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Outbound Investment Screening Momentum Builds

A bipartisan group of lawmakers has finalized a revised version of the National Critical Capabilities Defense Act of 2022 (NCCDA). Building on similar provisions in the America COMPETES Act, NCCDA seeks to establish a regulatory regime to screen outbound investments by American individuals and firms to “countries of concern”.

While the earlier provision focused on screening “transactions”, the new language is more expansive in as much as it refers to a broad range of “activities”. Drafted with the intention to protect U.S. supply chains, the new Bill has also expanded the definition of “entity of concern” to further include entities “affiliated with” or “influenced by” a country of concern. The bill, therefore, gives the proposed interagency Committee comprising of at least 12 government agencies– the wide power to prohibit or mitigate any economic activity with an entity affiliated to a country of concern.

NCCDA does, however, exempt certain types of activities from the scope of review, restricting “covered activities” to “capabilities” that include but are not limited to semiconductor manufacturing, artificial intelligence, pharmaceuticals, large-capacity batteries, and quantum technology. Recognizing the need for global cooperation, the new Act calls for “multilateral engagement” with allies and partners to counter threats posed by America’s adversaries and competitors.

Meanwhile, as lawmakers consider the nuts and bolts of the proposed legislation, the White House continues to take steps to curtail American cooperation with countries like Russia and China. As part of yet another response to the Ukrainian war, the President has announced that the government would be severely limiting its “bilateral science and technology research cooperation with the Russian government”. As momentum builds toward enacting the legal and economic architecture for the emerging great power competition, American businesses prepare to deal with more compliance requirements. (GS)

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*Publisher: Martin Kalin Editor: Frank Ruffing 703.283.5220. fruffing@traderegs.com
Contributing Editor: Gaurav Sansanwal, Esq.*

Supreme Court Limits Discovery to Courts, Arbitrators Left Out

In a decision significant for transnational dispute resolution process, the Court interpreted 28 U.S. Code (Section 1782) to hold that district courts can order production of evidence “for use in a foreign or international tribunal” only in cases where the arbitral body is “imbued with governmental authority”.

It accordingly follows that American courts can only order production of evidence in cases where proceedings are underway before a formal court of law, and not in a privately held international arbitration.

This narrow interpretation of the Supreme Court in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21-401 will have the effect of protecting American businesses from exposure in international arbitrations, while maintaining disclosure obligations in cross-border litigation before domestic and foreign courts of law. (GS)

DFC Commits \$300MM to Three Seas Private Equity Fund

U.S. International Development Finance Corporation (DFC) will provide up to \$300 million of financing to support energy and infrastructure investments that “enhance energy security, facilitate energy diversification, and improve connectivity in the Three Seas region,” according to a DFC announcement.

The investment is through the Three Seas Initiative Investment Fund (3SIIF), a privately managed fund which “invests in transportation, energy, and digital infrastructure on the North-South axis of the Three Seas region... and aims to reduce the socio-economic gap with the other Member States of the European Union.” Investment from DFC would bring the Fund’s capital commitment to approximately €1.3 billion.

The most recent Fund investment is “a significant interest” in the holder of a lease to operate the Port of Burgas in Bulgaria. Majority control remains in the hands of the seller, Advance Properties, the investment vehicle of brothers Kiril and Georgi Domuschiev, the richest men in Bulgaria. Since March 2020, the Fund has invested in a Polish locomotive leasing business; data centers in Estonia; and the acquisition of a “majority interest” in a developer of greenfield solar assets across Eastern Europe.

DFC, formerly known as OPIC, is the development finance arm of US foreign policy. According to the agency, DFC “complements, rather than competes, with private sector lenders and supports projects that have been unable to obtain sufficient support from private lenders... DFC can invest debt and equity into emerging market private equity funds to help address the shortfall of private equity capital in developing countries.”

UK Builds Post-Brexit Bilaterals, Hoosier Pact.

Eager to build and strengthen trade relations outside continental Europe in a post- Brexit world, the United Kingdom has announced that it has started talks on a Free Trade Agreement (FTA) with six Gulf countries including Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the UAE.

