Walking the Tightrope: Doing International Business in Light of the U.S. Iranian Transaction Regulations Concept of "Facilitation"

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A large variety of U.S. legal measures, including the Iran Libya Sanctions Act, the Syrian Accountability Act, and the Export Administration Regulations, contain ambiguous terms that, because the legal measures themselves are accorded extraterritorial reach, present substantial peril for non-American business enterprises that engage in international commercial transactions. The object of the current essay is to examine Section 560.208 of the Iranian Transaction Regulations (hereinafter ITR), one of the other provisions of U.S. law containing an important ambiguity that could affect business entities operating from foreign territory. Section 560.208’s lack of clarity emerges from the fact that it extends the ITR’s prohibitions on business dealings with Iran to the mere “facilitation” of transactions between Iran and persons outside the reach of the Regulations, whenever such transactions would have been prohibited if they had been conducted by those within the ITR’s jurisdictional reach. Given that the ITR, which applies to any “United States person,” might be read as extending its jurisdictional reach to foreign branches of businesses organized under the laws of the U.S., the importance of understanding what activities are covered by the concept of “facilitation” takes on a certain urgency for those engaged in commercial enterprises with the world’s most creative and industrious economic power.

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La question soulevée par la disposition des ITR dont il est question fut, indirectement bien que non explicitement, tragédie à l'occasion d'une poursuite judiciaire engagée par les autorités nord-américaines contre une personne américaine d'origine iranienne. L'information recueillie auprès de plusieurs sources indique que l'individu concerné fut accusé, notamment, de mettre en contact la Compagnie pétrolière nationale d'Iran, en tant qu'éventuel acheteur d'une technologie, avec des fournisseurs canadiens, peu de temps après que l'interdiction donnée à la compagnie américaine de technologie gazémieaque de naviguer dans cette même personne, d'exécuter de telles opérations soit devenue claire. Cet article explorera la signification et l'étendue conceptuelle du terme «faciliter» contenu dans les ITR. Il examinerait, notamment, si le terme exige un apport financier, contractuel, de production, de conception ou une assistance pour la livraison interdite à un acheteur iranien, ou s'il se satisfait de situations dans lesquelles l'acheteur frappé par l'interdiction est introduit par un fournisseur qui n'est pas couvert par les ITR ou, peut-être, en mettant ces acheteurs dans une position qui leur permet d'accéder à un annuaire commercial préexistant de fournisseurs de biens et de services. Notre attente est que le modestes spécimens offert par cet article puisse aider les décideurs économiques et leurs conseillers juridiques, lorsqu'ils réalisent des opérations impliquant l'Iran directement ou indirectement. L'importance du pétrole pour la communauté internationale et l'attention portée sur le position de l'Iran concernant les questions internationales sensibles, peuvent coïncider de même façon qu'augmente l'intérêt commercial qu'offre ce pays et, corrélativement, la vigilance à laquelle ces manifestations d'intérêt sont soumises.

This particular provision of the ITR was tangentially, though not explicitly, at issue in a recent prosecution by U.S. federal authorities of an American citizen of Iranian descent. Information obtained from various sources indicate that the individual concerned had been indicted for, among other things, connecting prospective technology purchasers from the Iranian National Oil Company with Canadian suppliers, after it had become clear that the individual's own U.S. gas technology company was prohibited from completing such transactions. The present essay will explore the precise dimensions of the ITR's conception of the term “facilitate”. It will examine, among other things, whether the term requires something like the provision of financial, contractual, production, design, or shipment assistance to a prohibited Iranian purchaser, or can be satisfied by situations where a prohibited purchaser is simply referred to a provider not subject to the reach of the ITR, or, perhaps, by merely putting such purchasers in a position where they are able to access generally available, pre-existing commercial listings of providers for the goods or services sought. The expectation is that the modest insights offered by this essay will assist business planners, and the legal counsel that advise them, whenever they are directly or indirectly involved in or contemplate transactions that implicate the country of Iran. The importance of oil to the world community and concerns about Iran's position on internationally destabilizing political issues are likely to coincide in a way that increases both business interest in that country and the scrutiny to which manifestations of such interest are subjected.

I. ORIGINS OF THE ITR'S USE OF "FACILITATE"

The Islamic revolution in Iran in early 1979, and the seizure of the U.S. embassy in Tehran in November of that same year, served to trigger serious U.S. regulatory impediments to commercial dealings between the two sovereign and formerly free-trading nations. The ITR of nearly a decade later, however, grew out of President Reagan's October 29, 1987 issuance of Executive Order (hereinafter E.O.) 12613, a response to the Iranian government's subsequent support for international terrorism and its actions against so-called non-belligerent ships plying the Persian Gulf. Based on E.O. 12613, which both aimed at prohibiting the importation into the United States of "goods or services of Iranian origin" and authorized this be accomplished through regulations "as may be necessary to carry out the purposes"
of the Executive Order\textsuperscript{14}, the original 1987 version of the ITR, though limited to imports alone, did indicate, in Section 560.202, that henceforth no person would be permitted to "order, buy, act as broker or facilitator for, receive, conceal, store, ..." or engage in a long list of other activities in connection with importation into the United States of any goods or services of Iranian origin\textsuperscript{15}. Thus, from the earliest possible date, the ITR contained a grammatical version of the term "facilitate" that appears in the currently enforceable codification of Section 560.208 of the regulations. Section 560.208, as written, prohibits United States persons, wherever located, from acting to "approve, finance, facilitate, or guarantee any transaction by a foreign person where the transaction ... would be prohibited ... if performed by a United States person or within the United States"\textsuperscript{16}. Clearly, by its very nature, the term "facilitate", in any of its variations, carries a broad connotation that would seem capable of encompassing a wide range of activities.

On March 15, 1995, in response to Iran's continued support of international terrorism, and its suspected pursuit of weapons of mass destruction, President Clinton ratcheted-up the pressure with the issuance of E.O. 12957\textsuperscript{17}. That E.O. prohibited relevant entities from contracting to provide "overall supervision and management" of petroleum development projects in Iran\textsuperscript{18} or "financing of the development" of such\textsuperscript{19}, and it also prohibited such entities from issuing a "guaranty of another person's performance" under any such contracts. And as with the earlier E.O., Clinton's order also authorized the adoption of regulations "as may be necessary to carry out the purposes" stated in 12957\textsuperscript{20}. Then on May 6, 1995, less than two months after the issuance of 12957, Clinton promulgated E.O. 12959, which further expanded the embargo on commercial dealings with Iran\textsuperscript{21}. Specifically, while leaving in-place President Reagan's prohibition on imports of goods or services\textsuperscript{22}, it extended the prohibition to "the financing of such importation"\textsuperscript{23}. It also struck at "exportation from the United States" or "the financing of such exportation" of goods, technology, or services to Iran, the government of Iran, or an entity owned or controlled by that government\textsuperscript{24}. Re-exportation to Iran of goods or services originally exported from the United States, and not substantially transformed or integrated into a product in another country, was also prohibited\textsuperscript{25}. Additionally, E.O. 12959 enunciated other prohibitions, but for present purposes the most important of these appeared in Section 1(f). The prohibition took aim at United States persons who

