

Export Controls and Economic Sanctions

JOHN BOSCARIOL, PATRICK BRISCOE, JAMIE BROWN,
SYLVIA COSTELLOE, ABIGAIL COTTERILL, GEOFFREY M. GOODALE,
TIMOTHY O'TOOLE, JASON PRINCE, CHRISTOPHER STAGG,
AND LAWRENCE WARD¹

This article discusses the significant legal developments that occurred in the area of export controls and economic sanctions in 2019.

I. Developments in Foreign Investment Risk Review Modernization Act (FIRRMA) and Export Control Reform Act (ECRA)

In 2018, Congress enacted two laws regarding technology export controls—FIRRMA² and the ECRA.³ FIRRMA focuses primarily on foreign investments in U.S. businesses, especially those involving critical technologies.⁴ FIRRMA considerably expanded the types of foreign investments that the Committee on Foreign Investment in the United States (CFIUS) is authorized to review.⁵ ECRA, by contrast, now serves as the statutory authority for current U.S. export control regulations and also directs the U.S. Department of Commerce to develop new regulations for U.S. exports involving emerging and foundational technologies.⁶

1. Contributing authors include John Boscariol, McCarthy Tétrault LLP; Patrick Briscoe, University of Minnesota; Jamie Brown, Duane Morris LLP; Sylvia Costelloe, Arent Fox LLP; Abigail Cotterill, Kirkland & Ellis LLP, Geoffrey M. Goodale, Duane Morris LLP; Timothy O'Toole, Miller & Chevalier Chartered; Jason Prince, Holland & Hart LLP; Christopher Stagg, Stagg PC.; and Lawrence Ward, Dorsey & Whitney LLP. Mr. Stagg and Mr. Ward served as editors of this article. This article includes developments occurring between December 1, 2018 and November 30, 2019.

2. Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Pub. L. No. 115-232, § 1701, 132 Stat. 2173 (codified in 50 U.S.C.S. §4565).

3. Export Control Reform Act of 2018 (ECRA), Pub. L. No. 115-232, §1741, 132 Stat. 2208 (codified in 50 U.S.C.S. § 4801).

4. Michael E. Leiter et al., SKADDEN, *CFIUS' First Full Year Under FIRRMA* (Jan. 21, 2020), <https://www.skadden.com/insights/publications/2020/01/2020-insights/cfius-first-full-year-under-firma>.

5. Review of Controls for Certain Emerging Technologies, 83 Fed. Reg. 58201 (proposed Nov. 9, 2018) (to be codified at 15 C.F.R. pt. 744).

6. Michael E. Leiter & Daniel J. Gerkin, SKADDEN, *Commerce Department Will Move Forward with More Stringent Export Controls for Certain Emerging Technologies* (Jan. 10, 2020), <https://www.skadden.com/insights/publications/2020/01/commerce-department-will-move-forward>.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

A. FIRRMA

Although FIRRMA made many procedural and substantive changes to the CFIUS review process, perhaps its most important provisions involved an expansion of the scope of reviewable “covered transactions.”⁷ Before FIRRMA, “covered transactions” included only those in which a foreign buyer obtained “control” over a U.S. business and the transaction implicated national security concerns.⁸ FIRRMA broadened this jurisdiction to include not only controlling investments but also four new types of non-controlling investments that afford a foreign person certain rights in, or influence over, a U.S. business:

- (1) a purchase, lease, or concession by or to a foreign person of real estate located in proximity to sensitive government facilities;
- (2) ‘other investments’ in certain U.S. businesses that afford a foreign person access to material nonpublic technical information in the possession of the U.S. business, membership on the board of directors, or other decision-making rights, other than through voting of shares;
- (3) any change in a foreign investor’s rights resulting in foreign control of a U.S. business or an ‘other investment’ in certain U.S. businesses; and
- (4) any other transaction, transfer, agreement, or arrangement designed to circumvent CFIUS jurisdiction. CFIUS also directed the Treasury Department to define a new regulatory term ‘covered investments.’⁹

FIRRMA also directed CFIUS to promulgate further regulations clarifying this new, broader jurisdiction.¹⁰ On October 11, 2018, CFIUS promulgated the first interim regulations pursuant to FIRRMA, that included immediate amendments to existing CFIUS procedures and the creation of a pilot program mandating CFIUS review of certain transactions involving U.S. businesses with critical technologies.¹¹ Before the pilot program, CFIUS review had been a purely voluntary process, with the only incentive being that transactions not submitted for clearance could be undone after closing if

7. Michael E. Leiter, Katie Clarke, Joe Molosky, & Michelle A. Weinbaum, SKADDEN, *US Finalizes CFIUS Reform: What It Means for Dealmakers and Foreign Investment* (Aug. 6, 2018), <https://www.skadden.com/insights/publications/2018/08/us-finalizes-cfius-reform>.

8. *Id.*

9. See Review of Controls for Certain Emerging Technologies, 83 Fed. Reg. at 58201; see also FIRRMA § 1701.

10. See FIRRMA §1727(c)(1).

11. Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 83 Fed. Reg. 51316 (Oct. 11, 2018)(to be codified at 31C.F.R. pt. 800) (amendments to existing regulations); Determination and Temporary Provisions Pertaining to a Pilot Program To Review Certain Transactions Involving Foreign Persons and Critical Technologies, 51 Fed. Reg. 51322 (to be codified at 31 C.F.R. pt. 801) (pilot program).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2020]

EXPORT CONTROLS & ECONOMIC SANCTIONS 23

CFIUS learned of them and determined they were within its jurisdiction and threatened national security.¹²

On September 24, 2019, the U.S. Department of the Treasury issued proposed regulations interpreting some of the new statutory provisions related to expanded CFIUS jurisdiction, particularly those related to “covered investments.”¹³ Among other things, the proposed regulations implement CFIUS’s new jurisdiction over certain non-controlling investments into certain U.S. businesses involved in critical technology, critical infrastructure, or sensitive personal data.¹⁴ They also implement CFIUS’s new jurisdiction over certain real estate transactions involving foreign persons.¹⁵ A final version of this rule will take effect no later than February 13, 2020.¹⁶

When the final rule takes effect, CFIUS will have jurisdiction to review a wide range of foreign investments in the United States, “including many types of minority, non-controlling investments by foreign persons.”¹⁷

Companies in the aerospace, defense, biotech, energy, life sciences, tech, telecom[s], transportation, and utilities sectors are likely to be impacted heavily. Early-stage start-up companies. . . will also need to consider the possibility that previously routine, non-controlling, foreign investment may now trigger CFIUS scrutiny. Further, any U.S. companies that maintain or collect sensitive personal data of U.S. citizens, or have plans to do so in the future, may also have to reckon with CFIUS when considering foreign investment options.¹⁸

B. ECRA

Section 1758 of ECRA requires the Commerce Department, acting through the Bureau of Industry and Security (BIS), to establish appropriate export controls for “emerging and foundational technologies that . . . are essential to the national security of the United States” and are not “already

12. *CFIUS Announces Pilot Program: Mandatory Declaration Filings in Connection with Certain Transactions*, DORSEY & WHITNEY LLP (Oct. 23, 2018), <https://www.dorsey.com/newsresources/publications/client-alerts/2018/10/cfius-announces-pilot-program>.

13. Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 84 Fed. Reg. 50174 (Sept. 24, 2019) (to be codified at 31 C.F.R. pt. 800).

14. *Id.*; see also Press Release, U.S. Dep’t of Treasury, Treasury Releases Proposed Regulations to Reform National Security Reviews for Certain Foreign Investments and Other Transactions in the United States (September 17, 2019), <https://home.treasury.gov/news/press-releases/sm779>.

