FOREIGN TRAINED LAWYERS ASSOCIATION

Journal Series Established MMXXVI

CROSS BORDER PRACTICE REVIEW

A Journal of Foreign Trained Legal Expertise,
United States Cross Border Compliance,
and the National Interest in Inbound Foreign Direct Investment

VOLUME I

Number One

INAUGURAL ISSUE

The Rule of Law · Cross Border Practice · National Interest

Foreign Trained Lawyers Association

An Independent Professional Organization

NEW YORK

United States of America

MMXXVI

Foreign Trained Lawyers Association
Cross Border Practice Review
New York, New York

The Cross Border Practice Review is an independent scholarly publication of the Foreign Trained Lawyers Association established to provide a sustained forum for the examination of the doctrinal, regulatory, and institutional questions that arise at the intersection of United States federal cross border regulation and the legal traditions, training, and practice experience that foreign trained counsel bring to American legal practice. The Review is conceived as a distinct publication from the FTLA Law Review, with a particular focus on the substantive regulatory architectures that animate contemporary cross border legal practice, including the foreign private issuer framework of the United States federal securities laws, the national security review of foreign investment conducted by the Committee on Foreign Investment in the United States, the supply chain integrity regime established under the Uyghur Forced Labor Prevention Act, the sanctions enforcement architecture administered by the Office of Foreign Assets Control, and the immigration and licensing pathways through which foreign trained counsel are integrated into the United States legal profession.

The Review welcomes submissions of original scholarly work from foreign trained attorneys and from domestic trained attorneys engaged with the questions that the Review addresses. The Review also welcomes case notes addressing significant judicial and administrative decisions in the substantive fields covered by the Review.

Suggested citation: Author, Title, 1 FTLA Cross Border Practice Review _ (2026).

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FOREWORD

Building the Inaugural Volume of the Cross Border Practice Review

It is with great pride that the Foreign Trained Lawyers Association presents Volume I, Number One of the Cross Border Practice Review. This inaugural volume marks the realization of a long held aspiration to establish a scholarly forum dedicated to the cross border regulatory questions that confront foreign trained attorneys engaged with United States legal practice. The Review is conceived as a platform for sustained analytical engagement with the doctrinal, regulatory, and institutional questions that arise at the intersection of United States federal cross border regulation and the legal traditions, training, and practice experience that foreign trained counsel bring to American legal practice.

The five Articles assembled in this volume address the principal regulatory architectures that animate contemporary cross border legal practice in the United States. The lead Article frames the field by examining foreign trained legal expertise as critical professional infrastructure for United States cross border compliance, capital markets integrity, and inbound foreign direct investment. The four additional Articles examine, in turn, the foreign private issuer framework under United States federal securities law and the substantial regulatory engagement that culminated in the Securities and Exchange Commission Concept Release on Foreign Private Issuer Eligibility issued in June 2025; the architecture of the national security review of foreign direct investment conducted by the Committee on Foreign Investment in the United States under the Foreign Investment Risk Review Modernization Act of 2018; the supply chain integrity regime established under the Uyghur Forced Labor Prevention Act and the sanctions enforcement architecture administered by the Office of Foreign Assets Control; and the immigration and licensing pathways through which foreign trained counsel are integrated into the United States legal profession, with particular attention to the second preference employment based immigrant visa with national interest waiver and the state bar admission frameworks for foreign trained attorneys.

The Court Decisions Review section of this volume contains three case notes addressing significant judicial decisions in the substantive fields covered by the Review. The case notes address the procedural due process analysis of the United States Court of Appeals for the District of Columbia Circuit in Ralls Corp. v. Committee on Foreign Investment in the United States; the transactional test for the extraterritorial application of United States federal securities law established by the United States Supreme Court in Morrison v. National Australia Bank Ltd.; and the judicial review of detention determinations under the Uyghur Forced Labor Prevention Act addressed by the United States Court of International Trade in Ningbo Sunrise Elastic Webbings Co. v. United States. The Editorial Board has elected to include a Court Decisions Review section in each volume of the Review on the view that the careful analysis of significant judicial decisions is an essential complement to the doctrinal and regulatory analysis presented in the Articles section.

The Articles and case notes assembled in this volume are unified by their attention to the cross border dimensions of the questions they examine, by their engagement with the comparative perspectives that foreign trained counsel are particularly positioned to contribute, and by their commitment to the practical and institutional concerns that animate the work of foreign trained attorneys engaged with American practice. The Articles are also unified by their commitment to the

development of advisory and institutional leadership capacity in their respective fields and by their identification of the contributions that foreign trained counsel can make to the strengthening of that capacity.

The Editorial Board of the Review extends its gratitude to the authors who contributed their scholarly work to this inaugural volume, to the broader community of foreign trained attorneys whose support made the establishment of the Review possible, and to the various institutions and individuals whose contributions to the field of foreign trained legal practice have made possible the engagement of foreign trained counsel with American legal practice and scholarship. The Review is offered with the aspiration that it will provide a sustained scholarly forum for the cross border work of foreign trained attorneys and that it will contribute to the broader integration of foreign trained perspectives into the academic, professional, and policy communities of the American legal system.

The Review will publish at least one volume per year, with each volume comprising one or more issues containing original Articles, case notes, and, in time, additional features including Notes, Comments, and Symposium contributions. The Editorial Board welcomes submissions of original scholarly work from foreign trained attorneys and from domestic trained attorneys engaged with the cross border questions that the Review addresses, and the Editorial Board looks forward to the development of the Review as a sustained forum for the work of the foreign trained legal community.

Kalenike Uridia. Sopiko Gugava, Mariami Zhorzholiani

Foreign Trained Lawyers Association

Cross Border Practice Review

New York, New York, 2026

ARTICLE I

Foreign Trained Legal Expertise as Critical Professional Infrastructure for United States Cross Border Compliance: Doctrinal, Institutional, and Regulatory Foundations of an Emerging Field of Practice

By

Levan Beridze

ABSTRACT

This Article examines the doctrinal, institutional, and regulatory foundations of foreign trained legal expertise as critical professional infrastructure for United States cross border compliance. The analysis traces the development of the contemporary architecture of United States cross border regulation through five overlapping policy waves, including the capital markets integrity regime established under the Sarbanes Oxley Act of 2002 and the Dodd Frank Wall Street Reform and Consumer Protection Act of 2010, the national security review of foreign investment established under the Foreign Investment Risk Review Modernization Act of 2018, the supply chain integrity regime established under the Uyghur Forced Labor Prevention Act of 2021, the sanctions enforcement architecture administered by the Office of Foreign Assets Control, and the inbound foreign direct investment facilitation activity conducted under the SelectUSA framework. The Article examines the structural mismatch between the volume and complexity of cross border legal demands placed on United States companies and the supply of professional capacity available to meet those demands, the comparative advantage of foreign trained counsel in addressing those demands, and the institutional architecture required to organize the population of foreign trained counsel integrated into United States practice into a coherent professional infrastructure adequate to the contemporary cross border compliance environment. The Article concludes with observations regarding the contributions that the Foreign Trained Lawyers Association and the broader foreign trained legal community can make to the development of that infrastructure.

KEYWORDS: foreign trained counsel, cross border compliance, capital markets integrity, foreign private issuer, Committee on Foreign Investment in the United States, Uyghur Forced Labor Prevention Act, Office of Foreign Assets Control, SelectUSA, EB Two national interest waiver, professional infrastructure.

I. Introduction

The contemporary architecture of United States cross border regulation has reached a level of doctrinal density, regulatory complexity, and operational reach that materially affects the capacity of United States companies to engage with the global economy and that materially affects the capacity of foreign companies to engage with the United States economy.[1] The architecture comprises five overlapping policy waves that have developed since the early 2000s, each driven by a distinct policy concern, each remaining in force in 2026, and each generating substantial demand for legal services that bridge United States and foreign legal systems. The five policy waves include the capital markets integrity regime established under the Sarbanes Oxley Act of 2002 and the Dodd Frank Wall Street Reform and Consumer Protection Act of 2010, the national security review of foreign investment established under the Foreign Investment Risk Review Modernization Act of 2018, the supply chain integrity regime established under the Uyghur Forced Labor Prevention Act of 2021, the sanctions enforcement architecture administered by the Office of Foreign Assets Control of the Department of the Treasury, and the inbound foreign direct investment facilitation activity conducted under the SelectUSA framework administered by the Department of Commerce.[2]

The volume and complexity of cross border legal demands generated by this architecture have outstripped the supply of professional capacity available to meet those demands. The Committee on Foreign Investment in the United States reviewed three hundred twenty five filings covering two hundred sixty nine distinct transactions in 2024, with active mitigation oversight of two hundred forty two agreements at year end. United States Customs and Border Protection detained more than five thousand five hundred shipments worth approximately two billion dollars under the Uyghur Forced Labor Prevention Act between mid 2022 and the end of 2024. The Securities and Exchange Commission issued the Concept Release on Foreign Private Issuer Eligibility in June 2025, reporting that approximately fifty five percent of foreign private issuers as of fiscal year 2024 had no or minimal trading of their equity securities on any non United States market.[3] Each of these enforcement and regulatory architectures generates substantial demand for legal services that bridge United States and foreign legal systems.

The supply of professional capacity available to meet these demands is constrained by structural friction in United States licensing pathways and by the absence of organized institutional infrastructure for the development and integration of foreign trained counsel into United States practice. Of the four thousand ninety candidates who sat for the New York bar examination in February 2025, foreign educated candidates accounted for two thousand two hundred twenty five candidates, representing fifty four percent of all takers. The pass rate of foreign educated candidates was thirty percent, against a domestic American Bar Association graduate pass rate that runs roughly two and one half times higher.[4] The result is a profession in which a majority of bar takers in the most international legal market of the United States are foreign trained, but most do not pass on first attempt, and those who do pass enter the profession with limited collective infrastructure to support continued professional development on cross border matters.

This Article addresses the implications of this structural mismatch for the practical operation of United States cross border regulation, for the integrity of United States capital markets, for the volume and quality of inbound foreign direct investment to the United States, and for the institutional development of the foreign trained legal community in the United States. Part II addresses the architecture of United States cross border compliance and the five policy waves that have produced the contemporary regulatory environment. Part III examines the structural mismatch between cross border

legal demand and professional supply and the consequences of the mismatch for the practical operation of the cross border regulatory architecture. Part IV addresses the comparative advantage of foreign trained counsel in addressing cross border legal demands, with attention to four case structures in which foreign trained capacity is decisive. Part V examines the institutional architecture required to organize the population of foreign trained counsel integrated into United States practice into a coherent professional infrastructure adequate to the contemporary cross border compliance environment. Part VI addresses the contributions that the Foreign Trained Lawyers Association and the broader foreign trained legal community can make to the development of that infrastructure. Part VII concludes with observations regarding the national interest dimensions of the questions addressed in the Article.

II. The Architecture of United States Cross Border Compliance

The body of federal law that governs cross border conduct by United States and foreign companies has grown substantially since the early 2000s through five overlapping policy waves, each driven by a distinct policy concern.[5] The first policy wave, the capital markets integrity wave, was driven by the corporate accounting scandals of the late 1990s and early 2000s and produced the Sarbanes Oxley Act of 2002 and the substantial subsequent development of the regulatory architecture through the Dodd Frank Wall Street Reform and Consumer Protection Act of 2010 and various subsequent statutory and regulatory developments. The second policy wave, the national security review wave, was driven by the substantial increase in foreign investment activity during the period of globalization and the substantial concerns regarding the implications of foreign investment for United States national security, and produced the Foreign Investment Risk Review Modernization Act of 2018 and the substantial subsequent development of the regulatory architecture administered by the Committee on Foreign Investment in the United States.[6]

The third policy wave, the supply chain integrity wave, was driven by substantial international concerns regarding the use of forced labor in the supply chains of products imported into the United States and produced the Uyghur Forced Labor Prevention Act of 2021, which established a substantial new regulatory architecture for the diligence of supply chains of products imported into the United States. The fourth policy wave, the sanctions enforcement wave, has produced an increasingly sophisticated and increasingly active sanctions enforcement architecture administered principally by the Office of Foreign Assets Control of the Department of the Treasury, with substantial enforcement activity addressing violations of the various sanctions programs administered by the Office. The fifth policy wave, the inbound investment facilitation wave, has been principally administered through the SelectUSA framework of the Department of Commerce and through the various complementary activities of the International Trade Administration and the State Department economic affairs apparatus, and has substantially affected the volume and character of inbound foreign direct investment to the United States over the past several decades.[7]

Each of these five policy waves remains in force in 2026 and continues to develop through ongoing regulatory and enforcement engagement. The capital markets integrity regime has developed substantially through the Securities and Exchange Commission Concept Release on Foreign Private Issuer Eligibility issued in June 2025 and through the various subsequent regulatory engagements anticipated to follow from the Concept Release. The Committee on Foreign Investment in the United States has continued to develop its review architecture through annual reports, regulatory guidance, and enforcement activity, with the substantial increase in covered transactions, mandatory filings, and mitigation activity reflecting the broader expansion of the national security review of foreign investment. The Uyghur Forced Labor Prevention Act enforcement architecture has continued to

develop through Customs and Border Protection guidance, detention activity, and the substantial subsequent litigation addressing the application of the Act to particular categories of conduct.[8]

The architecture of United States cross border compliance is, in operation, a global compliance architecture for the population of issuers, investors, importers, and other regulated parties that engage with the United States economy. The Securities and Exchange Commission has consistently treated the registration of securities in United States capital markets as a sufficient jurisdictional basis to impose full disclosure obligations on the registering issuer, with the consequence that the disclosure architecture of the federal securities laws has substantial extraterritorial reach. The Committee on Foreign Investment in the United States has substantial authority to review foreign investment in United States businesses regardless of the nationality or residence of the particular foreign investor. The Uyghur Forced Labor Prevention Act establishes a rebuttable presumption that goods produced in whole or in part in the Xinjiang Uyghur Autonomous Region are produced with forced labor and prohibited from importation into the United States, with the consequence that importers are required to conduct substantial diligence on their supply chains regardless of where the production activity occurs. The sanctions architecture administered by the Office of Foreign Assets Control has substantial extraterritorial reach, applying to United States persons and to foreign persons engaged in transactions involving United States elements.[9]

The cumulative effect of the five policy waves is a regulatory architecture that requires substantial cross border legal capacity for its practical operation. The capacity required is not only the capacity to read and apply United States federal law, but also the capacity to understand and engage with the foreign legal systems that interact with United States regulation through the architecture. A Canadian mining company listed on the New York Stock Exchange must comply with conflict minerals diligence obligations on its African supply chain. A German automotive supplier whose securities are registered in the United States must comply with Sarbanes Oxley internal controls certifications on operations conducted in Germany. A Chinese technology company seeking to invest in a United States semiconductor manufacturer must engage with the Committee on Foreign Investment in the United States review process. A United States retailer importing apparel from a manufacturer in Vietnam must conduct supply chain diligence sufficient to satisfy the Uyghur Forced Labor Prevention Act rebuttable presumption. Each of these regulatory engagements requires professionals capable of reading both legal systems involved.[10]

III. The Structural Mismatch Between Demand and Supply

The volume and complexity of cross border legal demands generated by the architecture of United States cross border compliance have substantially outstripped the supply of professional capacity available to meet those demands. The mismatch is not the product of any single statute or regulatory development. The mismatch is the cumulative result of two decades of federal policy choices, most of them deliberate, most of them bipartisan, that have built an increasingly dense architecture of cross border compliance obligations on top of an open investment economy that the United States has, since the Reagan administration, treated as a strategic asset.[11] The supply side of the equation has not developed at the same pace as the demand side, with the consequence that the United States now faces a structural capacity gap in cross border legal services.

The principal indicators of the demand side of the equation are the substantial enforcement and regulatory activity conducted under the various components of the cross border regulatory architecture. The Committee on Foreign Investment in the United States reported in its 2024 Annual Report to

Congress that the Committee reviewed three hundred twenty five filings covering two hundred sixty nine distinct transactions during fiscal year 2024, representing a substantial increase from the levels of activity reported in earlier years. The Committee maintained active mitigation oversight of two hundred forty two agreements at year end, with the mitigation activity addressing a substantial range of national security concerns identified during the Committee review process.[12] United States Customs and Border Protection detained more than five thousand five hundred shipments worth approximately two billion dollars under the Uyghur Forced Labor Prevention Act between mid 2022 and the end of 2024, reflecting the substantial enforcement activity conducted under the Act since its effective date in June 2022.

The Securities and Exchange Commission Concept Release on Foreign Private Issuer Eligibility, issued in June 2025, identified an FPI population that has changed materially in three respects since the foreign private issuer rules were last comprehensively reviewed in 2003.[13] First, the population has shifted geographically, with substantial growth in issuers from the Cayman Islands, China, Israel, Bermuda, and various other jurisdictions and corresponding decline in the relative share of issuers from Canada and the United Kingdom. Second, the trading pattern profile has shifted, with approximately fifty five percent of foreign private issuers as of fiscal year 2024 having no or minimal trading of their equity securities on any non United States market. Third, the regulatory environment profile has shifted, with a meaningful share of current foreign private issuers incorporated or headquartered in jurisdictions that operate less robust securities regulatory frameworks than were typical of foreign private issuer source jurisdictions in 2003. Each of these shifts generates new cross border legal demand.

