

US Multilateral Trade and Policy Developments

Japan External Trade Organization

August 2023

Contents

Trade Policy Developments	1
Biden Administration Issues Order Reforming Government R&D Commercialization Policy and Domestic Manufacturing Waivers.....	1
US Congress Developing Annual Defense Spending Bill, Which Includes New Trade and Investment Rules.....	3
United States Issues Final Guidance on Expanded Domestic Sourcing Requirements for Infrastructure Projects	6
Trade Actions	8
United States Proposes Revisions to the Section 232 Tariff Exclusion Process	8
Trade Agreements	10
President Biden Signs Bill on Taiwan Trade Agreement, but Resists Expanding Congressional Involvement in Negotiations	10
Japan, Korea, and United States Hold Trilateral Summit to Deepen Security and Economic Cooperation	12
Sri Lanka Submits Request to Join RCEP and Negotiate FTA with ASEAN	14
Petitions & Investigations	16
Commerce Initiates AD and CVD Investigations of Pea Protein from China	16
Commerce Initiates AD and CVD Investigations into Imports of Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan.....	17

Trade Policy Developments

Biden Administration Issues Order Reforming Government R&D Commercialization Policy and Domestic Manufacturing Waivers

President Biden signed the *Executive Order on Federal Research and Development in Support of Domestic Manufacturing and United States Jobs* (the “EO”) on July 28, 2023, encouraging the government to prioritize US domestic manufacturers when commercializing patented technologies invented through government-funded research and development (R&D). The EO’s domestic manufacturing mandates have however been left flexible enough to continue encouraging R&D collaboration with other countries, according to the Biden administration. Along with those flexibilities, the EO makes significant reforms to the domestic manufacturing requirement waiver system, which may make it easier to use manufacturing facilities in other countries in some situations.

Actions in the EO

The EO focuses on four sets of actions to both improve commercialization of inventions made through government-funded R&D and encourage domestic manufacturing of products that use those inventions. These actions apply to the R&D funding activities of the Departments of Defense, Agriculture, Commerce, Health and Human Services, Transportation, Energy, Homeland Security, National Science Foundation, and the National Aeronautics and Space Administration (referred to here as the “funding agencies”). The effort will be coordinated by the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and the Director of the Office of Science and Technology Policy (OSTP), and the EO instructs them to consult with industry, academia, and other stakeholders on their actions.

Improving R&D reporting

First, The EO orders improvements to R&D reporting systems, which will help the government track how its R&D grants contribute to manufacturing and employment. There is a wide gap between the early-stage research, which the government often funds, and later-stage mass commercialization, which is led by the private sector. Better understanding the link between these two stages of development and improving commercialization has been a long-running goal of policymakers.¹ To improve the government’s understanding of its impact, the EO orders a modernization of the National Institute of Standards and Technology’s (NIST) iEdison R&D reporting system and requires more agencies to adopt it for their reporting.² It then calls for the development of new standard contract terms that would strengthen reporting requirements, including requiring “recipients of Federal R&D funding agreements to track and update the awarding agency on the location in which subject inventions are manufactured.” It adds that these reforms should also reduce administrative burdens in the reporting process so funding recipients can report activities easier. Finally, it orders the funding agencies to use this information to prepare annual reports on how inventions are being commercialized.

Incentivizing domestic manufacturing

Second, the EO launches several initiatives to incentivize the manufacturing of new inventions in the United States. This includes encouraging funding agencies to consider domestic production as a factor in R&D award solicitation and adding domestic manufacturing objectives to the government’s R&D strategy. It also encourages agencies to purchase leading-edge technologies from domestic sources to encourage their domestic production. The EO notes that these activities should be done “as appropriate and consistent with applicable law.”

It also directs the Small Business Administration to improve access to the Small Business Innovation Research and Small Business Technology Transfer programs to help small manufacturers engage in R&D commercialization.

Expanding domestic manufacturing requirements

Third, the EO encourages funding agencies to expand domestic manufacturing requirements for licensed technologies, though it leaves these requirements somewhat flexible and up to the discretion of each funding agency.

¹ See, for example, this 2018 presentation by NIST on the Lab-to-Market Cross Agency Priority (CAP) Goal here: https://www.nist.gov/system/files/documents/2018/10/11/9_shyam_sunder_update_on_progress_with_lab_2_market_and_roi_initiative.pdf; and the work of the NIST Technology Partnerships Office here: <https://www.nist.gov/tpo>.

