



**WORLD***ecr*

**TRADE COMPLIANCE  
IN A TIME OF CRISIS**



# BACK TO THE RINK

Sanctions and export controls are now joined by a new slew of regulations aimed at protecting national industries and staving off security threats – broadening the remit of the advice sought from trade counsel. But what’s the direction of travel and ultimate intent of the suite of the new and dusted-down rules?

**S**ome years ago, we at *WorldEcr* latched on to the analogy of sanctions and export controls as ice-skaters on a frozen pond, in sync with other related areas of policy and practice such as AML and anti-corruption legislation, the glides, spins and swizzles of each, roughly aligned in pursuit of the same goal.

This nexus with ABAC (anti bribery, anti corruption) was – and remains – clear. We hear often how when one kind of

egregious behaviour is detected others are often to be found nearby. The recent \$86 million settlement, for instance, by the Korean Industrial Bank with the New York Department of Financial Services, demonstrated amongst other things the interlink between sloppy AML compliance and possible facilitation of sanctions violations.

But perhaps it’s time to extend the analogy a little further by adding some new

(or old but revitalised) skaters, such as CFIUS (Committee on Foreign Investment in the United States) and other investment-clearance regimes around the world, Section 232 of the Trade Expansion Act, the Defense Production Act, and others. For it seems that all over the world, the same questions are being asked: Who is acquiring our assets? To whom, and what is our nation exporting? How could it be used against the interests of the state that

exports it? Is the technology that our country purchases safe? The suspicion that 'the West' (however defined) may one day lose its economic, technological or military edge lends urgency to these questions.

### It's not just a CFIUS thing

The increasingly muscular powers of scrutiny possessed by CFIUS are well



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publicised – and its impact is being absorbed by (conscientious) companies' compliance functions well beyond US shores. (*WorldECCR* recently spoke to a compliance officer recruited by her European employer specifically to scrutinise export control functions in anticipation of CFIUS filings: 'That's high up the list of our priorities at the moment,' she told us.)

But it's not just about CFIUS in the US today. Giovanna Cinelli, leader of the international trade and national security practice at Morgan Lewis, describes 'a renaissance' in the way that the Trump administration is approaching national security issues. 'The US has had laws on its books going back to the early 1900s – such as the Trading With the Enemy Act – which successive presidents have done little with until now. One piece of legislation in particular, IEEPA [The International Emergency Economic Powers Act], is like a giant candy store when it comes to national security. IEEPA provides the foundational authority for sanctions and export controls. But what Trump has done is approach the possibilities more creatively.'

That, says Cinelli, is evident in the president's use of the Defense Production Act, in the May executive order 'prohibiting the acquisition, importation, transfer, or installation of certain "bulk-power system electric equipment" where it's determined that the transaction poses a risk to national security or critical infrastructure, and in the 2019 order on securing the ITC supply chain to regulate the acquisition and use of information and communications technology and services from a "foreign adversary"', among others.

Crowell & Moring partner Caroline Brown echoes that assessment: 'Undeniably we've seen a lot of rulemaking that disincentivises doing business with China.

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The administration's opening of several investigations under Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. §1862, as amended) to determine whether

certain imports threaten to impair national security represent, collectively represent another of our 'skaters'. According to a Congressional report, 'Prior to the Trump Administration, 1986 was the last time a president imposed tariffs or other trade restrictions under Section 232, based on a 1983 investigation into imports of machine tools.'

'This new supply chain focus is really interesting,' says Brown's colleague

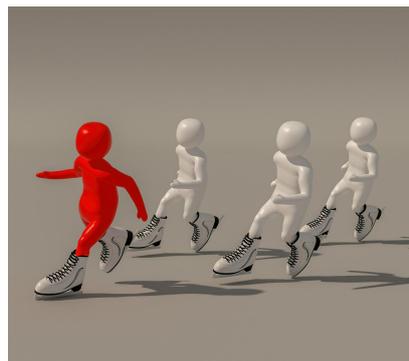


**'The executive order on the bulk-power system doesn't mention China by name, but it's pretty clear that one of its purposes is to keep Chinese equipment outside of the system.'**

**Caroline Brown, Crowell & Moring**

Dj Wolff. 'As counsel, you tend to see things in silos. You let the import people worry about s.232. But that's changed. Business is starting to look at the world the way that the administration is looking at it, not in regulatory silos, but at the big picture.'

As ever, the big picture is not necessarily



a clear one. 'A lot of [national security rule-making] is about bringing jobs back,' says Hughes Hubbard partner Ryan Fayhee. 'But much of it is focused on the tech industry and that won't serve to significantly increase employment. Also, the impact could be intensive in ways that a lot of people aren't prepared for. I also think that the administration isn't prepared for the inevitable pushback from [US] companies. The challenge of dealing with the Chinese economy is a difficult one. It's hard to know where it's going.'

That challenge inevitably has its mirror: 'It's hard enough to predict how our government will respond to China – and how will China respond to the US – it kind of goes back and forth...' points out one of the lawyers we spoke to.

### Nor is it just a US thing

While it's easy to get waylaid by the US-China paradigm, doing so is misleading. Around the world, governments are putting in place investment-clearance regimes to protect sensitive and critical assets. The debate in the United Kingdom around the role that Huawei should play in its 5G network (under pressure from the United States to tow its line and, at time of writing, agreeing to do so) shows how complex that

can be. National economic interests are playing out in myriad permutations as they always have, as illustrated not least by the the United States and the UK's negotiation of a free-trade agreement. Trading arrangements between the UK and the EU after the end of the Brexit transition period are no more clearly in sight than they were on the date of the referendum.

'We've seen protectionism before,' says Baker McKenzie's Mattias Hedwall, 'but never at this level. The whole world relies on free trade. It might be better if governments stopped thinking along nationalistic lines and started looking for solutions to common problems – especially at a time when we need to keep supply chains moving.'

Indeed, that's the conundrum that the skaters in the park are, in their own way, pondering as they turn and glide. ■