultimate solution to avoiding warfare because countries are less likely to engage in armed conflict against their trading partners.¹¹⁹ Preserving free trade promotes diplomatic and economic stability.¹²⁰ There remains controversy over whether economic sanctions are compatible with free trade.¹²¹

116. BALDWIN, *STRUCTURE AND EVOLUTION OF U.S. TRADE POLICY*, *supra* note 3, at 10-12.

117. Kilpatrick, *supra* note 6, at 295. While insurance companies have begun developing these new measures to hedge risk, the jurisprudence surrounding the validity of contractual tools such as sanctions clauses is sparse. The available interpretations of these clauses have been primarily through U.K. courts. *Id.* at 296-97. *See also* discussion *infra* Section III, Part B, Subheader 2.

118. Kilpatrick, *supra* note 6, at 298.

119. Maimon Schwarzschild, *Free Trade Then and Now, or Still Manchester United*, 52 SAN DIEGO L. REV. 1067, 1067 (2015).

120. *Id.* at 1071-72.

121. David A. Baldwin, *Prologamena to Thinking about Economic Sanctions and Free Trade*, 4 CHI. J. INT'L L. 271 (2003).

1. *Permissibility of Sanctions Under Multilateral Free Trade Agreements*

Based on the language of the General Agreement on Tariffs and Trade (GATT)¹²², economic sanctions are not contrary to free trade.¹²³ GATT is the core instrument that defines free trade policies and prohibits many types trading controls between member states.¹²⁴ Since sanctions are a form of economic regulation, it is important to consider them in the context of GATT, which memorializes the global commitment to open markets. Under GATT, sanctions based on national security concerns are permissible because they are intended to protect the institutions that facilitate trade.¹²⁵ The national security exception does not specify what types of action would be exempt from GATT's general principles, and therefore scholars debate what would qualify under that language.¹²⁶ One view argues that "although sanctions may conflict with free trade in the short run, they may facilitate it in the long run."¹²⁷ This argument may be true in regard to primary sanctions, but it does not necessarily hold true for secondary sanctions which are of a wholly different nature.

2. *Impacts of Secondary Sanctions on Free Trade Policy*

While traditional economic sanctions are considered exceptions to GATT policies, secondary restrictions present a more forceful form of coercion with much broader implications. The lack of consensus behind these measures suggests that

122. *General Agreement on Tariffs and Trade*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/General-Agreement-on-Tariffs-and-Trade> (last visited Aug. 31, 2021).

123. *Id.* at 279. Article XXI of GATT recognizes actions necessary to protect national security interests as exceptions to the agreement's free trade principles. *General Agreement on Tariffs and Trade*, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

124. Baldwin, *supra* note 121, at 280.

125. *Id.*

126. *See generally* *General Agreement on Tariffs and Trade*, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (containing the national security exception).

127. Baldwin, *supra* note 121, at 280. The JCPOA is an example of this because eventually the sanctions against Iran did lead to a multilateral nuclear deal. *See* discussion *infra* note 127.

extraterritorial sanctions are incongruent with the widely recognized rules of free trade.¹²⁸ The U.S. has worked with other countries to develop the institutions and agreements that promote the free flow of goods globally.¹²⁹ These structures depend on a broad sense of obligation from member countries in order to be successful.¹³⁰ Thus, by imposing secondary sanctions with far-reaching consequences, the U.S. has threatened this system of free trade that relies so heavily on global collaboration.¹³¹ The general disapproval of extraterritorial measures, particularly by the E.U., reveals the rifts in cooperation between global powers.¹³² Unilateral U.S. action leaves international institutions and multilateral agreements fragile because their legitimacy depends on consensus.¹³³

The United States' reimposition of secondary sanctions after its withdrawal from the JCPOA has escalated tensions with Iran,¹³⁴ which is precisely the opposite effect that sanctions are supposed to have. Although sanctions themselves proved to be largely ineffective in altering Iran's behavior and curbing the country's WMD development, sanctions did contribute to Iran's willingness to negotiate the JCPOA.¹³⁵ In this sense, sanctions were effective to the extent that they promoted multilateral cooperation. It was the subsequent reinstatement of secondary sanctions that severely hindered the diplomatic progress made

128. See generally Helal, *supra* note 2, at 103 (noting the differences between primary sanctions under GATT and secondary sanctions).