Le 15 mars 1995, en réponse au soutien non interrompu de l'Iran au terrorisme international et aux suspicions relatives à la poursuite de l'approvisionnement en armements de destruction massive, le président Clinton augmenta la pression en promulquant le Décret 12957. Ce Décret interdit aux entités concernées de conclure des contrats ayant pour objet «la supervision et la gestion d'ensemble» des projets de développement pétrolier en Iran ou de «financer le développement» desdits projets. Il interdit également à ces entités d'émettre une «garantie d'exécution par une tierce personne». À l'instar du décret présidentiel antérieur, le Décret de Clinton a autorisé l'adoption de toute réglementation «qui s'avérerait nécessaire pour atteindre les objectifs» fixés par le Décret 12957. Le 6 mai 1995, moins de deux mois après la promulgation du Décret 12957, Clinton promulgua le Décret 12959 qui étendit l'embargo aux opérations commerciales avec l'Iran. Plus particulièrement, tout en maintenant la prohibition du Président Reagan sur les importations de biens et des services, il étendit celle-ci au «financement desdites importations». Il s'est aussi attaqué aux «exportations depuis les États-Unis» ou «au financement de ces exportations» de biens, technologies et services à l'Iran, au gouvernement d'Iran ou à une entité appartenant ou contrôlée par ce gouvernement. Les réexportations à l'Iran de biens ou services exportés initialement des États-Unis et n'ayant pas souffert de transformations substantielles ou intégrés à un produit d'un autre pays, furent également interdites. De plus, le Décret 12959 énonça d'autres interdictions dont la plus pertinente pour nos propos est la Section 1(f). Cette interdiction visait les nationaux américains participant à
Les régulations d'application des Décrets promulgués par le Président Clinton furent pris le 11 septembre 1995. Concernant l'interdiction de « faciliter » des activités interdites par d'autres entités appartenant ou contrôlées, les régulations de 1995 n'ont fait que répéter la Section 1(f) du Décret 12959. La version préalable à la version actuelle de la Section 560.208 des ITR, à savoir les régulations de 1995, interdisait « l'approbation ou la facilitation » par une personne américaine, la conclusion ou l'exécution par une entité appartenant ou contrôlée de toute opération ou contrat impliquant des réexportations vers l'Iran, des importations depuis l'Iran, l'investissement en Iran ou en rapport avec le financement ou la garantie d'opérations ou de contrats interdits. Cette prohibition s'appliquait, néanmoins, uniquement si la personne américaine était autrement interdite de réaliser lesdits actes. Bien qu'aucune indication explicite n'apparaîsse dans les régulations de 1995 sur la signification exacte ou sur la portée du terme « facilitation », il apparaît clairement que son application était soumise à deux conditions. Premièrement, le destinataire des régulations devait être impliqué dans l'approbation ou la facilitation d'activités interdites par des entités lui appartenant ou contrôlées par lui. Deuxièmement, l'activité interdite réalisée par l'entreprise appartenant ou contrôlée devait impliquer une réexportation vers l'Iran, une importation depuis l'Iran, un investissement en Iran ou le financement ou cautionnement de ceux-ci.

Le 19 août 1996, le président Clinton a clarié la confusion qui existait entre les deux décrets et les régulations d'application régissant les relations commerciales avec l'Iran, par la promulgation du Décret présidentiel 13059. Une des plus importantes clarifications était liée aux réexportations directes ou indirectes des biens, technologies ou services initialement exportés à une personne dans un pays tiers et non soumis aux interdictions imposées aux relations commerciales avec l'Iran. Le Décret présidentiel 13059 prévoyait expressément que la réexportation par une personne américaine « où qu'elle soit » ou la réimportation depuis un pays tiers par « une personne engaged in "the approval or facilitation" of the entry into or performance of otherwise prohibited transactions or contracts, financing or guarantees, of any entity owned or controlled by the United States person. This clearly differed from the current language in Section 560.208 of the ITR, in that Section 1(f) of the E.O. required that "facilitation" be connected with entities actually owned or controlled by the facilitator. And as with E.O. 12957, Executive Order 12959 also provided authority to adopt regulations "as may be necessary to carry out the purposes" of the Order.

Regulations implementing the Executive Orders issued by President Clinton appeared on September 11, 1995. With respect to the matter of prohibiting subject entities from engaging in the “facilitation” of impermissible business activities by other owned or controlled entities, the 1995 regulations went no further than to reiterate Section 1(f) of E.O. 12959. In the earliest predecessor to Section 560.208 of the current version of the ITR, the 1995 regulations prohibited “the approval or facilitation”, by a United States person, of entry into or performance by a owned or controlled entity, of any transaction or contract involving re-exports to, imports from, or investments in Iran, or relating to the financing or guaranteeing of prohibited transactions or contracts. This prohibition applied, however, only if the United States person would otherwise be prohibited from undertaking such. While no explicit indication appeared in the 1995 regulations about the precise meaning or scope of the term “facilitation”, it is clear that the applicability of the term was conditioned by two requirements. First, one subject to the regulations must be involved in approving or facilitating impermissible activity by an owned or controlled entity. And second, the impermissible activity which the owned or controlled entity undertook must involve re-exportation to, importation from, or investment in Iran, or the financing or guaranteeing of such.

On August 19, 1997, President Clinton clarified confusion that reportedly had emerged with regard to his two earlier Orders and the implementing regulations concerning business dealings with Iran. The clarification came in the form of E.O. 13059. One of the most prominent clarifications had to do with the direct or indirect re-export of goods, technology, or services originally exported to someone in a third country and not subject to the prohibitions imposed on business dealings with Iran. E.O. 13059 explicitly made clear that re-export by a United States person, "wherever located", or re-export from a third country by "a person other
than a United States person" could fall within the ambit of prohibited activities. On the important matter of actions facilitating business dealings between Iran and those not otherwise subject to the United States' trade prohibitions, Sections 2(d) and (e) of 13059 provided significant illumination. The former prohibited all transactions or dealings in goods or services from or destined for Iran by United States persons, wherever located, "including purchasing, selling, transporting, swapping, brokering, approving, financing, facilitating, or guaranteeing...". The latter, in direct and most proximate relation to the current version of Section 560.208 of the ITR, prohibited "any approval, financing, facilitation, or guarantee by a United States person, wherever located, of a transaction by a foreign person where the transaction would be prohibited...if performed by a United States person or within the United States." Here, for the first time, the concept of "facilitate" appeared in precisely the same way employed in the presently controlling iteration of the Iranian Transaction Regulations. Concern was expressed not just with facilitation of imports from Iran, as was the case with E.O. 12613 in 1987, or transactions undertaken by those owned or controlled by United States persons, as was true with E.O. 12959 in 1995. Rather, activities of United States persons that served to "facilitate" a transaction between Iran and any other entity, no matter where located, were said to violate the regulatory prohibitions established by the Order, whenever the activities, if performed by the United States person or undertaken within the United States, would have contravened 13059.

On April 26, 1999, implementing regulations were adopted that captured verbatim the current Section 560.208 of the ITR. From a historical perspective, one should note that, both shortly before the issuance of E.O. 13059, as well as after the time following it, and even subsequent to the 1999 adoption of the regulations implementing that Executive Order, various other amendments have been made to the Iranian Transaction Regulations. These amendments have covered subjects such as reporting requirements associated with oilfield affiliates, treatment to be accorded to the payment of awards won in law suits and the provision of legal services, transactions involving agricultural products, medicines and medical equipment, and restrictions on trade in foodstuffs and carpets. None of these, however, depict progressions in the development of the concept of "facilitate", or help elucidate the meaning of that seemingly broad term.

IN LIGHT OF THE US IRANIAN TRANSACTION REGULATIONS CONCEPT OF "FACILITATION"

Le 26 avril 1999, les régulations d'application adoptées contenaient mot pour mot l'actuelle Section 560.208 des ITR. D'un point de vue historique, il doit être souligé que peu avant la promulgation du Décret 13059, ainsi qu'après l'adoption des régulations d'application de ce Décret, de nombreux amendements aux Iranian Transaction Regulations ont été adoptés. Ces amendements couvrent des sujets tels que les obligations d'informer pour les filiales pétrolières, le traitement qui doit être accordé au paiement des sentences arbitrales favorables et à la prestation de services juridiques, les opérations portant sur des produits agricoles, des médicaments et de l'équipement médical et des restrictions au commerce de denrées alimentaires et de tapis. Toutefois, aucun de ces amendements n'apporte d'avancée majeure dans l'évolution du concept de « faciliter » ni n'aide à éloigner la signification de ce terme en apparence très vague.
II. INTERPRÉTATION TEXTUELLE
DE « FACILITER »

Il ne fait aucun doute que le terme « faciliter » englobe un vaste ensemble d’activités qui entrent dans le domaine d’application de la Section 560.203 des interdictions des ITR. Toutefois, avant de présenter comment le terme « faciliter » utilisé dans les versions successives des ITR a vu sa portée s’étendre, et d’expliquer comment son utilisation courante et sa signification essentielle donnent préférence à une lecture large, il est clair que l’analyse préalable des origines du terme « faciliter » démontre que son développement est lié à l’accroissement de la sphère des relations commerciales. Par le biais de réitérations, les ITR ont évolué passant de l’interdiction des importations iraniennes à l’interdiction des opérations permettant de superviser, gérer ou financer l’industrie pétrolière iranienne. Les ITR ont alors mis hors-la-loi le financement d’importations et d’exportations iraniennes et le financement des importations ou exportations de biens, services ou technologies américaines vers l’Iran, directement ou indirectement à travers des réexportations. Les ITR n’ont jamais connu de telle restriction.Pas une seule fois il n’y eu d’indices de retour en arrière. Inlassablement, le mouvement a été celui d’atteindre le plus grand nombre d’activités commerciales dans le sillage des activités interdites par les ITR. La portée de la plus éprouvée de cette constante expansion « en ligne droite » du régime réglementaire des ITR, est que les mots utilisés pour l’articulation de ce régime sont certainement mieux compris si on leur donne une lecture large, au lieu d’une lecture étroite.