15. Press Release, U.S. Dep’t of Treasury, *supra* note 14.

16. *Id.*

17. See *Trade Compliance Flash: New Proposed Regulations Significantly Expand CFIUS Jurisdiction*, MILLER & CHEVALIER (Oct. 01, 2019), <https://www.millerchevalier.com/publication/trade-compliance-flash-new-proposed-regulations-significantly-expand-cfius-jurisdiction>.

18. *Id.*

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

24 THE YEAR IN REVIEW

[VOL. 54

controlled under existing export control programs.”¹⁹ Congress directed the imposition of controls “only after full consideration of the impact on the economy”²⁰ and on U.S. competitiveness in global markets,²¹ as well as consideration of whether the technology in question is “widely available from foreign sources.”²²

ECRA also specified a specific process for identifying these technologies.²³ In particular, ECRA directs an interagency process in which the Secretaries of Commerce, Energy, State, and other appropriate agency heads participate, taking into account the following considerations:

- “(1) the development of emerging and foundational technologies in foreign countries;
- (2) the effect export controls may have on the development of such technologies in the United States; and
- (3) the effectiveness of export controls on limiting the proliferation of emerging and foundational technologies in foreign countries.”²⁴

“Once identified, the technologies will be subject to unilateral controls, with a license requirement for a number of countries, including China.”²⁵ “Such technologies are also to be proposed for multilateral control by other countries, such as through U.S. participation in the Wassenaar Arrangement.”²⁶

BIS began seeking public comment on criteria for identifying “emerging technologies” in November 2018.²⁷ BIS also identified a host of categories of technology for review, including genetic engineering, artificial intelligence, face and voice print technologies, position, navigation and timing technology, microprocessor technology, quantum information and sensing technology, mobile electric power, robotics, and brain computer interfaces.²⁸

Since BIS made this request for public comment it has indicated on several occasions that proposed final regulations would be coming soon.²⁹

19. ECRA § 1758(a)(1).

20. *Id.* § 1752(1).

21. *Id.* § 1752(3).

22. *Id.* § 1752(6).

23. *Id.* § 1758(a)(1).

24. *Id.*

25. Stephan Becker et al., *Update on U.S. Government Review of “Emerging and Foundational” Technologies*, JD SUPRA (Jul. 30, 2019), <https://www.jdsupra.com/legalnews/update-on-u-s-government-review-of-93470/>.

26. *Id.*

27. Review of Controls for Certain Emerging Technologies, 83 Fed. Reg. at 58201.

28. *Id.* at 58202.

29. Ian Cohen, *Commerce Releasing Proposed Emerging Tech Controls in “Next Few Weeks,” Top Commerce Official Says*, EXPORT COMPLIANCE DAILY (Oct. 30, 2019), <https://exportcompliance.daily.com/news/2019/10/30/commerce-releasing-proposed-emerging-tech-controls-in-next-few-weeks-top-commerce-official-says-1910290062>.

Most recently, on October 30, 2019, the Deputy Assistant Secretary for Export Administration stated that proposed emerging technology controls would be released in “the next few weeks” and specifically stating they would come out “before December.”³⁰ He was also quoted as stating that the rule would be “very specific” and there would not be general categorical controls.³¹

As of December 1, 2019, BIS had not yet released the rule.³² This lack of action means that the biggest ECRA development of 2019 has not yet happened, but it is almost certainly imminent.³³ When the final rules take effect, there will likely be significant new controls in the emerging and foundational technologies sectors.³⁴ Once again, companies in the aerospace, defense, biotech, energy, life sciences, tech, telecoms, transportation, and utilities sectors will almost certainly be impacted heavily.³⁵ Stay tuned for a lot more news on this issue in the coming weeks, and in 2020.³⁶

II. Other Export Controls Updates

A. UPDATES TO THE INTERNATIONAL TRAFFIC IN ARMS REGULATIONS

The U.S. Department of State’s Directorate of Defense Trade Controls (DDTC) published a much-anticipated amendment to the International Traffic in Arms Regulations (ITAR) in 2019: the amendment to the ITAR section 126.4 license exemption.³⁷ As of December 2019, the long-awaited publication of a final rule amending United States Munitions List (USML) Categories I, II, and III, which control certain firearms, artillery, and ammunition, has yet to take place.³⁸ That said, those impending USML revisions—coupled with DDTC’s issuance in 2019 of an Advanced Notice of Proposed Rulemaking (ANPR) regarding potential revisions to the space-related subcategories in USML Categories IV and XV—suggest that 2019 may transition into an uptick in ITAR rulemaking activity in 2020.³⁹

30. *Id.*

31. *Id.*

32. Ian Cohen, *Commerce Planning to Release Six Proposed Emerging Technology Controls*, EXPORT COMPLIANCE DAILY (Dec. 16, 2019), <https://exportcompliancedaily.com/news/2019/12/16/commerce-planning-to-release-six-proposed-emerging-technology-controls-bis-official-says-1912130055>.

33. *Id.*

34. *Id.*

35. See *Trade Compliance Flash: New Proposed Regulations Significantly Expand CFIUS Jurisdiction*, *supra* note 17.

36. See Leiter & Gerkin, *supra* note 6.

37. Transfers by or for the United States Government, 22 C.F.R. §126.4 (2019).

38. See International Traffic in Arms Regulations: Transfers Made by or for a Department or Agency of the U.S. Government, 84 Fed. Reg. 16398 (Apr. 19, 2019) (to be codified in 22 C.F.R. pt. 126).

39. *Id.*

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

On April 19, DDTC issued a final rule amending section 126.4, which permits certain transfers of defense articles and defense services made by or for a U.S. Government department or agency without the need for an export license.⁴⁰ The former ITAR section 126.4 license exemption authorized only the “temporary export” and “temporary import” of ITAR-controlled items and defense services, and applied only when “all aspects of the transaction (export, carriage, and delivery abroad)” were “affected” by a U.S. Government agency or when “the export [was] covered by a U.S. Government Bill of Lading.”⁴¹

The final rule amended the section 126.4 license exemption to expand its scope and clarify its eligibility requirements.⁴² First, the amendment broadened section 126.4’s scope to cover “the export, reexport, retransfer, or temporary import of a defense article or the performance of a defense service” by or for a U.S. Government department or agency.⁴³ As a reflection of this expanded scope, DDTC also changed the title or header of section 126.4 to reference “transfers” instead of “shipments.”⁴⁴ Second, the amended section 126.4 clarified who may rely on the license exemption and under what circumstances.⁴⁵ It provides a license exemption for certain transfers undertaken by a U.S. Government department or agency or, in certain limited instances, by a U.S. Government contractor.⁴⁶ Section 126.4(b) also creates a license exemption for certain transfers by private persons to a U.S. Government department or agency at its request, or to an entity other than the U.S. Government at the written direction of a U.S. government department or agency or pursuant to an international agreement or arrangement.⁴⁷ Notably, DDTC has stated that “[e]ach department or agency will determine for itself who is authorized to issue such written directions” to engage in a transfer to a non-U.S.-Government recipient.⁴⁸ Paragraphs (c), (d), (e), and (f) provide further clarity by setting forth additional requirements for transfers performed under section 126.4.⁴⁹

40. *Id.* at 16398–402.

41. Amendments to the International Traffic in Arms Regulations, 58 Fed. Reg. 39280, 39313 (July 22, 1993) (to be codified in 22 C.F.R. pt. 120-128, 130); *see also*, Thomas McVey & Williams Mullen, *ITAR Amendment Expands License Exemption for Transfers By or For the U.S. Government*, JD SUPRA (Sept. 10, 2019), <https://www.jdsupra.com/legalnews/itar-amendment-expands-license-71842/>.