129. BALDWIN, STRUCTURE AND EVOLUTION OF U.S. TRADE POLICY, *supra* note 3, at 11.

130. *Id.*

131. Reciprocity is an essential component of collaboration making trade liberalization successful. BALDWIN, STRUCTURE AND EVOLUTION OF U.S. TRADE POLICY, *supra* note 3, at 30.

132. Richard N. Haas, *Economic Sanctions: Too Much of a Bad Thing*, BROOKINGS (June 1, 1998) <https://www.brookings.edu/research/economic-sanctions-too-much-of-a-bad-thing/> (discussing the potential consequences of secondary sanctions and the impacts that they have already had on foreign relations).

133. See BALDWIN, STRUCTURE AND EVOLUTION OF U.S. TRADE POLICY, *supra* note 3, at 29 (emphasizing the consequences of unilateral action generally in the context of trade).

134. *Iran Nuclear Deal: 'Heated Rhetoric and the Heightened Risk of Miscalculation' Widen Differences*, UN News (Dec. 22, 2020), <https://news.un.org/en/story/2020/12/1080592>.

135. KATZMAN, *supra* note 42.

through collective action.¹³⁶ This unilateral move by the U.S. was costly for the private sector and unsupported by other countries.¹³⁷ In order to stabilize the relationship with Iran and improve the global business landscape, which encompasses shipping at its core, the U.S. should take steps to mitigate the damage done by the aggressive reimposition of secondary sanctions.

3. *Solutions: How to Protect Free Trade*

In order to protect free trade and the institutions that support it, the U.S. should pursue a multilateral approach to cooperation that emphasizes diplomacy. Joint collaboration has proven effective in de-escalating tensions and creating cooperation.¹³⁸ This type of cooperation could be accomplished by rejoining the JCPOA, which President Joe Biden has pledged to do, or through a new, similar agreement.¹³⁹ Restrictions on trade with Iran should remain limited to primary sanctions, which do not pose the same threat to free trade and national sovereignty as secondary sanctions.¹⁴⁰ If broader sanctions are necessary at all, then they should be implemented through a coordinated UN sanctions policy. A streamlined approach would make it easier for companies doing business all over the world to navigate the rules and track important changes.¹⁴¹ Companies should not bear the burden of achieving U.S. foreign policy goals.¹⁴² In addition, a

136. David J. Scheffer, *The Flawed U.S. Effort to Revive Iran Sanctions*, COUNCIL ON FOREIGN RELATIONS (Sept. 22, 2020, 8:00 AM), <https://www.cfr.org/article/flawed-us-effort-revive-iran-sanctions> (describing the possible economic and diplomatic retaliation in response to the U.S. reimposing secondary sanctions).

137. Haas, *supra* note 132.

138. See generally U.N.C.T.A.D. Secretariat, *Trade, Multilateral Cooperation and Sustainable Development*, TD/B/C.I/ U.N. Doc. 45 (Sept. 3, 2018) (describing the long-term and short-term benefits of multilateral cooperation in achieving global development).

139. KATZMAN, *supra* note 42.

140. John J. Forrer, *Secondary Economic Sanctions: Effective Policy or Risky Business*, ATLANTIC COUNCIL, 12 (May 2018), https://www.atlanticcouncil.org/wp-content/uploads/2018/05/Secondary_Sanctions_WEB.pdf (noting that secondary sanctions threatening a country's sovereignty may be ineffective in achieving the desired behavioral changes).

141. Haas, *supra* note 132.

142. *Id.*

sanctions policy backed by the UNSC and other UN member states would be more likely to alter behavior because there is strength in consensus, as seen with the JCPOA.¹⁴³ These policy changes would mitigate the uncertainty that the new U.S. sanctions have created within the shipping industry in particular, where businesses are heavily impacted by how trade policies affect the flow of goods globally.

