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This Article reviews international law developments in the field of aerospace and defense industries in 2016.²

I. Modernization of Export Control Enforcement

At a regulatory level, 2016 reflected substantial continuity with the reforming, activist trend that has characterized United States export controls in recent years. Agency leadership, particularly in the United States Department of Commerce's Bureau of Industry and Security, has continued to push an agenda of regulatory regime interoperability and modernization. The State Department also continued its push to automate and simplify agency interactions with industry, releasing or announcing new automated forms and processes for common export-control interactions. Concurrently, regulators and enforcement authorities remained vigilant and active, with increasing expectations for compliance program robustness and systems automation, and the announcement of a new voluntary self-disclosure program by the Department of Justice (DOJ) for export controls and sanctions violations. The result of the November 2016 election, however, introduces a degree of uncertainty into the prospects for continuing United States export controls reform. Particularly given the Trump administration's deep critique of current United States trade and national security policies, there is potential for retrenchment or a change in direction commencing in 2017.

* R. Locke Bell of Morrison & Foerster LLP served as the editor of the Aerospace and Defense Industries Committee's Year in Review for 2016. Randy Cook, Francesca Harker, and Waqas Shahid, of Ankura Consulting Group, LLC, authored Section I on the Modernization of Export Control Enforcement and Section IV on the Increased Enforcement of Anti-Corruption Laws. Nicholas J. Spiliotes, Aki Bayz, and Felix Helmstaedter, of Morrison & Foerster LLP authored Section II, titled Export Controls Update: United States and European Union Sanctions Against Iran and North Korea. Tak-Kyun Hong and Philippe Shin, of Shin & Kim, authored Section III on Developments in Korean Military Procurement and the Impact of a New Anti-Corruption Act.

2. For developments in 2015, see R. Locke Bell et al., *Aerospace and Defense Industries*, 50 INT'L LAW. 289 (2016). For developments in 2014, see William M. Pannier et al., *Aerospace and Defense Industries*, 48 INT'L LAW. 231 (2015).

A. REGULATORY DEVELOPMENTS: EXPORT CONTROL REFORM RELOADED

In 2016, export control reforms (ECR) focused on further integration of the State Department-administered International Traffic in Arms' Regulations (ITAR) with the Commerce Department's Export Administration Regulations (EAR) and refinement of the United States Munitions List (USML). Among other reforms, the following were implemented:

- The definitions of “export,” “reexport,” “release,” and “retransfer” in ITAR Part 120 were modified or added in order to harmonize with the EAR’s preference for more specific description of transaction types. In practice, these refinements have limited impact, as all of these transactions, when involving defense articles, continue to require specific authorization under the ITAR.³
- New ECR rules were published for USML Categories XII (fire control / lasers / sensors / night vision), XIV (toxicological agents), and XVIII (directed energy weapons), while revised rules were issued for Categories VIII (aircraft) and XIX (gas turbine engines).⁴
- ITAR Parts 123 and 124 were amended to make clear that ITAR licenses and agreements are issued in reliance upon the representations and information in the transmittal letter and other documentations supporting the application.⁵ These provisions effectively serve to limit the scope of any license to the terms articulated in the license application, regardless of whether those limitations are expressed as provisos or other stated scope limitations in the approved license.⁶
- A new ITAR exemption was created for release of technical data to a person traveling overseas, provided that person would otherwise be authorized to receive the data.⁷ This reform addresses the sort of technical violation that previously occurred when a United States person (or authorized non-United States person) traveling overseas received an email containing technical data.⁸

3. See International Traffic in Arms Regulations: Revisions to Definition of Export and Related Definitions, 81 FR 35611-01 (June 3, 2016) (to be codified at 22 C.F.R. pts. 120, 123-26).

4. See Amendment to the International Traffic in Arms Regulations: U.S. Munitions List Categories VIII and XIX, 81 FR 6797-01 (Feb. 9, 2016) (to be codified at 22 C.F.R. pt. 121); Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XII, 81 Fed. Reg. 70340 (Oct. 12, 2016) (to be codified at 22 C.F.R. pt. 121); Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Categories XIV and XVIII, 81 FR 49531-01 (July 28, 2016) (to be codified at 22 C.F.R. pt. 121).

5. 22 C.F.R. §§ 123.28, 124.1 (2016).

6. 22 C.F.R. §§ 123.28, 124.1 (2016).

7. 22 C.F.R. § 125.4(b)(9) (2016).

8. *Id.*

Concurrent with these regulatory reforms, the agencies continued to focus on modernization and integration. In November, the State Department's Directorate of Defense Trade Controls (DDTC) transitioned from the previous manual submission process for commodity jurisdiction requests to an automated workflow submission platform.⁹ DDTC intends to continue this automation initiative in 2017 with a transition from its legacy "DTrade" license submission platform to a future Defense Export Control and Compliance System (the DECCS), which is to replace the current series of "DSP" license varieties with a single automated authorization form.¹⁰ Similarly, the current manual processes for submitting registration materials, advisory opinion requests, and disclosures are each to be replaced with automated modules in the DECCS.¹¹

B. ENFORCEMENT DEVELOPMENTS AND COMPLIANCE EXPECTATIONS

Enforcement authorities were highly active in 2016. The most intriguing development was DOJ's initiation of a new voluntary self-disclosure process for export control and sanctions violations. This process, administered by DOJ's National Security Division, Counterintelligence and Export Control (CES) Section, complements DOJ's guidelines for assessing corporate cooperation¹² and is intended to encourage industry to voluntarily disclose directly to DOJ where they become aware of willful or otherwise egregious violations.¹³ It is unclear how this process will interact with DDTC's and BIS's existing voluntary self-disclosure processes. Will DOJ give credit for self-disclosures made to the regulatory agencies, but not to CES? Will information provided to CES make its way to the regulatory agencies? What is clear is that DOJ is focused on increasing its opportunities to prosecute cases in this issue area and is dissatisfied with the information it has historically received out of the regulatory disclosure processes.