42. *See* Thomas McVey and Williams Mullen, *ITAR Amendment Expands License Exemption for Transfers By or For the U.S. Government*, JD SUPRA (Sept. 10, 2019), <https://www.jdsupra.com/legalnews/itar-amendment-expands-license-71842/>.

43. 22 C.F.R. § 126.4(a)–(b).

44. International Traffic in Arms Regulations: Transfers Made by or for a Department or Agency of the U.S. Government, 84 Fed. Reg. at 16398.

45. *Id.* at 16399.

46. 22 C.F.R. § 126.4(a).

47. *Id.* § 126.4(b).

48. International Traffic in Arms Regulations: Transfers Made by or for a Department or Agency of the U.S. Government, 84 Fed. Reg. at 16399.

49. *Id.*

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2020]

EXPORT CONTROLS & ECONOMIC SANCTIONS 27

On March 8, 2019, DDTC issued an ANPR soliciting public comments on potential revisions to USML Categories IV (Launch Vehicles) and XV (Spacecraft).⁵⁰ On July 26, 2019, DDTC issued an ANPR requesting responses to several questions about the potential consolidation of the ITAR's various license exemptions.⁵¹ With this July ANPR, DDTC made clear that it "does not seek to broaden or eliminate (unless determined to be redundant) existing exemptions in a rulemaking on this issue."⁵² Instead, [DDTC's] goal is to consolidate the various exemptions located throughout the ITAR in a single location and to organize them more effectively."⁵³

On July 31, 2019, the White House issued Presidential Determination No. 2019-21,⁵⁴ which designated Brazil as a major non-NATO ally in accordance with Section 517 of the Foreign Assistance Act of 1961.⁵⁵ Accordingly, on August 21, 2019, DDTC issued a notice on its website that "effective immediately [Brazil] is included within the definition of major non-NATO ally at ITAR section 120.32," and DDTC "will amend [section 120.32] in the future to include specific reference to Brazil among the list of designated nations."⁵⁶

November 2019 saw yet another development in DDTC's long-running litigation involving Defense Distributed, a U.S. company that has engaged in the online distribution of computer-aided design (CAD) files for printing 3D weapons.⁵⁷ DDTC asserted that the online distribution of such CAD files was subject to the ITAR and posed a major threat to U.S. national security.⁵⁸ A non-profit organization that designed such firearms challenged the prepublication approval requirement.⁵⁹ The District Court for the Western District of Texas and the Court of Appeals for the Fifth Circuit ruled in DDTC's favor on that issue during 2015 through 2016.⁶⁰ On July 29, 2018, however, DDTC reversed course by entering into a settlement agreement that approved the CAD files for public release online and temporarily modified the USML to allow such publication.⁶¹ This action prompted multiple states and the District of Columbia to sue DDTC and

50. Request for Comments Regarding Review of United States Munitions List Categories IV and XV, 84 Fed. Reg. 8486, 8486-87 (Mar. 8, 2019) (to be codified at 22 C.F.R. pt. 121).

51. Consolidation of Exemptions in the International Traffic in Arms Regulations, 84 Fed. Reg. 36040, 36040 (July 26, 2019) (to be codified in 22 C.F.R. pt. 120-30).

52. *Id.*

53. *Id.*

54. Designation of the Federative State of Brazil as a Major Non-NATO Ally, 84 Fed. Reg. 43035, 43035 (Aug. 19, 2019).

55. 22 U.S.C. 2321k (2019).

56. *Brazil designated a non-NATO ally*, U.S. DEP'T OF ST., DIRECTORATE OF DEF. TRADE CONTROLS (Aug. 21, 2019), https://www.pmdtc.state.gov/_public?id=ddtc_public_portal_news_and_events&timeframe=6month&cat=Notice.

57. See *Washington v. United States Dep't of State*, 420 F. Supp. 3d 1130, 1136 (W.D. Wash. 2019) (citing *Defense Distributed v. U.S. Dep't of State*, 838 F.3d 451, 458 (5th Cir. 2016)).

58. *Id.*

59. *Id.*

60. *Id.* at 1136-37.

61. *Id.* at 1137.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

several co-defendants in the Western District of Washington.⁶² On November 12, 2019, the Western District of Washington entered an order invalidating DDTC's regulatory actions, holding *inter alia* that DDTC's temporary modification of the USML to allow immediate publication of the CAD files constituted the removal of one or more items from the USML without the thirty-day Congressional notice required under the Arms Export Control Act,⁶³ and that DDTC's regulatory reversal was "arbitrary and capricious."⁶⁴

B. UPDATES TO THE EAR

1. Entity List Designations

On May 15, 2019, President Trump issued an Executive Order declaring a national emergency with regards to the creation and exploitation by "foreign adversaries" of vulnerabilities in information and communication technology and services.⁶⁵ On the following day, BIS added Huawei and its sixty-eight non-U.S. affiliates to the Entity List, effectively halting exports and reexports of items subject to the EAR to Huawei.⁶⁶ "As a result of the [Entity List] designation, no supplier . . . may export, reexport, or transfer (in country) any commodity, software, or technology (items) subject to the [EAR] to the listed Huawei [EL] entities unless authorized by a BIS license."⁶⁷ On May 20, 2019, BIS issued a temporary general license (TGL) permitting certain transactions with Huawei to continue despite the Entity List designation.⁶⁸ On November 20, 2019, the U.S. Government extended the TGL through February 16, 2020.⁶⁹

62. *Id.* at 1138.

63. *See Washington*, 420 F. Supp. 3d at 1144.

64. *Id.* at 1147.

65. Exec. Order No. 13,873, 84 Fed. Reg. 22689 (May 15, 2019).

66. Sylwia A. Lis, Paul Amberg, & Meghan Hamilton, *U.S. Government Imposes Comprehensive Restrictions on Exports/Reexports to Huawei*, BAKER MCKENZIE (May 19, 2019), <https://sanctionsnews.bakermckenzie.com/us-government-imposes-comprehensive-restrictions-on-exports-reexports-to-huawei-and-its-affiliates-and-issues-executive-order-to-secure-information-and-communications-technology-and-services-in-the-un/>.

67. *Id.*

68. Nicholas F. Coward et al., *US Government Issues a 90-Day Temporary General License*, BAKER MCKENZIE (May 23, 2019), <https://sanctionsnews.bakermckenzie.com/us-government-issues-90-day-temporary-general-license-authorizing-certain-transactions-with-huawei-and-its-affiliates/>.

69. Temporary General License: Extension of Validity, 84 Fed. Reg. 64018 (Nov. 20, 2019) (to be codified at 15 C.F.R. pt. 744).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2020]

EXPORT CONTROLS & ECONOMIC SANCTIONS 29

2. *Regulatory Updates*

a. Export Restrictions to Cuba

On October 19, 2019, BIS further restricted the Cuban Government's access to items subject to BIS's EAR.⁷⁰ "The United States maintains a comprehensive embargo on trade with Cuba, and the export and reexport to Cuba of items subject to the EAR require a BIS license unless authorized by a license exception specified in EAR section 746.2(a)(1) or exempted from license requirements in EAR section 746.2(a)(2)."⁷¹ The amendments to the EAR came in the wake of the U.S. Department of the Treasury's Office of Foreign Assets Control's (OFAC) amendments to the Cuban Assets Control Regulations, that re-imposed limitations on "U-turn" transactions and remittances effective October 9, 2019.⁷²

b. Advance Notice of Proposed Rulemaking

On November 19, 2018, BIS published an advance notice of proposed rulemaking (ANPRM) in the Federal Register that sought public comment on criteria for identifying and defining "emerging technologies" essential to U.S. national security.⁷³ "The ANPRM is the first step toward BIS adopting rules designating which technologies should be subjected to additional U.S. export controls."⁷⁴ BIS published the ANPRM as required by ECRA section 1758.⁷⁵

III. Economic Sanctions Update

A. CUBA RELATED SANCTIONS

In furtherance of the National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba (NSPM) issued in June 2017,⁷⁶ OFAC published two notices to amend the Cuban Assets Control Regulations (CACR).⁷⁷ On June 5, 2019, OFAC issued a rulemaking notice that eliminated the general license that permitted U.S.

