Trumpian Duties, Global Disputes: Arbitration Insights for Today's Tariff Landscape

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Transactional parties facing the newly announced tariffs by President Trump on imports from Canada, Mexico, and China must navigate a web of legal, commercial, and logistical issues. The tariffs, set to go into effect on February 4, 2025, impose an *additional 25% ad valorem duty* on goods from Canada and Mexico and *10%* on products from China. They apply to *all merchandise* imported for consumption in the United States except that certain Canadian energy resources face a lower *10% tariff*. These actions come amid broad hints of further escalation against multiple countries and sectors although on February 3, 2025 it was announced that the Mexico and Canada related tariffs would be paused for one month.

General counsels and corporate executives often assume that their existing free trade agreements or established supply contracts will protect them, only to discover unexpected liabilities. In parallel, the immediate shift in customs policies brings to mind recent arbitral decisions that highlight how a party's contract, its designated Incoterms, and underlying commercial assumptions can determine who ultimately bears the cost or faces liability for failing to deliver goods at the specified price.

Products Covered and Source Market. The White House has indicated that *all articles*, whether industrial, agricultural,

or manufactured, coming from Canada and Mexico will face a 25% duty. Canada's "energy or energy resources," including natural gas, oil, coal, uranium, and defined critical minerals, will incur a 10% tariff. Imports from China are subjected to a 10% duty on *all articles* that originate in China and are classified under ISO Country Code CN. This broad net spares only limited personal, charitable, and certain travel-related shipments. E-commerce packages are also affected, as Section 321 customs de minimis entry is suspended, subjecting low-value shipments to the same duties.

Miller Bros v. Recom Insights. The logic and reasoning from **Miller Bros v. Recom** (*Miller Bros, a Division of Wampole-Miller, Inc. v. Recom Corp., Including its Parents, Successors, Affiliates and Assigns, AAA Case No. 01-14-0002-0048*) underscore how tariff risk can abruptly become the centerpiece of a commercial conflict. In that case, Miller Bros insisted on a supply agreement with a fixed price "inclusive of any and all applicable taxes, duties, current or future applicable tariff fees." When the U.S. Department of Commerce announced new anti-dumping and countervailing duties on Taiwanese solar modules, the seller, Recom, tried to shift the burden of these duties to Miller Bros. That attempt triggered a contractual breach finding by the arbitral panel.

The award recounts that "Recom's actions constituted a default and breach under the Supply Agreement, and that Recom's default forced Miller Bros. to procure the solar panels from an alternate source, incurring substantial damages, including the loss of a deposit, higher prices for the new panels, higher costs for installation, and a break-up fee." This chain of events highlights the primacy of contractual language. Had the Miller Bros-Recom contract been less explicit in designating who bears tariff liability, the outcome might have been different. The tribunal observed that new tariffs on Taiwanese solar products "were entirely foreseeable" and that contractual references to *force majeure* did not excuse non-

performance where the tariff risk had been well-known in the industry.

Key Point: Foreseeability. The Miller Bros v. Recom decision emphasized that, when particular duties or trade remedy actions are foreseen or widely publicized, a party cannot readily rely on an unforeseen contingency argument. The award stated: “The evidence adduced with respect to these issues clearly established that Recom was aware of the likely imposition of new tariffs on Taiwanese solar products. The Supply Agreement’s force majeure clause only applies to events that are ‘unforeseeable.’ Recom’s knowledge of the impending tariffs therefore renders the Supply Agreement’s force majeure clause inapplicable.”

World Steel Trade v. Rikko Steel Logic. Another instructive arbitral precedent arises from **World Steel Trade v. Rikko Steel** (*World Steel Trade SA v. SC Rikko Steel Srl, ICC Case No. 24921/GR*) The parties concluded a contract requiring steel rebars to be delivered under the CFR Incoterm (2010). When the buyer faced an unexpected 25% import duty in the European Union, it refused to pay the contract price. The tribunal clarified that under CFR, the seller’s responsibility “ceases upon delivery of the goods to the vessel.” As the arbitrator put it: “The Seller’s responsibility in connection with the goods shall cease upon delivery of the goods to the vessel. After delivery the risk of loss or damage to the goods…are transferred from the Seller to the Buyer.” That meant the buyer, not the seller, was responsible for taxes and import duties once the goods were onboard.

The tribunal also distinguished between the payment documentation required for performance and additional proofs that the buyer later demanded. Despite the buyer’s claims, the arbitrator found that no extra conditions were placed upon the seller under the contract. One excerpt reads: “I do not accept Rikko Steel’s argument that WST unduly waited until it resold the Goods to a third party…the Parties were still negotiating

for the buyer to take the Goods, and it is only on 18 June 2019 that Rikko Steel unequivocally stated that it could not purchase them." This underscores that if the buyer balks at paying newly imposed duties, it cannot simply suspend payment and demand new terms from the seller, absent a genuine contractual revision.

Incoterms and Commercial Drafting. Drafting or revising supply agreements in the wake of these new Trump tariffs requires clarity about whether the sales terms reflect DDP, CFR, CIF, or other allocations of risk and cost. Under DDP ("Delivered Duty Paid"), the seller agrees to pay *all* duties, taxes, and charges to deliver the goods to the buyer's location. If the contract designates something akin to CFR or FOB, the buyer usually must pay import duties. That difference, as shown in the steel dispute, can shift hundreds of thousands of dollars in unanticipated tariffs onto one party.

The new tariff environment could also spawn renegotiation. Some suppliers may insert *force majeure* clauses or disclaimers that if trade remedies or special duties arise, the buyer must shoulder the cost. Others might press for break-up or termination fees to dissuade abrupt cancellations. Yet arbitral decisions are prone to side with a party that negotiated a comprehensive "all-in" fixed price, as with Miller Bros, if the contract language states that any future duties are included in the original price.

Contentious Phase: Breaches, Damages, and Award Enforcement. The worst-case scenario is a seller who withholds delivery until the buyer covers new tariffs, or a buyer who refuses to pay extra duties. In both Miller Bros v. Recom and World Steel Trade v. Rikko Steel, the tribunals addressed whether the parties' obligations were discharged or ongoing. One illustration from Miller Bros is the passage: "The undersigned hereby awards in favor of Miller Bros. and against Recom…the sum of $1,807,834.26 as and for actual damages suffered by Miller Bros. by reason of Recom's breach of the Parties'

Supply Agreement." That awarding of deposit recovery, plus additional installation and engineering costs, and the break-up fee underscores the magnitude of potential exposure when a party defaults.

Liability for Additional Fees or Delays. When transacting parties are not aligned on who bears newly imposed tariffs, shipping may stall. The goods could languish in port incurring storage charges, as happened in World Steel v. Rikko Steel. Delay costs, demurrage, and extra handling can mount quickly. The tribunal in that matter wrote: "There is evidence that WST provided within a few days of request the documents requested by Rikko Steel… On receipt of those documents, Rikko Steel therefore had to pay the Price." Even so, the goods remained in the port while the buyer refused to pay the new 25% duty or the invoice. Because the Incoterm was CFR, the buyer faced liability for those extended storage fees and the difference in resale price.

Practical Advice for Future Contracts. Contracting parties must heed the possibility of further U.S. tariff hikes, whether aimed at Canada, Mexico, China, or additional countries. A contract that designates the buyer as the importer of record and incorporates Incoterms such as CFR or FOB places the duty burden on the buyer. By contrast, a seller who cites DDP or who commits to an "all-in" sum that includes all present or future tariffs may be forced to absorb that cost. Industry participants who have not reexamined their provisions risk falling into disputes, incurring arbitral proceedings, or shouldering lost deposits if they do not adapt in time.

When dealing with "all articles" coverage, the very broad tariff scope ensures that even staple goods, from automotive parts to packaged consumer electronics, become subject to the additional duty. In some contracts, a *force majeure* clause might attempt to excuse performance due to sudden tariff changes, but the logic in the Miller Bros award reveals that a

known or foreseeable risk is rarely deemed an exempt event. The tribunal there wrote: “The undisputed evidence presented at the hearing regarding the foreseeability of new anti-dumping and countervailing duty tariffs on Taiwanese solar panels rendered the force majeure clause inapplicable.” The parallel is self-evident in the present environment, where many have been bracing for new tariffs for months.

Strategies for Dispute Avoidance. Legal counsel and managers can mitigate risk by building in explicit tariff-sharing or price-adjustment clauses. Where a contract is silent, parties should not assume that force majeure covers newly imposed tariffs. They must also remain mindful of the buyer’s or seller’s obligations to open letters of credit or to provide certain shipping documents, as any failure in those steps can trigger a separate breach claim. In ephemeral markets for steel, aluminum, electronics, or energy resources, one party might find a contract suddenly uneconomical but cannot freely walk away without incurring significant liability. Arbitrators are inclined to hold them to their bargained-for risks, especially if the new duties are widely anticipated or have been publicly threatened.