BIS's Office of Export Enforcement (OEE) continued to increase enforcement activity. In 2016, OEE issued 53 percent more administrative fines than in 2015.¹⁴ The agency also doubled the number of individuals arrested for export control and sanctions violations.¹⁵ OEE's principal focus

9. U.S. DEP'T OF STATE, DIRECTORATE OF DEFENSE TRADE CONTROLS, OMB Approval No. 1405-0163, DS-4076 COMMODITY JURISDICTION (CJ) DETERMINATION FORM.

10. *DECCS Information Center*, U.S. DEP'T OF STATE, http://www.pmdtcc.state.gov/DTAS-Online/deccs_info.html (last updated Jan. 31, 2017).

11. *Id.*

12. Memorandum from Sally Quillian Yates, Deputy Attorney General, U.S. Dep't of Justice (Sept. 9, 2015) (on file with the U.S. Dep't of Justice).

13. U.S. DEP'T OF STATE, NATIONAL SECURITY DIVISION, GUIDANCE REGARDING VOLUNTARY SELF-DISCLOSURES, COOPERATION, AND REMEDIATION IN EXPORT CONTROL AND SANCTIONS INVESTIGATIONS INVOLVING BUSINESS ORGANIZATIONS (Oct. 2, 2016).

14. Douglas Hassebrock, Director, Office of Enft, Address at the Update 2016 Conference on Export Controls and Policy (Nov. 1, 2016).

15. *Id.*

continues to be on illegal exports to Iran, with those cases representing over half of its enforcement caseload.¹⁶ Also, investigation of illegal exports to Russia and Ukraine were a growing share of OEE's activity.¹⁷

DDTC was active as well. On the consent agreement front, DDTC announced three new consent agreements, in contrast to zero in 2015. It also announced its intent to articulate qualification and performance standards and, possibly, a training regimen for future Special Compliance Officers (SCOs) in order to address industry concern regarding varying approaches taken by different SCOs in the past.¹⁸ DDTC also initiated a new form of enforcement agreement, the "oversight agreement," which is apparently intended to provide a less-intrusive, more tailored enforcement oversight option.¹⁹ Finally, the agency also gained significantly stiffer civil penalty authority in 2016, with the maximum assessment for each regulatory violation more than doubling to over \$1 million.²⁰

With regard to compliance expectations, DDTC compliance officials speaking at industry events articulated several specific elements they believe are hallmarks of an effective export compliance program, including the following:

- Centralized oversight of the international trade compliance function by the corporate parent.
- Automation of recurrent compliance processes and transactions, and integration of disparate processes into compliant systems. For example, export transactions conducted in a company's Enterprise Resource Planning system should automatically interact with classification information for the subject technology or hardware, the company's export authorization management system, and a screening function for denied parties.
- Development of detailed, automated processes to manage export authorization administrative requirements.
- Engaging engineers and other technical subject matter experts in deliberate jurisdiction and classification of technology and hardware.
- An investigation and disclosure process that proactively identifies regulatory violations, conducts effective root cause analysis, and scopes reviews and corrective actions to identify and address similar issues across the company.

16. *Id.*

17. *Id.*

18. Chad Leezer, Compliance Specialist, Office of Def. Trade Controls Compliance, Address to the 2016 Fall International Trade Export Licensing & Compliance Conference: Consent Agreements (Oct. 25, 2016); *see also* *DDTC Penalty and Oversight Agreements*, U.S. DEP'T OF STATE, <http://pmddtc.state.gov/compliance/poa.html> (last updated Oct. 5, 2016).

19. *Id.*

20. *See* U.S. DEP'T OF STATE, *DDTC CIVIL PENALTY INFLATION ADJUSTMENTS* (2016).

- An accountable, auditable process for effective implementation of corrective actions.²¹

The impending change in presidential administrations will likely affect the current approach to United States export controls and pace of ECR. But the direction and nature of this influence remains unclear. In the short term, the generally technical nature of ECR and the agencies' ongoing regulatory activities will likely insulate the issue area from drastic, immediate change.

II. Export Controls Update: United States and European Union Sanctions Against Iran and North Korea

This Article summarizes changes during 2016 to sanctions laws of the United States, administered by the United States Department of Treasury Office of Foreign Assets Control (OFAC) and the European Union with respect to Iran and North Korea.²²

A. IRANIAN SANCTIONS REGIME FOLLOWING JCPOA IMPLEMENTATION

The announcement by the International Atomic Energy Agency on January 16, 2016,²³ that the Government of Iran satisfied its commitments under the Joint Comprehensive Plan of Action (JCPOA),²⁴ triggered "Implementation Day" and the lifting of Iran sanctions as detailed in the JCPOA. The immediate general impact of Implementation Day under the United States sanctions regime was the lifting of the nuclear-related "secondary sanctions."²⁵ But United States "primary sanctions" applicable to United States persons and Iranian transactions that have a United States nexus remain in full force and effect. The EU's commitments under the

21. Leezer, *supra* note 18; see also U.S. DEP'T OF STATE, BUREAU OF POLITICAL MILITARY AFFAIRS DIRECTORATE OF DEFENSE TRADE CONTROLS OFFICE OF DEFENSE TRADE CONTROLS COMPLIANCE, DDTCCOMPLIANCE PROGRAM GUIDELINES.