S’agissant des versions du terme « faciliter » qui sont apparues dans les premières itérations des ITR, il est évident que les premières versions de 1987 visaient les citoyens américains qui servaient de « facilitateurs » pour les importations provenant de l’Iran. Cette vision fut postérieurement étendue en 1995 pour inclure ceux qui étaient les instruments de la « facilitation » de la réexportation, de l’importation, du financement ou du cautionnement des opérations avec l’Iran, pour autant qu’il s’agissait d’entités considérées comme appartenant ou étant contrôlées par une personne américaine. En d’autres termes, étaient visées les personnes américaines engagées dans la facilitation d’opérations interdites entre l’Iran et des entités étrangères appartenant à des personnes américaines ou contrôlées par eux. Selon le Décret 13059 (1997) et ses régulations d’application, la notion de « faciliter » fut une fois de plus étendue pour s’appliquer aux activités des personnes américaines résultant d’opérations réalisées par des entités étrangères sans aucune attaché avec des personnes américaines, lorsque ces opérations, si elles avaient été réalisées par des personnes américaines, auraient été interdites. En des termes quasiment identiques à ceux de la version actuelle de la Section 560.208, les

II. TEXTUAL INTERPRETATION OF “FACILITATE”

There can be little question that the term “facilitate” suggests a broad range of activities fall within the reach of what Section 560.208 of the ITR prohibits. But before considering how the versions of “facilitate” used in the various incarnations of the ITR have expanded over the years, as well as how both the term’s current usage and its essential meaning support the attractiveness of a broad reading, it is clear that the preceding review of the origins of “facilitate” demonstrates movement has been towards steadily increasing the ambit of commercial relationships within its grasp. By way of reiteration, the ITR has moved from prohibiting of Iranian imports, to striking at transactions supervising, managing, or financing the Iranian oil industry. It has then moved to outlawing the financing of Iranian imports and the export, or financing of export, of U.S. goods, services or technology to Iran, whether accomplished directly or through re-export. Never has there been a constriction of the ITR’s reach. On not one single occasion has there been even the slightest hint of backtracking. The movement has been unremitting in the direction of bringing an ever larger range of commercial activities within the ITR’s prohibitions. The plainest implication from such a constant and “straight-line” expansion of the ITR’s overall regulatory regime is that broad terms utilized in articulating that regime are probably best understood when they are accorded a broad, rather than a narrow reading.

Now with respect to the versions of “facilitate” that have appeared in earlier iterations of the ITR, it is apparent that the earliest version, in 1987, struck at those U.S. persons who served as “facilitator[s]” of imports from Iran. This was later expanded in 1995 to include those who were instrumental in the “facilitation” of re-export, import, investment, financing or guarantee transactions with Iran by entities considered owned or controlled by the subject United States person. In other words, aim was taken at U.S. persons engaged in the facilitation of prohibited transactions between Iran and foreign entities owned or controlled by the U.S. person. Under E.O. 13059 (1997), and its implementing regulations, “facilitate” was again extended, this time to apply to activities of United States persons that resulted in transactions being undertaken by wholly unrelated foreign entities, when such transactions would be prohibited if undertaken by a United States person. In language virtually identical to the current version of Section 560.208, the
E.O.'s implementing 1999 regulations hit "facilitation" activities of U.S. persons under such circumstances. The concept of "facilitator" suggests one who must at least have actively arranged for importation by another. In contradistinction, the concept of "facilitation", as it appears in the 1999 predecessor to Section 560.208, suggests the doing of anything that aids, assists, eases, or brings about the effectuation by another of a transaction that a U.S. person would be prohibited from undertaking. Similarly with the 1995 use of the term "facilitation"; one subject to the regulation's jurisdictional reach must help another complete a prohibited transaction. This is precisely the same term as employed in the current version of Section 560.208. Nonetheless, its use in the context of entities owned or controlled by the subject U.S. person leaves open the possibility that contemplated activities require a level of involvement in a prohibited transaction that exceeds more than just a company referring a client to another. The fact the "facilitation" must have been engaged in by an entity that has an ownership or control nexus with another who completes the transaction, makes it natural to think of the facilitative activity as involving something like managerial direction, command, or perhaps evasive subterfuge by a putative parent entity. With E.O. 13059 (1997), and implementing regulations in 1999, "facilitation" seems to have taken on a much less cramped, and more natural meaning. That version, reflected in the currently enforceable restatement of Section 560.208 of the ITR, suggests that a more open-ended and inclusive list of activities are cast as "off-limits" to entities subject to the Regulation's jurisdictional reach. Mere purchase referral would seem sufficient to stir governmental enforcement. Clearly, as the desire has mounted over the years to increase economic pressure on Tehran, and experience with earlier Executive Orders and versions of the ITR has been acquired, efforts have been made to widen the scope of what is considered forbidden "facilitation".

The very language of the ITR associated with "facilitate" seems to confirm the aggressive or broad approach that has just been suggested. First, in leaving "facilitate" undefined, it would not seem unreasonable to think a conscious decision had been made by lawmakers to avoid offering language that either expressly excluded activities some might regard as facilitative in nature, or raised the possibility that in choosing to enumerate specific activities, those left unmentioned might be read as somehow beyond the reach of the definition. In any event, the plain absence of any regulations d'application du Décrit présidentiel de 1999 ont fait entrer la « facilitation » des personnes américaines dans ces circonstances. Le concept de « facilitateur » suggère que la personne a pour le moins activement organisé l'importation par autrui. À l'inverse, le concept de « facilitation », tel qu'il est util-

Le vocabulaire des ITR associé au terme « faciliter » paraît confirmer l'appréhension large et offensive que l'on vient de suggérer. Prealtement, en ne définis-

Le vocable même des ITR associé au terme « faciliter » paraît confirmer l'approche large et offensive que l'on vient de suggérer. Premièrement, en ne définis-

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tion du terme "facilitar" lui assure une large assise. De plus, à la Section 560.208 des ITR, le terme "facilitar" est précédé de plusieurs dispositions qui suggèrent que le terme doit être lu de façon large. Ces autres dispositions consistent à interdire l'importation et le financement des importations en Iran des biens et services (ainsi que toute opération en rapport avec ceux-ci), les exportations ou financement des exportations vers l'Iran depuis les États-Unis de biens, services ou technologies, les réexportations vers l'Iran, depuis un pays tiers, de tout bien, service ou technologie exporté depuis les États-Unis et tout nouvel investissement en Iran. À la lumière de ces vastes interdictions, il paraît naturel d'interpréter d'une façon large l'interdiction additionnelle que constitue la facilitation d'activités. Après tout, lorsqu'un terme ayant un rayon d'action aussi grand est utilisé comme une adjonction aux interdictions très amples imposées aux opérations commerciales, force est de constater que son utilisation fut voulue comme un attrape-tout pour interdire aussi grand nombre d'autres opérations. Troisièmement, le terme "facilitar", tel qu'il apparait à la Section 560.208, est prolongé par la mention de toutes les sortes d'activités qui sont interdites, ce qui souligne le caractère approprié d'une interprétation large. Concrètement, la Section 560.208 empêche les personnes américaines, où qu'elles soient, de s'engager à « approuver, financer, faciliter ou cautionner » des opérations entre des tierces parties et des parties en Iran.

