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International Trade 2024

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USA: Law & Practice

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USA

Law and Practice

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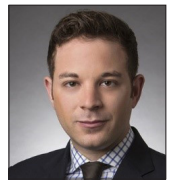
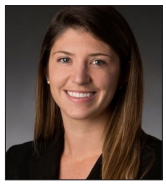


Justin Becker has experience in a variety of trade remedies matters, including Section 301 and anti-dumping and countervailing duty (AD/CVD) issues. In particular, he has assisted clients with major investigations and reviews before the Department of Commerce (DOC) and investigations before the International Trade Commission (ITC). He has appeared before the Court of International Trade and the US Court of Appeals for the Federal Circuit and has argued before a Chapter 19 NAFTA panel. Justin also counsels clients on transactions reviewed by the Committee on Foreign Investment in the United States (CFIUS). Prior to joining Sidley, Justin worked as an attorney for the DOC in the Office of Chief Counsel.



Carys Golesworthy focuses her practice on compliance with economic sanctions and export controls, and proceedings before the Committee on Foreign Investment in the United States (CFIUS). Prior to joining Sidley, Carys was an economic consultant for the World Bank, working on international trade matters. Carys was also a research economist for the White House Council of Economic Advisers, where she provided economic analysis on a wide range of economic policy issues, with an emphasis on international trade policy.

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1. Trade Agreements

1.1 World Trade Organization Membership or Plurilateral Agreements

The USA is an original member of the World Trade Organization (WTO). The USA is a party to both WTO plurilateral agreements – the Civil Aircraft Agreement and the Government Procurement Agreement – and a participant in the Information Technology Agreement.

1.2 Free Trade Agreements

The USA has free trade agreements in force with 20 countries, namely: Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, South Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru and Singapore.

1.3 Other Trade Agreements

The USA and China entered into a "Phase One" trade deal on 15 January 2000, entitled "Economic and Trade Agreement Between the United States of America and the People's Republic of China: Phase One".

The USA and Vietnam entered into a bilateral trade agreement on 13 July 2000, normalising economic relations and imposing legally binding obligations on the USA with respect to non-discriminatory terms of trade.

In May 2022, the United States launched the Indo-Pacific Economic Framework for Prosperity (IPEF) with Australia, Brunei Darussalam, Fiji, India, Indonesia, Japan, Republic of Korea, Malaysia, New Zealand, Philippines, Singapore, Thailand, and Vietnam.

The USA participates in several autonomous preferential arrangements, including the Generalized System of Preferences.

1.4 Future Trade Agreements

The Biden Administration appears to have placed a low priority on pursuing free trade negotiations that had been initiated by the Trump Administration with the EU, Kenya and the UK.

1.5 Key Developments Regarding Trade Agreements

On 15 June 2021, the USA and EU established a high-level Trade and Technology Council. At the time of publication of this guide (December 2023), the USA continued to block consensus on the selection of new WTO Appellate Body members.

In October 2023, the United States withdrew support for proposals being considered in the WTO e-commerce negotiations.

1.6 Pending Changes to Trade Agreements

The Biden Administration has dedicated itself to a "worker-centred" trade policy, which has manifested itself in active use by USTR of the facility-specific rapid-response labour mechanism in Chapter 31 Annex A of the US–Mexico–Canada Agreement.

2. Customs

2.1 Authorities Governing Customs

The primary legal and administrative authorities governing US customs matters are codified at Title 19 of the United States Code (US Code or USC) and Title 19 of the Code of Federal Regulations (CFR). These legal instruments implement the overarching multilateral, plurilateral and bilateral agreements covering customs law, such as the General Agreement on Tariffs and Trade and the Customs Valuation Agreement, among many others.

2.2 Enforcement Agencies Enforcing Customs Regulations

United States Customs and Border Protection (CBP), an agency within the US Department of Homeland Security (DHS), administers and enforces US customs laws and regulations, as well as the laws and regulations of approximately 40 other agencies as they apply at the border to restrict, limit or otherwise impose requirements on imported merchandise. US Immigration and Customs Enforcement/Homeland Security Investigations (ICE/HSI), also within the DHS, is responsible for enforcing criminal violations of US customs, trade and other laws.

2.3 Legal Instruments

There are three primary legal instruments through which the USA addresses negative impacts of trade practices in other jurisdictions: Section 201 of the Trade Act of 1974, Section 232 of the Trade Expansion Act of 1962 and Section 301 of the Trade Act of 1974.

Section 201

Section 201 of the Trade Act of 1974 (19 USC Sections 2251–2255) authorises the President to provide temporary import relief to US domestic industry if the US International Trade Commission (ITC) determines that a surge in imports has caused or threatens to cause serious injury to that industry. Section 201 "safeguard" actions are intended to facilitate positive adjustment of the US domestic industry to import competition.

At the time of publication (December 2023), there is one Section 201 measure in place related to solar cells and panels. The measures were extended for an additional four years, and modified by exempting bifacial solar panels, in February 2022. Furthermore, the United States and Canada signed a memorandum of understanding (MOU) on trade in solar products under the United States–Mexico–Canada Agreement, which suspended the application of the safeguard measures on solar products imported from Canada, effective February 2022. The Section 201 safeguard measures previously in place on washing machines and parts (washers) expired in February 2023.