70. Restricting Additional Exports and Reexports to Cuba, 84 Fed. Reg. 56117 (Oct. 21, 2019) (to be codified at 15 C.F.R. pt. 734, 740, 746).

71. *Cuba*, U.S. DEP'T OF COM., BUREAU OF INDUST. AND SEC. (2019), <https://www.bis.doc.gov/index.php/policy-guidance/country-guidance/sanctioned-destinations/cuba>.

72. Cuban Assets Control Regulations, 84 Fed. Reg. 47121 (Sept. 9, 2019) (to be codified at 31 C.F.R. pt. 515).

73. Review of Controls for Certain Emerging Technologies, 83 Fed. Reg. at 58201.

74. John B. Bellinger et al., *BIS Invites Comment on Identifying Emerging Technologies to New Export Controls and CFIUS*, ARNOLD & PORTER (Dec. 5, 2018), <https://www.arnoldporter.com/en/perspectives/publications/2018/12/bis-invites-comment-on-identifying-emerging-tech>.

75. ECRA § 1758.

76. See Strengthening the Policy of the United States Toward Cuba, 82 Fed. Reg. 48875, 48875 (Oct. 20, 2017) (Originally issued by President Trump on June 16, 2017, the NSPM was published in the Federal Register on October 20, 2017).

77. See Cuba Assets Control Regulations, 84 Fed. Reg. 25992 (June 5, 2019) (to be codified at 31 C.F.R. pt. 515); see also, Cuba Assets Control Regulations, 84 Fed. Reg. at 47121.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

30 THE YEAR IN REVIEW

[VOL. 54

persons to travel to Cuba to participate in educational exchanges to promote “people-to-people contact” under the auspices of a sponsoring organization.⁷⁸ Subsequently, on September 9, 2019, OFAC promulgated a rulemaking notice that, effective October 9, 2019, removed certain authorizations for banking institutions to process “U-turn” transactions in which the sender and recipient are outside U.S. jurisdiction and placed greater restrictions on authorizations relating to family remittances (e.g., capping remittances to \$1,000 per quarter to be sent from one remitter to one Cuban national).⁷⁹ It also excluded remittances from being provided to close family members of prohibited officials of the Cuban Government and prohibited members of the Cuban Communist Party.⁸⁰ Significantly, though, the amendment also revised the CACR to authorize unlimited remittances to self-employed individuals in the non-state sector in Cuba.⁸¹

B. IRAN RELATED SANCTIONS

After withdrawing from the Joint Comprehensive Plan of Action (JCPOA) in 2018, the United States continued to impose strict sanctions on Iran in 2019.⁸² On April 8, 2019, President Trump announced that the U.S. Department of State would designate Iran’s Islamic Revolutionary Guard Corps (IRGC) as a Foreign Terrorist Organization (FTO).⁸³ This designation marked the first time that the United States labeled a part of another government as an FTO.⁸⁴ As a result of the designation, the United States can impose secondary sanctions on non-U.S. persons who provide “material support” to the IRGC and entities it owns or controls, and can seize its assets wherever located worldwide, and can criminally prosecute persons, including non-U.S. persons wherever located, that provide such material support to the IRGC.⁸⁵

On May 8, 2019, President Trump issued Executive Order 13871, which provides for secondary sanctions in relation to Iran’s iron, steel, aluminum, and copper sectors, which provides the country with important sources of

78. Cuba Assets Control Regulations, 84 Fed. Reg. at 25992.

79. Cuba Assets Control Regulations, 84 Fed. Reg. at 47121.

80. *Id.*

81. *Id.*

82. Mark Landler, *Trump Abandons Iran Nuclear Deal He Long Scorned*, N.Y. TIMES (May 8, 2018), <https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html>.

83. Press Release, U.S. Dep’t of St., Statement from the President on the Designation of the Islamic Revolutionary Guard Corps as a Foreign Terrorist Organization, (April 8, 2019), <https://www.whitehouse.gov/briefings-statements/statement-president-designation-islamic-revolutionary-guard-corps-foreign-terrorist-organization/>.

84. *Id.*

85. *Legal and Practical Considerations of the Trump Administration’s Designation of the IRGC as a Foreign Terrorist Organization*, AKIN GUMP STRAUSS HAUER & FELD, LLP (Apr. 12, 2019), <https://www.akingump.com/en/news-insights/legal-and-practical-considerations-of-the-trump-administration-s.html>.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2020]

EXPORT CONTROLS & ECONOMIC SANCTIONS 31

export revenue.⁸⁶ The Executive Order provides for blocking of non-U.S. persons who engage in “significant transactions” with the iron, steel, aluminum, and copper sectors, including supplying goods and services to or purchasing products from those sectors.⁸⁷ On August 6, 2019, OFAC amended the Iranian Financial Sanctions Regulations to implement the Executive Order.⁸⁸

C. RUSSIA/UKRAINE RELATED SANCTIONS

The United States continues to balance the imposition of targeted sanctions on Russia with avoidance of significant disruptions to U.S. economic activity in Russia.⁸⁹ In January 2019, OFAC removed certain entities from the SDN List that OFAC had previously designated due to ownership by Russian oligarch Oleg Deripaska after he sold off part of his interest in the entities.⁹⁰ The removal came after OFAC had repeatedly extended certain general licenses allowing for wind down activities with the entities.⁹¹ OFAC has continued to extend the general license for GAZ Group, another entity in which Deripaska holds an interest, most recently issuing an extension through March 2020.⁹²

On August 2, 2019, the Trump Administration imposed a long-awaited second round of sanctions on Russia pursuant to the Chemical and Biological Weapons Control and Warfare Elimination Act (CBW Act).⁹³ These sanctions followed Russia’s failure to make adequate assurances it would not engage in other chemical weapons attacks, following the March 2018 nerve agent poisoning of two UK citizens in England, which was attributed to Russia.⁹⁴ Notably, President Trump did not exercise his authority to impose certain additional sanctions, and the President elected to waive some sanctions that are otherwise required under the CBW Act, such

86. *The Escalating Sanctions Against Venezuela, Russia and Iran*, KIRKLAND & ELLIS LLP (Aug. 16, 2019), https://www.kirkland.com/publications/article/2019/08/the-escalating-sanctions-against-venezuela_russia.

87. *Id.*

88. *Id.*

89. Press Release, U.S. Dep’t of the Treasury, OFAC Delists En+, Rusal, and EuroSibEnerg (Jan. 27, 2019), <https://home.treasury.gov/news/press-releases/sm592>.

90. *Id.*

91. *Ukraine/Russia-Related Sanctions*, U.S. DEP’T OF THE TREASURY, RES. CTR., <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx> (last updated Mar. 20, 2020).

92. *OFAC Recent Actions: Issuance of Amended Ukraine-related General Licenses*, U.S. DEP’T OF THE TREASURY (Nov. 1, 2019), <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20191101.aspx>.

93. *Second Round of U.S. Sanctions on Russia Pursuant to the Chemical and Biological Weapons Control Act*, AKIN GUMP STRAUSS HAUER & FELD LLP (Aug. 14, 2019), <https://www.akingump.com/en/news-insights/second-round-of-u-s-sanctions-on-russia-pursuant-to-the-chemical.html>.