Au-delà de l'évolution vers un régime réglementaire plus étendu des ITR, de l'expansion au cours des dernières années de ce qui est couvert par les différentes versions du terme « facilitar » et de la façon dont cette expression a été employée à la Section 560.208 en vigueur des Iranian Transaction Regulations, il paraît qu'il s'agit là de l'essence même du mot « facilitar » qui implique la prohibition la plus complète et vaste possible. La signification normale et naturelle de ce terme inclut toutes les activités qui aident, assistent, facilitent, assurent ou augmentent l'accomplissement d'une tâche spécifique ou d'un objectif. Ceci peut être fait d'une façon directe, en aidant quelqu'un à satisfaire les conditions préalables en rapport avec une tâche ou un objectif. Ceci peut également être fait d'une façon indirecte, par l'élimination, la minimisation ou le contourment des embûchements ou des obstacles qui se dressent contre l'accomplissement d'une tâche ou d'un objectif.

Le fait que le vocable "facilitar" utilisé dans la Section 560.208 exige une telle lecture est par ailleurs réaffirmé par deux autres dispositions des ITR. Premièrement, la prohibition additionnelle provision defining “facilitate” would seem to connote great breadth for that term. Second, given Section 560.208’s context in the ITR, the term “facilitate” is preceded by several other provisions that impose prohibitions suggesting the term is to be read generously. Those other provisions prohibit importing or financing the importation of Iranian goods or services (as well as all transactions related to such), exporting or financing the exportation from the U.S. to Iran of goods, services, or technology, re-exporting to Iran from a third country any goods or technology originally exported from the United States, and making any new investment in Iran. In view of such sweeping prohibitions, it would only seem natural to construe the additional prohibition on facilitative activities as warranting a broad reading. After all, when such an inherently encompassing term is used as an adjunct to already sweeping prohibitions imposed on commercial dealings, it suggests the use is designed as a catch-all to prohibit a wide range of other dealings as well. And third, the term “facilitate”, as it appears in the very language of Section 560.208, is surrounded by several other sorts of activities said to be prohibited, thus emphasizing the potential appropriateness of according the subject term a broad interpretation. Specifically, Section 560.208 strikes at United States persons, wherever located, undertaking to “approve, finance, facilitate, or guarantee” transactions between third parties and parties in Iran.

Apart from the evolution of an increasingly broader regulatory regime under the ITR, the basic expansion over the years in what the various versions of the term “facilitate” have covered, and the way in which that term has been employed in the currently controlling Section 560.208 of the Iranian Transaction Regulations, it seems that the very essence of the word “facilitate” connotes a prohibition of the most thoroughgoing and comprehensive sort. The normal and natural understanding regarding that term would be that it includes any and all activities which aid, assist, help, ease, assure, or increase the likelihood of the accomplishment of a specific task or objective. This can come about directly, as through helping one satisfy preconditions connected with a task or objective. Or it can come about indirectly, as through the elimination, minimization, or circumvention of impediments or obstacles to the accomplishment of a task or objective.

The fact the term “facilitate” in Section 560.208 is to be accorded such a reading seems buttressed by two other provisions in the ITR. First, there is the ITR's additional...
prohibition on any activity or undertaking that "evades or avoids, or has the purpose of evading or avoiding" the basic prohibitions on commercial dealings with Iran. In other words, in an effort to make absolutely sure that subterfuge, deception, circumvention, or business legerdemain will not defeat or skirt the objective of making commercial dealings with Iran "off-limits", the Regulations proscribe not only all facilitative activities, but also those activities considered evasive. Second, there is the ITR provision that indicates Section 560.208 includes, "among other instances", activities involving a person subject to the Regulations altering its own or a foreign affiliate's policies or procedures to permit the affiliate to conduct prohibited transactions with Iran, or referring to a foreign person Iranian business opportunities otherwise prohibited to the entity making the referral. In such cases, the actions taken certainly aid, assist, or help the occurrence of transactions with Iran. And yet the provision's observation that 560.208 only includes these "among other instances" suggests the concept of "facilitate" encompasses even much more. Given this, it would appear somewhat strange to ascribe a narrow, confined reading to the word "facilitate". Indeed, there is reason to think it appropriate to view the term as capable of covering everything from a U.S.-based enterprise, or an overseas affiliate, actively arranging for Iranian purchasers to receive restricted items from foreign providers, to such an enterprise or affiliate simply offering information that might eventuate in such purchasers making their own arrangements with foreign providers.

III. ADJUDICATIVE AND QUASI-ADJUDICATIVE STATEMENTS INFORMING THE INTERPRETATION OF THE TERM "FACILITATE"

Several adjudicative and quasi-adjudicative sources exist that provide useful interpretive guidance regarding the ITR's reference to "facilitate" in Section 560.208. Unfortunately, or fortunately, depending upon your perspective, the adjudicative sources do not include any authoritative statements offered by the judiciary in the context of addressing real, live disputes concerning the application of the term "facilitate". A few court opinions have been handed down citing various other aspects of the Iranian Transaction Regulations. Perhaps one of the more interesting, for the purposes of this essay, dealt with the ITR's prohibition on taking U.S. goods and transshipping them to Iran through a third party.
Le défendeur, dans le cas d'espèce, arguait que la règle dite de l'indulgence — une règle d'interprétation — devait être appliquée aux termes non définis des ITR, à savoir «exportation», «réexportation» et «transbordement», afin de donner au défendeur le bénéfice du doute quant à sa conduite. Le tribunal a toutefois limité la règle de l'indulgence aux situations dans lesquelles il existe une réelle ambiguïté dans le langage utilisé ou dans la structure de la norme applicable qui ne peut être clarifiée par le recours à des sources voisines. Elle a déterminé que les trois termes non définis, qui faisaient l'objet du débat dans le cas d'espèce, avaient un sens clair dès lors qu'on avait recours au sens usuel de ces mots, aux précédents jurisprudentiels interprétant ces termes dans des contextes différents et à la nature radicale du Décret présidentiel à la base de la promulgation des ITR. S'agissant de cette dernière considération, le Tribunal a noté que le Décret présidentiel en question avait été promulgué pour atténuer «le plus sérieux des objectifs» et qu'il avait été «formulé dans les termes les plus larges». Comme l'a observé le Tribunal, l'idée était celle d'exercer une pression intense sur l'Iran pour le dissuader de soutenir le terrorisme international, de contester son programme d'armes de destruction massive et de compliquer le processus de paix au Moyen Orient. La pression visait, notamment, à interdire — avec quelques exceptions clairement définies et limitées — aux personnes américaines d'expédier tout bien, technologie ou service vers l'Iran par le biais de n'importe quelle opération, y compris les comportements visant à contourner et à éviter l'interdiction de base.

