US Multilateral Trade Policy Developments

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US Trade Policy

Implications of the 2020 Election for US Trade Policy: An Early Look at the Biden Administration's Approach

The election of Joseph R. Biden as the 46th President of the United States will have important implications for US trade policy and the World Trade Organization. In the four years since his departure as Vice President, US trade policy and the multilateral trading system have undergone dramatic shifts, driven largely by the Trump administration's efforts to re-shore manufacturing, reduce trade deficits, and bolster trade enforcement, as well as its skepticism of the longstanding bipartisan consensus in favor of trade liberalization and multilateral institutions.

Aspects of this approach have proven controversial, but the fundamental shift towards a more "economic nationalist" trade policy has enjoyed bipartisan support, and this trend has been accelerated by the COVID-19 pandemic and growing geopolitical tensions with China. As a result, objectives such as repatriating supply chains, reducing dependence on imports, and protecting national security now figure prominently on the trade agendas of both parties, arguably in tension with the longstanding goals of economic efficiency, strengthening international alliances, and developing new export markets for US firms.

Against this backdrop, a return to the status quo ante under the Biden administration appears unlikely. During the campaign, President-elect Biden appeared to embrace many of the recent shifts in US trade policy, signaling that further trade liberalization would not be a near-term priority and instead offering a platform focused on expanding "Buy American" rules, reshoring domestic production in "critical" sectors, and aggressively enforcing US trade laws, particularly against China. On the other hand, the Biden campaign sharply criticized aspects of the Trump administration's approach, expressing a desire to de-escalate trade tensions with US allies, re-engage in multilateral institutions, and address China's alleged unfair trade practices primarily through coordinated action with like-minded countries rather than unilateral measures. Thus, while there is likely to be some continuity between the two administrations on trade policy, important changes are expected. This report provides an overview of President-elect Biden's trade platform and assesses how key trade issues and relationships might progress under his administration.

The Biden Trade Platform and the Emerging Landscape

President-elect Biden will take office in January 2021 with a slim Democratic majority in the House of Representatives and, depending on the outcome of runoff elections in Georgia, a Senate that is either narrowly Republican-controlled or split 50-50, with Vice President-elect Kamala Harris as the tie-breaking vote. As a result, almost all legislative initiatives will require bipartisan compromise, and major policy changes requiring congressional action will be difficult to achieve.

This dynamic may push trade policy higher on the Biden administration's agenda than was initially anticipated. During the campaign, President-elect Biden signaled that trade would not be a priority at the outset of his administration, emphasizing that he would first seek progress on his domestic agenda – including "investing in education, infrastructure, and manufacturing[.]" Many of those initiatives will require congressional action, however, and rapid progress on this agenda is far from guaranteed. This might push the Biden administration to seek achievements in other areas, such as trade, where the Executive Branch has considerable room to maneuver on its own. President-elect Biden has also said that repairing what he views as strained relationships with key allies will be an immediate priority, and many governments can be expected to seek progress on trade issues as an early step.

President-elect Biden did not offer a standalone platform on trade policy during the campaign. Instead, many of his statements on trade were embedded in broader economic proposals aimed at bolstering domestic manufacturing and innovation. In many ways, his proposals evoke the same "economic nationalist" themes that have animated President Trump's agenda, with a heavy focus on combatting offshoring and reversing perceived declines in US manufacturing. For example, President-elect Biden made the following proposals during the campaign:

- **Buy American**. President-elect Biden pledged to significantly expand "Buy American" requirements for US government procurement, including by tightening domestic content rules, limiting the use of waivers, and extending Buy American rules to additional forms of government assistance (e.g., support for research and development), while also strengthening "Buy America" requirements for infrastructure projects. He also pledged to renegotiate international trade rules on government procurement in order to accommodate this expansion of domestic procurement preferences. In conjunction with these changes, he pledged to make a "historic" $400 billion "procurement investment" during the first year of his administration in order to create new demand for "American products, materials, and services," including "American steel, cement, concrete, building materials, and equipment" and "tens of billions of dollars of clean vehicles and products[.]"

- **Offshoring Tax**. President-elect Biden pledged to impose an "Offshoring Tax Penalty" that would be "specifically aimed at those who offshore manufacturing and service jobs to foreign nations in order to sell goods or provide services back to the American market." This would involve the establishment of "a 28% corporate tax rate, plus a 10% Offshoring Penalty surtax, on profits of any production by a United States company overseas for sales back to the United States."

- **Trade Enforcement**. President-elect Biden promised to "[t]ake aggressive trade enforcement actions against China or any other country seeking to undercut American manufacturing through unfair practices, including currency manipulation, anti-competitive dumping, state-owned company abuses, or unfair subsidies." He also pledged to "confront foreign efforts to steal American intellectual property" and combat "state-sponsored cyber espionage."

- **"Critical" Products and Supply Chains**. President-elect Biden pledged to take action "to close supply chain vulnerabilities across a range of critical products on which the U.S. is dangerously dependent on foreign suppliers," including "energy and grid resilience technologies, semiconductors, key electronics and related technologies, telecommunications infrastructure, and key raw materials." He will initiate a 100-day review immediately upon taking office to identify "critical national security risks across America's international supply chains," and will implement a "national strategy" to close them.

- **Emerging Industries and Technologies**. To respond to China's "Made in China 2025" plan, President-elect Biden proposed a "dramatic, accelerated Research & Development investment of $300 billion over 4 years…to secure our global leadership in the most critical and competitive new industries and technologies." This will include "[m]ajor increases in direct federal R&D spending" as well as "[n]ew breakthrough technology R&D programs to direct investments to key technologies in support of U.S. competitiveness – including 5G, artificial intelligence, advanced materials, biotechnology, and clean vehicles."

- **Pause on New Trade Agreements**. The Biden administration "won't enter into any new trade agreements until we've made major investments here at home, in our workers and our communities – equipping them to compete and win in the global economy."

Though these plans suggest some continuity with the Trump administration's trade agenda, President-elect Biden has made other statements on trade – particularly in his foreign policy platform – that draw sharp contrasts with President Trump's approach. This is noteworthy given the extent to which foreign policy considerations are expected to shape his decisionmaking. President-elect Biden was not particularly active on trade during his 36-year Senate career, but he was a prominent voice on foreign policy as a longstanding member and Chairman of the Senate Foreign Relations Committee, and might therefore be inclined to view trade issues through a foreign policy lens. President-elect Biden's campaign platform contrasts with President Trump's "America First" theme, expressing a commitment to multilateralism and arguing that the Trump administration's tariffs and unilateral approaches have undermined US interests. He made the following statements during the campaign:

- **Multilateralism**. President-elect Biden argued generally that "[f]or 70 years, the United States, under Democratic and Republican presidents, played a leading role in writing the rules, forging the agreements, and animating the institutions that guide relations among nations and advance collective security and prosperity—

until [President] Trump." The Biden foreign policy agenda aims to "place the United States back at the head of the table, in a position to work with its allies and partners to mobilize collective action[.]" Otherwise, "someone else will take the United States' place, but not in a way that advances our interests and values, or no one will, and chaos will ensue."

- **China**. In President-elect Biden's view, the most effective way to meet the challenge posed by China's alleged unfair trade practices is "to build a united front of U.S. allies and partners to confront China's abusive behaviors[.]" He argues that the United States' economic influence alone is not sufficient to compel China to enact policy reforms, stating that "[o]n its own, the United States represents about a quarter of global GDP," whereas "[w]hen we join together with fellow democracies, our strength more than doubles. China can't afford to ignore more than half the global economy." Therefore, the Biden administration's strategy will focus on "enlist[ing] our international allies to collectively tackle unfair practices by China."
- **President Trump's Tariff Actions**. President-elect Biden argued that President Trump's use of tariffs has been "shortsighted and destructive" and has undermined support for collective efforts to address unfair trade practices. For example, he stated that "[President] Trump has designated imports from the United States' closest allies— from Canada to the European Union—as national security threats in order to impose damaging and reckless tariffs. By cutting us off from the economic clout of our partners, [President] Trump has kneecapped our country's capacity to take on the real economic threat."
- **Trade Liberalization**. President-elect Biden acknowledged the benefits of trade and warned against "a dangerous global slide toward protectionism," noting that a similar trend "exacerbated the Great Depression and helped lead to World War II." He expressed a desire to open new markets to US exports – noting that "[m]ore than 95 percent of the world's population lives beyond our borders" – and took the view that "[t]he wrong thing to do is to put our heads in the sand and say no more trade deals," because "[t]he United States, not China," should shape global trade rules.

Though these statements provide few specifics or detailed plans, they suggest that US trade policy under the Biden administration will neither pick up where it left off in 2016 nor continue on the same path charted by the Trump administration. Reshoring manufacturing jobs will remain a core objective of US policy, but the new administration appears more inclined to pursue this through subsidies, tax measures, and procurement policies than broad-based tariffs (though this new approach could also lead to trade disputes). The trade conflict with China is sure to remain high on the agenda, but perhaps with less emphasis on unilateral action. The Biden administration might engage more actively and constructively in the WTO, despite sharing some of the Trump administration's concerns. We assess below how these and other key trade issues and relationships might develop under the new administration, recognizing that considerable uncertainty remains at this stage.

US-China Trade Relations

In the near-term, President-elect Biden is likely to keep core elements of the Trump administration's China trade policy in place – including the "Phase One" trade agreement and the Section 301 tariffs on Chinese imports – even though he has signaled that he will prioritize other strategies for addressing China's alleged unfair trade practices. During the campaign, President-elect Biden indicated that China would be a primary focus of his trade policy, describing the country as a "special challenge" and citing industrial subsidies and overcapacity, state-owned enterprises (SOEs), and intellectual property rights practices among his concerns. This is reflective of the growing bipartisan consensus in favor of a more aggressive posture towards China on trade and economic issues.

"Phase One" Trade Agreement

President-elect Biden has criticized the Phase One agreement between the US and China as "weak" and insufficient to resolve the United States' most serious concerns about China's trade practices (citing "industrial subsidies, support for [SOEs], and cybertheft"), but he has not indicated that he would withdraw from the agreement. Doing so arguably would have little upside, given that the United States made few concessions in the Phase One deal. Moreover, withdrawal would likely enflame bilateral tensions and would free China from commitments on intellectual property,

technology transfer, and agriculture that are valued by the US business community. It is therefore expected that the Biden administration will keep the agreement in place and continue to pressure China to adhere to its terms.

On the other hand, the Biden administration might encounter difficulties enforcing the Phase One agreement, given the deal's unusual dispute resolution mechanism. Unlike most modern trade agreements, the Phase One deal does not provide for the establishment of dispute settlement panels, and instead allows a party to impose tariffs where it unilaterally determines that the other party has violated the agreement. However, the United States already maintains additional tariffs of up to 25% on approximately $350 billion in annual imports from China pursuant to Section 301 of the Trade Act, and the remaining $160 billion in imports not subject to those tariffs are mostly consumer goods for which there are few sources other than China. For economic and political reasons, the Trump administration was reluctant to impose tariffs on the latter set of products, and the Biden administration might hesitate to do so as well – particularly as it seeks to facilitate the US economic recovery. This dynamic raises questions about China's incentives to comply with the Phase One agreement going forward – a challenge to which President-elect Biden alluded when he described the Phase One agreement as "unenforceable." Thus, while the Phase One agreement is likely to remain in place for the foreseeable future, its relevance and effectiveness might be diminished.