The supply side of the equation, the population of foreign trained lawyers integrated into United States legal practice, is harder to characterize precisely, because the United States does not maintain a comprehensive registry of foreign trained lawyers as such. The strongest available proxies come from the New York State Board of Law Examiners, which administers the largest United States bar examination by foreign educated participation. The data reported by the New York State Board of Law Examiners reflect a substantial foreign educated candidate population, with foreign educated candidates accounting for approximately fifty four percent of total candidates sitting for the New York bar examination in February 2025.[14] The pass rate of foreign educated candidates, however, is approximately thirty percent, against a domestic American Bar Association graduate pass rate that runs roughly two and one half times higher.

The cumulative effect of these supply side characteristics is a foreign trained legal community that is substantial in size but constrained in collective capacity. The community is substantial in size because of the volume of foreign trained candidates entering the United States bar examination process and because of the substantial number of foreign trained lawyers practicing in the United States in various professional contexts. The community is constrained in collective capacity because of the absence of organized institutional infrastructure for the development and integration of foreign trained counsel into United States practice, the substantial friction in licensing pathways, the limited continuing professional development infrastructure focused on cross border practice, and the absence of an organized professional voice on cross border regulatory architecture. The structural capacity gap that results from the mismatch between the substantial cross border regulatory demand and the constrained collective capacity of the foreign trained legal community has substantial implications for the practical operation of the cross border regulatory architecture, for the integrity of United States capital markets, and for the volume and quality of inbound foreign direct investment to the United States.[15]

IV. The Comparative Advantage of Foreign Trained Counsel

The comparative advantage of foreign trained counsel in addressing cross border legal demands is rooted in the distinctive analytical capacity of foreign trained counsel to read and engage with both United States and foreign legal systems.[16] The comparative advantage is not an absolute advantage and does not entail that foreign trained counsel should displace domestic trained counsel in the various practice areas in which both populations engage. The comparative advantage is, rather, a comparative advantage in the particular categories of cross border practice in which the analytical capacity to read and engage with multiple legal systems is essential to the effective performance of the legal service in question.

The principal categories of cross border practice in which the comparative advantage of foreign trained counsel is most pronounced include four case structures that arise repeatedly in contemporary cross border practice. The first case structure involves the engagement of United States regulatory frameworks with foreign issuers, foreign acquirers, and foreign operating companies, including the substantial work of foreign private issuer counsel, the substantial work of cross border merger and acquisition counsel, and the substantial work of counsel advising on the foreign operations of United States public companies. The second case structure involves the engagement of foreign regulatory frameworks with United States issuers, United States acquirers, and United States operating companies, including the substantial work of counsel advising United States companies on their foreign operations, the substantial work of counsel advising on outbound foreign direct investment by United States companies, and the substantial work of counsel advising on the application of foreign regulatory frameworks to United States companies engaged with foreign markets.[17]

The third case structure involves the substantial cross jurisdictional litigation, enforcement, and dispute resolution activity that arises from the application of United States regulatory frameworks to foreign elements and from the application of foreign regulatory frameworks to United States elements. The substantial activity in this category includes Securities and Exchange Commission and Department of Justice enforcement activity addressing foreign issuers and foreign conduct, Office of Foreign Assets Control enforcement activity addressing sanctions violations involving foreign elements, Customs and Border Protection enforcement activity under the Uyghur Forced Labor Prevention Act, and substantial private litigation involving cross border elements. The fourth case structure involves the substantial compliance and advisory work that arises from the practical implementation of the cross border regulatory frameworks, including the design and operation of compliance programs adequate to cross border circumstances, the conduct of cross border investigations, and the ongoing advisory work that supports the practical operation of cross border business activity.[18]

The analytical capacity of foreign trained counsel to read and engage with multiple legal systems provides comparative advantage in each of these case structures. The capacity is not merely a translation capacity, in the sense of the literal translation of legal texts from one language to another. The capacity is, more fundamentally, a structural and conceptual capacity, involving the ability to identify the structural and conceptual differences between legal systems, to identify the practical implications of those differences for particular transactions and circumstances, and to develop legal solutions that account for those differences in ways that produce effective outcomes for the parties involved. The capacity is developed through legal education in foreign legal systems, through practice experience in foreign legal systems, through engagement with the comparative legal literature, and through the practical engagement with cross border transactions and circumstances over time.[19]

The comparative advantage of foreign trained counsel is most pronounced in case structures that involve substantial engagement with the foreign legal systems with which the foreign trained counsel are familiar. A foreign trained counsel familiar with German corporate law and German capital markets regulation has substantial comparative advantage in advising a German automotive supplier on the application of Sarbanes Oxley internal controls certifications to operations conducted in Germany. A foreign trained counsel familiar with the corporate law and securities regulation of the Cayman Islands has substantial comparative advantage in advising a Cayman Islands incorporated foreign private issuer on the application of the Securities and Exchange Commission Concept Release on Foreign Private Issuer Eligibility to the issuer. A foreign trained counsel familiar with the regulatory frameworks of jurisdictions whose financial institutions are subject to United States sanctions enforcement has substantial comparative advantage in advising those institutions on compliance with United States sanctions architecture. The comparative advantage of foreign trained counsel in particular case structures is, in this sense, a function of the particular foreign legal systems with which the counsel are familiar.[20]

V. The Institutional Architecture for Foreign Trained Legal Practice

The institutional architecture for foreign trained legal practice in the United States is, at present, substantially less developed than the substance of the foreign trained legal community would warrant.[21] The principal components of an adequate institutional architecture include admission and recognition pathways that integrate foreign trained counsel into United States practice in a coherent and predictable manner, professional development standards that support the continuing professional development of foreign trained counsel on the substantive matters that animate cross border practice, ethics infrastructure adequate to the distinctive ethical questions that arise in cross border practice, and coordination across federal, state, and professional bodies adequate to the cross border scope of contemporary practice.

The admission and recognition pathways through which foreign trained counsel are integrated into United States practice are, at present, substantially fragmented across the fifty states and the District of Columbia. The substantial variation in the admission requirements applicable to foreign trained counsel across jurisdictions creates substantial friction in the integration of foreign trained counsel into United States practice and substantially constrains the development of a coherent national approach to the admission and recognition of foreign trained counsel. The principal jurisdictions admitting foreign trained counsel include New York, California, the District of Columbia, Massachusetts, Texas, Florida, and various other jurisdictions, with substantial variation across the requirements of these jurisdictions and substantial variation in the patterns of foreign trained counsel admission across the jurisdictions.[22]

The professional development standards applicable to foreign trained counsel are, at present, substantially less developed than the standards applicable to particular substantive practice areas. The principal continuing legal education frameworks applicable to attorneys in the United States, including the various state bar continuing legal education requirements and the various practice oriented continuing legal education programs offered by professional organizations, do not address the distinctive professional development needs of foreign trained counsel engaged with cross border practice. The substantial range of cross border practice areas, including the foreign private issuer area, the Committee on Foreign Investment in the United States area, the supply chain integrity area, the sanctions enforcement area, and the various other cross border practice areas, would benefit from the development of professional development standards adequate to the distinctive characteristics of each

area and adequate to the cross border perspectives that foreign trained counsel bring to those areas.[23]

The ethics infrastructure for cross border practice is similarly less developed than the infrastructure applicable to domestic practice. The substantial range of ethical questions that arise in cross border practice, including questions concerning the application of professional responsibility rules across jurisdictions, questions concerning the management of conflicts of interest in transactions involving multiple jurisdictions, questions concerning the confidentiality of communications in jurisdictions with different attorney client privilege frameworks, and questions concerning the application of professional responsibility rules to foreign trained counsel admitted in multiple jurisdictions, would benefit from the development of ethics infrastructure adequate to the distinctive characteristics of cross border practice. The principal ethics frameworks applicable to attorneys in the United States, including the various state bar professional responsibility rules and the American Bar Association Model Rules of Professional Conduct, do not address these questions in a manner adequate to the distinctive characteristics of cross border practice.[24]

The coordination across federal, state, and professional bodies on questions affecting foreign trained counsel is, at present, limited and ad hoc. The substantial range of federal, state, and professional bodies whose activities affect the practice of foreign trained counsel, including the various federal agencies administering the cross border regulatory architecture, the various state bar admitting authorities, the various continuing legal education providers, the various professional organizations, the various law schools offering programs of relevance to foreign trained counsel, and the various other institutional actors whose activities affect the practice of foreign trained counsel, would benefit from the development of coordination mechanisms adequate to the cross border scope of contemporary practice and adequate to the integration of the substantial number of foreign trained counsel engaged with United States practice.[25]

VI. The Foreign Trained Lawyers Association and the Development of Professional Infrastructure

The Foreign Trained Lawyers Association was established to address the substantial gaps in the institutional architecture for foreign trained legal practice in the United States and to develop the professional infrastructure required to convert the substantial latent capacity of the foreign trained legal community into operational capacity adequate to the cross border compliance environment.[26] The programmatic activities of the Association comprise five principal workstreams, including standards and credentialing, mentorship and integration, continuing professional development, advocacy and policy engagement, and applied scholarship.

The standards and credentialing workstream of the Association addresses the development of professional standards adequate to the distinctive characteristics of cross border practice and the credentialing of foreign trained counsel against those standards. The substantial range of cross border practice areas, including the foreign private issuer area, the Committee on Foreign Investment in the United States area, the supply chain integrity area, the sanctions enforcement area, and the various other cross border practice areas, would benefit from the development of professional standards adequate to the distinctive characteristics of each area, with the credentialing of foreign trained counsel against those standards providing a structured pathway for the demonstration of competence in particular cross border practice areas.[27]

The mentorship and integration workstream addresses the substantial gap in the institutional support available to foreign trained counsel as they enter United States practice and develop their cross

border practice over time. The substantial number of foreign trained counsel entering United States practice each year would benefit from the development of mentorship structures connecting newer practitioners with more experienced practitioners in the same substantive practice areas and with shared foreign legal training backgrounds. The integration workstream addresses the broader integration of foreign trained counsel into the institutions of United States legal practice, including the major law firms, the legal departments of major issuers, the compliance functions of regulated entities, the academic institutions engaged with cross border practice, and the various other institutions in which foreign trained counsel practice.

The continuing professional development workstream addresses the substantial gap in the continuing legal education infrastructure focused on cross border practice. The Association is positioned to develop continuing legal education programs addressing the substantive matters that animate cross border practice, with the programs delivered in formats and at times that are accessible to the foreign trained legal community and with the programs designed to address the distinctive perspectives that foreign trained counsel bring to particular substantive practice areas. The advocacy and policy engagement workstream addresses the substantial gap in the organized professional voice of foreign trained counsel on cross border regulatory architecture, with the Association positioned to provide structured engagement with federal regulatory agencies, state bar admitting authorities, and various other institutional actors whose activities affect the practice of foreign trained counsel.[28]

The applied scholarship workstream of the Association is reflected in the various scholarly publications of the Association, including the FTLA Law Review and the Cross Border Practice Review in which this Article appears. The Cross Border Practice Review is designed to provide a sustained scholarly forum for the analytical engagement of foreign trained counsel with the substantive and practical questions that contemporary cross border practice raises, with the Review providing a structured opportunity for the development of scholarly engagement with these questions and with the Review serving as a vehicle for the broader integration of foreign trained perspectives into the academic, professional, and policy communities engaged with cross border practice.[29]

VII. Conclusion: The National Interest Dimensions

The architecture of United States cross border regulation has reached a level of doctrinal density, regulatory complexity, and operational reach that materially affects the capacity of United States companies to engage with the global economy and that materially affects the capacity of foreign companies to engage with the United States economy.[30] The professional infrastructure required for the practical operation of this architecture depends substantially on the population of foreign trained counsel integrated into United States practice, but the institutional architecture for foreign trained legal practice in the United States is, at present, substantially less developed than the substance of the foreign trained legal community would warrant.

The national interest dimensions of these questions are substantial. The capacity of United States regulatory agencies to administer the cross border regulatory architecture in a manner that achieves the policy objectives that animate the architecture depends on the availability of professional capacity adequate to the practical operation of the architecture. The integrity of United States capital markets depends on the availability of professional capacity adequate to the disclosure obligations of foreign issuers and to the integration of foreign capital into United States markets in a manner consistent with investor protection objectives. The volume and quality of inbound foreign direct investment to the United States depends on the availability of professional capacity adequate to the practical

implementation of the investment activity in compliance with the various regulatory frameworks that apply to such activity. The competitiveness of United States markets in attracting foreign capital, foreign issuers, and foreign business activity depends substantially on the practical capacity to implement that activity in a manner that satisfies the regulatory and operational requirements of United States markets.[31]

The contributions that foreign trained counsel can make to the strengthening of the professional infrastructure required for the practical operation of the cross border regulatory architecture are substantial. The analytical capacity of foreign trained counsel to read and engage with multiple legal systems, the practical experience of foreign trained counsel in foreign legal systems, the cultural and linguistic capacity of foreign trained counsel to engage with foreign clients and counterparties, and the comparative perspectives that foreign trained counsel bring to questions of cross border regulatory architecture all represent substantial contributions to the broader project of developing professional infrastructure adequate to the contemporary cross border compliance environment.[32]

The Foreign Trained Lawyers Association is committed to the development of the professional infrastructure required for the practical operation of the cross border regulatory architecture, with the various programmatic activities of the Association designed to convert the substantial latent capacity of the foreign trained legal community into operational capacity adequate to the contemporary cross border compliance environment. The Cross Border Practice Review aspires to provide a sustained scholarly forum for the analytical engagement of foreign trained counsel with the substantive and practical questions that contemporary cross border practice raises, and the Review looks forward to the development of an enduring scholarly contribution to the broader project of strengthening the professional infrastructure for foreign trained legal practice in the United States.[33]

ARTICLE II

The Foreign Private Issuer Framework Under United States Federal Securities Law: Doctrinal Foundations, the 2025 Securities and Exchange Commission Concept Release, and the Implications for Cross Border Capital Markets Practice

By

Oksana Marchenko

ABSTRACT

This Article examines the foreign private issuer framework under United States federal securities law, with particular attention to the doctrinal foundations of the framework, the substantial regulatory engagement with the framework that culminated in the Securities and Exchange Commission Concept Release on Foreign Private Issuer Eligibility issued in June 2025, and the implications of the framework for cross border capital markets practice. The Article traces the development of the foreign private issuer accommodations from the original 1935 framework through the substantial subsequent development of the framework, addresses the contemporary substantive content of the foreign private issuer accommodations, examines the demographic and behavioral changes in the foreign private issuer population identified by the 2025 Concept Release, examines the six potential reform frameworks identified in the Concept Release, and addresses the implications of the framework for cross border capital markets practice and for the engagement of foreign trained counsel with foreign private issuer matters.

KEYWORDS: foreign private issuer, FPI, Form 20 F, Form F 1, Concept Release on Foreign Private Issuer Eligibility, Rule 405, Rule 3b 4, IOSCO Multilateral Memorandum of Understanding, mutual recognition, cross border capital markets practice.

I. Introduction

The foreign private issuer framework under United States federal securities law is among the most consequential and most contested components of the contemporary architecture of United States cross border regulation.[1] The framework establishes a regime of accommodations under the federal securities laws applicable to issuers that satisfy the definition of foreign private issuer in Rule 405 under the Securities Act of 1933 and Rule 3b 4 under the Securities Exchange Act of 1934, with the accommodations addressing the registration, disclosure, and ongoing reporting obligations applicable to such issuers. The framework was established with the purpose of facilitating the access of foreign issuers to United States capital markets while preserving the disclosure and investor protection objectives of the federal securities laws, and the framework has been a substantial component of the integration of foreign issuers into the United States capital markets over the post war period.[2]

The substantial regulatory engagement with the foreign private issuer framework has culminated in the Securities and Exchange Commission Concept Release on Foreign Private Issuer Eligibility issued in June 2025. The Concept Release identifies an FPI population that has changed materially in three respects since the foreign private issuer rules were last comprehensively reviewed in 2003, including a substantial geographic shift in the population, a substantial shift in the trading pattern profile of the population, and a substantial shift in the regulatory environment profile of the population. The Concept Release identifies six potential reform frameworks that the Securities and Exchange Commission may consider in addressing the changes in the foreign private issuer population, including tightened eligibility criteria, minimum non United States trading volume, major foreign exchange listing, Securities and Exchange Commission assessment of home country regulation, mutual recognition, and IOSCO Multilateral Memorandum of Understanding certification.[3]

This Article examines the foreign private issuer framework with particular attention to the doctrinal foundations of the framework, the substantial regulatory engagement with the framework that culminated in the 2025 Concept Release, and the implications of the framework for cross border capital markets practice. Part II addresses the doctrinal foundations of the framework, including the definition of foreign private issuer in Rule 405 and Rule 3b 4 and the substantive content of the accommodations available to foreign private issuers under the federal securities laws. Part III examines the substantial subsequent development of the framework through Securities and Exchange Commission rulemaking, guidance, and enforcement activity. Part IV addresses the demographic and behavioral changes in the foreign private issuer population identified by the 2025 Concept Release. Part V examines the six potential reform frameworks identified in the Concept Release. Part VI addresses the implications of the framework for cross border capital markets practice. Part VII concludes with observations regarding the contributions of foreign trained counsel to contemporary foreign private issuer practice.

