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Legal Insights for Manufacturing: International Trade

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The global economy continues to be buffeted by geopolitical tensions and the divergent strategic interests of major countries. Trade policy has emerged as a primary tool in responding to the changes that are reconfiguring foreign affairs, placing pressure on U.S. manufacturers to comply with an ever-expanding list of sanctions, duties, and restrictions on the crossborder flow of goods, services, and capital.

Countervailing Duties, U.S. Manufacturers and Evasion

One conspicuous example of how geopolitical changes outside the U.S. are impacting U.S. trade policy is the People's Republic of China (PRC) Belt & Road Initiative (BRI), under which the PRC has invested over $1 trillion to create a web of economic and logistical dependencies encompassing over 150 countries. The BRI was specifically cited by the U.S. Department of Commerce as one of its key areas of concern when it recently reconsidered longstanding policy not to consider so-called "cross-border" subsidies by modifying its regulations to claim the authority to investigate subsidies provided by third-country governments to manufacturers in countries under investigation. The modified regulations are generally applicable but are largely in response to increased Chinese foreign direct investment in other countries, including through the BRI.

Commerce previously limited its examination of subsidies to those programs and benefits provided by the investigated country to exporters within that investigated country.

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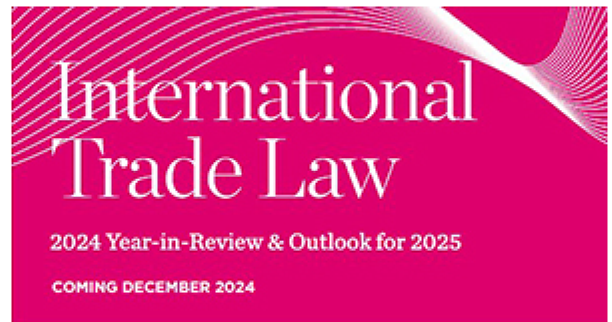
Formerly, a subsidy provided by the investigated government to the investigated company would be countervailable if it provided a financial contribution from the government to a producer and/or exporters that was specific, in that it provided the company, a group of companies, or an industry an unfair advantage to enable it to produce, and consequently export, more goods.

Commerce's amended regulations, among other things, claim statutory authority to examine "transnational subsidies," which casts serious uncertainty as to what constitutes a "countervailable" subsidy, as the regulations lack procedural and other specific factual guidance on how these third-party government subsidies will be examined and addressed as part of investigations and reviews. The new rules went into effect on April 24, 2024.

There is significant uncertainty around the government's new definition of specificity, making compliance efforts considerably more difficult in the short run, particularly those concerning what subsidies to examine and report. It also provides Commerce more opportunities to make assumptions based upon adverse inferences when responding companies attempt to report programs and benefits received.



The new rules also have implications for the conduct of parallel antidumping duty proceedings in that the receipt of subsidies for raw material inputs could lead to an increased use of Commerce's unique "particular market situation" (PMS) analysis and further increase the burden on responding companies in reporting sales and production costs to the agency.

For U.S. manufacturers at large, countervailing duties can be something of a double-edged sword, aiding manufacturers when it levels the playing field vis-à-vis competing foreign products, but also potentially raising the costs of inputs used by domestic businesses. Perhaps no area of trade policy illustrates this as starkly as enforcement actions in connection with the Enforce and Protect Act (EAPA), which provides U.S.-based companies with a powerful tool to uncover and report the existence of allegedly transshipped goods in the U.S. marketplace. EAPA provides additional tools for U.S. Customs and Border Protection (CBP) to investigate importers that may not be paying duties at the time of entry. One key feature of the law is a provision allowing U.S. domestic producers to file allegations against importers suspected of evasion, in effect, turning private businesses into whistleblowers regarding "suspicious" products, many of which may compete with their own products. Like other legal frameworks that employ whistleblowers, EAPA can be highly effective at rooting out illegal behavior, but it can also lead to unfounded allegations that are shrouded in administrative secrecy, making it difficult for accused importers to mount a defense.

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This circumstance can lead to legitimate due process concerns, an issue recently taken up by the Federal Circuit in *Royal Brush Manufacturing v. U.S. et al.*, which held that CBP violates importers' due process rights when it denies access to confidential information used against them in EAPA determinations. As a result, CBP announced in May 2024 that it will now issue administrative protective orders (APOs) granting accused parties access to business confidential information in EAPA investigations.

