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## Springtime in Paris

What did the second ministerial meeting of the US-EU Trade and Technology Council accomplish last week in Paris? It depends on who you ask. According to the European Commission, the four main outcome areas were Support for Ukraine, Secure Supply Chains, Emerging Technologies, and Sustainability. Using this framework, we compare the relative import assigned by each side.

**Support For Ukraine, human rights and freedom of expression** leads the E.U. readout, which calls for expanded trade with and investment in Ukraine, further cooperation on Russian sanctions and export controls, and a continued “fight against disinformation, foreign information manipulation and interference.” In their report the White House leads with sanctions and export licensing cooperation, with a much later nod to a “cooperation framework on issues related to information integrity in crises.”

**Supply chain resilience** measures include cooperation on rare earth magnets, transparency in and diversification of the solar supply chain, and common semiconductor supply chain monitoring, along with what the EC calls “a dedicated taskforce on public financing for secure and resilient digital infrastructure.” The purpose of the taskforce, according to the White House, is “to promote the use of trusted/non-high-risk ICTS suppliers through financing for deployments in third countries.”

This **proposed joint U.S.-E.U. third-country chip foundry financing scheme** is separate from a “transatlantic approach to semiconductor investment aimed at ensuring security of supply and avoiding subsidy races.”

**Emerging technologies** initiatives include establishing a Strategic Standardization Information mechanism to promote and defend common interests in the international standards community, shared methodology on Artificial Intelligence evaluation, developing a common roadmap on telecoms post 5G and 6G, and greater cooperation on “platform governance, such as content moderation, algorithmic amplifications, data access for researchers and the protection of minors.” The White House readout had no mention of platform governance, a longstanding point of divergence in U.S. – E.U. data regulation.

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Publisher: Martin Kalin  
Editor: Frank Ruffing 703.283.5220. [fruffing@gmail.com](mailto:fruffing@gmail.com)

**Sustainability** initiatives in the agreement include cooperation on green public procurement, aligned approaches to greenhouse gas lifecycle assessments, and measures to encourage electric vehicle adoption, according to the E.U, along with an agreement to “establish a Trade and Labor Dialogue, with participation of social partners on both sides,” which will, according to the White House “help workers and firms make successful digital and green transitions, remain globally competitive, and enjoy broad and inclusive prosperity.”

The US announcement makes no further mention of the sustainability element, though it did cite “an early dialogue on shared trade concerns regarding third-countries measures or initiatives,” and “an early-stage consultation mechanism regarding bilateral barriers that may disadvantage the transatlantic economy.” The Joint Statement is available at:

<https://www.commerce.gov/sites/default/files/2022-05/US-EU-Joint-Statement-Trade-Technology-Council.pdf>

## **Axelrod Maintains Enforcement Drumbeat**

Continuing to emphasize that greater consequences drive greater compliance, BIS Export Enforcement Chief Matt Axelrod updated practitioners on the changes to export control enforcement firms can expect from Commerce.

In a broad-ranging speech to the Society for International Affairs May 16, Axelrod reviewed the evolution of export control over the four decades since his office was established, recent developments regarding Russian sanctions, and policy changes planned “in the coming months.”

While enhanced screening mechanisms, an expanded Entity List, and the highly publicized moves in Russian aviation have garnered much attention, Axelrod noted his team’s outreach and education initiative, directed at firms with prior commercial relationships with sanctioned entities in Russia, has so far engaged 440 U.S. companies.

“A number of enforcement inquiries” have been opened, though public charges take longer to prepare. “Down the line you’ll see the results of that hard work – “Axelrod said, “in the form of public charges against companies that are putting profits ahead of the welfare of the Ukrainian people.”

“We are going to be making some changes to our administrative enforcement programs in order to increase prevention, increase transparency, and incentivize compliance and deterrence Our view is that, in addition to our obligation to enforce the law when it’s been violated, we also have an obligation to companies that are playing by the rules. If we are not vigorously enforcing against violators, then those companies that are obeying the law are unfairly disadvantaged in the marketplace.”