This is the fourth major set of FTA negotiations started by UK this year, after launching similar initiatives with India, Mexico, and Canada. European Union, on the other hand, is in the process of inking its own FTAs, and as part of a renewed effort, has restarted negotiations with India after a decade.

Meanwhile, diplomatic talks for a trade deal between the UK and the US are still underway. In view of the recent trade dispute between UK and EU over PM Boris Johnson's move to unilaterally alter parts of the Northern Ireland Protocol, the White House has expressed concern, by warning the UK that its action on the Protocol is "not conducive" to a trade deal with the US.

Frustrated with the slow progress on the US-UK trade agreement, the UK government continues to execute MoUs at the state level, with Indiana being the latest one to do so. However, these are unlikely to be of much help since these MoUs are not binding on account of the Constitution's Commerce Clause that mandates the Union to decide on trade issues. (GS)

Europe & US Evolve Environmental Regulations

The European Union has announced that it intends to pursue commitments on labor rights and climate change in trade deals with increased scrutiny. Warning businesses and partner countries that do not measure up to the letter and intent of its trade deal obligations, the EU has threatened to deploy sanctions "as a last resort".

This is significant for businesses operating under the ambit of trade deals with Europe because despite including various provisions on international labor and environmental standards, EU deals have thus far lacked strong and effective enforcement mechanisms.

Acting in a similar vein of intending to protect and promote "green" trade, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal has approved changes that seek to further scrutinize U.S. exports of non-hazardous e-scrap. While the US is not a party to the convention, the changes will cover exports to any of the 180 countries that are signatories.

Environmental regulations continue to shape up in the US as well, where the Securities and Exchange Commission is considering imposing mandatory disclosure requirements relating to climate risks and greenhouse-gas emissions. The proposed rule would require all publicly traded companies to report their emissions. Estimation of emissions may be cumbersome in as much as it may require reviewing data obtained from customers and suppliers. Having opened the provision for comments from public, many firms have argued that the process would lead to increased compliance costs for small and medium businesses. (GS)

Consolidated Guide to EU Sanctions

The European Commission has published a comprehensive guide to the sanctions imposed over the past four months in response to the Russian invasion of Ukraine. The 207-page document provides definitive answers to practitioners' questions, from the general (*what is the rationale behind the sanctions?*), to the specific (*is an extension of a contract considered an "ancillary contract"?*)

The document "*Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014*" has sections for Individual Measures, Finance & Banking, Trade & Customs, Energy, and Other Fields (Media, Aviation, Procurement, etc.). A copy should be on every trade lawyer's desk. https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/faqs-sanctions-russia-consolidated_en.pdf

Thermo Fisher's Russia Distributor Charged

The New Hampshire-based, Russian distributor for the world's largest manufacturer of analytical instruments has been charged with regards to equipment it shipped to Russia and Ukraine from 2016 to 2019.

The charges, filed June 6 by the U.S. Attorney in Concord Federal District Court, describe scientific instruments, including laser assemblies, falsely identified as intended for use in aquariums, welding systems and multimedia, and reported at artificially low values.

A search warrant unsealed in 2021 questioned 414 shipments worth \$60 million sent to Intertech's Russian affiliate, OOO Intertech Instruments, including four shipments totaling \$40 million sent to the FSB, the Russian State Security Agency. That warrant included taped phone conversations where executives allegedly discussed a plan to review records to avoid sanctions.

In March 2021, BIS added OOO Intertech Instruments to the entity list, which restricts exports from companies at risk of supplying nuclear, chemical and biological weapons programs because of "proliferation activities in support of Russia's weapons of mass destruction programs." The U.S. parent was not named in that action.

Northrop Engineer Pleads Guilty to Spying for China

A retired U.S. Army helicopter pilot-turned-civilian-contractor pleaded guilty in federal court to acting as an unregistered agent of China and providing aviation-related information from his defense-contractor employers. He also pleaded guilty to making related false statements during national security background checks.

Shapour Moinian, 67, of San Diego, served 23 years in the Army, and then worked for defense contractors and the Department of Defense on "various projects, including a high-altitude, unmanned surveillance aircraft used by the U.S. military and various allies," according to the U.S. Attorney's Office. His roles included "F-35/F-18 System Safety Engineering at Northrop Grumman Corporation," according to Radaris.