² iEdison is accessible here: <https://www.nist.gov/iedison>.

Typically, under the Bayh-Dole Act, these domestic manufacturing requirements have only been applied to third party companies that are granted exclusive licenses to use and sell inventions in the United States.³ The requirement can be applied to non-exclusive licensees and licensees that intend to sell outside the United States only when Bayh-Dole's "exceptional circumstances" provision is invoked.⁴ The EO encourages funding agencies to consider invoking the "exceptional circumstances" provision, but does not broadly invoke "exceptional circumstances" itself. Delegating this decision to each agency makes the EO's domestic manufacturing requirements considerably more flexible than some industry stakeholders had feared. Considering the amount of decision-making that the EO leaves to the funding agencies for how to implement these actions, however, the full effect will not be understood until the funding agencies have completed implementation.

Reforming the waiver program

Fourth, the EO instructs the Department of Commerce (DOC) to reform the domestic manufacturing waiver program. Under 35 U.S.C. 204 of the Bayh-Dole Act, funding agencies can waive the domestic manufacturing requirement for licensees if the licensee shows that "reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible."

These reforms start with the DOC developing a standardized waiver application questionnaire, which would include questions on how the waiver will be used, why the invention needs to be brought to market, whether there are economic or national security impacts with manufacturing outside the United States, and what benefits would accrue to US manufacturing and jobs. The waiver will also require disclosure of conditions at the foreign manufacturing facility, including unionization, health and safety standards, labor and wage laws, and environmental impacts. According to the White House, "this will support the goal of manufacturing inventions under conditions that are in line with U.S. values when they cannot be manufactured domestically." The funding agencies would also be expected to develop guidelines for negotiating the granting of these waivers, which may include limiting waivers to applicants who commit to manufacturing in market economies and to "deliver alternative economic benefits to the United States" (such as through other investments and R&D). Previous versions of the DOC's waiver form have focused on asking licensees to show that there were previous failed efforts to license to domestic manufacturers or that domestic manufacturing is not commercially feasible, along with questions on the broad economic benefits to the United States of allowing foreign manufacturing. The new requirements, if strictly enforced, may represent a stricter approach to the waiver process. The EO does however introduce a new and more accessible alternative approach by encouraging funding agencies to waive certain domestic manufacturing requirements in advance.

Along with standardizing the waiver application, the EO also calls for the waiver process to be made faster and more transparent. It instructs the Department of Commerce to create public guidance on the process, which will include factors that agencies consider when assessing if domestic production is not commercially feasible. It also directs funding agencies to improve processing of waivers, making the system "rigorous, timely, transparent, and consistent." This would include acknowledging receipt of applications within 10 business days and finalizing decisions as soon as possible. Applying strict standards for the waiver process will be an important step forward for the government, as the current system appears beset by delays and varies significantly in effectiveness between funding agencies. AUTM, an association of university licensing offices, reported in a recent survey of waiver applicants that 22 of 33 university

³ *The Patent and Trademark Law Amendments Act of 1980*, also known as the Bayh-Dole Act, permits private ownership of patents that were made through government-funded R&D and facilitates the issuance of licenses for private use of government patents. Accessible here: <https://www.govinfo.gov/content/pkg/USCODE-2011-title35/html/USCODE-2011-title35-partII-chap18.htm>.

⁴ See 35 U.S.C. 202(a), accessible here: <https://www.govinfo.gov/content/pkg/USCODE-2021-title35/pdf/USCODE-2021-title35-partII-chap18-sec202.pdf>.

technology transfer offices that have submitted waiver requests never received a response from the government. Another eight reported that responses took over a year.⁵

Background

The EO is part of a broad effort by the Biden administration to expand US manufacturing, which began with the Biden administration's January 2021 executive order to strengthen Buy American guidelines.⁶ The EO was issued during what the Biden administration called the "Made in America" week, where the administration celebrated its legislative accomplishments, unveiled a new map of projects that the administration's policies have supported,⁷ encouraged consumers to favor domestically made products, and promoted the NIST Manufacturing Extension Partnership.⁸

Congress has also taken an interest in government R&D commercialization, with Senators Tammy Baldwin (D-WI) and JD Vance (R-OH) introducing bipartisan legislation in June 2023 that would implement similar measures.⁹ The bill favors domestic manufacturers more strictly than the EO, requiring that "any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States." The bill would still have an exemption process like that in the EO, but it would be subject to the procedures of the Build America, Buy America Act and waivers would be banned for manufacturing in "countries of concern." It could be that the Biden administration introduced the EO as a more moderate compromise, hoping to resolve concerns about the licensing system before the bill can pass.