Conclusion. Recent U.S. tariff hikes on goods from Canada, Mexico, and China deliver a lesson repeated in both Miller Bros v. Recom and World Steel v. Rikko Steel: disputes explode whenever parties ignore the precise allocation of responsibility for new duties. Contract terms matter. Incoterms define who is the importer of record, while commercial clauses can either absorb new tariffs into a fixed price or push them onto the buyer. If a party tries to retroactively shift the burden, the risk is an arbitral finding of breach. As in Miller Bros, the “scope of ‘all-in’ pricing was unambiguous, and the foreseeability of the new tariffs ruled out reliance on force majeure.”

When drafting or revisiting supply agreements, counsel and executives should adopt robust language specifying how special

duties or retaliatory tariffs are handled. In a climate where duties can spike overnight, reliance on broad disclaimers is seldom effective. The ramifications are far-reaching, from lost deposits and condemnation at the port to an arbitral award imposing substantial damages. Parties that proceed on assumptions about stable duty rates may soon find themselves in precarious territory. The prudent approach is to anticipate tariffs as a contractual cost from the start and include detailed terms so that both parties understand their responsibilities if a new round of duties materializes.

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Overhaul of Space Export Controls Announced by US Commerce Department

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In October 2024 the the Commerce Department’s Bureau of Industry and Security (BIS) proposed amendments to the Export Administration Regulations (EAR) aimed at updating and streamlining controls on spacecraft and related items. Simultaneously, the Department of State is proposing revisions to the International Traffic in Arms Regulations (ITAR) concerning U.S. Munitions List (USML) Categories IV and XV. These developments are poised to reshape the regulatory

landscape for commercial space activities, defense contractors, and international collaborations.

At Wasel & Wasel, we understand the complexities these regulatory shifts introduce. Our global presence and expertise in international disputes and geopolicy position us to provide strategic guidance to entities navigating this new environment.

Understanding the Regulatory Announcements

The BIS's proposed rule, titled **"Export Administration Regulations: Revisions to Space-Related Export Controls, Including Addition of License Exception Commercial Space Activities (CSA),"** introduces several critical changes:

1. **Alignment with ITAR Revisions**: The proposed EAR amendments aim to harmonize with the Department of State's suggested changes to the ITAR. This alignment is crucial for companies that must comply with both sets of regulations, reducing the risk of inadvertent non-compliance.
2. **Introduction of License Exception CSA**: A significant addition is the new **License Exception for certain Commercial Space Activities (CSA)** under § 740.26. This exception is designed to facilitate exports, reexports, and transfers (in-country) of specific items for **official space agency programs** and **space tourism and research activities**.
3. **Revisions to ECCNs**: The proposed changes affect several Export Control Classification Numbers (ECCNs), particularly:
    - **ECCN 9A515**: Revisions include expanding control parameters to cover additional spacecraft and components, removing unnecessary language for clarity, and explicitly excluding certain items like planetary rovers and in-space habitats.
    - **Addition of ECCN 9C515**: A new ECCN controlling

materials, coatings, and treatments designed to reduce in-orbit signatures (e.g., radar, optical, ultraviolet, and infrared) of spacecraft.

- **Amendments to ECCNs 9D515 and 9E515**: These control software and technology related to the newly added items in ECCN 9A515, ensuring comprehensive regulatory coverage.

Practical Implications for Businesses

The proposed revisions carry several practical implications:

1. **Easier International Collaboration**: By streamlining and clarifying regulations, the changes aim to make it easier for U.S. companies to collaborate with international partners. For instance, the new License Exception CSA could reduce licensing burdens for companies participating in programs like NASA's Lunar Gateway.
2. **Regulatory Clarity and Compliance**: The alignment of EAR and ITAR controls reduces compliance complexities. Companies can more confidently navigate export controls without fearing regulatory overlap or conflict.
3. **Enhanced Competitiveness**: By updating control parameters and removing outdated restrictions, U.S. companies may find themselves on a more level playing field with international competitors.
4. **Impact on Licensing Requirements**: BIS estimates an increase of 90 license applications annually due to items moving from the USML to the CCL and a decrease of 100 applications because of the new License Exception CSA. Companies need to reassess their licensing strategies in light of these changes.

Detailed Analysis of Affected Items

To fully grasp the impact, it is essential to understand the specific items affected by the Final Rule, Interim Final Rule,

and Proposed Rule.

Final Rule and Interim Final Rule Highlights

- **Remote Sensing and Space-Based Logistics**: Adjustments have been made to controls on items related to remote sensing and space logistics. This facilitates collaboration with allies like Australia, Canada, and the United Kingdom, expanding market opportunities.
- **Spacecraft Components**: Certain components previously under stringent controls may now have revised licensing requirements. This includes parts and technologies that are no longer considered critical to national security under the updated guidelines.

Proposed Rule Specifics

1. **ECCN 9A515 Revisions**:
    - **Expanded Control Parameters**: The control parameters now include spacecraft performing **remote proximity operations**, **life-sustaining functions**, or **debris removal**. Companies in these sectors must assess how these changes affect their products.
    - **Exclusions Clarified**: Items such as **planetary rovers** and **in-space habitats** are explicitly excluded from ECCN 9A515. This clarification helps companies correctly classify their items and determine the appropriate licensing requirements.
2. **Addition of ECCN 9C515**:
    - **Control of Signature Reduction Materials**: Materials, coatings, and treatments designed to reduce in-orbit signatures are now controlled under this new ECCN. Companies producing these materials need to adjust their compliance programs accordingly.
3. **Amendments to ECCNs 9D515 and 9E515**:
    - **Software and Technology Controls**: The amendments

ensure that software and technology associated with the new items are adequately controlled. This includes **Space Situational Awareness (SSA) software** used for modeling and simulation.

4. **License Exception CSA Details**:
    - **Eligible Programs**: The exception applies to specific programs, including **NASA's Lunar Gateway**, **Mars Sample Return**, **Nancy Grace Roman Telescope**, **The Orion spacecraft**, **Commercial Low Earth Orbit Development program**, and **Habitable Worlds Observatory**.
    - **Conditions for Space Tourism and Research**: The exception allows exports of manned spacecraft and related components for **suborbital flights** for **tourism or fundamental research**, with stringent conditions to prevent misuse.

Strategic Considerations for Businesses

Companies must take proactive steps to adapt to these regulatory changes:

1. **Review Product Classifications**: Re-examine your products to determine if their ECCN classifications have changed. Misclassification can lead to compliance violations and penalties.
2. **Update Compliance Programs**: Revise internal export control compliance programs to reflect the new rules. This includes training staff on the changes and updating procedures.
3. **Assess Licensing Needs**: Determine if the new License Exception CSA can be utilized for your activities. This may streamline processes and reduce the need for individual licenses.
4. **Monitor International Collaborations**: With the emphasis on facilitating collaboration with allies, explore opportunities in countries like Australia, Canada, and the United Kingdom, where regulatory hurdles may be

reduced.

5. **Stay Informed on ITAR Changes**: Since the EAR revisions align with ITAR changes, ensure you are also up to date on the Department of State's proposed amendments to avoid gaps in compliance.

How Wasel & Wasel Can Assist

Navigating these changes requires expertise and strategic insight. Wasel & Wasel offers:

- Our team is well-versed in international export controls and can provide detailed advice tailored to your specific circumstances.
- We assist in creating or updating compliance programs to ensure they meet the latest regulatory requirements.
- We conduct thorough assessments to identify potential compliance risks and develop strategies to mitigate them.
- In cases where regulatory changes lead to disputes, our seasoned experts can effectively represent your interests.
- With our experience advising governments on critical geopolicy matters, we can offer insights into how regulatory changes align with broader geopolitical trends.

Case Studies and Practical Examples

Consider a U.S. company involved in developing components for the Nancy Grace Roman Telescope. Under the new License Exception CSA, exports of certain components to international partners may no longer require individual licenses, provided the conditions are met. This reduces administrative burdens and accelerates project timelines.

Another example is a company specializing in materials that reduce spacecraft radar signatures. With the introduction of ECCN 9C515, these materials now have specific controls. The

company must adjust its export strategies and ensure that any international sales comply with the new regulations.

Conclusion

The proposed revisions to the EAR and ITAR represent a significant shift in space export controls. While they offer opportunities for increased international collaboration and reduced regulatory burdens, they also require careful navigation to ensure compliance.

Wasel & Wasel is committed to guiding clients through this evolving landscape. Our global expertise and dedication to excellence make us the ideal partner for businesses seeking to capitalize on these changes while safeguarding their operations.

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Flying Fish 1, Mid-East War, Northern Sea Route, and Lessons from the Arctic Sunrise Arbitration

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The world of maritime trade is no stranger to change, but

recent events have stirred the waters in unprecedented ways. The **Flying Fish 1**, a 4,890 TEU container ship, has made headlines as the largest vessel of its kind to traverse the Arctic waters, charting a course from Europe to China. This remarkable journey not only showcases the vessel's capabilities but also signals a significant shift in global shipping routes—a shift that could have profound implications for the industry.