Section 232

Section 232 of the Trade Expansion Act of 1962 (19 USC Section 1862) authorises the President to take action to adjust imports of certain products (eg, through tariffs, quotas or other action) if the US Department of Commerce (the DOC or Commerce) determines that such products are imported in such quantities or under such circumstances as to threaten to impair the national security of the USA.

Since 2017, the DOC has initiated a number of Section 232 investigations. Significantly, following affirmative findings by the DOC, effective 23 March 2018, then President Trump imposed tariffs of 25% and 10% on certain imports of steel and aluminium, respectively, the scope of which was expanded in February 2020.

The DOC has implemented a process by which manufacturers may request exclusions from these measures if the products in question cannot be produced in sufficient quantity or quality in the USA, or for national security reasons. This process also permits domestic steel and aluminium producers to object to any exclusion requests. The DOC has proposed to revise certain aspects of the exclusion process, such as modifying certification requirements for exclusion requests and imposing new certification requirements on objectors, but a final rule has not been issued as of the time of this guide's publication (December 2023).

A number of the USA's trading partners, including China and the EU, have challenged the USA's Section 232 measures as inconsistent with its WTO commitments. In December 2022, WTO panels issued reports on complaints filed by China, Norway, Switzerland and Turkey, which found that the USA's Section 232 measures did not fall within the General Agreement on Tariffs and Trade 1994 (GATT) security exceptions. The USA has notified its appeal of the panel reports to the Appellate Body.

Section 301

Title III of the Trade Act of 1974 (Sections 301–310, 19 USC Sections 2411–2420) – collectively referred to as "Section 301" – authorises the United States Trade Representative (USTR) to investigate and take action (eg, suspend trade agreement concessions, impose import restrictions or enter into binding agreements) against any US trading partner that violates its trade agreement commitments or engages in acts that are unjustifiable, unreasonable or discriminatory, and burden or restrict US commerce.

Under the Trump Administration, USTR initiated a number of Section 301 investigations and imposed retaliatory tariffs as a result of two such investigations. President Biden has continued to impose these retaliatory measures with respect to China, but resolved investigations without applying tariffs with respect to Vietnam's currency valuation and timber import practices, and with respect to digital services taxes in ten jurisdictions.

USTR announced continuation of the Section 301 tariffs beyond the initial four-year term authorised by statute in September 2022, after receiving requests to continue the additional duties from domestic industry. The statutory four-year review process was commenced in October 2022, and has not been completed at the time of publication of this guide (December 2023). Notably, although the review is required by statute to analyse the effects of the duties, the statute does not mandate the review be completed in a certain timeframe nor require USTR to take any action based thereon. USTR has extended certain product exclusions while the review process continues.

2.4 Key Developments in Customs Measures

Enforcement of the Uyghur Forced Labour Protection Act

The Uyghur Forced Labour Prevention Act (UFLPA), signed into law in December 2021 by President Biden, strengthened the existing, long-standing prohibition on the import of goods made with forced labour into the United States. Specifically, the UFLPA established a rebuttable presumption that goods mined, produced or manufactured wholly or in part in the Xianjiang Uyghur Autonomous Region (XUAR) of China, or manufactured by an entity on the UFLPA Entity List, are produced with forced labour and, therefore, prohibited from importation in the United States. Although the UFLPA designates certain priority products for enforcement, there is no de minimis exception. As a result, any amount of XUAR content in any product – no matter how small or remote – will trigger the presumption. If an entry is subject to the UFLPA, the importer must comply with specified conditions and establish by "clear and convincing evidence" that the goods were not made using forced labour in order to rebut the presumption. To meet this high standard, importers must demonstrate due diligence and effective supply-chain tracing measures to prove that the product and all inputs therein are sourced outside the UFLPA and have no connection to any entity on the UFLPA Entity List.

CBP has added new validations for the entry of merchandise to aid in its enforcement of the UFLPA. For example, in March 2023, CBP deployed the UFLPA Region Alert enhancement to collect further data from importers of Chinese-originating good. More specially, importers of goods with a Chinese country of origin must provide the manufacturer's postal code with the Manufacturer Identification Code (MID). The postal code is used by CBP to scan against postal codes in the XUAR. Furthermore, CBP is employing other tactics, such as isotopic testing of apparel and footwear, to determine if the inputs used (such as cotton) are from the XUAR.

Additionally, the Forced Labour Enforcement Task Force (FLETF) continues to add entities to the UFLPA Entity List, which results in all products produced by these entities being subject to the UFLPA's rebuttable presumption of being manufactured with forced labour. Notably, if an importer successfully rebuts the presumption, CBP must issue a public report within 30 days of its determination. No such reports have been issued as of the date of publication of this guide (December 2023), meaning that no importer has successfully rebutted the presumption since the UFLPA has been in effect.

Continued Enforcement of Customs Laws via the False Claims Act

The US government continues to recover large amounts of unpaid duties, treble damages, and civil penalties through trade-related False Claims Act (FCA) settlements. Known as reverse false claims, because the alleged violations prevented the government from collecting what it was owed, these third-party initiated cases often allege the fraudulent evasion of duties by misclassification, misrepresentation of country of origin, or undervaluation.