Section 301 Tariffs and Exclusion Process

The Biden administration is unlikely to remove the Section 301 tariffs on Chinese imports in the near-term. Though President-elect Biden and many congressional Democrats have criticized the manner in which President Trump implemented the tariffs (characterizing his approach as "erratic"), the underlying decision to pursue a "reset" in US-China trade relations through the imposition of tariffs now enjoys bipartisan support. Removing the tariffs without securing significant Chinese concessions on issues such as intellectual property theft, subsidies, SOEs, and industrial overcapacity would likely encounter bipartisan opposition, and China appears unlikely to make such concessions in the near future. Moreover, President-elect Biden and other observers have asserted that China is not complying with its existing commitments under the Phase One agreement (in particular its purchase commitments for agricultural and other products), which would make any effort to remove the tariffs particularly controversial at this stage. For these reasons, President-elect Biden is more likely to maintain the existing Section 301 tariffs and seek to use them as leverage to secure commitments from China in the priority areas mentioned above. However, it is unclear whether he will seek to do so by negotiating a "Phase Two" bilateral agreement, which the Trump administration has proposed but China has strongly resisted. As discussed below, President-elect Biden might prioritize other approaches given his stated view that China is unlikely to yield to unilateral pressure from the United States.

Though the majority of the Section 301 tariffs are likely to remain in place for the foreseeable future, the Biden administration could seek to mitigate their effects by modifying the product exclusion process. USTR has granted thousands of Section 301 exclusions under the current process, but the system has been challenging for many importers given the limited scope and duration of granted exclusions. Under USTR's current policy, exclusions often apply only to a narrow subset of products within a 10-digit Harmonized Tariff Schedule of the United States (HTSUS) subheading, and some of the most recent tranches of exclusions have been granted for a duration of only 3 months, limiting their usefulness. Members of Congress of both parties have expressed a desire to provide more significant relief through the exclusion process, including by extending the duration of granted exclusions. The Biden administration will have considerable latitude to make such changes, if it wishes to mitigate the tariffs' effects on the US economy while maintaining the overall policy of tariffs on Chinese imports.

Efforts to Address "Non-Market Oriented Policies and Practices"

As noted above, President-elect Biden has criticized the Trump administration's reliance on unilateral measures and bilateral negotiations to address concerns about China's trade practices, and has emphasized that his approach will rely more on coordinated action with US allies. He has described his view in the following terms:

> The United States does need to get tough with China. If China has its way, it will keep robbing the United States and American companies of their technology and intellectual property. It will also keep using

> subsidies to give its state-owned enterprises an unfair advantage—and a leg up on dominating the technologies and industries of the future.
>
> The most effective way to meet that challenge is to build a united front of U.S. allies and partners to confront China's abusive behaviors…On its own, the United States represents about a quarter of global GDP. When we join together with fellow democracies, our strength more than doubles. China can't afford to ignore more than half the global economy. That gives us substantial leverage to shape the rules of the road[.]

Separately, he has pledged to "[r]ally our allies in a coordinated effort to pressure the Chinese government and other trade abusers to follow the rules" and "focus our allies on addressing overcapacity in industries, ranging from steel and aluminum to fiber optics to shipbuilding and other sectors." However, he has not specified what this would entail in practice. Potential avenues through which the Biden administration might seek to influence China's trade policies include the following:

- **Trilateral initiative on WTO reform**. The Biden administration might seek to intensify and expand the United States' trilateral initiative with Japan and the EU to reform WTO rules on issues such industrial subsidies and SOEs, technology transfer practices, and transparency and notification requirements. This initiative was launched in 2018 with the objective of bringing "non-market oriented policies and practices" more firmly under WTO rules, and was widely viewed as targeting China's industrial policies. Thus far, the initiative has resulted in a joint proposal to amend the WTO Agreement on Subsidies and Countervailing Measures so as to strengthen disciplines on industrial subsidies, but the proposal has not been tabled formally in the WTO.
- The trilateral initiative enjoys bipartisan support in the US Congress, but faces several obstacles. The most notable is the opposition to the initiative that is almost certain to arise from China, India, and other WTO Members. These Members already have rejected a proposal from the trilateral group to enhance the WTO's transparency and notification requirements, and the proposal on industrial subsidies is expected to face similar opposition. Secondly, heightened trade tensions between the United States and the EU (and to a lesser extent the United States and Japan) have raised questions about their ability to remain united over the long-haul that it would likely take to turn their proposals into an agreement. Third, the United States' blockage of appointments to the WTO Appellate Body (AB) has left the WTO dispute settlement system in a weakened state and has therefore raised doubts about the value of new WTO rules on non-market practices. The Biden administration might seek to address the latter two obstacles by de-escalating trade tensions with the EU and Japan and engaging in discussions on the AB, but overcoming the opposition of China and other WTO Members to the trilateral group's proposals will be difficult, time consuming, and likely unsuccessful.
- **CPTPP accession**. Some observers have speculated that the Biden administration will seek to negotiate the accession of the United States to the Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP). They consider that US accession to the CPTPP would reduce the parties' dependence on trade with China and, over the long term and with expanded participation, exert indirect pressure on China to reform and liberalize its economy in line with the CPTPP's rules on SOEs, digital trade, investment, and intellectual property, among other issues. This was part of the Obama administration's rationale for negotiating the original TPP, and the recent completion of the Regional Comprehensive Economic Partnership (RCEP) has exacerbated concerns that US absence from the CPTPP has allowed China to expand its influence in the region. On the other hand, any effort to join the CPTPP would face domestic political obstacles, particularly in the absence of fast track authority for Congressional approval, and would involve difficult negotiations with the CPTPP parties, as discussed below.

As indicated above, President-elect Biden has alluded to a different strategy for US-China trade policy than the one pursued by the Trump administration, which sought to leverage the size and importance of the US market to compel reforms unilaterally. Many countries share the United States' concerns about the effects of industrial subsidies, SOEs, and technology transfer practices and would likely welcome US cooperation on these issues. At the same time, none of the available approaches – whether unilateral, plurilateral, or multilateral – are likely to yield results

quickly. Thus, absent significant new developments, the status quo in US-China trade relations might remain largely unchanged over the coming years, though the Biden administration's approach to policymaking and implementation may generate less uncertainty for business.

Section 232 Measures and Investigations

The Trump administration's use of Section 232 of the Trade Expansion Act to impose tariffs on steel and aluminum imports on national security grounds has been one of its most controversial trade policies. The Section 232 measures have created frictions between the United States and its trading partners, and have resulted in retaliatory tariffs on US exports of agricultural and other products to multiple countries. They also have caused some observers to question the United States' commitment to its international obligations and have sparked debate over the extent to which Congress has delegated its constitutional authority to impose tariffs to the President.

There are a range of views within Congress and the business community regarding the appropriateness of the Section 232 tariffs. Some stakeholders have supported the imposition of the tariffs on imports from China and other countries whose industrial policies contribute to excess capacity in the steel and aluminum sectors. However, the Trump administration's decision to apply the tariffs to imports from market-economy countries that are close allies of the United States – including Japan, NATO and EU Member States, and for a brief period Canada and Mexico – has been far more controversial. The Trump administration has argued that collective actions to address overcapacity have been unsuccessful and that the problems facing the US steel and aluminum industries are global, which means that a more selective application of the Section 232 measures would be ineffective and vulnerable to evasion. On the other hand, President-elect Biden has argued that imposing tariffs on close allies on "national security" grounds has left the United States isolated, and has undermined collective efforts to address unfair trade practices.

During the campaign, President-elect Biden stated that he generally supports maintaining the Section 232 tariffs until a global solution is found to address excess capacity, but he provided several caveats. First, he explained that he "will review the existing 232 tariffs" to ensure that they "achieve the goal of supporting workers and growing our middle class, both now and in the long-term." Second, he emphasized that "while a Biden administration will take whatever action is needed to ensure fair trade, protect critical infrastructure and our national security, a core part of our strategy will be to enlist our international allies to collectively tackle unfair practices by China[.]" Referencing this strategy, he criticized President Trump for "designat[ing] imports from the United States' closest allies—from Canada to the European Union—as national security threats in order to impose damaging and reckless tariffs," contending that "[b]y cutting us off from the economic clout of our partners, [President] Trump has kneecapped our country's capacity to take on the real economic threat" (i.e., China).

These statements suggest that the Biden administration might consider removing the Section 232 tariffs on imports from some countries, such as Japan and the EU, in an effort to reduce bilateral tensions and build support for other trade initiatives. However, any such moves would likely be preceded by bilateral discussions on measures to address potential evasion of the Section 232 tariffs, such as those that were agreed with Canada and Mexico, and on future initiatives aimed at combating overcapacity and unfair trade practices. Decisions to exempt certain countries but not others might also raise diplomatic concerns, and the Biden administration might wish to consider how such decisions would intersect with its broader foreign policy objectives. Thus, any major changes to the Section 232 measures likely would not occur until after the relevant cabinet officials have taken office, deliberated the decisions within the administration, and consulted with their foreign counterparts – a process that could take months if not longer. There might also be domestic opposition to a significant rollback of the Section 232 tariffs, even on imports from close allies, and the Biden administration might be reluctant to make such changes until economic conditions in the United States have improved.

More broadly, it appears unlikely that the Biden administration will utilize Section 232 in the same manner as the Trump administration, which sometimes used the threat of Section 232 measures (e.g., on automotive goods) to extract trade concessions or compel reluctant partners to engage in bilateral negotiations. These actions were received poorly by some in Congress, the US business community, and foreign governments, and led many to

question the United States' reliability as a trading partner. The Trump administration's invocation of the WTO national security exception to defend its Section 232 actions has also placed strain on the WTO's dispute settlement system. Given these sensitivities, the Biden administration is likely to use Section 232 more selectively going forward.

Trade Negotiations and Agreements

President-elect Biden has indicated that negotiating new trade agreements will not be a priority during the early stages of his administration. Instead, he has suggested that new trade agreements will come after (and might be contingent upon) progress on his domestic policy agenda, pledging that he "will not enter into any new trade agreements until we have invested in Americans and equipped them to succeed in the global economy." He took this position before the onset of the COVID-19 pandemic and the resulting calls for domestic economic stimulus, indicating that his position reflects broader considerations – including the heightened, bipartisan skepticism of trade liberalization following President Trump's election and the failure of the TPP in 2016.

President-elect Biden's position on new trade agreements might not preclude continued US participation in ongoing sectoral negotiations, such as the current WTO initiatives on fisheries subsidies and electronic commerce. The United States is likely to remain interested in those initiatives, and some observers have speculated that the Biden administration might also seek to reinvigorate plurilateral negotiations in the WTO on an Environmental Goods Agreement (EGA). The latter move would be intended to demonstrate US leadership on trade and climate change, signal a commitment to the WTO, and build goodwill with trading partners such as the EU that assign considerable importance to the EGA. However, the administration appears unlikely to initiate negotiations for new, comprehensive FTAs or US accession to the CPTPP in the near-term. In addition, the expiration on July 1, 2021 of the existing authority for the President to "fast track" Congressional approval of a trade agreement without amendment means that the Biden Administration will have to clear the additional hurdle of obtaining an extension or new Congressional authorization for fast track before submitting any FTA to Congress. The passage of an extension or new fast track authority is far from guaranteed in a Congress in which neither party has a strong majority.