Apart from this decision, the U.S. Treasury Department's Office of Foreign Assets Control (OFAC), the agency that oversees the administration of the ITR, has issued several advisory letter rulings and one "guidance" statement that provide a degree of assistance with respect to interpreting the notion of "facilitate" in Section 560.208. The advisory letter rulings of particular significance are three in number and have to do with U.S. provided internet-based listings that may prove useful in connecting Iranian businesses together with non-Iranian businesses. The rulings, though, do not focus with particular detail on the precise notion of "facilitate". The "guidance" statement of OFAC does place at least partial reliance on "facilitate" in addressing the issue of corporate sponsorship by U.S. businesses of international conferences or events jointly organized by third-country entities and Iranian partners. With respect to both the rulings and the "guidance" statement, there is reason to believe they provide additional support for understanding Section 560.208's reference to "facilitate" to have a meaning that is broad and far-reaching.
Of the three rulings on internet-based listings, one involved an inquiry from a U.S. entity about licensing an entity in Iran to access and then search information on the U.S. entity’s database. Apparently, the U.S. entity was a not-for-profit organization, and its database was accessible at hundreds of libraries and universities around the world. In advising the inquiring entity on the permissibility of its proposed activity, OFAC noted that the ITR contains an explicit and very clear exception to its basic prohibitions when it comes to the import or export of information or informational materials, in whatever format. This permission is found in Section 560.208, inserted in part to reflect free speech concerns under the First Amendment of the U.S. Constitution. But the very fact of that Section’s inclusion in the ITR also suggests something about the reach of Section 560.208’s reference to “facilitate”. Specifically, the term “facilitate” must admit of a broad and inclusive reading, for why else would it have been necessary to include an exception for the dissemination of information, an activity that might, at best, merely contribute to the establishment of a prohibited business transaction? In this connection, OFAC then took great pains in the letter ruling to caution the inquirer that its view of the proposed activity hinged on the question of access to the database, including through the electronic search functions integrated into the system itself. OFAC’s view did not extend to “any additional products or services that may be offered by [U.S. person] in connection with the use of [its database] in Iran; nor ... to technical support, customer support, or other services ...”. Is it possible that OFAC’s caution about not supplying additional products or services might be read as emphasizing the broad reach of the concept of “facilitate” under the ITR and reiterating that the agency’s permission as to database access was driven only by the deliberate and conscious inclusion of the express exception regarding information?

A second advisory letter ruling on internet-based listings involved an inquiry from a U.S. provider who wished to know of the permissibility of a licensing agreement it was proposing to enter into with a foreign company. The objective of the agreement was to provide, on a fee basis, for the enhancement of current listings of Iranian companies on the U.S. entity’s web site. OFAC described the enhancements as being “produced at the behest of and for the benefit of customers in Iran”. From the content of the letter ruling, it appeared the enhancements would supplement existing listings that contained “basic information, including...”.

Parmi les trois circulaires sur les banques de données sur Internet portait sur une consultation réalisée par une entité américaine au sujet d'une licence fournie à une entité en Iran pour avoir accès à la banque de données d'une entité américaine et y faire des recherches. Apparemment, l'entité américaine en question était une association à but non lucratif et sa banque de données était accessible par des centaines de bibliothèques et d'universités dans le monde. En conseillant la demanderesse sur le caractère permisible ou non de l'activité prévue, l'OFAC a noté que les ITR contiennent une exception explicite très claire aux interdictions fondamentales s'agissant de l'importation ou de l'exportation d'informations ou de matériels d'information, quelque soit leur format. Cette autorisation est prévue à la Section 560.208, dans la partie qui a été introduite afin de satisfaire aux exigences de la liberté de parole du premier amendement de la Constitution américaine. Mais le fait même qu'elle soit comprise dans cette Section des ITR suggère également l'étendue de la référence faite au terme « faciliter » à la Section 560.208. Concrètement, le terme « faciliter » bénéfice d'une lecture large, autrement pourquoi aurait-il été nécessaire d'inclure une exception pour la diffusion de l'information, une activité qui, au mieux, ne fait que contribuer à l'établissement d'une opération commerciale interdite ? A cet égard, l'OFAC a pris le plus grand soin dans sa réponse pour avertir l'administré que l'activité qu'il proposait dépendait de l'accès à la banque de données, y compris les fonctions de recherche intégrées au système lui-même. Le point de vue de l'OFAC ne s'est pas étendu à « tous les produits et services additionnels qui peuvent être offerts par [une personne américaine] en relation avec l'utilisation de [ses banques de données] en Iran ; ni ... sur le support technique, l'assistance à la clientèle ou d'autres services ... ». La prudence de l'OFAC à ne pas accepter des produits ou des services additionnels peut-elle être interprétée comme mettant en avant la large portée du concept de « faciliter » dans les ITR et comme une accentuation du fait que l'autorisation de l'agence (OFAC) concernant l'accès aux banques de données était due à l'inclusion expresse et délibérée de l'exception sur l'information ?
The third letter ruling on internet-based listings followed-up on, and provided a clarification to, the second. Specifically, when OFAC was informed that the information appearing in the so-called enhanced listings would merely include information that had always been in the website holders' hands, it indicated no objection, so long as action was not taken to "substantively enhance [the] information provided to [the] Iranian customers." According to OFAC, "[t]he listing of basic information on a website in a uniform format for companies around the world, including Iran, by a U.S. person, is not prohibited by the ITR." Clearly, this position stresses the significance of information as such, and leaves little question about the general permissibility of business directories that facilitate linking Iranian entities with non-Iranian providers or consumers of goods, services or technology. In this connection, however, OFAC went out of its way to caution that it regarded "marketing services" associated with business listings as strictly forbidden by the ITR. The fact a U.S. entity offering internet business listings enabled users of its service to e-mail form inquiries to listed companies suggested no real concern about this constituting a "marketing service." From all of this, it would seem the plain meaning of the third letter points towards OFAC reading the ITR's prohibitions in a rather sweeping and inclusive fashion. Information and informational material

name, address, telephone number and product line, for companies throughout the world." In advising the inquirer of the impermissibility of its proposed agreement with the foreign company, OFAC acknowledged that the ITR contains an explicit exception for information and informational materials, but that it also recognizes a distinction between information, on the one hand, and "transactions related to information and informational materials." To the extent information or informational materials were "not [already] fully created and in existence", or were subject to "substantive or artistic alteration or enhancement", or benefited from "the provision of marketing and business consulting services", the ITR's exception was inapplicable. Indeed, OFAC noted in its letter that regulatory language in the very provision of the ITR setting forth the information exception left it with no other viable option on this matter. It would seem hard to conclude from this second ruling that OFAC was construing the ITR's basic prohibitions in any fashion other than an extremely broad one. As the notion of "facilitate" forms a fundamental part of those prohibitions, why should it be accorded a narrow, crabbed interpretation?

La troisième circulaire sur les banques de données sur Internet est la suite de la deuxième et participe à sa clarification. Concrètement, lorsque l'OFAC fut informé que l'information qui apparaissait dans ladite liste était liée à l'inculcure des informations qui étaient déjà entre les mains des détenteurs du site Internet, il n'opposa aucune objection, pour autant que l'action ne soit pas réalisée pour "augmenter substantiellement l'information fournie par [les] consommateurs iranians". Selon l'OFAC, le fait de "répéter toute l'information élémentaire sur une page Internet dans un format uniforme au bénéfice de sociétés du monde entier, y compris iraniennes, ni n'est pas interdit par les ITR". Clairement, cette position souligne la signification de l'information en tant que telle et laisse peu de doutes quant au caractère permis ou non d'annuaires de commerce qui facilitent les relations des entités iraniennes avec des fournisseurs non iraniens de biens, services ou technologies. A cet égard, l'OFAC a fait savoir avec insistance que les «services de marketing» associés à des annuaires de commerce étaient strictement interdits par les ITR. Dans le cas d'espèce, le fait que l'entité américaine qui fournissait des annuaires de commerce sur Internet permettait à ses usagers de lui soumettre par courrier électronique des demandes d'informations sur les compagnies répertoriées, n'a pas conduit à requalifier l'activité comme étant un «service de marketing». Il semble donc que, dans ce troisième exemple, l'OFAC donne une lecture à l'emporte pièce des interdictions contenues dans les ITR. L'information et le matériel d'informa-
in their purest and unaltered state may escape the ITR's prohibitions, but actions that change them or supplement them with some other form of effort that assists in moving towards a business transaction violate the Regulation's proscriptions. While it may seem puzzling that Internet systems providing direct e-mail inquiry capability would be regarded as acceptable under this sort of approach (for could this not be seen as "marketing"?), perhaps the acceptability hinges on the fact such systems reflect a preset, non-assisted mechanism concerning pure information.