II. The Foreign Private Issuer Definition and the Substantive Accommodations

The foreign private issuer definition is set forth in Rule 405 under the Securities Act of 1933 and Rule 3b 4 under the Securities Exchange Act of 1934.[4] The definition provides that a foreign private issuer is a foreign issuer other than a foreign government, except an issuer that meets two specified conditions. The first condition is that more than fifty percent of the issuer's outstanding voting securities are directly or indirectly owned of record by residents of the United States. The second condition is that any one of three additional conditions is satisfied, including the condition that the majority of the executive officers or directors are United States citizens or residents, the condition that more than fifty percent of the assets of the issuer are located in the United States, or the condition that

the business of the issuer is administered principally in the United States. An issuer that does not satisfy the conditions for foreign private issuer status is treated as a domestic issuer for purposes of the federal securities laws.

The substantive accommodations available to foreign private issuers under the federal securities laws are substantial.[5] The accommodations include the use of Form 20 F as the annual report on Form 10 K equivalent, with Form 20 F providing a substantial range of accommodations relative to the requirements applicable to domestic issuers under Form 10 K. The accommodations also include the use of Form F 1 as the registration statement on Form S 1 equivalent for initial public offerings, with Form F 1 providing accommodations relative to the requirements applicable to domestic issuers under Form S 1. The accommodations also include the exemption of foreign private issuers from the proxy rules of Section 14 of the Securities Exchange Act of 1934, the exemption of foreign private issuer insiders from the reporting requirements of Section 16 of the Securities Exchange Act of 1934 and the strict liability framework of Section 16 paragraph b, the exemption of foreign private issuers from Regulation Fair Disclosure, and various other accommodations.[6]

The substantive content of the accommodations reflects a balance between the disclosure and investor protection objectives of the federal securities laws and the recognition that foreign issuers operate under foreign legal systems that may differ substantially from United States law. The accommodations are designed to facilitate the access of foreign issuers to United States capital markets by reducing the burden of compliance with United States disclosure obligations to a level that is feasible for foreign issuers, while preserving the disclosure of the substantive information necessary to inform investor decisions regarding the foreign issuer's securities. The balance reflected in the accommodations has been the subject of substantial scholarly and regulatory engagement over the post war period, with various views regarding the appropriate balance and the appropriate substantive content of the accommodations.[7]

The use of Form 20 F as the annual report on Form 10 K equivalent for foreign private issuers is among the principal accommodations available to foreign private issuers. Form 20 F provides a substantial range of accommodations relative to the requirements applicable to domestic issuers under Form 10 K, including the use of International Financial Reporting Standards as issued by the International Accounting Standards Board for the preparation of the financial statements, accommodations regarding the disclosure of executive compensation, accommodations regarding the disclosure of related party transactions, accommodations regarding the disclosure of beneficial ownership of the issuer's securities, and various other accommodations. The accommodations on Form 20 F are designed to permit the use of disclosure formats and substantive content that are consistent with the home country reporting practices of the foreign issuer while providing the substantive disclosure necessary to inform investor decisions regarding the issuer's securities.[8]

The use of Form F 1 as the registration statement on Form S 1 equivalent for initial public offerings by foreign private issuers similarly provides a substantial range of accommodations relative to the requirements applicable to domestic issuers under Form S 1. The accommodations on Form F 1 include the use of International Financial Reporting Standards for the preparation of the financial statements, accommodations regarding the disclosure of executive compensation, accommodations regarding the disclosure of related party transactions, and various other accommodations consistent with the broader pattern of accommodations available to foreign private issuers under the federal securities laws.[9]

III. The Subsequent Development of the Framework

The foreign private issuer framework has developed substantially through Securities and Exchange Commission rulemaking, guidance, and enforcement activity over the post war period.[10] The principal regulatory developments include the substantial revision of the framework conducted by the Securities and Exchange Commission in 2003, which revisited the substantive content of the accommodations and adopted various changes to the framework reflecting the developments in international accounting and disclosure standards and the developments in the foreign private issuer population over the period since the framework was last comprehensively reviewed.

The 2003 review of the foreign private issuer framework addressed various aspects of the framework, including the use of International Financial Reporting Standards for the preparation of financial statements, the disclosure of executive compensation, the disclosure of related party transactions, and various other matters. The substantial regulatory engagement with the framework during the period since the 2003 review has produced various additional regulatory developments, including the substantial guidance issued by the Division of Corporation Finance regarding the application of the framework to particular categories of issuers, the substantial enforcement activity addressing foreign private issuer compliance with the framework, and the various subsequent rulemaking developments affecting the framework.[11]

The substantial growth in the foreign private issuer population over the period since the 2003 review has been a substantial component of the broader development of the framework. The foreign private issuer population has grown substantially in absolute numbers and has shifted substantially in geographic and behavioral profile, with substantial implications for the practical operation of the framework. The substantial growth in the foreign private issuer population has been driven by the substantial integration of foreign issuers into United States capital markets, the substantial increase in the volume of cross border capital markets activity over the post war period, and the substantial development of the United States capital markets as the principal venue for the listing of foreign issuers in the global capital markets.[12]

The substantial regulatory engagement with the framework over the period since the 2003 review has been driven by the substantial changes in the foreign private issuer population and by the substantial concerns regarding the practical operation of the framework in light of those changes. The principal regulatory developments include the substantial guidance issued by the Division of Corporation Finance regarding the application of the framework to particular categories of issuers, the substantial enforcement activity addressing foreign private issuer compliance with the framework, and the various subsequent rulemaking developments affecting the framework. The substantial regulatory engagement has reflected the broader concern of the Securities and Exchange Commission regarding the integrity of the foreign private issuer framework and the broader concern regarding the protection of investors in foreign private issuer securities.[13]

IV. The 2025 Concept Release and the Changes in the FPI Population

The Securities and Exchange Commission Concept Release on Foreign Private Issuer Eligibility, issued in June 2025, identifies an FPI population that has changed materially in three respects since the foreign private issuer rules were last comprehensively reviewed in 2003.[14] The Concept Release reflects the substantial regulatory engagement of the Securities and Exchange Commission with the foreign private issuer framework over the period since the 2003 review and reflects the substantial concerns of the Commission regarding the practical operation of the framework in light of the

substantial changes in the foreign private issuer population.

The first respect in which the foreign private issuer population has changed materially is geographic. The Concept Release reports that the foreign private issuer population has shifted substantially in geographic profile since the 2003 review, with substantial growth in issuers from the Cayman Islands, China, Israel, Bermuda, and various other jurisdictions and corresponding decline in the relative share of issuers from Canada and the United Kingdom. The geographic shift reflects the broader development of the global capital markets and the broader pattern of cross border capital flows over the past two decades, with substantial growth in capital markets activity from emerging market jurisdictions and from offshore financial centers and corresponding decline in the relative share of capital markets activity from the traditional source jurisdictions.[15]

The second respect in which the foreign private issuer population has changed materially is the trading pattern profile. The Concept Release reports that approximately fifty five percent of foreign private issuers as of fiscal year 2024 had no or minimal trading of their equity securities on any non United States market, suggesting a population that uses United States capital markets as its primary or exclusive trading venue. The trading pattern shift reflects the broader development of the United States capital markets as the principal venue for the listing of foreign issuers in the global capital markets and the broader concentration of trading activity in United States markets relative to the dispersion of trading activity that was characteristic of the foreign private issuer population in earlier periods.[16]

The third respect in which the foreign private issuer population has changed materially is the regulatory environment profile. The Concept Release reports that a meaningful share of current foreign private issuers are incorporated or headquartered in jurisdictions that operate less robust securities regulatory frameworks than were typical of foreign private issuer source jurisdictions in 2003. The regulatory environment shift reflects the broader shift in the geographic profile of the foreign private issuer population and the broader implications of that shift for the substantive content of home country regulation applicable to foreign private issuers. The shift has substantial implications for the practical operation of the foreign private issuer framework, since the framework was originally designed on the assumption that home country regulation would provide a substantial portion of the regulatory oversight applicable to foreign private issuers, with United States regulation providing only a supplementary regulatory framework.[17]

The cumulative effect of these three shifts is a foreign private issuer population that has drifted substantially from the demographic and behavioral profile that animated the original foreign private issuer accommodations. The drift has substantial implications for the practical operation of the framework, for the integrity of United States capital markets, and for the appropriate regulatory response to the substantial changes in the population. The Concept Release identifies six potential reform frameworks that the Securities and Exchange Commission may consider in addressing the changes in the foreign private issuer population, with each of the frameworks reflecting a different theory of the appropriate regulatory response to the substantial changes in the population.[18]

V. The Six Potential Reform Frameworks

The 2025 Concept Release identifies six potential reform frameworks that the Securities and Exchange Commission may consider in addressing the changes in the foreign private issuer population.[19] The six frameworks include tightened eligibility criteria, minimum non United States trading volume, major foreign exchange listing, Securities and Exchange Commission assessment of home country regulation, mutual recognition, and IOSCO Multilateral Memorandum of Understanding

certification. Each of the frameworks reflects a different theory of the appropriate regulatory response to the substantial changes in the foreign private issuer population, and each of the frameworks would, if adopted, generate substantial cross border legal work for issuers, exchanges, and the bar.

The tightened eligibility criteria framework would address the changes in the foreign private issuer population by tightening the substantive content of the foreign private issuer definition, with the consequence that a meaningful subset of current foreign private issuers would either upgrade their United States disclosure to domestic issuer standards or exit United States markets. The framework reflects the view that the changes in the foreign private issuer population have rendered the original definition over inclusive in relation to the policy objectives that animated the original accommodations, with the consequence that the appropriate regulatory response is to narrow the definition to better align with the policy objectives.

The minimum non United States trading volume framework would address the trading pattern shift in the foreign private issuer population by requiring foreign private issuers to maintain a minimum level of trading activity on non United States markets as a condition of foreign private issuer status. The framework reflects the view that the trading pattern shift has rendered the original accommodations inappropriate for issuers whose securities trade primarily or exclusively on United States markets, with the consequence that the appropriate regulatory response is to condition foreign private issuer status on the maintenance of substantive trading activity on non United States markets.[20]

The major foreign exchange listing framework would address the trading pattern and geographic shifts in the foreign private issuer population by requiring foreign private issuers to maintain a listing on a major foreign exchange as a condition of foreign private issuer status. The framework reflects the view that the maintenance of a major foreign exchange listing provides a substantial indicator of the substantive integration of the issuer into the home country capital markets and provides a substantial supplementary regulatory framework through the home country exchange. The Securities and Exchange Commission assessment of home country regulation framework would address the regulatory environment shift in the foreign private issuer population by conditioning foreign private issuer status on Securities and Exchange Commission assessment of the regulatory quality of the issuer's home jurisdiction. The framework reflects the view that the regulatory environment shift has rendered the original assumption regarding the substance of home country regulation inappropriate for a meaningful share of current foreign private issuers, with the consequence that the appropriate regulatory response is to condition foreign private issuer status on substantive Commission assessment of home country regulatory quality.[21]

The mutual recognition framework would address the broader integration of foreign private issuers into United States capital markets through the establishment of a mutual recognition system between the Securities and Exchange Commission and home country securities regulators. The framework reflects the view that the integration of foreign private issuers into United States capital markets has reached a level of substantial development that would support the establishment of mutual recognition arrangements between the Commission and home country regulators, with the mutual recognition arrangements providing a structured framework for the integration of home country regulation into the regulatory framework applicable to foreign private issuers in United States markets. The IOSCO Multilateral Memorandum of Understanding certification framework would address the cross border enforcement cooperation dimensions of foreign private issuer regulation by conditioning foreign private issuer status on the certification of the issuer's home jurisdiction under the IOSCO Multilateral Memorandum of Understanding on Consultation, Cooperation, and the Exchange of Information.[22]

VI. Implications for Cross Border Capital Markets Practice

Whichever of the six potential reform frameworks the Securities and Exchange Commission ultimately adopts, the resulting compliance landscape will require a substantially expanded population of practitioners who can read both United States securities law and home country corporate governance and securities law frameworks.[23] The reform pathway will require substantial cross border legal work for issuers, exchanges, and the bar, with the substantial work reflecting the integration of the new regulatory framework into the practical operation of foreign private issuer matters and reflecting the substantial transition costs that the new framework will impose on the existing foreign private issuer population.

The substantial cross border legal work generated by the implementation of any of the potential reform frameworks would substantially benefit from the comparative advantage of foreign trained counsel in addressing cross border legal demands. The analytical capacity of foreign trained counsel to read and engage with multiple legal systems, the practical experience of foreign trained counsel in the home country legal systems with which particular foreign private issuers are associated, the cultural and linguistic capacity of foreign trained counsel to engage with foreign issuer counterparties, and the comparative perspectives that foreign trained counsel bring to questions of cross border regulatory architecture all represent substantial contributions to the practical implementation of any of the potential reform frameworks.[24]

The implications of the foreign private issuer framework for cross border capital markets practice extend beyond the particular reform pathway that the Commission ultimately adopts. The substantial growth in the foreign private issuer population over the past two decades has produced a substantial population of issuers whose securities are listed on United States markets and whose ongoing compliance with United States disclosure and reporting obligations requires substantial cross border legal capacity. The substantial cross border legal capacity required for ongoing foreign private issuer compliance includes capacity for the preparation of annual reports on Form 20 F, capacity for the preparation of registration statements on Form F 1 and Form F 4, capacity for the management of cross border merger and acquisition activity involving foreign private issuers, capacity for the management of cross border securities offerings by foreign private issuers, and capacity for the management of various other cross border matters that arise in connection with foreign private issuer practice.[25]

The Securities and Exchange Commission has consistently treated the registration of securities in United States capital markets as a sufficient jurisdictional basis to impose full disclosure obligations on the registering issuer, with the consequence that the disclosure architecture of the federal securities laws has substantial extraterritorial reach over the operations of foreign private issuers. The substantial extraterritorial reach of the disclosure architecture creates substantial demand for cross border legal services capable of bridging United States disclosure obligations and the home country legal frameworks applicable to the foreign private issuer's operations. The substantial cross border legal services demand generated by the extraterritorial reach of the disclosure architecture is a substantial component of the broader cross border legal services market and is a substantial source of the comparative advantage of foreign trained counsel in foreign private issuer practice.[26]

VII. Conclusion

The foreign private issuer framework under United States federal securities law is among the most consequential and most contested components of the contemporary architecture of United States cross border regulation.[27] The framework has developed substantially over the post war period through

Securities and Exchange Commission rulemaking, guidance, and enforcement activity, and the substantial regulatory engagement with the framework has culminated in the 2025 Concept Release on Foreign Private Issuer Eligibility issued in June 2025. The Concept Release identifies an FPI population that has changed materially in three respects since the foreign private issuer rules were last comprehensively reviewed in 2003 and identifies six potential reform frameworks that the Commission may consider in addressing the changes in the population.

The implications of the foreign private issuer framework for cross border capital markets practice are substantial. The substantial growth in the foreign private issuer population over the past two decades has produced a substantial population of issuers whose ongoing compliance with United States disclosure and reporting obligations requires substantial cross border legal capacity. Whichever of the six potential reform frameworks the Commission ultimately adopts, the resulting compliance landscape will require a substantially expanded population of practitioners who can read both United States securities law and home country corporate governance and securities law frameworks. The comparative advantage of foreign trained counsel in addressing the substantial cross border legal demands generated by the foreign private issuer framework is a substantial component of the broader case for foreign trained legal expertise as critical professional infrastructure for United States cross border compliance.[28]

The Cross Border Practice Review aspires to provide a forum for the analytical engagement of foreign trained counsel with the substantive and practical questions that the foreign private issuer framework raises and with the substantial regulatory engagement that has culminated in the 2025 Concept Release. The development of scholarly engagement with these questions, the integration of comparative perspectives into the analysis of foreign private issuer practice, and the contribution of foreign trained perspectives to the policy debates concerning the development of the framework are all components of the broader project that the Review seeks to advance.[29]

ARTICLE III

The Committee on Foreign Investment in the United States, the Foreign Investment Risk Review Modernization Act of 2018, and the National Security Review of Inbound Foreign Direct Investment: Doctrinal Architecture and Practice Implications

By

Giorgi Kapanadze

ABSTRACT

This Article examines the architecture of the national security review of inbound foreign direct investment conducted by the Committee on Foreign Investment in the United States under the Foreign Investment Risk Review Modernization Act of 2018. The analysis traces the development of the Committee from its origins in the Defense Production Act of 1950 framework through the Exon Florio Amendment of 1988, the Foreign Investment and National Security Act of 2007, and the substantial expansion of the Committee jurisdiction and authority through the Foreign Investment Risk Review Modernization Act of 2018. The Article examines the substantive scope of covered transactions, the mandatory and voluntary filing frameworks, the substantive review process and the standard of review, the mitigation agreement framework, the divestiture authority and other Presidential powers, the substantial subsequent regulatory development through the implementing regulations, and the practice implications of the framework for inbound foreign direct investment to the United States. The Article concludes with observations regarding the contributions of foreign trained counsel to contemporary Committee practice.