- **First, Administrative Charging Letters will be made public when filed**, as is now the case with the SEC. Currently information on violations is not released until after the case is resolved, if ever (see below).
- **Second, OEE will discourage the use of no admit/no deny settlements.** Such settlements, while expedient, fail to make public a statement of facts, “making it more difficult for other companies to learn from their peers’ mistakes and adjust their behavior accordingly.” Further,

current practice affords companies reduced fines when a settlement is reached. “In other enforcement contexts, companies must admit to their conduct in order to qualify for the reduced penalty.”

- **Third, penalties will be higher.** “Given the amount of federal resources it takes to gather the evidence necessary to bring one of these cases, and the national security stakes, penalties must be high enough to both punish and deter those who would violate the law. If penalties are low, it is too easy for companies to do a cost-benefit analysis and conclude that they would rather risk paying a small fine on the back end if they get caught than invest in compliance systems or forego revenue from sales they should be turning down up front.”
- **Reform of the voluntary self-disclosure process has apparently been shelved.** In a similar discussion we reported in March [WTTL 3/21], Axelrod noted that of the 400 self-disclosures last year, only three prompted an administration resolution, with no criminal investigations. At the time, Axelrod said his office was having trouble issuing timely letters of response; we imagine the past two months have scarcely afforded time to catch up.

Axelrod also said that the BIS Regulations and Procedures Technical Advisory Committee (RPTAC) is seeking to reprioritize antiboycott enforcement in a similar fashion.

## Tai Cheesed at Ottawa’s Dairy Move.

in response to Canada’s revised allocation mechanism for its dairy Tariff-Rate Quotas (TRQs) published May 16, U.S. Trade Representative Katherine Tai reiterated her previously stated “great frustration” with negotiating with Ottawa on thorny trade issues. “To date, we have not seen the promises by Canada in the USMCA fully realized,” Tai said in a May 19 statement.

Earlier this year, a Canada-United States Canada Mexico Agreement (USCMA) panel determined Canada’s allocation of dairy TRQs, specifically the set-aside of a percentage of each dairy TRQ exclusively for Canadian processors, is inconsistent with Canada’s commitment not to “limit access to an allocation to processors.”

**An indication of Ottawa’s negotiating strategy** can be found in their TRQ announcement, which noted “given Canada’s deep concerns with the discriminatory electric vehicle tax credits proposed in the Build Back Better bill under U.S. Congress consideration, a decision regarding the potential allocation of the previously unallocated quota under the 2022 CUSMA calendar year dairy TRQs will be taken as the issue evolves, but not later than July 31.”

The National Milk Producers Federation (NMPF) and the U.S. Dairy Export Council (USDEC) called on the White House to levy retaliatory tariffs on Canada. “Ottawa’s decision today is clearly designed to test our resolve by doubling down on its longstanding dairy trade violations, ignoring both the spirit and the letter of its trade agreements. That decision demands retaliatory action by the U.S. government. Otherwise, our trade agreements will be seen as toothless before the ink is dry,” said Jim Mulhern, President and CEO of NMPF.

## FMC: New Compliance Rules, D&D Audits

The Federal Maritime Commission met in open session May 18 to receive updates on ocean transport supply chain, China's monopoly on container and chassis production, the Vessel-Operating Common Carrier (VOCC) Audit Program, and Rulemaking on Carrier Automated Tariffs.

**Fact Finding 29, a two-year long study of the maritime shipping supply chain**, presented its final report. Commissioner Rebecca Dye, who led the effort, proposed a dozen new rules for the Commission to consider next week, including:

- **“We will require compliance officers for ocean carriers and seaports and marine terminal operators.** These compliance officers should report directly to CEO's and not to the general counsel or reside in the general counsel office.
- “[FMC will] establish processes for ocean carriers and marine terminal operators on in two areas: empty container return and earliest return date. Most of you have heard me say that the problems we have experienced during the pandemic are not new and these are two poster children for that assertion.
- “We will issue a rule that defines merchant haulage and ocean carrier haulage.
- “I recommended investigation of charges that are assessed through tariffs under the shipping act of 1984. I heard many complaints about the multitude and the variety of new charges assessed by carriers and marine terminals during the pandemic and I would like to see the Commission have more tools rather than our very limited authority to analyze these new charges: a full time FMC international ocean supply chain program with dedicated resources.”
- Dye also called for greater cooperation with the USDA on ways to improve the agricultural exporter international supply chain, and other outreach initiatives.