22. Though beyond the scope of this article, the United States instituted a number of other reforms to its export controls sanctions regime, including further liberalizing the sanctions in effect against Cuba and terminating sanctions against Myanmar (formerly Burma) and Côte d'Ivoire (or Ivory Coast).

23. Int'l Atomic Energy Agency [IAEA], *Verification and Monitoring in the Islamic Republic of Iran in light of United Nations Security Council Resolution 2231 (2015)*, IAEA Doc. No. GOV/INF/2016/1 (Jan. 16, 2016).

24. The full text of the JCPOA is available on the United States Department of State website, see *Joint Comprehensive Plan of Action*, U.S. DEP'T OF STATE, <http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/> (last visited Apr. 3, 2017).

25. Secondary sanctions generally are directed toward non-United States persons for specified conduct involving Iran that occurs entirely outside of United States jurisdiction. See U.S. DEP'T OF TREASURY & U.S. DEP'T OF STATE, GUIDANCE RELATING TO THE LIFTING OF CERTAIN UNITED STATES SANCTIONS PURSUANT TO THE JOINT COMPREHENSIVE PLAN OF ACTION ON IMPLEMENTATION DAY at 2 n.3 (Jan. 16, 2016). The specific United States commitments are set forth in Sections 4.1-4.7 of Annex II and Sections 17.1-17.2 of Annex V of the JCPOA.

JCPOA were significantly broader and effectively lifted the substance of its economic and financial sanctions imposed in relation to the Iranian nuclear program, with only a limited number of restrictive measures, including the listing of certain individuals and entities, remaining in effect under the EU Iran sanctions.²⁶ This extraordinary event significantly altered the United States and EU sanctions in effect against Iran, opening the opportunity for Iran to reengage with the global economy and for non-United States companies to engage in business with Iran.

B. UNITED STATES SANCTIONS

1. *Removal of Nuclear Related Secondary Sanctions*

Under its JCPOA commitments, the United States government lifted the nuclear-related secondary sanctions imposed against Iran under various United States laws.²⁷ As a result, non-United States persons and entities can engage in activities that were previously subject to United States sanctions, including transactions in the following sectors: finance and banking; insurance; energy and petrochemicals; shipping, shipbuilding and ports; gold and other precious metals; software and metal; and automotive. Prior to Implementation Day, the United States could sanction non-United States persons that engaged in transactions with Iran in these sectors, or transactions with persons or entities identified on OFAC's listing of Specially Designated National and Blocked Persons (SDNs).²⁸ As part of its JCPOA commitments OFAC removed approximately 400 Iranian entities and persons from the SDN list. However, approximately 200 Iranian SDNs remain on the list.²⁹

26. The specific EU commitments are set forth in Sections 4.1-4.7 of Annex II and Sections 16.1-16.4 of Annex V of the JCPOA.

27. The primary United States laws that impose secondary sanctions on Iran include: Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. 111-195, 124 Stat. 1312 (2010); Iran and Libya Sanctions Act of 1996, Pub. L. 104-172, 110 Stat. 1541 (1996); Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, 126 Stat. 1214 (2012); National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, § 1245, 125 Stat. 1298, 1311 (2011); National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, §§ 1241-55, 126 Stat. 1632, 2004 (2013); and various Executive Orders (E.O.s), including, Exec. Order No. 13574, 76 F.R. 30,505 (May 23, 2011); Exec. Order No. 13590, 76 F.R. 72,609 (Nov. 20, 2011); Exec. Order No. 13622, 77 F.R. 45,897 (July 30, 2012); Exec. Order No. 13628, 77 F.R. 62,139 (Oct. 9, 2012); Exec. Order No. 13645, 78 F.R. 33,945 (June 3, 2013).

28. The full SDN list, which is updated regularly, is available at <https://sanctionssearch.ofac.treas.gov/>. See *Sanctions List Search*, OFFICE OF FOREIGN ASSETS CONTROL, <https://sanctionssearch.ofac.treas.gov/> (last visited Apr. 4, 2017). In addition, any entity that is 50 percent or more owned by one or more SDNs is also considered an SDN even if not specifically identified on the SDN list. See U.S. DEP'T OF TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, REVISED GUIDANCE ON ENTITIES OWNED BY PERSONS WHOSE PROPERTY AND INTERESTS IN PROPERTY ARE BLOCKED (2014).

29. *Sanctions List Search*, OFFICE OF FOREIGN ASSETS CONTROL, <https://sanctionssearch.ofac.treas.gov/> (last visited Apr. 4, 2017).