US-UK and US-Kenya FTA Negotiations

President-elect Biden has not indicated how he will approach the ongoing FTA negotiations that the Trump administration has initiated with the United Kingdom (UK) and Kenya. The negotiations with the UK are considerably more advanced than those with Kenya, and some observers have speculated that the UK agreement could be close to completion by the time the Biden administration takes office (though USTR Lighthizer recently noted that significant hurdles remain on agriculture and other issues). It seems unlikely that President-elect Biden would withdraw from the US-UK process entirely, but he almost certainly will want input into the agreement's substance, which would require further negotiations with the UK after the inauguration in 2021. Those negotiations likely could not make substantive progress until the Biden administration's trade team is in place – a process that will require Senate confirmation of USTR and Deputy USTR nominees, and could take months.

Given these circumstances, it would be difficult for the Biden administration to complete negotiations with the UK by April 1, 2021 – the date by which the President would have to notify Congress of his intention to sign a US-UK FTA if it is to benefit from the "fast track" legislative procedures set forth in the 2015 Trade Promotion Authority (TPA) statute. TPA expires on July 1, 2021, which will complicate efforts to finalize and implement any US-UK agreement.

Some observers have speculated that Congress might approve a temporary extension of TPA applicable only to the US-UK agreement, giving the Biden administration additional time to finalize the deal. Congress has approved such "agreement-specific" extensions of TPA in the past, including for the Uruguay Round Agreements Act that implemented the WTO Agreements. An extension is not guaranteed, however, and it could be several months before the Biden administration has a team in place that can negotiate substantively with the UK. Given these challenges and President-elect Biden's broader pledge to temporarily refrain from entering into new trade agreements, completing a US-UK FTA or negotiating and submitting a US-Kenya FTA in 2021 will be difficult.

Expiration of Trade Promotion Authority

The expiration of TPA next year and potential debates over its renewal could have important implications for the Biden administration's trade agenda. Congressional views on trade policy have changed in important ways since "fast track" trade promotion authority was last enacted in 2015, and any discussion of new legislation is likely to reflect these shifts. There are a wide range of views in Congress regarding the objectives that should be pursued in trade negotiations, and the debate is likely to touch on other questions including (1) which countries the United States should negotiate with and in what formats, and Congress's role in such decisions; (2) whether "phased" and partial-scope negotiations should be permitted and subject to Congressional approval; (3) what should be the United States' priorities with respect to WTO reform and dispute settlement; (4) what procedures should apply with respect to the renegotiation of, and withdrawal from, trade agreements; and (5) whether Congressional notification and consultation requirements should be expanded. As has historically been the case, Congress might debate other trade issues in addition to the grant of fast track legislative approval, including trade enforcement measures and assistance for workers that are negatively affected by trade. President Trump's unilateral trade actions have also generated interest in using any new grant of trade promotion authority to revisit Congress's delegation of tariff authority to the President.

It is highly unlikely that these issues will be settled by July 1, 2021. Despite the recent bipartisan vote in favor of the US-Mexico-Canada Agreement (USMCA), there continue to be significant differences between and within the parties on trade policy, and the notion that USMCA should be a model for future trade agreements is not universally accepted on either side. It is therefore expected that TPA will lapse next year, as has happened periodically since the current trade promotion authority model was first established in 1974.

It is unclear when Congress will begin debating new trade legislation, and it might not do so in earnest unless and until the Biden administration actively seeks new trade promotion authority. The absence of such authority would not preclude the Biden administration from initiating new trade negotiations, and previous Presidents (including President Obama) have launched ambitious bilateral, plurilateral and regional negotiations without fast track authority in effect. However, if the Biden administration intends to conclude significant new trade agreements, such authority likely will be necessary in order to assure negotiating partners that any agreement concluded by the Biden administration can be expeditiously considered by Congress without amendment. Whether the Biden administration pushes Congress to debate new fast track legislation early on might be a signal as to the extent of its trade ambitions.

CPTPP Accession

President-elect Biden has not stated definitively whether he would seek to join the CPTPP. When asked whether he would do so, he made the following statement:

> When it comes to trade, either we're going to write the rules of the road or China is – and not in a way that advances our values…TPP wasn't perfect but the idea behind it was a good one: to unite countries around high standards for workers, the environment, intellectual property, and transparency, and use our collective weight to curb China's excesses. Going forward, my focus will be on rallying our friends in both Asia and Europe in setting the rules of the road for the 21st century and joining up to get tough on China on its trade and technology abuses.

Separately, President-elect Biden indicated that he would not join the CPTPP in its current form, stating that "I would not rejoin the TPP as it was initially put forward. I would insist that we renegotiate pieces of that with the Pacific nations that we had in South America and North America, so that we could bring them together to hold China accountable." These statements leave open the possibility of joining the agreement, but only if the CPTPP members agree to as yet unspecified additional changes sought by the Biden administration.

A decision on joining the CPTPP would involve a complex weighing of costs, benefits, and political realities, and might not be made during the early stages of the new administration. Renegotiating the CPTPP terms to enable the US to join could be an appealing prospect in light of President-elect Biden's broader objectives for trade and foreign policy, some of which reflect bipartisan concerns. He has acknowledged a need to develop new export markets for US firms, and has indicated that the Asia-Pacific region will figure prominently in his foreign policy agenda.

Moreover, his stated strategy for responding to China's alleged unfair trade practices emphasizes partnering with like-minded countries to develop trade rules that reflect US priorities. Similar considerations motivated the original US effort to negotiate the TPP, and some of President-elect Biden's cabinet appointees supported the TPP on these grounds. These include his nominee for Secretary of State, Antony J. Blinken, who has argued that the US withdrawal from TPP was an "economic and strategic mistake" that "hand[ed] a win to countries such as China" by allowing them to "shape global trade and innovation to their benefit, not ours."

The recent completion of the Regional Comprehensive Economic Partnership (RCEP) between China and 14 other Asia-Pacific nations has only heightened concerns about the economic and geopolitical implications of US absence from the CPTPP. President-elect Biden appeared to acknowledge this recently, when he responded to the completion of RCEP by stating that "[w]e need to be aligned with the other democracies…so that we can set the rules of the road, instead of having China and others dictate outcomes because they are the only game in town."

On the other hand, any effort to join the CPTPP would face immense political challenges in the United States. The vast majority of Democrats in Congress at the time opposed the TPP, and although it enjoyed broader support among Republicans before President Trump's election, neither party is now on record supporting the TPP or joining the CPTPP. Vocal factions within each party are likely to oppose efforts to join the CPTPP, and rebranding the agreement to make it politically palatable – particularly amidst heightened concerns about declining US manufacturing employment and popular "backlash" against globalization – will be difficult.

Negotiating revisions to the CPTPP that would be acceptable to the Biden administration, the current member countries, and both parties in Congress would also be a complicated balancing act. During the campaign, President-elect Biden indicated that the objectives he would pursue in trade agreements would resemble the approach taken in the USMCA, while going beyond it in some areas such as environmental rules. He emphasized the following points:

- **Investor-state dispute settlement**. He opposes the inclusion of investor-state dispute settlement provisions in future trade agreements, alleging that they allow private companies to "attack labor, health, and environmental policies" through "special tribunals that are not available to other organizations."

- **Pharmaceutical IP**. He supports "reducing monopoly rights for pharmaceutical firms in trade agreements[.]" He criticized the USMCA's intellectual property chapter as a "massive giveaway to pharmaceutical companies" prior to the removal in December 2019 of provisions regarding market exclusivity for biologic medicines and certain clinical information, and other provisions that would have required parties to make patents available for new uses of a known product, new methods of using a known product, or new processes of using a known product.

- **Rules of Origin**. Any trade agreement negotiated under the Biden Administration "will include strong rules of origin to promote our production by the trade agreement signatories and to limit the benefits for free riders." Though he has provided few details on this point, he has indicated that he would insist on a "melted and poured" rule of origin for steel and aluminum products, as was included in USMCA, "so that countries can't exploit loopholes."

- **Labor**. He has promised to "aggressively push for strong and enforceable labor provisions in trade agreements" and support the inclusion of "swift and strong labor enforcement mechanisms[.]" He took the position that the USMCA had "no real enforcement of labor protections" prior to the December 2019 revisions that created a "Facility-Specific Rapid Response Labor Mechanism," allowing the imposition of tariffs against individual companies that deny collective bargaining rights.

- **Environment**. He has promised to support trade agreement provisions "strengthening climate pollution enforcement," and has criticized the Trump administration for failing to include "protections against climate change" in its trade agreements. Though he has not described in detail the environmental provisions he would seek, he has stated that he will "condition future trade agreements on partners' commitments to meet their enhanced Paris climate targets."

Securing some of these outcomes in a renegotiation of the CPTPP might not be difficult. For example, the CPTPP parties suspended provisions on intellectual property rights protection for pharmaceuticals and biologics following the United States' withdrawal from the TPP discussions in 2017, and they might agree to the permanent removal of these provisions. Such an outcome would be consistent with President-elect Biden's stated priorities and those of many Congressional Democrats, who insisted that similar provisions be removed from the USMCA or scaled back prior to its consideration by Congress. The CPTPP also narrowed the scope of ISDS (which, like the IP provisions, had been included largely at the United States' insistence), and the parties might be amenable to further limiting ISDS to enable the US to join on terms more consistent with the USMCA's scaled-back ISDS mechanism. On the other hand, US efforts to tighten the CPTPP's rules of origin (e.g., with the intent of limiting the use of China-origin content) would likely encounter significant pushback, especially since many of the CPTPP parties are now also participants in RCEP. US efforts to expand labor and environmental rules could also create difficulties given the diverse range of CPTPP participants.

Even if the Biden administration were able to bring the CPTPP more closely in line with the USMCA, the agreement could still face obstacles in Congress, especially in the absence of fast track trade promotion authority. The Trump administration's scaling-back of ISDS and removal of pharmaceutical IP provisions proved essential in securing Democratic support for the USMCA but contradicted longstanding Republican priorities, and it is unclear how many Republicans would accept similar outcomes if the US sought to join a modified CPTPP. Indeed, some Republicans who supported the USMCA to help President Trump fulfill one of his signature campaign promises (and to avert his threatened attempt to withdraw from NAFTA) might not feel the same pressure to support a modified CPTPP. The USMCA was also unique in that it involved little new trade liberalization on the part of the United States – rather, it largely preserved the level of market access granted under NAFTA while adopting stricter rules of origin and labor and environmental protections. It is unclear how many Democrats who supported the USMCA due to its enhanced labor and environmental standards would accept a renegotiated CPTPP that mirrored those standards, but involved significant new market access commitments by the United States.

Given these dynamics, any effort by the Biden administration to modify and join the CPTPP would require a significant investment of time and political capital, with no guarantee of success. The Biden administration might eventually decide to take on this challenge, but first it might explore other ways of engaging with the Asia-Pacific region and demonstrating leadership on trade issues.