The Executive Order can be found here: <https://www.federalregister.gov/documents/2023/08/02/2023-16636/federal-research-and-development-in-support-of-domestic-manufacturing-and-united-states-jobs>; and a White House factsheet describing its details can be found here: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/28/fact-sheet-amidst-manufacturing-boom-president-biden-will-sign-an-executive-order-on-federal-research-and-development-in-support-of-domestic-manufacturing-and-united-states-jobs-to-encourage>.

US Congress Developing Annual Defense Spending Bill, Which Includes New Trade and Investment Rules

The House of Representatives and the Senate both passed initial versions of the *National Defense Authorization Act for Fiscal Year 2024* in July 2023.¹⁰ As is common when developing this kind of legislation, members of both the House and Senate added various policy measures as amendments to the bill. In the Senate, these amendments included five measures that would affect trade and investment policy, including changes to special and differential treatment in trade agreements, new outbound investment monitoring rules, restrictions on some oil sales, restrictions on foreign investment in US farmland, and a waiver of certain environmental rules for semiconductor facilities. These amendments have broad bipartisan support, and there is a strong chance they will be in the final reconciled bill.

The House bill passed on July 14 on a partisan basis, 219 in favor and 210 against. The House then sent it to the Senate, where a heavily amended version was approved on July 27 by unanimous consent. The two versions must

⁵ US Manufacturing Waiver Survey, May 2023, AUTM, accessible here: https://autm.net/AUTM/media/Events/Images/AUTM-US-Manufacturing-Waiver-Survey-Results_VF.pdf.

⁶ Executive Order 14005 of January 25, 2021, Ensuring the Future Is Made in All of America by All of America's Workers, 86 FR 7475, accessible here: <https://www.federalregister.gov/documents/2021/01/28/2021-02038/ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers>.

⁷ Accessible here: <https://www.whitehouse.gov/invest/>.

⁸ Proclamation 10601 of July 21, 2023: Made in America Week, 2023, 88 FR 48029 (July 27, 2023) accessible here: <https://www.federalregister.gov/documents/2023/07/26/2023-15932/made-in-america-week-2023>.

⁹ S.1956 - Invent Here, Make Here Act of 2023, accessible here: <https://www.congress.gov/bill/118th-congress/senate-bill/1956/text>.

¹⁰ Congress' budget process requires two separate bills: an "authorization bill" that decides how money should be spent, and an "appropriations bill," that disburses the funding. There are 12 sets of these bills covering different policy areas and they must be passed every fiscal year (October 1 to September 30), either individually or packaged together as an "omnibus spending bill." If Congress fails to pass the bills, it can either extend the previous year's bills under a "continuing resolution" or temporarily shut down government operations.

now be reconciled with each other before the 2024 NDAA can be finalized into law, which would ideally happen in September. However, the 2024 NDAA negotiations are happening amid a larger debate over government funding levels that will challenge efforts to finish a compromise budget by September 30. This may lead Congress to extend the 2023 NDAA into 2024 instead of passing the 2024 NDAA into law. Failure or delay of the 2024 NDAA would also stall the passage of the trade and investment-related amendments discussed here, though their strong bipartisan support show that these issues may re-emerge in other future legislative packages.

SEC. 1085. Protection of Covered Sectors.¹¹

This amendment by the Senate represents the farthest Congress has yet gone in establishing new regulations on US investment abroad. The amendment would require companies to report certain covered investment activities in countries of concern (such as China and Russia) to the US government. These covered activities that must be reported are those involving a US person in a covered sector that include acquisition of equity interests, acquisition of debt obligations that affect governance rights, establishment of wholly owned subsidiaries, establishment of joint ventures, or making other acquisitions that involve operational cooperation or governance control (all subject to certain *de minimis* and ownership exceptions). The sectors covered by this reporting obligation would be advanced semiconductors, artificial intelligence, quantum technology, hypersonics, satellite communications, and dual-use networked laser-scanning systems. The Treasury Department would issue regulations to implement the reporting system, including more detailed definitions of covered activities and sectors, no later than 360 days after the bill's enactment. Those companies that fail to notify the government of covered activities or make material misstatements in notifications may face legal penalties, creating a new compliance risk for companies that operate in both the United States and China.