Since 2012, United States sanctions prohibited foreign subsidiaries owned or controlled by a United States person from engaging in transactions, directly or indirectly, with Iran and any person subject to the jurisdiction of the Government of Iran that would be prohibited if undertaken by a United States person.³⁰ Consistent with its JCPOA commitments, OFAC issued General License H (GL H) that expressly authorizes non-United States subsidiaries of United States persons to engage in Iran-related transactions and permits United States persons to establish operating procedures to implement the activities covered by GL H.³¹ In addition, GL H authorizes a United States person to make available to its owned or controlled non-United States entities that may be engaged in Iran-related transactions any “automated” and “globally integrated” computer, accounting, email, telecommunications, or other business support system, platform, database, application, or server necessary to store, collect, transmit, generate, or otherwise process documents or information related to the Iran transactions of the non-United States owned or controlled entity.³² However, this authorization does not extend to cover any systems used to transfer funds through the United States financial system.³³

2. *Continuation of Primary and Certain Secondary Sanctions*

The “primary” sanctions in effect against Iran—that is, sanctions that apply to transactions that have a United States nexus—remain in full force and effect.³⁴ Additionally, notwithstanding the JCPOA commitments, the United States retains certain secondary sanctions and OFAC can sanction non-United States persons and entities that engage in transactions (a) with Iranian SDNs³⁵ or (b) that materially contribute to the ability of Iran to develop weapons of mass destruction and support acts of terrorism.³⁶

30. Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, 126 Stat. 1214, 1234 (2012).

31. U.S. DEP’T OF TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, GENERAL LICENSE H: AUTHORIZING CERTAIN TRANSACTIONS RELATING TO FOREIGN ENTITIES OWNED OR CONTROLLED BY A UNITED STATES PERSON 1 (2016).

32. *Id.*

33. *Id.* at 2.

34. These sanctions are primarily set forth in the Iranian Transactions and Sanctions Regulations (ITSR), 31 C.F.R. pt. 560 (2016). A transaction will generally have a United States nexus if it involves a United States person, United States goods, technology or services, or use of the United States financial system.

35. National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, § 1241(c)(1), 126 Stat. 1632, 2006-07 (2013).

36. *See, e.g.*, Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. 111-195, §§ 105, 105A, 105B, 124 Stat. 1312, 1335 (2010); and Exec. Order No. 13553, 75 F.R. 60,567 (Sept. 28, 2010).

3. *Licensing Policy*

To the extent an Iran related activity is prohibited under the ITSR or other applicable law, an OFAC license is required in order to engage in such transaction. As a general matter of licensing policy, OFAC will deny such license applications unless consistent with United States objectives. In furtherance of its JCPOA commitment, OFAC will license, on a case-by-case basis, United States persons and, where there is a United States jurisdictional nexus, non-United States persons, to export or transfer to Iran commercial passenger aircraft and components for exclusively civil aviation end-use and to provide associated services, provided that licensed items and services are used exclusively for commercial passenger aviation.³⁷ Such licenses will include conditions to ensure that licensed activities do not involve, and no licensed aircraft, goods, or services are re-sold or re-transferred to, any person on the SDN list or other sanctioned parties (such as individuals and entities listed on the Department of Commerce Bureau of Industry and Security (BIS) Denied Persons List).³⁸

C. EU SANCTIONS

The EU sanctions relief, effective January 16, 2016, removed a broad range of restrictive measures, allowing EU companies to re-engage in business with Iranian partners in a variety of business areas.³⁹ A certain number of persons, entities, and bodies have been de-listed from the applicable EU sanctions lists and their assets have been unfrozen. However, certain activities remain restricted and the EU also keeps several individuals and entities on the EU watchlist. EU companies are therefore still obliged to conduct proper diligence and comply with remaining sanctions law restrictions as well as general obligations under EU and national export control laws.⁴⁰

Financial, Banking and Insurance Measures: Under the softened EU sanctions regime, most importantly, financial transfers to and from Iran are permitted and do not need prior authorization, to the extent that the Iranian persons, entities or bodies involved are not listed on the remaining EU lists of designated persons, entities, or bodies. At the same time, certain Iranian

37. See U.S. DEP'T OF TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, STATEMENT OF LICENSING POLICY FOR ACTIVITIES RELATED TO THE EXPORT OR RE-EXPORT TO IRAN OF COMMERCIAL PASSENGER AIRCRAFT AND RELATED PARTS AND SERVICES (2016).

38. See *id.*

39. The implementation of the EU sanctions relief occurred through several legislative acts beginning with the measures taken on October 18, 2015 which took effect on Implementation Day. For a detailed summary, see *Information Note on EU sanctions to be lifted under the Joint Comprehensive Plan of Action (JCPOA)* (Jan. 23, 2016), http://eeas.europa.eu/archives/docs/top_stories/pdf/iran_implementation/information_note_eu_sanctions_jcpoa_en.pdf. The description herein is based on the legislative acts cited in the Information Note as well as on the Information Note itself.

40. See *id.*

banks and financial institutions will continue to be listed under the EU sanctions regime against Iran.⁴¹

Oil, Gas and Petrochemical Sectors: It is permissible to import, purchase, swap and transport crude oil and petroleum products, gas, and petrochemical products from Iran, and to export equipment or technology to be used in Iran for business activities in this industry.⁴²

Software: Trade with software and related services are permitted, but remain subject to a licensing requirement if the software is designed for use in nuclear or military industries. Authorization may be obtained from the competent EU Member State authorities.