2.5 Pending Changes to Customs Measures

Limitations on the Use of Section 321

Pursuant to Section 321 of the Tariff Act of 1930, as amended, 19 USC Section 1321, certain goods valued at less than USD800 (the de minimis threshold) may enter the United States free of duty (including Section 301 tariffs) and without filing a formal customs entry. Although there are restrictions on the use of Section 321, the growth in e-commerce and direct-to-consumer sales has corresponded to an exceptionally high volume of low-value shipments entering the United States free of duty and without the scrutiny of formal entries. For example, CBP reported USD771.5 million de minimis shipments in 2021, more than half of which were imported from China, and USD685 million in 2022.

Legislation has been proposed to limit the use of Section 321 so as to prevent exploitation of the de minimis threshold by bad actors that split shipments to avoid payment of duties, or introduce illicit goods, and to bolster competitiveness of American businesses.

3. Sanctions

3.1 Sanctions Regime

The USA imposes economic and trade sanctions on individuals, entities and jurisdictions throughout the world based on US foreign policy and national security goals. US sanctions programmes include comprehensive, country-based sanctions, and more selective, list-based sanctions, using the blocking of assets and trade restrictions to accomplish foreign policy and national security goals.

3.2 Legal or Administrative Authorities Imposing Sanctions

The International Emergency Economic Powers Act (IEEPA) is the main source of statutory authority for most US sanctions programmes. IEEPA authorises the US President to broadly regulate international commerce after declaring a national emergency in response to any unusual and extraordinary threat to the USA which has a foreign source. Other statutory authorities include the Trading with the Enemy Act of 1917 (TWEA), which is the basis for the Cuba sanctions programme, the Foreign Narcotics Kingpin Designation Act, the Antiterrorism and Effective Death Penalty Act of 1996, and the Clean Diamond Trade Act.

3.3 Government Agencies Enforcing the Sanctions Regime

The US Department of the Treasury's Office of Foreign Assets Control (OFAC) and the US Department of State (DOS) are primarily responsible for administering US sanctions. The US Department of Commerce, Bureau of Industry and Security (BIS) has jurisdiction over certain exports and re-exports of commodities, software and technology, and in this capacity also plays a role in aspects of US sanctions enforcement.

3.4 Persons Subject to Sanctions Laws and Regulations

US persons are required to comply with all US economic sanctions.

Companies organised under the laws of other countries are not required to comply with primary US sanctions, with two important exceptions, as follow.

- First, non-US companies must comply with US sanctions against Iran or Cuba if such companies are owned or controlled by a US person (ie, a company or individual).
- Second, non-US companies must generally comply with all US primary sanctions to the extent any of their activities involve the USA in some way. For example, non-US entities may be subject to OFAC regulations to the extent their transactions involve the US financial system (eg, transactions denominated in US dollars that clear through US banks), items subject to US jurisdiction (eg, US-origin goods or goods containing a certain amount of US content), or the shipment of goods via the USA.

3.5 List of Sanctioned Persons

The USA prohibits dealings with persons on the List of Specially Designated Nationals and Blocked Persons (SDN List). The USA also maintains several lists of persons with which certain transactions are restricted, including the Sectoral Sanctions Identification List (SSI List), the Non-SDN Chinese Military-Industrial Complex Companies List (NS-CMIC List), the Palestinian Legislative Council List (NS-PLC List), the Non-SDN Iran Sanctions Act List (NS-ISA List), the Foreign Sanctions Evaders List (FSE List), the Cuba Prohibited Accommodations List, and the Cuba Restricted List. The US Treasury and State Departments have significant discretion over the addition of persons to sanctioned party lists.

3.6 Sanctions Against Countries/Regions

The countries and territories subject to comprehensive country-based US sanctions are currently Cuba, North Korea, Iran, Syria and the Crimea and so-called Donetsk People's Republic and Luhansk People's Republic regions of Ukraine.

3.7 Other Types of Sanctions

The USA maintains some sanctions under which certain transactions, but not all transactions, are restricted. For example, sectoral sanctions apply to specific entities in Russia's financial, energy and defence sectors that OFAC has identified for inclusion on the SSI List. These sectoral sanctions prohibit US individuals and entities from engaging in specific kinds of transactions related to lending, investment, and/or trade with entities on the SSI List, but permit other transactions with these same entities. The USA also imposes certain activity-based prohibitions which restrict certain types of dealings with even non-listed parties. For example, the USA prohibits new investment in Russia, and the export of certain accounting, trust and corporate formation, management consulting, architecture and engineering, and quantum computing services to persons in Russia, and the provision of certain services related to the maritime transport of crude oil of Russian origin.

3.8 Secondary Sanctions

The USA imposes certain sanctions on parties that have no connection with the USA (ie, secondary sanctions). Secondary sanctions target non-US entities doing business with certain listed persons or in identified sectors of certain sanctioned markets. The USA need not have jurisdiction over the entity for secondary sanctions to apply, as the USA can add the entity to the list of entities that are themselves being sanctioned (as opposed to being subjected to enforcement actions in the USA, as is the case for primary sanctions violations).