According to his plea agreement, in 2017 while working for Northrop Grumman, Moinian was contacted by an individual in China who claimed to be working for a technical recruiting company. This person offered Moinian the opportunity to consult for the aviation industry in China. He then was issued a cell phone and other equipment to communicate with them and aid in the electronic transfer of materials and information.

In early 2018, Moinian made several internet searches regarding "sabotage vs. spying," "espionage vs. sabotage" and "selling military information to foreign country is considered as," according to the complaint filed last Fall in San Diego federal court.

Sentencing is scheduled for Aug. 29, where Moinian faces a maximum penalty of 10 years in prison and fine up to \$250,000 for acting as an agent of a foreign government, and up to five years and a \$250,000 fine for the false statements count.

Monaco: Sanctions are "The New FCPA"

Deputy Attorney General Lisa Monaco shared her thoughts on sanctions enforcement to the GIR Live / Women in Investigations conference held June 16 in London. Highlights of her presentation include:

"One tool that is increasingly prominent at the intersection of national security challenges and corporate criminal enforcement is the department's work on sanctions enforcement... We are pouring resources into sanctions enforcement, and you have seen and will continue to see results.

"Over the last couple of months, I've given notice of that sea change by describing sanctions as 'the new FCPA.' The growth of sanctions enforcement follows the path that the FCPA traveled before it. Both FCPA and sanctions enforcement are relevant to an expanding number of industries. They have extended beyond just U.S. actions to an increasingly multilateral enforcement regime. And they both reward companies that develop the capacity to identify misconduct within the organization, and then come forward and voluntarily disclose that misconduct to the department.

"Sanctions have been considered by some as a concern mainly for banks and financial institutions. [Now] the risk of sanctions violations cuts across industries and geographic regions... for any business with an international supply chain — sanctions should be at the forefront of its approach to compliance.

"Every company needs to be pressure-testing its sanctions compliance program, for instance through risk assessments, technology upgrades and industry benchmarking. Every board of directors of such a company should be inquiring whether it is conducting necessary oversight of the company's sanctions

controls. Every corporate officer should be committed to ensuring they have the programs, culture, personnel, and counsel to identify problem areas and navigate the rapidly changing landscape.

“Just as the last decade saw the world of FCPA enforcement expand to foreign partners and counterparts, the months and years ahead will see the department’s sanctions teams work hand-in-glove with civil and law enforcement agencies across the world. The multilateralization of our sanctions work follows the same trajectory as our FCPA history, which grew from a largely unilateral effort by the United States to a worldwide movement to combat international corruption.

“Finally, we aim for our sanctions enforcement to incentivize companies to come forward and voluntarily disclose discovered misconduct. As with the FCPA, the department ... has a self-disclosure program to address potential criminal sanctions violations.

“For any company that thinks it may have a sanctions problem, I have a clear, unequivocal message for you: pick up the phone and call us. Do not wait for us to call you.”

Kendler: Use the License Exception STA

In a presentation to the American Association of Exporters and Importers Annual Conference June 15, Assistant Secretary for Export Administration Thea Rozman Kendler encouraged the adoption of streamlined processes offered by Commerce.

“Sometimes BIS implements solutions with good intentions that don’t land the way we expect. We created License Exception Strategic Trade Authorization (STA) eleven years ago. Our goal was to reduce licensing burdens for sensitive items to trusted destinations, facilitating compliance and protecting national security.

“Those trusted destinations are many of the same countries that joined our Russia export controls coalition. STA was – and still is -- intended to facilitate exports between the United States and our close partners by easing license burdens. The data shows you aren’t utilizing STA the way we’d hoped, and this means you’re continuing to drive the slower route.

“Some of you have followed us into the faster lanes -- Since its inception in 2011, STA has been used for approximately 145,000 shipments, for a total value of \$10.0 billion worth of transactions. Per year, that is an average of 12,000 shipments with a value of \$830 million.