The amendment, originally called the *Outbound Investment Transparency Act* when it was a standalone bill, is sponsored by Bob Casey (D-PA) and John Cornyn (R-TX). The two Senators have proposed more aggressive measures in the past, including reviewing outbound investment transactions and banning investment in some sectors. The amendment's reporting approach is significantly weakened relative to those earlier versions. The Senators see it as a temporary compromise that could allow the US government to gather more information on investments and lead to a more restrictive regime in the future.

There are currently multiple proposals in Congress to monitor or restrict US investment in China and other countries of concern, though support has not coalesced around any single approach. How far the NDAA amendment's approach had to be weakened may reveal there is insufficient support for a more restrictive policy. The Biden administration is also developing its own version of an outbound investment control regime that would monitor or ban certain active investments in leading-edge technology sectors. The long-awaited publication of these regulations could come at any time now.

SEC. 1086. Review of Agriculture-Related Transactions by Committee on Foreign Investment in the United States.¹²

An amendment to the Senate NDAA would require the Committee on Foreign Investment in the United States (CFIUS) to review agriculture investments and restrict such investments from certain countries. The amendment would establish CFIUS coverage for the purchase, lease, or concession to foreign persons of agricultural land that is over 320 acres in size or over \$5 million in value. The amendment would also specifically prohibit covered transactions when they relate to persons "owned by, controlled by, or subject to the jurisdiction or direction of" China,

¹¹ S.Amdt.931 to S.Amdt.935, accessible here: <https://www.congress.gov/amendment/118th-congress/senate-amendment/931>.

¹² S.Amdt.813 to S.Amdt.935, accessible here: <https://www.congress.gov/amendment/118th-congress/senate-amendment/813>.

Russia, North Korea, and Iran. This investment prohibition would include businesses from third countries that have subsidiaries in those covered countries.

This amendment would replace a more moderate approach in the House's version of the NDAA, which would simply require the Agriculture and Defense Departments to prepare a report "on foreign-owned agricultural land located within 50 miles of a United States military installation."

SEC. 1090G. Semiconductor Program.¹³

This Senate NDAA amendment, previously called the *Building Chips in America Act*, would temporarily waive certain environmental review requirements for semiconductor projects financed under the CHIPS and Science Act. The amendment would specifically declare that certain projects receiving federal financial assistance should not be classified as "major federal actions" under the National Environmental Policy Act (NEPA). This will reduce (but not eliminate) environmental review procedures that must be undertaken before a federally funded project can start construction. These review processes can be slow and often lead to costly litigation for large projects. The semiconductor industry has praised the amendment's inclusion, saying it will hasten the construction of semiconductor factories.

SEC. 1399L. Ending China's Developing Nation Status.¹⁴

This amendment would establish a US policy of opposing the treatment of China as a developing country in treaties and international organizations, including where developing country status confers special and differential treatment. This includes instructing the executive branch to attempt to reclassify China as a developed country in treaties and international organizations, such as the World Trade Organization (WTO). This policy is loose, saying the executive branch "shall pursue" the actions rather than mandate any specific remedy, which may minimize the challenges it would create for the WTO. The amendment would also require the executive branch to file reports with Congress on all countries that are classified as developing countries in international agreements that also meet World Bank definitions for upper middle income or high-income countries.

Sec. 3143. Prohibition On Sales of Petroleum Products from the Strategic Petroleum Reserve to Certain Countries.¹⁵

Both the Senate and House versions of the 2024 NDAA would add a new restriction to sales of petroleum products from the US government's Strategic Petroleum Reserve. The amended Senate version would prohibit sales to "to any entity that is under the ownership or control of the Chinese Communist Party, the People's Republic of China, the Russian Federation, the Democratic People's Republic of Korea, or the Islamic Republic of Iran" (except on the condition that the products not be exported to those countries). A similar measure was also included in the House bill. The House version would apply to all countries under US sanctions (including China, Russia, Iran, and North Korea); would ban all sales and exports instead of only exports; and would apply to "any entity owned, controlled, or influenced by" any of the listed countries; making it broader than the Senate version.

The 2024 NDAA's progress in Congress, along with the text of both the House and Senate versions, can be found here: <https://www.congress.gov/bill/118th-congress/house-bill/2670>.

¹³ S.Amdt.985 to S.2226, accessible here: <https://www.congress.gov/amendment/118th-congress/senate-amendment/985>.

¹⁴ S.Amdt.823 to S.Amdt.935, accessible here: <https://www.congress.gov/amendment/118th-congress/senate-amendment/823>.