The Arctic Passage: A New Frontier

Setting sail from St. Petersburg on September 3, the Flying Fish 1 embarked on a voyage that many would have deemed improbable just a decade ago. By September 10, it entered the **Northern Sea Route (NSR)** near Novaya Zemlya. In a historic moment, it crossed paths with another Chinese container ship, marking the first-ever encounter between two large container vessels in the Arctic—just 850 nautical miles from the North Pole. Notably, there was **no sea ice in sight**, a testament to the dramatic changes in Arctic ice conditions over the past 20 years.

Maintaining a steady speed of **16 knots**, the Flying Fish 1 navigated the treacherous waters of the Laptev and East Siberian seas with remarkable ease, deftly avoiding the late-summer ice near Wrangel Island. By September 17, it had exited the Russian Arctic, passing through the Bering Strait near Alaska without the need for icebreaker assistance—only six days after entering Russian waters. When it reaches Shanghai, the journey from the Baltic Sea will total approximately **8,000 nautical miles**, slashing around **4,000 nautical miles** off the traditional Suez Canal route.

A Response to Middle East Instability

The timing of this voyage is no coincidence. The **instability in the Red Sea and broader Middle East** has made the traditional routes through the Suez Canal increasingly

precarious. Heightened tensions and the threat of disruptions have forced many shipping companies to divert their vessels around South Africa's Cape of Good Hope, adding another **4,000 miles** to the usual journey to Asia. This detour not only extends transit times but also escalates fuel costs and environmental impact.

The Arctic route, on the other hand, presents a compelling alternative. It's not just shorter by 30% to 40%, but it also bypasses the politically volatile regions altogether. Furthermore, the absence of pirate attacks in these northern waters enhances the safety and reliability of shipments—a crucial consideration for global trade.

The Northern Sea Route: Challenges and Opportunities

While the NSR offers significant advantages, it's not without its challenges. Currently, shipping services between Europe and Asia via the Arctic are confined to a **3-4 month summer window**. However, as Arctic ice continues to **recede earlier and return later**, this window is expected to widen. The success of the Flying Fish 1 underscores the growing feasibility of this route. It's not just ice-class vessels that are making the journey; an increasing number of non-ice-class ships, including aframaxes and container ships, have secured transit licenses from Russia, venturing into Arctic waters for the first time.

Traffic analysis by Norway's Center for High North Logistics indicates that **2024 is on course to surpass last year's record cargo volumes** along the NSR. The surge in interest is palpable, driven by both environmental changes and geopolitical pressures. Companies are recognizing the potential for reduced transit times, cost savings, and the strategic advantage of avoiding hotspots of conflict and piracy.

Lessons from the Arctic Sunrise Arbitration

The expanding use of the NSR brings into focus the **legal and regulatory complexities** of Arctic navigation. The **Arctic Sunrise Arbitration** between the Netherlands and Russia serves as a poignant reminder of the delicate balance between national sovereignty and international maritime law. In that case, Russia detained the Dutch-flagged vessel Arctic Sunrise and its crew following a protest against oil drilling activities. The Permanent Court of Arbitration ultimately ruled that Russia had violated the United Nations Convention on the Law of the Sea (UNCLOS).

This landmark decision highlights the importance of understanding the **rights of flag states** and the limitations of coastal state enforcement in **Exclusive Economic Zones (EEZs)**. As more vessels, particularly from nations without Arctic coastlines, begin to traverse these waters, the potential for legal disputes increases. It’s imperative for shipping companies to navigate not just the physical challenges of the Arctic but also the **legal frameworks** that govern these routes.

Strategic Navigation in Uncertain Times

For the maritime industry, the convergence of geopolitical tensions and environmental change necessitates a strategic reassessment. The success of the Flying Fish 1 is a clear indication that the Arctic route is no longer a theoretical alternative but a practical one. However, companies must exercise due diligence, ensuring compliance with international laws and understanding the regulatory environment of the Arctic nations, particularly Russia.

At **Wasel & Wasel**, we recognize the complexities that our clients face in this evolving landscape. Navigating the Arctic waters requires not just advanced vessels and technology but also astute legal guidance to mitigate risks and capitalize on new opportunities. The shifting tides of global shipping demand a proactive approach, blending operational excellence with strategic legal counsel.

The Future of Global Shipping

The journey of the Flying Fish 1 may well be a harbinger of things to come. As climate change continues to reshape our world, the Arctic is emerging as a pivotal corridor for international trade. The potential benefits are substantial—reduced distances, lower fuel consumption, decreased emissions, and avoidance of geopolitical flashpoints.

However, embracing this new frontier requires collaboration between industry stakeholders, governments, and legal experts. It’s about striking the right balance between innovation and regulation, opportunity and responsibility.

Conclusion

The maritime industry stands at a crossroads. The traditional routes, while familiar, are fraught with increasing risks and uncertainties. The Arctic offers a promising alternative, but one that comes with its own set of challenges. The voyage of the Flying Fish 1 symbolizes both the possibilities and the complexities of this new era.

As we steer into uncharted waters, it’s essential to be equipped not just with the right vessels but with the right knowledge and partnerships. The lessons from the Arctic Sunrise Arbitration remind us that legal considerations are as critical as navigational ones. In this dynamic environment, aligning with experienced counsel can make all the difference.

The horizon is broadening, and those who adapt will lead the way in the future of global shipping.

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When Iran Sued NASA: A Lesson in Earnest Money and Space Launch Transactions

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Few cases stand out as starkly as the **Telecommunication Company of Iran (TCI) v. NASA**. The case, heard by the **Iran-US Claims Tribunal (IUSCT)** in 1984 dealt with the often misunderstood concept of "earnest money" within the context of space launch negotiations. The case highlights the critical importance of understanding contractual obligations and the risks inherent in international space agreements.

The Case in a Nutshell

On January 15, 1982, the **Telecommunication Company of Iran** filed a claim against the **National Aeronautics and Space Administration (NASA)**, seeking the return of $100,000 paid as "earnest money" during negotiations for launching two Zohreh satellites. These satellites were intended to bolster Iran's domestic communications infrastructure. However, the negotiations fell apart, and no final agreement was reached. When TCI asked for their money back, NASA refused, leading to the arbitration proceedings that followed.

Understanding Earnest Money in Space Transactions

Earnest money is a concept with roots in commercial practice, often used to show a party's seriousness in negotiations. In the context of this case, the $100,000 paid by TCI was intended as a **non-refundable deposit** that would either be

applied to the first payment of the launch services or retained by NASA if the deal did not come to fruition. This was clearly stated in NASA's **Management Instruction (NMI) 8610.8**, which governed the terms of such transactions.

TCI's position was straightforward: they believed that since no agreement was finalized, the earnest money should be returned. However, NASA argued that the payment was meant to cover the costs incurred during the negotiation process, whether or not an agreement was reached. The **Tribunal** accepted the position of NASA, finding that the terms of NMI 8610.8 were clear and unambiguous, and TCI had accepted these terms when they sent the payment.

The Tribunal's Reasoning

The Tribunal's reasoning in dismissing TCI's claim was grounded in the principle that **earnest money** serves a vital function in such negotiations. When a party like NASA invests substantial time and resources into discussions with a potential customer, it is not unreasonable to require compensation if those discussions do not lead to a contract. The Tribunal emphasized that this practice is not uncommon in commercial transactions, particularly those involving significant investments of time and expertise.

The Tribunal found that the **provisions of NMI 8610.8** were "clear and unambiguous" and that TCI understood and accepted these terms. The $100,000 payment was not a mere placeholder; it was a firm commitment by TCI, indicating their intention to move forward with the project. Even though the negotiations eventually fell through, this did not change the nature of the payment or NASA's right to retain it.

Master List and Index to NASA Directives

NASA's **Management Instruction (NMI) 8610.8** is part of a broader set of directives that guide the agency's operations. The **Master List and Index to NASA Directives** provides an

exhaustive catalog of all NASA management directives in force as of August 1, 1982. This includes major subject headings showing number, effective date, title, responsible office, and distribution code. The directives are comprehensive, covering everything from delegations of authority to management handbooks and safety standards.

Understanding these directives is crucial for any entity engaging in transactions with NASA. They offer a roadmap of the agency’s internal processes and expectations, ensuring that parties entering into negotiations are fully informed of their obligations. This comprehensive indexing underscores NASA’s commitment to transparency and operational consistency, essential elements when dealing with complex projects like satellite launches.

Considerations for Dispute Resolution in Space-Related Transactions

Notwithstanding that this arbitration was under the specifically designed **IUSCT (Iran-US Claims Tribunal)**, the **Telecommunication Company of Iran v. NASA** case provides valuable insights into how parties involved in space-related transactions should formulate dispute resolution options. **Arbitration** offers a neutral and structured forum for resolving disputes that arise from these highly technical and often international agreements.