Generalized System of Preferences

The Trump administration used the Generalized System of Preferences (GSP) – which provides duty free access to the US market for certain products from developing countries – in a different manner than other recent administrations. Whereas GSP had long been viewed primarily as a development tool that promoted economic growth in the developing world and reduced costs for US manufacturers, the Trump administration often sought to use the program as leverage to secure trade concessions from beneficiary countries. As part of these efforts, the administration fully or partially revoked GSP benefits for several major users of the program, including India and Thailand, based in part on allegations that these countries did not provide the United States with reasonable access to their markets as required by the GSP statute's eligibility criteria. At the same time, Congressional Democrats have become increasingly vocal about their desire to expand the statutory eligibility criteria to include new requirements relating to labor and environmental practies, human rights, and good governance.

Compared to the Trump administration, the Biden administration appears less likely to use GSP as a cudgel to secure market access concessions from developing countries. Instead, it might embrace the more traditional view of GSP as a development tool that was not intended to require reciprocal market access. Moreover, because most GSP beneficiaries are not major trading partners, they might not factor into the Biden administration's short- to medium-term trade priorities as enumerated above.

On the other hand, the Biden administration might be more inclined than the Trump administration to use GSP to address concerns about alleged labor and human rights abuses – an approach supported by many Democrats in Congress and some key Democratic constituencies, such as organized labor. For example, in February 2020, six

Democratic senators (including Sen. Bob Menendez (D-NJ), Ranking Member of the Senate Foreign Relations Committee; and Sen. Ron Wyden (D-OR), Ranking Member of the Senate Finance Committee) called for the suspension of GSP benefits for the Philippines due to alleged human rights abuses. House Ways and Means Trade Subcommittee Chairman Earl Blumenauer (D-OR) recently introduced legislation to expand the GSP eligibility criteria to address environmental practices, human rights, rule of law, good governance, and anti-corruption issues, and other Democratic lawmakers have proposed tightening the existing criterion concerning labor practices.

Though the GSP program continues to enjoy bipartisan support, its immediate fate is uncertain, owing in part to the trend described above. The program is set to expire on December 31, 2020, and Members of Congress have been unable to agree on legislation to renew the program. Congressional Democrats have insisted that any legislation to renew GSP also expand the statutory eligibility criteria along the lines proposed by Chairman Blumenauer. Congressional Republicans, on the other hand, have proposed a "clean" extension of the program to allow time for further negotiations on potential changes to the eligibility criteria. Whether a compromise will be reached before the program expires is uncertain, but the position taken by Democrats in the debate over its renewal may be a preview of the Biden administration's priorities with respect to GSP.

US-EU Trade Relations

The US-EU trade relationship is likely to improve under the Biden administration, though neither side appears interested in resuming negotiations for a comprehensive FTA in the near future. President-elect Biden has not laid out an agenda for US-EU trade but has pledged to reverse decisions in other areas that have strained the bilateral relationship, including by rejoining the Paris Climate Agreement, the World Health Organization, and potentially the Joint Comprehensive Plan of Action concerning the Iranian nuclear program. There is hope that these decisions will improve the overall tenor of US-EU relations and make the resolution of bilateral trade irritants more achievable in the near-term.

The EU has expressed new optimism about the trajectory of the relationship, with the European Commission stating that "[w]hile the past years have been tested by geopolitical power shifts, bilateral tensions and unilateral tendencies, the victory of President-elect Joe Biden and Vice-President-elect Kamala Harris, combined with a more assertive and capable European Union and a new geopolitical and economic reality, present a once-in-a-generation opportunity to design a new transatlantic agenda for global cooperation." Accordingly, the Commission on December 2 formally proposed "A new EU-US agenda for global change" in which it outlined short and long-term goals for bilateral cooperation on trade. Notably, some of the initiatives on the proposed agenda already enjoy bipartisan support in the United States and were advocated by Republican members of the US Senate Foreign Relations Committee in a November report entitled "A Concrete Agenda for Transatlantic Cooperation on China." This indicates at least some alignment of priorities, despite the ongoing disputes on trade issues such as steel and aluminum tariffs, aircraft subsidies and digital taxation.

Resolution of Section 232 and Civil Aircraft Disputes

The Commission's proposed agenda indicates that, as a first step, the EU will seek to resolve two bilateral trade disputes that it says have weakened the transatlantic partnership. The first concerns the United States' Section 232 tariffs on European steel and aluminum, to which the EU has responded with retaliatory tariffs on approximately $3.2 billion in US exports and a WTO complaint challenging the legality of the measures. As noted above, President-elect Biden has signaled that he did not agree with the application of Section 232 tariffs to the EU, and there appears to be a reasonable prospect of a negotiated solution that results in the removal of each side's tariffs.

The EU is also seeking a quick resolution of the long-running disputes over subsidies provided by the US and European governments to Boeing and Airbus, respectively. These parallel WTO disputes have each gone through panel, Appellate Body, compliance, and arbitration proceedings, and the United States has imposed WTO-authorized retaliatory tariffs of up to 25% on $7.5 billion worth of EU exports since last year (though the Dispute Settlement Body had authorized countermeasures having approximately four times this value). The EU received its authorization to retaliate this October, and announced its retaliatory tariffs on approximately $4 billion worth of US exports on

November 9. Both sides have expressed a strong preference to negotiate a settlement, but their starting positions appear far apart, owing in part to the US demand for Airbus to repay at least a portion of the subsidies that it received.

It is not yet clear whether the change in the US administration and the newly-added pressure of European retaliation will lead to a breakthrough in these discussions, but there are strong incentives to reach a settlement. Each side's retaliatory tariffs have targeted the aircraft sector, which is among those that have been harmed the most during the COVID-19 pandemic, and a negotiated solution is strongly favored by US and EU business interests unrelated to the aircraft sector to which tariff countermeasures have been applied.

Another factor that might encourage a settlement is shared concern about China's efforts to enter the aircraft market, and its potential use of subsidies and other measures in support of this objective. That concern was expressed by Senate Republicans in their November report, which urged the US and EU to resolve the Boeing-Airbus dispute "so we can focus on the real challenge," which it characterized as "a Commercial Aircraft Corporation of China replete with stolen technology and fully backed and financed by the Chinese government." EU High Representative for Foreign Affairs and Security Policy Josep Borrell similarly lamented this summer that "while the U.S. is punishing Airbus and we prepare measures on Boeing, China is fully subsidizing wide-body aircrafts which they will sell everywhere in the world[.]" The EU has included a proposal for "future disciplines for subsidies in the aircraft sector" in its broader proposal to the United States to resolve their dispute, perhaps with China's entry into the sector in mind. Resolving the Boeing-Airbus dispute could therefore represent an early victory for the Biden administration, furthering its stated aim of de-escalating trade tensions with allies and shifting attention to China's alleged unfair practices.

Digital Services Taxes

The European Commission also indicated that it will seek to reduce tensions with the United States over the taxation of digital services, though this issue will be more difficult to resolve. The United States has objected strongly to digital service taxes (DSTs) that have been adopted or are under consideration by the EU and several of its Member States, arguing that they disproportionately target US firms and that the proliferation of unilateral DSTs could undermine basic principles of international taxation. On these grounds, the Trump administration launched a Section 301 investigation of France's DST in 2019 and followed with additional investigations targeting Austria, the Czech Republic, the EU, Italy, Spain, and the UK this year.

A temporary truce announced by the United States and France in January 2020 now appears increasingly fragile. They agreed to pause their dispute (with France postponing the collection of its DST and the United States postponing any retaliatory tariffs) while the two countries sought to negotiate a multilateral solution on digital services taxation under the auspices of the OECD. It had been hoped that those negotiations would produce an agreement this year, but the US and European positions remain far apart and OECD officials now acknowledge that an agreement this year is unlikely. According to OECD officials, the United States has not softened its position – expressed publicly in a June 12 letter from Secretary Mnuchin – that any digital taxes should be implemented "on a safe harbor basis," which some argue would effectively enable companies to opt-out of the tax. In light of the lack of progress, France recently confirmed that it would begin collecting its DST in mid-December. For its part, the United States has already found France's DST to be actionable under Section 301, and is scheduled to impose retaliatory tariffs on French goods beginning on January 6, 2021, just two weeks before President-elect Biden takes office.

There is considerable skepticism that the United States' position on digital services taxation will change significantly under the Biden administration. Many observers have questioned why the new administration would be more inclined than its predecessor to accept a regime that results in significant new taxation of US-based companies by other jurisdictions while providing few apparent benefits to the United States. Moreover, unilateral DST measures are opposed strongly by the US business community and Members of Congress of both parties (Senate Finance Committee Ranking Member Ron Wyden (D-OR), for example, has been among the most prominent critics of DST measures, warning recently that France's decision to begin collecting the tax is "an escalation" that will leave the United States "no choice but to use every available tool" to defend its interests.) Thus, if additional European

countries proceed to implement DSTs next year, the Biden administration may face strong pressure to respond – presenting an early test of the bilateral relationship and the new administration's approach to resolving disputes where multilateral solutions prove difficult.

WTO Reform and Climate Initiatives

The European Commission's agenda proposes that the US and EU governments commit to "joint leadership on reforming the WTO," starting by finalizing the appointment of a new Director-General, restoring the dispute settlement function by reforming the Appellate Body, and intensifying the trilateral work between the US, the EU, and Japan on industrial subsidies, technology transfer practices, and other issues. President-elect Biden has not addressed these issues specifically (though his advisors have signaled that he will seek to resolve the Appellate Body impasse).

There is unlikely to be complete alignment between the US and the EU on reforming WTO rules and dispute settlement, but the Biden administration brings improved prospects for transatlantic cooperation on these issues.

The European Commission also proposes to launch with the United States a "transatlantic green trade agenda" in mid-2021, which would include the joint development of a "Trade and Climate initiative" within the WTO. It states in particular that the upcoming, "WTO-compatible" EU Carbon Border Adjustment Mechanism, which is intended to avoid "carbon leakage," can be "an opportunity to work together to set a global template for such measures."

The Biden administration is likely to share some of the EU's ambitions on trade and climate issues. President-elect Biden has shown a strong interest in crafting new trade rules to address climate change, and he has also pledged that "the Biden Administration will impose carbon tariffs, fees, or quotas on carbon-intensive goods from countries that are failing to meet their climate and environmental obligations." Such carbon border adjustments have figured prominently in the US legislative debate over efforts to establish a domestic carbon tax. Indeed, all of the current US legislative proposals to establish such a tax include some form of border adjustment, and some Congressional leaders have made their support for a carbon tax contingent on the inclusion of a border adjustment to offset any competitive disadvantages to US businesses. The Biden administration reportedly is not planning to pursue a carbon tax in the near-term due to the current COVID-19 work contraction, but it might seek to coordinate with the EU on this issue given its long-term objectives for trade and climate policy.

FTA Negotiations

Notably absent from the European Commission's proposed agenda is any mention of resuming negotiations for a comprehensive FTA (such as the proposed Transatlantic Trade and Investment Partnership (TTIP)). Nor does the agenda mention a potential US-EU agreement to eliminate tariffs on industrial goods, which the Commission proposed (and for which it secured a negotiating mandate) in 2019. Instead, the proposed agenda calls only for "reactivat[ing] proposals for EU-US standards cooperation and re-engag[ing] on conformity assessment negotiations."