Other Activities Affected by the EU Sanctions Relief: The broad range of released activities also concerns the shipping, shipbuilding, and transport sectors, as well as the trade with gold and other precious metals, banknotes, and coinage. Authorization requirements however remain with respect to graphite and raw or semi-finished metals.⁴³

Continuation of Certain EU Sanctions: The EU maintains an arms embargo against Iran and restrictive measures related to missile technology and on specific nuclear-related transfers and activities, resulting in a set of prohibited activities and certain authorization requirements. Some of these restrictions, such as the arms embargo, will only be lifted following Transition Day as defined by the JCPOA (i.e., October 18, 2023). Further, restrictive measures imposed by the EU in connection with human rights violations, support of terrorism, or for other reasons will continue to have effect.⁴⁴

Exports from certain EU Member States to Iran, including Germany, increased in 2016 following Implementation Day, though the overall volume was smaller than many stakeholders in the industry had expected.⁴⁵ While certain large deals have been reported, such as the sale of Boeing and Airbus airplanes to the Iranian air transport industry, hesitance of the banking sector and other factors certainly have tempered the expectations to immediately re-install trade relations as they had existed between many EU countries and Iran prior to the implementation of the strict sanctions regime. Further developments will largely depend on whether businesses can sufficiently rely on the current status of the United States and EU restrictive measures, which at the end of 2016 is hard to predict.

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

45. According to figures published by the German-Iranian Chamber of Commerce (Deutsch-Iranische Handelskammer e.V.), exports to Iran increased by approximately 15 percent between January 2016 to August 2016 compared to the exports in the respective period in 2015, data available at *Exports to Iran Continue to Grow*, DEUTSCH-IRANISCHE HANDELSKAMMER E.V., <http://www.dihkev.de/de/news/6397-Exporte-nach-Iran-wachsen-weiter> (last visited April 4, 2017).

D. NORTH KOREA SANCTIONS

In response to North Korea's test of a nuclear weapon and ballistic missile technology in January and February 2016, on March 2, 2016, the United Nations Security Council (UNSC) unanimously adopted Resolution 2270.⁴⁶ The most significant provisions include: crackdown on illicit foreign trade channels; shipping and transport limitations requiring Member States to inspect cargo that originated in North Korea for items shipped in violation of sanctions; limitation of rare earth and other mineral exports from North Korea; and placing significant restrictions on both North Korean and Member State financial institutions.⁴⁷ Member States must prohibit new North Korean banks in their territories and close existing North Korean banks in their territories by May 31, 2016, and enhance arms control measures.⁴⁸ On November 30, 2016, the UN Security Council adopted a new Resolution to impose further restrictive measures as a reaction to North Korea's nuclear test on September 9, 2016, limiting scientific or technical cooperation and the number of bank accounts for North Korean diplomatic missions.⁴⁹

1. *Implementation by the United States, and Additional United States Sanctions*

The United States already had in place a stringent North Korean sanctions regime.⁵⁰ On February 18, 2016, before the United Nations agreed upon Resolution 2270, the United States enacted The North Korea Sanctions and Policy Enhancement Act of 2016⁵¹ that specified both mandatory and discretionary categories of entities that the President should sanction.⁵² The President subsequently issued E.O. 13722⁵³ placing additional sanctions on North Korea, including the following: blocking all property or interests of the North Korean government, the Workers' Party of Korea, and other entities within the United States or within possession or control of any United States person; prohibiting all exportation from the United States or by a United States person of any good, service, or technology to North Korea; and prohibiting approval, financing, facilitation, or guarantee by any United States person of an action by a foreign person that would be prohibited under United States law.

46. S.C. Res. 2270 (Mar. 2, 2016).

47. *Id.* at ¶¶ 18, 30, 32, 34.

48. *Id.* at ¶ 6.

49. S.C. Res. 2321, ¶ 16 (Nov. 30, 2016).

50. See North Korea Sanctions Regulations (NKSRS), 31 C.F.R. pt. 510 (2016).

51. North Korea Sanctions and Policy Enhancement Act of 2016, Pub. L. 114-122, 130 Stat. 93 (2016).

52. For example, there was no discussion of human rights abuses in the Resolution; however, the NKSPEA requires the President to sanction any entities who were knowingly and significantly involved in them. See *id.*

53. Exec. Order No. 13722, 81 F.R. 14,943 (Mar. 15, 2016).

2. *Implementation by the European Union*

The EU maintains restrictive measures against North Korea since the implementation of UN Security Council Resolution 1718 ten years ago.⁵⁴ In 2016, following the adoption of UN Resolution 2270, the EU has implemented restrictive measures in line with the broadened scope of the UN sanctions regime. In particular, in order to prevent asset flight, the EU Commission immediately aligned the list of persons and entities subject to the freeze of assets and continued to add further persons in May 2016.⁵⁵

The transposition of the more complex new sectoral sanctions included in UN Resolution 2270 aimed at, amongst others, the prohibition of sale or supply of aviation fuel and the prohibition to establish new joint ventures with North Korean banks and the jurisdiction of EU Member States.⁵⁶ The Council of the European Union, on May 27, 2016, decided to impose additional restrictive measures going beyond the prohibitions and restrictions implemented in transposition of UNSC resolutions (so-called autonomous sanctions), arguing that it considered North Korea's nuclear and ballistic tests in early 2016 to be a grave threat to international peace and security.⁵⁷ These new measures include (i) prohibitions on the import of petroleum products, luxury goods and additional dual-use goods from North Korea, (ii) restrictions of financial support for trade with North Korea or prohibition on transferring funds to and from the country without prior authorization, (iii) prohibition on investments by North Korea in the EU and investments by EU persons in certain sectors in North Korea, and (iv) obligations of the EU Member States to deny permission to land in, take off from or overfly their territory to any aircraft operated by North Korean carriers or originating from North Korea.⁵⁸