94. *Id.*

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

32 THE YEAR IN REVIEW

[VOL. 54

as prohibiting all loans to the Russian government (rather than just non-ruble-denominated debt).⁹⁵

D. SYRIA RELATED SANCTIONS

On March 25, 2019, OFAC published an Advisory to the Maritime Petroleum Shipping Community on Sanctions Risks Related to Petroleum Shipments involving Iran and Syria.⁹⁶ The advisory notes that OFAC will “aggressively target for designation” anyone who supports the Government of Syria, including by financing or facilitating the delivery of petroleum to the Government of Syria.⁹⁷ OFAC outlined the deceptive practices found in the shipping industry that could lead to inadvertent dealings in Syria.⁹⁸ These practices include falsifying documents, ship to ship transfers (e.g., transferring cargo at sea to conceal origin or destination), disabling online systems designed to track cargo, and changing vessel names.⁹⁹ OFAC recommended entities bolster compliance procedures and specifically monitor for deceptive practices by carefully reviewing documentation and conducting diligence.¹⁰⁰ The advisory also provides a list of vessels that OFAC determined had delivered to Syria from 2016-2018 for use in identifying potentially risky transactions.¹⁰¹ The advisory comes on the heels of a similar 2018 advisory related to North Korea and demonstrates OFAC’s renewed concern for the circumvention of sanctions by the shipping community and OFAC’s reliance on secondary sanctions to target non-U.S. entities.¹⁰²

E. VENEZUELA RELATED SANCTIONS

The U.S. Government continued to impose harsher sanctions against Venezuela in 2019.¹⁰³ On January 28, 2019, OFAC added *Petróleos de Venezuela, S.A. (PdVSA)*, Venezuela’s state-owned oil and natural gas company, to the Specially Designated Nationals and Blocked Persons List (SDN List), although OFAC issued general licenses on the same date to allow several of U.S. companies to be able to continue to engage in certain

95. Laura Brank et al., *U.S. Announces Second Round of Sanctions on Russia for Chemical Weapons Violations*, JD SUPRA (Aug. 7 2019), <https://www.jdsupra.com/legalnews/u-s-announces-second-round-of-sanctions-75316/>.

96. U.S. DEP’T OF THE TREASURY, OFAC ADVISORY TO THE MARITIME PETROLEUM SHIPPING COMMUNITY (Mar. 25, 2019), *available at* https://www.treasury.gov/resource-center/sanctions/Programs/Documents/syria_shipping_advisory_.pdf.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *U.S. Economic Sanctions: Across Last Year*, KIRKLAND & ELLIS LLP (Feb. 24, 2020), https://www.kirkland.com/publications/article/2020/02/us-economic-sanctions_across-last-year.

103. *Id.*

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2020]

EXPORT CONTROLS & ECONOMIC SANCTIONS 33

kinds of transactions with PdVSA for several months.¹⁰⁴ Subsequently, the Trump Administration imposed comprehensive sanctions against the Government of Venezuela pursuant to Executive Order 13884 of August 5, 2019 (EO 13884).¹⁰⁵ Specifically, EO 13884 served to block all property and interests in property of the Government of Venezuela that are in or that come into the United States or the possession or control of a U.S. person and to authorize the imposition of secondary sanctions for dealings by non-U.S. persons with certain persons whose property is blocked pursuant to the Executive Order.¹⁰⁶ President Trump then issued Executive Order 13808 of August 24, 2019 (EO 13808), pursuant to which certain transactions by U.S. persons are prohibited relating to new debt of *Petróleos de Venezuela, S.A.* (PdVSA), new debt and new equity of the Government of Venezuela, bonds issued by the Government of Venezuela before August 25, 2017, the purchase of securities from the Government of Venezuela, and the payment of dividends and other distribution of profits to the Government of Venezuela by entities owned or controlled by the Venezuelan government.¹⁰⁷ During the course of the year, OFAC also added a number of other Venezuelan persons and entities to the SDN List.¹⁰⁸

F. COMPLIANCE GUIDANCE

On May 2, 2019, OFAC published “A Framework for Compliance Commitments,” which outlines its expectations for effective sanctions compliance programs and identified five key components of a compliance program.¹⁰⁹

104. Press Release, U.S. Department of the Treasury, Treasury Sanctions Venezuela’s State-Owned Oil Company *Petróleos de Venezuela, S.A.* (Jan. 28, 2019), <https://home.treasury.gov/news/press-releases/sm594>.

105. *Trump Administration Imposes Broad Sanctions on the Government of Venezuela*, AKIN GUMP STRAUSS HAUER & FELD LLP (Aug. 16, 2019), <https://www.akingump.com/en/news-insights/trump-administration-imposes-broad-sanctions-on-the-government.html>.

106. See Exec. Order No. 13,884, 84 Fed. Reg. 38843, § 1 (Aug. 7, 2019). (noting that in connection with the issuance of EO 13884, OFAC issued new or revised general licenses authorizing certain U.S. persons to engage in certain activities that otherwise would be prohibited by the EO 13884 because they involve the Government of Venezuela, including entities owned or controlled by the Government of Venezuela, such as *Petróleos de Venezuela, S.A.* (PdVSA), PDV Holding, Inc., CITGO Holding, Inc., and Nynas AB, among others).

107. Exec. Order No. 13808, 82 Fed. Reg. 41155 (Aug. 24, 2017) (noting that at the same time, OFAC issued several general licenses to authorize certain transactions with certain Venezuelan entities that would otherwise be prohibited under EO 13808).

108. *Specially Designated Nationals and Blocked Persons List (SDN) Human Readable Lists*, U.S. DEP’T OF THE TREASURY, RES. CTR., <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> (last visited May 25, 2020).

109. U.S. DEP’T OF THE TREASURY, A FRAMEWORK FOR COMPLIANCE COMMITMENTS (May 2, 2019), available at https://www.treasury.gov/resource-center/sanctions/Documents/framework_ofac_cc.pdf.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

G. OTHER DEVELOPMENTS

1. *Nicaragua*

Beginning in April 2019, OFAC has designated a number of individuals and entities pursuant to Executive Order 13851, issued November 2018, authorizing designation of persons engaged in human rights violations or corruption in Nicaragua.¹¹⁰ To date, OFAC designations have largely targeted President Ortega, his inner circle, and others with ties to the Government of Nicaragua.¹¹¹ In addition to designating certain persons on the SDN List, on September 3, 2019, OFAC also published the Nicaragua Sanctions Regulations to formally implement the Executive Order.¹¹² Given that the Trump administration has included Nicaragua in what it terms the “Troika of Tyranny” along with sanctioned countries Cuba and Venezuela, U.S. companies should treat Nicaragua as a high-risk country.

2. *Turkey*

On October 14, 2019, OFAC designated two Turkish government ministries and three Turkish officials in reaction to Turkey’s military operations in Syria.¹¹³ The military operations occurred after the Trump Administration removed U.S. forces from Syria.¹¹⁴ In removing forces, President Trump indicated his willingness to sanction Turkey if it committed acts of violence in Syria.¹¹⁵ After Turkish forces moved into Syria, OFAC designated Turkish entities that the United States deemed responsible for the violence.¹¹⁶ OFAC issued General Licenses for certain wind down activities and the conduct of official business with Turkey. But after Turkey agreed to a ceasefire, OFAC delisted the Turkish entities and officials.¹¹⁷

110. Exec. Order No. 13851, 83 Fed. Reg. 61505 (Nov. 29, 2018); *see generally Nicaragua Sanctions: Releases*, U.S. DEP’T ST. (last visited May 25, 2020), <https://www.state.gov/nicaragua-sanctions/#Releases>.