Section 301 Tariff Increases

On September 13, the U.S. Trade Representative (USTR) released a list of significant Section 301 tariff increases that is largely consistent with a proposed list announced on May 22, 2024. USTR also announced an exclusion process by which U.S. manufacturers may request that "particular machinery used in domestic manufacturing be temporarily excluded from Section 301 tariffs." Finally, USTR included a limited number of temporary exclusions for certain manufacturing equipment. The specific products are identified by the U.S. Harmonized Tariff schedule code in the relevant annexes to USTR's September 13 notice.

USTR's increased Section 301 tariffs claims to target "certain products from China in strategic sectors," including lithium-ion batteries, electronic vehicles, solar power, steel, and aluminum, semiconductors, medical equipment and shipping. These industries have long been at the heart of the Biden administration's efforts at supply chain diversification and bolstering U.S. manufacturing. USTR has confirmed that the proposed tariff increases in these sectors include "products targeted by China for dominance or are products in sectors where the United States has recently made significant investments."

The tariff increases were foreshadowed by the publication of a USTR report detailing the results of its four-year review of the existing Section 301 measures. As expected, the report found that the Section 301 tariffs imposed during the Trump administration have had some positive effect in shifting U.S. supply chains away from China; however, the report also found ample opportunity to incentivize China to make further reforms in order to remedy the acts, policies, and practices related to technology transfer, intellectual property, and innovation found to have provided the basis for USTR to impose the Section 301 measures.

As mentioned above, USTR has proposed limited exclusions solely for imported equipment dedicated to U.S. manufacturing activity. Unlike prior rounds of Section 301 exclusions—where the question of domestic availability was at issue—the most recent round of exclusions are clearly aimed at incentivizing U.S. manufacturing and shifting supply chains away from China through alternative import sourcing. The USTR report noted that the 429 existing product-specific Section 301 exclusions

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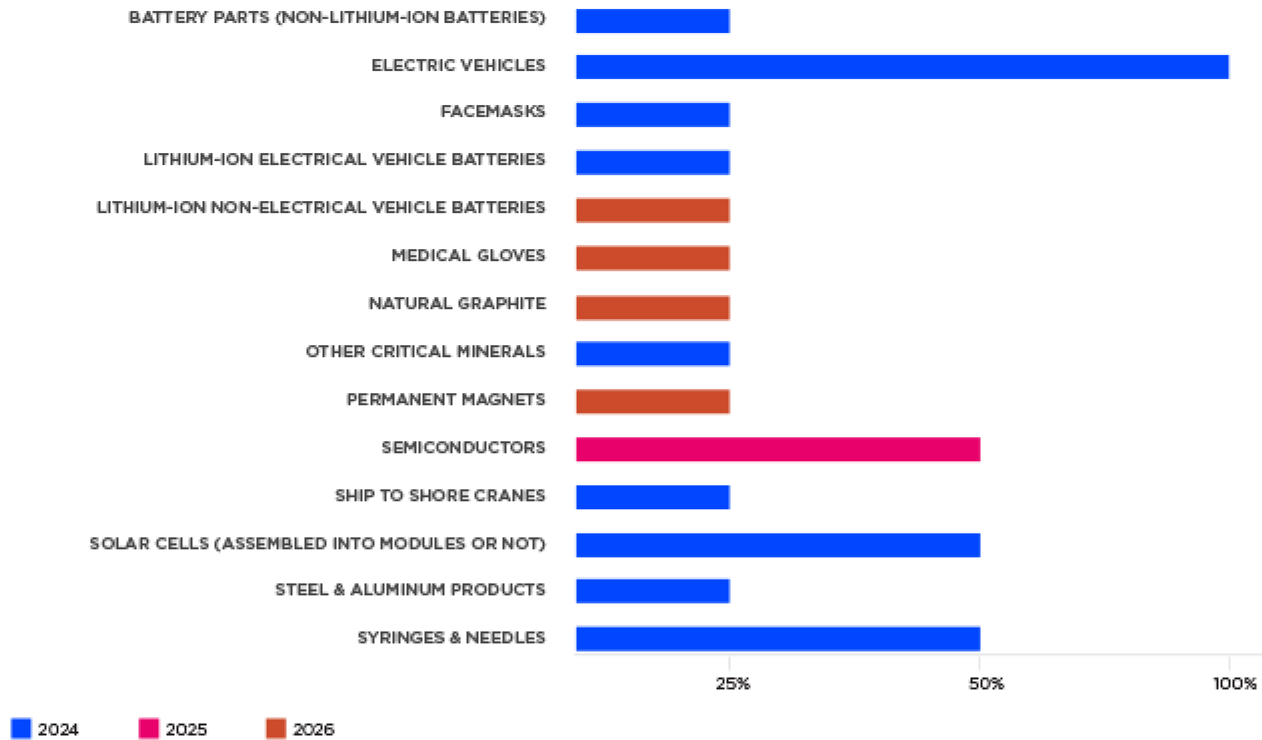
were set to expire on May 31, 2024, and while the report hinted that a renewal of those exclusions was unlikely, USTR subsequently elected to extend certain exclusions through May 31, 2025.