3. *Conclusion*

In 2016, apart from its sanctions activities in relation to Iran and North Korea, the EU decided to extend existing sanctions regimes, particularly those relating to the Ukraine crises and the conflict in Syria.⁵⁹ The EU also

54. This resolution was a reaction to North Korea's nuclear test on 9 October 2006 and was implemented by the Council of the European Union's common position. See Council Common Position 2006/795/CFSP of 20 November 2006, 2006 O.J. (L 322) 32; Council Regulation (EC) No. 329/2007 of 27 March 2007, 2007 O.J. (L 88) 1.

55. Commission Implementing Regulation (EU) 2016/780 of 19 May 2016, 2016 O.J. (L 131) 55 (adding 16 individuals and 12 entities); Commission Implementing Regulation (EU) 2016/780 of 4 March 2016, 2016 O.J. (L 60) 62 (adding 18 individuals and one entity).

56. Council Decision (CFSP) 2016/476 of 31 March 2016, 2016 O.J. (L 85) 38; Council Regulation (EU) 2016/682 of 29 April 2016, 2016 O.J. (L 117) 1.

57. Council Decision (CFSP) 2016/849 of 27 May 2016, 2016 O.J. (L 141) 79; Council Regulation (EU) 2016/841 of 27 May 2016, 2016 O.J. (L 141) 36.

58. *Id.*

59. Press Release, EEAS, EU Restrictive Measures in Response to the Crisis in Ukraine (Mar. 16, 2017) (on file with the EEAS); Press Release, European Council, Council of the EU, Syria: EU Extends Sanctions Against the Regime by One Year (May 27, 2016) (on file with author).

implemented, for the first time, additional autonomous sanctions targeting terrorist groups ISIL (Da'esh) and Al-Qaeda.⁶⁰ Going forward, the UK European Union membership referendum's result (Brexit referendum) may however impact future decision making processes, as the UK strongly supported the implementation of the EU's restrictive measures over the past years. In the United States, the pending change in President, coupled with the Republican control of both the United States House of Representatives and Senate, raises the issue of potential changes in United States sanctions policies with respect to Iran, Cuba, and potentially other countries.

III. Developments in Korean Military Procurement and the Impact of a New Anti-Corruption Act

Defense contracts are an area with high risks of corruption, and Korea is no exception. Large-scale defense contracts typically require a long time to prepare, execute, and perform, and the process has perennially been plagued with problems, such as (a) leakage of military secrets (e.g., governmental plans for introduction of new weapons systems), (b) provision of economic benefits intended to secure favorable results in various evaluations, and (c) retired military officers or former public servants being employed by private businesses to act as agents or consultants, creating problems such as influence peddling or lobbying.⁶¹

Near the end of 2014, the Korean government designated defense contracts as an area which structurally presents serious irregularities and launched a "joint investigation team for defense contracting" task force consisting of about 100 investigators dispatched from the Ministry of National Defense, the National Police Agency, the Korea Customs Service and the Prosecutors' Office.⁶² The task force conducted large-scale investigations until early 2016 which resulted in the indictment or prosecution of large numbers of active and retired military officers and public officials, as well as employees of defense contractors and weapons consultants.⁶³

Anti-corruption investigations related to defense contracts are likely to continue in the future, in spite of concerns expressed by some at the excessive prosecution efforts by the Prosecutors' Office. For example, a former Navy Chief of Staff was found not guilty by the court after being indicted on charges of manipulating the procurement process to allow the

60. Press Release, European Council, Council of the EU, Fight Against Terrorism: EU Strengthens its Legal Arsenal Against ISIL/Da'esh and Al-Qaida (Sept. 20, 2016) (on file with author).

61. *President Park Geun-hye's Commitment to Eradicate Corrupt Practices in the Defense Industry and Expected Follow-up Measures*, YOON & YANG LLC (Nov. 28, 2014), <http://www.lexology.com/library/detail.aspx?g=29034028-0929-4876-b28d-5a2e82354351>.

62. *Id.*

63. Amy Watson, *South Korea is Rocked by-Defense Corruption Scandal*, THE SCOTSMAN (July 16, 2015), <http://www.pressreader.com/uk/the-scotsman/20150716/281951721499708>.

purchase of hull mounted sonars (HMS) for the Tongyeong salvage and rescue ship which failed to meet the Navy's required operational capability (ROC).⁶⁴

The 2014–2016 anti-corruption campaign has led to several consequences for practitioners. One noticeable consequence is the considerably reduced use of agents or consultants (which were seen as a major source of corruption) when foreign weapons manufacturers sell their products to the Defense Acquisition Program Administration (DAPA), the Korean government's military procurement office. Another consequence felt by practitioners is the tendency by certain DAPA officers to refuse to take any decision which may be interpreted against them by government auditors, opting instead to adopt an extremely rigid attitude, thus rendering negotiation and implementation of defense contracts more difficult.