“But during the same period, \$2.0 billion in exports were shipped using a BIS license even though those transactions could have been shipped using STA, which would have saved time and money for industry, not to mention BIS’s ability to more quickly process licenses for which there isn’t a substitute license exception available.

“I know there are businesses that could benefit from STA if they took the time to consider the alternate path and adapt their compliance programs. “

***** Briefs *****

USTR Scoffs at China Tariff Giveaways. Continuing her insistence that existing tariffs should be used as bargaining chips, US Trade Representative Katherine Tai told the Senate Appropriations Committee "The China tariffs are, in my view, a significant piece of leverage and a trade negotiator never walks away from leverage... The United States has repeatedly sought and obtained commitments from China, only to find that lasting change remains elusive."

TikTok Makes China Hawks' Day- *Buzzfeed* obtained audio from 80 internal TikTok meetings that indicate employees in the PRC had access to American user data, even after company representatives testified under oath they did not, and repeatedly said publicly they did not. *Bloomberg* reports the video app is on track to triple revenue this year to \$12 billion, and planning an e-commerce pivot.

Russia – More Airline Sanctions BIS issued orders June 24 denying the export privileges of three Russian airlines – Nordwind Airlines, Pobeda Airlines, and S7 Airlines – due to ongoing apparent violations of the comprehensive export controls imposed on Russia. These three Temporary Denial Orders (TDOs) terminate the right of these airlines to participate in transactions subject to the Export Administration Regulations (EAR), including exports and reexports from the United States.

Colombia - Leftist's Election to Test Trade with US: *AP* reports newly elected President Gustavo Petro's campaign platform calls for the creation of "smart tariffs" to protect Colombia's countryside from agricultural imports allowed under a decade old free trade agreement with the U.S. Former US Ambassador to Panama is quoted on the absence of an envoy to Bogota: "It's beyond disappointing that the Biden team has not nominated an ambassador to shepherd U.S. policy through this critical transition period," said John Feeley, "They can't blame Republican obstructionism in the Senate for this one and they would do well to announce a nominee ASAP."

Timber and Lumber Trade. Treasury Secretary Janet Yellen said that President Biden is not expected to cut U.S. tariffs on Canadian lumber as part of potential tariff relief he is considering to fight inflation. *FT* reports Ukraine war has seriously disrupted the global timber trade. A reminder, the Programme for the Endorsement of Forest Certification, the global alliance of national forest certification systems, has designated all timber originating from Russia and Belarus as "conflict timber," which cannot be used in PEFC-certified products.

***** Calendar *****

COMMERCE - BIS Update 2022 June 29 - July 1 The Bureau of Industry and Security (BIS) will offer a hybrid Update Conference on Export Controls and Policy from Wednesday, June 29-Friday, July 1, 2022. This 35th annual conference will be offered in-person at the Marriott Marquis in Washington, D.C., and virtually for the first two days. Use this link <https://events.ely.com/bis2022> to complete registration.

COMMERCE – BIS Encryption Controls Virtual Seminar. Presented by BIS, co-sponsored by Professional Association of Exporters and Importers. August 10-11, 2022 9:00 a.m. to 12:00 p.m. PDT (UTC -7) each day. Cost: \$300. To register contact the PAEI Admin at (408) 532-7234 or email paeadmin@paei.org. Last day to register is Friday, August 5. California MCLE: 5.5 credit hours.

CUSTOMS - Commercial Customs Operations Advisory Committee (COAC) will hold its quarterly meeting in Harper's Ferry, WV on Wednesday, June 29, 1 p.m. to 5 p.m. EDT. The meeting will be open to the public via webinar only. *The COAC will hear from the current subcommittees on the topics listed below:*

Intelligent Enforcement Subcommittee: The Antidumping/Countervailing Duty (AD/CVD) Working Group and the Intellectual Property Rights Process Modernization Working Group will provide updates regarding development of an electronic notice of detention and enhanced procedures for manipulation of shipments, The Bond Working Group's updates will include the status of proposed revisions to Directive 3510-004, "Monetary Guidelines for Setting Bond Amounts," and the testing of electronic delivery of CBP Form 5955a Notice of Penalty or Liquidated Damages Incurred and Demand for Payment. The Forced Labor Working Group will submit recommendations for the committee's consideration regarding the Uyghur Forced Labor Prevention Act (UFLPA) implementation as well as the UFLPA Importer Guidelines.