When drafting contracts for space-related transactions, parties should carefully consider the forum for dispute resolution. Arbitration can be advantageous due to its flexibility, confidentiality, and the ability to select arbitrators with specific expertise in space law and related fields. Moreover, the enforceability of arbitration awards across borders under treaties like the New York Convention provides an added layer of certainty in international dealings.

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The Regulatory Void: Why Space Flight Suppliers Face Heightened Risks

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As the commercial space flight industry continues to expand, the nature of liability within this domain presents challenges that are distinctly different from those faced in more established industries. While certain principles, such as the need for robust contracts and clear indemnification clauses, are universal, the specific hazards, regulatory requirements, and the sheer novelty of space operations introduce a level of complexity that demands a closer examination.

The Distinct Nature of Space Flight Liabilities

Space flight is not merely an extension of aviation; it is a radically different environment with its own set of risks and unknowns. Unlike traditional industries where the liabilities are well-defined and governed by decades of regulatory precedents, the space flight industry operates at the cutting edge of technology and human endeavor. This inherently experimental nature of space travel means that the risks are not only higher but also less predictable.

One of the most significant differences lies in the **absence of**

a mature regulatory framework. Unlike the aviation industry, where safety standards and liability norms are well-established, the space flight industry is still developing its regulatory backbone. The FAA's regulations for commercial space flight, while comprehensive, are designed to evolve as the industry matures. This creates a fluid environment where liability standards can shift rapidly, depending on technological advancements and legislative changes.

Informed Consent and the Assumption of Risk

One of the cornerstones of liability management in the space flight industry is the concept of informed consent. Space flight participants, unlike passengers on a commercial airline, must explicitly acknowledge the high-risk nature of their journey. This goes beyond the typical waivers found in other industries; participants must understand that they are embarking on a venture where the government itself has not certified the safety of the vehicles involved. This recognition of risk is not just a legal formality but a fundamental aspect of managing liability in space operations.

For third-party suppliers, this means that the traditional safeguards—such as product liability insurance—might not offer the same level of protection as they would in other industries. Suppliers must account for the fact that their components will be used in an environment where failure rates, even if minimal, can have catastrophic consequences. **The standard of care required** in the space industry is therefore significantly higher, and the consequences of a breach are more severe.

Regulatory Requirements and the Chain of Liability

Another unique aspect of the space flight industry is the way regulatory requirements interact with the supply chain. In most industries, liability tends to be concentrated at the end of the supply chain—typically with the manufacturer or service

provider directly interacting with consumers. However, in the space flight industry, the **regulatory obligations extend throughout the supply chain**. This means that even subcontractors and component suppliers can be directly impacted by regulatory actions.

For instance, FAA regulations may require that specific safety standards be met not just by the space flight operator but by all entities involved in the construction and operation of the spacecraft. This creates a situation where third-party suppliers could be held liable for regulatory non-compliance, even if their products are only a small part of the overall system. The interconnectedness of space flight operations means that liability is often shared, and a failure in one component can lead to legal repercussions across the entire supply chain.

The International Dimension of Space Liability

The space flight industry is inherently international, with operators, suppliers, and customers often spread across multiple jurisdictions. This global nature introduces additional layers of complexity to liability management. Different countries have varying regulatory standards, and there is no unified international framework for space flight liability akin to what exists in maritime or aviation law.

For third-party suppliers, this means navigating a patchwork of national regulations, each with its own approach to liability and indemnification. **Jurisdictional conflicts** can arise, particularly in cases where an incident leads to legal actions in multiple countries. Suppliers must therefore ensure that their contracts account for these international dimensions, incorporating choice of law and jurisdiction clauses that clearly define where and how disputes will be resolved.

Insurance and Risk Transfer in Space Operations

Traditional insurance models also struggle to adapt to the unique risks of space flight. The high cost of space missions, combined with the potential for catastrophic losses, makes insuring these operations a challenge. While insurance products are available, they often come with high premiums and significant exclusions, particularly concerning third-party liabilities.

Suppliers must be aware that the **insurance coverage for space flight operations** may not fully protect them from liability. This necessitates a more proactive approach to risk management, where suppliers not only rely on insurance but also on comprehensive contractual protections. This might include obtaining additional coverage, negotiating higher limits on existing policies, or requiring the space flight operator to bear a greater share of the risk.

Conclusion: A New Paradigm in Liability Management

The space flight industry is pushing the boundaries of what is possible, but with this comes a need for a new approach to liability management. For third-party suppliers, the traditional models of risk transfer and liability protection may not be sufficient. Instead, they must engage with the unique challenges of space flight—ranging from the evolving regulatory landscape to the international nature of operations—and develop strategies that are as innovative and forward-thinking as the industry itself.

As space flight becomes more commonplace, the lessons learned today will shape the liability frameworks of tomorrow. Third-party suppliers have a critical role to play in this evolution, and by understanding and adapting to the unique liabilities of the space flight industry, they can help ensure not only their own protection but also the safety and success of future space missions.

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Impact of the U.S. Supreme Court overturning of the Chevron Doctrine on Commercial Space Regulation

February 3, 2025

In 1984, the **Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.** decision established the **Chevron Doctrine**, a cornerstone of administrative law in the United States. This doctrine directed courts to defer to federal agencies' reasonable interpretations of ambiguous statutes. Its influence extended across various sectors, including emerging fields like **commercial space**, where regulatory frameworks were still evolving or absent.

However, the regulatory landscape underwent a seismic shift on **June 28, 2024**, when the U.S. Supreme Court handed down a landmark decision in **Loper Bright Enterprises et al v. Raimondo, Secretary of Commerce, et al**, effectively overturning the **Chevron Doctrine**. This decision marked a departure from decades of judicial precedent, asserting that courts must independently evaluate whether agencies acted within their statutory authority. No longer bound by automatic deference to agency interpretations, courts now wield enhanced

oversight over regulatory decisions.

Justice Kagan, in dissent joined by **Justices Sotomayor and Jackson**, criticized this shift, arguing that it empowers courts excessively at the expense of agency expertise and Congress's intent in delegating interpretive discretion.

The **Chevron Doctrine** operated under a straightforward two-step framework: first, determining if **Congress** explicitly addressed the issue; if not, agencies' interpretations of ambiguous statutes were upheld if deemed reasonable.

For **commercial space regulation**, this decision holds profound implications. Agencies such as the **Federal Communications Commission (FCC)**, **Federal Aviation Administration (FAA)**, and **National Oceanic and Atmospheric Administration (NOAA)**, responsible for overseeing satellite communications, space tourism, and environmental monitoring in space, face a new and more restrictive regulatory environment. Without the **Chevron deference**, agencies' flexibility to adapt regulations to technological advancements and evolving industry practices is diminished. Courts now play a pivotal role in scrutinizing and potentially challenging agency decisions, which could lead to increased litigation and regulatory uncertainty.

The removal of **Chevron deference** not only alters the dynamics of regulatory authority but also impacts **judicial review**. Courts will now take a more active role in interpreting statutes, ensuring closer alignment with legislative intent but potentially lacking the specialized knowledge and nuanced understanding of technical issues that agencies traditionally provided.

The implications extend to **regulatory certainty**. While clearer **legislative mandates** might offer stability, the absence of **Chevron deference** introduces uncertainty. This uncertainty could deter investment in the **commercial space sector**, where rapid technological innovation and global competitiveness are

paramount. Companies may hesitate to innovate or expand operations in an unpredictable regulatory climate where agency decisions are subject to judicial second-guessing.

Real-world examples illustrate these challenges vividly. The **FCC**, for instance, faces heightened scrutiny over its regulation of **satellite constellations** and the burgeoning **space tourism industry**. Previously, the FCC enjoyed significant latitude in adapting regulations to accommodate technological advancements and new market entrants. Now, each regulatory decision is subject to judicial review, potentially slowing down approvals and stifling innovation critical for industry growth. This also has potential implications vis-à-vis the FCC's assumed power to regulate space debris given the FCC's "statutory authority" – as per the Communications Act of 1934 – is the regulation of interstate and international communications.

Similarly, the **FAA**'s oversight of **commercial human spaceflight** is now under increased judicial scrutiny. Safety standards and operational guidelines, which previously evolved in tandem with industry advancements, may now face delays or inconsistencies due to judicial interpretation of agency actions.

Furthermore, **mission authorization and supervision** now face significant obstacles, hindering industry efforts to achieve streamlined processes for mission authorization. The lack of specific **congressional action** has the potential to further complicate the authorization and supervision by the executive branch of new commercial space ventures. **Article 6 of the Outer Space Treaty** requires State signatories to conduct continuing authorization and supervision of its national space activities, including commercial activities.

In November 2023, the **Commercial Space Act of 2023** was introduced in Congress and outlines a certification process for mission authorization under the ambit of the Department of

Commerce. A few days later, the White House published a proposal to split mission authorization under the **Department of Commerce and the Department of Transportation**. Simultaneously, the National Aeronautics and Space Administration (NASA) has consistently emphasized the need for their agency to maintain mission authorization.

