US & Multilateral Trade Policy Developments

Japan External Trade Organization

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US Trade Actions

Section 301

United States and China Announce "Phase One" Agreement on Tariffs and Agriculture Purchases but Light on Other Details

On October 11, 2019, President Trump announced that the United States and China have reached a "phase one deal," including the suspension of the planned tariff hike on approximately $250 billion in annual imports from China (*i.e.*, Section 301 tariff Lists 1-3), previously scheduled to increase to 30% on October 15. In exchange, China will commit to purchasing $40-50 billion in certain US agricultural exports, in addition to unspecified commitments relating to intellectual property, market access, and foreign exchange practices. Treasury Secretary Mnuchin said discussions on China's currency practices were "almost complete," and that the partial deal addresses "transparency" issues. The announcement comes after two days of high-level meetings between Chinese trade negotiator Liu He and US administration officials.

The precise details of the narrow deal are not yet known and have yet to be formalized in writing. The Office of the US Trade Representative (USTR) has not yet issued a formal Federal Register notice postponing the October 15 tariff increase on Lists 1-3, which USTR proposed for public comments in late August but never finalized. USTR may publish a Federal Register notice in the coming days implementing the postponement. Beyond the tariff pause and agriculture buys, the two sides reportedly reaffirmed an agreement to refrain from devaluing their currencies to gain an export advantage. The Treasury Department is scheduled to release its semiannual report on exchange rate policies next month, so this could provide a vehicle to revise US policy on China's alleged "manipulation" of the yuan. China also recently announced expanded market access in its domestic financial services market via increased foreign investment limits. Little else, however, is known about the terms of the "phase one deal." The agreement appears ***not*** to address the wide range of "structural" changes to China's industrial and trade policies that the United States has prioritized in the negotiation, including those with respect to forced technology transfer, industrial subsidies, cyber theft of trade secrets, foreign investment practices, and enforcement.

Meanwhile, the United States' existing Section 301 tariffs and China's existing retaliatory measures will remain in place at their current rates, as follows:

Tariff action / effective date	Annual trade value / tariff rate	
	United States	China
List 1 – Jul. 6, 2018	$34 billion at 25%	$34 billion at 25%
List 2 – Aug. 23, 2018	$16 billion at 25%	$16 billion at 25%
List 3 – Sept. 24, 2018	$200 billion at 25%	$60 billion at 5-25%
List 4A – Sept. 1, 2019	$112 billion at 15%	$29 billion at 5-10% (significant overlap w. Lists 1-3)
List 4B – Dec. 15, 2019	$160 billion at 15%	$46 billion at 5-10% (significant overlap w. Lists 1-3)

According to President Trump, the "phase one" agreement will be finalized within the next several weeks and signed at the APEC leaders' meeting in Chile next month. President Trump indicated that negotiation on "phase two" will begin immediately upon signing the first agreement. It is expected that the United States will continue seeking commitments from China in the aforementioned structural areas during "phase two" and subsequent phases, if any. US sources have indicated that the two sides will continue to discuss the possible postponement or cancellation of the additional tariff increases that each side has scheduled to take effect on December 15, 2019, as well as a possible reduction of the "List 4A" tariffs imposed on September 1, 2019, but this has not been confirmed. US Trade Representative Lighthizer said a decision on the December 15 tariff increase has not been made.

Outlook

The interim agreement comes amid increasing indications that the existing US tariffs and Chinese retaliation, combined with uncertainty regarding future such actions, are contributing to the recent contraction of the US manufacturing sector and may also contribute to a slowdown in global economic growth over the coming months. Today's agreement therefore has been welcomed by global markets and the US business community, which in recent weeks has increasingly expressed concerns that the additional tariffs planned for October 15 and December 15, and China's expected retaliation thereto, would exacerbate these harms (concerns that reportedly are shared by at least some of President Trump's advisors). These concerns likely were the primary motivation for the two sides to adopt the interim agreement announced today, rather than substantive progress in the recent negotiations (which appears to have been minimal). Indeed, the Dow finished up 320 points (1.2%) on Friday, though it dropped almost 200 points following the President's press conference.

The interim agreement will avert an increase in US tariffs next week, but it should not be read as an indication that the two sides are significantly closer to reaching consensus on a more comprehensive agreement to resolve their trade dispute and remove the existing tariffs each side has imposed. Indeed, despite the interim agreement, the two sides appear to have drifted further apart recently on the structural issues that the United States has prioritized in the negotiation. For example, Chinese officials have publicly reiterated in recent weeks that China is unwilling to significantly alter its industrial policies in response to US pressure, and the Chinese delegation indicated in advance of this week's meeting that China is increasingly reluctant to continue discussions regarding subsidies and other structural issues that the United States has raised. The United States also has continued its aggressive use of non-tariff measures, such as export controls, against Chinese companies in recent weeks, including by adding 28 prominent Chinese companies to the Entity List maintained by the Bureau of Industry and Security on October 9 (a move for which China has recently indicated it will retaliate, possibly by releasing its own "Unreliable Entities List" targeting US firms). Negotiating dynamics could change over the coming months depending on the performance of the US and global economies and political developments in the United States may weaken (or strengthen) the Trump administration's negotiating position. It is therefore possible that the two sides will announce additional agreements to postpone further tariff increases or scale back tariffs currently in place. Nevertheless, given the persistence of bilateral tensions and the negotiating impasse on structural issues, a full resolution of the US-China trade dispute continues to appear unlikely in the near term, and the tariffs currently in place are likely to remain in effect for the foreseeable future.

Update: "Phase One" US-China Agreement to Require Further Substantive Negotiations

Following President Trump's October 11, 2019 announcement of a "phase one" trade agreement between the United States and China (*please refer to the W&C US Trade Alert dated October 11, 2019*), additional details have emerged and suggest that the two sides are further from finalizing such an agreement than President Trump initially indicated. In particular, published reports and public statements by US and Chinese officials indicate that further substantive negotiations (not merely finalization or legal scrubbing of agreed text) will be necessary to conclude a phase one agreement, and that only the United States' postponement of the October 15, 2019 tariff increase on Section 301 product lists 1-3 is at this stage certain.

The key developments since President Trump's announcement may be summarized as follows:

- **China's reaction.** Official statements from China on the outcome of last week's negotiating round have avoided any mention of an "agreement" (or even an "agreement in principle") between the United States and China. Rather, China's Ministry of Commerce and Chinese state media have acknowledged only that the two sides "made substantial progress" in the fields of agriculture, intellectual property protection, and exchange rates (among others) and "agreed to work together in the direction of final agreement." Moreover, reports state that (1)

China is seeking to hold additional, in-person negotiations at the ministerial level over the coming weeks regarding the substance of the "phase one" agreement; and (2) China will seek a commitment from the United States to cancel the US tariff increase scheduled for December 15, 2019 (*i.e.*, Section 301 tariff list 4B) as a prerequisite to signing any such deal. US officials on October 11 publicly declined to make such a commitment, offering only that President Trump would continue to evaluate whether to proceed with the December 15 tariff increase.

- **US statements.** Following President Trump's initial comments on October 11, US officials have appeared to acknowledge that further substantive negotiations will be needed before a phase one agreement can be signed. For example, Treasury Secretary Steven Mnuchin stated that "I think we have a fundamental understanding on the key issues," but acknowledged that "there is more work to do." Secretary Mnuchin later explained in an October 14 interview that "we have every expectation that phase one will close", but he acknowledged that "there are still some issues that need to be worked out in wording," and that the United States expects to hold further meetings with China at the deputy and ministerial levels in an effort to "finish the deal" before the November 16-17 APEC meeting in Chile. News reports have indicated that these meetings could even include a visit by USTR Lighthizer and Secretary Mnuchin to China before the APEC meeting.

These developments indicate that the results of last week's negotiating round may be more modest or unsettled than previously reported. Indeed, it appears now that the only confirmed results of the round are (1) a commitment by both sides to continue negotiations towards a phase one deal; and (2) a commitment by the United States to cancel the October 15 tariff increase on Lists 1-3 while the negotiations continue. Moreover, substantial difficulties may arise as negotiators seek to translate verbal commitments into legal text – especially given that the two sides previously have offered drastically different interpretations of commitments purportedly made by the other side during prior negotiating rounds, and these disagreements have substantially complicated the negotiations. It also appears that a phase one agreement may depend on the United States' willingness to call off its December 15 tariff increase without obtaining commitments from China on several structural issues, which remains uncertain. Thus, while the Trump administration's upbeat assessment of last week's meeting signals increased openness to a partial agreement that averts further tariff increases in exchange for modest concessions from China, even this outcome remains far from guaranteed.

USTR Establishes Product Exclusion Process for Fourth List of China-Origin Goods Subject to Section 301 Tariffs

On October 21, 2019, the Office of the US Trade Representative (USTR) released a Federal Register notice inviting interested persons to request the exclusion of particular products from the 15 percent *ad valorem* tariff imposed on "List 4A" goods from China as of September 1, 2019, pursuant to Section 301 of the Trade Act of 1974.[1] The notice establishes the schedule and requirements for requesting product exclusions for List 4A goods and describes the criteria that USTR may consider when determining whether to exclude products. The List 4A exclusion process is similar to the exclusion process for List 3 goods (*please see the W&C US Trade Alert dated June 20, 2019*), but does include some important changes. Most notably, USTR has shortened significantly the effective period for List 4A exclusions, limiting it to one year from the tariffs' September 1, 2019 implementation date (August 31, 2020). This hard deadline removes an incentive for requesters to delay submission of their exclusion requests in an attempt to extend the duration of granted exclusions.

The List 4A exclusion request system will open at noon on October 31, 2019 and close at 11:59pm on January 31, 2020. We provide below an overview of the List 4A exclusion process and key deadlines.

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[1] USTR's unpublished Federal Register notice is available **here**.

Product Exclusion Requests

USTR is inviting "interested persons," including trade associations, to submit requests for the exclusion of particular products from the additional duties imposed by the United States on approximately $112 billion worth of annual imports from China since September 1, 2019 (List 4A). The list of products currently subject to such duties is set forth in Annex A to USTR's Federal Register notice of August 20, 2019 (84 FR 43304). An additional 15 percent duty on a second list of products set forth in the August 20 notice ("List 4B") is currently scheduled to take effect on December 15, 2019, and USTR may establish another exclusion process for this list should the tariffs go into effect.

Unlike Section 301 Lists 1-3, Lists 4A and 4B cover significant quantities of consumer goods from China, including toys and sports equipment, footwear, textiles and clothing, and electronics (in addition to certain intermediate inputs and capital equipment, which were a primary focus of Lists 1-3). A list of the general product categories covered by Lists 4A and 4B is provided below.

Product Category	Percentage of US Imports from China Affected by List 4A (Sept. 1)	Percentage of US Imports from China to be Affected by List 4B (Dec. 15)
Toys and sports equipment	18%	82%
Footwear	45%	47%
Textiles and clothing	77%	13%
Electronics and electrical machinery	17%	41%
Stone and glass	30%	20%
Machinery	13%	36%
Vegetable products	41%	3%
Plastics and rubber	23%	20%
Wood products	20%	14%
Metals	17%	13%
Fuel	27%	0%
Chemicals	6%	13%
Prepared foodstuffs	12%	1%
Animal products	11%	2%
Transportation equipment	2%	2%
Miscellaneous	12%	6%

Source: Peterson Institute for International Economics (August 2019), available at ***https://www.piie.com/blogs/trade-and-investment-policy-watch/trumps-fall-2019-china-tariff-plan-five-things-you-need-know***

The schedule for the List 4A exclusion process is as follows:

- USTR will begin accepting exclusion requests for List 4A goods on October 31, 2019 at noon EDT.
- The deadline for submitting exclusion requests is January 31, 2020 at 11:59 PM EST.

- Responses to individual exclusion requests are due 14 days after USTR posts the request on the online portal.
- Any replies to responses to an exclusion request are due the later of 7 days after the close of the 14-day response period, or 7 days after the posting of a response.

Like the Section 301 exclusion process for List 3 goods, the new exclusion process for List 4A will utilize the online portal established by USTR at **http://exclusions.USTR.gov**. The web portal must be used to submit exclusion requests, responses to exclusion requests, and replies to responses.

Exclusion Request Form and Information Requirements

Parties seeking an exclusion will be required to provide information regarding, among other things, the specific product in question, the requester's efforts to source the product from US and third country sources, and the impact of the Section 301 duties on the requester and other US interests. The information required by USTR is largely the same as that required for the List 3 exclusion process, except that, as noted below, USTR will now require requesters to disclose whether the product in question is subject to an antidumping or countervailing duty order issued by the US Department of Commerce.

Product identification

Requests must include:

- The 10-digit HTSUS subheading for the product subject to the exclusion request. If no 10-digit subheading is available (i.e. the 8-digit subheading does not contain breakouts at the 10-digit level), requesters should use the 8-digit subheading and add "00". USTR states that "[d]ifferent models classified under different 8-digit or 10-digit subheadings are considered different products and require separate exclusion requests."
- The product name and a detailed description of the product. A detailed description of the product includes, but is not limited to, its physical characteristics (e.g., dimensions, weight, material composition, etc.) Requesters may submit "a range of comparable goods within the product definition set out in an exclusion request. Thus, a product request may include two or more goods with similar product characteristics or attributes." USTR further states that "[g]oods with different SKUs, model numbers, or sizes are not necessarily different products."
- The product's function, application (whether the product is designed to function in or with a particular machine or other device), principal use, and any unique physical features that distinguish it from other products within the covered 8-digit HTSUS subheading. Requesters may submit attachments that help distinguish the product (e.g., CBP rulings, photos and specification sheets, and previous import documentation). Documents submitted to support a requester's product description must be made available for public inspection and contain no business confidential information (BCI). USTR will not consider requests that identify the product using criteria that cannot be made available for public inspection.
- Whether the product is currently subject to an antidumping or countervailing duty order issued by the US Department of Commerce.

Company-specific information

Requests must include:

- The requester's relationship to the product (Importer, U.S. Producer, Purchaser, Industry Association, Other);
- Specific data on the annual quantity and value of the Chinese-origin product, domestic product, and third-country product that the requester purchased in 2017, 2018, and the first half of 2019.

- The requester's gross revenues for 2018 and the first half of 2019.
- Whether the requester's business meets the size standards for a small business as established by the Small Business Administration.
- For imports sold as final products: the percentage of the requester's total gross 2018 sales for which sales of the Chinese-origin product accounted.
- For imports used in the production of final products: (i) the Chinese-origin input's share (%) of the requester's total cost of producing the final product(s); and (ii) the final product(s)' share (%) of the requester's total gross 2018 sales.

The required information regarding the requester's purchases and gross sales and revenue is BCI, and the information entered will not be publicly available.