Another consequence of the anti-corruption campaign has been the adoption of a very tough and thorough new anti-corruption law, effective since September 28, 2016, formally called the "Improper Solicitation and Graft Act" but better known as the "Kim Young Ran Act" (KYR Act), from the name of the Korean Supreme Court justice who initiated it.⁶⁵ The KYR Act applies to a wide scope of targets including not only public officials but also employees of state-owned enterprises and private media companies, teachers and employees of private schools, and private individuals performing public duties.⁶⁶

Specifically, the KYR Act, which is not specific to the defense industry, has two major components: (1) prohibition of provision of economic benefits to a public official; and (2) prohibition of improper solicitation.⁶⁷ When the economic benefit is in excess of KRW1,000,000 (approximately U.S. \$900) at a time or KRW3,000,000 (approximately U.S. \$2,700) in total in one fiscal year, provision of such benefit is criminally punished regardless of its connection with the public official's duties and its motive.⁶⁸ When the economic benefit is less than the above amounts and the benefit is given in relation to the public official's duties, provision of such benefit is punished by a surcharge regardless of whether it is provided to receive an improper advantage.⁶⁹ Interestingly, for the ease of social relations the law provides for exceptions which reflect widely-practiced traditions of gift giving in Korean society. Some of the typical exceptions are: (i) food and beverages

64. *Former Navy Chief Acquitted of Corruption Allegations*, KOREA TIMES (Aug. 18, 2016), http://www.koreatimes.co.kr/www/news/nation/2016/08/205_212195.html.

65. *Geumpundeung Susuui Geumjie Gwanhan Beoblyul [Improper Solicitation and Graft Act]*, Act No. 13278, Mar. 27, 2015 (S. Kor.).

66. The term "public official" is defined very broadly in the KYR Act (articles 2 and 11). See *id.* arts. 2, 11. In essence, certain individuals vested with a public function or who could be viewed as such may be considered public officials under the KYR Act. The definition includes journalists, who are deemed as having the power to influence the public, and thus by extension exercise a public office.

67. *Id.* arts. 5, 8.

68. *Id.* arts. 8(1), 22(1), 22(1)(3).

69. *Id.* arts. 8(2), 23(5)(1), 23(5)(3).

worth less than KRW30,000 (U.S. \$27), gifts worth less than KRW50,000 (U.S. \$45), and congratulatory or condolence money worth less than KRW100,000 (U.S. \$90), unless the food, gift, or money is provided in return for a favor or to influence the discharge of the public official's duty; (ii) transportation, accommodation, and food and beverages, that are uniformly provided by an organizer of an official event related to the duties of a public official, to all participants to the event; and (iii) souvenirs or promotional goods distributed to people regardless of their identity.⁷⁰

"Improper solicitation," in short, means requesting a public official to discharge his/her duty in violation of the laws, or beyond their authority granted under the laws.⁷¹ In principle, any person engaging in improper solicitation will be subject to an administrative surcharge regardless of whether he/she received money for exerting his influence.

The KYR Act has a vicarious liability provision applicable to corporations.⁷² Thus, any violation of the KYR Act will subject corporations to criminal and administrative punishment, unless a corporation can prove it properly supervised the conduct of its employees so as to prevent such violation.⁷³

The KYR Act is attracting unprecedented attention both from the Korean public and from enforcement agencies. Taking this into account, defense companies doing business in Korea need to update their compliance systems and guidelines to prevent any unintended entanglement with the KYR Act.

IV. Increased Enforcement of Anti-Corruption Laws

The global anti-corruption landscape for the balance of 2016 continued recent years' ratcheting trends. Both United States and international authorities escalated their enforcement activity. Non-United States jurisdictions, in particular, witnessed enhanced anti-corruption policy attention and regulatory activity. An industry initiative led by the International Organization for Standardization (ISO) resulted in a new auditable standard for robust industry compliance. The result of the November 2016 United States election, however, introduces a degree of uncertainty into the horizon. Given President Trump's stance regarding deregulation and United States corporate competitiveness, and his own

70. *Id.* arts. 8(3); Enforcement Decree of the Improper Solicitation and Graft Act, Presidential Decree No. 27490, Sept. 8, 2016 (S. Kor.).

71. Article 5 of the KYR Act defines 15 actions which constitute improper solicitation. See Improper Solicitation and Graft Act art. 5. For example, Trading in influence so that duty-related confidential information on tender, auction, development, test, patent, military affair, taxation, etc., is disclosed in violation of statutes; Trading in influence so that a specific individual, organization, or legal person is selected or rejected as a party to a contract in violation of statutes related to the contract.

72. *Id.* art. 24.

73. Before the KYR Act, official bribery and private commercial bribery used to be primarily governed by the Criminal Act which does not recognize a corporation's vicarious criminal liability. Therefore, bribery cases led to the punishment of individuals but not corporations.

experience conducting business in high-risk environments, the ground may begin to shift for United States priorities in the new year.

Within the United States, the Department of Justice's (DOJ) decision to create a targeted FCPA enforcement division is beginning to have real impact, with the DOJ and Securities and Exchange Commission (SEC) bringing 39 enforcement actions in October 2016—the highest number of cases in a single year since 2010.⁷⁴ The cases resolved by the DOJ have generally been high-dollar, complex cases. The SEC has resolved a higher volume, but more of these have been against individuals or involved lower dollar amounts. With the two agencies seemingly focusing their resources in different, but complementary areas, companies and executives are left with little room for error.