Export Controls & Trade Sanctions Developments

Transshipment risks are significant for importers, but perhaps even more burdensome in the export setting. The robust exports controls and sanctions regime deployed by the U.S. government over the past decade has added compliance costs for U.S.-based manufacturers, especially so given that the cost of noncompliance includes not just civil or administrative penalties but possible criminal indictments for certain illegal conduct.

In 2024, the associated compliance burden expanded in scope with the enactment of the 21st Century Peace through Strength Act, which President Biden signed into law in April 2024. Section 3111 of the Act extends from five years to 10 years the statute of limitations for civil and criminal violations of the International Emergency Economic Powers Act (IEEPA) and the Trading with the Enemy Act (TWEA). In July 2024, the Office of Foreign Assets Control (OFAC) published guidance stating that it

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"may now commence an enforcement action for civil violations of IEEPA- or TWEAbased sanctions prohibitions within 10 years of the latest date of the violation if such date was after April 24, 2019." Correspondingly, OFAC introduced an interim final rule on September 11, 2024, amending the Reporting, Procedures and Penalties Regulations to increase the recordkeeping requirements to 10 years to align with the statute of limitations for civil and criminal violations.

By expanding the statute of limitations, the U.S. government has significantly moved the compliance goalposts for manufacturers. Compliance programs will now need to contemplate conduct on a longer timeline with all of the associated recordkeeping requirements. But that longer timeline could have less obvious implications, as well. Having a "reasonable" risk-based compliance program often figures prominently in whether OFAC decides to mitigate the penalties it assesses when it uncovers a violation, but reasonableness is a fluid concept. What seemed reasonable in 2022 might not seem so to OFAC in 2032 with the benefit of 10 years of hindsight. Manufacturers will need to be alert to all the implications an expanded statute of limitations and recordkeeping requirements may have on their operations.

This change in law is consistent with the U.S. government's ongoing efforts to ramp up enforcement of its steadily growing exports controls and trade sanctions regime. For instance, in February 2024, OFAC and the Department of State jointly announced more than 500 sanctions designations targeting government officials, companies, and individuals in Russia and beyond. The sanctions illustrate how U.S. trade policy has evolved to address not just economic concerns but also to signal U.S. displeasure with the geopolitical aims of foreign governments. The sanctions primarily targeted Russian government officials responsible for the death of Aleksey Navalny—a Russian opposition politician who died in February 2024 while in prison—as well as entities in Russia's military-industrial base, entities providing revenue to the Russian government to support its military, and companies and individuals throughout Europe, Asia, and the Middle East considered to be aiding Russia in its efforts to evade sanctions.

As OFAC and the Department of State were expanding U.S. sanctions, the Department of Commerce's Bureau of Industry and Security (BIS) added 93 entities and over 900 parties from Russia, China, Turkey, the UAE, Kyrgyzstan, India, and South Korea to its Entity List. BIS also expanded from 45 to 50 the number of high priority items subject to Export Administration Regulations (EAR). These entities are subject to a license requirement for all items subject to the EAR and a license review policy of either presumption of denial or policy of denial for all items subject to the EAR.

Additionally, BIS released guidance in August 2024 highlighting the various mechanisms it has employed— outside of its usual public screening lists—to notify companies and universities about parties that present risks of diversion to Russia. These include letters and notices with information drawn from a variety of sources, including government data, news reports, open-source reports, and

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information learned from the exporter community at large. Importantly, BIS will consider as an aggravating factor in any enforcement action an organization's decision to proceed with a transaction (without obtaining an export license) when the company or university knew or had reason to know or believe that a red flag exists which could not be affirmatively addressed or explained.

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