As for the OFAC "guidance" statement regarding sponsor-ship of conferences or events involving Iranian partners, it grew out of a series of inquiries about the sponsorship by American companies of meetings organized by third country entities and Iranian partners that focused on Iran's oil and gas industry. In its indication that such sponsorship would be regarded as inconsistent with the ITR, OFAC cited Section 560.208 in particular, and clearly expressed its concern about the fact sponsorship could result in, among other things, contacts being made between key Iranian businesses and non-U.S. participants. And while U.S. participants may religiously endeavor to avoid actions that might result in them directly running afoul of the ITR's prohibitions, conference or event sponsorship had the potential for eventually leading to "non-U.S. participants providing consulting or other business services to Iran, [with] the U.S. oil companies [thereby violating the ITR in] ... facilitating such transactions ...". From this approach, there seems little doubt OFAC was recognizing the reach of "facilitate" in 560.208 to U.S. persons playing the part of host to occasions bringing together non-U.S. entities and Iranians with common and active commercial interests. Distinct from the situations involving mere Internet-based business listings, sponsorship of events built around topics that cannot help but bring together Iranian business and government person-nel with like-minded non-U.S. entities, potentially involve the sponsoring U.S. companies in "facilitating" transactions in which they themselves could not have engaged. Mere Internet-based business listings seem too random to constitute more than just information and informational material excluded from the ITR's prohibitions. Supplementing listings with the provision of direct e-mail inquiry capability moves closer to prohibited activity, but again can be explained as too far removed from the transactional stage to warrant condemnation under the notion of "facilitate". When one provides assistance and support to an event that is sure to get

En ce qui concerne la recommandation de l'OFAC sur le parrainage de conférences et d'événements impliquant des partenaires iraniens, on y trouve une série de renseignements sur le parrainage par des sociétés américaines de réunions organisées par des entités de pays tiers et des partenaires iraniens engagés dans l'industrie pétrolière et gazeuse iranienne. Dans sa recommandation, l'OFAC a pris appui sur la Section 560.208 pour affirmer que de tels parrainages sont contraires aux ITR et il a clairement exprimé le sentiment que le parrainage pouvait donner lieu, notamment, à des contacts entre les entreprises iraniennes et des participants non-américains. Quand bien même les participants américains agiraient consciencieusement afin d'éviter la violation directe des interdictions des ITR, le parrainage de conférences et d'événements pourrait permettre que « des participants étrangers fournissent des consultations ou d'autres services d'affaires à l'Iran, [avec] des entreprises pétrolières américaines [vio-lant ainsi les ITR en]... facilitant ces opérations... ». A la lumière de cette approche, il y a peu de doutes quant au fait que l'OFACait reconnu que le terme «facilitier» s'appliquait à des personnes américaines agissant en tant qu'initiatrices d'événements permettant de réunir des entités étrangères et iraniennes ayant des intérêts commerciaux actifs et convergents. À la différence des situations qui ne mettent en cause qu'une entreprise de base de données sur Internet, le parrainage d'événements sur des sujets qui ne peuvent qu'acter à ce que se mettent en rapport des entreprises et des autorités gouvernementales iraniennes avec des entités non-américaines ayant les mêmes intentions, peut potentiellement engager l'organisateur américain dans une activité de «facilitation» des opérations que lui-même ne peut conclure. La base de données sur Internet paraît être trop aléatoire pour constituer plus qu'une information ou un matériel d'information exclus des interdictions des ITR. Fournir un annuaire de relations d'affaires par une demande adressée directement par un courrier électronique s'approche plus d'une activité interdite, mais encore une fois cette activité peut être excusée car trop éloignée de la phase de conclusion de l'opération pour mériter une condamnation sur la base de la notion de «facilitier». Lorsqu'on offre une assistance et une aide à un évé-
IV. CONCLUSION

Au regard de ce qui précède, il est certain que la Section 560.208 interdit à toute personne soumise aux ITR d’orienter la personne l’ayant approché au sujet d’une opération interdite, alors qu’elle ne peut lui prêter assistance, vers une entreprise déterminée non-américaine. Un comportement de ce type constitue une «facilitation» typique. Fournir un annuaire de commerce sur internet compilé et mis à jour, d’une façon accessible à une personne américaine, pourrait aussi constituer une «facilitation» d’opérations interdites si les ITR ne contenaient pas à la Section 550.210(c) une exception explicite sur l’information et le matériel d’information. Comme nous l’avons indiqué, l’exception sur l’information s’étend également aux banques de données consultées directement par le biais de courriers électroniques. Toutefois, elle ne s’étend pas aux interventions des personnes soumises à la législation américaine qui altèrent substantiellement l’information détenue par un fournisseur d’Internet ou qui consultent pour des iraniens ou qui fournissent des études de marketing à des iraniens qui réalisent des recherches sur les banques de données. L’essentiel est de savoir si nous sommes face à de l’information pure ou face à des actions qui enrichissent, altèrent, utilisent ou font la promotion de l’information. Par conséquent, il n’existe aucune raison de croire que les annuaires commerciaux imprimés puissent être vus différemment de ceux ayant un format électronique.

Il n’est pas vraiment clair que le fait d’être approché au sujet d’une opération interdite peut constituer une «facilitation» à sa réalisation lorsqu’une personne indique à une autre personne l’existence d’un annuaire commercial qui peut éventuellement mener une entité étrangère contactée à fournir des biens, des services ou des technologies à l’Iran. L’OFAC a averti les personnes l’ayant consulté au sujet des consultations et des services de marketing associés à de l’information et du matériel d’information exemplaire. Il a également condamné le parrainage de conférences et d’événements qui pourraient mettre des acheteurs iraniens en position d’acquérir des biens, des services ou des technologies interdites de la part d’entités non-américaines. Il semble donc raisonnable de dire que le fait d’indiquer l’existence d’un annuaire de commerce ne puisse être vu favorablement. En effet, la simple information qui est fournie dans une liste est toujours disponible pour interested Iranian consumers and willing foreign providers together in the same room, how reasonable is it to conclude that the sponsorship has not been “facilitative” of any subsequent transactions?

IV. CONCLUSION

From what has been seen, there can be absolutely no question that it is impermissible under Section 560.208 for any person subject to the ITR’s jurisdictional reach to inform one who has approached them regarding a prohibited transaction that, while they cannot help, a specifically named non-U.S. entity can. Conduct of this sort constitutes classic “facilitation”79. The provision of an internet-based business listing compiled and made generally available by a U.S. person on an on-going basis could also be seen as “facilitative” of prohibited transactions, but for the fact the ITR contains in Section 560.210(c) an explicit exception for information and informational material80. As has been noted, the exception for information also extends to listings that contain direct e-mail inquiry forms attached thereto. However, it does not extend to interventions by subject persons that have as their aim substantively altering information in the possession of the internet provider, or consulting with or providing marketing for Iranians appearing in or making inquiries about such listings81. The focus appears to be on whether one is concerned with pure information as such, or concerned with actions to enhance, alter, use or promote information. As a consequence, there is no reason to believe that business listings that are in printed form should be regarded any differently than those presented in electronic format.

It is not entirely clear whether one approached about a prohibited transaction “facilitates” the completion of such by simply referring one to a business listing that eventually leads to a non-U.S. entity being approached about supplying goods, services or technology to Iran. OFAC has cautioned inquirers with respect to consulting and marketing services associated with exempt information and informational material. It has also condemned conference and event sponsorship that could put Iranian purchasers in the position of obtaining otherwise prohibited goods, services or technology from non-U.S. persons. Therefore, it would seem reasonable to conclude that any such reference to a business listing may not be looked upon favorably. After all, the mere information provided in the listing is one thing; it is
always available for everyone to see. The minute a person subject to the jurisdictional reach of the ITR is approached by an interested party with whom business is prohibited, however, the provision of that very same information could be seen as nearing the situation of getting willing buyers and sellers together in the same room. Perhaps the central point of distinction between the two would be that the mere provision of the business listing, without more, would leave the interested party in much the same situation they would have found had they stumbled on the listing themselves. They may be willing, but they are still required to hunt down their own potential counterpart among untold numbers of non-U.S. providers, many of whom may have neither the capacity nor the desire to provide items requested. In the event such an interested party is also pointed in the direction of a particular group of potential providers in the listing, or is given access to a specialized business listing that proves interest-specific, then a strengthened case for “facilitation” would seem to be present. Nonetheless, in all situations of this sort, any prosecution will have to overcome substantial practical problems of discovering infractions and then convincing a judge or jury of the infractions’ existence.