Separately, EU officials have indicated that they do not intend to pursue an FTA with the Biden administration. Instead, they have argued that shoring up the multilateral trading system and countering the emergence of state capitalism are more urgent priorities for the two governments, and that a bilateral FTA would do little to further these objectives. For example, EU Director-General for Trade Sabine Weyand suggested recently that the two governments should prioritize "rebuilding together…the multilateral trading system" and dealing with "the challenge posed by China," and stated that "I don't think that a bilateral agreement is the answer to that." She argued instead that the US and the EU "need to work inside the WTO" to address issues such as industrial subsidies – working on a plurilateral basis where necessary – and that this approach would be more effective at addressing the most pressing challenges "than going through a repeat of TTIP, which failed because of very important differences between us." President-elect Biden also appears unlikely to prioritize a US-EU FTA given the serious difficulties that were encountered during the TTIP negotiations and his broader commitment to prioritize domestic policy over new trade agreements, among other factors. Thus, in the near term, the two governments appear more likely to focus on WTO reform and resolving specific bilateral disputes such as Boeing-Airbus than ambitious efforts to liberalize bilateral trade and investment.

Trade Remedies and Enforcement

The Trump administration has aggressively enforced US trade remedy (i.e., antidumping and countervailing duty) laws, and this trend is likely to continue under the Biden administration. The numbers of new trade remedy investigations and final measures imposed by the United States have reached record levels under President Trump, and related proceedings such as circumvention inquiries have also become more frequent. This uptick in enforcement activity has occurred in tandem with policy changes designed to enhance the effectiveness of the trade remedy laws. For example:

- The Trump administration has made frequent use of a 2015 law – commonly referred to as the Leveling the Playing Field Act – that expanded the Commerce Department's authority to find the existence of "particular market situations" in antidumping investigations. Such findings enable the agency to reject a respondent exporter's home market sales prices and adjust its raw material costs to offset distortions caused by government intervention. This process has often led to increased antidumping duties.
- In February 2020, the Commerce Department amended its regulations to establish a process by which it may treat a foreign country's "currency undervaluation" as a countervailable subsidy – potentially subjecting imports from that country to increased countervailing duties. Commerce has already used the rule to impose preliminary countervailing duties on products from China and Vietnam in response to alleged currency undervaluation.
- The Commerce Department under the Trump administration has self-initiated several circumvention inquiries based on its own monitoring of trade patterns. It has also amended its steel import licensing system to newly require information about the source of raw materials used in imported steel products, in order to enhance its monitoring of suspected unfair trade practices.
- US Customs and Border Protection (CBP) has aggressively used its authorities under the 2016 Enforce and Protect Act (EAPA) to investigate allegations that an importer's material false statements or omissions in entry documents have enabled it to evade antidumping or countervailing duties. CBP has initiated more than 130 EAPA investigations and claims to have "prevented the evasion of over $600 million" in duties under the law.

Most of these enforcement trends are likely to continue under the Biden administration. During the campaign, President-elect Biden touted his role in securing the passage of the "Leveling the Playing Field Act" provisions that expanded Commerce's authority on "particular market situation" and made other changes that were generally favorable toward domestic industry petitioners. More broadly, he described dumping as "a serious risk to our economy," pledged to "consistently and aggressively enforce American trade laws," and promised to "address the continuous efforts to evade and circumvent our trade laws and undermine the effectiveness of our trade cases." There is strong bipartisan support in Congress for this aggressive posture on trade enforcement. And in any event, the investigations follow a statutory process that can be triggered by a petition from US producers, so the number of cases that any administration pursues is determined in large measure by domestic industry,

President-elect Biden has not specified whether he will continue the policy of applying countervailing duties in response to currency undervaluation, though he has implied that he might do so by pledging to "[t]ake aggressive trade enforcement actions" in response to "unfair practices, including currency manipulation[.]" This was one of the more controversial trade policy changes enacted by the Trump administration, as it contradicted the US government's longstanding position that the Treasury Department should maintain sole jurisdiction over exchange rate policy and address concerns about currency undervaluation through bilateral consultations and multilateral fora such as the IMF. The Obama administration, for example, opposed legislative efforts to require Commerce to countervail currency undervaluation, arguing that they would undermine international efforts to address the issue, raise questions regarding US compliance with WTO rules, and result in retaliatory actions. Though some of President-elect Biden's advisors have argued that tariffs are a poor tool for addressing currency undervaluation, it is unclear whether there will be a reconsideration of the Trump administration's approach.

Trade Personnel in the Biden Administration

President-elect Biden has announced his nominees for several of the cabinet and White House positions that will be responsible for formulating and implementing US trade policy. These include the United States Trade Representative (the lead US official responsible for trade negotiations, representation of the United States in the WTO, and enforcement of certain trade laws and agreements), as well as members of his broader economic team. We discuss these selections and their known views on trade policy below.

US Trade Representative

President-elect Biden has announced his intention to nominate Ms. Katherine Tai for the role of United States Trade Representative. Ms. Tai currently serves as Chief Trade Counsel to the Chairman and Democratic members of the Ways and Means Committee of the US House of Representatives. Before joining the Committee in 2014 as Trade Counsel, Ms. Tai served in USTR's Office of the General Counsel, first as Associate General Counsel from 2007 to 2011 and then as Chief Counsel for China Trade Enforcement from 2011 to 2014.

Ms. Tai has not written or spoken as extensively about her personal views on trade policy as some previous USTR nominees (as is common for Congressional trade committee staff), though she is considered to be aligned with the progressive wing of the Democratic Party on trade issues. She was included on a list of suggested hires provided to the Biden administration transition team by the Progressive Change Institute, and her nomination has been endorsed by progressive Members of Congress such as Sen. Sherrod Brown (D-OH) – a longstanding critic of trade liberalization and US trade agreements. Sen. Brown and other Members of Congress have praised Ms. Tai's role in finalizing the USMCA, citing in particular her representation of House Democrats in their negotiations with the Trump administration on modifications to the USMCA provisions on labor, the environment, intellectual property, and rules of origin. Those changes were instrumental in securing support for the USMCA among Congressional Democrats and US labor unions.

In recent public appearances, Ms. Tai has briefly addressed some of the most pressing issues in US trade policy, though she has not offered detailed policy prescriptions. For example:

- She has suggested that she would prefer a more "strategic" approach to the trade conflict with China than the one pursued by the Trump administration, arguing that "we are facing very stiff competition from China, but China is not going away[.]" In her view, "a good and progressive trade policy" towards China "has to have both offensive and defensive elements." Specifically, Ms. Tai said:

  > I would say that in terms of what we've experienced over these most recent years with this administration, they have been very strong on confronting China, very aggressively. But I would characterize those measures as actually largely defensive. And again, you must have both defensive and offensive. But with respect to counteracting unfair trade practices and enforcing our trade rights, I see those primarily as defensive maneuvers that is to make sure that China is playing by the rules or if not playing by the rules that we are taking countermeasures.
  >
  > I think the offense has got to be about what we are going to do to make ourselves and our workers and our industries and our allies faster, nimbler, be able to jump higher, be able to compete stronger, and ultimately be able to defend this open democratic way of life that we have.

- With respect to efforts to "re-shore" supply chains, she stated that "one of the things that's become very clear and very powerful to me is that it is critical for any nation, it is critical for us because I think we've lost quite a bit of this, to have a critical mass, if you will, of ongoing manufacturing activity to maintain the versatility and also the innovation ecosystem that we need to be able to pivot and to be able to respond."

- With respect to WTO reform, she stated that "[t]he WTO is a great idea" and "has been very effective in accomplishing a number of things," but is in need of "modernization" in light of developments over the past 25 years. She stated in particular that the WTO needs reform in light of "digitalization of our economy, of changes

in technology, and the way that we communicate with each other in the way that we transact commerce," as well as "the economic growth and rise of China in the global economy."

- When asked whether USMCA should be a model for future trade agreements, she stated that she views the USMCA "not as much as a model but as an important block or foundation to build off of," arguing that "you can't just take this and go stamp it in the UK and Kenya." In her view, "what is most critical…about USMCA is that it was the first attempt to revisit or reimagine how our trade policies, how our globalization policies can be modified and meet with more robust support[.]"

These statements align with mainstream Democratic (and in some cases bipartisan) sentiments on trade, but leave many questions as to how Ms. Tai's views will shape the Biden administration's policies. Senators are likely to explore Ms. Tai's views in greater detail during the confirmation process.

One notable element of President-elect Biden's decision to nominate Ms. Tai is that she has been one of the officials on the Democratic side who has been most closely involved with USTR over all four years of the Trump Administration. As a result, she is familiar with the USTR staff who are remaining and is likely very much up to speed on the status of ongoing negotiations. She is also intimately familiar with the concerns of all of the key Members of Congress regarding trade issues, and thoroughly understands the collaboration that the Congress will expect if fast track trade promotion authority is to be extended or renewed. As a result, to the extent that the Biden administration wants to engage in trade policy measures, Ms. Tai will be well positioned to effectively implement that agenda.

Secretary of the Treasury

President-elect Biden's nominee for Secretary of the Treasury, Ms. Janet Yellen, has a long track record of supporting trade liberalization and the multilateral trading system, dating back to her time as an economic adviser to President Bill Clinton. Following her departure as Federal Reserve Chair in 2018, she has often criticized the Trump administration's trade policies. For example, she offered the following critique of the Trump administration's approach in 2018:

> We're seeing a huge retreat from the principles the US has espoused and all the institutions that we built in the postwar period. Resisting protectionism and strongly supporting a rules-based multilateral system are what the US stood for and promoted as a global system with great success. And I believe that system is responsible for great improvements in growth and well-being around the globe. But, this is a set of principles that the US has walked away from and has been unwilling to endorse. There are some valid trade issues with China, and perhaps with Europe, but we've always approached dealing with these issues in an orderly way respective of WTO principles and long-established principles of trade. And it greatly worries me to see the US taking bilateral approaches and unilateral action.

Ms. Yellen has stated that the United States has "valid concerns" about China's alleged unfair trade practices, but has argued against "decoupling" from China. In her view, President Trump's Section 301 tariffs have not succeeded in compelling China to reform its policies, but "are taxes on American consumers and businesses" and have been "a wash from the perspective of U.S. jobs, especially in manufacturing." More broadly, she has disagreed with the views of President Trump and some of his advisors regarding trade deficits, stating that "I do not see unfair trade practices in China, or anywhere else in the world, as what is responsible for the US trade deficit," and that remedying bilateral trade deficits is "not an appropriate objective of policy[.]" Given these views, Ms. Yellen is expected to be a moderate voice on trade issues in the Biden administration.