Rationale for exclusion

Each requester must address:

- Whether the particular product is available only from China and whether the particular product and/or a comparable product is available from sources in the United States and/or in third countries. The requester's responses will be made public. If the product is not available outside of China or the requester is not sure of the product availability, the requester must provide an explanation for this conclusion and can determine whether this information is BCI or public.
- Whether the requester has attempted to source the product from the United States or third countries. The requester's response will be made public.
- Whether the imposition of additional duties on the particular product will cause severe economic harm to the requester or other US interests. The requester's response will be treated as BCI.
- Whether the particular product is strategically important or related to "Made in China 2025" or other Chinese industrial programs. The requester's response will be made public.

Requesters also must submit information about any exclusion requests they have submitted for products covered by the initial $34 billion tariff action (List 1), the additional $16 billion tariff action (List 2), and the additional $200 billion tariff action (List 3).

Responses to Requests for Exclusions and Replies Thereto

After a request for exclusion of a particular product is posted on USTR's online portal, interested persons will have 14 days to respond to the request, indicating support or opposition and providing reasons for their view. After a response is posted on USTR's online portal, the requester will have the opportunity to reply to the response using the same portal. Any reply must be submitted within the later of 7 days after the close of the 14 day response period, or 7 days after the posting of a response. All responses and replies to responses will be publicly available.

Exclusion Determinations' Retroactivity and Applicability

Exclusions granted for products on List 4A will have a shorter duration than those granted for products on Lists 1-3. The FR notice states that any exclusions granted for List 4A goods "will be effective for one year, starting from the September 1, 2019 effective date of [the List 4A tariffs]," thus establishing a hard deadline of August 31, 2020 for a List 4A exclusion, regardless of when it is requested or approved. By contrast, exclusions granted for List 1 and 2 goods apply retroactively to the effective date of the applicable tariff and extend for one year past the date of

publication of USTR's exclusion determination in the Federal Register. As a result, List 1 and 2 exclusions have had effective periods of substantially longer than one year. USTR initially adopted this same rule for List 3 exclusions, but later amended the process "so as to adopt a uniform expiration date for exclusions granted for the [List 3 tariff action]" whereby "all exclusions from the [List 3 tariff action] will be effective from September 24, 2018, to August 7, 2020." As a result of these changes, the effective periods for Section 301 exclusions vary significantly depending on the list on which the product is included:

- List 1 and 2 exclusions are valid for substantially longer than one year (at least 17 months for List 1 exclusions and at least 23 months for List 2 exclusions);
- All List 3 exclusions will be valid from September 24, 2018, to August 7, 2020 (a period of approximately 22.5 months); and
- All List 4A exclusions will be valid for one year, from September 1, 2019 to August 31, 2020.

USTR's adoption of a hard deadline for List 4A exclusions may alter the strategies of requesters seeking to maximize the benefits of Section 301 exclusions. Under the previous system, requesters had an incentive to delay submission of their exclusion requests, as exclusions granted later in the process are effective for a longer period than those approved early in the process (for example, a List 1 exclusion granted in December 2018 will have an effective period of approximately 18 months, whereas a List 1 exclusion granted in October 2019 will have an effective period of approximately 27 months.) However, under the new system for List 4A, requests granted later in the process will not enjoy any additional benefit.

USTR has not stated whether exclusions granted for List 4A will be party-specific. USTR has made exclusions for Lists 1-3 applicable to all imports of the product at issue regardless of whether the importer filed an exclusion request. However, the List 4A exclusion notice does not specifically address this point.

USTR will evaluate each exclusion request "on a case-by-case basis, taking into account the asserted rationale for the exclusion, whether the exclusion would undermine the objective of the Section 301 investigation, and whether the request defines the product with sufficient precision." USTR will periodically announce decisions on pending requests, but is under no set timeframe to do so.

Outlook

It is likely that USTR will receive a large volume of exclusion requests for products on List 4A, as it has during the exclusion processes for Lists 1-3. Given the high volume of requests expected, the amount of information sought by USTR in connection with exclusion requests, and the significant delays experienced in the prior exclusion processes, it is expected that obtaining a decision on List 4A exclusion requests will be a lengthy process. Given this possibility and the new hard deadline for granted exclusions, interested persons should begin preparing now to submit exclusion requests as soon as possible once the process opens on October 31.

USTR's notice also indicates that the Trump administration does not intend to terminate the List 4A tariffs as part of the "Phase One deal" between the United States and China that President Trump announced on October 11 (*please refer to the W&C US Trade Alert dated October 14, 2019.)* If so, any such deal – and its economic effects – could end up being even more modest than initially reported.

USTR Requests Comments on Possible Extension of "List 1" Exclusions Set to Expire in December 2019

On October 28, 2019, the Office of the US Trade Representative (USTR) announced that it will soon initiate a process for considering whether to extend for up to twelve months certain China tariff exclusions that were granted by

USTR in December 2018 and are set to expire in December 2019.[2] This process will allow interested parties to file comments supporting or opposing the extension of the 31 exclusions, which provided US importers relief from the 25% additional tariff imposed on $34 billion in annual imports from China ("List 1") pursuant to Section 301 of the Trade Act of 1974. The tariff exclusions subject to USTR's new Federal Register notice were the first to be granted by the agency under the Section 301 exclusion process, and therefore are the first that are scheduled to expire. The USTR announcement indicates that subsequent Section 301 tariff exclusions might also be subject to an extension process, and that the United States does not foresee eliminating the List 1 tariffs as part of the "Phase One" deal between the United States and China that President Trump announced earlier this month.

The USTR notice contains the following information about the new extension process:

Key Dates

Beginning on November 1, 2019 at noon EDT, USTR will open a docket (Docket Number USTR-2019-0019) for public comments on the possible extension of particular exclusions granted to List 1 goods. (USTR will not be using the new Section 301 Exclusion Portal that the agency opened for List 3 and List 4A tariff exclusions.) To be assured of consideration, written comments must be submitted by November 30, 2019.

Exclusions Eligible for Extension

USTR is requesting comments regarding the possible extension of particular product exclusions granted in USTR's Federal Register notice of December 28, 2018 (83 FR 67463). On that date, USTR granted exclusions from the List 1 tariff (initially imposed on July 6, 2018) for 31 different products, which are listed in the Annex to the **Federal Register notice**. These were the first product exclusions granted by USTR under the Section 301 exclusion process, and they are currently scheduled to expire on December 28, 2019 (one year after the publication of the notice granting the exclusions). USTR has subsequently issued several additional rounds of product exclusions for List 1 (the next of which are set to expire on March 25, 2020), but USTR at this time "is not considering comments concerning possible extensions of exclusions granted under any other product exclusion notice."

Criteria for Granting Extensions

USTR is inviting public comments on whether to extend particular exclusions granted in the December 2018 notice "for up to twelve months." USTR will evaluate the possible extension of each exclusion "on a case-by-case basis." According to USTR, the focus of the evaluation will be whether, despite the first imposition of the additional duties in July 2018, the particular product remains available only from China. In addressing this factor, USTR states that commenters should address specifically:

- Whether the particular product and/or a comparable product is available from sources in the United States and/or in third countries.
- Any changes in the global supply chain since July 2018 with respect to the particular product, or any other relevant industry developments.
- The efforts, if any, the importers or U.S. purchasers have undertaken since July 2018 to source the product from the United States or third countries.

In addition, USTR will continue to consider "whether the imposition of additional duties on the products covered by the exclusion will result in severe economic harm to the commenter or other U.S. interests."

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[2] USTR's Federal Register notice on the new extension request process is available **here**.

Procedures for Submitting Requests

USTR "strongly encourages" parties submitting comments to do so using Form A, which is attached to the Federal Register notice and requests information regarding (1) the organization submitting comments; (2) the exclusion request and product at issue; (3) whether the products covered by the exclusion "or comparable products" are available from non-Chinese sources; and (4) the commenter's rationale for supporting or opposing the exclusion. USTR will post completed the Form A on the public docket.

In addition, USTR states that "commenters who are importers and/or purchasers of the products covered by the exclusion should complete Form B," which also is attached to the FR notice. Form B requests business confidential information (BCI), and will not be posted on the public docket. Form B requires commenters who are importers and/or purchasers of the products covered by the exclusion to provide the following information:

- Efforts undertaken since July 2018 to source the product from the United States or third countries.
- The value and quantity of the Chinese-origin product covered by the specific exclusion request purchased in 2018, the first half of 2018, and the first half of 2019, and whether these purchases are from a related company, and if so, the name of and relationship to the related company.
- Whether Chinese suppliers have lowered their prices for products covered by the exclusion following the imposition of duties.
- The value and quantity of the product covered by the exclusion purchased from domestic and third country sources in 2018, the first half of 2018 and the first half of 2019.
- If applicable, the commenter's gross revenue for 2018, the first half of 2018, and the first half of 2019.
- Whether the Chinese-origin product of concern is sold as a final product or as an input.
- Whether the imposition of duties on the products covered by the exclusion will result in severe economic harm to the commenter or other U.S. interests.

Given the relatively short timeframe for submitting comments and the volume of information requested by USTR, parties seeking to comment on the extension of exclusions expiring on December 28 should begin preparing to do so as soon as possible.

Outlook

As noted above, the exclusions that are the subject of the new proceeding were the first to be granted by USTR under the Section 301 exclusion process, and they represent only a small share of the exclusions that USTR has granted for List 1. Additional List 1 exclusions were granted and are set to expire on the following dates:

Exclusion Round	Expiration
Exclusions Granted March 25, 2019	March 25, 2020
Exclusions Granted April 18, 2019	April 18, 2020
Exclusions Granted May 14, 2019	May 14, 2020
Exclusions Granted June 4, 2019	June 4, 2020
Exclusions Granted July 9, 2019	July 9, 2020
Exclusions Granted September 20, 2019	September 20, 2020
Exclusions Granted October 2, 2019	October 2, 2020

USTR has not stated whether it will establish similar processes allowing parties to request the extension of the above exclusions (or the exclusions that USTR has granted for Lists 2 and 3) before they expire. However, the new USTR notice indicates that USTR will probably establish similar processes as the other exclusions' expiration dates approach (assuming there is no breakthrough in US-China negotiations that results in the removal of the tariffs). Parties interested in the extension of Section 301 exclusions that are not covered by the new process should therefore monitor future announcements by USTR.

Trade Agreements

Analysis of the US-Japan Trade Agreement

On October 7, 2019, the Office of the US Trade Representative (USTR) published the official text of the US-Japan Trade Agreement (USJTA), which will reduce or eliminate tariffs on bilateral trade in certain agricultural and industrial products. The USJTA consists of the following elements: (1) a core text setting out the scope and operation of the Agreement and the Parties' core commitment to improve market access; (2) Annexes detailing the specific market access commitments to be undertaken by each Party and the rules of origin applicable to goods covered by the Agreement; and (3) six side letters containing additional commitments by the Parties with respect to alcoholic beverages, beef, rice, safeguards, skimmed milk powder, and whey. The text of the USJTA confirms that, as expected, the Agreement covers a relatively small share of bilateral trade between the United States and Japan (*i.e.*, approximately 5% of total US goods imports from Japan, and less than 18% of Japan's total goods imports from the United States). Nevertheless, the Agreement will have important implications for certain industries, and perhaps for future trade negotiations between the United States and Japan. This report provides an overview of the Agreement, its implications, and the procedures that each side must complete before the Agreement may enter into force.

I. Background

In a Joint Statement issued on September 25, President Trump and Prime Minister Abe announced that, after a year of negotiations, the United States and Japan had completed the US-Japan Trade Agreement and the US-Japan Digital Trade Agreement, and are aiming for these agreements to enter into force "in the very near future[.]"[3] In addition, they agreed to initiate a second stage of negotiations after the USJTA enters into force. In particular, they stated that "[w]ith the conclusion of these early achievements, the United States and Japan intend to conclude consultations within 4 months after the date of entry into force of the United States-Japan Trade Agreement and enter into negotiations thereafter in the areas of customs duties and other restrictions on trade, barriers to trade in services and investment, and other issues in order to promote mutually beneficial, fair, and reciprocal trade." Thus, the

[3] An overview of the US-Japan Digital Trade Agreement will be provided in a forthcoming report.

USJTA has been characterized as an "early harvest" agreement that will be followed by a comprehensive FTA between the United States and Japan. The Trump administration's desire to quickly mitigate the competitive disadvantages faced by US agricultural exporters as a result of the US withdrawal from the TPP in 2017 (and the subsequent entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the EU-Japan FTA) was the primary impetus for this two-stage approach to the negotiation.

II. Scope of the Agreement

The Agreement is limited to trade in goods. It heavily emphasizes specific tariff measures (as opposed to non-tariff barriers) and lacks "horizontal" commitments (*i.e.*, obligations that are generally applicable to measures affecting trade in goods between the parties, regardless of the product in question). In particular, the core obligation of the Agreement, set forth in Article 5, is a commitment that each Party "shall improve market access in accordance with Annex I or Annex II," which contain commitments by the Japan and the United States, respectively, to reduce customs duties and modify tariff-rate quotas for specific items. The Agreement does not cover other issues related to trade in goods – such as customs procedures, technical barriers to trade, and sanitary and phytosanitary measures – that are typically addressed in modern FTAs.

III. Market Access Commitments of the United States

The United States' market access commitments, set forth in Annex II to the Agreement, provide for the reduction of customs duties on a list of products of Japan comprising 241 tariff lines at the 8-digit level of the Harmonized Tariff Schedule of the United States (HTSUS). US imports of these products from Japan were valued at approximately $7.1 billion in 2018, and accounted for less than 5 percent of total US imports of goods from Japan that year (valued at approximately $142.4 billion). The United States has committed to fully eliminate tariffs for certain of the covered products immediately upon the entry into force of the Agreement, but the majority of the covered products will be subject to staging (*i.e.*, tariffs will be eliminated incrementally over periods ranging from 2 to 10 years). Moreover, for certain products covered by the Agreement, the United States has committed to reduce the applicable rates of duty by no more than 50 percent of the "base" (*i.e.*, most-favored nation) duty rate. This outcome reflects the constraints set forth in Section 103(A) of the US trade promotion authority statute (TPA), which authorizes the President to enter into agreements regarding tariff barriers and to unilaterally modify US tariff rates in order to implement such agreements, subject to the following limitations (among others):[4]

- The President may not reduce any rate of duty (other than a rate of duty that does not exceed 5 percent) to a rate that is less than 50 percent of the rate that applied on the date of TPA's enactment.
- The President also may not reduce the rate of duty on any "import sensitive agricultural product" below the rate applicable under the Uruguay Round Agreements or a successor agreement.
- Any tariff reductions exceeding the above limitations may take effect "only if a provision authorizing such reduction is included within an implementing bill provided for under section 106 [of TPA] and that bill is enacted into law."