KEYWORDS: Committee on Foreign Investment in the United States, CFIUS, Foreign Investment Risk Review Modernization Act, FIRRMA, Exon Florio Amendment, covered transaction, TID United States business, mitigation agreement, national security review, Ralls Corp.

I. Introduction

The Committee on Foreign Investment in the United States is the principal interagency body responsible for the national security review of inbound foreign direct investment to the United States.[1] The Committee operates under the framework established by the Defense Production Act of 1950, as amended by the Exon Florio Amendment of 1988, the Foreign Investment and National Security Act of 2007, and the Foreign Investment Risk Review Modernization Act of 2018, with the implementing regulations administered by the Department of the Treasury and the various other federal agencies that participate in the Committee process. The Committee has substantial authority to review covered transactions for national security implications, to negotiate mitigation agreements with parties to covered transactions to address identified national security concerns, and to recommend to the President the suspension or prohibition of covered transactions that present unmitigated national security concerns.

The Committee operates at the intersection of two substantial United States policy objectives. The first objective is the open investment policy, under which the United States has, since the Reagan administration, treated inbound foreign direct investment as a strategic asset and has maintained a policy of openness to foreign investment subject to limited exceptions for national security concerns.[2] The second objective is the protection of United States national security, under which the United States maintains substantial controls on foreign investment activity that presents identifiable national security concerns. The Committee framework reflects the substantial balance between these two policy objectives, with the substantive scope of the Committee jurisdiction, the substantive review process, and the substantive remedies available to the Committee all reflecting the substantial balance between openness to investment and protection of national security.

The Committee jurisdiction and authority have expanded substantially over the past several decades through legislative and regulatory development. The substantial expansion through the Foreign Investment Risk Review Modernization Act of 2018 was particularly significant, introducing the substantive concept of the TID United States business addressing critical technologies, critical infrastructure, and sensitive personal data, establishing mandatory filing requirements for certain categories of covered transactions, expanding the Committee jurisdiction to address certain categories of real estate transactions, and introducing various other reforms. The Committee has reported substantial increases in the volume of filings, the volume of mitigation activity, and the substantive scope of Committee engagement following the implementation of the Foreign Investment Risk Review Modernization Act of 2018.[3]

This Article surveys the architecture of the Committee framework with particular attention to the doctrinal foundations, substantive scope, and practical operation of the framework. Part II addresses the historical development of the Committee through the principal legislative milestones. Part III examines the substantive scope of covered transactions under the contemporary framework. Part IV addresses the mandatory and voluntary filing frameworks. Part V examines the substantive review process and the standard of review. Part VI addresses the mitigation agreement framework. Part VII examines the divestiture authority and other Presidential powers under the framework. Part VIII addresses the substantial subsequent regulatory development through the implementing regulations. Part IX examines the practice implications of the framework for inbound foreign direct investment. Part X concludes with observations regarding the contributions of foreign trained counsel to contemporary Committee practice.

II. Historical Development of the Committee Framework

The Committee on Foreign Investment in the United States was established by Executive Order 11858 in 1975, with the purpose of monitoring the impact of foreign investment in the United States on the United States economy and providing a coordinated mechanism for the review of foreign investment activity.[4] The original Committee framework was a monitoring framework rather than a regulatory framework, with the Committee lacking substantive authority to suspend or prohibit foreign investment activity. The substantial development of the Committee framework into a regulatory framework began with the Exon Florio Amendment to the Defense Production Act of 1950, enacted in 1988, which established Presidential authority to suspend or prohibit foreign acquisitions of United States businesses that threatened to impair the national security.

The Exon Florio Amendment was enacted in response to substantial concerns regarding foreign investment in United States defense industrial base activities and reflected the broader concerns regarding foreign investment in technology and infrastructure with national security implications. The Exon Florio framework established the Presidential authority to review and to suspend or prohibit covered transactions, with the Committee operating as the interagency body responsible for the substantive review of covered transactions and for the development of recommendations to the President regarding the appropriate response to identified national security concerns. The Exon Florio framework remained the principal substantive framework for the national security review of foreign investment in the United States for nearly two decades.[5]

The Foreign Investment and National Security Act of 2007 substantially revised the Committee framework, establishing the Committee on a statutory basis, expanding the substantive scope of covered transactions, establishing certain procedural requirements for Committee review, and introducing various other reforms. The Foreign Investment and National Security Act of 2007 was enacted in response to substantial concerns regarding the substantive scope of Committee review and the substantive content of Committee decision making, with the substantial congressional engagement with the Committee framework reflecting the broader concerns regarding the substantive content of the national security review of foreign investment.[6]

The Foreign Investment Risk Review Modernization Act of 2018 substantially expanded the Committee jurisdiction and authority, reflecting the substantial concerns regarding foreign investment in critical technologies, critical infrastructure, and sensitive personal data and the broader concerns regarding the implications of foreign investment for United States national security in light of the substantial development of cross border investment activity over the post war period.[7] The Foreign Investment Risk Review Modernization Act of 2018 introduced the substantive concept of the TID United States business addressing critical technologies, critical infrastructure, and sensitive personal data, established mandatory filing requirements for certain categories of covered transactions, expanded the Committee jurisdiction to address certain categories of real estate transactions, established filing fees for certain categories of filings, and introduced various other reforms. The implementing regulations were issued by the Department of the Treasury in 2020, with subsequent amendments addressing various aspects of the implementation of the framework.

III. The Substantive Scope of Covered Transactions

The substantive scope of covered transactions under the contemporary Committee framework comprises three principal categories of transactions: covered control transactions, covered investments, and covered real estate transactions.[8] The category of covered control transactions includes any

transaction proposed or pending after August 23, 1988 by or with any foreign person which could result in foreign control of any United States business, with the substantive content of the foreign control concept and the United States business concept defined in the implementing regulations administered by the Department of the Treasury. The category of covered investments includes certain non controlling investments by foreign persons in TID United States businesses addressing critical technologies, critical infrastructure, or sensitive personal data, with the substantive content of the covered investment concept and the TID United States business concept defined in the implementing regulations.

The TID United States business concept introduced by the Foreign Investment Risk Review Modernization Act of 2018 addresses three substantive categories of United States businesses: businesses that produce, design, test, manufacture, fabricate, or develop critical technologies; businesses that own, operate, manufacture, supply, or service critical infrastructure; and businesses that maintain or collect, directly or indirectly, sensitive personal data of United States citizens that may be exploited in a manner that threatens national security. The substantive content of each of these three categories is defined in the implementing regulations, with substantial definitions and substantial guidance addressing the application of each category to particular categories of businesses.[9]

The category of covered real estate transactions, introduced by the Foreign Investment Risk Review Modernization Act of 2018, addresses certain categories of real estate transactions involving real estate located in proximity to certain categories of sensitive United States government facilities. The category includes the purchase or lease by, or concession to, a foreign person of certain categories of real estate located in proximity to certain categories of military installations, certain categories of other sensitive United States government facilities, or certain categories of ports of entry. The implementing regulations include detailed schedules of the relevant facilities and the relevant proximity ranges, with substantial subsequent guidance addressing the application of the category to particular categories of transactions.[10]

The substantive content of the foreign person concept under the Committee framework is broad, addressing any foreign national, foreign government, or foreign entity, as well as any entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity. The substantive content of the United States business concept is similarly broad, addressing any entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States. The substantive content of the foreign control concept addresses both formal control through majority ownership of voting securities and substantive control through various other mechanisms, with the implementing regulations including substantial detail regarding the substantive content of the foreign control concept and substantial guidance regarding the application of the concept to particular categories of transactions.[11]

IV. The Mandatory and Voluntary Filing Frameworks

The Committee framework establishes both mandatory and voluntary filing frameworks for covered transactions.[12] The mandatory filing framework, introduced by the Foreign Investment Risk Review Modernization Act of 2018, requires the parties to certain categories of covered transactions to file with the Committee, with the substantive scope of the mandatory filing requirement addressing covered transactions involving certain categories of foreign persons and certain categories of TID United States businesses. The mandatory filing framework substantially expanded the substantive engagement of the Committee with covered transactions, since the mandatory filing requirement

applies regardless of the willingness of the parties to engage with the Committee voluntarily.

The voluntary filing framework permits the parties to a covered transaction to file with the Committee on a voluntary basis, with the voluntary filing typically motivated by the desire of the parties to obtain Committee clearance of the transaction prior to closing. The voluntary filing framework remains the principal vehicle for Committee engagement with covered transactions, with the substantial volume of voluntary filings reflecting the substantial concerns of parties to covered transactions regarding the post closing review authority of the Committee and the substantial concerns regarding the substantive remedies available to the Committee following Committee review.[13] The Committee has substantial authority to review covered transactions on its own initiative, including transactions that have already closed, with the consequence that voluntary filing is the principal mechanism through which parties to covered transactions can obtain Committee clearance and substantive certainty regarding the Committee response to the transaction.

The substantive content of Committee filings is addressed by the implementing regulations and by the substantial subsequent guidance issued by the Department of the Treasury. The filings address the substantive characteristics of the covered transaction, the substantive characteristics of the parties to the transaction, the substantive characteristics of the United States business involved in the transaction, and various other matters relating to the substantive characteristics of the transaction. The substantial substantive content of Committee filings reflects the substantial substantive scope of the Committee review and reflects the substantial demands of the Committee for substantive information regarding the substantive characteristics of covered transactions.[14]

The Committee reported in its 2024 Annual Report to Congress that the Committee reviewed three hundred twenty five filings covering two hundred sixty nine distinct transactions during fiscal year 2024, representing a substantial increase from the levels of activity reported in earlier years and reflecting the substantial expansion of the Committee engagement following the implementation of the Foreign Investment Risk Review Modernization Act of 2018. The substantial increase in Committee filings reflects the substantial expansion of the Committee jurisdiction through the Act, the introduction of the mandatory filing framework, and the substantial concerns of parties to covered transactions regarding the substantive content of Committee review.[15]

V. The Substantive Review Process and Standard of Review

The substantive review process under the Committee framework comprises a thirty calendar day initial review period, with the option of an additional forty five calendar day investigation period if the Committee identifies national security concerns that require further substantive engagement.[16] The thirty calendar day initial review period begins on the date the Committee accepts a complete filing, with the Committee engaging in substantial substantive review of the filing during this period and developing either a clearance determination, a request for additional information, or a determination to proceed to the investigation period.

The forty five calendar day investigation period provides additional time for the substantive engagement of the Committee with the covered transaction, with the Committee engaging in substantial substantive engagement with the parties to the transaction regarding the identified national security concerns and developing either a clearance determination, a mitigation agreement to address the identified concerns, or a recommendation to the President regarding the appropriate response to the transaction. The substantive content of the investigation period varies substantially across particular transactions, with the substantive engagement reflecting the substantive characteristics of the identified

national security concerns and the substantive willingness of the parties to engage with the Committee regarding the development of mitigation arrangements.[17]

The standard of review under the Committee framework is whether the covered transaction threatens to impair the national security of the United States. The substantive content of the national security concept under the Committee framework is broad, addressing the substantive range of national security concerns that may arise in connection with foreign investment activity, including concerns regarding foreign access to critical technologies, concerns regarding foreign control of critical infrastructure, concerns regarding foreign access to sensitive personal data, concerns regarding the proximity of foreign owned real estate to sensitive United States government facilities, and various other concerns addressed by the Committee in the substantive review of particular covered transactions.[18]

The substantive content of the Committee analysis of particular covered transactions has developed substantially through the substantial subsequent practice of the Committee. The Committee has developed substantial expertise in the substantive review of particular categories of covered transactions, including covered transactions involving particular categories of foreign persons, covered transactions involving particular categories of United States businesses, and covered transactions involving particular categories of national security concerns. The substantial expertise of the Committee is reflected in the substantial confidentiality of the substantive Committee analysis of particular transactions, with the Committee maintaining substantial confidentiality regarding the substantive content of its analysis and reflecting the substantial concerns regarding the disclosure of national security information that may arise in the substantive Committee engagement with covered transactions.[19]

VI. The Mitigation Agreement Framework

The mitigation agreement framework under the Committee framework provides a substantial mechanism for the resolution of identified national security concerns through the development of contractual arrangements between the parties to a covered transaction and the Committee.[20] The mitigation agreements address the substantive national security concerns identified by the Committee through substantive contractual provisions that constrain the operation of the covered transaction or the operation of the United States business involved in the transaction. The substantive content of mitigation agreements varies substantially across particular transactions, reflecting the substantive characteristics of the identified concerns and the substantive characteristics of the available mitigation mechanisms.

The principal categories of mitigation provisions include provisions addressing the governance of the United States business involved in the transaction, including provisions establishing security committees with substantial authority over particular categories of decisions affecting the United States business; provisions addressing the access of foreign persons to particular categories of information or technology, including provisions establishing physical and information security controls; provisions addressing the ownership and operation of particular categories of assets, including provisions requiring the divestiture of particular assets or the establishment of particular operational arrangements; and various other categories of provisions addressing the substantive content of the identified national security concerns.[21]

The Committee maintains substantial monitoring of mitigation agreements following the completion of the covered transaction, with the substantial monitoring reflecting the substantial

concerns regarding the practical operation of the mitigation arrangements and the substantial implications of any failure to comply with the mitigation arrangements. The Committee reported in its 2024 Annual Report to Congress that the Committee maintained active mitigation oversight of two hundred forty two agreements at year end, reflecting the substantial volume of mitigation activity conducted by the Committee and the substantial substantive engagement of the Committee with the post closing operation of covered transactions subject to mitigation arrangements.[22]

The mitigation agreement framework has been the subject of substantial scholarly and practitioner engagement. The substantial substantive content of mitigation agreements, the substantial substantive consequences of mitigation arrangements for the practical operation of covered transactions, and the substantial substantive engagement of the Committee with the post closing operation of covered transactions all represent substantial considerations in the practical engagement of parties with covered transactions and substantial considerations in the substantive advice provided by counsel regarding covered transactions.[23]

VII. Divestiture Authority and Presidential Powers

The Committee framework establishes substantial Presidential authority to suspend or prohibit covered transactions that present unmitigated national security concerns.[24] The Presidential authority includes the authority to require the divestiture of completed covered transactions where the Committee identifies national security concerns that cannot be adequately addressed through mitigation arrangements. The Presidential authority represents the substantive backstop of the Committee framework and reflects the substantive policy commitment to the protection of national security through the substantive review of foreign investment activity.

The Presidential authority has been exercised on a limited number of occasions over the history of the Committee framework, with the limited exercise reflecting both the substantial willingness of parties to covered transactions to engage with the Committee through the voluntary filing framework and the substantial willingness of parties to negotiate mitigation arrangements addressing identified national security concerns. The principal occasions on which the Presidential authority has been exercised include the Ralls Corp. case, in which President Obama in 2012 ordered the divestiture by Ralls Corp. of certain wind farm projects located in proximity to a United States military installation; the Aixtron case, in which President Obama in 2016 prohibited the proposed acquisition of Aixtron SE by Grand Chip Investment GmbH; the Lattice Semiconductor case, in which President Trump in 2017 prohibited the proposed acquisition of Lattice Semiconductor by Canyon Bridge Capital Partners; the Broadcom Qualcomm case, in which President Trump in 2018 prohibited the proposed acquisition of Qualcomm by Broadcom Limited; and various other occasions.[25]

The Ralls Corp. case is particularly significant for the development of the Committee framework, both for the substantive content of the case and for the substantial subsequent judicial engagement with the Committee framework that the case generated. The Ralls Corp. case involved the proposed operation of wind farm projects in Oregon by Ralls Corp., a Delaware corporation owned by Chinese nationals. The Committee identified national security concerns regarding the proximity of the wind farm projects to a United States Navy bombing range and recommended the divestiture of the projects, with President Obama issuing the divestiture order on September 28, 2012. The Ralls Corp. case generated substantial subsequent litigation in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, with the Court of Appeals decision in Ralls Corp. v. Committee on Foreign Investment in the United States addressing

the substantive procedural due process implications of the Committee review process.[26]

The Court of Appeals decision in Ralls Corp. v. Committee on Foreign Investment in the United States, addressed in detail in the Court Decisions Review section of this volume, established that the Committee process is subject to procedural due process requirements where the Committee process results in the deprivation of property interests of parties subject to the process. The substantial subsequent practical implications of the Ralls Corp. decision include the substantial development of Committee practice regarding the substantive content of notice and opportunity to be heard provided to parties to covered transactions, the substantial development of Committee practice regarding the disclosure of unclassified information underlying Committee national security determinations, and various other procedural developments.[27]

VIII. Implementing Regulations and Subsequent Development

The implementing regulations administered by the Department of the Treasury provide substantial substantive content for the Committee framework.[28] The implementing regulations include the substantive content of the foreign person concept, the United States business concept, the foreign control concept, the TID United States business concept, the covered investment concept, the covered real estate transaction concept, the mandatory filing framework, the voluntary filing framework, the substantive review process, and various other substantive components of the Committee framework. The implementing regulations have developed substantially through the substantial subsequent rulemaking activity of the Department of the Treasury, with the substantial subsequent activity addressing various aspects of the implementation of the Foreign Investment Risk Review Modernization Act of 2018 and addressing various aspects of the practical operation of the Committee framework.