While United States agencies declined more cases than in previous years and authorized several deferred prosecution agreements, those individuals and entities that are charged are facing record-setting penalties. For example, Och-Ziff Capital Management Group settled with the SEC and DOJ for \$412 million in September for violations of the FCPA's anti-bribery, books and records, and internal control provisions, marking the first time a hedge fund has been charged with FCPA violations.⁷⁵ The fourth largest FCPA penalty to date stemmed from allegedly improper payments made by third-party agents of Och-Ziff to government officials of several African countries.⁷⁶ Och-Ziff's CEO and CFO also settled charges with the SEC.⁷⁷ In another significant action, Embraer settled with the DOJ and SEC, agreeing to pay a total of \$205 million in fines, \$98 million of which represented disgorgement of profits and interest, one of the largest disgorgements in FCPA enforcement history.⁷⁸ The Brazilian based airline manufacturer allegedly made improper payments to win government contracts in several foreign countries.⁷⁹

Parallel to the increased cadence of United States enforcement activity, international anti-corruption efforts accelerated as well. For example, Brazil's Operation Car Wash, an epic corruption probe, unleashed a

74. In 2010, the SEC and DOJ had a combined 74 FCPA enforcement actions. (This number was derived from SEC and DOJ websites that list enforcement actions.). See also Kevin Y. Wang, *Valuable Nepotism?: The FCPA and Hiring Risks in China*, 49 COLUM. J.L. & SOC. PROBS. 460, 466 (2016).

75. Press Release, U.S. Dep't of Justice, Office of Public Affairs, Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay \$213 Million Criminal Fine (Sept. 29, 2016) (on file with the U.S. Dep't of Justice).

76. *Id.*

77. Press Release, SEC, Och-Ziff Hedge Fund Settles FCPA Charges (Sept. 29, 2016) (on file with the SEC).

78. Press Release, SEC, Embraer Paying \$205 Million to Settle FCPA Charges (Oct. 24, 2016) (on file with the SEC).

79. *United States v. Embraer*, No. 16-cr-60294-JIC, at A-1 (S.D. Fl. Oct. 24, 2016) (deferred prosecution agreement); SEC, *supra* note 77.

fundamental shock to Brazil's political establishment.⁸⁰ Operation Car Wash focused on an alleged embezzlement scheme in which businesses bribed politicians in order to secure inflated government contracts.⁸¹ To date, numerous senior officials, including two of Brazil's ex-presidents, have been charged.⁸² Brazil recently enacted the Clean Company Act in 2014, which holds companies liable for both domestic and foreign bribery, extending anti-bribery prohibitions that previously only applied to individuals.⁸³ While Brazil's Congress is currently debating proposed legislation that would strengthen existing anti-corruption legislation, prosecutors conducting Operation Car Wash warn that the legislation would also provide for an "unofficial amnesty" of politicians linked to Operation Car Wash.⁸⁴ It is unclear whether the legislation is truly motivated by deterring future corruption, or insulating those political officials who have engaged in illegal bribes and might ultimately be caught in Operation Car Wash's net.

The increased attention to anti-corruption issues globally was reflected in the 2016 publication of ISO 37001 – Anti-bribery Management Systems—an auditable standard articulating international industry best practices in anti-bribery compliance.⁸⁵ ISO 37001 contemplates many of the same elements for assessing the robustness of corporate compliance programs as those stated in the DOJ and SEC's A Resource Guide to the Foreign Corrupt Practices Act, issued in November 2012.⁸⁶ Companies must implement systems designed to detect, deter, and prevent corruption; risk-appropriate policies supported by documented training of all personnel; automation of recurring compliance processes; credible, independent audits; a process for identifying, investigating, and correcting violations; and demonstration of leadership commitment to accountable compliance.⁸⁷ Companies can become ISO 37001 certified by an independent auditor in order to demonstrate the credibility of their compliance program and mitigate the risk of enforcement against the company in the event an employee or agent is involved in a corruption violation.⁸⁸

80. *Petrobras: Brazil Officials Forced to Give \$60m Back*, BBC NEWS (Nov. 19, 2016), <http://www.bbc.com/news/world-latin-america-38034497>.

81. *Id.*

82. *Id.*

83. Thomaz Favaro & Geert Aalbers, *Breaking Open Brazil: Large-Scale Corruption Investigation Persists, Will Expand Across Sectors*, FORBES (Aug. 4, 2016), <https://www.forbes.com/sites/riskmap/2016/08/04/breaking-open-brazil-large-scale-corruption-investigation-persists-will-expand-across-sectors/#c778b2920f5d>.

84. *Car Wash Judge: Amnesty to Corrupt Politicians a Risk to Brazil*, PLUS 55 (Nov. 24, 2016), <http://plus55.com/politics/2016/11/amnesty-corrupt-politicians-brazil>.

85. INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, ISO: 37001:2016, ANTI-BRIBERY MANAGEMENT SYSTEMS (2016).

86. See U.S. DEP'T OF JUSTICE & SEC, A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT (2012).

87. International Organization for Standardization, *supra* note 85.

88. *Id.*

The result of the United States presidential election may signal a challenge to current trends. Given the statutory status of the FCPA, DOJ's institutionalization of enforcement activity with a dedicated division, and the momentum of current actions, it is unlikely that industry will observe an immediate shift. But at a policy level, the new administration's focus on de-regulation, United States international business competitiveness, and more public safety-oriented law enforcement priorities may result in a downshift over time in United States enforcement initiatives. The ultimate impact on the global anti-corruption environment, however, is unclear.