Because the Trump administration entered into the US-Japan Trade Agreement pursuant to Section 103(A) and is seeking to implement the agreement unilaterally (*i.e.*, without submitting implementing legislation to Congress), the Agreement is subject to the aforementioned limitations. Accordingly, the United States has committed in its schedule to (1) fully eliminate duties on 169 products that currently are subject to MFN duties of 5 percent or less; and (2) reduce duties to 50 percent of the MFN rate for 72 products that currently are subject to MFN duties of greater than 5

[4] 19 U.S.C. § 4202(a)

percent. As discussed in the next sections, the vast majority of imports covered by the US schedule to Annex II fall into the former category.

Products subject to full tariff elimination (staging categories A-E)

The United States will immediately eliminate customs duties on 57 of the covered tariff lines on the date that the USJTA enters into force. These products, set forth in staging category A, have an annual import value of approximately $2.4 billion and include, among other things, camera lenses, components of air conditioning machines, tools, and parts of gas turbines. Duties on another $4 billion worth of goods (set forth in staging categories B-C) will be phased out over 2 years, including machining centers for working metal, horizontal lathes, injection-molding machines, certain chemical products, and certain types of pneumatic tires. A smaller group of products valued at approximately $18 million will be subject to 5- or 10-year phase-outs, including soy sauce and chewing gum.

Trade Value of Imports from Japan Subject to Full Tariff Elimination Under USJTA Annex II		
Staging Category	**Tariff Elimination Schedule**	**2018 Import Value (USD Actual)**
A	Duty-free upon entry into force	$ 2,415,719,246
B	Duties to be reduced by three percentage points upon entry into force; duty-free in Year 2	$ 4,050,685,862
C	Duties to be eliminated in two equal annual stages, duty-free in Year 2	$ 1,514,433
D	Duties to be eliminated in five equal annual stages, duty-free in Year 5	$ 17,622,857
E	Duties to be eliminated in ten equal annual stages, duty-free in Year 10	$ 638,990
Total		**$ 6,486,181,388**

Products subject to partial tariff reduction (staging categories F-K)

The United States will immediately reduce customs duties on 22 products (staging category F) to 50 percent of their base rates on the date that the Agreement enters into force. These products have an annual import value of approximately $238 million and include certain metal-cutting tools, articles of iron or steel (*e.g.,* washers and flanges), and musical instruments. Duties on another $306 million worth of goods (staging categories G and I) will be reduced by 50% over two years, including certain herbicides and other chemicals, parts and accessories for bicycles, and self-tapping screws. For a smaller subset of products valued at approximately $64 million (staging categories H, J, and K), duties will be reduced to 50 percent of their current rates over periods ranging from 3-5 years. Such products include telescopic sights for rifles and certain food products (green tea, yams, and sugar confections).

Trade Value of Imports from Japan Subject to Partial Tariff Elimination Under USJTA Annex II		
Staging Category	**Tariff Reduction Schedule**	**2018 Import Value (USD Actual)**
F	Duties to be reduced to 50% of base rate upon entry into force	$ 238,130,270
G	Duties to be reduced by three percentage points upon entry into force; reduced to 50% of base rate in Year 2	$ 304,052,232

H	Duties to be reduced by three percentage points upon entry into force, three percentage points in Year 2, and reduced to 50% of base rate in Year 3	$ 43,347,077
I	Duties to be reduced to 50% of base rate in two equal annual stages	$ 2,279,707
J	Duties to be reduced to 50% of base rate in three equal annual stages	$ 9,122,102
K	Duties to be reduced to 50% of base rate in five equal annual stages	$ 11,327,928
Total		**$ 608,259,316**

Notably, the United States has not committed in the USJTA to reduce tariffs on automobiles and automotive parts, which are among Japan's top exports to the United States. However, the two sides have agreed that, after the USJTA enters into force, they will enter into consultations and subsequently initiate negotiations for a comprehensive FTA that will reduce customs duties on a wider range of products than those covered by the USJTA.[5] Annex II contains a reference to these future negotiations, stating that "[c]ustoms duties on automobile and auto parts will be subject to further negotiations with respect to the elimination of customs duties." However, the timing and outcome of any such negotiations are uncertain.

Rules of Origin

The US tariff concessions described above will apply only to goods that qualify as "originating" under the applicable rules of origin set forth in Annex II. These general and product-specific rules of origin may be summarized as follows:

- **General rules of origin.** A good will qualify as originating, and will therefore be eligible for preferential tariff treatment, if it is:[6]

  (a) wholly obtained or produced entirely in one or both of the Parties;

  (b) produced entirely in one or both of the Parties, exclusively from originating materials; or

  (c) produced entirely in one or both of the Parties, using non-originating materials provided such materials satisfy the applicable change in tariff classification requirement under the Product-Specific Rules of Origin set forth in Annex II and described below.

  In addition, paragraph 4(a) of Annex II provides that a good that contains non-originating materials that do not satisfy the applicable product-specific rule of origin is nonetheless an originating good of Japan if the value of all such materials does not exceed 10 percent of the value of the good and the good meets all the other applicable requirements of the USJTA rules of origin and origin procedures.

- **Product-specific rules of origin.** Annex II sets forth a product-specific rule of origin for each of the 241 tariff lines on which the United States has committed to reduce duties. Each product-specific rule of origin is based on a **tariff-shift methodology**, whereby non-originating materials used in the production of a good become originating when they undergo the change in tariff classification specified in the rule. Depending on the product

[5] *See* Joint Statement of the United States and Japan (September 25, 2019), available at **https://www.whitehouse.gov/briefings-statements/joint-statement-united-states-japan-2/**.

[6] In addition to satisfying one of these criteria, the good must satisfy all other applicable requirements of the Rules of Origin and Origin Procedures set forth in Annex II.

at issue, the rules require a change in tariff classification at either the 2-, 4-, or 6-digit level for a good to qualify as originating (sometimes in combination with additional criteria).

Many of the product-specific rules set forth in Annex II are similar to those agreed by the United States and Japan in the Trans-Pacific Partnership (TPP), though this is not the case for all products. Among other differences, the USJTA's product specific rules of origin do not permit any good to qualify as originating on the basis of regional value content (RVC), whereas the TPP would have permitted certain goods to qualify as originating by satisfying RVC thresholds as an alternative to the tariff-shift requirement. An example of this difference is provided below: a color television reception apparatus with a flat panel screen classified under HTSUS number 85287272 could qualify as originating under the TPP by undergoing a tariff shift at the four-digit level or by satisfying RVC requirements ranging from 30-50 percent, whereas the same product can qualify under the USJTA only by undergoing a tariff shift at the 6-digit level. Thus, the USJTA rules of origin are not equivalent in all cases to those agreed by the United States and Japan in TPP.

Sample Comparison of USJTA and TPP Rule of Origin	
USJTA Rule of Origin	**TPP Rule of Origin**
85287272: A change in tariff classification at the 6-digit level	**85.28:** A change to a good of heading 85.28 from any other heading; or No change in tariff classification required for a good of heading 85.28, provided there is a regional value content of not less than: (a) 30 per cent under the build-up method; or (b) 40 per cent under the build-down method; or (c) 50 per cent under the focused value method taking into account only the non-originating materials of heading 85.28.

IV. Market Access Commitments of Japan

Annex I to the Agreement sets forth Japan's concessions to the United States with respect to market access for agriculture-related products. Annex I consists of three sections: Section A sets forth general provisions while Sections B and C provide for Japan's tariff commitments and rules of origin, respectively. Section B is the core of Annex I and is further divided into five subsections, which are (1) general notes, (2) tariff elimination or reduction, (3) tariff rate quotas (TRQs), (4) agricultural safeguard measures, and (5) Japan's schedule of concessions. The rules of origin provided under Section C are generally equivalent with the rules of origin in the CPTPP with respect to products covered in Annex I. In addition, the United States and Japan exchanged several side letters pertinent to the Agreement (*i.e.*, side letters concerning alcoholic beverages, beef, rice, safeguards, skimmed milk powder, and whey). In the following sections, we review the main elements of Section B, the core of Japan's concessions in the Agreement, with references to the side letters.

Tariff reduction and elimination

As noted in our Trade Alert of September 27, 2019, Japan under the Agreement has committed to eliminate or reduce tariffs on a group of US food and agricultural exports valued at approximately $7.2 billion annually, according to the fact sheet released by USTR. USTR also stated that "the tariff treatment for the products covered in this agreement will match the tariffs that Japan provides preferentially to countries in the CP-TPP agreement." The legal

text of the USJTA confirms that the levels of tariff reduction and elimination provided for the products covered under both the CPTPP and the USJTA are generally the same. Although the USJTA will likely enter into force about one year after CPTPP went into effect, the tariff levels that US exporters will face under the USJTA will match those faced by exporters from the CPTPP parties (*i.e.*, the tariff levels provided for in Year 2 of the USJTA will match those provided for in Year 3 of CPTPP, and so on for the following years). However, the CPTPP covers a wider range of agricultural products than the USJTA. For example, while all poultry meat, eggs, and egg products are covered under CPTPP, fresh or chilled poultry meat and eggs in shells are not covered under the USJTA (though Japan's imports of such products have been minimal). Other products for which Japan agreed to reduce or eliminate tariffs under CPTPP but not under the USJTA include fishery and forestry products.

TRQs

Japan has agreed to establish country-specific TRQs (CSQs) for nine categories of products under the Agreement. These products are (1) mixes and doughs and cake mixes, (2) wheat, (3) non-roasted malt, (4) roasted malt, (5) processed cheese, (6) whey, (7) glucose and fructose, (8) corn and potato starch, and (9) inulin. CSQs of the same levels are provided under the CPTPP, but that agreement provided a CSQ for one additional product – rice – that is not covered under the USJTA. Rice is one of the most sensitive agricultural commodities in trade negotiations for Japan. Japan agreed to establish a new duty-free CSQ for 70,000 MT of US rice under CPTPP, but it did not create such a CSQ under the USJTA. The side letter concerning rice confirms only that Japan will continue its transparency-related practice (*i.e.*, publication of certain information relating to its rice purchases through government tenders), and thus does not appear to provide for improved market access. Furthermore, while CPTPP sets forth CPTPP-wide TRQs for 33 categories of products, *e.g.*, butter, condensed milk, barley, and sugar, Japan did not create new CSQs for the United States for these products under the Agreement, thus denying US producers similar benefits.

Japan has also agreed to reduce "mark-ups" with respect to wheat, at the same level as that provided by CPTPP. The vast majority of wheat imported into Japan is purchased by the Ministry of Agriculture, Forestry and Fisheries (MAFF) through tenders. Under this scheme, MAFF imports wheat duty-free and sells wheat to flour millers at the import price plus a margin – or, mark-up – some of which is used for promotion of domestic wheat production. This margin in effect raises the price of imported wheat in the Japanese market, and the mark-up reduction is expected to lead to better market access for foreign producers. Securing this commitment in the USJTA appears to have been a US priority, considering that competing exporters of wheat products to Japan, in particular in Canada and Australia, have been enjoying such improved market access since CPTPP went into effect. Japan also reduced mark-ups for barley under the USJTA.

Agricultural safeguard measures

Like the CPTPP, the USJTA will permit Japan to impose agricultural safeguard measures in the form of increased tariffs if imports of particular products covered by the Agreement exceed specified thresholds. While most provisions concerning agricultural safeguard measures are identical between CPTPP and the USJTA, the trigger levels set forth under the two agreements are different in that, for certain products, CPTPP concerns the aggregate volume of imports from all CPTPP parties whereas the USJTA focuses on US-specific import volumes. The USJTA agricultural safeguard measure for beef, for example, would be triggered if import volumes from the United States exceed 242,000 MT for Year 2 (April 1, 2020 to March 31, 2021) whereas the trigger level for beef under CPTPP is 613,600 MT based on the aggregate volume of imports from all CPTPP parties for the same period. However, the USJTA and one of its side letters provide for certain consultation requirements, according to which the trigger levels may be modified to include import volumes from CPTPP parties after a certain number of years. In the case of beef, the two countries would have a consultation by the end of the first half of Year 4 for the modification of the trigger level for

Year 5 and thereafter. The side letter also provides that the two countries will enter into consultations to adjust the trigger levels when an agricultural safeguard measure is imposed.

Regarding the form of an agricultural safeguard measure, Japan may increase its tariff rate to a level not to exceed the lesser of (a) the MFN rate in effect at the time the agricultural safeguard measure is applied; (b) the MFN rate in effect on the day immediately preceding the date of entry into force of the USJTA; and (c) the specific rate set out in the USJTA.

Overview of Japan's market access concessions

The following table summarizes Japan's market access concessions for major agricultural products, and compares those concessions to the commitments undertaken by Japan under the CPTPP.

Comparison of Japan's Agricultural Market Access Concessions Under USJTA and CPTPP	
Wheat	**TRQ**: CPTPP-equivalent level (US-CSQ 120,000MT in Year 1 ⇒ 150,000MT in Year 8) **Mark-up reduction**: CPTPP-equivalent level (45-50% reduction depending on the wheat variety by Year 8).
Beef	**Tariff reduction**: CPTPP-equivalent level (Base rate 38.5% ⇒ 26.6% in Year 1 ⇒ 9% in Year 15) **Safeguard**: Generally equivalent to CPTPP except for the trigger level. While CPTPP provides for a trigger level based on CPTPP-wide aggregate volumes of imports, the trigger level set forth under the Agreement is specific to the volume of imports from the United States. However, a clause in Annex I and the side letter concerning agricultural safeguard measures provide that the trigger level may be combined with the aggregate volume of imports from CPTPP parties subject to consultations between Japan and the United States under certain conditions.
Pork	**Tariff reduction**: CPTPP-equivalent level (maintaining the gate price mechanism for certain fresh and frozen pork meat, with the reduction of the maximum gate price to 50 yen per kg by Year 9) **Safeguard**: For Year 1 to Year 3, the trigger level is specific to the volume of imports from the United States, which is generally equivalent to the trigger level with regard to an individual party under CPTPP. For Year 4 and thereafter, for certain pork meats that are below threshold price levels, Japan may impose safeguard measures based on aggregate import volumes of the United States and CPTPP parties combined. The trigger level in this respect is no different between CPTPP and the USJTA.
Dairy Products	**TRQ**: With respect to certain dairy products for which Japan had created a CPTPP-wide TRQ under CPTPP (*e.g.*, butter and condensed milk), Japan did not establish a new TRQ for the United States under the USJTA.
Fresh Oranges	**Tariff reduction**: CPTPP-equivalent level (tariff elimination by Year 5 or Year 7, depending on the importing period of the year – *e.g.*, tariffs for oranges imported between April 1 and May 31 will be reduced from the base rate of 32% to 0% by Year 5)

	Safeguard: More preferable than CPTPP. CPTPP provides for a trigger level based on the aggregate volume of imports from all CPTPP parties whereas the trigger level under the Agreement is specific to import volumes from the United States. Despite this difference and Australia being a large orange exporter to Japan, the trigger level under the USJTA is almost the same as that of CPTPP (*e.g.*, aggregate import volumes of 39,000 MT for Year 3 under CPTPP versus US-specific import volumes of 37,050 for Year 2 under the Agreement.)
Soybean meal and soybean oil	**Tariff reduction**: CPTPP-equivalent level (Base rate 4.2% ⇒ immediate elimination for soybean meal; Base rate 10.90 or 13.20 yen per kg ⇒ tariff elimination by Year 5 for soybean oil)
Rice	**Coverage**: No additional market access concession was made with respect to rice under the USJTA, whereas Japan had agreed to establish a duty-free CSQ for US rice (50,000MT in Year 1 ⇒ 70,000 MT in Year 13) under CPTPP. The side letter concerning rice only confirms that Japan will continue its transparency-related practice with respect to its rice procurement through government tenders.
Fishery / Forestry products	**Coverage**: No coverage under the USJTA; whereas Japan has committed to eliminate tariffs on such products for CPTPP parties.