Council of Economic Advisers

President-elect Biden will nominate Ms. Cecilia Rouse to serve as Chairperson of his Council of Economic Advisers. He has also appointed two members of the CEA to work under Ms. Rouse: Ms. Heather Boushey and Mr. Jared Bernstein. These economists have expressed views on trade policy that are within the Democratic Party mainstream: they have generally acknowledged that trade liberalization provides net economic benefits to the United States, but have emphasized its disruptive effects on industries that are exposed to import competition, and have

argued that US policy has done too little to assist workers in those industries. For example, Mr. Bernstein has argued that "globalization cannot nor should not be stopped," and that "[trade] is a net plus, increasing supply chains, jobs and commerce, while lowering prices. But it also comes at a great cost for those workers and communities in wealthy countries like ours who face increased competition from lower-wage countries." Similarly, Ms. Rouse in a 2012 survey agreed with the assertions that NAFTA provided net benefits to US citizens and that the long-term benefits of free trade "are much larger than any effects on employment," though she added that "[t]here could be other, less desirable, impacts as well."

None of these officials have advocated the use of broad-based tariffs as a component of US trade policy, and Ms. Boushey and Mr. Bernstein have been critical of the Trump administration's tariff strategy. Mr. Bernstein, for example, has criticized President Trump's Section 232 tariffs on steel and aluminum and Section 301 tariffs on Chinese goods, arguing that "tariffs can be a useful tool, but the problem with [President] Trump's is that they're far too sweeping…Tariffs should be targeted at specific goods that are being dumped in our country[.]" In his view, "tariffs generally won't provide those whose economic prospects have been hurt by globalization with the economic opportunity they lack." Instead, he has advocated substantial changes to US trade negotiating objectives (seeking stronger labor and environmental rules and less emphasis on intellectual property and investor protections), as well as direct government assistance to workers harmed by import competition, among other changes. Ms. Boushey has suggested that policymakers should prioritize trade ("whether that means restricting it, as [President] Trump wants to do, or expanding it") less than they have in the past, given that "communities and workers are being left behind" and "[i]n the end, trade is a modest slice of our $18.6 trillion economy." While these views diverge from the priorities of the US business community, they do not appear to embrace the most controversial aspects of the Trump administration's trade policy.

Department of Commerce

President-elect Biden has not yet announced his nominee for Secretary of Commerce. Most of the individuals rumoured to be under consideration for the position have backgrounds in business: they include Meg Whitman (CEO of Quibi; former CEO of eBay and Hewlett Packard); Mellody Hobson (President and co-CEO of Ariel Investments); Indra Nooyi (Co-director of the Connecticut Economic Resource Center; former chair and CEO of Pepsico); and Ursula Burns (Senior advisor at Teneo; former chair and CEO of VEON). This official will play an important role in overseeing the enforcement of US trade laws – in particular the antidumping and countervailing duty laws, Section 232, and aspects of the US export controls regime – though none have expressed detailed views on these issues.

The US Role in the WTO

It is not clear yet what priority the Biden Administration will attach to the multilateral trading system, but there can be no doubt that the WTO is deeply in need of engagement and leadership from the United States if it is to remain relevant and to deliver results.

Repairing the dispute settlement system is a priority for many WTO Members. There is widespread support among WTO Members for reforming the Appellate Body to bring it back to its original purpose and reverse its perceived mission-creep, in sympathy with criticism from the United States that began long before the Trump Administration brought the Appellate Body to a standstill in late-2019. However, the United States did not engage actively in the Walker process in 2019 to adjust the Appellate Body's mandate and procedures in response to US complaints, nor has it set out its own proposals for reform that could lead to the Appellate Body's reinstatement. In the meantime, the loss of the two-tier system for resolving disputes and the increasing practice of appealing the findings of some dispute panels "into the void" is making the whole process of dispute settlement less predictable and the trade rules appear less legally-binding. This is the area that other WTO Members are likely to look to first for concrete engagement with the United States and a signal from the Biden Administration of renewed confidence in multilateral dispute settlement.

The way in which the new Administration chooses to handle the US Section 232 disputes that are currently working their way through the WTO system is also likely to be closely watched by other WTO Members. Justifying tariffs on

imports of steel and aluminum (and threatening others on automobiles) from friend and foe alike under the WTO national security exception, and on that basis claiming immunity from dispute settlement, has struck many as far-fetched and as opening a potentially disastrous breach in the WTO rulebook that others could pour through with deliberate protectionist intent. If the existing multilateral rules can be outflanked so easily, many WTO Members will question the purpose of spending time negotiating new ones. Some will be looking for signs from the United States of a willingness to declare a ceasefire in the cycle of restriction and retaliation that has developed out of the Section 232 tariffs as well as that resulting from the Boeing-Airbus dispute with the EU. Some Members certainly hope that the national security exception can be put back in its box and that alternative ways can be found to justify the tariffs under WTO rules if they are kept in place.

Engaging the WTO in the global health and climate change agendas is also a priority for many Members. US support and leadership is essential if the WTO is to be viewed as relevant for international policymaking in these areas. President-elect Biden has not indicated whether he sees a role for the WTO in these areas, though he has taken the general position that “[w]e can no longer separate trade policy from our climate objectives.”

In other areas, the WTO is likely to find itself continuing to compete for attention with the US bilateral and regional trade agendas. Most important in that regard is whether reforms can be introduced in the WTO that will make it a more effective platform for members to manage their trade relations with China and other countries where “state-capitalism” plays a central role. The United States can count on support from like-minded WTO Members, such as the EU and Japan, who have backed its proposals to strengthen WTO notification requirements, bring in new disciplines on industrial subsidies and write new rules to cover the activities of state-controlled enterprises. However, on its own that support will not be enough to convince the United States that a multilateral approach is practical. One question is whether ambitious results can be achieved in these areas in a timely manner when WTO decision-making depends on consensus. It is also not apparent that advanced developing countries will agree to be weaned off “Special and Differential Treatment” in the process of reforming WTO rules, as well as in market access negotiations, and accept a higher level of obligation and reciprocity than has been the case in the past. The Trump Administration concluded that the concensus necessary for substantive WTO reform would not be reached on any of these important issues. It took a more direct bilateral approach in dealing with China and it has championed a plurilateral approach to the E-Commerce negotiations that could end up outside the WTO framework. What remains to be seen is how the Biden Administration plans to change the dynamic at the WTO, given that China has expressed no interest in seeing substantive reforms enacted at the WTO that would require substantial changes to China’s economic model.

Indications of whether, and if so how, the United States will re-engage on a multilateral basis and help create a counterbalance to entrenched Chinese influence in the WTO could become apparent early on from how the Biden Administration handles the legacy of the Trump administration at the WTO, how it reacts to new challenges such as the introduction of digital taxes by several European countries and the design of a carbon tax on imports by the EU, and how it proceeds to implement an enhanced “Made in America” policy on public procurement in light of US obligations under the WTO Government Procurement Agreement. The US position on most WTO issues is not expected to change overnight, although there will be anticipation in Geneva that progress can be made early in the new Administration to repair the dispute settlement system. Before the next WTO Ministerial Conference in 2021, WTO Members will need to persuade the United States that sufficient WTO reforms are realistic and that important parts of US trade policy can be achieved successfully through multilateral cooperation and negotiation. It seems a fair assumption that the jury will be out on both of those counts until then.

Free Trade Agreements

United States and Ecuador Sign Bilateral Protocol on Trade Rules and Transparency

On December 8, 2020, the United States and Ecuador signed a Protocol to their bilateral Trade and Investment Council Agreement (TIC) concerning "Trade Rules and Transparency."[1] The Protocol resembles a similar agreement on Trade Rules and Transparency signed by the United States and Brazil in October. Ecuadorian officials have expressed hope that the Protocol will eventually lead to negotiations for a comprehensive free trade agreement with the United States. We provide an overview of the Protocol and its implications below.

Background

Ecuador, like Peru, Colombia, and Bolivia, used to enjoy duty-free access to the United States for most of its exports under a preferential trade scheme that expired in 2013.[2] Peru and Colombia struck separate free trade agreements with the United States that were approved by the US Congress in 2007 and 2011, respectively, but Ecuador did not.

Bilateral relations between Ecuador and the United States have been distant for most of the last two decades. However, relations began to improve three years ago following the election of President Lenin Moreno. Discussion of a potential trade agreement began soon after President Moreno met with President Trump in Washington, DC in February 2020.

Though USTR has described the Protocol as "an important step in establishing closer economic ties between [the two] countries," the Ecuadorian government has called it a "Phase-One Deal" in the hope that this will lead to negotiations for a free trade agreement.

Separately, the United States recently added roses to the list of imported goods eligible for duty-free treatment under its Generalized System of Preferences program. That has provided a significant boost for one of Ecuador's top export industries, which faces fierce competition from its neighbors.

The Protocol

The Protocol updates the US-Ecuador TIC, signed in 1990. According to USTR, the Protocol contains "state-of-the-art provisions" in the following areas, based on the United States-Mexico-Canada Agreement (USMCA) and the recent protocol with Brazil:

- An Annex on *Trade Facilitation and Customs Administration* expands on the WTO Trade Facilitation Agreement;
- An Annex on *Good regulatory practices* includes provisions designed to promote fairness and transparency in Ecuador's regulatory process;
- An Annex on *Anti-corruption* includes obligations to adopt and maintain measures to prevent and combat bribery and other forms of public corruption; and
- An Annex on *Small and Medium-Sized Enterprises (SMEs)* seeks to facilitate cooperation on trade and investment opportunities for SMEs, which make up the bulk of Ecuador's business community.

Outlook

The Protocol will enter into force the day after both Parties have notified one another of the completion of their internal ratification procedures. USTR has asserted that the Protocol does not require Congressional approval in the

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[1] The full text of the U.S.-Ecuador TIC Protocol on Trade Rules and Transparency can be found here: **https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/december/united-states-and-ecuador-update-trade-and-investment-council-agreement-new-protocol-trade-rules-and**.

[2] The Andean Trade Preference Act, originally enacted in 1991 and renewed in 2002 as the Andean Trade Promotion and Drug Eradication Act (ATPDEA).

United States to enter into force. House Ways and Means Committee Chairman Richard Neal (D-MA) has criticized USTR's approach, alleging that it failed to consult Congress on the negotiation of the Protocol and that "nearly the whole negotiation, if not its entirety, was conducted after the U.S. presidential election occurred and in less than two months[.]" He stated that Democratic Members of the Committee "support active engagement with Ecuador," but have concerns about alleged labor and environmental practices that should have been addressed in any negotiation.

As noted above, Ecuadorian officials hope that the Protocol will lead to talks on a comprehensive free trade agreement with the United States, like those that its neighbors Colombia, Peru and Chile already have. However, this appears unlikely to occur quickly. President-elect Joe Biden has said that he plans to prioritize his domestic policy agenda before entering into new trade agreements, and Ecuador will hold its presidential elections in February 2021. President Moreno will not stand for re-election and one of the two leading candidates is sponsored by former leftist president Rafael Correa, who led the country between 2007 and 2017 and firmly opposed a deeper economic relationship with the United States.

USTR's statement on the Protocol can be viewed **here**.