3.9 Penalties for Violations

With respect to criminal penalties, a person who wilfully commits, wilfully attempts to commit, wilfully conspires to commit, or aids or abets in the commission of, a violation of any licence, order, regulation or prohibition may, upon conviction, be fined not more than USD1 million or, if a natural person, be imprisoned for not more than 20 years, or both. In past cases receiving criminal penalties, there has often been an aspect of wilful concealment present.

OFAC assesses civil penalties on a transaction-by-transaction basis, according to (i) whether it considers a case to be egregious or non-egregious, and (ii) whether the apparent violation is disclosed through a voluntary self-disclosure. Most comprehensive US sanctions programmes are issued under the International Emergency Economic Powers Act (IEEPA), for which the statutory maximum per transaction is the greater of USD356,579 or twice the amount of the underlying transaction.

3.10 Sanctions Licences

There are two types of sanctions-related licences: general licences and specific licences. A general licence authorises a particular type of transaction for a class of persons, without the need to apply for a licence. A specific licence is a written document issued to a particular person or entity, authorising a particular transaction in response to a written licence application.

For example, US sanctions programmes often allow for legitimate humanitarian-related trade and activity and exports of medicines under existing laws and regulations, either through general licences or other exemptions from the relevant prohibitions. Where a general licence is not available, parties may apply directly to the relevant enforcement agency for a specific licence authorising otherwise prohibited activity.

3.11 Compliance

There is "strict liability" under US primary sanctions regulations, meaning that there is no ele-

ment of knowledge required under the law. However, knowledge and compliance efforts will often be considered as factors relevant to the calculation of penalties in an enforcement setting.

3.12 Sanction Reporting Requirements

Persons subject to US jurisdiction holding property blocked pursuant to US sanctions laws and regulations must report the blocked property to OFAC within ten business days from the date that property becomes blocked, and thereafter on an annual basis. Persons subject to US jurisdiction must also report to OFAC rejected transactions that are not per se blocked pursuant to US sanctions laws and regulations, but where processing or engaging in the transactions would nonetheless violate such laws and regulations.

3.13 Adherence to Third-Country Sanctions

The USA maintains anti-boycott laws which prohibit US companies from furthering or supporting the boycott of Israel, including by complying with certain requests for information designed to verify compliance with the boycott.

3.14 Key Developments regarding Sanctions

Over the last year, the USA has continued to use its sanctions authority as a top foreign policy tool, particularly in response to actions taken by Russia in Ukraine and surrounding areas. In addition to the enforcement of existing sanctions measures, the USA has in the last year dedicated significant effort to addressing circumvention and evasion of Russian sanctions.

In October 2023, the USA eased certain sanctions on Venezuela in response to a deal reached between the Maduro government and opposition parties. New general licences issued by the USA authorise certain previously restricted dealings involving Venezuela's oil and gas sectors, assuming the Maduro government meets its election-related commitments. The USA also authorised certain dealings in Venezuelan debt on the secondary market.

3.15 Pending Changes to Sanction Regulations

The USA is expected to continue targeting evasion of US sanctions, in particular to ensure that previously issued measures involving Russia have the desired effect on sanctioned Russian actors and the Russian economy.

The USA may introduce additional sanctions measures in response to increasing tensions in Israel and the Middle East, potentially to include new measures on Iran.

4. Exports

4.1 Export Controls

The USA imposes export controls to protect national security interests and promote foreign policy objectives. To do so, the USA controls the export of sensitive goods, software and technology to certain destinations without an export licence.

4.2 Administrative Authorities for Export Controls

The primary authorities governing the enforcement of US export controls are the Export Control and Reform Act of 2018 (ECRA) and the Export Administration Regulations (EAR). The restrictions on the export of certain defence articles and services covered on the United States Munitions List (USML) are authorised by the Arms Export Control Act (AECA) and imple-

mented through the International Traffic in Arms Regulations (ITAR).

4.3 Government Agencies Enforcing Export Controls

The US Department of Commerce Bureau of Industry and Security (BIS) has jurisdiction over export controls, including exports and re-exports of commodities, software and technology that are subject to the EAR.

The US Department of State's Directorate of Defense Trade Controls (DDTC) is responsible for enforcing the ITAR.

4.4 Persons Subject to Export Controls

US export controls regulate:

- exports and re-exports of items in the USA;
- US-origin items wherever located;
- foreign-made commodities that contain more than de minimis levels of "controlled" US-origin content; and
- certain foreign-made commodities that are the direct product of US-origin technology or software.

4.5 Restricted Persons

Restricted party lists maintained by BIS include the Entity List, the Denied Persons List and the Unverified List. The DDTC also maintains the Debarred Parties List. BIS and DDTC have significant discretion to add persons to the restricted party lists. For example, any company that has been involved in, or poses a significant risk of becoming involved in, activities contrary to the national security or foreign policy interests of the USA may be added to the Entity List.

4.6 Sensitive Exports

BIS maintains the Commerce Control List (CCL), a list of items controlled for export to certain destinations without an export licence due to the sensitive nature or potential use of the item. BIS also maintains separate lists of goods, including certain non-sensitive items, which require a licence to sensitive destinations such as Russia, Belarus, Crimea and Iran.

DDTC maintains the USML, which covers and restricts the export of certain defence articles and services without DDTC authorisation.