As noted above, Japan and the United States have agreed to hold a second stage of negotiations for a comprehensive free trade agreement after the USJTA enters into force. Annex I to the Agreement contains a reference to these future negotiations, stating that "[i]n future negotiations, the United States will be seeking preferential treatment with respect to agricultural goods." Rice, which is not covered under the USJTA, may be a focus of the United States in any subsequent negotiations with Japan concerning agricultural market access, though other areas (*e.g.*, services, non-tariff barriers, and non-agricultural market access) are likely to be higher priorities for the United States.

V. Dispute Settlement

Notably, the USJTA contains no formal dispute settlement mechanism. Article 6 of the Agreement establishes a consultation mechanism whereby "[n]o later than 30 days after a request by either Party, the Parties shall enter into consultations regarding any matter that might affect the operation or interpretation of this Agreement, with a view to arriving at a mutually satisfactory resolution of the matter within 60 days." However, the Agreement provides no additional means for resolving a dispute if the Parties fail to arrive at a solution through consultations. This is a significant departure from the approach taken in most modern FTAs, which have provided for the establishment of independent dispute settlement panels where a Party alleges that another Party has acted inconsistently with its obligations under the agreement.

The United States and Japan may have agreed to forego a formal dispute settlement mechanism in the USJTA on the view that the commitments set forth in the Agreement are relatively straightforward (*e.g.*, obligations to reduce tariffs to specified levels and establish TRQs) and thus are unlikely to give rise to disputes regarding their interpretation. However, in the event that disputes do arise under the USJTA, the complaining Party will have limited options for addressing an alleged violation, aside from seeking to resolve the issue through bilateral negotiations, derogating from some of its own USJTA commitments as "retaliation," or terminating the Agreement entirely pursuant to Article 10 (which permits either Party to terminate the Agreement after providing the other Party four months' notice). This outcome may have been desired by the current US administration, given its skepticism of binding,

independent dispute settlement and its preference for bilateral negotiations and unilateral action as a means of resolving trade disputes.

VI. Other Provisions

The Agreement incorporates several exceptions and additional provisions that are standard in US FTAs. These include the following:

- A security exception, set forth in Article 5, provides that nothing in the USJTA "shall be construed to …preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests." This language mirrors that of the security exception set forth in the TPP, and in other recent US trade agreements such as the US-Mexico-Canada Agreement (USMCA). However, it is broader than the security exception set forth in GATT Article XXI, which permits a member to take any action which it considers necessary for the protection of its essential security interests (i) relating to nuclear material; (ii) relating to traffic in arms, ammunition and implements of war; or (iii) "taken in time of war or other emergency in international relations[.]" By contrast, the USJTA security exception contains no such conditions.
- A general exception, set forth in Article 3, incorporates by direct reference the general exceptions set forth in Article XX of the GATT 1994.
- Article 8 provides that the Parties may agree in writing to amend the Agreement and that such amendments shall enter into force 30 days after the date on which the Parties have notified each other in writing of the approval of the amendment in accordance with their respective applicable legal procedures, or on such other date as the Parties may decide.

As expected, the Agreement does not contain any commitment by the United States to refrain from imposing tariffs on Japanese automotive goods under Section 232 of the Trade Expansion Act. The Agreement also does not address the existing Section 232 measures on steel and aluminum imports from Japan. In the joint statement accompanying the USJTA and the US-Japan Digital Trade Agreement, the two countries agreed that "[w]hile faithfully implementing these agreements, both nations will refrain from taking measures against the spirit of these agreements and this Joint Statement. In addition, both nations will make efforts for an early solution to other tariff-related issues." This language could be interpreted as an implicit commitment by the United States to refrain from imposing Section 232 measures on Japanese automotive goods and to discuss the possible removal of the steel and aluminum measures as part of the second stage of negotiations between the two countries. Nevertheless, given the lack of express commitments in the USJTA regarding Section 232 measures, these statements on their own have provided little certainty to the business community that such measures will be avoided in the case of automotive goods, or rolled back for steel and aluminum.

VII. Next Steps and Implications

The USJTA could enter into force as soon as January 1, 2020, given that Japan is expected to ratify the Agreement by mid-December and the Trump administration intends to implement the Agreement unilaterally rather than seeking congressional approval. Prime Minister Abe's Cabinet is seeking to secure parliamentary approval of the USJTA before the current extraordinary session of the Diet ends on December 9, and although some Japanese lawmakers

have raised questions about the value of the Agreement – particularly given its lack of coverage for Japanese automotive exports – it is expected that the Diet will approve the Agreement this year. Once Japan has ratified the USJTA, the Trump administration may be able issue a Proclamation implementing the agreed tariff reductions (and promulgate any necessary implementing regulations) relatively quickly, allowing the Agreement to enter into force by January 1 or shortly thereafter.

Once implemented, the Agreement will provide benefits for some industries in the United States and Japan. For example, the Agreement will mitigate significantly the competitive disadvantages in the Japanese market that many US agricultural exporters would have faced as a result of the United States' withdrawal from the TPP and the recent entry into force of the CPTPP and the EU-Japan FTA. Nevertheless, the Agreement's overall impact on bilateral trade is likely to be small, especially when compared to the bilateral market access commitments negotiated by the United States and Japan in the TPP. Whereas the TPP would have eliminated tariffs on the vast majority of US-Japan trade in goods, which totaled $217.6 billion in 2018, the USJTA tariff commitments cover just a small fraction of this amount *(i.e.*, approximately $14.3 billion in bilateral trade.)[7] Thus, the vast majority of US-Japan trade in goods will remain subject to MFN duty rates for the foreseeable future, leaving most industries unaffected by the USJTA. Moreover, the TPP included similar levels of liberalization for other countries, such as Vietnam, New Zealand and Malaysia, while the USJTA is of course limited to Japan.

Despite its narrow scope, the USJTA may still have important implications for the US-Japan trading relationship. In particular, the USJTA might make it more challenging to secure US political support for the negotiation and approval of a more comprehensive US-Japan FTA, or for potential US re-entry into the CPTPP. Indeed, there has been a longstanding consensus in the United States in favor of comprehensive FTAs that are negotiated as a "single undertaking", in part because securing the necessary political support for US trade agreements is more easily achievable in the context of a broad agenda offering trade-offs and benefits to the widest possible range of stakeholders. The US agriculture sector has been among the most vocal advocates of such agreements, including the TPP, and thus has been instrumental in securing congressional support for their negotiation and approval. Given that the US agriculture sector already has secured significant access to the Japanese market under the USJTA, generating sufficient political will to complete a comprehensive FTA with Japan might now be more difficult. For this reason, many in the US business community expressed concern about the Trump administration's "staged" approach to the negotiation with Japan.

It also remains to be seen whether WTO Members will question the USJTA's consistency with WTO rules. GATT Article XXIV requires that regional trade agreements eliminate duties and other restrictive regulations of commerce on "substantially all the trade" among the constituent members. Given that the legal text of the USJTA confirms its relatively narrow scope, some WTO Members could question whether the Agreement meets the "substantially all the trade" requirement. While the Agreement could nonetheless be justified under WTO rules as an "interim agreement" that will lead to the formation of a free-trade area, the United States and Japan would need to include "a plan and schedule for the formation of [a customs union or free-trade area] within a reasonable length of time." This requirement has not yet been interpreted by WTO panels or the Appellate Body, but Members might argue that the United States and Japan will need to provide a more detailed "plan and schedule" than the four-month consultation period and reference to future negotiations provided in their joint statement. The USJTA could therefore become a source of friction between the US, Japan, and other WTO Members in the future.

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[7] The TPP when fully implemented would have eliminated tariffs on 99.8% of US tariff lines applied to Japan and 94.7% of Japan's tariff lines applied to the United States. See *Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors*, US International Trade Commission (May 2016) at p. 52, available at **https://www.usitc.gov/publications/332/pub4607.pdf**.

GSP

President Trump Partially Suspends GSP Benefits for Thailand and Restores GSP Benefits for Ukraine

On October 25, 2019, President Trump issued a Proclamation suspending tariff preferences for approximately $1.3 billion in annual imports from Thailand under the Generalized System of Preferences (GSP) program.[8] In addition, the Proclamation restores GSP benefits for certain products of Ukraine that lost such benefits in 2018. The Office of the US Trade Representative (USTR) announced concurrently that it is opening new GSP eligibility reviews for South Africa and Azerbaijan, and is closing GSP eligibility reviews with no loss of GSP eligibility for Bolivia, Iraq, and Uzbekistan.[9] We provide an overview of these developments below.

Partial Suspension of GSP Benefits for Thailand

President Trump has determined to suspend GSP treatment for approximately $1.3 billion in annual imports from Thailand, effective April 25, 2020. The list of products of Thailand that will lose GSP eligibility as of that date is available **here**. The list includes seafood as well as certain chemicals, plastics, wood products, apparel, jewelry, articles of iron or steel, and washing machines, among other items. These products account for approximately one-third of total US imports from Thailand under the GSP program, which totaled $4.4 billion in 2018.

President Trump's October 25 Proclamation provides for the partial suspension of Thailand's GSP benefits based on his determination that "Thailand is not taking steps to afford to workers in Thailand internationally recognized worker rights."[10] According to USTR, the President made this determination in response to a 2015 petition filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), which alleged that Thailand has not taken steps to afford internationally-recognized worker rights to workers in its territory. USTR has indicated that a separate review of Thailand's compliance with the GSP eligibility criterion regarding market access will remain open.

The Trump administration's decision to partially suspend GSP benefits for Thailand – the program's second-largest beneficiary by 2018 import volume – follows its decisions earlier this year to fully terminate GSP benefits for India and Turkey, which were the program's largest and fifth-largest beneficiaries, respectively, at that time (*please refer to the W&C US Trade Alert dated June 3, 2019*.) Moreover, USTR has now initiated a GSP eligibility review of South Africa, which in 2018 was the seventh-largest GSP beneficiary by import volume. Taken together, these developments indicate that trade preferences, and particularly those afforded to larger developing countries, are coming under increased scrutiny under the current US administration.

Partial Restoration of GSP Benefits for Ukraine

President Trump has determined to restore GSP benefits for approximately $12 million in annual imports from Ukraine, effective October 30, 2019. The list of products of Ukraine that will regain GSP eligibility is available **here**. The list includes certain food products, machine tools, clothing, and industrial machinery, among other items. President Trump in December 2017 determined to suspend GSP benefits for these products, and an additional $24 million in annual imports from Ukraine, based on a determination that Ukraine was failing to provide adequate and effective protection of intellectual property rights. USTR has indicated that the Trump administration is restoring GSP benefits for approximately one-third of the $36 million in annual imports subject to the suspension because legislation

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[8] President Trump's Proclamation of October 25 is available **here**.

[9] USTR's statement is available **here**.

[10] The GSP statute at 19 U.S.C. 2462(c)(7) provides that, in determining whether to designate any country as a beneficiary developing country under the GSP, the President shall take into account whether or not such country has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized worker rights.

enacted by Ukraine in 2018 "provides a framework to address concerns covered by the GSP review," which addressed Ukrainian measures related to the collection and distribution of royalties to rights holders.

New GSP Eligibility Reviews

As noted above, USTR announced on October 25 that it will initiate a new country practice review of South Africa based on a petition from the International Intellectual Property Alliance (IIPA). According to USTR, the IIPA petition identifies concerns regarding South Africa's compliance with the GSP eligibility criterion on intellectual property rights protection, in the area of copyright protection and enforcement.

In addition, USTR announced that it is self-initiating a country practice review of Azerbaijan based on concerns about that country's compliance with the GSP worker rights criterion. This self-initiated review stems from USTR's new triennial process for assessing whether beneficiary developing countries are complying with the statutory eligibility criteria for the GSP program (*please refer to the W&C US Trade Alert dated October 26, 2017*.) This year's assessment period covered GSP beneficiary countries in the Western Hemisphere and Europe.

USTR has indicated that it will announce the dates for a public hearing and comment period for the new and existing GSP country eligibility reviews in an upcoming Federal Register notice.

Closed GSP Eligibility Reviews

USTR also announced that it is closing the following GSP reviews without any loss of GSP benefits for the covered countries:

- **Bolivia.** USTR is closing the GSP eligibility review of Bolivia, which addressed labor issues, "following Bolivia's passage of legislation raising the minimum age of work to 14[.]" The Trump Administration self-initiated this review of Bolivia in 2017.
- **Iraq.** USTR is closing a GSP eligibility review of Iraq opened in 2012, which also addressed labor issues, following Iraq's passage of legislation "that expands collective bargaining rights, further limits child labor, provides improved protections against discrimination and sexual harassment at work, and dramatically expands coverage of labor protections to more workers."
- **Uzbekistan.** USTR is closing the GSP eligibility review of Uzbekistan opened in 1999, which addressed intellectual property rights, following Uzbekistan's accession to the Geneva Phonograms Convention, the World Intellectual Property Organization (WIPO) Copyright Treaty, and the WIPO Performances and Phonograms Treaty. USTR has indicated that a separate review of Uzbekistan's compliance with the GSP eligibility criteria on worker rights will remain open.

CFIUS

Proposed FIRRMA Regulations Define CFIUS's Expanded Jurisdiction and Mandatory Filing Requirements

On September 17, the US Department of the Treasury issued comprehensive proposed regulations to implement the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). This report describes key aspects of the proposed regulations. Overall, the proposed regulations reflect a concerted effort by the Committee on Foreign Investment in the United States (CFIUS) to limit the expansion of its jurisdiction and mandatory filing requirements only to those transactions most likely to raise national security concerns. Importantly, under the proposed regulations CFIUS review would remain mostly a voluntary process. However, despite authorization in FIRRMA, the proposed regulations appear to exempt few foreign investors from the expanded jurisdiction, and would not exercise CFIUS's discretion to waive mandatory filing requirements for certain investors with substantial foreign government ownership. Public comments on the proposed regulations must be submitted by October 17. Final regulations will go into effect by February 2020.