Looking ahead, the post-**Chevron era** demands precise **legislative guidance** to navigate these complexities effectively. Congress must play a proactive role in providing clear and detailed statutes that empower regulatory agencies while ensuring accountability and alignment with national priorities. Harmonizing **U.S. regulations** with international standards, including obligations under treaties like the **Outer Space Treaty**, becomes more challenging without the deference framework that previously guided agency discretion.

The evolving **space regulatory landscape** also underscores the need for adaptive governance structures that balance the expertise of regulatory agencies with the oversight of the judiciary. This balance is crucial to fostering an environment that supports innovation, safety, and responsible growth in the **commercial space sector**.

In conclusion, the Supreme Court's decision to overturn the **Chevron Doctrine** represents a watershed moment in **U.S. administrative law** and **regulatory policy**. As **Wasel & Wasel** continues to monitor these developments closely, we are committed to assisting clients in navigating the evolving **space industry** landscape. For guidance on understanding and navigating the complexities of **U.S. space industry**, please contact **Abdulla Abu Wasel**, Deputy Managing Partner at **(awasel@waselandwasel.com)**.

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U.S. LNG Exports: A Catalyst for Geopolitical Shifts and Terminal Agreement Disputes

February 3, 2025

The U.S. LNG Export Boom: A New Energy Landscape

The U.S. has become the largest exporter of liquefied natural gas (LNG), driven by significant infrastructure development and advances in natural gas extraction. This growth has led to debates about environmental sustainability, economic effects on communities, and how this aligns with U.S. climate goals. The CP2 LNG project, in particular, has faced criticism from environmental groups concerned about its fit with climate objectives.

The unexpected rise in domestic shale gas production, due to technological and market developments, has shifted the U.S. from an expected LNG importer to a major exporter. This shift was initially met with concerns about potential increases in domestic gas prices affecting consumers and industries. However, studies by the U.S. Department of Energy from 2012 to 2018 suggested that LNG exports would have minimal impact on domestic prices under certain conditions. Indeed, despite the growth in LNG exports, domestic gas prices have remained stable, supported by increased production in areas like the Marcellus Shale and the Permian Basin.

Yet, the projected doubling of LNG export capacity by 2028 prompts questions about future domestic gas prices and the impact on other industries. The significant use of U.S.

natural gas for LNG exports could potentially affect prices and supply.

Legal Challenges in the Shifting Energy Market

The transition in the energy market raises important questions about contractual risks and the predictability of such major changes. The situation with the Pascagoula Facility in the Eni v. Gulf LNG arbitration (ICDR Case No. 01-16-0000-7065) originally designed for LNG import but underused due to the domestic gas surplus, highlights the legal and economic issues arising from the shale gas boom. The Eni v. Gulf LNG arbitration case underscores the need to consider foreseeability within the broader context of contractual risk allocation, reflecting the parties' initial intentions and expectations.

The shale gas boom has complicated contractual arrangements, particularly Terminal Use Agreements (TUAs), by altering traditional views on supply, demand, and pricing. This has implications not only in the U.S. but also in international energy markets, where U.S. LNG exports have contributed to global energy security and changed trade dynamics.

Companies should be cognizant of supervening events (such as the shale gas revolution) that lead to frustration of the principal purpose of a TUA.

Supervening Events and TUA Contract Frustration

Defining the Supervening Event

The "supervening event" that could potentially disrupt the main purpose of a TUA needs precise definition. Various interpretations include the disappearance of the U.S. import market or technological advancements that led to increased domestic shale gas production. The event is best understood as a combination of factors resulting in the market shifts known as the "shale gas revolution" and its impact on the

contractual relationship.

Nature of Changes and Legal Implications

The distinction between “evolutionary” and “revolutionary” changes does not critically influence the identification of the supervening event. The legal doctrine of frustration is not confined to isolated, instantaneous events but also applies to developments that unfold over time with significant impacts. Both sudden events and gradual developments can usually be recognized as supervening events under the applicable law.

Impact of the Shale Gas Revolution

The shale gas revolution, brought about by several converging factors, has transformed the supply and demand dynamics of the U.S. natural gas market, rendering LNG importation economically unviable. This shift from a net importer to a net exporter of natural gas has fundamentally questioned the economic viability of importing LNG into the U.S. market, leading to the underutilization of infrastructures like the Pascagoula Facility.

Substantial Frustration of the TUA

The shale gas revolution’s impact on the contract was unprecedented, structural, and permanent, rendering the economic rationale of the TUA completely senseless. This situation could not have been reasonably anticipated by the parties at the contract’s inception, indicating a substantial frustration of the TUA’s principal purpose.

Future Directions for Terminal Use Agreements

The shale gas revolution necessitates a reevaluation of TUAs, challenging old assumptions about risk, supply, and demand. As environmental issues become increasingly important in energy discussions, TUAs need to incorporate sustainability and

emissions reduction more prominently. This involves creating agreements that are economically viable and flexible, yet also environmentally responsible.

The impact of the U.S. shale gas boom on TUAs highlights the global implications of domestic energy developments. It emphasizes the need for TUAs to be adaptable and innovative, capable of handling market volatility and the interconnected nature of global energy networks. This shift underscores the importance of evolving contractual frameworks to meet the challenges of today's dynamic energy landscape.

The profound impact of the shale gas revolution on the contractual landscape of the energy sector, particularly affecting TUAs, highlights the need for companies to be aware of supervening events that could lead to the frustration of a contract's principal purpose. This necessitates a reevaluation of existing agreements and careful consideration of future contractual frameworks in the dynamic energy market.

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Biden's Executive Order on Israel / West Bank Sanctions: Global Business Compliance Considerations

February 3, 2025
On February 1, 2024, President Joe Biden's executive order

introduced sanctions targeting individuals and entities that contribute to instability in the West Bank, notably through violence or threats against civilians. This directive, with its broad implications, mandates a closer examination of how businesses worldwide engage with Israel and the West Bank, especially given the region's significant contributions to the global technology sector.

The sanctions bring to the forefront the issue of indirect liability, a concept that extends a business's accountability to its wider network of partnerships and supply chains. This complexity is particularly pronounced in today's globalized economy, where the multifaceted layers of production and distribution can obscure the ultimate destination or use of products and services. As a result, businesses utilizing Israeli innovations, for instance, may inadvertently find themselves supporting sanctioned activities, highlighting the need for thorough due diligence.

On February 1, 2024, the State Department invoked the executive order to impose sanctions on individuals for a range of disruptive conduct in the West Bank. This included leading violent riots, attacking civilians and activists, with actions such as arson and physical violence. The executive order, particularly under section 1(a)(i)(B)(2), casts a wide net, sanctioning those "responsible for or complicit in, or to have directly or indirectly engaged or attempted to engage in" these activities.

Financial institutions and companies across sectors must now intensify their scrutiny of transactions and relationships connected to Israel and the West Bank to ensure compliance with the new sanctions. This increased vigilance could have far-reaching effects on international trade and investment, potentially deterring engagement with the region due to the heightened risks and compliance requirements.

The executive order's broad scope may also spark legal debates

over its interpretation, particularly concerning actions that “threaten the peace, security, or stability” of the West Bank. This ambiguity adds a layer of complexity to international business operations, requiring careful navigation to avoid unintended consequences.

Drawing from historical precedents, such as sanctions against Iran and Russia, the potential for these new measures to impact global business and economic landscapes is significant. The sanctions could disrupt supply chains, particularly in industries dependent on resources from the region, and complicate international trade relations. Moreover, the potential for reduced foreign investment could have a profound effect on the region’s economic development and necessitate a reevaluation of existing trade agreements and partnerships.

In response, businesses must adopt a multifaceted strategy to mitigate risks and adapt to the evolving landscape. This includes:

1. **Enhanced Due Diligence:** Corporations must strengthen their due diligence processes to identify and assess any direct or indirect connections to entities or activities that might be targeted under the new sanctions regime. This involves a comprehensive review of partners, suppliers, and customers within the region to ensure they are not involved in activities undermining stability in the West Bank.
2. **Reevaluation of Business Relationships and Investments:** Companies may need to reevaluate their business relationships, investments, and operations in the region. This could involve restructuring agreements, divesting from certain ventures, or seeking alternative suppliers and partners that comply with the new regulations.
3. **Strengthening Compliance Infrastructure:** Investing in robust compliance infrastructure is essential. This includes technology systems that can monitor

transactions and relationships for potential sanctions violations and platforms that facilitate the reporting and management of compliance issues. Automation and artificial intelligence can play a significant role in enhancing the efficiency and effectiveness of these systems.