4.7 Other Export Controls

Items not listed on the USML or the CCL may nevertheless be controlled for export based on the intended end use, the intended end user, or the destination. For example, BIS restricts the export of all items subject to the EAR to certain parties on the Entity List. BIS further restricts the export of all items on the CCL, and even certain items not on the CCL, to Russia or Belarus.

4.8 Penalties

For violations of the EAR, the statutory maximum civil penalty amount is USD353,534 per violation or twice the value of the transaction, whichever is greater. With respect to criminal penalties, a person who wilfully commits, wilfully attempts to commit, wilfully conspires to commit, or aids or abets in the commission of, a violation of any licence, order, regulation or prohibition may, upon conviction, be fined not more than USD1 million, or, if a natural person, be imprisoned for not more than 20 years, or both.

Violations of the ITAR may result in civil penalties up to the greater of USD1,200,000 per violation, or the amount that is twice the value of the transaction that is the basis of the violation with respect to which the penalty is imposed. Criminal violations of the ITAR may result in criminal penalties of up to USD1 million and ten years' imprisonment per violation.

4.9 Export Licences

There are certain licence exceptions which authorise the export, under stated conditions, of items subject to EAR or ITAR that would otherwise require a licence. Where a licence is required and an exception is not available, parties may apply to BIS for a licence authorising the export of specific items by the party holding the licence to the end users and under the circumstances identified in the licence.

4.10 Compliance

Violations of US export controls are generally "strict liability" in nature. However, in certain instances, BIS may consider a party's reason or ability to know of the export violation.

4.11 Export Reporting Requirements

Persons utilising certain licence exceptions or certain export licences may have reporting obligations to BIS, depending on the exception or licence used.

Persons registered under the ITAR have strict reporting requirements to the DDTC, including obligations to promptly notify the DDTC of any changes to the registration information initially reported.

4.12 Key Developments Regarding Exports

BIS continues to focus efforts on combating the evasion and circumvention of US export controls regarding Russia. BIS imposed in February 2023 new destination-based controls on Iran in order to address the use of Iranian Unmanned Aerial Vehicles (UAVs) by Russia. These controls imposed licence requirements on certain EAR99 items destined for Iran, regardless of whether a US person was involved in the transaction. The controls also created a new "Iran Foreign Direct Product (FDP) Rule" specific to Iran for certain items. The rules are designed to ensure that US products are not available for shipment to Iran for use in the manufacture of UAVs being used by Russia in Ukraine.

In May 2023, BIS also issued a new rule expanding controls relating to Russia and Belarus.

The USA continues to rely on designations to the Entity List as a foreign policy tool, including in response to perceived national security risks involving Russian and Chinese parties.

On 17 October 2023, BIS announced two new rules that update and expand upon those existing controls aimed at restricting China's ability to obtain advanced computing chips, develop and maintain supercomputers, and manufacture advanced semiconductors. According to BIS, the latest changes reinforce the 7 October 2022 controls to restrict China's ability to both purchase and manufacture certain high-end chips critical for military advantage, and are necessary to maintain the effectiveness of these controls, close loopholes and ensure they remain durable.

4.13 Pending Changes to Export Regulations

The Biden Administration has stated that it plans to update the controls regarding advanced computing items and semiconductor manufacturing equipment "at least annually" to make sure they are keeping pace with innovation and to address circumvention efforts. BIS also plans to seek multilateral enforcement of these controls through the Wassenaar Arrangement process, and this process may in turn shape BIS's own enforcement of the controls.

BIS is otherwise expected to continue exploring measures to prevent, track and penalise evasion and circumvention of US export controls, includ-

ing the restrictive controls involving Russia and Belarus.

5. Anti-dumping and Countervailing (AD/CVD)

5.1 Authorities Governing AD/CVD

The Tariff Act of 1930 (the "Act") provides the statutory authority to impose anti-dumping (AD) and countervailing duties (CVD). The implementing regulations of the relevant administering authorities are included under Title 19 of the Code of Federal Regulations.

5.2 Government Agencies Enforcing AD/CVD Measures

US AD and CVD laws are administered by the US Department of Commerce (DOC) and the US International Trade Commission (ITC). The DOC determines whether a producer is dumping and/or receiving unfair subsidies and the extent of such dumping or subsidisation. The ITC determines whether the US domestic industry is injured by subject imports.

5.3 Petitioning for a Review

Domestic companies may petition the ITC and the DOC to initiate an investigation. In the event dumping and/or subsidisation is found, and an order is imposed, interested parties must request reviews of companies with entries that may be subject to the order. Administering authorities may self-initiate an investigation, but unilateral initiation is rare.

5.4 Ad Hoc and Regular Reviews

The DOC conducts administrative reviews of AD and CVD orders on a regular basis. However, interested parties, including domestic interested parties (domestic producers, importers, trade or business associations, etc) and foreign exporters and producers must request a review of specific entities. If a request is not submitted by deadlines established under the law, the DOC will not conduct a review.

The DOC and ITC also conduct "sunset reviews" or AD and CVD orders every five years to determine whether revoking the order would be likely to lead to continuation or recurrence of dumping or subsidies and material injury.