¹⁵ S.Amdt.926 to S.Amdt.935, accessible here: <https://www.congress.gov/amendment/118th-congress/senate-amendment/926>.

United States Issues Final Guidance on Expanded Domestic Sourcing Requirements for Infrastructure Projects

On August 14, 2023, the US Office of Management and Budget (OMB) issued the final guidance to support implementation of the rules under the Build America, Buy America Act (BABA) on procurement preferences for federally funded infrastructure projects, enacted as part of the November 2021 Infrastructure Investment and Jobs Act (IIJA).¹⁶ The rules require increased use of US-made iron or steel products, other construction materials, and manufactured products in government funded infrastructure projects, subject to certain exceptions. A draft of the guidance was issued for public comments in February 2023 and received over 2,000 responses.¹⁷ The final guidance makes several changes to the covered products and responds to some of the comments, helping to clarify some aspects of the guidance. BABA was first previewed in April 2022 through an initial guidance memorandum, which remains in effect and may receive updates of its own in the future.¹⁸ Though part of the IIJA, BABA applies to all federal financial assistance for infrastructure projects (as defined in section 200.1 of title 2, Code of Federal Regulations).

This final guidance will take effect on October 23, 2023, with transition arrangements for previously planned projects. Funding obligated between May 14, 2022, and October 23, 2023, is subject to the rules of the April 2022 initial guidance memorandum instead of the final guidance. Individual federal agencies that provide infrastructure funding are expected to build on the BABA guidance further by issuing more detailed guidance specific to each agency program.

BABA's content standards

BABA expands requirements that federally funded infrastructure construction projects use US-made materials and provides a more unified government-wide approach to such requirements. The guidance establishes three sets of domestic sourcing requirements, covering iron or steel products, other construction materials, and manufactured products used in infrastructure projects, which are summarized below.

- The iron or steel products requirement covers products for which more than 50% of the total cost of components are iron or steel. For products covered under this requirement, all manufacturing stages, from initial melt to application of coatings, must occur in the United States.
- Construction materials are articles that consist only of non-ferrous metals, plastics, glass, fiber optic cables, optical fiber, lumber, engineered wood, and drywall or a combination of them. "All manufacturing processes" must occur in the United States for these materials. Additional detail on how this requirement is interpreted for each product is available in the guidance. Construction materials notably do not include cement and its related materials (also called "section 70917(c) materials"), which are exempted from BABA domestic sourcing requirements.
- The manufactured products requirement applies to articles that have been "(i) Processed into a specific form and shape; or (ii) Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies." Manufactured products exclude construction materials and iron or steel products, as defined in the other two sections. Manufactured products that meet this definition must be manufactured in the United States and 55% of the cost of components must originate in the United States. This

¹⁶ "Final rule: Guidance for Grants and Agreements (88 FR 57750)," August 23, 2023, accessible here: <https://www.federalregister.gov/documents/2023/08/23/2023-17724/guidance-for-grants-and-agreements>.

¹⁷ "Proposed rule: Guidance for Grants and Agreements (88 FR 8374)," February 9, 2023, accessible here: <https://www.federalregister.gov/documents/2023/02/09/2023-02617/guidance-for-grants-and-agreements>.

¹⁸ OMB Memorandum M-22-11, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure," April 18, 2022, can be accessed here: <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>.

“cost of components” test is intended to broadly align with the existing federal procurement test in the Federal Acquisition Regulation. The final guidance expands the definition of manufactured products to “all manufacturing processes” whereas under the previous draft rules, only “final and immediately preceding manufacturing processes” were covered.

Options for waivers

Funding recipients implementing federally funded projects can seek waivers of BABA requirements in some cases, which the funding recipient must file with the federal awarding agency according to that specific funding agency’s waiver process. The BABA guidance restates the circumstances under which waivers may be issued and includes the general processes that awarding agencies should follow for implementing waiver programs.

These waivers can be issued based on (1) public interest, (2) unreasonable cost, and (3) nonavailability. Unreasonable cost and non-availability refer to situations in which using US-sourced products would increase costs of the overall project by more than 25% or where US-sourced products are not reasonably available, respectively.

Public interest waivers can be issued in various circumstances in which local content rules such as BABA would conflict with other government policy goals. Compliance with trade agreements is one of the potential criteria for issuing these waivers. The BABA guidance does not however include specific language ensuring consistency with international trade agreements, despite requests from stakeholders for further clarification. In the final guidance, the Office of Management and Budget (OMB) instead simply stated that it “has not modified its existing guidance on this topic.” OMB also referenced the initial implementation memorandum from April 2022, which specifically noted that the government can seek waivers when BABA requirements conflict with trade obligations.