4. **Open Communication with Regulators:** Establishing and maintaining open lines of communication with relevant regulatory bodies, such as the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) and the State Department, is vital. This ensures that corporations are up-to-date with any changes or updates to the sanctions list and understand the regulatory expectations.
5. **Contingency Planning:** Developing contingency plans to address potential disruptions to operations or supply chains resulting from the sanctions is critical. This includes identifying alternative markets, suppliers, and logistics routes to ensure business continuity in the face of sanctions-related challenges.
6. **Contractual Compliance Review:** A thorough examination of all contractual documents, both current and forthcoming, is imperative to ensure alignment with sanctions regulations to embed specific provisions that mandate adherence to sanctions laws. Such clauses are crucial as they afford the legal groundwork for altering or dissolving agreements in the event a business partner falls under the ambit of the sanctions. This proactive legal safeguarding is essential for maintaining operational integrity and legal compliance in the face of the evolving sanctions landscape.
7. **Stakeholder Engagement:** Engaging with stakeholders, including investors, customers, and business partners, to communicate the steps being taken to comply with the executive order and manage risks is essential. Transparency in these efforts can help maintain trust and mitigate reputational risks associated with

potential sanctions violations.

By embracing a proactive and comprehensive approach to compliance and strategic planning, businesses can navigate the complexities introduced by the Israel / West Bank sanctions, safeguarding their operations and maintaining their strategic objectives in the face of these new challenges.

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Ownership, Control, and Nationality in Investor-State Dispute Settlement: Analysis of 2021 Cases (UNCTAD Review)

February 3, 2025

Navigating the labyrinthine complexities of Investor-State Dispute Settlement (ISDS) often requires a discerning eye for detail, especially when it comes to pivotal issues such as ownership, control, investor nationality, and corporate structuring. The 2021 review by the United Nations Conference on Trade and Development (UNCTAD) published in July/August 2023 serves as a recent cartography of this intricate landscape, shedding light on how arbitral tribunals have approached these multifaceted questions. This article highlights these dimensions, guided by the interpretive

subtleties and judicial temperaments exhibited in recent tribunal decisions.

Çap and Sehil v. Turkmenistan: Ownership and Third-Party Funding

The tribunal in this case was confronted with the question of whether it had jurisdiction over the claimants, considering the allegation that the claims had been assigned to a third-party funder with non-Turkish nationality. The tribunal found that no evidence had been presented to suggest that the claimants were no longer the proper owners of the claims. This decision underscores the need for concrete evidence when challenging the ownership of claims, particularly in the context of third-party funding.

Carrizosa Gelzis v. Colombia: Dual Nationality and Dominant Nationality

The tribunal had to determine its jurisdiction over the claimants, who were dual nationals of the United States and Colombia. The tribunal found that Colombia was the center of the claimants' professional, private, and public lives at the critical dates. Consequently, it concluded that the dominant and effective nationality of the claimants was Colombian, not American. This decision highlights the importance of the "dominant and effective nationality" test in ISDS cases involving dual nationals.

Eco Oro v. Colombia: Nationality Requirement and Beneficial Ownership

The tribunal had to ascertain whether Eco Oro met the nationality requirement under the Canada-Colombia Free Trade Agreement (FTA) and whether it was owned or controlled by Canadian investors. The tribunal found in favor of Eco Oro on both counts, emphasizing that the respondent did not present any evidence of actual control by non-Party investors. This decision elucidates the need for a meticulous examination of

beneficial ownership and control structures in ISDS cases.

Fynerdale v. Czechia: Corporate Structuring and Jurisdiction

The tribunal had to decide whether the alleged investments made by a Dutch entity through a Maltese company were protected under the Czechia-Netherlands BIT. The tribunal declined jurisdiction on another basis, rendering it unnecessary to entertain this argument. Nevertheless, the case raises pertinent questions about the role of corporate structuring in determining the jurisdiction of arbitral tribunals.

Hope Services v. Cameroon: Denial of Benefits and Ownership

The tribunal had to determine its jurisdiction over the claims despite the respondent's invocation of the denial of benefits clause. The tribunal found that the respondent's invocation was not valid, as it failed to "promptly consult" with the United States, the other contracting party to the BIT. Moreover, the tribunal found that the claimant did not own or control investments in the online platform and related government contracts. This decision accentuates the procedural and substantive aspects of invoking the denial of benefits clause in ISDS cases.

Infracapital v. Spain: Abuse of Process and Good Faith

The tribunal had to decide whether it had jurisdiction over the claims, considering the respondent's objection that there was an abuse of process or lack of good faith on the part of the claimants. The tribunal found no elements to sustain such allegations, emphasizing that the investment was not restructured solely for gaining access to investment arbitration. This decision serves as a cautionary tale against hastily alleging abuse of process or lack of good faith without substantial evidence.

Littop and Others v. Ukraine: Minority Shareholding and

Business Activities

The tribunal had to ascertain whether the claimants had an investment under the Energy Charter Treaty at the time the arbitration was commenced. The tribunal found that they did not, as they failed to prove ownership of any Ukrnafta shares at that time. Moreover, the tribunal found that the claimants did not have substantial business activities in Cyprus, the alleged home state. This decision underscores the importance of proving ownership and substantial business activities in the alleged home state for establishing jurisdiction.

MAKAE v. Saudi Arabia: Control and Physical Presence

The tribunal had to decide whether it had jurisdiction over the claims, considering the respondent's allegation that the claimant did not control the investment in the host State. The tribunal found that the claimant had no ownership interest in the alleged investment and did not exercise de facto control over it at any relevant time. This decision highlights the need for concrete evidence of control and ownership for establishing jurisdiction in ISDS cases.

Pawlowski and Projekt Sever v. Czechia: Incorporation and Control

The tribunal had to decide whether the claimants qualified as protected investors under the Czechia-Switzerland BIT, considering the respondent's objection that Pawlowski AG had neither real economic activities nor its seat in the alleged home state Switzerland. The tribunal found that Pawlowski AG was incorporated under the laws of Switzerland and fully owned and controlled by a Swiss national, thereby qualifying as a protected investor. This decision emphasizes the significance of the place of incorporation and control in determining the status of a protected investor.

Concluding Remarks: The Temperament of ISDS Tribunals in the Current Landscape

In synthesizing the jurisprudential landscape delineated by the UNCTAD's 2021 review, one cannot overlook the discernible temperament of ISDS tribunals as they navigate the intricate corridors of ownership, control, nationality, and other pivotal issues. The tribunals have exhibited a proclivity for rigorous evidentiary scrutiny, eschewing superficial analyses in favor of a more nuanced, fact-intensive inquiry. This is not merely a matter of jurisprudential preference but a reflection of the tribunals' cognizance of the gravity of their mandates.

The tribunals have demonstrated an acute awareness of the dual imperatives that underpin ISDS proceedings: the need to safeguard the legitimate expectations and rights of foreign investors, and the equally compelling need to respect the sovereignty and regulatory prerogatives of host states. This delicate equipoise is manifest in the tribunals' approach to questions of ownership and control, where the emphasis has consistently been on substantive economic reality over formalistic legal structures.

Moreover, the tribunals have shown a marked attentiveness to the specificities of treaty language, particularly in the context of denial of benefits clauses and nationality requirements. This textual fidelity serves a dual function: it not only ensures fidelity to the parties' bargain as encapsulated in the treaty but also fortifies the legitimacy of the ISDS mechanism itself by mitigating accusations of judicial overreach.

The trend toward a more discerning, evidence-based analysis is especially salient in cases involving complex corporate structures and third-party funding. Tribunals are increasingly wary of claimants who seek to manipulate corporate form to gain access to ISDS or to circumvent treaty limitations, and they are correspondingly rigorous in their scrutiny of the factual matrix that underpins such structures.

In the realm of nationality and dual nationality, the tribunals have evinced a nuanced understanding of the complexities that arise in an increasingly globalized world. The "dominant and effective nationality" test, although not without its critics, has emerged as a pragmatic tool for resolving the dilemmas posed by multiple allegiances, thereby ensuring that the protective ambit of investment treaties is neither over- nor under-inclusive.

In sum, the prevailing temperament of ISDS tribunals, as gleaned from the 2021 UNCTAD review, is one of cautious deliberation, evidentiary rigor, and a nuanced appreciation of the complex interplay between investor rights and state sovereignty. This judicial temperament does not operate in a vacuum; it is both a response to and a shaping force in the evolving norms and expectations that govern the international investment regime. As such, it warrants close attention from practitioners and scholars alike, serving as both a barometer and a guidepost for future developments in this ever-evolving field.

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"You are not a horse." – How the US Court's Ruling on COVID and Ivermectin Impacts

Global Industries

February 3, 2025

In an era marked by the global upheaval of the COVID-19 pandemic and the ensuing debates around treatments like Ivermectin, a recent pivotal U.S. Court of Appeals for the Fifth Circuit judgment serves as a beacon of clarity, in Apter et al. v. Dep’t of Health & Human Services et al (No. 22-40802).

The judgment, which delves into the nuanced distinction “between telling about and telling to,” has implications that reverberate far beyond the healthcare sector. It serves as a timely reminder of the delicate balance that regulatory bodies must maintain in their interactions with various industries.

The judgment comes at a critical juncture, where the line between guidance and directive action has been blurred by the urgency of the pandemic and the hyperbole that often accompanies it. In such times, the role of regulatory bodies becomes even more pivotal, not just in healthcare but across a spectrum of industries that form the backbone of modern society. From construction and finance to new technologies and private wealth management, the judgment underscores the importance of regulatory restraint and nuanced communication.