B. *Reimposing Secondary Sanctions Has Created Compliance Uncertainty for the Shipping Industry*

As U.S. sanctions become increasingly complex, the global shipping industry often faces compliance difficulties because it is unclear what is expected. Although businesses have begun developing internal risk management tools, the rules can change so quickly that the preventative measures may not always be sufficient to protect a company from OFAC. Marine insurance, along with its required due diligence, and sanctions clauses are emerging as key areas of controversy in the face of the newly reimposed secondary sanctions.¹⁴⁴

1. *Marine Insurance*

Changes in the various economic sanctions regimes worldwide have, in particular, impacted the marine insurance sector, which provides critical services to the shipping industry.¹⁴⁵ The purpose of marine insurance is to spread risk, thereby expanding business opportunities and facilitating trade.¹⁴⁶ Together, Hull & Machinery policies and Protection & Indemnity Clubs (P&I Clubs) provide insurance coverage for vessels.¹⁴⁷ A hull policy is essentially property insurance and is limited to the

143. See Brian O'Toole, *Rejoining the Iran Nuclear Deal: Not So Easy*, ATLANTIC COUNCIL (Jan. 14, 2021), <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/rejoining-the-iran-nuclear-deal-not-so-easy/> (discussing the impact of the U.S. withdrawal from the JCPOA). With countries divided on how to move forward, the global community has little leverage to use to induce changes in Iran's behavior, which has only worsened since the U.S. withdrawal. *Id.*

144. Haas, *supra* note 132.

145. Kilpatrick, *supra* note 6, at 273.

146. *Id.* at 279.

147. *Id.* at 279–80.

value of the vessel itself.¹⁴⁸ P&I Clubs are associations of ship owners, where each member contributes to a monetary pool annually based on the number of vessels registered with the club.¹⁴⁹ This pool of money is available to members as a means of reimbursement for their covered losses in accordance with the club's rules.¹⁵⁰ Since marine insurance is an essential component of any shipping-related transaction, restricting access to it forces companies to comply with regulations, in theory.¹⁵¹

OFAC's maritime advisories provide a series of "Risk Mitigation Measures" to help insurers, and other companies involved in shipping-related services, comply with U.S. sanctions and avoid violations.¹⁵² The Iran advisory encourages companies to "conduct KYC ['Know Your Customer'] due diligence," which includes researching the companies, individuals, vessels, vessel owner, and charterers that are connected to the transaction.¹⁵³ While P&I Clubs have incorporated the KYC approach into their own systems, individual members must also perform these due diligence checks in order to avoid the possibility of losing their insurance or having a transaction blocked.¹⁵⁴ The KYC approach has been extended to knowing your customer's customer (KYCC), as an added precaution.¹⁵⁵ KYCC involves researching and understanding the immediate customer's clients and business relationships.¹⁵⁶ Given the high standard of due diligence that

148. *Id.* at 279.

149. *Id.* at 280.

150. *Id.*

151. *Id.* at 273.

152. See U.S. DEP'T. OF TREASURY, OFFICE OF FOREIGN ASSET CONTROL, OFAC ADVISORY TO THE MARITIME PETROLEUM SHIPPING COMMUNITY: SANCTIONS RISK RELATED TO SHIPPING PETROLEUM AND PETROLEUM PRODUCTION FROM IRAN (2019) [hereinafter OFAC ADVISORY].

153. *Id.*

154. Kilpatrick, *supra* note 6, at 294–95; see also American Steamship Owners Mutual Protection and Indemnity Association Inc., UNITED STATES ISSUES GLOB. ADVISORY PROVIDING GUIDANCE TO MARITIME SECTOR TO PRECLUDE ILLICIT SHIPPING AND SANCTIONS EVASION (2020), https://www.american-club.com/files/files/cir_22_20.pdf [hereinafter GUIDANCE TO MARITIME SECTOR] (demonstrating the emphasis that P&I Clubs are placing on the KYC approach).

155. GUIDANCE TO MARITIME SECTOR, *supra* note 154.

156. OFAC ADVISORY, *supra* note 152.

KYC and KYCC require, the private sector is now in a position where it must essentially regulate itself.