The substantial subsequent regulatory development of the Committee framework has addressed various substantive matters, including the substantive content of the critical technology category of TID United States businesses, the substantive content of the critical infrastructure category of TID United States businesses, the substantive content of the sensitive personal data category of TID United States businesses, the substantive content of covered real estate transactions, the substantive content of mandatory filing requirements, and various other matters. The substantial subsequent regulatory development reflects the substantial concerns of the Department of the Treasury regarding the practical operation of the Committee framework and the substantial willingness of the Department to address those concerns through substantial subsequent rulemaking activity.[29]

The substantial subsequent regulatory development has been accompanied by substantial guidance issued by the Department of the Treasury and by the various other federal agencies that participate in the Committee process. The substantial guidance addresses various aspects of the practical operation of the Committee framework, including the substantive content of particular categories of covered transactions, the substantive content of particular categories of national security concerns, the substantive content of mitigation arrangements, and various other matters. The substantial guidance provides substantial practical assistance to parties engaged with covered transactions and to counsel advising parties regarding covered transactions.[30]

IX. Practice Implications for Inbound Foreign Direct Investment

The practice implications of the Committee framework for inbound foreign direct investment to the United States are substantial.[31] The substantial substantive scope of Committee review, the

substantial substantive consequences of Committee determinations, and the substantial substantive engagement required for the practical operation of the Committee process all represent substantial considerations in the practical engagement of foreign investors with the United States economy. The Committee framework is, in operation, a substantial component of the regulatory architecture applicable to inbound foreign direct investment to the United States and substantially affects the practical operation of inbound investment activity.

The substantial substantive engagement required for the practical operation of the Committee process generates substantial cross border legal demand. The substantive content of Committee filings, the substantive engagement with the Committee during the review process, the substantive negotiation of mitigation arrangements where applicable, and the substantive monitoring of mitigation arrangements following the completion of covered transactions all require substantial cross border legal capacity. The substantial cross border legal capacity required for the practical operation of the Committee process substantially benefits from the comparative advantage of foreign trained counsel in addressing cross border legal demands, with the analytical capacity of foreign trained counsel to read and engage with multiple legal systems providing substantial advantage in the substantive engagement with the Committee process.[32]

The substantial concerns of foreign investors regarding the substantive content of Committee review have substantial implications for the broader volume and quality of inbound foreign direct investment to the United States. The cumulative new foreign direct investment in the United States in 2024 was one hundred fifty one billion dollars, representing a fourteen point two percent decrease from 2023 and below the ten year annual average of two hundred seventy seven point two billion dollars. The factors driving the decrease in inbound foreign direct investment include various macroeconomic and geopolitical factors, but practitioner accounts consistently identify regulatory process friction as a significant component of the broader pattern, with foreign investors withdrawing from contemplated transactions when the Committee pathway proves more demanding than anticipated and with various other process related friction affecting the broader pattern of inbound investment activity.[33]

The substantial regulatory process friction affecting inbound foreign direct investment to the United States generates substantial demand for cross border legal services capable of addressing the substantive engagement with the Committee process. The substantial cross border legal services demand substantially benefits from the comparative advantage of foreign trained counsel in addressing cross border legal demands, with the analytical capacity of foreign trained counsel to read and engage with multiple legal systems providing substantial advantage in the substantive engagement with the Committee process and with the substantial cultural and linguistic capacity of foreign trained counsel to engage with foreign investor counterparties providing substantial advantage in the substantive communication with foreign investors regarding the Committee process.[34]

X. Conclusion

The Committee on Foreign Investment in the United States operates at the intersection of two substantial United States policy objectives, the open investment policy under which the United States maintains substantial openness to foreign investment and the protection of United States national security under which the United States maintains substantial controls on foreign investment activity that presents identifiable national security concerns.[35] The Committee framework has developed substantially over the past several decades through legislative and regulatory development, with the substantial expansion through the Foreign Investment Risk Review Modernization Act of 2018

representing a particularly significant development that has substantially reshaped the substantive scope and practical operation of the Committee framework.

The contributions that foreign trained counsel can make to contemporary Committee practice are substantial. The substantial substantive engagement required for the practical operation of the Committee process, the substantial cross border dimensions of Committee matters, the substantial implications of Committee determinations for inbound foreign direct investment activity, and the substantial implications of Committee determinations for the broader pattern of inbound investment activity to the United States all represent substantial areas in which the comparative advantage of foreign trained counsel is particularly valuable. The integration of foreign trained counsel into the legal departments of major foreign investors, into the law firms that handle Committee matters, into the compliance functions of regulated entities engaged with cross border investment activity, and into the academic and policy communities that engage with the Committee framework is an important component of the broader development of advisory capacity adequate to contemporary practice.[36]

The Cross Border Practice Review aspires to provide a forum for the analytical engagement of foreign trained counsel with the substantive and practical questions that the Committee framework raises. The development of scholarly engagement with these questions, the integration of comparative perspectives into the analysis of Committee practice, and the contribution of foreign trained perspectives to the policy debates concerning the development of the Committee framework are all components of the broader project that the Review seeks to advance.[37]

ARTICLE IV

The Uyghur Forced Labor Prevention Act, the Office of Foreign Assets Control Sanctions Architecture, and the Integrity of the United States Cross Border Supply Chain and Financial System: A Compliance and Enforcement Survey

By

Yuriy Kovalchuk

ABSTRACT

This Article examines the Uyghur Forced Labor Prevention Act of 2021 and the Office of Foreign Assets Control sanctions architecture, with particular attention to the substantive compliance frameworks and substantive enforcement activity conducted under each framework. The Article addresses the substantive scope of the Uyghur Forced Labor Prevention Act and the substantive operation of the rebuttable presumption established by the Act, the substantive operation of the Forced Labor Enforcement Task Force entity list, the substantive content of the regional alert and statutory regional alert mechanisms, the substantive enforcement activity conducted by United States Customs and Border Protection under the Act, the substantive content of the principal sanctions programs administered by the Office of Foreign Assets Control, the substantive enforcement activity of the Office addressing sanctions violations, and the practical implications of the two frameworks for cross border supply chain and financial compliance practice.

KEYWORDS: Uyghur Forced Labor Prevention Act, UFLPA, rebuttable presumption, Forced Labor Enforcement Task Force, FLETF entity list, withhold release order, Office of Foreign Assets Control, OFAC, Specially Designated Nationals List, secondary sanctions, supply chain compliance.

I. Introduction

The Uyghur Forced Labor Prevention Act of 2021 and the sanctions architecture administered by the Office of Foreign Assets Control of the Department of the Treasury are among the principal components of the contemporary architecture of United States cross border regulation addressing the integrity of the cross border supply chain and financial system.[1] The two frameworks operate through substantially different substantive mechanisms, with the Uyghur Forced Labor Prevention Act establishing a rebuttable presumption applicable to imports of goods produced in the Xinjiang Uyghur Autonomous Region of the People's Republic of China and to imports of goods produced in connection with various other entities identified by the Forced Labor Enforcement Task Force, and the Office of Foreign Assets Control sanctions architecture operating through various sanctions programs that prohibit transactions with various sanctioned persons and various sanctioned jurisdictions.

The two frameworks share substantial common features. Both frameworks operate principally through the imposition of restrictions on cross border activity. Both frameworks have substantial extraterritorial reach, applying to conduct of United States persons and to conduct of foreign persons engaged in transactions involving United States elements. Both frameworks generate substantial demand for cross border legal services capable of bridging the United States compliance frameworks and the home country legal systems with which the regulated parties operate. Both frameworks have generated substantial enforcement activity over the past several years, with the substantial enforcement activity reflecting the substantial substantive engagement of the responsible federal agencies with the practical operation of the frameworks.[2]

This Article surveys the two frameworks with particular attention to the substantive compliance frameworks and substantive enforcement activity conducted under each framework. Part II addresses the substantive scope and operation of the Uyghur Forced Labor Prevention Act, including the substantive content of the rebuttable presumption, the substantive operation of the Forced Labor Enforcement Task Force entity list, and the substantive enforcement activity conducted by United States Customs and Border Protection under the Act. Part III examines the substantive content of the principal sanctions programs administered by the Office of Foreign Assets Control. Part IV addresses the substantive enforcement activity of the Office. Part V examines the practical implications of the two frameworks for cross border supply chain and financial compliance practice. Part VI concludes with observations regarding the contributions of foreign trained counsel to compliance practice under the two frameworks.

II. The Uyghur Forced Labor Prevention Act

The Uyghur Forced Labor Prevention Act of 2021 establishes a rebuttable presumption applicable to imports of goods produced in whole or in part in the Xinjiang Uyghur Autonomous Region of the People's Republic of China and to imports of goods produced by entities identified on the entity list maintained by the Forced Labor Enforcement Task Force.[3] The rebuttable presumption provides that any goods produced in whole or in part in the Xinjiang Uyghur Autonomous Region or by listed entities are presumed to be produced with forced labor and are prohibited from entry into the United States under Section 307 of the Tariff Act of 1930. The presumption is rebuttable, with the importer having the burden of demonstrating by clear and convincing evidence that the goods were not produced with forced labor.

The substantive scope of the rebuttable presumption is broad, addressing any goods produced in whole or in part in the Xinjiang Uyghur Autonomous Region or by listed entities, regardless of where

the final assembly or processing of the goods occurs. The substantial substantive scope reflects the substantive concerns of Congress regarding the use of forced labor in the Xinjiang Uyghur Autonomous Region and the substantive concerns regarding the integration of forced labor produced inputs into broader supply chains. The substantial substantive scope generates substantial compliance demands for importers, including demands for substantive supply chain diligence sufficient to identify the presence of inputs produced in the Xinjiang Uyghur Autonomous Region or by listed entities and demands for substantive documentation sufficient to rebut the presumption where applicable.[4]

The Forced Labor Enforcement Task Force, established under Section 741 of the United States Mexico Canada Agreement Implementation Act, maintains the entity list under the Uyghur Forced Labor Prevention Act. The entity list includes various entities identified by the Forced Labor Enforcement Task Force as engaged in the use of forced labor or in the integration of forced labor produced inputs into broader supply chains, with the entity list updated periodically through the substantial subsequent activity of the Task Force. The substantial substantive content of the entity list reflects the substantial substantive engagement of the Task Force with the practical operation of the framework and the substantial substantive concerns regarding the integration of forced labor produced inputs into broader supply chains.[5]

The substantial enforcement activity conducted by United States Customs and Border Protection under the Uyghur Forced Labor Prevention Act has been substantial. United States Customs and Border Protection detained more than five thousand five hundred shipments worth approximately two billion dollars under the Uyghur Forced Labor Prevention Act between mid 2022 and the end of 2024, reflecting the substantial enforcement activity conducted under the Act since its effective date in June 2022. The substantial enforcement activity has addressed a substantial range of product categories, including textiles, apparel, electronics, agricultural products, and various other product categories, with the substantial range reflecting the substantial substantive scope of the rebuttable presumption and the substantial substantive integration of forced labor produced inputs into broader supply chains across product categories.[6]

The substantial subsequent litigation addressing the application of the Uyghur Forced Labor Prevention Act to particular categories of conduct has been substantial. The principal litigation venues include the United States Court of International Trade, which has substantial jurisdiction over challenges to United States Customs and Border Protection detention determinations under the Act, and various other federal courts addressing various aspects of the application of the Act to particular categories of conduct. The substantial subsequent litigation has addressed various substantive questions, including questions regarding the substantive content of the rebuttable presumption, questions regarding the substantive content of the clear and convincing evidence standard for the rebuttal of the presumption, questions regarding the substantive content of the entity list determinations, and various other substantive questions. The Ningbo Sunrise Elastic Webbings Co. v. United States case, addressed in detail in the Court Decisions Review section of this volume, is among the principal recent decisions addressing the application of the Act to particular categories of conduct.[7]

III. The Office of Foreign Assets Control Sanctions Architecture

The Office of Foreign Assets Control of the Department of the Treasury administers a substantial range of sanctions programs that prohibit transactions with various sanctioned persons and various sanctioned jurisdictions.[8] The sanctions programs administered by the Office include comprehensive

sanctions programs addressing particular jurisdictions, including the comprehensive sanctions programs applicable to Cuba, Iran, North Korea, Syria, and certain regions of Ukraine; targeted sanctions programs addressing particular categories of conduct or particular categories of persons, including the targeted sanctions programs addressing terrorism, narcotics trafficking, transnational criminal organizations, and various other categories of conduct; and various other sanctions programs addressing various substantive concerns of United States foreign policy and national security.

The substantive content of the sanctions programs is established through executive orders issued by the President, statutory frameworks enacted by Congress, and regulatory frameworks issued by the Office. The principal statutory frameworks include the International Emergency Economic Powers Act, which provides the principal statutory authority for the President to address unusual and extraordinary threats to the national security, foreign policy, or economy of the United States; the Trading with the Enemy Act, which provides supplementary statutory authority addressing certain categories of sanctions programs; and various other statutory frameworks addressing particular categories of sanctions programs.[9]

The Office maintains the Specially Designated Nationals and Blocked Persons List, which identifies specific persons subject to sanctions under the various sanctions programs administered by the Office. The List is updated periodically through the substantial subsequent activity of the Office, with the substantial subsequent activity reflecting the substantial substantive engagement of the Office with the practical operation of the sanctions programs and the substantial substantive concerns regarding the conduct of particular persons and particular categories of persons. The substantial substantive content of the List, the substantial substantive consequences of designation under the List, and the substantial substantive engagement required for the management of compliance with the List all represent substantial considerations in the practical operation of cross border transactions involving United States persons or United States elements.[10]

The substantial substantive scope of the sanctions architecture has substantial extraterritorial reach. The principal extraterritorial dimensions of the sanctions architecture include the substantial substantive scope of secondary sanctions, which apply to foreign persons engaged in transactions with sanctioned persons or sanctioned jurisdictions; the substantial substantive scope of the United States person concept, which addresses both natural persons present in the United States and entities organized under United States law; the substantial substantive scope of the United States element concept, which addresses various categories of United States nexus that subject foreign conduct to United States sanctions; and various other extraterritorial dimensions of the sanctions architecture. The substantial extraterritorial reach generates substantial compliance demands for foreign persons engaged in transactions with United States nexus and substantial demand for cross border legal services capable of bridging the United States sanctions architecture and the home country legal systems applicable to the foreign persons.[11]

IV. Office of Foreign Assets Control Enforcement Activity

The substantial enforcement activity of the Office of Foreign Assets Control addressing sanctions violations has been substantial over the past several years.[12] The substantial enforcement activity reflects the substantial substantive engagement of the Office with the practical operation of the sanctions architecture and the substantial substantive concerns regarding compliance with the various sanctions programs administered by the Office. The substantial enforcement activity has addressed a substantial range of sanctions violations, including violations of the comprehensive sanctions programs

applicable to particular jurisdictions, violations of the targeted sanctions programs addressing particular categories of conduct, and violations of various other sanctions programs.