**Total detention and demurrage billed in 2021 was \$5.3 billion** and waived was \$646.7 million. “I am concerned by the extent to which the detention and demurrage collected has risen faster than waivers or refunds, said Lucille Marvin, head of the VOCC Audit Program. The average detention and demurrage charge for containers of all types in March 2021 was twice the level seen a year earlier, according to *Container xChange*. Recent FMC Actions have led to substantial fines for carriers levying unreasonable D&D fees [WTTL 5/2]

**Carrier Automated Tariffs Rule Changes** [Docket No. 21-03] remove the option for ocean common carriers to charge a fee to access their tariff; allow non-vessel operating common carriers (NVOCCs) to cross reference certain aspects of other carriers' terms in their tariffs; clarify the ability for NVOCCs to reflect increases in certain charges passed-through by other entities without notice; and make other miscellaneous updates and clarifications.

**Co-Loading**, both in combining less than container load shipments, as well as cooperation between NVOCCs to obtain more favorable rates and services was identified as an area for further study by the

commission. FMC will require that documentation be annotated with the names of all NVOCCs involved in a shipping transaction.

Commissioner Carl Bentzel briefed his colleagues about the *Assessment of the People's Republic of China's Control of Container and Intermodal Chassis Manufacturing*, released in March. Production of containers and chassis is dominated by three China-based manufacturers who control almost 90% of the world's supply. Bentzel expressed concern about so heavily relying on one source.

"We took actions in Russia to restrict trade, to take trade actions when they when they attacked the Ukraine," said Bentzel, "I question whether because of our reliance on containers that we could take the same sort of actions to China. Is this a critical piece of equipment, an essential piece of equipment that we need to pay more attention to?"

## Playbook for Evading Airline Sanctions

Aerospace suppliers and repair centers considering compliance with recent sanctions on Russia and Belarus have an updated case study from BIS' experience with Iran's largest private airline. In an *Order Renewing Order Temporarily Denying Export Privileges* dated May 13 [87 FR 30173], BIS has updated sanctions against Mahan Air and related persons for a pattern of export violations that began fourteen years ago.

The saga of Mahan Airlines' fleet, and the movable feast of ruses to keep it flying has a cast of characters out of Ian Fleming, with transactions spanning from the UK to the Antipodes, most recently ensnaring the Australian logistics operator Toll Group, which concluded an OFAC enforcement case with a \$6.1 million civil penalty earlier this year, precipitated by Mahan-related transactions.

Beginning with the 2008 sham purchase of three Armenian 747s, UK and US regulators have been chasing aircraft and parts since. Over the years, parties have been added to and removed from the TDO, and Mahan has continued to operate the aircraft, adding Airbus and BAe jets, as well as an additional US origin aircraft, an MD-82.

Maintaining a fleet of 55 aircraft, most of which are subject to the EAR for U.S., has called for a broad network of procurement agents and repair depots, as well as the assistance of the freight forwarding community, unwitting or otherwise. Periodic arrests and convictions are announced, yet the aircraft still fly.

According to the aviation analytics firm Cirium, of the 861 passenger and cargo aircraft currently in service in Russia, 332 were manufactured by Boeing, and 304 were made by Airbus. Dozens of the rest are from Bombardier and other western manufacturers, while only 136 are Russian-made Sukhoi planes.

If you or a client have access to western aircraft, parts or MRO facilities, the Mahan experience shows the resourcefulness of a rogue carrier one-thirteenth the size of the Russians.

## Playbook for Overturning ALJ Rulings

Matt Levine of *Bloomberg* brings to our attention a May 18 ruling in the Fifth Circuit in Texas [Jarkesy vs. SEC] which holds that decisions by an Administrative Law Judge violate the Seventh Amendment right to a jury trial, Congress unconstitutionally delegated legislative power to the agency, and statutory removal restrictions on SEC ALJs violate the Take Care Clause of Article II. Levine notes, “The point is that the nondelegation doctrine is alive again, and the Fifth Circuit is making a bet that the next time it goes before the Supreme Court it will win.”