5.5 Non-domestic Company Participation

Non-domestic companies are the subject of investigations and reviews and, therefore, are afforded the opportunity to participate. They may request a review of themselves, and if selected by the DOC for individual review would be required to participate to the best of their abilities by responding to the DOC's inquiries. Non-domestic companies subject to an investigation or review but not individually investigated or reviewed may also participate; however, in general, such companies will be assigned a rate equal to the average or weighted average rates calculated for the companies that DOC individually investigated or reviewed.

5.6 Investigation and Imposition of Duties and Safeguards

The investigation process is bifurcated between the DOC and the ITC. As noted above, the DOC investigates whether there is dumping or subsidisation, and the ITC investigates whether the domestic industry is injured because of subject imports.

The investigation begins with the ITC's preliminary phase. During the preliminary phase, if the ITC finds there is a reasonable indication that an industry is materially injured or is threatened by material injury, or that the establishment of

an industry is materially retarded, because of subject imports, then the DOC will continue the investigation.

The DOC will then review individual, foreign exporters and/or producers of subject merchandise. If it affirmatively finds dumping or subsidisation in its preliminary investigation, both the DOC and the ITC will continue the investigation into the final phase. During this process, the DOC will conduct a verification (typically on-site) of a respondent's responses to the agency's inquiries. The DOC will complete its final phase first and issue a final determination. If the DOC's final determination is affirmative, thereafter the ITC will complete its final phase. If the ITC's final determination is affirmative, then the DOC will issue an order and impose duties on subject imports.

With regard to safeguards, the ITC has the authority to impose temporary import relief under Section 201 of the Trade Act of 1974. For further discussion related to safeguards, see **2.3 Legal Instruments**.

5.7 Publishing Reports

Both the ITC and the DOC issue preliminary and final determinations. The determinations are publicly reported in the Federal Register, and the accompanying reports and decision memoranda to the Federal Register notice are also made public on the ITC's and the DOC's websites. The DOC also issues preliminary and final results in reviews, which include publication of notice in the Federal Register and accompanying decision memoranda.

5.8 Jurisdictions with No Imposition of Duties and Safeguards

No jurisdictions are exempted from the potential imposition of AD or CVD duties.

5.9 Frequency of Reviews

Interested parties have the opportunity to request administrative reviews each year. Review requests must be made during the anniversary month of publication of the AD or CVD order. Requests for review are submitted to the DOC. Sunset reviews are conducted every five years.

5.10 Review Process

In general, the administrative review process is similar to that of the DOC's investigation process. There is a preliminary phase and a final phase. During the process, the DOC issues questionnaires to respondents it selects for individual review. In non-market economy proceedings, parties are invited to submit information. Similarly, the sunset review process is similar to that of the DOC's and ITC's investigation process.

5.11 Appeal Process

Parties may appeal the DOC's and the ITC's findings before the US Court of International Trade (CIT) or, if the proceeding involves Mexico or Canada, before a five-member binational panel under Chapter 10 of the USMCA.

Parties may also seek appellate review of the CIT's determinations before the US Court of Appeals for the Federal Circuit (CAFC). In most instances, parties may not seek review of panel determinations under the USMCA. Further appeal of decisions by the CAFC may be sought before the Supreme Court of the United States, but the Court has discretion to hear the appeal.

In addition, countries may seek review of the DOC's and ITC's determinations and practices before the WTO.

5.12 Key Developments Regarding AD/CVD Measures

On 29 September 2023, the DOC published a final rule modifying its regulations governing procedures related to administrative protective orders and service of documents, and deleted from its regulations two provisions that have been invalidated by the United States Court of Appeals for the Federal Circuit.

5.13 Pending Changes to AD/CVD Measures

In May 2023, the DOC proposed a broad array of procedural and substantive amendments to its regulations, including new tools to address the following:

- alleged government "inaction" related to property rights (including intellectual property rights), human rights, labour and environmental protection issues;
- potential excess capacity and oversupply of certain major inputs in international markets; and
- transnational subsidisation.

These tools, if implemented, could result in new investigations, more rigorous administrative proceedings with higher burdens, and substantially increased AD/CVD rates in future proceedings.

6. Investment Security

6.1 Investment Security Mechanisms

The Committee on Foreign Investment in the United States (CFIUS) has jurisdiction to review certain foreign investment transactions in the USA that pose a threat to national security and recommend to the President actions to mitigate the threat.

Notifying a transaction to CFIUS carries the benefit that, if CFIUS reviews and clears the transaction, it is cleared forever (with some limited exceptions). In contrast, if the parties choose not to file, CFIUS has the option to self-initiate a review of the transaction at any time (including many years after the deal has closed), with uncertain and potentially significant results, including the possibility that the buyer would be required to divest the US business or US assets.

Parties to a transaction typically jointly prepare the submission to CFIUS. The notice process includes the preparation of a 30–50-page notice, the submission of a draft to CFIUS for comments, preparation and acceptance of a formal notice, a 45-day formal review by CFIUS, and (if necessary) a 45-day investigation.

Alternatively, the parties could choose to notify the transaction to CFIUS through an expedited filing process in which parties would submit an approximately five-page "declaration".

CFIUS operates pursuant to Section 721 of the Defense Production Act of 1950 (codified at 50 USC 4565). Section 721 was substantially revised by the Foreign Investment and National Security Act of 2007 (FINSA), which became effective 24 October 2007, and the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), which became effective 13 August 2018.