As we previously reported in 2018, FIRRMA provided the general contours for CFIUS reform – including expanded jurisdiction over certain non-controlling investments and real estate transactions; limitation of such expanded jurisdiction to certain categories of foreign investors; and mandatory filing requirements for certain transactions involving foreign government interest or critical technologies – but largely deferred to CFIUS itself to define the precise extent of such reforms.

The proposed regulations were issued in two parts (investment-related regulations found here and real estate-specific regulations found here) and provide this definition, often in the form of highly specific bright-line criteria. These bright lines reflect efforts by CFIUS to limit the expansion of its jurisdiction and mandatory filing requirements only to those transactions most likely to raise national security concerns. But they also reflect reluctance to create exemptions that might enable potentially higher-threat investors to avoid CFIUS's jurisdiction. While these bright lines may provide clarity, they would also, in many instances, require a highly detailed assessment of the target to determine whether a transaction falls within CFIUS's jurisdiction and whether a mandatory filing is required. Parties to transactions that potentially fall within CFIUS's jurisdiction – especially foreign investors with substantial government ownership and therefore could be subject to mandatory filing requirements – will need to allot adequate time and resources for this detailed assessment in their deal timelines.

Expanded Jurisdiction

Prior to FIRRMA, CFIUS's jurisdiction was limited to transactions that could result in foreign control of any US business. As a result, the jurisdictional analysis was largely legal in nature: did the investor's ownership structure make it a "foreign person"; could the investor's governance rights result in "control"; and did the target company or assets constitute a "US business"? There was little, if any, need to consider the *substantive* national security vulnerabilities of the target to complete the *jurisdictional* analysis.

FIRRMA retains CFIUS's jurisdiction over such transactions (referred to as "covered control transactions" in the proposed regulations) but gives CFIUS two new bases for jurisdiction: (1) certain non-controlling investments in certain US businesses involved with critical technology, critical infrastructure, or sensitive personal data (referred to in the proposed regulations as "TID US businesses" for **t**echnology, **i**nfrastructure, and **d**ata), and (2) certain real estate transactions. The proposed regulations provide detailed criteria of a US business's operations or the real estate assets, as applicable, that would cause a transaction to fall within these new bases for jurisdiction. As a result, under the proposed framework, once the final FIRRMA regulations go into effect, the *jurisdictional* analysis for non-controlling transactions will require a *substantive* assessment of the target business against these detailed criteria.

Historically, the substantive assessment would typically be considered in assessing whether to file and potential risks relating to such a decision where jurisdiction was clear or presumed.

The criteria for subjecting transactions to CFIUS's expanded jurisdiction reflect the types of US businesses or real estate assets that have presented heightened national security vulnerabilities in CFIUS's caseload over the past years as well as the US government's growing concern with maintaining the integrity and reliability of the defense industrial base. We summarize these criteria below.

Covered Investments

CFIUS's jurisdiction to review certain non-controlling, yet non-passive investments (called "covered investments" in the proposed regulations) is based on both the nature of the investment, and the nature of the target US business. FIRRMA supplied the first half of the test: the nature of the investment must afford a foreign person (other than a foreign person that meets a detailed list of criteria, referred to as an "excepted investor") one or more of the following:

a) access to any material non-public technical information in the possession of the TID US business;

b) membership or observer rights on the board of directors (or equivalent) of the TID US business or the right to nominate an individual to a position thereto; or

c) any involvement, other than through voting of shares, in substantive decisionmaking of the TID US business regarding critical technology, critical infrastructure, or sensitive personal data.

The proposed regulations now supply the second half of the test by defining with more particularity what is required to be a "TID US business." The three categories of TID US businesses are as follows:

1. *Critical Technology*

The proposed regulations maintain without change or additions the definition of "critical technology" in FIRRMA, which includes: defense articles and defense services included on the United States Munitions List; certain items included on the Commerce Control List; certain nuclear-related facilities, equipment, parts and components, materials, software, and technology; select agents and toxins; and a new category of "emerging and foundational technologies" that will be controlled for export pursuant to section 1758 of the Export Control Reform Act of 2018 (ECRA). As of the date of this report, no "emerging or foundational technologies" have been controlled under ECRA. A US business that produces, designs, tests, manufactures, fabricates, or develops one or more "critical technologies" would be considered a "TID US business."

2. *Critical Infrastructure*

FIRRMA instructs CFIUS to limit its jurisdiction over covered investments in "critical infrastructure" to a *subset* of critical infrastructure (referred to in the proposed regulations as "covered investment critical infrastructure") that is likely to be of particular importance to US national security. The proposed regulations define this subset with precise bright lines – but with many such lines – in a detailed appendix that identifies 28 *types* of infrastructure. These include:

- **telecoms**: certain internet protocol networks, telecommunications and information services, internet exchange points, submarine cable systems and related facilities (including certain data centers);
- **power**: certain systems for the generation, transmission, distribution, or storage of electric energy comprising the bulk-power system, industrial control systems utilized therefor, and certain electric storage resources physically connected to the bulk-power system;

- **oil and gas**: certain refineries, crude oil storage facilities, liquid natural gas (LNG) import or export terminals, natural gas underground storage facilities or LNG peak-shaving facilities, interstate oil and natural gas pipelines, and industrial control systems therefor;
- **water**: certain public water systems and treatment works, and industrial control systems therefor;
- **finance**: certain systemically important financial market utilities, securities and options exchanges, and core processing services providers; and
- **defense industrial base**: fiber optic cables that directly serve certain military installations; facilities that provide electric power generation, transmission, distribution, or storage directly to or located on certain military installations and industrial control systems therefor; public water systems or treatment works directly serving certain military installations and industrial control systems therefor; interstate oil pipelines that directly serve the strategic petroleum reserve; rail lines and associated connector lines designated as part of the Department of Defense's (DOD) Strategic Rail Corridor Network; satellites or satellite systems providing services directly to DOD and its components; facilities in the United States that manufacture certain specialty metals, covered materials, chemical weapons antidotes, and carbon, alloy, and armor steel plate; and – other than commercially available off-the-shelf items – certain industrial resources manufactured or operated for a Major Defense Acquisition Program, Major System, or "DX" priority-rated contract or order, or funded by the Title III program, Industrial Base Fund, Rapid Innovation Fund, Manufacturing Technology Program, Defense Logistics Agency (DLA) Warstopper Program, or a DLA Surge and Sustainment contract.

The appendix also assigns one or more of five specified functions (own, operate, supply, service, or manufacture) to each of the 28 types of infrastructure. A US business that performs at least one of the *functions* assigned to the corresponding *type* of covered investment critical infrastructure would be a "TID US business."

3. *Sensitive Personal Data*

FIRRMA contains no definitions or delineating principles with respect to "sensitive personal data," other than that it refers to data that may be exploited in a manner that threatens national security.

To address this, the proposed regulations create two classes of sensitive personal data. First, any amount of "genetic information" as defined pursuant to 45 C.F.R. § 160.103 – regardless of the amount of such data, or the population on whom it is collected – would constitute "sensitive personal data." This includes, among others, information from genetic tests, information about the manifestation of disease or disorders, and requests for genetic services.

Second, sensitive personal data includes "identifiable data," which is defined as data that can be used to distinguish or trace an individual's identity – but only if the following *category* and *collection* requirements are satisfied:

- Categories: the identifiable data falls within one of 10 identified categories: (a) data that could be used to determine an individual's financial distress or hardship; (b) data in a consumer report (with certain exceptions); (c) data included in health or other types of insurance applications; (d) data relating to the physical, mental, or psychological health of an individual; (e) non-public electronic communications (email, text, chat, etc.) between users of the US business's products or services if facilitating third-party user communications is a primary purpose of such products or services; (f) geolocation data; (g) biometric enrollment data; (h) data used to generate a state or federal government ID card; (i) data

concerning US government personnel security clearance status, or (h) data contained in the application for a personnel security clearance or for employment in a position of public trust.

- Collection: the US business that maintains or collects the identifiable data (a) targets or tailors products or services to US executive branch agencies or military departments with intelligence, national security, or homeland security responsibilities, or to personnel and contractors thereof; (b) had such data on greater than one million individuals at any point over the preceding 12 months; or (c) has a demonstrated business objective to maintain or collect such data on greater than one million individuals *and* such data is an integrated part of the US business's products or services.

Any US business that maintains or collects either class of "sensitive personal data," with limited exceptions (e.g., such data on the employees of the US business or available in the public domain), would be considered a "TID US business."

Covered Real Estate Transactions

FIRRMA also gave CFIUS jurisdiction to review the purchase or lease by, or concession to, a "non-excepted" foreign person of certain real estate (a) involving air or maritime ports or (b) that is in close proximity to, or that provides the foreign person the ability to collect intelligence on or surveil national security activities at, US military installations or other sensitive US government facilities or property.

The proposed regulations would implement this new basis for jurisdiction through the concept of a "covered real estate transaction." Specifically, unless any of the seven exceptions listed below applies, CFIUS would have the authority to review any purchase or lease by, or concession to, a foreign person of "*covered real estate,*" either directly or indirectly, that affords the foreign person *at least three* of the following four "*property rights*":

- physically access the real estate;
- exclude others from physical access to the real estate;
- improve or develop the real estate; or
- attach fixed or immovable structures or objects to the real estate.

"Purchase" includes less than full ownership of the covered real estate. A "lease" includes a sub-lease. "Concessions" only pertain to the development or operation of infrastructure for an "airport" or "maritime port" (each as further defined below), though CFIUS is considering additional applications in the final regulations.

There are five types of "covered real estate":

1. real estate that is, is located within, or will function as part of, an "airport" or "maritime port";
    - "airports" are limited to (i) any "large hub airport" as defined in 49 U.S.C. § 40102, (ii) any airport with annual aggregate all-cargo landed weight greater than 1.24 billion pounds, and (iii) any "joint use airport" as defined in 49 U.S.C. § 47175.
    - "maritime ports" are limited to (i) strategic seaports within the National Port Readiness Network, and (ii) the top 25 tonnage, container, or dry bulk ports according to the most recent annual report submitted to Congress by the US Department of Transportation pursuant to 49 U.S.C. 6314.
2. real estate that is within "close proximity" (defined as one mile) of any military installation listed on part 1 (132 such sites) or part 2 (32 such sites) of Appendix A to the proposed real estate regulations;

3. real estate that is within the "extended range" (defined as up to 100 miles generally, but no more than 12 nautical miles seaward of any US coastline) of any military installation listed on part 2 of Appendix A. These 32 military installations generally cover expansive territory, and contain sensitive training ranges or launch sites susceptible to physical or electronic surveillance. These sites include, for example, Naval Weapons Systems Training Facility Boardman, Oregon, which was relevant to a Presidential divestment order in 2012 on the basis of a CFIUS review in the Ralls transaction;
4. real estate located within the 24 counties or other geographic areas listed on part 3 of Appendix A, which are associated with missile fields; and
5. real estate located within the 23 offshore military operating areas listed on part 4 of Appendix A, but only up to 12 nautical miles seaward of the coastline.

In an effort to streamline what could otherwise be a countless number of "covered real estate transactions," which would be unworkable for both industry and CFIUS, the proposed regulations include seven important exceptions:

1. The proposed regulations provide a blanket exemption from "covered real estate transactions" for certain categories of foreign persons known as "excepted real estate investors" (see next section, below).
2. The proposed regulations carve out any transaction involving covered real estate that is a covered transaction subject to CFIUS's investment-related jurisdiction. Any transaction involving a US business must be analyzed under CFIUS's "covered control transaction" or "covered investment" jurisdiction, described above, and would not be considered a "covered real estate transaction" even if it includes covered real estate. In other words, "covered real estate transactions" only apply to transactions involving real estate that does not constitute a US business.
3. The proposed regulations carve out any covered real estate that is within an "urbanized area" or "urban cluster," each as identified in the most recent US Census, *unless* the real estate either (i) is, is located within, or will function as part of, an airport or maritime port, or (ii) is within close proximity (i.e., one mile) of the military installations listed on part 1 or part 2 of Appendix A.
4. The proposed regulations carve out all single housing units, including fixtures and adjacent land that is incidental to the use of the real estate as a single housing unit.
5. The proposed regulations carve out leases and concessions involving covered real estate at airports or maritime ports that may be used *only* as a retail trade, accommodation, or food service sector establishment, as described within the North American Industry Classification System (NAICS) Sectors 44-45 and 72. Presumably, this is meant to exclude, for example, leases by vendors within an airport food court.
6. The proposed regulations carve out commercial office space within a multi-tenant commercial office building, but only if the foreign person and its affiliates (i) do not, in the aggregate, exceed 10 percent of the total square footage *and* (ii) do not represent more than 10 percent of the total number of tenants.
7. The proposed regulations carve out certain lands owned by certain Alaska Native entities or held in by the United States for American Indians, Indian tribes, Alaska Natives, and Alaska Native entities.

In short, the proposed real estate regulations are extremely detailed and could require a time- and fact- intensive assessment to determine whether a transaction falls within this new basis for CFIUS jurisdiction. We note, however,

that "covered real estate transactions" are subject to *voluntary* review – they are not subject to the two categories of mandatory filing requirements described below.

Very Narrow Exemption from Expanded Jurisdiction

Excepted Investors

FIRRMA instructs CFIUS to limit the application of the two new bases for jurisdiction (covered investments and covered real estate transactions) to certain categories of foreign persons. FIRRMA did not provide specific criteria for such limitation, other than that a foreign person's connections to a foreign country or foreign government and whether the connections may affect US national security should be considered.

Rather than limiting the two new bases for jurisdiction to certain categories of foreign persons, the proposed regulations instead would apply the new bases for jurisdiction to *all* foreign persons *unless* a foreign person is specifically exempted. When considered together with the very narrow criteria to qualify for exemption, this re-framing of FIRRMA's instruction indicates reluctance of CFIUS member agencies to create exemptions that might enable potentially higher-threat investors to avoid CFIUS's expanded jurisdiction.

The exact extent of the proposed regulations' exemption currently is not known, because CFIUS has not yet published one or more lists of "*excepted foreign states*" on which the exemption is based (the lists of exempted foreign states may be different for covered investments and covered real estate transactions). The Assistant Secretary of the Treasury for Investment Security has confirmed that this list will be published by the time the regulations take effect and will not be a null set.