The principal categories of enforcement activity conducted by the Office include settlement actions, in which the Office and the relevant party reach a substantive settlement of the alleged sanctions violations through the payment of substantive monetary penalties and the implementation of substantive remedial measures; civil penalty actions, in which the Office assesses substantive monetary penalties for sanctions violations; and criminal referrals to the Department of Justice for the most serious sanctions violations, with the Department of Justice conducting criminal prosecution of substantial sanctions violations. The substantial substantive content of the enforcement activity reflects the substantial substantive concerns of the Office regarding compliance with the sanctions architecture and the substantial substantive engagement of the Office with particular categories of conduct.[13]

The substantial substantive content of the enforcement activity has produced substantial guidance regarding the substantive content of compliance expectations under the various sanctions programs. The substantial guidance addresses various substantive matters, including the substantive content of compliance program expectations, the substantive content of risk based diligence expectations, the substantive content of voluntary self disclosure expectations, the substantive content of cooperation expectations during enforcement matters, and various other substantive matters. The substantial guidance reflects the substantial substantive engagement of the Office with the practical operation of compliance and reflects the substantial substantive expectations of the Office regarding compliance with the various sanctions programs.[14]

The substantial substantive concerns regarding compliance with the sanctions architecture have generated substantial demand for cross border legal services capable of bridging the United States sanctions architecture and the home country legal systems applicable to regulated parties. The substantial substantive demands of compliance with the sanctions architecture, including the substantive demands of risk based diligence, the substantive demands of compliance program design and operation, the substantive demands of transaction screening, and the substantive demands of enforcement matter management, all require substantial cross border legal capacity capable of bridging the United States sanctions architecture and the home country legal systems applicable to the regulated parties. The substantial cross border legal capacity required substantially benefits from the comparative advantage of foreign trained counsel in addressing cross border legal demands.[15]

V. Practical Implications for Cross Border Compliance Practice

The practical implications of the Uyghur Forced Labor Prevention Act and the Office of Foreign Assets Control sanctions architecture for cross border supply chain and financial compliance practice are substantial.[16] The two frameworks generate substantial compliance demands for parties engaged with cross border activity, with the substantial demands reflecting the substantial substantive scope of the two frameworks, the substantial extraterritorial reach of the two frameworks, and the substantial enforcement activity conducted under the two frameworks. The substantial compliance demands generate substantial demand for cross border legal services capable of bridging the two frameworks and the home country legal systems applicable to regulated parties.

The principal compliance demands generated by the Uyghur Forced Labor Prevention Act include demands for substantive supply chain diligence sufficient to identify the presence of inputs produced in the Xinjiang Uyghur Autonomous Region or by listed entities, demands for substantive documentation sufficient to rebut the presumption where applicable, demands for the design and operation of

compliance programs adequate to the substantive scope of the Act, and demands for the substantive engagement with United States Customs and Border Protection in connection with detention determinations under the Act. The substantial substantive demands of compliance with the Act require substantial cross border legal capacity capable of bridging the United States compliance framework and the home country legal systems applicable to suppliers engaged with United States supply chains.[17]

The principal compliance demands generated by the Office of Foreign Assets Control sanctions architecture include demands for substantive risk based diligence sufficient to identify potential sanctions exposures, demands for the design and operation of compliance programs adequate to the substantive scope of the sanctions architecture, demands for transaction screening sufficient to identify transactions involving sanctioned persons or sanctioned jurisdictions, and demands for the substantive engagement with the Office in connection with enforcement matters and voluntary self disclosure matters. The substantial substantive demands of compliance with the sanctions architecture require substantial cross border legal capacity capable of bridging the United States sanctions architecture and the home country legal systems applicable to regulated parties engaged with cross border activity.[18]

The substantial cross border legal capacity required for compliance with the two frameworks substantially benefits from the comparative advantage of foreign trained counsel in addressing cross border legal demands. The analytical capacity of foreign trained counsel to read and engage with multiple legal systems, the practical experience of foreign trained counsel in foreign legal systems, the cultural and linguistic capacity of foreign trained counsel to engage with foreign suppliers and counterparties, and the comparative perspectives that foreign trained counsel bring to questions of cross border compliance architecture all represent substantial contributions to the practical operation of compliance practice under the two frameworks.[19]

VI. Conclusion

The Uyghur Forced Labor Prevention Act and the Office of Foreign Assets Control sanctions architecture are among the principal components of the contemporary architecture of United States cross border regulation addressing the integrity of the cross border supply chain and financial system.[20] The two frameworks generate substantial compliance demands for parties engaged with cross border activity and substantial demand for cross border legal services capable of bridging the two frameworks and the home country legal systems applicable to regulated parties. The substantial cross border legal capacity required for compliance with the two frameworks substantially benefits from the comparative advantage of foreign trained counsel in addressing cross border legal demands.

The contributions that foreign trained counsel can make to compliance practice under the two frameworks are substantial. The analytical capacity of foreign trained counsel to read and engage with multiple legal systems, the practical experience of foreign trained counsel in foreign legal systems, the cultural and linguistic capacity of foreign trained counsel to engage with foreign suppliers and counterparties, and the comparative perspectives that foreign trained counsel bring to questions of cross border compliance architecture all represent substantial contributions to the practical operation of compliance practice under the two frameworks. The integration of foreign trained counsel into the compliance functions of major multinational issuers and importers, into the law firms that handle sanctions and supply chain compliance matters, and into the academic and policy communities that engage with the two frameworks is an important component of the broader development of advisory capacity adequate to contemporary practice.[21]

ARTICLE V

Immigration and Licensing Pathways for Foreign Trained Counsel: The EB Two National Interest Waiver, State Bar Admission of Foreign Trained Attorneys, and the Institutional Architecture for the Integration of Foreign Trained Lawyers Into United States Practice

By

Nino Tsereteli

ABSTRACT

This Article examines the immigration and licensing pathways through which foreign trained counsel are integrated into the United States legal profession. The Article addresses the second preference employment based immigrant visa with national interest waiver, with particular attention to the substantive content of the national interest waiver standard, the substantial recent development of the standard through the Matter of Dhanasar precedent decision of the Administrative Appeals Office of the United States Citizenship and Immigration Services, and the application of the standard to the foreign trained legal community. The Article also examines the state bar admission frameworks for foreign trained attorneys, with particular attention to the New York, California, and District of Columbia frameworks, and addresses the institutional architecture required for the coherent integration of foreign trained lawyers into United States practice. The Article concludes with observations regarding the contributions of the Foreign Trained Lawyers Association to the development of that institutional architecture.

KEYWORDS: EB Two national interest waiver, NIW, Matter of Dhanasar, Immigration and Nationality Act, Section 203 paragraph b paragraph 2 paragraph B, exceptional ability, advanced degree, state bar admission, New York Court of Appeals Rule 520.6, foreign trained attorney.

I. Introduction

The integration of foreign trained counsel into the United States legal profession depends on the practical operation of two principal frameworks: the immigration framework through which foreign trained counsel obtain authorization to live and work in the United States, and the state bar admission framework through which foreign trained counsel obtain authorization to practice law in the United States.[1] The two frameworks operate through substantially different substantive mechanisms, with the immigration framework administered principally by the United States Citizenship and Immigration Services and the state bar admission framework administered principally by the various state bar admitting authorities. The two frameworks together establish the principal substantive pathway through which foreign trained counsel are integrated into United States practice.

The immigration framework includes various substantive categories of immigrant visas and non immigrant visas applicable to foreign trained counsel. The principal immigrant visa categories applicable to foreign trained counsel include the second preference employment based immigrant visa with national interest waiver, addressed in detail in this Article; the first preference employment based immigrant visa for persons of extraordinary ability; the third preference employment based immigrant visa for skilled workers and professionals; and various other immigrant visa categories. The principal non immigrant visa categories applicable to foreign trained counsel include the H 1B specialty occupation visa, the L 1 intracompany transferee visa, the O 1 extraordinary ability visa, and various other non immigrant visa categories.[2]

The state bar admission framework includes various substantive pathways through which foreign trained counsel obtain authorization to practice law in the United States. The principal state bar admitting authorities for foreign trained counsel include the New York State Board of Law Examiners, the California State Bar, the District of Columbia Bar, the Massachusetts Board of Bar Examiners, and various other state bar admitting authorities. The substantial variation in the admission requirements applicable to foreign trained counsel across jurisdictions creates substantial friction in the integration of foreign trained counsel into United States practice and substantially constrains the development of a coherent national approach to the admission and recognition of foreign trained counsel.[3]

This Article examines the immigration and licensing pathways through which foreign trained counsel are integrated into United States practice. Part II addresses the second preference employment based immigrant visa with national interest waiver, with particular attention to the substantive content of the national interest waiver standard. Part III examines the substantial recent development of the standard through the Matter of Dhanasar precedent decision and the application of the standard to the foreign trained legal community. Part IV addresses the state bar admission frameworks for foreign trained attorneys, with particular attention to the New York, California, and District of Columbia frameworks. Part V examines the institutional architecture required for the coherent integration of foreign trained lawyers into United States practice. Part VI concludes with observations regarding the contributions of the Foreign Trained Lawyers Association to the development of that institutional architecture.

II. The Second Preference Employment Based Immigrant Visa with National Interest Waiver

The second preference employment based immigrant visa with national interest waiver, established under Section 203 paragraph b paragraph 2 of the Immigration and Nationality Act, is among the principal immigrant visa categories applicable to foreign trained counsel.[4] The category

includes two principal substantive pathways: the advanced degree pathway, applicable to persons holding an advanced degree or its equivalent, and the exceptional ability pathway, applicable to persons of exceptional ability in the sciences, arts, or business. The second preference category requires both a job offer from a United States employer and a labor certification from the Department of Labor, except that the job offer and labor certification requirements may be waived if the Secretary of Homeland Security determines that the waiver is in the national interest.

The national interest waiver provision, set forth in Section 203 paragraph b paragraph 2 paragraph B of the Immigration and Nationality Act, provides that the Secretary of Homeland Security may, when the Secretary deems it to be in the national interest, waive the requirements that the services of a person be sought by an employer in the United States. The substantial substantive content of the national interest concept and the substantial substantive operation of the waiver provision have been developed through the substantial subsequent practice of the United States Citizenship and Immigration Services, with the substantial subsequent practice culminating in the Matter of Dhanasar precedent decision of the Administrative Appeals Office in 2016.[5]

The national interest waiver framework operates as a substantial alternative pathway to the standard second preference category, with the substantial alternative pathway addressing circumstances in which the standard requirements of the job offer and labor certification are not feasible or appropriate but in which the substantive contributions of the petitioner to the United States are substantial. The substantial substantive content of the national interest concept reflects the substantial substantive engagement of the United States Citizenship and Immigration Services with the practical operation of the framework and reflects the substantial substantive considerations regarding the contributions of foreign professionals to the United States.[6]

The substantial substantive engagement of foreign trained counsel with the national interest waiver framework has been substantial. The substantial substantive contributions of foreign trained counsel to the practical operation of United States cross border regulation, the substantial substantive contributions of foreign trained counsel to the integrity of United States capital markets, the substantial substantive contributions of foreign trained counsel to inbound foreign direct investment activity, and the substantial substantive contributions of foreign trained counsel to the broader integration of foreign business activity with United States markets all represent substantial substantive considerations in the practical engagement of foreign trained counsel with the national interest waiver framework.[7]

III. The Matter of Dhanasar Standard

The Matter of Dhanasar precedent decision of the Administrative Appeals Office of the United States Citizenship and Immigration Services, issued in December 2016, established the substantive standard applicable to national interest waiver petitions filed under Section 203 paragraph b paragraph 2 paragraph B of the Immigration and Nationality Act.[8] The Dhanasar standard replaced the prior standard established in Matter of New York State Department of Transportation in 1998, which had been the principal substantive standard for national interest waiver petitions for nearly two decades. The Dhanasar standard represents a substantial substantive development of the national interest waiver framework and has substantially affected the practical operation of the framework over the period since its issuance.

The Dhanasar standard establishes a three prong substantive analysis applicable to national interest waiver petitions. The first prong of the Dhanasar standard requires the petitioner to demonstrate that the proposed endeavor of the petitioner has both substantial merit and national importance. The

substantial merit element of the first prong addresses the substantive value of the proposed endeavor, with the substantial merit element being satisfied where the proposed endeavor has substantive intrinsic value to the United States. The national importance element of the first prong addresses the substantive scope of the impact of the proposed endeavor, with the national importance element being satisfied where the proposed endeavor has potential prospective impact at a level that rises beyond the local or regional level.[9]

The second prong of the Dhanasar standard requires the petitioner to demonstrate that the petitioner is well positioned to advance the proposed endeavor. The substantive content of the well positioned element addresses the substantive qualifications of the petitioner, the substantive plan of the petitioner for advancing the proposed endeavor, the substantive track record of the petitioner in the relevant field, and various other substantive considerations regarding the substantive capacity of the petitioner to advance the proposed endeavor. The well positioned element does not require a guarantee of success but does require substantive evidence regarding the substantive capacity of the petitioner to advance the proposed endeavor.[10]

The third prong of the Dhanasar standard requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and labor certification. The substantive content of the on balance element addresses the substantive comparison between the substantive benefits of the waiver and the substantive purposes of the job offer and labor certification requirements, with the on balance element being satisfied where the substantive benefits of the waiver substantially outweigh the substantive purposes served by the job offer and labor certification requirements. The substantive content of the on balance element reflects the substantial substantive considerations regarding the contributions of the petitioner to the United States and regarding the substantial substantive purposes served by the job offer and labor certification requirements in the standard second preference category.[11]

The substantial substantive engagement of foreign trained counsel with the Dhanasar standard has been substantial. The substantial substantive contributions of foreign trained counsel to the practical operation of United States cross border regulation, the substantial substantive scope of the impact of those contributions, the substantial substantive qualifications of foreign trained counsel to advance their proposed endeavors, and the substantial substantive benefits to the United States of the integration of foreign trained counsel into United States practice all represent substantial substantive considerations in the practical engagement of foreign trained counsel with the Dhanasar standard. The substantial substantive engagement of foreign trained counsel with the Dhanasar standard has produced substantial substantive practice regarding the application of the standard to the foreign trained legal community, with the substantial substantive practice reflecting the substantial substantive considerations regarding the contributions of foreign trained counsel to the United States and the substantial substantive operation of the Dhanasar standard in addressing those contributions.[12]

IV. State Bar Admission of Foreign Trained Attorneys

The state bar admission frameworks for foreign trained attorneys vary substantially across the fifty states and the District of Columbia.[13] The principal state bar admitting authorities for foreign trained counsel include the New York State Board of Law Examiners, the California State Bar, the District of Columbia Bar, the Massachusetts Board of Bar Examiners, the Texas Board of Law Examiners, and various other state bar admitting authorities. The substantial variation in the admission requirements across jurisdictions creates substantial friction in the integration of foreign trained counsel

into United States practice and substantially constrains the development of a coherent national approach to the admission and recognition of foreign trained counsel.

The New York State Board of Law Examiners administers the principal state bar examination by foreign educated participation in the United States. The substantive content of the New York admission framework for foreign trained attorneys is set forth in Section 520.6 of the Rules of the New York Court of Appeals for Admission of Attorneys and Counselors at Law, which establishes the substantive requirements applicable to foreign trained attorneys seeking admission to the New York bar. The principal substantive requirements include the requirement that the foreign trained attorney has completed legal studies in a foreign jurisdiction whose principles of law are based upon English common law or whose legal education program has been certified by the Court of Appeals as substantially equivalent in duration to the program required for admission in New York, the requirement that the foreign trained attorney has been admitted to practice in the foreign jurisdiction or has completed an additional program of legal education in the United States, and various other substantive requirements.[14]

The substantial substantive engagement of foreign trained counsel with the New York admission framework has been substantial. Of the four thousand ninety candidates who sat for the New York bar examination in February 2025, foreign educated candidates accounted for two thousand two hundred twenty five candidates, representing fifty four percent of all takers. The substantial substantive engagement of foreign trained counsel with the New York admission framework reflects the substantial substantive position of New York as the principal venue for the integration of foreign trained counsel into United States practice and reflects the substantial substantive volume of cross border legal activity conducted in New York.[15]

The California State Bar administers a substantially different admission framework for foreign trained attorneys, with the substantial substantive content of the California framework reflecting various distinctive features of the California legal system. The substantial substantive content of the California admission framework includes the requirement that foreign trained attorneys complete the regular bar examination of the California State Bar, with various accommodations and various alternative pathways applicable to foreign trained attorneys with particular substantive qualifications. The District of Columbia Bar administers a third substantially different admission framework, with the substantial substantive content of the District of Columbia framework reflecting various distinctive features of the District of Columbia legal community and the substantial substantive engagement of foreign trained counsel with international legal practice in the District of Columbia.[16]

The substantial variation in the admission requirements across jurisdictions creates substantial substantive challenges for foreign trained counsel seeking integration into United States practice. The substantial substantive challenges include the substantive challenges of identifying the appropriate admitting jurisdiction, the substantive challenges of complying with the various substantive requirements of the chosen jurisdiction, the substantive challenges of obtaining the substantive accommodations applicable to foreign trained attorneys in the chosen jurisdiction, and various other substantive challenges. The substantial substantive challenges substantially affect the practical operation of the integration of foreign trained counsel into United States practice and substantially affect the broader development of the foreign trained legal community in the United States.[17]

V. The Institutional Architecture for Integration

The institutional architecture required for the coherent integration of foreign trained lawyers into United States practice is, at present, substantially less developed than the substance of the foreign trained legal community would warrant.[18] The principal components of an adequate institutional architecture include admission and recognition pathways that integrate foreign trained counsel into United States practice in a coherent and predictable manner, professional development standards that support the continuing professional development of foreign trained counsel on the substantive matters that animate cross border practice, ethics infrastructure adequate to the distinctive ethical questions that arise in cross border practice, and coordination across federal, state, and professional bodies adequate to the cross border scope of contemporary practice.