### \*\*\* Briefs \*\*\*

**USTR and the Department of Labor** announced their intent to participate in the Trade and Labor Dialogue called for at the U.S-E.U. Trade and Technology Council Ministerial meeting in Paris. The dialogue will convene at least once a year with representatives of trade unions and industry to discuss issues of mutual interest, including “a fair transition for workers and businesses towards a sustainable, green economy and the impact of digital trade on U.S. and EU workforces.”

**ITC Section 337 Violations, Fulfilled by Amazon** An ITC review [FR 2022-20523] initiated May 11 of power tool batteries illustrates the extent by which Amazon’s fulfillment model may facilitate violations and hamper enforcement. Dongguan, China-based Techtronic Power Tools Technology Ltd (TTT), owner of the Milwaukee, Ryobi, Homelite and Hoover brands, initiated the complaint in response to numerous merchants on Amazon selling replacement batteries for TTT rechargeable tools. Amazon is not named in the action.

**ITC Section 337 Complaint Kindled.** Irish patent troll Sonrai Memory filed a confidential complaint [Docket 3621] May 11, naming Amazon respondent, along with several US and Asian manufacturers of laptops, mobile phones and tablets, citing a power management patent. Sonrai is part of a group of operators sharing the same directors and address in Dublin, including Scramoge Technology, which purchased more than 100 patents on wireless charging last year from respondent LG Electronics.

**BIS Bad Clam Clampdown.** BIS proposes section 1758 controls on four naturally occurring, dual-use marine toxins. As these toxins are now capable of being more easily isolated and purified due to novel synthesis methods and equipment, the absence of export controls on such toxins could be exploited for biological weapons purposes. BIS proposes to amend the CCL by adding these toxins to Export Control Classification Number (ECCN) 1C351.d [Docket No. 220516-0114]

**JUSTICE** 12 months in prison for a Chicago man who illegally exported high-performance computing equipment to Pakistan’s Atomic Energy Commission (PAEC) without obtaining the required authorization from Commerce. From 2006 to 2015 Obaidullah Syed, 67, of Northbrook, Ill and others falsely represented to U.S.-based computer manufacturers that the shipments were intended for Pakistan-based universities or Syed’s businesses, when the true end user of each shipment was either the PAEC or a research institute that trained the agency’s engineers and scientists. The PAEC is a Pakistani government agency designated by the U.S. government as an entity which may pose an unusual or extraordinary threat to the national security, foreign policy, or economy of the United States.

**BRUSSELS. The European Commission** announced May 20 a provisional political agreement was reached for the new **EU Single Window for Customs initiative**. Following the recent recommendations for a more modern and efficient Customs Union put forward by the EU's Wise Persons' Group on the future of Customs, the Commission will table a package of proposals to modernize the Customs Union by the end of the year.

**BRAZIL Cuts Food Tariffs:** The Government of Brazil cut import tariffs May 12 for several categories of goods, focusing on food staples in an attempt to reduce consumer inflation, according to the USDA Foreign Agricultural Service. Import tariffs on beef, chicken, corn, wheat flour, wheat, cookies and bakery products were eliminated through the end of the year, though the duty on mozzarella cheese (HS: 0406.10) was raised back to its original tariff of 28 percent (due to pressure from the dairy sector). Last month Brazil saw the largest monthly jump in inflation in 26 years.

**BRITAIN Readies ITAR Avoiding Missile:** European missile consortium MBDA will soon ship a new Block 6 variant of the ASRAAM dogfight missile that removes American-made components, so that export of the weapon will not be subject to U.S. international traffic in arms regulations (ITAR), *The Defense Post* reports. The ASRAAM Block 6 will be integrated with the UK's Eurofighter Typhoon in 2022 and the F-35 in 2024.

**BRITAIN Aeroflot Slots Stranded.** The UK Department for Transport announced that Aeroflot, Ural Airlines, and Rossiya Airlines will not be permitted to sell their unused landing slots at UK airports – preventing Russia from cashing in on an estimated £50 million. The news comes as the Transport Secretary, Grant Shapps takes up Presidency of the International Transport Forum, which he will use to call for a united response against Russia's invasion of Ukraine.