Though room is present to think otherwise, one of the key ingredients with respect to the existence of “facilitation” by a person subject to the ITR’s restrictions would seem to be some intervention by that person that puts together potential buyers and sellers with particular shared and active interests. The shared and active interest in oil and gas of the non-U.S. entities and the Iranian businesses and officials in attendance at U.S. corporate sponsored conferences or events proved especially troubling to OFAC when it issued its earlier “guidance” statement. Even taking an interested Iranian entity and providing them with a general business listing of non-U.S. entities would fail to approximate that kind of situation. Some sort of effort that narrows the field would seem a prerequisite. And perhaps effort going even beyond that, to the point of getting suspected willing buyers and sellers together, would be essential. For this reason, it would be difficult to imagine “facilitation” to exist, for instance, as a consequence of a U.S. academic providing a world-wide listing of cutting-edge solar technology companies to an energy conservation conference at which individuals from Iran happen to be present. Despite the fact those very same individuals may turn out to have a genuine interest in purchasing such technology, the information of use has not been offered in the context of aiming to put suspected
réunir des acheteurs et des vendeurs suspects. Tout ce qui a été fourni est de l'information protégée, puisque l'institution académique n'a pas agi en tant que promoteur, acheteur ou intermédiaire actif dans la vente d'information. Il en est de même lorsqu'une entreprise américaine qui fabrique une marchandise que les ITR interdisent d'exporter vers l'Iran, informe une entreprise étrangère associée de l'existence d'une autre entreprise étrangère qui produit la même marchandise. Dans l'hypothèse où l'entreprise étrangère donne l'information à un acheteur iranien potentiel qui réserve la marchandise à l'entreprise étrangère indiquée par l'entreprise américaine, il nous semble difficile d'admettre que la révélation puisse être qualifiée comme la «facilitation» d'une opération interdite à l'entreprise américaine. Incontestablement, à un moment donné, la relation de causalité entre la fourniture de l'information et une opération associée n'a pas été attestée pour satisfaire aux exigences des ITR. Il n'y a pas de doutes sur le fait que l'entreprise américaine est l'élément déclencheur. Mais s'il est vrai que le terme «facilitate», au sens de la Section 560.208, semble exiger une intervention qui réunit un acheteur et un vendeur suspects, désireux de conclure une opération, l'entreprise américaine n'est coupable que d'un mauvais jugement dans les affaires. La révélation ayant mené à l'achat par l'Iran ne correspond pas à une opération interdite puisque l'entreprise n'a pas été réalité par une entreprise américaine dans le contexte de la mise en relation d'un acheteur intéressé suspect avec un vendeur à l'étranger. Bien que la Section 560.208 utilise le vocable «facilitate» dans un sens large, ce terme ne semble pas être pour autant sans limites.

En raison du vieil intérêt des États-Unis pour maintenir des pressions économiques internationales sur l'Iran, il est compréhensible que l'OFAC se soit montré résolument à clarifier les limites exactes du vocable «facilitate». En laissant les parties soumises aux restrictions dans l'impasse, on s'assure le bénéfice des restrictions sans avoir à formuler les variables qui pourraient être mises à l'épreuve. Toutefois, il découle de ce qui précède que l'historique législatif de la Section 560.208 utilise le terme «facilitate» d'une façon très large mais pas sans limites pour autant. Cet état d'incertitude, néanmoins, crée des complications pour les entreprises commerciales qui désirent contribuer à la croissance économique tout en respectant les restrictions, et limitent nécessairement leurs opportunités de faire des affaires. A défaut de clarté, les entreprises respectant la loi courrent le risque de réaliser des opérations suscap-

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willing buyers and sellers together. All that has been provided is protected information, as the academic has in no way intervened to act as a promoter, marketer, or supportive purchase intermediary. And likewise with regard to situations where a U.S. company that makes an item the ITR prohibits being shipped to Iran informs a non-U.S. associate enterprise about another foreign company producing the exact same item. In the event the non-U.S. enterprise passes that information on to a potential Iranian purchaser who then secures the item from the identified foreign company, it would be hard to characterize the original disclosure as "facilitating" a transaction the American company was prohibited from undertaking. Surely, at some point, the causal relationship between the supplying of information and a transaction with Iran becomes too attenuated to satisfy the expectations of the ITR. There can be no doubt that the relevant U.S. company set the entire chain of events in motion. But if Section 560.208's reference to "facilitate" is deemed to require an intervention that puts a suspected willing buyer and seller together, the U.S. company would seem guilty of little more than bad business judgment. The disclosure that eventuated in the Iranian purchase not only did not amount to a referral of a prohibited transaction, it was not made in the context of a situation involving the U.S. company endeavoring to put a suspected willing and interested purchaser together with a similarly situated foreign seller. Though Section 560.208's use of the term "facilitate" is to be understood broadly, the term seems not to be without limits.

In view of the United States' strong interest in maintaining international economic pressure on Iran, it is somewhat understandable that OFAC has shown reluctance to clarify the precise dimensions of the term "facilitate". By leaving regulated parties in somewhat of a quandary, one secures all the benefits of restriction without having to articulate parameters that then raise the possibility of them being tested. Nonetheless, from what has been seen in the preceding pages, enough is available from the regulatory history of Section 560.208's use of "facilitate" to suggest it is understood in a very broad, but not limitless fashion. Such a state of affairs, however, causes complications for commercial enterprises that have an interest in both contributing to economic growth and complying with restrictions that necessarily circumscribe business opportunities. In the absence of total clarity, enterprises disposed towards compliance are unlikely to run the risk of entering transactions.
that present the prospect of raising the ire of OFAC. While one might purport to suggest the exact limits of "facilitate", as drawn from a reading of the overall regulatory history, the cleanest and most authoritative form of clarity can only come from the government agency charged with overseeing its administration.