The principal admission and recognition pathways for foreign trained counsel are, at present, fragmented across the various state bar admitting authorities, with substantial variation in the substantive requirements across jurisdictions and substantial substantive challenges for foreign trained counsel seeking integration into United States practice. The development of admission and recognition pathways adequate to the cross border scope of contemporary practice would benefit substantially from the substantial substantive engagement of the various state bar admitting authorities with the substantial substantive considerations regarding the integration of foreign trained counsel into United States practice and from the substantial substantive coordination across the various state bar admitting authorities regarding the development of coherent national approaches to the admission and recognition of foreign trained counsel.[19]

The professional development standards applicable to foreign trained counsel are, at present, substantially less developed than the standards applicable to particular substantive practice areas. The development of professional development standards adequate to the distinctive characteristics of cross border practice would benefit substantially from the substantial substantive engagement of the various professional organizations engaged with cross border practice and from the substantial substantive contributions of the foreign trained legal community to the development of those standards. The substantial substantive contributions of the foreign trained legal community include the substantial substantive perspective regarding the practical operation of cross border practice and the substantial substantive perspective regarding the distinctive substantive considerations that arise in cross border practice.[20]

The ethics infrastructure for cross border practice is similarly less developed than the infrastructure applicable to domestic practice. The substantial substantive range of ethical questions that arise in cross border practice, including questions concerning the application of professional responsibility rules across jurisdictions, questions concerning the management of conflicts of interest in transactions involving multiple jurisdictions, and various other substantive ethical questions, would benefit substantially from the development of ethics infrastructure adequate to the distinctive characteristics of cross border practice. The substantial substantive contributions of the foreign trained legal community to the development of that infrastructure would substantially benefit the broader practice of cross border legal services in the United States.[21]

VI. Conclusion

The integration of foreign trained counsel into the United States legal profession depends on the practical operation of the immigration and state bar admission frameworks addressed in this Article.[22] The substantial substantive engagement of foreign trained counsel with the second preference employment based immigrant visa with national interest waiver and with the various state

bar admission frameworks for foreign trained attorneys reflects the substantial substantive contributions of the foreign trained legal community to the practical operation of United States cross border regulation, to the integrity of United States capital markets, to inbound foreign direct investment activity, and to the broader integration of foreign business activity with United States markets.

The contributions that the Foreign Trained Lawyers Association can make to the development of the institutional architecture required for the coherent integration of foreign trained lawyers into United States practice are substantial. The substantial substantive engagement of the Association with the various components of the institutional architecture, including the admission and recognition pathways, the professional development standards, the ethics infrastructure, and the coordination across federal, state, and professional bodies, all represent substantial substantive contributions to the broader project of developing professional infrastructure adequate to the contemporary cross border compliance environment. The Cross Border Practice Review aspires to provide a forum for the analytical engagement of foreign trained counsel with the substantive and practical questions that the immigration and licensing pathways raise and with the substantial substantive considerations regarding the institutional architecture required for the coherent integration of foreign trained lawyers into United States practice.[23]

COURT DECISIONS REVIEW

The Court Decisions Review section of the Cross Border Practice Review is dedicated to the careful analysis of significant judicial and administrative decisions in the substantive fields addressed by the Review. The case notes assembled in this inaugural volume address three decisions of substantial importance to contemporary cross border legal practice: the decision of the United States Court of Appeals for the District of Columbia Circuit in Ralls Corp. v. Committee on Foreign Investment in the United States, addressing the procedural due process requirements applicable to the national security review of foreign direct investment; the decision of the United States Supreme Court in Morrison v. National Australia Bank Ltd., establishing the transactional test for the extraterritorial application of United States federal securities law; and the decision of the United States Court of International Trade in Ningbo Sunrise Elastic Webbings Co. v. United States, addressing the judicial review of detention determinations under the Uyghur Forced Labor Prevention Act.

CASE NOTE I

Ralls Corp. v. Committee on Foreign Investment in the United States, 758 F.3d 296 (D.C. Cir. 2014): Procedural Due Process and the National Security Review of Foreign Direct Investment

By

Rusudan Chkhartishvili

ABSTRACT

This Case Note examines the decision of the United States Court of Appeals for the District of Columbia Circuit in Ralls Corp. v. Committee on Foreign Investment in the United States, addressing the procedural due process requirements applicable to the national security review of foreign direct investment under the Defense Production Act of 1950, as amended by the Exon Florio Amendment of 1988 and the Foreign Investment and National Security Act of 2007. The Case Note addresses the procedural posture of the case, the factual background of the dispute, the substantive analysis of the Court of Appeals, the holding of the Court of Appeals, and the practical implications of the decision for foreign trained counsel advising on national security review matters.

KEYWORDS: Ralls Corp., Committee on Foreign Investment in the United States, procedural due process, Fifth Amendment, divestiture order, national security review, foreign direct investment, judicial review.

I. Procedural Posture

The decision of the United States Court of Appeals for the District of Columbia Circuit in Ralls Corp. v. Committee on Foreign Investment in the United States arose from the Presidential divestiture order issued by President Barack Obama on September 28, 2012, directing Ralls Corp., a Delaware corporation owned by two Chinese nationals, to divest its interests in four wind farm projects located in proximity to a United States Navy bombing range in Oregon. Ralls Corp. brought suit in the United States District Court for the District of Columbia, challenging the Presidential divestiture order on substantive due process grounds, on procedural due process grounds, and on equal protection grounds. The District Court dismissed the complaint, and Ralls Corp. appealed to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals issued its decision on July 15, 2014, reversing the dismissal of the procedural due process claim and remanding the case for further proceedings consistent with the opinion of the Court of Appeals. The decision is reported at 758 F.3d 296.

The Court of Appeals decision addresses the procedural due process implications of the Committee on Foreign Investment in the United States review process and of the Presidential divestiture authority under the Defense Production Act of 1950, as amended by the Exon Florio Amendment of 1988 and the Foreign Investment and National Security Act of 2007. The decision is among the principal judicial decisions addressing the Committee framework and represents the principal judicial engagement with the procedural dimensions of the Committee process. The substantial subsequent practical implications of the decision for the Committee process and for the practice of foreign investment counsel addressing Committee matters have been substantial.

II. Factual Background

The factual background of the Ralls Corp. case involves the proposed operation of four wind farm projects in Oregon by Ralls Corp., a Delaware corporation owned by two Chinese nationals. Ralls Corp. acquired the four wind farm projects in early 2012 from Oregon Wind L.L.C., a wind farm development company. The four wind farm projects were located in proximity to a United States Navy facility known as the Naval Weapons Systems Training Facility Boardman, a substantial facility used for various aviation training activities including activities involving electronic warfare and electronic warfare training. The proximity of the wind farm projects to the Naval Weapons Systems Training Facility Boardman was a substantial substantive concern of the Committee on Foreign Investment in the United States during the substantive review of the transaction.

Following its acquisition of the wind farm projects, Ralls Corp. proceeded with various preparatory activities, including the construction of certain physical facilities at the wind farm sites. Ralls Corp. did not file a voluntary notice with the Committee on Foreign Investment in the United States prior to the acquisition. The Committee initiated a substantive review of the transaction in mid 2012, with the Committee issuing various interim orders during the review process restricting the activities of Ralls Corp. at the wind farm sites. Following the substantive review process, the Committee referred the matter to President Obama with a recommendation regarding the appropriate response to the substantive national security concerns identified by the Committee.

President Obama issued the divestiture order on September 28, 2012, directing Ralls Corp. to divest its interests in the four wind farm projects within ninety days. The Presidential divestiture order included substantial substantive requirements regarding the manner of the divestiture, including requirements regarding the removal of certain physical structures from the wind farm sites and

requirements regarding the disposal of certain items in the vicinity of the wind farm sites. The substantial substantive requirements of the divestiture order reflected the substantive substantive concerns of the Committee and the President regarding the substantive national security implications of the proposed wind farm operations.

III. The Court of Appeals Analysis

The substantive analysis of the Court of Appeals in Ralls Corp. addressed the procedural due process implications of the Presidential divestiture order. The Court of Appeals applied the substantive procedural due process framework established by the United States Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976), which addresses three principal substantive considerations: the substantive private interest affected by the official action; the substantive risk of an erroneous deprivation of the private interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and the substantive government interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

The Court of Appeals applied the Mathews framework to the substantive procedural considerations applicable to the Presidential divestiture order. The Court of Appeals determined that the substantive private interest affected by the divestiture order was substantial, addressing the substantial substantive property interests of Ralls Corp. in the four wind farm projects and in the substantial substantive investments made by Ralls Corp. in the projects prior to the divestiture order. The Court of Appeals further determined that the substantive risk of an erroneous deprivation of the private interest through the procedures used was substantial, addressing the substantive substantive consequences of the divestiture order and the substantial substantive considerations regarding the substantive accuracy of the substantive determinations of the Committee and the President.

The Court of Appeals further determined that the substantial substantive considerations regarding the substantive procedures applicable to the Presidential divestiture order supported the application of substantive procedural due process requirements to the Presidential divestiture process. The Court of Appeals held that the substantive procedural due process requirements applicable to the Presidential divestiture process include the substantive requirement that the affected party receive substantive notice of the substantive evidentiary basis for the divestiture order, with the substantive notice requirement applicable to the substantive unclassified evidence underlying the divestiture order, and the substantive requirement that the affected party receive substantive opportunity to rebut the substantive unclassified evidence underlying the divestiture order.

The substantive holding of the Court of Appeals on the procedural due process question addresses the substantive substantive content of the procedural due process requirements applicable to the Presidential divestiture process. The substantive holding does not extend to the substantive content of the substantive determinations of the Committee or of the President regarding the substantive national security implications of particular transactions, with the Court of Appeals expressly recognizing the substantial substantive deference owed to the substantive determinations of the political branches regarding the substantive national security implications of foreign investment activity. The substantive limitation of the holding to the substantive procedural dimensions of the divestiture process reflects the substantial substantive considerations regarding the substantive separation of powers between the political branches and the judicial branch in addressing national security matters.

IV. The Holding

The principal holding of the Court of Appeals in Ralls Corp. is that the substantive procedural due process requirements applicable to the Presidential divestiture process include the substantive requirement that the affected party receive substantive notice of the substantive unclassified evidentiary basis for the divestiture order and the substantive requirement that the affected party receive substantive opportunity to rebut the substantive unclassified evidence underlying the divestiture order. The substantive holding establishes that the Presidential divestiture process is subject to substantive procedural due process requirements where the divestiture process results in the substantial substantive deprivation of substantive property interests of parties subject to the process. The substantive holding represents a substantial substantive development of the substantive judicial engagement with the Committee framework and substantially affects the practical operation of the Committee process and of the Presidential divestiture authority.

The substantive holding of the Court of Appeals reverses the substantive determination of the District Court regarding the procedural due process claim of Ralls Corp. and remands the case for further proceedings consistent with the substantive opinion of the Court of Appeals. The substantive remand of the case to the District Court provided the substantive opportunity for the substantive engagement of the substantive Committee process and of the substantive Presidential divestiture process with the substantive procedural due process requirements established by the Court of Appeals. The substantial subsequent practical implications of the substantive holding of the Court of Appeals have been substantial, with the substantial subsequent practice of the Committee reflecting the substantive substantive engagement of the Committee with the procedural due process requirements established by the Court of Appeals.

V. Implications for Foreign Trained Counsel

The practical implications of the Ralls Corp. decision for foreign trained counsel advising on national security review matters are substantial. The substantive procedural due process requirements established by the Court of Appeals affect the substantive practical operation of the Committee process in substantial substantive respects, including the substantive engagement of the Committee with parties to covered transactions during the substantive review process, the substantive disclosure of unclassified information to parties to covered transactions during the substantive review process, and the substantive opportunity of parties to covered transactions to rebut substantive unclassified evidence underlying potential adverse determinations of the Committee. The substantial substantive engagement of foreign trained counsel with the substantive practical operation of the Committee process, including the substantive engagement of foreign trained counsel with foreign investor counterparties regarding the substantive procedural dimensions of the Committee process, substantially benefits from the substantive substantive understanding of the substantive procedural due process framework established by the Ralls Corp. decision.

The substantial substantive considerations regarding the substantive engagement of foreign trained counsel with the Ralls Corp. framework include the substantive considerations regarding the substantive practical operation of the substantive procedural due process requirements in connection with covered transactions involving foreign investor counterparties from particular substantive jurisdictions, the substantive considerations regarding the substantive practical operation of the substantive procedural due process requirements in connection with covered transactions involving particular substantive categories of national security concerns, and various other substantive

considerations regarding the substantive practical operation of the substantive procedural due process requirements. The substantial substantive engagement of foreign trained counsel with these substantive considerations represents a substantial substantive contribution to the substantive practical operation of the Committee process and to the substantive practical operation of the substantive procedural due process requirements established by the Ralls Corp. decision.

CASE NOTE II

Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010): Extraterritorial Application of United States Federal Securities Law and the Transactional Test

By

Dmytro Sydorenko

ABSTRACT

This Case Note examines the decision of the United States Supreme Court in Morrison v. National Australia Bank Ltd., establishing the transactional test for the extraterritorial application of Section 10 paragraph b of the Securities Exchange Act of 1934 and Rule 10b 5 thereunder. The Case Note addresses the procedural posture of the case, the factual background of the dispute, the substantive analysis of the Supreme Court, the holding of the Supreme Court, and the practical implications of the decision for foreign trained counsel advising on cross border securities matters and for the foreign private issuer population.

KEYWORDS: Morrison v. National Australia Bank, transactional test, extraterritorial application, Section 10 paragraph b, Rule 10b 5, presumption against extraterritoriality, foreign cubed claims, foreign private issuer, federal securities laws.

I. Procedural Posture

The decision of the United States Supreme Court in Morrison v. National Australia Bank Ltd., reported at 561 U.S. 247, was issued on June 24, 2010. The case arose from litigation initially filed in the United States District Court for the Southern District of New York by Russell Leslie Owen and several other Australian investors who had purchased ordinary shares of National Australia Bank Ltd., an Australian banking corporation, on the Australian Securities Exchange. The plaintiffs alleged that National Australia Bank Ltd. and certain of its officers and directors had engaged in conduct prohibited by Section 10 paragraph b of the Securities Exchange Act of 1934 and Rule 10b 5 thereunder, with the alleged conduct involving the financial reporting of HomeSide Lending, Inc., a Florida based mortgage servicing subsidiary of National Australia Bank Ltd.

The District Court dismissed the complaint for lack of subject matter jurisdiction, applying the substantive jurisdictional framework that had been developed by the United States Court of Appeals for the Second Circuit through a substantial line of decisions addressing the substantive extraterritorial application of Section 10 paragraph b and Rule 10b 5. The United States Court of Appeals for the Second Circuit affirmed the dismissal, applying the substantive jurisdictional framework that had been developed by the Court of Appeals in the substantial line of prior decisions. The Supreme Court granted certiorari to address the substantive jurisdictional question and issued the substantive decision on June 24, 2010, affirming the dismissal of the complaint and substantially revising the substantive framework applicable to the extraterritorial application of Section 10 paragraph b and Rule 10b 5.

II. Factual Background

The factual background of the Morrison case involves the financial reporting of HomeSide Lending, Inc., a Florida based mortgage servicing subsidiary of National Australia Bank Ltd. The plaintiffs alleged that HomeSide Lending, Inc. had engaged in substantial manipulation of the substantive valuation of its mortgage servicing rights, with the substantial manipulation resulting in the substantial overstatement of the substantive value of the mortgage servicing rights and in the substantial overstatement of the substantive earnings of National Australia Bank Ltd. The plaintiffs further alleged that National Australia Bank Ltd. and certain of its officers and directors had been aware of the substantial substantive manipulation and had failed to disclose the substantial substantive manipulation to the substantive investing public.

The substantial substantive disclosure of the substantive manipulation occurred in 2001, with the substantial disclosure resulting in the substantial substantive decline in the substantive market price of the ordinary shares of National Australia Bank Ltd. on the Australian Securities Exchange. The plaintiffs alleged that they had purchased ordinary shares of National Australia Bank Ltd. on the Australian Securities Exchange during the period of the substantial manipulation and that they had suffered substantial substantive losses as a result of the substantial substantive decline in the substantive market price following the substantial substantive disclosure of the substantive manipulation. The plaintiffs sought to bring a class action under Section 10 paragraph b and Rule 10b 5 on behalf of all foreign investors who had purchased ordinary shares of National Australia Bank Ltd. on foreign exchanges during the period of the substantial substantive manipulation. The substantive substantive nature of the claims, involving foreign plaintiffs, foreign issuer, and foreign exchange transactions, gave rise to the substantive characterization of the claims as foreign cubed claims that has come to be associated with the substantive jurisdictional framework applicable to such claims.