The structure of secondary sanctions effectively shifts the burden of sanctions policing to private entities.¹⁵⁷ As discussed above, these sanctions are designed to have a long reach, which exposes a wider range of businesses to the consequences of violations. Due to the broadened threat of violation, more companies are now involved in monitoring in order to protect themselves from unintentional associations with a sanctioned individual or entity.¹⁵⁸ As the shipping community embraces the KYC approach and other risk mitigation measures suggested by OFAC, the industry assumes the role of implementing U.S. foreign policy.¹⁵⁹ Further complicating the compliance web is the lack of clarity surrounding proper due diligence research and procedures.

Although the maritime advisories offer some guidance for proper compliance, there is no concrete standard marking when the due diligence requirement has been satisfied so as to absolve the possibility of violations.¹⁶⁰ Even a thorough search may not reveal connections to designated individuals or entities.¹⁶¹ Private companies do not have access to the same breadth of information as the U.S. government. These gaps in information create compliance pitfalls for companies that make good faith efforts to exercise due diligence in accordance with the KYC approach. The dilemma is whether companies can ever do enough to fully protect themselves from unknowingly violating secondary sanctions. The

157. Kilpatrick, *supra* note 6, at 294; see also Ami Daniel, *The Data Science of Compliance*, WINDWARD (May 1, 2019), <https://www.wnwd.com/insights/the-data-science-of-compliance/> (confirming that the private sector now bears the burden of regulating itself, thus becoming the de facto OFAC enforcer).

158. Kilpatrick, *supra* note 6, at 295.

159. OFAC ADVISORY, *supra* note 152.

160. Ami Daniel, *Solving Sanctions Compliance and Due Diligence in Mar. Trade*, THE MAR. EXEC. (Feb. 17, 2021, 6:37 AM), <https://maritime-executive.com/editorials/solving-sanctions-compliance-and-due-diligence-in-maritime-trade?src=ilaw> (emphasizing the compliance and due diligence difficulties that the maritime industry faces in trying to avoid sanctions amidst complicated webs of parties).

161. Daniel, *supra* note 82 (explaining the difficulties in discerning the true identities of vessel owners and other sanctions evasion tactics that complicates due diligence).

U.S. has arguably made it impossible for companies to ensure their own compliance with the economic sanctions. Thus, although OFAC issued suggestions for best practices, businesses do not have substantive parameters to rely on in order to protect themselves.

Another potential side effect of limiting access to insurance is the social cost that could be involved. Without insurance, the cost of environmental damage from an oil spill, for example, would likely be externalized to the public.¹⁶² Even if the responsible party is held accountable, that party may not be in a financial position to properly mitigate damage.¹⁶³ Communities that rely on the ocean for their livelihood will be disproportionately impacted as a result.¹⁶⁴ Insurance has significant social utility in this respect because it protects people and the environment from unintended hazards.¹⁶⁵ The goal to deter certain types of business transactions should not come at a cost to society. Achieving sanctions compliance should be balanced against societal needs. Thus, the U.S. should be cautious in restricting insurance. As pressure mounts for insurers and vessel owners in terms of accountability, these entities have turned to creative contracting in order to combat sanctions repercussions.

2. *Sanctions Clauses*

Contractual sanctions clauses are becoming more popular as a means of compliance.¹⁶⁶ These clauses allow insurers to cancel coverage for suspicion of sanctions violations.¹⁶⁷ Alternatively, a

162. Kilpatrick, *supra* note 6, at 293.

163. *Id.*

164. See, e.g., Mark Schleifstein, *BP Oil Spill Cost Fishing Industry At Least \$94.7 Million in 2010*, THE TIME-PICAYUNE (June 27, 2016 5:30 PM) https://www.nola.com/news/environment/article_462806af-c1e5-5712-9608-31b125c43c8c.html (indicating the amount of damage suffered by commercial fishermen in the aftermath of the worst environmental marine catastrophe in recent history) (arguing that the infamous 2010 BP oil spill demonstrates the grave risks that shipping and related activities pose to the environment and underscores the importance of insurance and accountability).