USMCA "Technical Corrections" Included in Consolidated Appropriations Act; GSP and MTB Likely to Expire on January 1

On December 21, 2020, Congress approved the Consolidated Appropriations Act for 2021 – an omnibus bill containing new coronavirus relief legislation, appropriations to fund the federal government for the remainder of the fiscal year, and other measures.[3] Though trade issues received little attention in the bill, certain "technical corrections" to the US-Mexico-Canada Agreement (USMCA) Implementation Act were incorporated, including a much-debated amendment that denies USMCA tariff treatment to products manufactured in US foreign-trade zones (FTZs). The bill does not extend the tariff relief provided under the Generalized System of Preferences (GSP) program or the Miscellaneous Tariff Bill (MTB), both of which are scheduled to expire on January 1, 2021. As a result, these programs are likely to lapse, despite efforts by the US business community and some Members of Congress to secure their extension as part of the year-end legislative package. We discuss these developments in greater detail below.

Technical Corrections to the USMCA Implementation Act

The Consolidated Appropriations Act at Division O, Section 601 makes several "technical corrections" to the USMCA Implementation Act that President Trump signed into law in January of 2020.[4] Though most of the technical corrections are not controversial, the Act includes one change concerning the treatment of US foreign-trade zones that had been strongly opposed by some in Congress and the US business community.[5]

The USMCA Implementation Act as approved in January did not carry forward a provision of the NAFTA Implementation Act that denied preferential tariff treatment to goods manufactured in US FTZs using non-originating materials, even if those goods satisfied the applicable product-specific rule of origin set forth in Annex 401 of the NAFTA.[6] Some Members of Congress claim that this language was inadvertently omitted from the USMCA statute, and that Congress had intended to maintain the restriction on FTZs that existed under the NAFTA statute. The Consolidated Appropriations Act would address this by reinstating the restriction on FTZs. Specifically, it would amend the USMCA Implementation Act to provide that a good manufactured in a US FTZ or subzone using non-originating materials is not eligible for preferential tariff treatment under the USMCA when entered into the United

[3] H.R. 133.

[4] For an overview of the USMCA Implementation Act, please refer to the W&C US Trade Report dated January 16, 2020.

[5] The FTZ program was created by the US Foreign-Trade Zone Act of 1934 (19 U.S.C. §§81[a-u]). FTZs are designated areas of the United States into which zone users may import goods duty-free, subject to certain requirements, for warehousing or production purposes within the zones. Duties are collected when goods leave the zones for consumption in the United States and not when exported.

[6] Formerly codified at 19 U.S.C. §3332(a)(2)(A); repealed pursuant to the USMCA Implementation Act on July 1, 2020.

States for consumption, even if the good satisfies the applicable product-specific rule of origin set forth in Annex 4-B of the USMCA.[7]

Though this “technical correction” is consistent with the longstanding treatment of FTZs under the NAFTA, some US business groups and Members of Congress strongly opposed its adoption. Industry groups representing users of the FTZ program (which include manufacturers of automobiles, heavy equipment, and chemicals, among other goods) argued that the NAFTA statute’s treatment of FTZs placed US manufacturers at a disadvantage compared to their competitors in Canada and Mexico, and that this approach should not be replicated the USMCA statute. A bipartisan group of Senators led by Sen. John Cornyn (R-TX) took the same position, arguing that reinstating the NAFTA language would amount to “a $2 billion tax increase on job-creators operating on U.S. soil.” By contrast, the Trump administration advocated reinstating the restriction on FTZs, arguing that it would further the USMCA’s objective “to incentivize more manufacturing in the United States and North America through stronger rules of origin that further limit the use of non-originating inputs for goods traded under the Agreement.”

GSP Expiration

The Consolidated Appropriations Act does not address the upcoming expiration of tariff preferences for developing countries under the Generalized System of Preferences (GSP). GSP is scheduled to expire on January 1, 2021, and Members of Congress have been unable to agree on legislation to reauthorize the program. Congressional Democrats have insisted that any legislation reauthorizing GSP should also expand the criteria that countries must satisfy to participate in the program, and they have introduced legislation that would add eligibility criteria related to environmental practices, human rights, the rule of law, good governance, and anti-corruption. Congressional Republicans, on the other hand, have argued that these proposals were introduced too late to allow for sufficient debate this year, and instead have advocated a “clean” extension of the program that would allow for debate on the eligibility criteria in the next Congress. Given the failure to resolve this disagreement in the omnibus legislation, as well as the limited time remaining on the congressional calendar, it is now almost certain that GSP will expire on January 1.

Despite the disagreement over the terms of GSP’s reauthorization, the program continues to enjoy bipartisan support, and it is likely to be reauthorized eventually. In all prior instances where GSP has lapsed, Congress has reauthorized the program on a retroactive basis, allowing importers to obtain a refund of duties paid as result of the lapse. Nevertheless, it is unclear how quickly the next Congress will take up GSP reauthorization, and some previous lapses have lasted for several years. In any event, the expected lapse of the program will result in new tariff costs for importers of GSP-eligible merchandise on January 1 – an outcome that many US business groups sought to avoid by advocating an extension of GSP as part of the year-end legislative package.

Miscellaneous Tariff Bill

The Consolidated Appropriations Act does not address the upcoming expiration of duty suspensions on more than 1,600 products under the Miscellaneous Tariff Bill Act of 2018 (MTB 2018) – the first MTB enacted by Congress under the new process established by the American Manufacturing Competitiveness Act of 2016 (AMCA). The AMCA process allows importers to file petitions with the US International Trade Commission (ITC) seeking temporary suspensions or reductions of import duties on particular products. The ITC then submits a report to Congress assessing whether each petition meets certain statutory criteria (including whether they involve products that are produced in the United States and, if so, whether domestic producers object to the proposed duty suspensions). Based on the ITC’s report, Congress then determines which of the proposed duty suspensions to include in the MTB. Historically, MTBs have been limited to intermediate goods for which there is little to no domestic production.

The tariff suspensions provided under the MTB 2018 will expire on January 1, 2021. The ITC on August 10 submitted its final report to Congress assessing the petitions it received for inclusion in the next MTB. However, Congress has been unable to agree on new MTB legislation, reportedly due to disagreement between the House and the Senate over which duty suspensions should be included in the bill. Given the failure to resolve this disagreement

[7] Division O, Section 601(b).

in the omnibus legislation, as well as the limited time remaining on the congressional calendar, it appears unlikely that new MTB legislation will be enacted by the current Congress.

Next Steps

On December 22, President Trump criticized provisions of the Consolidated Appropriations Act relating to coronavirus relief and foreign assistance, and he urged Congress to make changes to the legislation. At this stage, it is unclear whether Congress will revise the bill in response to the President's concerns, or whether President Trump will veto the bill absent such revisions. Some observers have speculated that the passage of the legislation might be delayed until the new Congress convenes in January, given President Trump's apparent opposition to the legislation in its current form. In any event, Congress appears unlikely to revisit the trade-related aspects of the legislation.

The text of the Consolidated Appropriations Act can be viewed here.

US Trade Actions

Section 232

US Department of Commerce Modifies Section 232 Exclusion Process for Steel and Aluminum Imports

On December 10, the US Department of Commerce (DOC) published an interim final rule amending its Section 232 product exclusion process for steel and aluminum imports.[8] Among other changes, the interim final rule (1) establishes a list of "General Approved Exclusions" for certain products that have not been the subject of objections by domestic producers; (2) newly requires a requester to "certify" that the import volume it seeks in an exclusion request "is consistent with legitimate business needs;" and (3) revises the definition of an "immediately" available product in order to "apply the same time standard to U.S. objectors and foreign suppliers[.]" The changes made by the interim final rule will take effect on December 14, except for the establishment of the General Approved Exclusions, which will take effect on December 29.

BIS is accepting public comments on the interim final rule, and it plans to publish at least one subsequent interim final rule responding to outstanding public comments on its previous notices and rulemakings. We provide an overview of the new rule and the next steps in the process below.

Modifications to Section 232 Exclusion Process

BIS is amending its regulations governing the Section 232 exclusion process (15 C.F.R. Part 705, Supplements 1 and 2) in response to comments it has received from the public pursuant to the following notices and rulemakings:

- The interim final rule of September 11, 2018 (83 Fed. Reg. 46026), which modified the exclusion process to establish the "rebuttal and surrebuttal" process (among other changes) and sought comments on those modifications;
- The interim final rule of June 10, 2019 (84 Fed. Reg. 26751), which implemented a new online "Section 232 Exclusions Portal" and sought comments thereon; and
- The notice of inquiry of May 26, 2020 (85 Fed. Reg. 31441), which sought public comments on the appropriateness of the information requested and considered in applying the exclusion criteria, and the efficiency and transparency of the process employed.

DOC's new interim final rule makes the following substantive changes to the exclusion process:

General Approved Exclusions

The interim final rule adds two new supplements to 15 C.F.R. Part 705 identifying steel and aluminum articles that have been approved for importation pursuant to a "General Approved Exclusion" (GAE). These GAEs can be used by any importer and will be valid indefinitely, though DOC may at any time issue a notice removing, revising or adding to an existing GAE. Unlike regular product exclusions, there is no limitation on the quantity of imports that may enter pursuant to a GAE. To obtain relief from Section 232 duties on a product covered by a GAE, the importer must specify the applicable "GAE identifier" number in the Automated Commercial Environment (ACE) system.

The interim final rule creates 108 GAEs for steel articles and 15 GAEs for aluminum articles, which are described at the HTSUS 10-digit level and in some cases are more narrowly defined. These GAEs will be effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after December 29, 2020. There will be no retroactive relief for GAEs, however.

[8] DOC's interim final rule can be viewed at: **https://www.federalregister.gov/public-inspection/2020-27110/steel-and-aluminum-tariff-exclusions-process-revision**.

In the preamble to the interim final rule, DOC explained that the establishment of the GAE process "addresses the need to create a more efficient method for approving exclusions where objections have not been received in the past for certain steel or aluminum articles." According to DOC, this change "will result in an estimated immediate decrease of 5,000 exclusion requests annually, resulting in a significant improvement in efficiency, with the possibility of more in the future."

The list of products covered by GAEs is provided in DOC's Federal Register notice.

Volume Certification

The interim final rule newly requires a requester to "certify" that the import volume it seeks in an exclusion request "is consistent with legitimate business needs" of the requesting entity. In the certification, the requester must attest to the following statements (emphases added):

- "My organization intends to manufacture, process, or otherwise transform the imported product for which I have filed an exclusion request or I have a purchase order or orders for such products;"
- "My organization does not intend to use the exclusion for which I have filed an exclusion request, if granted, solely to hedge or arbitrage the price;"
- "My organization expects to consume, sell, or otherwise use the total volume of product across all my active exclusions and pending exclusion requests in the course of my organization's business activities within the next calendar year";
- "If my organization is submitting an exclusion request for a product for which we previously received an exclusion, I certify that my organization either imported the full amount of our approved exclusion(s) last year or intended to import the full amount but could not due to one of the following reasons:
  (1) Loss of contract(s);
  (2) Unanticipated business downturns; or
  (3) Other factors that were beyond my organization's control that directly resulted in less need for steel or aluminum articles"; and
- "[T]he exclusion amount requested this year is in line with what my organization expects to import based on our current business outlook."

As part of the certification, the requester must also agree that, if requested by DOC, it will provide documentation that "justifies its assertions in this certification regarding its past imports of steel or aluminum articles and its projections for the current year, as it relates to past and current calendar year exclusion requests."