The proposed regulations provide no criteria for how CFIUS will select countries for the list(s), other than that: two-thirds of voting CFIUS member agencies must agree[11]; and, to remain on the list(s), a country, within two years, must have established and be effectively utilizing (or, with respect to real estate, made significant progress towards) a robust process to (a) analyze national security risks in foreign investment and (b) coordinate with the United States on matters relating to investment security. The specific factors that CFIUS will consider as to whether a listed country has developed such a "robust process" have not yet been made available. The proposed regulations indicate that the initial list(s) will be small, given that "excepted foreign states" is a new concept with potentially significant implications for US national security. The proposed regulations also indicate that such list(s) will be updated from time to time.

Once the set of "excepted foreign states" is known, the process to determine whether a particular foreign person is an "*excepted investor*" is complex and ultimately highly restrictive. To be an "excepted investor," the foreign person must fall into one of three categories:

1. A foreign national who is exclusively a national of one or more excepted foreign states.
2. A foreign government of an excepted foreign state.
3. A foreign entity that meets each of the following five criteria with respect to itself *and each of its parents*:
    i. Organized under the laws of an excepted foreign state or in the United States.
    ii. Principal place of business in an excepted foreign state or the United States.

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[11] All other decisions of CFIUS are taken by consensus. Thus, it is striking that only two-thirds of the voting members must agree to add (or remove) a country from the list.

iii. Each member and observer to its board of directors is either a US national or a foreign national who is exclusively a national of one or more excepted foreign states.

iv. Any foreign person that individually, or as part of a group of foreign persons, holds five percent or more of voting interest, economic interest, profit interest, or asset interest upon dissolution or that could otherwise control such entity must be (a) a foreign national who is exclusively a national of one or more excepted foreign states, (b) a foreign government of an excepted foreign state, or (c) a foreign entity organized under the laws of an excepted foreign state and that has its principal place of business in an excepted foreign state or the United States.

v. The "minimum excepted ownership" of such entity – defined as a majority of its voting, profit, *and* asset–upon-dissolution interest for an entity publicly traded on an exchange in an excepted foreign state or the United States; and at least 90 percent of its voting, profit, *and* asset–upon-dissolution interest for any other entity – must be held, individually or in the aggregate, by persons each of whom either is not a foreign person or qualifies as (a), (b), or (c) in criterion (iv) above.

Even if a foreign person meets all of the above criteria, it is still not an "excepted investor" if (a) it is listed on the Commerce Department, Bureau of Industry & Security's Unverified List or Entity List, or (b) in the five years prior to the completion of its transaction, either the foreign person or any of its parents or subsidiaries engaged in any of eight types of bad acts, including: material misstatements in a CFIUS filing, material breach of a CFIUS mitigation agreement, violations of US sanctions laws, debarment from the Directorate of Defense Trade Controls, violations of US export control laws, and felony crimes. Further, if the foreign person no longer satisfies the criteria in (1), (2), and (3)(i)-(iii), above, at any time during the three-year period after the completion of the transaction, it is no longer an "excepted investor" from the completion date onward, and its transaction would become subject to a potential CFIUS-initiated agency notice during this three-year period.

Investment Funds – No Exemptions from CFIUS's Expanded Jurisdiction

One of the most confusing aspects of FIRRMA is its "clarification" for certain investment fund investments. As we have previously reported, this "clarification" creates a number of ambiguities. The "clarification" first purports to create a *carve-out* for certain indirect investments by a foreign limited partner in a TID US business through such limited partner's membership on the fund's advisory board or other committee, from what would otherwise be a "covered investment." But the "clarification" then appears to *broaden* the criteria that such limited partner must satisfy for its investment not to be considered a "covered investment."

Two FAQs in the context of the CFIUS Pilot Program revealed that CFIUS is interpreting this "clarification" to mean only one thing: that a foreign limited partner's membership on an advisory board or committee of a fund does not, *in and of itself*, render the foreign person's indirect investment in a TID US business to be a covered control transaction or a covered investment *if it would not otherwise be*. Whether such indirect investment *would otherwise be* such a covered transaction would still need to be assessed based on the respective criteria for covered control transactions and covered investments.

Therefore, we caution investors in investment funds from relying on this investment fund "clarification" as any sort of "exemption" from CFIUS's expanded jurisdiction (but see below regarding exemption from mandatory filing requirements). A limited partner's investment through an investment fund must still be assessed against (i) CFIUS's broad definition of "control" (which remains unchanged) and (ii) in the context of the investment fund's investment in a

TID US business, the nature of the rights, access, and involvement *at the level of the TID US business* that the limited partner is afforded (either through its membership on the fund's advisory board or committee, or otherwise).

Limited Mandatory Filing Requirements

A key takeaway from both FIRRMA and the proposed regulations is that CFIUS remains primarily a voluntary process. Unless a transaction falls within either of the two specific categories below, the parties may decide for themselves whether to submit the transaction for CFIUS review. Though, importantly, CFIUS retains the right to initiate reviews of, or encourage parties to voluntarily submit for review, non-notified transactions.

Critical Technology – Pilot Program Remains in Effect

Covered control transactions and covered investments in certain US businesses involved with critical technologies in or for 27 specific "pilot program industries" (known as "pilot program covered transactions") already are subject to CFIUS's jurisdiction, as well as a mandatory filing requirement, pursuant to a Pilot Program that went into effect in November 2018 (see here for a summary). The proposed regulations do not alter this Pilot Program, and thus the Pilot Program will remain in effect while CFIUS decides whether to continue it in some form beyond its expiration at the effective date of the new regulations. FIRRMA authorized, but did not require, CFIUS to mandate filings for transactions involving critical technology, and CFIUS is considering whether to do so as part of the final regulations.

The Pilot Program's interim rules require that a short-form declaration, or a full notice in lieu of a declaration, be filed at least *45 days* prior to the completion date of the pilot program covered transaction. Failure to do so may incur civil penalties up to the value of the transaction.

Substantial Foreign Government Interest in TID US Businesses

The proposed regulations would implement FIRRMA's second, non-discretionary category of mandatory filing requirements: transactions involving substantial foreign government interest in a TID US business. Specifically, a short-form declaration, or a full notice in lieu of a declaration, must be submitted at least *30 days* prior to the completion date of any covered control transaction or covered investment that results in:

- a "substantial interest" (defined as a *voting* interest, direct or indirect, of 25 percent or more) in a TID US business
- by a foreign person in which a foreign government has a "substantial interest" (defined as a *voting* interest, direct or indirect, of 49 percent or more).
    - For purposes of determining the percentage of voting interest held indirectly by one entity in another entity, any voting interest of a parent will be deemed to be 100 percent in its subsidiary. Thus, for the substantial-interest analysis, the proposed regulations do not recognize dilution throughout the ownership chain that would otherwise result from parent ownership interests less than 100 percent.
    - A foreign government will be considered to have a "substantial interest" in a limited partnership if it either (i) holds 49 percent or more of the *voting* interest in the general partner, or (ii) is a limited partner and holds 49 percent or more of the *voting* interest of the limited partners.

Failure to make such a mandatory filing may incur civil penalties not to exceed $250,000 per violation or the value of the transaction, whichever is greater, with the amount of the penalty based on the nature of the violation.

While the filing must be made at least 30 days before the expected completion date (which as discussed below is defined more strictly), the proposed regulations would permit the parties to close their transaction prior to the expiration of the 30 days if they have been informed in writing by CFIUS either that (a) CFIUS has concluded all action, or (b) in the case of a declaration, CFIUS is not able to complete action on the basis of the declaration (but CFIUS does not request or self-initiate a full notice).

Notably, while FIRRMA gave CFIUS discretion to waive this mandatory filing requirement with respect to any foreign person that CFIUS determines to have demonstrated that (a) the investments of that foreign person are not directed by a foreign government and (b) the foreign person has a history of cooperation with CFIUS, the proposed regulations contain no such waiver provisions. No explanation was provided for CFIUS's decision to forego any possibility of waivers.

Investment Funds – Certain Exemptions from Mandatory Filings

Both the CFIUS Pilot Program and the proposed regulations implement FIRRMA's exemption of certain investment fund transactions from the above categories of mandatory filings. An investment by an investment fund is exempt from the Pilot Program mandatory filing requirement, and would also be exempt from the substantial foreign government interest mandatory filing requirement, if:

1. the fund is managed exclusively by a general partner, a managing member, or equivalent;
2. that general partner, managing member, or equivalent is not a foreign person; and
3. if any foreign person has membership as a limited partner on an advisory board or committee of the fund:
   i. the advisory board or committee does not have the ability to approve, disapprove, or otherwise control (a) investment decisions of the investment fund or (b) decisions made by the general partner, managing member, or equivalent related to entities in which the investment fund is invested; and
   ii. the foreign person does not otherwise have the ability to control the investment fund.

Somewhat inexplicably, this provision of FIRRMA appears to exempt from mandatory filing requirements those investment fund investments that afford a foreign limited partner any of the rights, access, or involvement that would constitute a "covered investment" (for example, access to material non-public technical information of the US business), so long as the criteria above are met. Further clarity on this point will be needed in the final regulations.

Other Notable Features of the Proposed Regulations

The proposed regulations make other notable choices for the implementation of FIRRMA.

- *No filing fees – yet.* The proposed regulations do not contain any provisions for filing fees, but they note that filing fees will be the subject of a separate rulemaking. FIRRMA authorizes CFIUS to impose filing fees not to exceed the lesser of one percent of the value of the transaction or $300,000 (adjusted for inflation).
- *Strict definition of "completion date."* In the context of covered control transactions and covered investment, the proposed regulations newly define the term "completion date" to be the earliest date upon which any ownership interest, including a contingent equity interest, is conveyed, assigned, delivered, or otherwise transfers to a person, or a change in rights that could result in a covered control transaction or covered investment occurs. Significantly greater clarity will be needed from CFIUS to understand the rationale for, and implications of, this new definition. For example, in the context of a transaction that has multiple tranches (which is common in

venture capital and other early-stage investing), this new definition appears to make the closing of the first such tranche the "completion date" (including for purposes of the 30-day lead time by which a mandatory filing must be submitted), even if "control" or "non-passive" rights do not attach at the first closing. If this is the approach that CFIUS will take, then this new definition appears to foreclose a practice that developed under the CFIUS Pilot Program, whereby part or all of the equity portion of an investment closed first, but "control" or other non-passive rights (e.g., board seat, access to material non-public technical information) did not attach, until at least 45 days after submission of a declaration to CFIUS. This practice developed as a way for foreign investors to provide urgently needed funding to a US business while still respecting the Pilot Program's 45-day advance filing requirement. Foreclosing this practice could further disadvantage foreign investors vis-à-vis domestic investors in a bid process and limit urgently needed capital infusions for struggling US companies.

- *Potential extra-territorial interpretation of "US business."* CFIUS's current regulations define "US business" to mean any entity engaged in interest commerce in the United States, *but only to the extent of its activities in interstate commerce*. Two examples in the current regulations imply that, in the context of a multinational company with operations both within and outside of the United States, "US business" is understood to be only the operations within the United States.

  The proposed regulations would delete the limitation "*but only to the extent of its activities in interstate commerce*." The Treasury Department's official explanation is that this change was made to conform the definition in the proposed regulations to the definition of "United States business" in FIRRMA, but Treasury has declined to comment thus far on whether such a change would affect the scope of what CFIUS considers to be a "US business." Adding to this uncertainty: the proposed regulations *retain* one of the examples that implies that – in the context of a multinational company that operates within the United States through a branch or subsidiary – the "US business" is only that branch or subsidiary; but *deletes* a second example that clarified that CFIUS's concept of "covered transaction" would have been limited only to the businesses in the United States. This uncertainty as to the scope of a "US business" in these circumstances – and thus the scope of the "covered transaction" that CFIUS is empowered to review – also creates uncertainty as to the scope of the "risks posed by" such transaction that CFIUS can legitimately use as the basis for mitigation and/or a block recommendation.

- *Limited applicability of the "incremental acquisition rule".* The proposed regulations maintain the essence of the current "incremental acquisition rule": a transaction will not be deemed a "covered transaction" if a foreign person acquires an additional interest in a US business over which the same foreign person (or any of its direct or indirect wholly-owned subsidiaries) previously acquired direct control in a transaction for which CFIUS concluded action on the basis of a full notice. However, the proposed regulations do not extend the "incremental acquisition rule" either to where the initial transaction was submitted only as a declaration or was only a "covered investment."

- *Subpoena power for pre-filing information gathering*. CFIUS's current regulations state that parties to a transaction that is notified to the Committee must provide any information to enable the Committee to conduct a full review or investigation of such transaction, and that CFIUS may subpoena any such information if necessary. The proposed regulations extend this information-gathering power to declarations, but also extend it to any transaction for which no notice or declaration has been submitted if needed to assess whether the transaction is a covered transaction. The express expansion of parties' obligations to provide *pre*-filing information to CFIUS, and CFIUS's rights to subpoena such *pre*-filing information, is one more way that CFIUS is significantly building its internal resources to more quickly and effectively identify transactions of concern that have not been filed for review.

- *New information requirements for filings*.
    - *Declarations*: the proposed regulations adopt, for the most part, the information that is currently required to be provided in declarations under the CFIUS Pilot Program, with notable additions including copies of the transaction document(s), lists of government contracts (for covered control transactions and covered investments), and more detailed pre- and post-transaction organizational charts.
    - *Notices*: for covered control transactions and covered investments, the proposed regulations maintain, for the most part, the information that is currently required to be provided in notices under the current CFIUS regulations, with notable additions including details of any critical technology, critical infrastructure, or sensitive personal data implicated in the transaction, and more detailed pre- and post-transaction organizational charts.
- *Potential authority to review additional lending transactions*. Finally, we note that the proposed regulations maintain the general rule that CFIUS will accept notices (and now, declarations) concerning a loan or similar financing arrangement that does not, *by itself*, constitute a covered transaction only when imminent or actual default or some other condition creates a significant possibility that a covered control transaction or covered investment would result. The proposed regulations also maintain the guideline that a financing arrangement, *by itself*, may constitute a covered transaction if it affords the foreign person the right to appoint members of the board of directors of the US business or other comparable financial or governance rights "characteristic of an equity investment but not of a typical loan." However, a new example in this section of the proposed regulations suggests that *any* financing arrangement through which a foreign person obtains "control" of a US business would be a covered control transaction (and *any* financing arrangement through which a foreign person obtains board member/observer rights, access to material non-public technical information, and/or involvement in substantive decisionmaking of a TID US business would be a covered investment) – even if such rights are typical for a loan. This could potentially expand the set of lending transactions that would constitute covered transactions *in themselves* – some of which might require a mandatory filing. Further clarity on this from CFIUS is warranted.

In closing, we note two fundamental transformations of CFIUS reflected in these proposed regulations. First, notwithstanding CFIUS's concerted efforts to limit its own expansion, CFIUS has transformed from a committee of limited jurisdiction with ostensibly an exclusively voluntary process, to a committee of expanded jurisdiction with mandatory filing requirements. Thus, while the CFIUS process remains primarily voluntary, it is now – for the first time in its history – a "screen" for certain foreign investments into the United States.