165. Kilpatrick, *supra* note 6, at 297, 300–01.

166. *Id.* at 296.

167. *Id.*

clause such as this may appear in a charter party.¹⁶⁸ In this context, sanctions clauses primarily benefit the vessel owner by allowing repossession of the ship purely for suspicious conduct on the charterer's part. Suspicious behavior that would provide grounds for invoking a sanctions clause could include evidence of a planned ship-to-ship transfer, turning off the vessel's AIS tracking system, or something similar.¹⁶⁹ Since these clauses are a relatively new addition to policies and charters, jurisprudence regarding how courts will interpret them has not yet developed.¹⁷⁰ Whether an insurer or owner properly invoked the clause becomes a fact-intensive inquiry involving the specific language used and the details of the alleged misconduct.¹⁷¹ Although these clauses were developed to help increase and ensure compliance, they have to some extent introduced another layer of uncertainty without further case law on their interpretation.

C. *Solutions: Removing Compliance Uncertainty*

The U.S. has several policy options that would mitigate the chaos caused by the reimposition of secondary sanctions, while still allowing the U.S. to pursue its foreign policy objectives. On a broad level, the U.S. could return to a more multilateral approach in addressing its relationship with Iran. In addition, the political branches should avoid non-binding political agreements as a means of resolving issues and making agreements. Finally, if secondary sanctions must remain intact, OFAC is in the best position to create certainty for the private sector by defining expectations. These measures could potentially help improve U.S.

168. *Id.* at 297. See generally *Charter Party*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/charter-party> (last visited Mar. 7, 2021) (stating a charter party is a contract by which the vessel owner leases the vessel to the charterer for the purpose of transporting cargo and that there are several different types of charter parties available depending on the desired arrangement between the parties and the owner's level of involvement).

169. Kilpatrick, *supra* note 6, at 295.

170. *Id.* at 297.

171. See Eleanor Midwinter, *Guidance on Contractual Sanctions Clauses in Commercial Mar. Agreements*, INT'L L. OFF. (Dec. 18, 2018), <https://www.internationallawoffice.com/Newsletters/Shipping-Transport/United-Kingdom/Wikborg-Rein/Guidance-on-contractual-sanctions-clauses-in-commercial-maritime-agreements> (last visited Sept. 1, 2021).

diplomatic ties while simultaneously establishing a more succinct sanctions regime.

1. *The U.S. Should Reinstate a Multilateral Approach*

The shipping industry in particular would benefit from coordinated, multilateral regulations. As discussed above, a streamlined set of primary sanctions would provide stability for the private sector and avoid the extraterritoriality issues stemming from secondary sanctions.¹⁷² The dynamic and global nature of shipping exposes the industry to the political ebbs and flows of foreign affairs. As a result of this interconnection, companies that are involved in shipping in any capacity are heavily impacted by politics and conflict. Thus, maintaining a simplified approach, backed by international consensus, will help facilitate a more stable trade environment. Commercial shipping is a vital component of the global economy and the U.S. should ensure that the underlying regulatory structure is conducive to its continued success. This can be achieved through diplomacy and collaboration within key international institutions, such as the UN.

2. *The U.S. Should Avoid Non-Binding Political Agreements*

In attempting to establish more concrete standards for economic sanctions against Iran, the U.S. should focus on methods of agreement that are not susceptible to domestic political change. Much of the progress in improving the U.S. relationship with Iran, including the signing of the JCPOA, was accomplished through non-binding political agreement under President Obama.¹⁷³ The danger of relying on this type of agreement is that it is only in place for as long as that president is in office, unless a subsequent president renews it.¹⁷⁴ The

172. See discussion *infra* Section II, Part A (describing the issues arising from secondary sanctions that encroach upon on sovereignty).

173. STEPHEN MULLIGAN, CONG. RESEARCH SERV., LSB10134, WITHDRAWAL FROM THE IRAN NUCLEAR DEAL: AUTHORITIES AND IMPLICATIONS (2018).