Next Generation Facilitation Subcommittee will provide updates on its task forces and working groups, including an update on the progress of the 21st Century Customs Framework (21CCF) and E-Commerce Task Forces. The Automated Commercial Environment (ACE) 2.0 Working Group will present

Rapid Response Subcommittee will provide updates for the Domestic Manufacturing and Production (DMAP) Working Group and the Broker Modernization Working Group, including the April 2022 broker exam, potential regulatory updates to 19 CFR part 111, and requiring continuing education for licensed customs brokers.

Secure Trade Lanes Subcommittee will provide updates on the progress and plans for the In-Bond Working Group and the Remote and Autonomous Cargo Processing Working Group. The Partnership Programs and Industry Engagement Working Group (formerly Trusted Trader Working Group) topics of discussion will include the inclusion of forced labor into the Customs Trade Partnership Against Terrorism (CTPAT) program.

register online at <https://teregistration.cbp.gov/index.asp?w=265> by 5:00 p.m. EDT on June 28,

*** IPR / ITC 337 Actions***

Universal Golf Club Shaft and Golf Club Head Connection Adaptors [87 FR 38179] as amended, on behalf of Club-Conex, LLC of Scottsdale, Arizona

Electrical Connectors and Cages, Components Thereof [87 FR 38180] On behalf of Amphenol Corp. ITC has determined to review in part a final initial determination of the presiding administrative law judge .

Barcode Scanners, Scan Engines, Mobile Computers with Barcode Scanning Functionalities , Inv. No. 337-TA-1231 [posted 6/22/22]

Oil-Vaping Cartridges, Components Thereof, and Products Containing the Same , Inv. No. 337-TA-1286 [posted 6/22/22]

Robotic Floor Cleaning Devices and Components Thereof , Inv. No. 337-TA-1252 [posted 6/22/22]

Computer Network Security Equipment and Systems, Related Software, Components Thereof, and Products Containing Same , Inv. No. 337-TA-1314 [posted 6/22/22]

High-Performance Gravity-Fed Water Filters and Products Containing the Same , Inv. No. 337-TA-1294 [posted 6/21/22]

*** AD/CVD Actions***

Artist Canvas, Wooden Bedroom Furniture, Tapered Roller Bearings, Ceramic Tile [87 FR 37822], all from China: Scope Ruling Applications Filed.

Emulsion Styrene-Butadiene Rubber (ESBR) from the Czech Republic [2022-13542] and Russia [2022-13543] Preliminary Affirmative Determination of Sales at Less Than Fair Value

Welded Line Pipe from the Republic of Korea [2022-13664]: Final Results, with certain changes to the calculation of the preliminary weighted- average dumping margins for Hyundai Steel and SeAH.

Circular Welded Non-Alloy Steel Pipe from the Republic of Korea {2022-13774} On June 16, 2022, the U.S. Court of International Trade (CIT) issued its final judgment in Nexteel Co., Ltd., et al. v. United States, Consol. Court no. 20-03868, sustaining Commerce's first remand results. Commerce is amending final results with respect to the dumping margin assigned to Nexteel Co., Ltd., SeAh Steel Corporation, and Hyundai Steel Company.

Gypsum Board, Sheet, or Panel originating in or exported from the United States of America [87 FR 37822]. The Binational Panel affirmed the Canadian Intentional Trade Tribunal's Final Determination.

Urea Ammonium Nitrate Solutions (UAN) From the Republic of Trinidad and Tobago [87 FR 37824] and [87 FR 37828: Final Affirmative Determination of Sales at Less Than Fair Value. and Final Affirmative Countervailing Duty Determination. From the Russian Federation [87 FR 37831] and [87 FR 37836]: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Countervailing Duty Determination.

Acrylonitrile-Butadiene Rubber from the Republic of Korea [87 FR 37825] and Mexico [87 FR 37829] and France [87 FR 37833]: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part.

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*Frank Ruffing 703.283.5220
fruffing@traderegs.com*