Endnotes

3. Otherwise known as the EAR, see generally 15 CFR 730-774.
4. As an illustration of an ambiguity, see the term "investment" in section 5 of ILSA, supra note 1. In that connection, see also Rex J. Zedalis, The Total S.A. Case: Meaning of "Investment" Under the ILSA, 92 Am. J. Int'l L. 539 (1998). For an illustration of an ambiguity in the Syrian Accountability Act, see grant of presidential power to prohibit "investing or operating in" Syrian in section 5(a)(2)(B) of the SAA, supra note 2. With respect to the ambiguities in the Export Administration Regulations, see prohibition in section 736.2(b)(10) of the EAR, supra note 3, on activities that "transfer, .... remove, ...., or otherwise service" items subject to the regulations. Also see EAR, supra note 3 at section 734.8, which defines "fundamental research". The significance of the latter arises in the context of the EAR subjecting transmissions of information, including in the university setting, to export controls.
5. On the extraterritorial reach of the ILSA, see Section 5, which applies sanctions for violations of ILSA to all "persons", with section 10, para. (14), defining "persons" sufficiently broadly to include foreign persons. This is then confirmed by the fact that section 9(a)(1) of the ILSA instructs the President that if a "foreign person" is to be sanctioned under section 5, the President is to consult with the nation having primary jurisdiction over that person. Section 10, para. (7) then defines "foreign person" in a way that clearly includes foreign individuals and business entities. On the extraterritorial reach of the Syrian Accountability Act, see section 5(a)(2)(A) and (F), providing the President with authority to prohibit exports of "products of the United States" and block transactions "by any person ... subject to the jurisdiction of the United States". This is then illuminated by Executive Order 13338, Fed. Reg. 26761 (May 13, 2004), where section 1(b) and (c) indicates the prohibition on exports applies to re-exports as well, presumably even by foreign entities, and section 3 indicates blocked transactions applies to property "within the possession or control of United States persons, including ... overseas branches". On the extraterritorial reach of the EAR, 15 C.F.R. 730-774, originally adopted under the Export Administration Act of 1979, 50 App. USC 2402, et. seq., and remaining in place under the International Emergency Economic Powers Act of 1977, see 50 USC 1701, et. seq., as well as E.O. 13222, 3 C.F.R. 2001 Comp., p. 763, 66 Fed. Reg. 44025 (Aug. 22, 2001) and Presidential Notice, Aug. 7, 2003, 68 Fed. Reg. 47833 (Aug. 11, 2003), especial attention should be given, for example, to 15 C.F.R. 760 (a)(2), providing coverage for "reexports" to Cuba, and 760 (b)(3) indicating inclusion within this of exports of foreign-made items from third countries when such contain more than 20 % U.S.-origin material, parts, or components. Another interesting example can be found in the anti-boycott provisions of the EAR, Section 570.1(c), providing "permanent foreign establishments ... controlled in fact" by U.S. concerns have reporting obligations.
7. The precise language reads in pertinent part: "No United States person, wherever located, may approve, finance, facilitate, or guarantee any transaction by a foreign person where the transaction by that foreign person would be prohibited by this part if performed by a United States person or within the United States". See 31 C.F.R. 560.206 (emphasis added).
8. The regulations define "United States person", the operative term in 560.208, see supra note 7, to mean a U.S. citizen, a permanent resident alien of the U.S., entities "organized under the laws of the United States (including foreign branches)" and any person physically within the United States. See 31 C.F.R. 560.314. While the focus of this paper is not on the question of the possible extra-jurisdictional reach of the ITR, an objective reading of the definition of "United States person" referenced above would have to acknowledge that the language regarding entities "organized under the laws of the United States (including foreign branches)" could be read as meaning only U.S. branches of foreign business entities. This would be consistent with the definition's other references to aliens permanently resident in U.S. territory and persons physically present in the United States. Nonetheless, given the additional reference to U.S. citizens, presumably irrespective of their physical location, the definition's reference to entities "organized under the laws of the United States (including foreign branches)" could be argued to support application of the ITR to foreign branches of any parent business entity that is organized under the laws of the United States.


13. See id. at Section 1.

14. See id. at Section 4.


16. See text of supra note 7. It should be reiterated that, because United States persons might be defined to include foreign branches of U.S. companies, this prohibition could be understood as having extraterritorial reach. See text accompanying supra notes 5-9.


18. See id. at Section 1(a).

19. See id. at Section 1(b).

20. See id. at Section 3.


22. It should be noted that Section 5 of E.O. 12959 did officially revoke the relevant substantive provisions of E.O. 12613 and E.O. 12957, but only "to the extent inconsistent with" 12959.

23. See id. at Section 1(a).

24. See id. at Section 1(b).

25. See id. at Section 1(c).

26. See id. at Section 1(f).

27. See id. at Section 2.


29. See prohibitions discussed supra note 26.

30. The exact language of Section 560.208 is to be understood in the context of three other provisions: Section 560.205, which prohibits United States origin goods from being re-exported to Iran from third countries; Section 560.206, which prohibits United States persons from engaging in activities related to the importation of Iranian origin goods or services; and Section 560.207, which prohibits United States persons from making investments in Iran. Section 560.208 follows these three provisions with a prohibition that aims at "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 prohibited as to United States persons by [Secs.] 560.205, 560.206, and 560.207, or relating to the financing of activities prohibited as to United States persons by those sections, or of a guaranty of another person's performance of such transaction or contract...".

31. See Iran: What You Need to Know, supra note 11 at 1 ("On August 19, 1997, the President signed Executive Order 13059 clarifying Executive Orders 12957 and 12959.")

33. See id. at Section 2(b) (prohibits re-export from the third country by one who is not a United States person subject to the trade regulations with Iran, if the item of concern had been exported from the United States at one time, and the re-export was known to be intended for Iran and was subject to U.S. export licensing laws). For another interesting clarification appearing in the Order, see id. at Section 2(c) (no new "investment ... in Iran or in property").

34. See id. at Section 2(a) and (b).

35. See id. at Section 2(d).

36. See id. at Section 2(f).


42. See supra Section II, especially the text accompanying notes 12-20.

43. See supra Section II, especially the text accompanying notes 21-25.

44. See text accompanying supra notes 15-16. It should also be noted that the 1987 version was issued only as a Final Rule. This is also true of all subsequent versions of the ITR of relevance here. As a consequence, we have no Notice of Proposed Rulemaking, public comment, revision, and then Final Rule process from which interpretive inferences might be drawn with respect to the meaning of "facilitate", or for that matter, any other term considered ambiguous.

45. See text accompanying supra notes 25-30.

46. See text accompanying supra notes 35-37.

47. Id.


49. See id. at 560.206.

50. See id. at 560.204.

51. See id. at 560.205.

52. See id. at 560.207.

53. See id. at 560.208.

54. See id. at 560.203.

55. See id. at 560.417.

56. Conceivably, one might wonder whether the regulations and E.O.s that prohibit "facilitative" activity with Iran should be regarded as ultra vires. The fact is, however, that the E.O.s serving as the basis for the regulations were all issued pursuant to the 1977 International Emergency Economic Powers Act (IEEPA), see Pub. L. 95-223, 91 Stat. 1625 (Dec. 28, 1977), and that legislation contains a broad delegation of authority to the Executive branch. Section 203 notes that the President's authority to issue regulations extends to those that "regulate, ... prevent or prohibit, ..., importation or exportation of, or dealing in" specific property. (Emphasis added). Thus, it would seem unproductive to argue the prohibition on "facilitative" activity is beyond the authority of the Executive to announce.


59. See id. at 857-58.
60. See id. at 858-59.
61. See id. at 859.
62. See id.
64. See also 31 C.F.R. Section 560.315 defining the concept of information and informational materials.
65. For a related and interesting international economic law case that involved the same kind of interpretive approach concerning the term "affecting" in Article III (4) of the General Agreement on Tariffs and Trade (GATT 1947), see Italian Discrimination Against Imported Agricultural Machinery, 7th Supp BISD 60 (1959) (The case determined that III(4)'s prohibition on internal laws, regulations or requirements "affecting" the sale of imported goods in a less favorable way that those produced domestically was violated by the giving of a subsidy to "purchasers" of domestic goods alone. This holding was arrived at by giving "affecting" a broad reading, one prohibiting the subsidy, even though it did not establish direct conditions on sales, because Article III(4)'s exception permitting subsidies to "producers". The inference drawn from III(4)'s exception regarding an activity that might only indirectly impact sales of imports was that "affecting" must have been understood as having a broad meaning, lest there be no need for excepting subsidies to "producers").
66. See id.
68. Id.
69. Id.
70. Of specific importance here is Section 560.210(c)(2), that provides the exception for information does not apply to alterations and services of the sort contemplated by the inquirer and its foreign licensee.
72. Id.
73. Id.
74. Id.
75. See id. ("With respect to the direct e-mail service that, according to your website, you provide as part of your enhanced listing service, the ITR do not prohibit you from enabling users of your database to e-mail a form inquiry to any of your Iranian entity subscribers...").
77. See id.
78. Id. (Emphasis added).
79. See text accompanying supra note 55.
80. See text accompanying supra notes 63-70.
81. See text accompanying supra notes 71-75.
82. See text accompanying supra notes 76-78.
83. For emphasis, it is important for the reader to distinguish between the situation at hand, and a situation in which a U.S. company is approached about a prohibited transaction with Iran, then informs the one who approached it about a non-U.S. entity that can undertake the requested transaction. In the situation at hand, the U.S. entity simply informs a non-U.S. associate, outside the context of being initially approached about some prohibited transaction with Iran, that another non-U.S. entity is capable of supplying certain goods, services or technology. Later, that associate provides information regarding such capability to a third person, thus aiding a transaction in which the U.S. entity itself could not have engaged.
84. It should be noted that, in some situations, this sort of fact pattern might trigger the ITR's prohibition on activities that "evade" the basic requirements of the Regulations. See 31 C.F.R. Section 560.203 and text accompanying supra note 54.