DOC states in the preamble to the interim final rule that this change "addresses a trend identified by commenters and validated in data reviewed by Commerce -- that certain exclusion requesters may have requested more volume than they may have needed for their own business purposes compared to past usage." In DOC's view "[s]ubmitting large numbers of unneeded exclusion requests decreases the efficiency of the 232 exclusions process" and "creates issues for potential objectors."

"Clarification" of eight weeks and available "immediately"

The interim final rule makes changes aimed at "clarifying" when an objector would be required to be able to provide the steel or aluminum in the quantity and quality to which they were objecting on the basis that they could provide that steel or aluminum "immediately."

Previously, DOC's regulations provided that a product would be eligible for exclusion where it was "not produced in the United States in a sufficient and reasonably available amount," which meant that "the amount of steel that is

needed by the end user requesting the exclusion is not available immediately in the United States[.]" They further provided that "immediately" means "whether a product is currently being produced or could be produced 'within eight weeks' in the amount needed in the business activities of the user[.]"

The interim final rule revises DOC's criteria to provide that, instead of being strictly limited to eight weeks, an objector must be able to provide the steel or aluminum "by a date earlier than the time required for the requester to obtain the entire quantity of the product from the requester's foreign supplier[.]" The term "immediately" is redefined to mean "that a product (whether it is currently being produced in the United States, or could be produced in the United States) can be delivered by a U.S. producer 'within eight weeks', or, if that is not possible, by a date earlier than the time required for the requester to obtain the entire quantity of the product from the requester's foreign supplier." DOC explains that it made this change "to create a more equal playing field between U.S. objectors and foreign producers, and to ensure that U.S. producers are not given less time to be able to meet the steel or aluminum demand being requested in an exclusion request." It did so to address "an objector concern they were being held to a higher standard than foreign suppliers[.]"

Additional revisions made by the interim final rule codify DOC's "current practice" whereby it may partially approve an exclusion request when an objector can produce and deliver a portion, which is less than 100 percent but 10 percent or more, of the amount sought in the request. In such scenarios, the rule newly specifies that DOC "may deny a requested exclusion for that percentage of imported steel or aluminum" that can be produced by the objector. The interim final rule also newly "clarifies" that a domestic producer may object to an exclusion request even if it is not currently producing the steel or aluminum product at issue.

Next Steps

DOC is requesting public comments on its interim final rule with a deadline of February 12, 2021. DOC also notes that its interim final rule does not address certain comments made in response to its May 26 notice of inquiry on the exclusion process and its June 10 rule implementing the 232 Exclusions Portal. The unaddressed comments pertain to, among other things (1) "the role of objections in the 232 exclusions process and whether objections have an outsized influence on the process, in particular on how long the Commerce decision-making process takes and whether an exclusion will be granted," (2) the potential establishment of a process "to give preferential treatment for products further manufactured or substantially transformed in the United States," (3) the potential establishment of "a 60-day window for submitting exclusion requests on a bi-annual basis," whereby only exclusion requests submitted during these bi-annual periods would be considered; and (4) various proposed improvements to the usability and search functionality of the 232 Exclusions Portal. Accordingly, DOC intends to publish "at least one subsequent interim final rule" that addresses these outstanding comments, though it does not provide a timeframe for this forthcoming rule.

Trade Remedies

US Department of Commerce Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Wood Mouldings and Millwork Products from China

On December 29, 2020, US Department of Commerce (DOC) announced affirmative final determinations in the antidumping duty (AD) and countervailing duty (CVD) investigations of wood mouldings and millwork products from China. DOC also announced a negative final determination in the AD investigation of wood mouldings and millwork products from Brazil. The petitioner in these investigations is the Coalition of American Millwork Producers, whose members are Bright Wood Corporation (Madras, OR), Cascade Wood Products, Inc. (White City, OR), Endura Products, Inc. (Colfax, NC), Sierra Pacific Industries (Red Bluff, CA), Sunset Moulding (Live Oak, CA), Woodgrain Millwork, Inc. (Fruitland, ID), and Yuba River Moulding (Yuba City, CA).

In its investigations, DOC determined determined that exporters from China have sold wood mouldings and millwork products in the United States at dumping margins ranging from 44.60 percent to 230.36 percent. In addition, DOC determined that exporters from China received countervailable subsidies at rates ranging from 20.56 percent to 252.29 percent.

The US International Trade Commission (ITC) is currently scheduled to make its final injury determinations on or around February 11, 2021. If the ITC makes affirmative final injury determinations, DOC will issue AD and CVD orders on imports from China. If the ITC makes negative final determinations of injury, the investigations will be terminated, and no orders will be issued.

The merchandise subject to these investigations consists of wood mouldings and millwork products that are made of wood (regardless of wood species), bamboo, laminated veneer lumber (LVL), or of wood and composite materials (where the composite materials make up less than 50 percent of the total merchandise), and which are continuously shaped wood or finger-jointed or edge-glued moulding or millwork blanks (whether or not resawn). The merchandise subject to this investigation can be continuously shaped along any of its edges, ends, or faces. Imports of wood mouldings and millwork products are primarily entered under the following Harmonized Tariff Schedule of the United States (HTSUS) numbers: 4409.10.4010, 4409.10.4090, 4409.10.4500, 4409.10.5000, 4409.22.4000, 4409.22.5000, 4409.29.4100, and 4409.29.5100. Imports of wood mouldings and millwork products may also enter under HTSUS numbers: 4409.10.6000, 4409.10.6500, 4409.22.6000, 4409.22.6500, 4409.29.6100, 4409.29.6600, 4418.20.4000, 4418.20.8030, 4418.20.8060, 4418.99.9095 and 4421.99.9780.

According to DOC, imports of wood mouldings and millwork products from Brazil and China in 2019 were valued at an estimated $315 million and $193 million, respectively.

US Department of Commerce Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Prestressed Concrete Steel Wire Strand from Eight Countries

On December 8, 2020, the US Department of Commerce (DOC) announced affirmative final determinations in the antidumping duty (AD) investigations of prestressed concrete steel wire strand (PC strand) from Argentina, Colombia, Egypt, the Netherlands, Saudi Arabia, Taiwan, Turkey, and the United Arab Emirates, as well as the countervailing duty (CVD) investigation of PC strand from Turkey. The petitioners in these investigations are Insteel Wire Products Company (Mount Airy, NC), Sumiden Wire Products Corporation (Dickson, TN), and Wire Mesh Corporation (Houston, TX).

In its investigations, DOC determined that exporters from the countries listed below have dumped PC strand in the United States at the following rates:

- 60.40 percent for Argentina,
- 86.09 percent for Colombia,

- 29.72 percent for Egypt,
- 30.86 percent for the Netherlands,
- 194.40 percent for Saudi Arabia,
- 23.89 percent for Taiwan,
- 53.65 percent for Turkey, and
- 170.65 percent for the United Arab Emirates.

In addition, DOC determined that exporters from Turkey received countervailable subsidies at rates ranging from 30.78 percent to 158.44 percent.

The US International Trade Commission (ITC) is currently scheduled to make its final injury determinations on or around January 21, 2021. 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. DOC is conducting concurrent AD investigations of PC strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine, and the final determinations for these investigations are scheduled to be announced on April 6, 2021.

The merchandise covered by these investigations is prestressed concrete steel wire strand (PC strand), produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand. PC strand is normally sold in the United States in sizes ranging from 0.25 inches to 0.70 inches in diameter. PC strand made from galvanized wire is only excluded from the scope if the zinc and/or zinc oxide coating meets or exceeds the 0.40 oz./ft2 standard set forth in ASTM-A-475. The PC strand subject to these investigations is currently classifiable under subheadings 7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (HTSUS).

According to DOC, imports of PC strand from the countries under investigation were approximately valued as follows in 2019:

- $2.3 million for Argentina;
- $9.6 million for Colombia;
- $345.9 thousand for Egypt;
- $1.6 million for the Netherlands;
- $1.4 million for Saudi Arabia;
- $3.0 million for Taiwan;
- $13.1 million for Turkey; and
- $2.3 million for the United Arab Emirates.

US Department of Commerce Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Forged Steel Fluid End Blocks from Multiple Countries

On December 8, 2020, the US Department of Commerce announced affirmative final determinations in the antidumping duty (AD) investigations of forged steel fluid end blocks (fluid end blocks) from Germany and Italy, and affirmative final determinations in the countervailing duty (CVD) investigations of fluid end blocks from China,

Germany, India, and Italy. DOC also announced a negative determination in the AD investigation of fluid end blocks from India. The petitioners in these investigations are the FEB Fair Trade Coalition (Cleveland, OH), Ellwood City Forge Company, Ellwood Quality Steels Company, and Ellwood National Steel Company (collectively, the Ellwood Group) (Ellwood City, PA), and A. Finkl & Sons (Finkl Steel) (Chicago, IL).

In its investigations, DOC determined that exporters from Germany and Italy have sold fluid end blocks in the United States at dumping margins ranging from 3.82 to 70.84 percent, and 0.00 to 58.48 percent, respectively. In addition, DOC determined that exporters from China, Germany, India, and Italy received countervailable subsidies at the following rates:

- 16.80 to 337.07 percent for China;
- 5.86 to 14.81 percent for Germany;
- 5.20 percent for India; and
- 3.12 to 44.86 percent for Italy.

The US International Trade Commission (ITC) is currently scheduled to make its final injury determinations on or around January 21, 2021. 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.

The products covered by this investigation are forged steel fluid end blocks (fluid end blocks), whether in finished or unfinished form, and which are typically used in the manufacture or service of hydraulic pumps. The products included in the scope of this investigation may enter under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7218.91.0030, 7218.99.0030, 7224.90.0015, 7224.90.0045, 7326.19.0010, 7326.90.8688, or 8413.91.9055.

The petitioners in these investigations estimated that the value of imports of forged steel fluid end blocks in 2018 from China, Germany, India, and Italy was approximately $17.8 million, $23.3 million, $44.4 million, and $46.4 million, respectively.

US Department of Commerce Issues Affirmative Final Determination in Antidumping Investigation of 4th Tier Cigarettes from South Korea

On December 7, 2020, the US Department of Commerce (DOC) announced its affirmative final determination in the antidumping duty (AD) investigation of 4th tier cigarettes from South Korea. The petitioner in this investigation is the Coalition Against Korean Cigarettes, whose members are Xcaliber International (Pryor, OK) and Cheyenne International (Grover, NC). In its investigation, DOC determined that exporters from South Korea have dumped 4th tier cigarettes in the United States at a rate of 5.48 percent.

The US International Trade Commission (ITC) is scheduled to make its final injury determination on or around January 19, 2021. If the ITC makes an affirmative final injury determination, DOC will issue an AD order. If the ITC makes a negative final determination of injury, the investigation will be terminated, and no order will be issued.

The merchandise covered by this investigation is certain tobacco cigarettes, commonly referred to as "4th tier cigarettes." The subject cigarettes are composed of a tobacco blend rolled in paper, have a nominal minimum total length of 7.0 cm but do not exceed 12.0 cm in total nominal length, and have a nominal diameter of less than 1.3 cm. Merchandise covered by this investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheading 2402.20.8000.

According to DOC, imports of 4th tier cigarettes from South Korea were valued at an estimated $82 million in 2019