111. *See* Press Release, Michael Pompeo, The United States Takes Action Against the Ortega Regime in Nicaragua, (Dec. 12, 2019) (on file with U.S. Dep’t of State).

112. Nicaragua Sanctions Regulations, 84 Fed. Reg. 46,440 (Sept. 4, 2019) (to be codified at 31 C.F.R. pt. 582).

113. Press Release, U.S. Dep’t of the Treasury, Treasury Designates Turkish Ministries and Senior Officials in Response to Military Action in Syria (Oct. 14, 2019), <https://home.treasury.gov/news/press-releases/sm792>.

114. *Id.*

115. *Id.*

116. *Id.*

117. Press Release, U.S. Dep’t of the Treasury, Treasury Removes Sanctions Imposed on Turkish Ministries and Senior Officials Following Pause of Turkish Operations in Northeast Syria (Oct. 23, 2019), <https://home.treasury.gov/news/press-releases/sm801>.

IV. Notable Enforcement Cases

A. DDTC ENFORCEMENT CASES

Darling Industries, Inc. (Darling) agreed to pay a fine of \$400,000 as part of a civil consent agreement with DDTC concluded on February 26, 2019.¹¹⁸ DDTC alleged that a Darling subsidiary committed six violations of the ITAR,¹¹⁹ although the agency also summarized the results of a self-initiated review that revealed “decades of systematic, reoccurring violations” arising from inadequate training and inattention to export classification and licensing requirements.¹²⁰ The six alleged violations involved the failure to appoint a qualified “empowered official,” unauthorized exports of ITAR-controlled missile insulator material and related data and services to Canada from 2012 to 2014, and exports of breathing hoses designed for use in military aircraft to several European countries from 2009 to 2013.¹²¹

In a consent agreement concluded with DDTC on September 19, 2019, L3Harris Technologies, Inc. was assessed a civil fine of \$13,000,000 for 131 alleged violations of the ITAR.¹²² The alleged violations included unauthorized exports of military radio software, tactical radios, military electronics, technical data relating to night-vision gear and tactical radios, remote-controlled vehicles, and radar simulators to end-users in various NATO member countries (Australia, Brazil, New Zealand, Singapore, and Thailand).¹²³ Multiple infractions of a more administrative nature were also alleged.¹²⁴ The alleged violations were made known to DDTC via one directed and ten voluntary disclosures.¹²⁵ Because three of the voluntary disclosure reports described matters materially related to the directed disclosure, DDTC determined the voluntary nature of their submission did not warrant consideration as a mitigating factor.¹²⁶ The seven other

118. Darling Indus. Inc., (U.S. Dep’t of State Feb. 26, 2019) (final order), *available at* https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=a1923dd3dbf3ef405c3070808c96199a.

119. Letter from Jae Shin, Dir. of Compliance, Directorate of Def. Trade Controls, to Gary Darling, President, Darling Indus., Inc. (Feb. 2019) (proposed charging letter), *available at* https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=4e52f153dbf3ef405c3070808c961906.

120. *Id.* at 3.

121. *Id.* at 4–5.

122. L3Harris Tech., Inc., (U.S. Dep’t of State, Sept. 19, 2019) (final order), *available at* https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=43579882db44c0107ede365e7c9619cc.

123. Letter from Michael Miller, Acting Deputy Assistant Sec’y, Directorate Def. Trade Controls, to William M. Brown, Chairman & CEO, L3 Harris Tech., Inc. (Sept. 2019) (proposed charging order), *available at* https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=ff9be8dad0044107ede365e7c96190f.

124. *Id.* at 7–9.

125. *Id.* at 3.

126. *Id.* at 1.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

disclosure reports were sufficiently unrelated to the directed disclosure to be considered voluntary.¹²⁷

AeroVironment, Inc. reached a \$1,000,000 civil settlement with DDTTC effective November 19, 2019, in connection with ten alleged violations of the ITAR.¹²⁸ These alleged violations fell into roughly five categories:

- (1) unauthorized exports of unmanned aircraft systems (UAS) to Canada and related infractions;
- (2) unauthorized exports of controlled technical data in the form of non-public UAS user manuals to Australia, Canada, France, and Thailand;
- (3) unauthorized exports of Shrike UAS to the United Kingdom;
- (4) violations of terms, conditions, and provisos attached to DDTTC authorizations; and
- (5) material recordkeeping lapses.¹²⁹

AeroVironment voluntarily disclosed these activities and undertook self-initiated compliance program improvements.¹³⁰

B. MAJOR BIS ENFORCEMENT CASES

BIS imposed a \$600,000 fine on China-based Yantai Jereh Oilfield Services Group Co., Ltd. (Yantai Jereh) on December 10, 2018.¹³¹ Yantai Jereh was alleged to have arranged three attempted transshipments of U.S.-origin coiled tubing (valued at \$383,881 total) to Iran via China and the United Arab Emirates, in violation of the EAR (and related OFAC requirements).¹³² In addition, Yantai Jereh was alleged to have made false or misleading statements to BIS investigators about its knowledge of the intended ultimate destination of these shipments.¹³³

127. *Id.* at 2.

128. AeroVironment, Inc., (U.S. Dep't of State, Nov. 19, 2019) (final order), *available at* https://www.pmdtcc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=06321fe0db5dc410529d368d7c9619a8.

129. Letter from Michael Miller, Acting Deputy Assistant Sec'y, Directorate Def. Trade Controls, to Wahid Nawabi, President & CEO, AeroVironment, Inc. (Nov. 2019) (proposed charging order), *available at* https://www.pmdtcc.state.gov/_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=2d321fe0db5dc410529d368d7c9619a4.

130. *Id.* at 1.

131. Yantai Jereh Oilfield Services Grp. Co., Ltd. (U.S. Dep't of Commerce, Dec. 10, 2018) (final order), *available at* <https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2018/1207-e2574/file>.

132. *Id.* at 2–3; U.S. DEP'T OF THE TREASURY, ENFORCEMENT INFORMATION FOR DECEMBER 12, 2018 (2018), *available at* https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20181212_jereh.pdf (noting that OFAC concurrently imposed a fine of \$2,774,972 on Yantai Jereh).

133. Yantai Jereh Oilfield Services Grp., *supra* note 131, at 3–4.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2020]

EXPORT CONTROLS & ECONOMIC SANCTIONS 37

On July 8, 2019, Pouran Aazad and Sadr Emad-Vaez (both naturalized U.S. citizens originally from Iran), along with Ghareh Sabz Co. (an Iranian company), agreed to remit \$300,000 to BIS as part of a joint settlement.¹³⁴ BIS charged the three respondents with conspiring to engage in an unauthorized export by attempting to have a highly-accurate micro drill press with a video edge finder, process inspection camera, and spray mister system sent from the United States to Iran via the United Arab Emirates in 2013.¹³⁵ The respondents allegedly took specific and concrete steps to persuade the U.S. manufacturer to conceal the ultimate destination of the drill press in shipping documentation.¹³⁶ BIS learned of the activity and intervened to stop the shipment before it left the United States.¹³⁷

C. MAJOR OFAC ENFORCEMENT CASES

OFAC announced on April 9, 2019, that London-headquartered Standard Chartered Bank (SCB) entered into a global settlement agreement with federal, New York, and United Kingdom authorities relating to apparent violations of the now-repealed Burmese and Sudanese Sanctions Regulations, the CACR, the ITSR, the Syrian Sanctions Regulations (SySR),¹³⁸ and related laws, occurring between 2009 and 2014.¹³⁹ As part of the global arrangement, SCB agreed to pay a fine of \$639,023,750 to settle its potential civil liability with OFAC, which described the bank's processing of 9,335 prohibited financial transactions from 2009 to 2014 as an "egregious case" involving "reckless disregard" of relevant law, "actual knowledge and/or reason to know" of problematic activities, and "significant harm" to several economic sanctions programs.¹⁴⁰ In parallel with (but separate from) the global settlement, SCB also agreed to a fine of \$18,016,283 for allegedly processing 1,795 financial transactions involving persons specially designated or blocked pursuant to the Zimbabwe Sanctions Regulations.¹⁴¹

On April 15, OFAC released information on three global settlement agreements that UniCredit Bank AG (Germany), UniCredit Bank Austria AG, and UniCredit S.p.A. (Italy) reached with OFAC, the Department of Justice, and New York state authorities.¹⁴² Together the UniCredit

134. Pouran Aazad, 84 Fed. Reg. 33913 (Dep't of Commerce July 16, 2019).

135. *Id.* at 3.