As we navigate through the complexities of this judgment, we will explore its implications across diverse sectors, shedding light on the intricate dance between regulatory bodies and industries. This exploration is not just an academic exercise; it is a crucial endeavor to understand the commercial consequences and potential liabilities that may arise when industries rely on non-directive government policies, public instructions, private notifications, and more.

In the following sections, we will delve into the multifaceted interactions between regulatory bodies and various industries, offering a global perspective on a judgment that, while rooted in American jurisprudence, has global reverberations.

Background

The dispute involving the United States Food and Drug Administration ("FDA") and three medical practitioners ("the Doctors"). The crux of the issue lies in the FDA's public advisories concerning the use of the drug ivermectin for the treatment of COVID-19, and the alleged impact of these advisories on the medical practice of the Doctors.

The FDA, in its role as a regulatory body, issued public statements and utilized social media platforms to dissuade the general populace from employing ivermectin as a treatment for COVID-19. The agency employed phrases such as "You are not a horse" to underscore the point that ivermectin, particularly the version formulated for animals, is not approved for treating COVID-19 in humans. This messaging was part of a broader strategy aimed at public health and safety.

The Doctors, on the other hand, contend that they have been prescribing the human version of ivermectin to their patients as a treatment for COVID-19. They argue that the FDA's public advisories have not only interfered with their medical practice but have also inflicted reputational harm. They further assert that the FDA's actions are in violation of its enabling act and the Administrative Procedure Act.

The district court initially dismissed the Doctors' claims, invoking the doctrine of sovereign immunity to shield the FDA and associated officials. However, the United States Court of Appeals for the Fifth Circuit took a divergent view. The Court held that the Doctors could indeed proceed with their claims under the Administrative Procedure Act, bypassing the barrier of sovereign immunity. The Court reasoned that the FDA's

advisories could plausibly be considered “ultra vires” actions, as they ventured into the realm of medical advice, a domain not within the FDA’s statutory mandate.

In light of the foregoing, the Court of Appeals reversed the district court’s judgment and remanded the case for further proceedings. The Court of Appeals’ judgment opens the door for a more nuanced exploration of the tension between regulatory advisories and the autonomy of private sector professionals.

Reasoning

The FDA had argued that the social media posts neither “directed” consumers nor any other parties to act or refrain from acting in a specific manner, and thus should not be classified as rules under administrative law.

Contrary to the FDA’s position, the court found that the posts contained imperative elements that transcended the realm of mere factual dissemination. The FDA had also posited that these posts could not be considered rules as they did not “prescribe…policy.” This line of argument was dismissed by the court, which noted that the FDA itself conceded that the posts “generally recommended that consumers not take ivermectin to prevent or treat COVID-19.”

The court discerned no material distinction between an agency employing imperative language to recommend a general course of action and one employing similar language to prescribe a policy.

Moreover, the FDA’s assertion that the posts were nonbinding and did not signify the conclusion of the agency’s decisional process was found to conflate the criteria for determining what constitutes action with those for determining finality. The court clarified that “nonfinal action” remains action under the law. It also rejected the FDA’s attempt to impose a finality requirement for a waiver of sovereign immunity, particularly in the context of the Doctors’ ultra vires claim,

which constituted a non-statutory cause of action.

The court adjudicated that the posts constituted “agency action,” thereby laying down a legal benchmark that could profoundly affect the nuanced distinction “between telling about and telling to.” This verdict not only invites further judicial exploration but also carries sweeping implications across diverse sectors. Specifically, it raises questions about the commercial repercussions of depending on non-directive government policies and the potential liabilities that may arise as a result.

Finding

The court emphasized that while the FDA has the authority to “inform, announce, and apprise,” it does not possess the authority to “endorse, denounce, or advise” on medical matters.

The Doctors had plausibly alleged that the FDA’s posts crossed this critical boundary, shifting from the realm of “telling about” to “telling to.” The court agreed, affirming that the Doctors could use the Administrative Procedure Act to assert their ultra vires claims against the FDA and associated Officials.

The court went further to state that even “tweet-sized doses of personalized medical advice” are beyond the FDA’s statutory purview. This statement underscores the court’s view that the FDA had overstepped its regulatory mandate by issuing advisories that could be construed as medical advice or recommendations.

In overturning the district court’s dismissal and remanding the case for further evaluation, the court’s pivotal ruling not only sets the stage for more comprehensive judicial oversight but also establishes a crucial legal framework. This framework is particularly significant in delineating the fine line “between telling about and telling to.” The verdict has

wide-ranging implications across a variety of sectors, notably in the commercial sphere where businesses often rely on non-directive government policies as a basis for decision-making. The potential for liabilities stemming from such reliance becomes a critical concern, especially in an era where new media platforms like podcasts can amplify or challenge governmental advisories.

The Joe Rogan controversy over the use of ivermectin exemplifies the complexities of this landscape. Rogan's endorsement of the drug on his widely-followed podcast added another layer of public discourse, complicating the role of traditional regulatory advisories. In a world where new media can rival or even overshadow governmental instructions, the court's judgment serves as a timely reminder of the legal intricacies involved. It raises questions about how much weight should be given to government instructions in commercial activities and private sector disputes that may arise when those instructions are deemed to have crossed the line from informational to directive.

Thus, the ruling is not just a legal touchstone but also a lens through which to view the evolving dynamics between governmental advisories, new media influences like podcasts, and the commercial risks and disputes that may ensue from the interplay of these factors.

A Tapestry of Interactions Across Industries

This recent judgment by the U.S. Court of Appeals Fifth Circuit has cast a spotlight on the nuanced but pivotal distinction "between telling about and telling to." This distinction, while seemingly subtle, has far-reaching implications across various sectors, particularly when it comes to the commercial consequences of relying on non-directive government policies and the liabilities that may ensue.

Following we aim to examine its far-reaching effects across various industries, illuminating the delicate interplay between regulatory authorities and commercial sectors. This investigation goes beyond mere scholarly inquiry; it serves as an essential effort to grasp the commercial ramifications and possible legal risks that could emerge when industries depend on non-directive governmental guidelines, public advisories, private alerts, and the like.

Construction / Infrastructure

In the construction and infrastructure sector, the distinction between regulatory guidance and directive action can have profound implications. For example, when a regulatory body merely informs about the safety standards for construction materials, contractors may interpret this as a green light to use specific materials in their projects. However, if those materials later prove to be substandard or unsafe, the contractors could face significant legal liabilities. Similarly, if a regulatory body provides information about environmental sustainability but stops short of issuing directives, construction firms may adopt certain green technologies. If these technologies later prove to be ineffective or problematic, the firms could face both reputational damage and legal challenges.

In the realm of construction and infrastructure, regulatory bodies are akin to architects sketching the outlines of a cityscape. Beyond mere guidelines, they often employ public consultations and even mobile apps to update contractors on safety norms. In Germany, the Federal Ministry of Transport and Digital Infrastructure uses social media to announce public hearings on new construction projects, inviting citizen participation in shaping their own neighborhoods. In Australia, the Building Codes Board not only issues construction guidelines but also holds public forums where contractors and citizens alike can voice their concerns. In India, the Real Estate Regulatory Authority (RERA) sends SMS

notifications to registered builders about compliance deadlines, making sure everyone is on the same page.

Insurance / Reinsurance

In the insurance and reinsurance sectors, the line between guidance and directive action is equally critical. Regulatory bodies often issue frameworks for risk assessment. If insurers interpret these frameworks as tacit approval for specific risk assessment models and those models later prove to be flawed, the insurers could face a slew of legal disputes from policyholders. Additionally, if regulatory bodies inform about but do not direct specific claims processes, insurers may adopt these processes as best practices. Should these processes later be found to violate consumer rights, the legal ramifications could be severe.

In the U.S., the National Association of Insurance Commissioners (NAIC) not only sets standards but also conducts webinars and podcasts to clarify complex insurance terms. Meanwhile, the UK's Prudential Regulation Authority sends out private notifications to insurers about risk assessment changes, ensuring a dynamic and responsive insurance landscape.

Biotech / Pharmaceuticals

In the biotech and pharmaceutical sectors, the stakes are incredibly high. Regulatory bodies frequently issue guidelines on drug safety and clinical trials. Companies may interpret these guidelines as endorsements of specific research methods or treatments. If these methods or treatments later prove to be harmful or ineffective, the companies could face not only legal action but also severe reputational damage. Moreover, if regulatory bodies provide information about the efficacy of certain drugs but do not issue formal approvals, pharmaceutical companies may proceed with production. Should these drugs later be found to have adverse side effects, the

companies could face both legal challenges and public backlash.

The European Medicines Agency (EMA) in the EU issue guidelines and also holds annual public meetings to discuss the ethical implications of new drugs. In Japan, the Pharmaceuticals and Medical Devices Agency (PMDA) uses newsletters to update companies on changes in clinical trial protocols, ensuring a seamless blend of innovation and safety.