6.2 Agencies Enforcing Investment Security Measures

CFIUS is an interagency committee, chaired by the United States Secretary of the Treasury. Additional members of CFIUS include the Secretaries of Homeland Security, Commerce, Defense, State, Energy, and Labor, the Attorney General, the Director of National Intelligence, the United States Trade Representative, and the

Director of the Office of Science and Technology Policy. Representatives from other federal agencies also hold "observer" status.

6.3 Transactions Subject to Investment Security Measures

CFIUS has jurisdiction over three types of "covered transactions":

- "covered control transactions" – ie, transactions in which a foreign person acquires control of a US business, including a US business involved in "critical infrastructure", "critical technology" or storage/maintenance of sensitive personal information (a TID US business);
- "covered investments" – ie, certain investments by a foreign person in TID US businesses that give the foreign person certain non-control rights (ie, the right to appoint a board director/observer, the right to access material non-public technical information or the right to be involved in substantive decision-making); and
- "covered real estate transactions" – ie, the acquisition by a foreign person of certain property rights with respect to real estate that meets certain criteria and that is in and/or around sensitive US locations such as specific airports, maritime ports or military installations.

6.4 Mandated Filings/Notifications

Certain covered transactions involving US businesses that produce, design, test, manufacture, fabricate or develop one or more critical technologies are subject to a mandatory filing requirement.

CFIUS also requires filings for certain covered transactions where a foreign government has a "substantial interest" in a foreign person that will acquire a substantial interest in US businesses involved in critical infrastructure, critical technology or storage/maintenance of sensitive personal information.

6.5 Exemptions

Certain investors from the UK, Australia, New Zealand and Canada are currently exempt from CFIUS's review of non-controlling investments in certain US businesses. CFIUS may revise the list of exempt foreign states over time.

6.6 Penalties and Consequences

If CFIUS has concerns with a transaction, CFIUS could recommend that the President block the investment (or order divestment if the transaction has closed) or require other mitigation measures to address the national security concerns.

FIRRMA also authorises CFIUS to impose certain fees on parties who violate the CFIUS review process. Pursuant to the CFIUS regulations, any person that fails to submit a mandatory filing or that violates CFIUS mitigation requirements may be liable for a civil penalty up to USD250,000 or the value of the transaction, whichever is greater. Additionally, any person who submits a material misstatement or omission in a declaration or notice, or who makes certain other false statements, may be liable for a civil penalty of up to USD250,000 per violation.

6.7 Fees

Notices submitted to CFIUS are subject to a filing fee of up to USD300,000. The filing fee required in any given transaction is determined by the value of the transaction. There are no fees for filing declarations.

6.8 Key Developments Regarding Investment Security

CFIUS continues to enhance its monitoring and enforcement measures over non-notified transactions, including by reviewing public and non-public databases and resources to determine whether certain transactions should have been presented to CFIUS.

CFIUS has also this year demonstrated a greater focus on ensuring compliance with mitigation agreements and pursuing enforcement against actions of non-compliance. In particular, CFIUS is increasingly engaging in on-site compliance checks, and issuing warning letters for violations of mitigation agreements. While CFIUS has thus far published information on only two past instances of the imposition of penalties, CFIUS staff have informally acknowledged that additional penalties have been levied in the last year, and that more are forthcoming.

In May 2023, CFIUS issued a rule clarification with significant effect, namely, that so-called "springing rights" arrangements are not permissible when a transaction would require a mandatory filing. In a typical springing rights arrangement, an investor would immediately acquire equity interests that would not in themselves result in a covered transaction but would hold its governance/information rights in abeyance until CFIUS approval, at which time the investor's governance or information rights would "spring". This solution allowed parties to close a deal in a timely manner without triggering an immediate mandatory CFIUS filing, while still ultimately giving CFIUS the opportunity to review the transaction before the foreign investor acquired the rights that would result in a covered transaction. CFIUS' clarification makes clear that this creative solution is not acceptable in the context of mandatory CFIUS filings. Investors thus need to file mandatory CFIUS filings 30 days before the closing of the deal, regardless of when the relevant rights would spring.

6.9 Pending Changes to Investment Security Measures

CFIUS is expected to continue focusing on enforcement, including on parties' compliance with mitigation agreements. In particular, it is expected that the imposition of CFIUS monetary penalties will become a more common occurrence going forward. According to CFIUS' annual report, there has also been a significant increase in the past year in the committee's use of mitigation measures and other conditions to mitigate perceived national security risks. CFIUS is expected to continue utilising these measures with increased frequency.

Turning to outbound investment, in August 2023, the Biden Administration issued a long-anticipated executive order outlining controls on US outbound investments in certain Chinese entities. This order was accompanied by an Advance Notice of Proposed Rulemaking outlining proposed details for the new outbound investment regime and seeking public comment. Under the proposed rules, the programme would (i) prohibit US persons from entering into certain types of transactions with a covered foreign person engaged in activities involving certain sensitive technologies and products, and (ii) require that US persons who enter into the same types of transactions for a broader set of defined technologies and products notify the US Department of the Treasury of such actions. The initial sectors targeted by the programme include semiconductors and microelectronics, quantum information technologies, and artificial intelligence. It is possible the list of sensitive sectors could be expanded in the future to include, for example,

biotechnology, advanced batteries and clean energy technology.