136. *Id.* at 4.

137. *Id.*

138. *See generally* Syrian Sanctions Regulations, 31 C.F.R. pt. 542 (2014).

139. U.S. DEP'T OF THE TREASURY, ENFORCEMENT INFORMATION FOR APRIL 9, 2019 (2019), *available at* https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190408_scb_webpost.pdf.

140. *Id.* at 2.

141. *Id.* at 3; *see* Zimbabwe Sanctions Regulations, 31 C.F.R. pt. 541 (2004).

142. U.S. DEP'T OF THE TREASURY, ENFORCEMENT INFORMATION FOR APRIL 15, 2019 (2019), *available at* https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190415_uni_webpost.pdf.

companies were alleged to have committed 2,897 violations of the now-repealed Burmese and Sudanese Sanctions regulations, the CACR, the ITSR, the SySR, the Libyan Sanctions Regulations,¹⁴³ the Global Terrorism Sanctions Regulations,¹⁴⁴ and the Weapons of Mass Destruction Proliferators Sanctions Regulations¹⁴⁵ from 2007 through 2012.¹⁴⁶ OFAC characterized the three cases as “egregious,” and summarized the systemic, “reckless,” and sometimes apparently “willful” measures the banks employed to disguise the involvement of sanctioned countries and entities in financial transactions subject to U.S. jurisdiction.¹⁴⁷ The combined fine was \$611,023,421.¹⁴⁸

V. Canadian Developments

A. ECONOMIC SANCTIONS

1. *Canada Expands Sanctions Related to Ukraine*

In 2019, the Canadian government substantially expanded the list of sanctioned individuals related to Ukraine.¹⁴⁹ Canada has imposed sanctions on the Russian-occupied Crimea region of Ukraine and on Ukrainian individuals and entities related to Crimea’s annexation and the ongoing Russian occupation in parts of eastern Ukraine in 2014.¹⁵⁰ This list of sanctioned persons was further expanded first in March 2019 and then in June 2019 to target an additional 114 individuals and fifteen entities.¹⁵¹ The expansion of sanctions was a response to Russia’s involvement in the Kerch Strait incident on November 25, 2018, when Russian coastguard vessels seized a Ukrainian tugboat and two gunboats on their way to port of Mariupol.¹⁵²

2. *Canada Continues to Expand Sanctions on Venezuela*

Beginning in 2017, Canada has imposed several rounds of sanctions against Venezuela in response to reported democratic and human rights

143. Libyan Sanctions Regulations, 31 C.F.R. pt. 570 (2016).

144. Global Terrorism Sanctions Regulations, 31 C.F.R. pt. 594 (2004).

145. Weapons of Mass Destruction Proliferators Sanctions Regulations, 31 C.F.R. pt. 544 (2005).

146. ENFORCEMENT INFORMATION FOR APRIL 15, 2019, *supra* note 142, at 1.

147. *Id.* at 1–2.

148. *Id.*

149. Regulations Amending the Special Economic Measures (Ukraine) Regulations (Special Economic Measures Act), SOR/2019-72 (Can.).

150. *Canada imposes new sanctions in response to Russia’s aggressive actions*, GLOBAL AFFAIRS CAN., (Mar. 15, 2019), <https://www.canada.ca/en/global-affairs/news/2019/03/canada-imposes-new-sanctions-in-response-to-russias-aggressive-actions.html>.

151. *Id.*; see *Canadian Sanctions Related to Russia*, GOV’T OF CANADA, https://www.international.gc.ca/world-monde/international_relations-reactions_internationales/sanctions/russia-russie.aspx?lang=eng (last modified Jan. 14, 2020).

152. *Canada imposes new sanctions in response to Russia’s aggressive actions*, *supra* note 150.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2020]

EXPORT CONTROLS & ECONOMIC SANCTIONS 39

abuses by the regime of Nicolás Maduro.¹⁵³ In April 2019, forty-three Venezuelan individuals were added to the Canadian sanctions list, most of whom are high level officials of the Maduro regime.¹⁵⁴ Two months later, one of those individuals, the former deputy director of the Venezuelan Directorate General of Military Intelligence, Cristopher Figuera, was delisted by Canada because he had parted with the Maduro regime to support Juan Guaidó's opposition forces.¹⁵⁵

3. *Canada's Response U.S. Helms-Burton Developments*

On April 17, 2019, the Trump administration announced that the United States will no longer suspend the private right of action under Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (the Helms-Burton Act).¹⁵⁶ Title III of the Helms-Burton Act allows parties whose property was confiscated by the Cuban Government in 1959 to bring actions in U.S. courts against companies and individuals who traffic in such property.¹⁵⁷ The Helms-Burton Act is extraterritorial.¹⁵⁸

On the same day as the U.S. announcement, European Union (EU) High Representative/Vice President Federica Mogherini, Minister of Foreign Affairs of Canada Chrystia Freeland, and EU Commissioner for Trade Cecilia Malmström issued a joint statement declaring that Canada and the EU are “determined to work together to protect the interests of our companies in the context of the WTO.”¹⁵⁹ In addition to likely challenges at the WTO, Canadian companies subject to Title III claims in U.S. courts may also consider pursuing damages against the U.S. government under the NAFTA Chapter 11 investor-state dispute mechanism.¹⁶⁰ This dispute mechanism, however, will not be available for long as NAFTA's proposed

153. Regulations Amending the Special Economic Measures (Venezuela) Regulations (Special Economic Measures Act), SOR/2019-106 (Can.).

154. *Id.* at 1–2.

155. Regulations Amending the Special Economic Measures (Venezuela) Regulations (Special Economic Measures Act), SOR/2019-263 (Can.); see *Canadian Sanctions Related to Venezuela*, GOV'T OF CAN., https://www.international.gc.ca/world-monde/international_relations-internationales/sanctions/venezuela.aspx?lang=eng (last modified Jan. 14, 2020).

156. Peter Fox, *Will Putting Title III of Helms-Burton Into Effect Open the Litigation Floodgates?*, CLS BLUE SKY BLOG, (May 14, 2019), <https://clsbluesky.law.columbia.edu/2019/05/14/will-putting-title-iii-of-helms-burton-into-effect-open-the-litigation-floodgates/>.

157. *Id.* at 1.

158. *Id.* at 2.

159. See *Joint Statement by EU High Representative/Vice President Federica Mogherini, Minister of Foreign Affairs of Canada Chrystia Freeland and EU Commissioner for Trade Cecilia Malmström on the decision of the United States to further activate Title III of the Helms Burton (Libertad) Act*, GLOBAL AFFAIRS CAN., (Apr. 17, 2019) at 1, <https://www.canada.ca/en/global-affairs/news/2019/04/joint-statement-by-eu-high-representativevice-president-federica-mogherini-minister-of-foreign-affairs-of-canada-chrystia-freeland-and-eu-commissio.html>.