**CHINA Lockdown Pig Enters Logistics Snake:** An estimated 260,000 TEU (twenty-foot equivalent units) of Shanghai's unshipped cargo is set to swamp the market this summer, making the peak season "even more chaotic" than last year, reports *Loadstar*, citing a study from consultancy *Drewry*.

**CYPRUS** The Cypriot foreign ministry said the Republic has now fulfilled the requirements of the US 2019 partnership act and hopes that Washington will fully lift its decades-old arms embargo on Cyprus. In a statement, the ministry appeared positive regarding the possibility of a total lifting of the US arms embargo against Cyprus, imposed in 1987

**MEXICO / USTR** announced that the United States has asked Mexico to review whether workers at the Panasonic Automotive Systems de Mexico facility in Reynosa, State of Tamaulipas, are being denied the rights of free association and collective bargaining. Mexico has ten days to agree to conduct a review and, if it agrees, 45 days from today to complete the review. The May 18 request is the third under the USMCA's Rapid Response Labor Mechanism.

**NORTH KOREA (DPRK)** State, Treasury and the FBI issued a joint advisory May 16 to warn of attempts by DPRK information technology workers to obtain employment while posing as non-North Korean nationals. The DPRK 'dispatches thousands of highly skilled IT workers around the world to generate revenue that contributes to its weapons of mass destruction, reports the advisory.

**RUSSIA / BIS Issued a Temporary Denial Order terminating the right of Rossiya Airlines** to participate in transactions subject to the Export Administration Regulations (EAR), including exports and reexports from the United States. BIS also publicly identified additional aircraft in likely violation of U.S. export controls, including a **787 Dreamliner owned by Russian oligarch Roman Abramovich**. Providing any form of service to aircraft subject to the EAR that may have violated these controls on Russia or Belarus requires authorization.

**SYRIA The US officially lifted sanctions** on foreign investments in breakaway regions of northern Syria last week, but American officials said there were no plans to remove sanctions on the Assad regime's government. Before the civil war, the Northern Syria was home to most industry and all oil reserves.

**TAIWAN USTR Katherine Tai met with Taiwan's Minister-Without-Portfolio John Deng** in Bangkok Friday under the auspices of the American Institute in Taiwan (AIT) and the Taipei Economic and Cultural Representative Office in the United States (TECRO). Tai and Deng directed their teams to explore concrete ways to deepen the U.S.-Taiwan trade and investment relationship and to meet again in the coming weeks to discuss the path forward.

**VENEZUELA Limited changes to existing sanctions** will permit Chevron to resume negotiations with the state-owned oil company PDVSA, though drilling and export is still prohibited, two senior government officials told the AP last week. "It does not allow entry into any agreement with PDVSA or any other activity involving PDVSA or ... Venezuela's oil sector. So, fundamentally, what they are doing is just allowed to talk." Chevron's stranded assets in Venezuela are reported to exceed \$2.6 billion.

### **\*\*\* Appointments & Calendar \*\*\***

**USDA / USTR** When the White House nominated Alexis Taylor to serve as Under Secretary for Trade and Foreign Agricultural Affairs May 13, Sen. Chuck Grassley welcomed the news, reminding us, "while I'm very pleased an Iowan whom I know to be talented and hardworking has been nominated for this role, the announcement is long overdue. **I once again urge the Biden administration to also nominate a qualified individual for Chief Agricultural Negotiator at USTR without delay.**"

**STATE/DDTC - DECCS Licensing 2.0 Webinar** June 9 DDTC's IT Modernization Team hosts an overview of the updated Licensing application coming this summer to DECCS. The application is being updated to work on a new software platform, providing greater flexibility, security, and administration of the application to the support team. The session will focus on: Goals for the update, Demonstration, Impacts on Existing and in-progress license submissions, Future submissions, and Timeline of release. *Registration to open shortly at <https://www.pmdtc.state.gov/>*

**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.epl.com/bis2022> to complete registration.*

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*Frank Ruffing 703.283.5220 [fruffing@gmail.com](mailto:fruffing@gmail.com)*