Second, CFIUS's expanded jurisdiction with respect to TID US businesses and real estate, and CFIUS's exemptions from such expanded jurisdiction for certain "excepted investors," are all pegged to bright-line lists reflecting specific and evolving vulnerabilities and threats, respectively. Thus, CFIUS's regulations have necessarily become a living document, that can – and must – be routinely updated as these vulnerabilities and threats continue to evolve. No longer will ten years pass between updates.

In sum, the proposed regulations solidify CFIUS's future as a constantly evolving process – one that is increasingly difficult to avoid, and in any event, impossible to ignore.

Petitions and Investigations

US Department of Commerce Issues Affirmative Preliminary Determination in Antidumping Duty Investigation of Sodium Sulfate Anhydrous from Canada

On October 25, 2019, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the antidumping duty (AD) investigation of imports of sodium sulfate anhydrous from Canada. In its investigation, DOC preliminarily determined that exporters from Canada have sold sodium sulfate anhydrous in the United States at a dumping margin of 9.85 percent. As a result of the decision, DOC will instruct US Customs and Border Protection to collect cash deposits from importers of sodium sulfate anhydrous from Canada based on that preliminary rate.

The petitioner in this investigation is Cooper Natural Resources, Inc. (Fort Worth, TX), Elementis Global LLC (East Windsor, NJ), and Searles Valley Minerals, Inc. (Overland Park, KS). The merchandise covered by this investigation is sodium sulfate (Na_2SO_4) (Chemical Abstracts Service (CAS) Number 7757-82-6) that is anhydrous (i.e., containing no water), regardless of purity, grade, color, production method, and form of packaging, in which the percentage of particles between 20 mesh and 100 mesh, based on U.S. mesh series screens, ranges from 10-95% and the percentage of particles finer than 100 mesh, based on U.S. mesh series screens, ranges from 5-90%. The

merchandise subject to this investigation is classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheading 2833.11.5010. Subject merchandise may also be classified under 2833.11.1000, 2833.11.5050, and 2833.19.0000.

DOC is scheduled to announce its final determination on or about March 10, 2020. If DOC makes an affirmative final determination, and the US International Trade Commission (ITC) makes an affirmative final determination that imports of sodium sulfate anhydrous from Canada materially injure, or threaten material injury to, the domestic industry, DOC will issue an AD order. If either DOC or the ITC issues a negative final determination, no AD order will be issued. The ITC is scheduled to make its final injury determination approximately 45 days after DOC issues its final determination, if affirmative.

In 2018, imports of sodium sulfate anhydrous from Canada were valued at an estimated $5.7 million, according to DOC.

US Department of Commerce Announces Affirmative Preliminary Circumvention Ruling on Exports of Diamond Sawblades from China

On October 25, 2019, the US Department of Commerce (DOC) announced an affirmative preliminary circumvention ruling involving diamond sawblades and parts thereof. In its investigation, DOC preliminarily determined that diamond sawblades produced in Canada, using cores and segments of Chinese origin, are circumventing the existing antidumping duty order on diamond sawblades from China.

This circumvention inquiry only covers one Canadian company, Protech Diamond Tools Inc. Accordingly, DOC will instruct US Customs and Border Protection to suspend liquidation and to require a cash deposit of estimated duties on unliquidated entries of diamond sawblades produced, by Protech in Canada, using Chinese cores and Chinese segments. The applicable cash deposit rate will be equal to the rate previously established for the China-wide entity – 82.05 percent.

DOC expects to issue its final ruling by February 24, 2020.

US Department of Commerce Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Aluminum Wire and Cable from China

On October 22, 2019, the US Department of Commerce (DOC) announced its affirmative final determinations in the antidumping duty (AD) and countervailing duty (CVD) investigations of imports of aluminum wire and cable from China. In its investigations, DOC determined that exporters from China have sold aluminum wire and cable in the United States at dumping margins ranging from 58.51 percent to 63.47 percent. In addition, DOC determined that exporters from China received countervailable subsidies at rates of 33.44 percent to 165.63 percent.

The petitioners in these investigations are Encore Wire Corporation (McKinney, TX) and Southwire Company, LLC (Carrollton, GA). The scope of the investigations covers aluminum wire and cable, which is defined as an assembly of one or more electrical conductors made from 8000 Series Aluminum Alloys (defined in accordance with ASTM B800), Aluminum Alloy 1350 (defined in accordance with ASTM B230/B230M or B609/B609M), and/or Aluminum Alloy 6201 (defined in accordance with ASTM B398/B398M), provided that: (1) at least one of the electrical conductors is insulated; (2) each insulated electrical conductor has a voltage rating greater than 80 volts and not exceeding 1000 volts; and (3) at least one electrical conductor is stranded and has a size not less than 16.5 thousand circular mil (kcmil) and not greater than 1000 kcmil. The merchandise covered by the investigations is currently classifiable under subheading 8544.49.9000 of the Harmonized Tariff Schedule of the United States (HTSUS). Products subject to the scope may also enter under HTSUS subheading 8544.42.9090.

The US International Trade Commission (ITC) is currently scheduled to make its final injury determinations on or around December 2, 2019. If the ITC makes affirmative final injury determinations, DOC will issue AD and CVD orders. If the ITC makes negative final determinations of injury, the investigations will be terminated and no orders will be issued.

In 2018, imports of aluminum wire and cable from China were valued at an estimated $115 million, according to DOC.

US Department of Commerce Initiates Circumvention Inquiry into Imports of Rebar from Mexico

On October 22, 2019, the US Department of Commerce announced the initiation of a circumvention inquiry into imports of steel concrete reinforcing steel bar from Mexico, to determine if imports of rebar that are bent at one or both ends circumvent the existing antidumping duty (AD) and countervailing duty (CVD) orders on rebar. This inquiry was initiated in response to requests from U.S. domestic producers of rebar: Nucor Corporation, Gerdau Ameristeel U.S. Inc., Commercial Metals Company, Cascade Steel Rolling Mills, Inc., Byer Steel Group, Inc., and Steel Dynamics, Inc.

If DOC preliminarily determines that circumvention is occurring, it will instruct Customs and Border Protection to begin collecting cash deposits on rebar from Mexico that is subject to the inquiry. These duties will be imposed on future imports, and on any unliquidated entries since the date on which DOC initiated this circumvention inquiry.

In 2018, imports of rebar from Mexico were valued at an estimated $51 million, according to DOC.

US Department of Commerce Issues Affirmative Final Determination in Antidumping Investigation of Imports of Mattresses from China

On October 18, 2019, the US Department of Commerce (DOC) announced its affirmative final determination in the antidumping duty (AD) investigation of imports of mattresses from China. In its investigation, DOC determined that that exporters from China have sold mattresses in the United States at dumping margins ranging from 57.03 to 1,731.75 percent. Accordingly, US Customs and Border Protection will continue to collect cash deposits equal to the applicable final weighted-average dumping rate.

The petitioners in this investigation are Corsicana Mattress Company (Dallas, TX), Elite Comfort Solutions (Newman, GA), Future Foam, Inc. (Council Bluffs, IA), FXI, Inc. (Media, PA), Innocor, Inc. (Red Bank, NJ), Kolcraft Enterprises, Inc. (Chicago, IL), Leggett & Platt, Inc. (Carthage, MO), Serta Simmons Bedding, LLC (Atlanta, GA), and Tempur Sealy International, Inc. (Lexington, KY). The products subject to this investigation are currently classifiable under Harmonized Tariff Schedule for the United States (HTSUS) subheadings: 9404.21.0010, 9404.21.0013, 9404.29.1005, 9404.29.1013, 9404.29.9085, and 9404.29.9087. Products subject to this investigation may also enter under HTSUS subheadings 9404.21.0095, 9404.29.1095, 9404.29.9095, 9401.40.0000, and 9401.90.5081.

The US International Trade Commission (ITC) is currently scheduled to make its final injury determination on or about December 2, 2019. If the ITC reaches an affirmative final injury determination, DOC will issue an AD order. If the ITC reaches a negative final determination of injury, the investigation will be terminated and no order will be issued.

In 2017, imports of mattresses from China were valued at an estimated $436.5 million, according to DOC.

US Department of Commerce Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Imports of Stainless-Steel Kegs from China and Germany

On October 18, 2019, the US Department of Commerce announced its affirmative final determinations in the antidumping duty (AD) and countervailing duty (CVD) investigations of imports of refillable stainless-steel kegs from China and Germany. In its investigations, DOC determined that exporters from China and Germany have sold stainless-steel kegs in the United States at dumping margins of up to 77.13 percent and 7.47 percent, respectively. In addition, DOC determined that exporters from China received countervailable subsidies at rates ranging from 16.21 to 145.23 percent.

The petitioner in these investigations is the American Keg Company, LLC (Pottstown, PA). The merchandise covered by these investigations are kegs, vessels, or containers with bodies that are approximately cylindrical in shape, made from stainless steel (i.e., steel containing at least 10.5 percent chromium by weight and less than 1.2 percent carbon by weight, with or without other elements), and that are compatible with a "D Sankey" extractor (refillable stainless steel kegs) with a nominal liquid volume capacity of 10 liters or more, regardless of the type of finish, gauge, thickness, or grade of stainless steel, and whether or not covered by or encased in other materials. The merchandise covered by these investigations are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 7310.10.0010, 7310.10.0050, 7310.29.0025, and 7310.29.0050.

The US International Trade Commission (ITC) is currently scheduled to make its final injury determinations on or around December 2, 2019. If the ITC makes affirmative final injury determinations, DOC will issue AD and CVD orders. If the ITC makes negative final determinations of injury, the investigations will be terminated and no orders will be issued.

In 2018, imports of stainless-steel kegs from China and Germany were valued at an estimated $16.4 million and $2.9 million, respectively, according to DOC.

US Department of Commerce Initiates Antidumping Duty and Countervailing Duty Investigations of Imports of Glass Containers from China

On October 16, 2019, the US Department of Commerce (DOC) announced the initiation of new antidumping duty (AD) and countervailing duty (CVD) investigations to determine whether certain glass containers from China are being dumped in the United States and to determine if producers from China are receiving countervailable subsidies. These investigations were initiated based on petitions filed by the American Glass Packaging Coalition, whose members are Anchor Glass Container Corporation (Tampa, FL) and Ardagh Glass Inc. (Chicago, IL).

The merchandise covered by these investigations is certain glass containers with a nominal capacity of 0.059 liters (2.0 fluid ounces) up to and including 4.0 liters (135.256 fluid ounces) and an opening or mouth with a nominal outer diameter of 14 millimeters up to and including 120 millimeters. Glass containers subject to this investigation are specified within the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 7010.90.5005, 7010.90.5009, 7010.90.5015, 7010.90.5019, 7010.90.5025, 7010.90.5029, 7010.90.5035, 7010.90.5039, 7010.90.5045, 7010.90.5049, and 7010.90.5055.

The dumping margins alleged in the petition range from 40.45 to 255.68 percent. There are 35 subsidy programs alleged in the petition, including tax programs, export credit and guarantee programs, grant programs, as well as loan programs.

If DOC makes affirmative findings in these investigations, and if the US International Trade Commission (ITC) determines that dumped and/or subsidized US imports of glass containers from China are causing injury to the US industry, DOC will impose duties on those imports in the amount of dumping and/or countervailable subsidization found to exist.

In 2018, imports of glass containers from China were valued at an estimated $370.8 million.

US Department of Commerce Issues Affirmative Final Determination in Antidumping Investigation of Carbon and Alloy Steel Threaded Rod from Thailand

On October 16, 2019, the US Department of Commerce announced its affirmative final determination in the antidumping duty (AD) investigation of imports of carbon and alloy steel threaded rod from Thailand. In its investigation, DOC determined that exporters from China have sold carbon and alloy steel threaded rod in the United States at a dumping margin of 20.83 percent. As a result, US Customs and Border Protection will continue to collect cash deposits equal to the final applicable dumping rate.

The petitioner in this investigation is Vulcan Threaded Products Inc. (Pelham, AL). The merchandise covered by this investigation is carbon and alloy steel threaded rod. Steel threaded rod is certain threaded rod, bar, or studs, of carbon or alloy steel, having a solid, circular cross section of any diameter, in any straight length. Steel threaded rod is currently classifiable under subheadings 7318.15.5051, 7318.15.5056, and 7318.15.5090 of the Harmonized Tariff Schedule of the United States (HTSUS). Subject merchandise may also enter under subheading 7318.15.2095 and 7318.19.0000 of the HTSUS.

The US International Trade Commission (ITC) is currently scheduled to make its final injury determination on or around November 29, 2019. If the ITC reaches an affirmative final injury determination, DOC will issue an AD order. If the ITC reaches a negative final determination of injury, the investigation will be terminated and no order will be issued.

In 2018, imports of carbon and alloy steel threaded rod were valued at an estimated $5.3 million, according to DOC.

US Department of Commerce Issues Affirmative Final Determinations in Antidumping Investigations of Acetone from Singapore and Spain

On October 16, 2019, the US Department of Commerce (DOC) announced its affirmative final determinations in the antidumping duty (AD) investigations of imports of acetone from Singapore and Spain. In its investigations, DOC determined that exporters from these countries sold acetone in the United States at dumping margins ranging from 66.42 to 131.75 percent and 137.39 to 171.81 percent, respectively. As a result of these decisions, US Customs and Border Protection will continue to collect cash deposits from importers of acetone from Singapore and Spain based on these final rates.

The petitioner in these investigations is the Coalition for Acetone Fair Trade, which includes AdvanSix, Inc. (Parsippany, NJ), Altivia Petrochemicals, LLC (Haverhill, OH), and Olin Corporation (Clayton, MO). The merchandise covered by these investigations is all grades of liquid or aqueous acetone. The merchandise covered by these investigations is currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 2914.11.1000 and 2914.11.5000. Combinations or mixtures of acetone may enter under subheadings in Chapter 38 of the HTSUS, including, but not limited to, those under heading 3814.00.1000, 3814.00.2000, 3814.00.5010, and 3814.00.5090.

The US International Trade Commission (ITC) is currently scheduled to make its final injury determinations on or before November 29, 2019. If the ITC makes affirmative final injury determinations, DOC will issue AD orders. If the ITC makes negative final determinations of injury, the investigations will be terminated and no orders will be issued.

In 2018, imports of acetone from Singapore and Spain were valued at an estimated $8.5 million and $17 million, respectively, according to DOC.