160. See Martin J. Valasek et al., *Major changes for investor-state dispute settlement in new United States-Mexico-Canada Agreement*, NORTON ROSE FULBRIGHT, (Oct. 2018), <https://www.nortonrosefulbright.com/en/knowledge/publications/91d41adf/major-changes-for-investor-state-dispute-settlement-in-new-united-states-mexico-canada-agreement>.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

40 THE YEAR IN REVIEW

[VOL. 54

replacement, the United States-Mexico-Canada Agreement, eliminates the application of investor-state dispute settlement as between Canada and the United States.¹⁶¹

4. *Canada Imposes Sanctions on Nicaragua*

On June 21, 2019, Canada implemented sanctions against Nicaragua.¹⁶² The sanctions were imposed under the Special Economic Measures Act to include a dealings prohibition, asset freezes, and travel bans on nine individuals.¹⁶³ These listed individuals are key members of the Government of Nicaragua and are considered to be part of President Daniel Ortega's inner circle.¹⁶⁴ Canada implemented the measures in response to reports of gross and systematic human rights violations, campaign of repression, and state-sponsored violence against anti-government protests, including the torture, extrajudicial killings, and mistreatment of protestors.¹⁶⁵

5. *Canada Expands Sanctions on Yemen*

On June 25, 2019, Canada amended its sanctions against Yemen to implement the decisions of UN Security Council Resolution 2216, imposing a targeted arms embargo against certain individuals or entities, into Canadian domestic legislation.¹⁶⁶ Canadian sanctions against Yemen prohibit any Canadian or any person in Canada from dealings with designated persons.¹⁶⁷ The UN Security Council expanded the number of designated persons by adding two Houthi leaders to the list.¹⁶⁸ The UN Resolution was adopted in connection to military escalation by a Houthi insurgency group.¹⁶⁹

6. *Canada Suspends Export Permits for Transfers to Turkey*

Turkey's intrusion into northern Syria in October of 2019 created a wave of responses by international community. While Canada has not imposed formal economic sanctions against Turkey, it has joined the United States and the EU countries by suspending new weapon sales to its fellow NATO

161. *Id.*

162. See *Canada imposes sanctions on Nicaraguan officials*, GLOBAL AFFAIRS CAN., (Jun. 21, 2019), <https://www.canada.ca/en/global-affairs/news/2019/06/canada-imposes-sanctions-on-nicaraguan-officials.html>.

163. Special Economic Measures (Nicaragua) Regulations (Special Economic Measures Act), SOR/2019-232 (Can.).

164. *Id.* at 6.

165. *Id.* at 4.

166. Regulations Amending the Regulations Implementing the United Nations Resolution on Yemen (United Nations Act), SOR/2019-250 (Can.).

167. *Id.* at 2.

168. S.C. Res. 2216, ¶ 2 (Apr. 14, 2015).

169. *Id.*

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2020]

EXPORT CONTROLS & ECONOMIC SANCTIONS 41

member.¹⁷⁰ On October 11, 2019, the Canadian Government announced that it has temporarily suspended the issuance of new export permits to Turkey, particularly for military equipment and technology, although it appears that export of controlled items may continue under existing permits.¹⁷¹

7. *Canada Prosecutes Syria National Under Syrian Sanctions*

In October 2019, a criminal trial was finally set for Nader Mohamad Kalai, a Canadian permanent resident and Syrian national, who was charged in 2018 with breaching the Special Economic Measures (Syria) Regulations.¹⁷² It is alleged that Mr. Kalai contravened Canada's sanctions by making a payment equivalent to CAD \$140,000 to Syrialink, a Syrian real estate and telecommunications company.¹⁷³ Mr. Kalai, who is currently listed under the EU sanctions¹⁷⁴, has pleaded not guilty to the charges.

B. EXPORT CONTROLS

1. *Canada Adopts New Export Controls and Brokering Regulations*

In September 2019, Canada became a State Party to the United Nations Arms Trade Treaty (ATT), a treaty establishing standards for international trade in a broad range of conventional arms that currently counts more than 100 State Parties.¹⁷⁵ To meet its ATT obligations, Canada amended the Export and Import Permits Act (EIPA) and adopted a package of brokering regulations, namely, the Brokering Control List, Brokering Permit Regulations, Regulations Specifying Activities that Do Not Constitute Brokering, General Brokering Permit No. 1, and General Export Permit No. 47 (ATT Package).¹⁷⁶

The newly established legislative scheme imposes controls over brokering activities.¹⁷⁷ This legislation is a significant development for the Canadian

170. See *Notice to Exporters – Export of items listed on the Export Control List to Turkey*, GOV'T OF CAN., (Apr. 16, 2020), <https://www.international.gc.ca/trade-commerce/controls-controles/notices-avis/992.aspx?lang=eng>.

171. *Id.*

172. Economic Measures (Syria) Regulations (Special Economic Measures Act), SOR/2011-114 (Can.); Steve Bruce, *Halifax man faces May trial on charge of violating economic sanctions in Syria*, SALTWIRE NETWORK, (Oct. 24, 2019), <https://www.saltwire.com/news/canada/halifax-man-faces-may-trial-on-charge-of-violating-economic-sanctions-on-syria-367558/>.

173. Bruce, *supra* note 172.

174. Council Implementing Decision (CFSP) 2019/1576 of 20 September 2019 implementing Decision 2013/798/CFSP concerning restrictive measures against the Central African Republic, 2019 O.J. (L 243) 6.

175. John Boscariol et al., *Canada Adopts New Export Controls and Brokering Requirements*, LEXOLOGY, (Sept. 30, 2019), <https://www.lexology.com/library/detail.aspx?g=5b4b7cae-66cb-4597-be8d-174f2d216f24>.

176. *Id.* at 1; An Act to amend the Export and Import Permits Act and the Criminal Code, S.C. 2018, c 47 (Can.).

177. Boscariol, *supra* note 175 at 1.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

industry as this is the first time such controls have been introduced in Canada.¹⁷⁸ The amended EIPA prohibits unauthorized brokering by any Canadian company or individual, whether located in Canada or abroad, which essentially means that new Canadian brokering obligations apply on an extraterritorial basis.¹⁷⁹ All companies and individuals in Canada as well as Canadians (including permanent residents) abroad now require a Canadian permit to engage in brokering activities.¹⁸⁰

2. *Canada Tests New Export Controls Regulations Regarding Transfers to Saudi Arabia*

In the fall of 2018, Global Affairs Canada was tasked with conducting a review of Canada’s arms exports to Saudi Arabia.¹⁸¹ The issuance of new permits for exports to Saudi Arabia was put on hold, pending the completion of this review.¹⁸²

In September 2019, as set out in a departmental briefing note,¹⁸³ GAC conducted its review under the new substantial risk assessment process and concluded that there was no “credible evidence linking Canadian exports of military equipment or other controlled items to any human rights or humanitarian law violations committed by the Saudi government.”¹⁸⁴ GAC also noted that it did not identify “existing permits or pending applications that would be of concern under the standard robust risk assessment framework.”¹⁸⁵

178. *Id.*

179. *Id.* at 1–2.

180. *Id.* at 2.

181. *Memorandum for Information: Update on export permits to Saudi Arabia*, GLOBAL AFFAIRS CAN., (Sept. 17, 2019), *available at* https://www.international.gc.ca/trade-commerce/assets/pdfs/controls-controles/arms-export-saudi-arabia_exportations-armes-arabie-saoudite_eng.pdf.

182. *Id.* at 2.

183. *See id.* at 1.

184. *Id.*

185. *Id.*