Importantly, the proposed rules do not immediately impose any new legal obligations or restrictions, but rather outline certain parameters that the US Department of the Treasury is considering and had requested comment by 28 September 2023. Once the Biden Administration has reviewed the public comments on the proposed rule, it will then issue a draft of the proposed regulations and once again allow for public comment before issuing the final rules. As a result, the effective date of the outbound investment regulations is likely not until mid- to late 2024.

7. Other Measures Affecting Production and Trade

7.1 Subsidy and Incentive Programmes for Domestic Production

As described by the WTO Secretariat, the USA has no overarching legal framework governing subsidies at federal and sub-federal levels. Traditionally, federal subsidies have been in the form of grants, tax concessions, loan guarantees and direct payments. The federal government maintains a search engine referred to as "Assistance Listings" at sam.gov.

See the WTO Secretariat's Report in the 2022 Trade Policy Review – USA, paragraph 3.221.

7.2 Standards and Technical Requirements

As described by the WTO Secretariat, the development of standards in the USA is decentralised and demand-driven. The private sector addresses the needs or concerns expressed by industry, government and consumers, through the development of voluntary consensus standards (VCSs). The actual work to develop these VCSs is undertaken by standards-developing organisations (SDOs). A private, non-profit organisation, the American National Standards Institute (ANSI), co-ordinates and administers the VCS system. ANSI is the sole US member body to the International Organization for Standardization (ISO) and, through the US National Committee, to the International Electrotechnical Commission (IEC).

See the WTO Secretariat's Report in the 2022 Trade Policy Review – USA, paragraphs 3.228–3.247.

7.3 Sanitary and Phytosanitary Requirements

As described by the WTO Secretariat, the USA has numerous laws and regulations pertaining to food safety, animal health and plant health. The promulgation of the Food and Drug Administration (FDA) Food Safety Modernization Act (FSMA) in 2011 (PL 111–353) represented a major and long-awaited update in the oversight of food safety. The FSMA was accompanied by the issuance of seven key implementing regulations during 2015 and 2016, as well as four supplementary regulations, following a period of extensive public comment and review.

See the WTO Secretariat's Report in the 2022 Trade Policy Review – USA, paragraphs 3.248–3.263.

7.4 Policy and Price Controls

There are no competition policies or price controls at the federal level in the USA that appear to be aimed at reducing imports and/or encouraging domestic production. The competition policy framework has been well established in the USA for many years. The federal competition (antitrust) legislation consists of three core laws:

- the Sherman Act (1890), which limits agreements in restraint of trade, and bars abuse of monopoly;
- the Clayton Act (1914), which prohibits mergers and acquisitions that lessen competition; and
- the Federal Trade Commission Act (1914, FTC Act), which prohibits mainly unfair methods of competition and unfair or deceptive acts in or affecting commerce.

See the WTO Secretariat's Report in the 2022 Trade Policy Review – USA, paragraphs 3.264 and 3.279.

7.5 State and Privatisation Measures

As noted by the WTO Secretariat, the incidence of US governmental authorities owning or controlling enterprises that engage in commercial activities is fairly limited. These entities – for example, the Tennessee Valley Authority – are not likely to conduct themselves in a manner that would reduce imports. At the federal level, a number of government corporations or government-sponsored enterprises generally fulfil public policy objectives or governmental functions and their intended purpose is not to compete with private enterprises.

While US states possess a general incorporation statute, the federal government does not have such powers, and each government corporation is chartered through an act of Congress to perform a public purpose with a clear and transparent mandate. Government corporations have a separate legal personality, and may receive federal allocations, but they may also have their own sources of revenue.

See the WTO Secretariat's Report in the 2022 Trade Policy Review – USA, paragraphs 3.280–3.283.

7.6 "Buy Local" Requirements

As summarised by the WTO Secretariat, the Buy American Act of 1933 (BAA) and the Trade Agreements Act of 1979 (TAA) remain the main laws regarding government procurement. The BAA requires the federal government to purchase domestic goods, while the TAA provides authority for the President to waive purchasing requirements, such as those contained in the BAA. These requirements are waived for WTO Government Procurement Agreement (GPA) participants, trading partners with which the USA has an FTA that covers procurement and beneficiaries of preferences. Federal agencies may waive domestic procurement requirements in US law under certain conditions.

See the WTO Secretariat's Report in the 2022 Trade Policy Review – USA, paragraphs 3.280–3.294.

7.7 Geographical Protections

As noted by the WTO Secretariat, the USA provides protection to foreign and domestic geographical indications (GIs) through its trade mark system for all classes of goods and services, usually as certification marks and collective marks with indications of regional origin. As such, the US system of GI protections would not appear to be aimed at reducing imports per se but, as is the case in any trade mark system, could be used to restrict infringing imports.

See the WTO Secretariat's Report in the 2022 Trade Policy Review – USA, paragraphs 3.366–3.370.

8. Other Significant Issues

8.1 Other Issues or Developments

There are no other significant issues or developments in US trade or investment law that have not already been addressed.

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