

Top Trade Policy Moves Of 2023: Midyear Report

By Jennifer Doherty

Law360 (July 21, 2023, 10:25 PM EDT) -- The first half of 2023 saw the Biden administration expand sanctions to take on Russia's overseas enablers, start tracing new tech trade routes around China, and aggravate Congress into passing legislation on Taiwan and solar tariffs.

Here are Law360's picks for the top international trade policy developments so far this year.

New Tools for Russia Sanctions

The U.S. and partner democracies marked the one-year anniversary of Russia's invasion of Ukraine with a new round of sanctions and export control actions against the aggressor state.

Those measures fit into what Dj Wolff, the vice chair of Crowell & Moring LLP's international trade group, identified as a "monthly rhythm" of actions aimed at curbing Russia's economy to thwart its military campaign. But a new round of sanctions at the conclusion of the G7 meeting in May expanded the scope of the economic targets.

The G7 made much of its intent to punish Russia's "enablers" working out of neutral countries. The U.S. Treasury Department designated several entities in countries including Kazakhstan, Iran and China for supplying the Kremlin with prohibited technology and munitions.

At the same time, the expanding scope of business sectors that also became subject to U.S. sanctions in the May orders — including engineering, architecture and energy — presented the specter of secondary sanctions.

"The secondary pieces to me on Russia are all of the 'operating in' language, where they can designate people for operating in 20 sectors of the Russian economy at this point," Wolff said.

Secondary sanctions arise when U.S. authorities blacklist an entity for conducting business in a country of concern without any connection to the U.S.

The May sanctions action also blew open the already lengthy list of items that may not be exported from the U.S. to Russia.

"A lot of the export control that was in there was really catching up with what the EU had already," Wolff said, citing one company that, up until May, was sourcing cotton fluff for diapers from the U.S.

because it was easier to get it to Russia that way.

"My comment to clients always is, if diaper fluff is caught, then you should just start from an assumption that everything is caught until you can prove otherwise," said Wolff.

Japan Critical Minerals Deal Redefines FTAs

The office of the U.S. Trade Representative had certain lawmakers from both sides of the aisle seeing red after it announced a new deal with Japan in March governing trade in critical minerals between the two countries, and treated the deal as a subcategory of a free trade agreement.

While there is no specific legal definition of a free trade agreement, most of the 20 FTAs the U.S. has negotiated have been reached by White House negotiators operating with a clear set of directives from Congress. The deals also generally involve removing tariffs on goods from both countries.

The Japan deal has neither of those hallmarks, but by treating it as an FTA, the Biden administration aims to appease an important ally and trading partner by grandfathering it into language in the Inflation Reduction Act that grants consumer tax credits on electric vehicles whose batteries meet certain thresholds for content produced either domestically or in FTA-partner countries.

Lawmakers pointed to various shortcomings, including a lack of enforceable requirements on subjects like environmental protections and labor rights in the executive-level agreement, and also what some saw as a dodge of Congress' intent to boost domestic manufacturing through the IRA incentives.

"No one disagrees on the broader goal of strengthening critical mineral supply chains and reducing our collective dependence on China," Tim Brightbill, co-chair of Wiley Rein LLP's international trade group, told Law360. But, he said, "Congress thinks the administration is setting a dangerous precedent here."

Congress Elbows In On Taiwan Agreement

When the White House announced another executive-level agreement in May, this time with Taiwan, lawmakers did not content themselves with issuing angry press releases.

The deal itself proved uncontroversial. Former USTR official and current King & Spalding partner Jamieson Greer described the arrangement as covering "the easy chapters of a free trade agreement." Instead of assailing it, Congress passed legislation this month to ratify it, despite the Biden administration's position that there was no need for such action.

"This legislation is really Congress laying down a marker saying if USTR is going to do deals and they involve trade, whether or not it requires a change to U.S. law, whether or not it requires tariff adjustment, we, Congress, not only have to be consulted, but we have to be able to approve it," Greer said.

The former official also told Law360 that Taiwan's leadership was "positive" about the initiative, but view it as "a stepping stone to an eventual free trade agreement."

Lawmakers' Solar Tariff Stand Burns Out

In another showing of bipartisan frustration, Congress moved to undo a two-year waiver on new duties

for solar power equipment from four countries where the U.S. Department of Commerce is currently investigating tariffs circumvention allegations.

House Joint Resolution 39 cleared both chambers before the president vetoed it in May.

Wiley Rein partner Robert DeFrancesco, who represents domestic petitioners, viewed the initiative as a sign of the times.

"There's a lot more alignment across party lines on trade so far as supporting domestic manufacturing goes," he said. "I think some of the disagreements that you're seeing, to one degree or another, are about have we gone far enough to support domestic manufacturing? That's a very different position than say over the last two or three or four previous administrations."

Akin Gump Strauss Hauer & Feld LLP partner Matt Nicely, whose clients include importers, took a slightly different view of the tension that gave rise to resolution.

"I do think the tug of war between trade policy on the one hand and climate change policy on the other is really what created the waiver in the first place and then the resolution following it," Nicely said. "That tug of war isn't going anywhere."

--Editing by Emily Kokoll and Kelly Duncan.