US Department of Commerce Initiates Circumvention Inquiries into Imports of Uncoated Paper from Australia, Brazil, China, and Indonesia

On October 11, 2019, the US Department of Commerce announced the initiation of new inquiries into imports of uncoated paper from Australia, Brazil, China, and Indonesia, to determine if imports of uncoated paper in roll form, which are then converted into sheets of paper after entering the United States, result in circumvention of the existing antidumping duty (AD) and countervailing duty (CVD) orders on uncoated paper from these countries. These inquiries are being initiated in response to requests from U.S. producers of uncoated paper: Domtar Corporation, Packaging Corporation of America, North Pacific Paper Company, Finch Paper LLC, as well as the United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union.

If DOC preliminarily determines that circumvention is occurring, it will instruct Customs and Border Protection to begin collecting cash deposits on rolls of uncoated paper from Australia, Brazil, China, and Indonesia, that are subject to the inquiry. These duties will be imposed on future imports, and on any unliquidated entries since the date on which Commerce initiated these circumvention inquiries.

In 2018, imports of uncoated paper in sheet, roll, and folio form from Australia, Brazil, China, and Indonesia were valued at an estimated $3.9 million, $61.2 million, $1.9 million, and $14.9 million, respectively, according to DOC.

US Department of Commerce Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Imports of Vertical Metal Filing Cabinets from China

On October 8, 2019, the US Department of Commerce (DOC) announced its affirmative final determinations in the antidumping duty (AD) and countervailing duty (CVD) investigations of imports of vertical metal filing cabinets from China. In its investigations, DOC determined that exporters from China have sold vertical metal filing cabinets in the United States at a dumping margin of 198.5 percent. In addition, DOC determined that exporters from China received countervailable subsidies at a rate of 271.79 percent.

The petitioner in these investigations is Hirsh Industries, LLC (West Des Moines, IA). The scope of these investigations covers freestanding vertical metal file cabinets containing two or more extendable file storage elements and having an actual width of 25 inches or less. The merchandise subject to the investigations is classified under Harmonized Tariff Schedule of the United States (HTSUS) subheading 9403.10.0020. The subject merchandise may also enter under HTSUS subheadings 9403.10.0040, 9403.20.0080, and 9403.20.0090.

The US International Trade Commission (ITC) is currently scheduled to make its final injury determinations on or about November 21, 2019. If the ITC makes affirmative final injury determinations, DOC will issue AD and CVD orders. If the ITC makes negative final determinations of injury, the investigations will be terminated and no orders will be issued.

In 2018, imports of vertical metal filing cabinets from China were valued at an estimated $45.2 million, according to DOC.

US Department of Commerce Issues Affirmative Preliminary Determinations in the Countervailing Duty Investigations of Imports of Quartz Surface Products from India and Turkey

On October 8, 2019, the US Department of Commerce (DOC) announced its affirmative preliminary determinations in the countervailing duty (CVD) investigations of imports of certain quartz surface products from India and Turkey. In its investigations, DOC preliminarily determined that exporters received countervailable subsidies of up to 4.32 percent for India and 3.81 percent for Turkey. As a result, US Customs and Border Protection will collect cash deposits from importers of quartz surface products from India and Turkey based on these preliminary rates.

The petitioner in these investigations is Cambria Company, LLC (Eden Prairie, MN). The merchandise covered by the investigations is certain quartz surface products. Quartz surface products consist of slabs and other surfaces created from a mixture of materials that includes predominately silica (e.g., quartz, quartz powder, cristobalite, glass powder) as well as a resin binder (e.g., an unsaturated polyester). The products subject to the scope are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under the following subheading: 6810.99.0010. Subject merchandise may also enter under subheadings 6810.11.0010, 6810.11.0070, 6810.19.1200, 6810.19.1400, 6810.19.5000, 6810.91.0000, 6810.99.0080, 6815.99.4070, 2506.10.0010, 2506.10.0050, 2506.20.0010, 2506.20.0080, and 7016.90.1050.

DOC is currently scheduled to announce its final CVD determinations on or about February 19, 2020. If DOC makes affirmative final determinations, the US International Trade Commission (ITC) will be scheduled to make its final injury determinations on or about April 3, 2020. If DOC makes affirmative final determinations in these investigations, and the ITC makes affirmative final injury determinations, DOC will issue CVD orders. If DOC makes negative final determinations, or the ITC makes negative final determinations of injury, the investigations will be terminated and no orders will be issued.

In 2018, imports of quartz surface products from India and Turkey were valued at an estimated $69.5 million and $28.0 million, respectively, according to DOC.

US International Trade Commission Issues Affirmative Final Determinations in Antidumping Investigations of Strontium Chromate from Austria and France

On October 31, 2019, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of strontium chromate from Austria and France that the US Department of Commerce (DOC) has determined are sold in the United States at less than fair value. As a result of the ITC's affirmative determinations, Commerce will issue antidumping duty orders on imports of this product from Austria and France. Chairman David S. Johanson and Commissioners Rhonda K. Schmidtlein, Jason E. Kearns, Randolph J. Stayin, and Amy A. Karpel voted in the affirmative.

DOC in October 2019 issued its final determination that imports of strontium chromate from Austria and France were sold in the United States at dumping margins of 25.90 percent and 32.16 percent, respectively. The merchandise subject to these investigations is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheading 2841.50.9100. Subject merchandise may also enter under HTSUS subheading 3212.90.0050.

In 2018, imports of strontium chromate from Austria and France were valued at an estimated $5.00 million and $1.08 million, respectively, according to DOC.

US Department of Commerce Issues Affirmative Preliminary Antidumping Duty Determination on Wooden Cabinets and Vanities from China

On October 3, 2019, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the antidumping duty (AD) investigation of imports of wooden cabinets, vanities, and components thereof from China. In its investigation, DOC preliminarily determined that exporters from China have sold wooden cabinets in the United States at dumping margins ranging from 4.49 to 262.18 percent. As a result of the decision, US Customs and Border Protection will collect cash deposits from importers of wooden cabinets from China based on these preliminary rates.

The petitioner in this investigation is the American Kitchen Cabinet Alliance. The scope of the investigation covers wooden cabinets and vanities that are for permanent installation (including floor mounted, wall mounted, ceiling hung or by attachment of plumbing), and wooden components thereof. Imports of subject merchandise are classified under Harmonized Tariff Schedule of the United States (HTSUS) statistical numbers 9403.40.9060 and 9403.60.8081. The subject component parts of wooden cabinets and vanities may be entered into the United States under HTSUS statistical number 9403.90.7080.

DOC is scheduled to announce the final determination on or about February 17, 2020. If DOC's final determination is affirmative, the US International Trade Commission (ITC) will be scheduled to make its final injury determination on or about March 30, 2020. If DOC makes an affirmative final determination of dumping, and the ITC makes an affirmative final injury determination, DOC will issue an AD order. If DOC makes a negative final determination of dumping, or the ITC makes a negative final determination of injury, the investigation will be terminated and no order will be issued.

In 2018, imports of wooden cabinets from China were valued at an estimated $4.4 billion, according to DOC.

WTO Developments

WTO Arbitrator Authorizes $7.5 Billion in US Retaliation against EU Exports in Airbus Subsidy Dispute; United States Announces Retaliatory Tariffs to Take Effect October 18

On October 2, 2019, a World Trade Organization (WTO) arbitrator issued its decision on the level of countermeasures that the United States may request to take against the European Union (EU) and certain EU member states in the long-running dispute over subsidies provided to the European aircraft manufacturer Airbus (*European Communities and Certain member States — Measures Affecting Trade in Large Civil Aircraft* – DS316). The arbitrator determined that the United States may request authorization from the WTO Dispute Settlement Body (DSB) to take countermeasures with respect to the EU and certain member states at a level not exceeding, in total, $7.496 billion annually – the largest award ever granted by a WTO arbitrator. Shortly after the arbitrator's report became public, the United States published a final list of products of the EU that it intends to target with retaliatory tariffs of 10 to 25 percent, beginning on October 18, 2019. We provide an overview of these actions and their implications below.

Background

The WTO arbitrator's ruling is the latest development in the long-running disputes between the United States and the EU over subsidies provided by each government to its large civil aircraft sector. In June 2011, the DSB adopted the Appellate Body (AB) report in this dispute (DS316), which found that certain subsidies provided by the EU and some of its member states to Airbus caused "serious prejudice" to the interests of the United States, and thus were inconsistent with Article 5(c) of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement).[12] The AB found that the effect of the subsidies at issue was to displace exports of Boeing aircraft from the European Union, Chinese, Korean, and Australian markets, and to cause Boeing to lose sales to several airlines.

Though the EU subsequently claimed to have brought its measures into conformity with its WTO obligations and the DSB's recommendations and rulings, the United States disputed this claim, and after lengthy compliance proceedings under Article 21.5 of the WTO's Dispute Settlement Understanding (DSU), the AB in May 2018 concluded that the EU had failed to bring its measures into conformity with the DSB's recommendations and rulings. Shortly thereafter, the United States requested that a WTO arbitrator (which previously had suspended its work at the request of the parties) resume its work to determine the level of countermeasures that the United States would be permitted to take against the EU and certain member states due to the aforementioned non-compliance.

Arbitrator's Decision

In its report pursuant to Article 22.6 of the DSU, the arbitrator determined that the level of countermeasures "commensurate with the degree and nature of the adverse effects determined to exist" due to the EU subsidies at issue amounts to $7.496 billion per year. This award is less than the $11.2 billion annual amount sought by the United States, but is nonetheless the largest award ever granted by a WTO arbitrator. Pursuant to the arbitrator's decision, the United States is permitted to request authorization from the DSB to take countermeasures against the EU and certain member states at a level not exceeding $7.496 billion per year. The countermeasures may take the form of (1) the suspension of tariff concessions and related obligations under the GATT 1994, and/or (2) the

[12] The principal subsidies covered by the ruling included financing arrangements (known as "Launch Aid" or "Member state financing") provided by France, Germany, Spain, and the UK for the development of the A300, A310, A320, A330/A340, A330-200, A340-500/600, and A380 large civil aircraft projects. The ruling also covered certain equity infusions provided by the French and German governments to companies that formed part of the Airbus consortium, and certain infrastructure measures provided to Airbus.

suspension of horizontal or sectoral commitments and obligations contained in the United States' services schedule under the GATS.

The United States on October 2 asked that the WTO schedule a meeting on October 14 to approve the US request under DSU Article 22.7 for authorization to take countermeasures against the EU. The request will be granted unless it is inconsistent with the decision of the arbitrator or the DSB rejects the request by consensus – neither of which is likely. Once the United States has obtained authorization from the DSB, it will be free to decide when to impose the retaliatory measures and whether to do so to the full extent authorized.

US Tariff List

The United States does not thus far appear willing to impose the maximum amount of countermeasures authorized by the WTO. The Office of the US Trade Representative (USTR) on October 2 published a final list of products of the EU and certain member states on which it intends to impose retaliatory duties beginning on October 18, 2019, pursuant to the expected authorization from the DSB. The list includes large civil aircraft from France, Germany, Spain, and the United Kingdom, which will be subject to an additional duty of 10 percent *ad valorem*, and a range of agricultural and other products from these and other EU member states, which will be subject to an additional duty of 25 percent *ad valorem*. The latter group of affected products includes cheeses, seafood, pork, olives, liquors, olive oil, wine, clothing items, and certain industrial equipment. In a statement accompanying the list, USTR stated that "[a]lthough USTR has the authority to apply a 100 percent tariff on affected products, at this time the tariff increases will be limited to 10 percent on large civil aircraft and 25 percent on agricultural and other products. The U.S. has the authority to increase the tariffs at any time[.]"

USTR's statement also notes that the agency "has the authority…to change the products affected" by the additional tariffs, and published reports indicate that the agency is indeed considering a "carousel" approach whereby it will periodically change the list of products that are subject to the tariffs in order to maximize the pressure on the EU to remove the offending subsidy measures. This approach is permitted under US law: USTR must, 120 days after the date the retaliatory measure takes effect (and every 180 days thereafter), review and revise the list in whole or in part to affect other goods of the subject countries, unless USTR (1) determines that implementation of the DSB's recommendations by the targeted country is imminent; or (2) agrees with the affected US industry that it is unnecessary to revise the list.[13] The additional scope and uncertainty created by this approach might magnify the effects of United States' countermeasures.

USTR has not yet issued a formal Federal Register notice implementing the additional duties, but is expected to do so in the coming days.

Next steps and implications

In the coming months, a WTO arbitrator will produce a similar decision on the magnitude of the adverse effects caused to the EU by the United States' subsidies for its own large civil aircraft sector, which the DSB has found to be inconsistent with WTO rules (see *United States — Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* – DS353). The level of countermeasures to be authorized in that dispute is expected to be significantly lower than that recently granted to the United States, following the recent ruling of the Appellate Body that the United States' compliance with 2011 dispute settlement findings was considerably more complete than that of the EU. Nevertheless, the EU already has drawn up a provisional list of US goods valued at $12 billion per year which it has said it could target with additional tariffs.

[13] 19 U.S.C. §2416(b)(2)(B)

EU officials also have indicated that they might respond to the new US tariffs more swiftly by implementing countermeasures that the EU previously has been authorized by the DSB to impose, but is not currently imposing, in unrelated WTO disputes with the United States. This could potentially enable the EU to more quickly respond to the new US tariffs, but the EU reportedly has put this option on hold, at least until the new European Commission takes office next month.

In a statement announcing the new US tariffs, USTR Robert Lighthizer said that "[w]e expect to enter into negotiations with the European Union aimed at resolving this issue in a way that will benefit American workers", and the agency further noted that "USTR will continually re-evaluate these tariffs based on our discussions with the EU." EU officials reportedly approached the United States earlier this year in an effort to negotiate mutual reductions of each side's subsidies to the large civil aircraft sector, but the Trump administration reportedly declined to engage substantively in the negotiations. At this stage, it is unclear whether the imposition of countermeasures by the United States (and the potential imposition of countermeasures by the EU) will spur more productive negotiations towards the mutual elimination of the subsidies at issue in the Boeing and Airbus disputes.

Although the new US tariffs and the EU's likely response will be authorized by the WTO, they are still likely to exacerbate bilateral trade tensions, which already have risen sharply under the Trump administration. On the other hand, the new US tariffs may have the effect of forestalling an even greater confrontation between the United States and the EU over potential US "national security" tariffs on EU automotive goods under Section 232 of the Trade Expansion Act of 1962. Indeed, President Trump has frequently threatened to impose tariffs on EU goods, including automobiles and wine, in response to the EU's alleged "unfair" treatment of the United States in trade relations. The US tariff action resulting from the Airbus dispute might satisfy President Trump's desire and perceived political need to impose tariffs on EU goods, making it less likely that the United States will resort to imposing Section 232 tariffs on EU automotive goods. Thus, the forthcoming US tariffs may have the effect of averting a conflict over automotive goods that would likely be far more damaging for both the global economy and the multilateral trading system.

The report of the WTO arbitrator is available **here**. The US retaliation list is available **here.**