174. *Executive Agreement*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/executive-agreement> (last visited Feb. 11, 2021).

domestic political whims of U.S. citizens should not impact U.S. foreign policy, which has a dramatic effect on the global business landscape. The U.S. is currently experiencing the consequences of achieving its foreign policy objectives through non-binding political agreements as the Biden Administration transitions into office.

Although President Biden has committed to rejoining the JCPOA, it is unclear whether it will be possible for the U.S. to do so.¹⁷⁵ The first challenge in this endeavor is understanding that the circumstances surrounding negotiation have fundamentally changed since 2015.¹⁷⁶ Tensions between the U.S. and Iran have escalated, and the two countries are no longer approaching the situation with the same sense of collaboration.¹⁷⁷ The U.S. has significantly less leverage to use to persuade Iran to meet its WMD development requirements.¹⁷⁸ Another hurdle is EU frustration over how the situation devolved under the Trump Administration.¹⁷⁹ The domestic political landscape could also be a barrier to rejoining the JCPOA or introducing something similar.¹⁸⁰ With less leverage and less international support, the U.S. faces serious challenges in recreating the original deal with Iran. The current state of the JCPOA demonstrates the difficulties in accomplishing foreign policy through non-binding political agreements. Going forward, this form of agreement should be avoided and replaced with agreements that are backed by Congress, which provide more stability.

175. O'Toole, *supra* note 143.

176. *Id.*

177. *Id.*

178. *Id.* See also Steven Erlanger, *Biden Wants to Rejoin the Iran Nuclear Deal, but It Won't Be Easy*, NY TIMES (Nov. 17, 2020), <https://www.nytimes.com/2020/11/17/world/middleeast/iran-biden-trump-nuclear-sanctions.html> (arguing that Iran has more leverage than it did in 2015 and will likely demand better terms for itself if President Biden attempts to rejoin the JCPOA and that with elections in Iran scheduled for June 2021, the political landscape could also impact how the U.S. approaches the situation).

179. O'Toole, *supra* note 143.

180. *Id.* (suggesting that domestic unity between the Democratic party may be difficult to achieve).

3. *OFAC Should Define Expectations*

While President Biden and Congress concentrate on the long-term political and economic relationship with Iran, OFAC could provide immediate solutions to the challenges in navigating the complex web of secondary sanctions. Issuing clear guidelines that outline the due diligence requirements would give companies a concrete method to ensure their own compliance. These parameters would allow shipping companies to conduct proper KYC research and remain within the bounds of the maritime advisories. In addition, OFAC could provide tools to help the private sector gather pertinent information about the parties involved in a transaction. Increasing transparency in this way would alleviate much of the uncertainty plaguing the maritime industry. Although secondary sanctions have proved to be more difficult to comply with, OFAC is in the best position to clarify and define expectations.

IV. CONCLUSION

The reimposition of secondary sanctions by the U.S. has caused international political turmoil and created compliance difficulties within the shipping industry specifically. This regression towards extraterritorial economic measures has raised sovereignty concerns because businesses without a connection to the U.S. are now directly exposed to U.S. penalties for prohibited transactions. In addition, the bedrock of free trade, which has become the global economic policy norm, is arguably under threat as a result of the tension that secondary sanctions create amongst states.

For the shipping industry in particular, avoiding OFAC violations requires more diligence checks and increased information gathering to satisfy the suggestions set out in the maritime advisories. The social costs of these political measures may not be fully realized yet. In order to surmount these business hindrances, the U.S. government should address the issues at a high level by establishing a diplomatic and more positive relationship with Iran. Crippling Iran's economy through aggressive enforcement of secondary sanctions can only go so far in achieving lasting behavioral change. This goal should be

accomplished through multilateral agreements backed by Congress, which would avoid the uncertainty surrounding the effectiveness of non-binding political agreements. Finally, OFAC should take immediate steps to mitigate the complexity of the U.S. secondary sanctions regime by providing the private sector with clear expectations and tools for conducting KYC research. These changes would help stabilize the maritime industry and lay the groundwork for collective action to address any perceived threats.