Energy / Natural Resources

In the energy sector, the implications of the distinction between “telling about and telling to” are vast. Regulatory bodies often issue guidelines on sustainable energy practices. Energy companies may interpret these guidelines as an endorsement of specific technologies or methods. If these technologies later prove to be environmentally harmful or less efficient than initially thought, the companies could face legal action. Additionally, if regulatory bodies provide information about extraction methods without issuing directives, companies may proceed with extraction activities that later prove to be environmentally damaging, leading to both legal liabilities and reputational loss.

The U.S. Department of Energy not only sets efficiency standards but also releases interactive online tools that allow companies to calculate their carbon footprint. In Saudi Arabia, the Ministry of Energy utilizes SMS alerts to inform companies of shifts in oil production quotas, allowing for real-time adjustments.

Banking / Finance

In the banking and finance sectors, the line between regulatory guidance and directive action can have far-reaching implications. Regulatory bodies often issue guidelines on ethical investment and risk management. Financial institutions may interpret these guidelines as tacit approval for specific

investment strategies. If these strategies later prove to be high-risk or unethical, the institutions could face both regulatory action and legal disputes from clients. Moreover, if regulatory bodies provide information about lending criteria without issuing formal directives, banks may adopt these criteria. Should these criteria later be found to be discriminatory or unfair, the banks could face legal challenges and reputational damage.

In the world of banking and finance, regulatory bodies act as the traffic lights at busy intersections. The Reserve Bank of India, for instance, employs a mobile app to update banks on changes in interest rates. In Switzerland, the Financial Market Supervisory Authority uses videos to explain complex financial instruments, making the arcane world of finance more accessible to the public.

Hospitality / Leisure

In the hospitality and leisure industry, the distinction between “telling about and telling to” can have significant operational implications. Regulatory bodies often issue guidelines on hygiene and safety standards. Hotel chains may interpret these guidelines as endorsements of specific cleaning products or methods. If these products or methods later prove to be ineffective or harmful, the chains could face legal action from guests. Similarly, if regulatory bodies provide information about licensing requirements without issuing directives, leisure facilities may proceed with operations that later prove to be non-compliant, leading to both legal action and reputational damage.

In the hospitality sector, regulatory bodies are the critics who shape our leisure experiences. The U.S. Food and Drug Administration (FDA) not only sets hygiene standards for restaurants but also uses social media to alert the public about food recalls. In France, the Ministry of Culture employs virtual reality to offer virtual tours of new leisure spaces

before they open, gathering public opinion in an interactive manner.

Retail / Consumer Goods

In the retail and consumer goods sector, the line between regulatory guidance and directive action is particularly salient. Regulatory bodies often issue safety standards for products. Manufacturers may interpret these standards as endorsements of specific materials or designs. If these materials or designs later prove to be unsafe, the manufacturers could face legal action from consumers. Moreover, if regulatory bodies provide information about labeling requirements without issuing directives, retailers may proceed with labeling that later proves to be misleading, leading to both legal challenges and a loss of consumer trust.

The UK's Competition and Markets Authority uses Instagram stories to educate consumers about their rights. In Japan, the Consumer Affairs Agency employs QR codes on product labels to direct consumers to web pages detailing product recalls, ensuring that safety information is just a scan away.

Public Sector / Government

In the public sector, the implications of the distinction between "telling about and telling to" are vast. Regulatory bodies often issue guidelines on public service delivery. Government agencies may interpret these guidelines as endorsements of specific service delivery methods. If these methods later prove to be inefficient or ineffective, the agencies could face legal action from the public. Additionally, if regulatory bodies provide information about budgetary allocations without issuing directives, government departments may proceed with spending that later proves to be wasteful, leading to both legal scrutiny and public outcry.

In the public sector, regulatory bodies are the architects of governance. The U.S. Federal Communications Commission (FCC)

not only regulates media but also employs town halls to discuss public concerns about media ethics. In Sweden, the Ministry of Health and Social Affairs uses podcasts to update the public on changes in social welfare policies, making governance a two-way street.

Transportation / Logistics

In the transportation and logistics sectors, the line between regulatory guidance and directive action can have far-reaching implications. Regulatory bodies often issue safety and environmental guidelines. Logistics companies may interpret these guidelines as endorsements of specific shipping routes or cargo handling methods. If these routes or methods later prove to be unsafe or environmentally damaging, the companies could face legal action. Moreover, if regulatory bodies provide information about import/export regulations without issuing directives, companies may proceed with activities that later prove to be non-compliant, leading to both legal action and reputational damage.

In transportation and logistics, regulatory bodies are the navigators charting the course. The International Maritime Organization (IMO) not only sets shipping standards but also employs webinars to discuss the impact of new regulations on global trade routes. In China, the Ministry of Transport uses WeChat to update trucking companies on changes in road tariffs, ensuring smooth flow of goods.

Blockchain / Digital Assets

In the realm of blockchain and digital assets, the distinction between “telling about and telling to” can have significant legal and financial implications. Regulatory bodies often issue guidelines on security and transparency. Companies operating in this space may interpret these guidelines as endorsements of specific blockchain protocols or trading platforms. If these protocols or platforms later prove to be

insecure or non-transparent, the companies could face both legal action and a loss of investor trust.

In the realm of blockchain and digital assets, regulatory bodies are the pioneers mapping uncharted territories. The U.S. Commodity Futures Trading Commission (CFTC) not only sets trading standards but also uses Reddit AMAs to answer questions about digital assets. In Estonia, the Financial Intelligence Unit employs newsletters to update companies on anti-money laundering measures specific to digital currencies.

New Technologies / Space

In the realm of new technologies and space exploration, the line between regulatory guidance and directive action can have profound implications. Regulatory bodies often issue guidelines on safety and ethical considerations for new technologies. Companies may interpret these guidelines as endorsements of specific technologies or methods for space exploration. If these technologies or methods later prove to be unsafe or ethically problematic, the companies could face not only legal action but also severe reputational damage. Moreover, if regulatory bodies provide information about international collaborations in space exploration without issuing formal directives, companies may proceed with partnerships that later prove to be problematic, either due to technological failures or diplomatic tensions, leading to both legal challenges and a loss of public and international trust.

In the arena of new technologies and space exploration, regulatory bodies are the visionaries dreaming of new worlds. For instance, the European Space Agency (ESA) not only establishes protocols for satellite launches but also engages with the public through interactive webinars to discuss the environmental impact of space debris. In Russia, the Federal Space Agency (Roscosmos) uses televised roundtables to discuss the ethical implications of space colonization.

Private Wealth / Families

For private wealth and family offices, the distinction between "telling about and telling to" can have significant financial and legal implications. Regulatory bodies often issue tax guidelines and estate planning recommendations. Wealth managers and family offices may interpret these guidelines as endorsements of specific investment vehicles or estate planning strategies. If these vehicles or strategies later prove to be less advantageous or even financially detrimental, the offices could face both legal scrutiny and financial loss. Similarly, if regulatory bodies provide information about charitable giving without issuing formal directives, families may proceed with donations that later prove to be non-compliant with tax laws, leading to both legal complications and potential financial penalties.

The U.S. Internal Revenue Service (IRS) not only sets tax guidelines but also employs webinars to discuss the implications of tax reforms on estate planning. In the UK, the Office of Tax Simplification uses newsletters to update family offices on changes in inheritance tax laws, ensuring that legacies are passed down in compliance with the law.

Conclusion

The Court of Appeals' recent judgment provides a practical framework for understanding the limits of regulatory authority. By focusing on the distinction "between telling about and telling to," the Court has clarified an important aspect of regulatory communication that is relevant across various sectors. In a digital age where information is easily accessible, the judgment underscores the need for both regulators and industries to be cautious in how they issue and interpret guidance.

For regulatory bodies, the ruling serves as a reminder to be precise in their communications. Whether issuing public

guidelines, private notifications, or other forms of instruction, regulators must be clear about the intent and scope of their messages to avoid crossing into directive action. This is particularly important in a fast-paced information environment where messages can be quickly disseminated and misinterpreted.

Industries also have a role to play in this dynamic. The Court’s judgment highlights the importance of scrutinizing regulatory communications carefully. Companies need to consider the nature of these communications—whether they are guidelines, instructions, or other forms of information—when making business decisions. Misinterpreting the intent behind regulatory messages can lead to commercial risks and potential legal liabilities.

The judgment is also relevant for corporate strategists and policymakers. Corporate strategists can incorporate the ruling into their risk assessment processes, particularly when navigating regulatory environments, and policymakers can take the Court’s insights into account when drafting new regulations, aiming for clarity and precision to minimize misunderstandings.

Overall, the Court of Appeals’ judgment offers a balanced perspective on the boundaries of regulatory authority. It encourages both regulators and the regulated to exercise caution and due diligence in their interactions, highlighting the complexities and potential pitfalls in this area.

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