III. The Supreme Court Analysis

The substantive analysis of the Supreme Court in Morrison addresses the substantive question of the substantive extraterritorial application of Section 10 paragraph b of the Securities Exchange Act of 1934 and Rule 10b 5 thereunder. The Supreme Court applied the substantive presumption against extraterritoriality, a substantive interpretive principle of substantial substantive significance in the substantive interpretation of federal statutes. The substantive presumption against extraterritoriality provides that, absent a substantive indication of contrary intent, federal statutes are presumed not to apply extraterritorially. The substantive presumption reflects the substantive substantive considerations regarding the substantive comity between the substantive legal systems of the United States and foreign jurisdictions and reflects the substantial substantive considerations regarding the substantive avoidance of substantive conflicts between substantive United States law and substantive foreign law.

The Supreme Court determined that Section 10 paragraph b of the Securities Exchange Act of 1934 does not include a substantive indication of contrary intent sufficient to overcome the substantive presumption against extraterritoriality. The Supreme Court rejected the substantive jurisdictional framework that had been developed by the United States Court of Appeals for the Second Circuit through the substantial line of prior decisions, with the substantive framework involving the substantive conduct test and the substantive effects test that had been applied by the Court of Appeals in the substantial line of prior decisions. The Supreme Court determined that the substantive conduct test and the substantive effects test were not substantively grounded in the substantive text of Section 10 paragraph b and that the substantive substantive application of the tests had produced substantial substantive uncertainty regarding the substantive scope of the substantive extraterritorial application of Section 10 paragraph b.

The Supreme Court established a substantive transactional test as the substantive framework applicable to the substantive extraterritorial application of Section 10 paragraph b. The substantive transactional test provides that Section 10 paragraph b applies to substantive transactions in securities listed on substantive domestic exchanges and to substantive domestic transactions in other securities. The substantive transactional test substantially narrows the substantive scope of the substantive extraterritorial application of Section 10 paragraph b relative to the substantive scope that had been established by the substantive conduct test and the substantive effects test, with the substantive narrowing reflecting the substantive substantive considerations regarding the substantive presumption against extraterritoriality and the substantive substantive considerations regarding the substantive comity between the substantive legal systems of the United States and foreign jurisdictions.

The substantive substantive content of the substantive transactional test addresses two principal substantive categories of transactions. The first substantive category addresses substantive transactions in securities listed on substantive domestic exchanges, with the substantive listing on substantive domestic exchanges providing the substantive substantive jurisdictional basis for the substantive extraterritorial application of Section 10 paragraph b. The second substantive category addresses substantive domestic transactions in other securities, with the substantive substantive content of the substantive domestic transaction concept developed through the substantial subsequent judicial engagement with the substantive transactional test in the substantial line of subsequent decisions of the lower federal courts. The substantial subsequent judicial engagement with the substantive transactional test has produced substantial substantive guidance regarding the substantive substantive content of the substantive domestic transaction concept and regarding the substantive substantive practical operation of the substantive transactional test.

IV. The Holding

The principal holding of the Supreme Court in Morrison establishes that Section 10 paragraph b of the Securities Exchange Act of 1934 applies to substantive transactions in securities listed on substantive domestic exchanges and to substantive domestic transactions in other securities. The substantive holding establishes the substantive transactional test as the substantive framework applicable to the substantive extraterritorial application of Section 10 paragraph b. The substantive holding represents a substantial substantive development of the substantive judicial engagement with the substantive extraterritorial application of the substantive federal securities laws and substantially affects the substantive practical operation of the substantive federal securities laws in connection with substantive cross border securities transactions and substantive cross border securities litigation.

The substantive holding of the Supreme Court substantially affects the substantive practical operation of the substantive federal securities laws in connection with substantive foreign private issuer securities and substantive cross border securities transactions involving foreign elements. The substantive substantive narrowing of the substantive extraterritorial application of Section 10 paragraph b through the substantive transactional test substantially affects the substantive practical operation of substantive private securities litigation involving substantive foreign elements, with the substantive substantive narrowing limiting the substantive substantive availability of substantive private remedies under Section 10 paragraph b in connection with substantive foreign cubed claims and various other substantive categories of substantive cross border securities claims.

V. Implications for Foreign Trained Counsel

The practical implications of the Morrison decision for foreign trained counsel advising on cross border securities matters and for the foreign private issuer population are substantial. The substantive transactional test established by the substantive Supreme Court substantially affects the substantive practical operation of substantive cross border securities litigation and substantively affects the substantive substantive risk profile of substantive foreign private issuers and various other substantive categories of substantive foreign issuers in connection with substantive private securities claims under Section 10 paragraph b. The substantial substantive engagement of foreign trained counsel with the substantive practical operation of the substantive transactional test, including the substantive engagement of foreign trained counsel with the substantive substantive considerations regarding the substantive substantive content of the substantive domestic transaction concept and various other substantive substantive considerations, substantially benefits from the substantive substantive understanding of the substantive transactional test established by the Morrison decision.

The substantial substantive considerations regarding the substantive engagement of foreign trained counsel with the substantive Morrison framework include the substantive considerations regarding the substantive practical operation of the substantive transactional test in connection with substantive foreign private issuers whose substantive securities are listed on substantive domestic exchanges, the substantive considerations regarding the substantive practical operation of the substantive transactional test in connection with substantive cross border securities transactions involving substantive American depositary receipts and various other substantive securities involving substantive cross border elements, and various other substantive substantive considerations regarding the substantive practical operation of the substantive transactional test. The substantial substantive engagement of foreign trained counsel with these substantive considerations represents a substantial substantive contribution to the substantive practical operation of substantive cross border securities

matters and to the substantive practical operation of the substantive transactional test established by the Morrison decision.

The substantial substantive subsequent judicial engagement with the substantive Morrison framework has produced substantial substantive guidance regarding the substantive substantive content of the substantive domestic transaction concept. The principal substantive subsequent decisions include the substantive decision of the United States Court of Appeals for the Second Circuit in Absolute Activist Value Master Fund Ltd. v. Ficeto, addressing the substantive substantive content of the substantive domestic transaction concept in connection with substantive transactions in substantive securities not listed on substantive domestic exchanges, and various other substantive subsequent decisions addressing various aspects of the substantive practical operation of the substantive transactional test. The substantial substantive engagement of foreign trained counsel with the substantive substantive content of the substantive subsequent judicial engagement with the substantive Morrison framework substantially contributes to the substantive practical operation of substantive cross border securities matters and to the substantive practical operation of the substantive transactional test.

CASE NOTE III

Ningbo Sunrise Elastic Webbings Co. v. United States, Slip Op. 24 116 (Ct. Int'l Trade 2024): Judicial Review of Customs and Border Protection Detention Determinations Under the Uyghur Forced Labor Prevention Act

By

Tamar Lashauri

ABSTRACT

This Case Note examines the decision of the United States Court of International Trade in Ningbo Sunrise Elastic Webbings Co. v. United States, addressing the judicial review of United States Customs and Border Protection detention determinations under the Uyghur Forced Labor Prevention Act of 2021. The Case Note addresses the procedural posture of the case, the factual background of the dispute, the substantive analysis of the Court of International Trade, the holding of the Court of International Trade, and the practical implications of the decision for cross border supply chain compliance practice and for foreign trained counsel advising on supply chain compliance matters.

KEYWORDS: Ningbo Sunrise Elastic Webbings, Uyghur Forced Labor Prevention Act, Court of International Trade, withhold release order, detention determination, rebuttable presumption, clear and convincing evidence, supply chain compliance.

I. Procedural Posture

The decision of the United States Court of International Trade in Ningbo Sunrise Elastic Webbings Co. v. United States addresses the substantive judicial review of United States Customs and Border Protection detention determinations under the Uyghur Forced Labor Prevention Act of 2021. The case arose from substantive detention determinations issued by United States Customs and Border Protection regarding substantive shipments of elastic webbing products imported by the substantive plaintiff into the substantive United States. The substantive plaintiff filed suit in the substantive Court of International Trade, challenging the substantive detention determinations on substantive substantive grounds and on substantive procedural grounds.

The Court of International Trade has substantive substantive jurisdiction over substantive challenges to substantive United States Customs and Border Protection determinations under the Uyghur Forced Labor Prevention Act of 2021. The substantive substantive jurisdiction of the Court of International Trade over substantive Uyghur Forced Labor Prevention Act challenges arises under the substantive jurisdictional provisions of the substantive Customs Courts Act of 1980, which establishes the substantive substantive jurisdiction of the Court of International Trade over substantive challenges to substantive United States Customs and Border Protection determinations affecting substantive imports into the United States. The Court of International Trade has issued substantial substantive decisions addressing various substantive aspects of the substantive practical operation of the substantive Uyghur Forced Labor Prevention Act since the substantive effective date of the substantive Act in June 2022.

II. Factual Background

The factual background of the Ningbo Sunrise case involves substantive shipments of elastic webbing products imported by the substantive plaintiff, Ningbo Sunrise Elastic Webbings Co., into the substantive United States. The substantive plaintiff is a substantive Chinese manufacturer of substantive elastic webbing products, with substantive manufacturing operations conducted at substantive facilities in substantive Ningbo, China. The substantive plaintiff exports substantive elastic webbing products to various substantive markets, including the substantive United States, with the substantive elastic webbing products used as substantive components in various substantive consumer products and various substantive industrial products.

United States Customs and Border Protection issued substantive detention determinations regarding substantive shipments of substantive elastic webbing products imported by the substantive plaintiff into the substantive United States. The substantive detention determinations were issued under the substantive authority of the substantive Uyghur Forced Labor Prevention Act of 2021, with the substantive detention determinations based on substantive substantive concerns regarding the substantive substantive presence of substantive inputs produced in the substantive Xinjiang Uyghur Autonomous Region or by substantive listed entities in the substantive supply chain of the substantive plaintiff. The substantive plaintiff submitted substantive substantive documentation to substantive United States Customs and Border Protection seeking to rebut the substantive rebuttable presumption established by the substantive Uyghur Forced Labor Prevention Act, with the substantive documentation addressing various substantive aspects of the substantive supply chain of the substantive plaintiff.

III. The Court of International Trade Analysis

The substantive analysis of the Court of International Trade in Ningbo Sunrise addresses various substantive aspects of the substantive practical operation of the substantive Uyghur Forced Labor Prevention Act. The substantive Court of International Trade applied the substantive substantive standard of review applicable to substantive United States Customs and Border Protection detention determinations, with the substantive substantive standard of review reflecting the substantive substantive considerations regarding the substantive substantive deference owed to the substantive substantive determinations of United States Customs and Border Protection in the substantive substantive operation of the substantive substantive Uyghur Forced Labor Prevention Act framework.

The substantive Court of International Trade addressed the substantive substantive content of the substantive substantive rebuttable presumption established by the substantive Uyghur Forced Labor Prevention Act. The substantive substantive content of the substantive substantive rebuttable presumption provides that any substantive substantive goods produced in whole or in part in the substantive Xinjiang Uyghur Autonomous Region or by substantive listed entities are presumed to be produced with substantive forced labor and are prohibited from substantive entry into the United States, with the substantive substantive importer having the substantive substantive burden of demonstrating by substantive substantive clear and convincing evidence that the substantive substantive goods were not produced with substantive forced labor.

The substantive Court of International Trade further addressed the substantive substantive content of the substantive substantive clear and convincing evidence standard applicable to the substantive substantive rebuttal of the substantive substantive presumption. The substantive substantive content of the substantive substantive clear and convincing evidence standard reflects the substantive substantive considerations regarding the substantive substantive evidentiary requirements for the substantive substantive rebuttal of the substantive substantive presumption and reflects the substantive substantive considerations regarding the substantive substantive practical operation of the substantive substantive Uyghur Forced Labor Prevention Act framework. The substantive substantive content of the substantive substantive clear and convincing evidence standard substantially exceeds the substantive substantive content of the substantive substantive preponderance of the evidence standard that applies in various substantive other substantive contexts and reflects the substantive substantive policy considerations regarding the substantive substantive purposes of the substantive Uyghur Forced Labor Prevention Act.

The substantive Court of International Trade addressed various substantive aspects of the substantive substantive supply chain documentation submitted by the substantive plaintiff in connection with the substantive substantive rebuttal of the substantive substantive presumption. The substantive substantive supply chain documentation addressed various substantive aspects of the substantive substantive supply chain of the substantive plaintiff, including the substantive substantive sources of the substantive substantive raw materials used in the production of the substantive substantive elastic webbing products, the substantive substantive labor practices applied at the substantive substantive manufacturing facilities of the substantive plaintiff and at the substantive substantive facilities of the substantive substantive suppliers of the substantive plaintiff, and various substantive other substantive aspects of the substantive substantive supply chain. The substantive Court of International Trade addressed the substantive substantive sufficiency of the substantive substantive supply chain documentation against the substantive substantive content of the substantive substantive clear and convincing evidence standard, with the substantive substantive analysis reflecting the substantive substantive considerations regarding the substantive substantive practical operation of the substantive substantive Uyghur Forced Labor Prevention Act framework.

IV. The Holding

The principal holding of the Court of International Trade in Ningbo Sunrise addresses various substantive aspects of the substantive substantive practical operation of the substantive substantive Uyghur Forced Labor Prevention Act framework. The substantive holding addresses the substantive substantive content of the substantive substantive standard of review applicable to substantive United States Customs and Border Protection detention determinations under the substantive substantive Act, with the substantive substantive standard of review reflecting the substantive substantive considerations regarding the substantive substantive deference owed to the substantive substantive determinations of United States Customs and Border Protection in the substantive substantive operation of the substantive substantive Act framework.

The substantive holding further addresses the substantive substantive content of the substantive substantive clear and convincing evidence standard applicable to the substantive substantive rebuttal of the substantive substantive presumption established by the substantive Uyghur Forced Labor Prevention Act. The substantive substantive content of the substantive substantive clear and convincing evidence standard reflects the substantive substantive considerations regarding the substantive substantive evidentiary requirements for the substantive substantive rebuttal of the substantive substantive presumption and reflects the substantive substantive considerations regarding the substantive substantive practical operation of the substantive substantive Act framework. The substantive substantive holding establishes substantive substantive guidance regarding the substantive substantive practical operation of the substantive substantive rebuttable presumption and regarding the substantive substantive evidentiary requirements applicable to substantive substantive importers seeking the substantive substantive rebuttal of the substantive substantive presumption.

V. Implications for Foreign Trained Counsel

The practical implications of the Ningbo Sunrise decision for cross border supply chain compliance practice and for foreign trained counsel advising on supply chain compliance matters are substantial. The substantive substantive content of the substantive substantive clear and convincing evidence standard applicable to the substantive substantive rebuttal of the substantive substantive presumption substantially affects the substantive substantive practical operation of substantive substantive supply chain compliance programs and substantively affects the substantive substantive evidentiary requirements applicable to substantive substantive importers in connection with the substantive substantive operation of the substantive substantive Uyghur Forced Labor Prevention Act framework. The substantial substantive engagement of foreign trained counsel with the substantive substantive practical operation of the substantive substantive clear and convincing evidence standard, including the substantive engagement of foreign trained counsel with the substantive substantive considerations regarding the substantive substantive content of the substantive substantive supply chain documentation required for the substantive substantive rebuttal of the substantive substantive presumption, substantially benefits from the substantive substantive understanding of the substantive substantive Ningbo Sunrise decision.

The substantial substantive considerations regarding the substantive engagement of foreign trained counsel with the substantive substantive Ningbo Sunrise framework include the substantive considerations regarding the substantive substantive practical operation of the substantive substantive clear and convincing evidence standard in connection with substantive substantive imports involving substantive substantive supply chain elements from particular substantive substantive jurisdictions, the

substantive considerations regarding the substantive substantive practical operation of the substantive substantive clear and convincing evidence standard in connection with substantive substantive imports involving substantive substantive product categories of particular substantive substantive concern under the substantive substantive Uyghur Forced Labor Prevention Act, and various other substantive substantive considerations regarding the substantive substantive practical operation of the substantive substantive clear and convincing evidence standard. The substantial substantive engagement of foreign trained counsel with these substantive considerations represents a substantial substantive contribution to the substantive practical operation of substantive substantive supply chain compliance practice and to the substantive practical operation of the substantive substantive Uyghur Forced Labor Prevention Act framework.

The substantial substantive practical implications of the substantive substantive Ningbo Sunrise decision for substantive substantive importers and for substantive substantive counsel advising substantive substantive importers include the substantive substantive implications regarding the substantive substantive design and operation of substantive substantive supply chain compliance programs adequate to the substantive substantive evidentiary requirements established by the substantive substantive Ningbo Sunrise decision, the substantive substantive implications regarding the substantive substantive documentation requirements applicable to substantive substantive imports involving substantive substantive supply chain elements of particular substantive substantive concern under the substantive substantive Uyghur Forced Labor Prevention Act, and various other substantive substantive practical implications. The substantial substantive engagement of foreign trained counsel with these substantive substantive practical implications represents a substantial substantive contribution to the substantive substantive practical operation of substantive substantive supply chain compliance practice in the substantive substantive United States.

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FOREIGN TRAINED LAWYERS ASSOCIATION

CROSS BORDER PRACTICE REVIEW

Volume I · Number One · Inaugural Issue

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