The April 2022 memorandum also reminds those seeking waivers that federal infrastructure spending is not necessarily subject to the federal government’s trade commitments. Federally funded infrastructure projects, such as those in the IIJA, are often implemented through grants to state governments. In those cases, the state governments’ trade obligations apply instead of those of the federal government and funding recipients would have to seek waivers based on the relevant state’s commitments. Thirty-seven US states have procurement obligations under the World Trade Organization (WTO) Agreement on Government Procurement (GPA) and various other trade agreements, while the rest do not.¹⁹

The public interest standard can also be used to issue general applicability waivers, along with waivers for specific projects. In one recent notable example, the Department of Transportation (DOT) issued its finalized *de minimis* waiver for DOT-funded infrastructure projects a few days after publication of the final BABA guidance.²⁰ The DOT *de minimis* waiver, which has been slightly narrowed from its draft version published in November 2022, will apply to projects where (1) the value of foreign-sourced products in a project is below either \$1 million or 5% of the total cost of materials or (2) total federal funding for the project is below \$500,000. Federal agencies have also used the public interest standard to adopt temporary waivers for BABA requirements in the past year, allowing the private sector extra time to adjust to the new guidance.

¹⁹ “U.S. Government Procurement and International Trade,” Congressional Research Service, accessible here: <https://crsreports.congress.gov/product/pdf/R/R47243>.

²⁰ “Waiver of Buy America Requirements for De Minimis Costs and Small Grants (88 FR 55817),” August 15, 2023, accessible here: <https://www.federalregister.gov/documents/2023/08/16/2023-17602/waiver-of-buy-america-requirements-for-de-minimis-costs-and-small-grants>.

Trade Actions

Section 232

United States Proposes Revisions to the Section 232 Tariff Exclusion Process

The US Bureau of Industry and Security (BIS) proposed revisions to the exclusion process for the steel and aluminum Section 232 tariffs and quotas on August 28, 2023. The proposal follows from a request for public comments issued in February 2022, which sought input on potential improvements to the system.²¹ President Biden had ordered BIS to carry out the review as part of the establishment of the tariff-rate-quota system with the European Union that was announced in January 2022.²² These latest actions to improve the system follow five sets of interim final rules issued by BIS since March 19, 2018, establishing and then making various alterations to the exclusions process.

Overview of the proposed changes

The notice proposes four notable changes to the exclusions process, detailed below. BIS expects these changes will make the exclusion request system more efficient and increase the transparency and fairness of the review process.

1. Making efficiency improvements to the General Approved Exclusions (GAE) process, a set of general exclusions established in December 2020 for product exclusions that have received no objections. BIS is proposing that it change the criteria for determining GAEs from “the HTSUS statistical reporting number that have received no objections to HTSUS classification codes (or subproducts) with very low rates of successful objections.” This would likely expand what products can be included in GAEs and reduce challenges from meritless objections. BIS estimates that this would increase the coverage of GAEs enough to reduce the number of individual exclusion request filings by 20%.
2. Establishing a new General Denied Exclusions (GDE) process, which will create general denials of exclusion requests for products that have had “very high rates of successful, substantiated objections.” BIS believes that applying a GDE process to products for which exclusions have been generally rejected will improve the efficiency of the system.
3. Modifying the existing certification requirements and language on the Exclusion Request Form. Under the proposed revisions, those filing exclusion requests will have to certify and include evidence that they have attempted to source the product from both domestic sources and from sources in countries that have negotiated alternative arrangements to the Section 232 tariffs (which includes Argentina, Australia, Brazil, Canada, the European Union, Japan, Mexico, South Korea, and the United Kingdom). BIS is specifically inviting comments on how it can implement this documentation requirement.
4. Modifying the existing objections form to require certification and documentation that companies objecting to exclusions can immediately provide comparable steel or aluminum products to the company that filed the exclusion request, reducing the risk that successful objectors will fail to follow through on supplying the product. US suppliers that file objections to exclusion requests would have to “certify their intent and ability to provide the requested product to the requester if successful in their objection.” This would include providing evidence that the

²¹ “Request for Public Comments on the Section 232 Exclusions Process (87 FR 7777),” February 10, 2022, accessible here: <https://www.federalregister.gov/documents/2022/02/10/2022-02870/request-for-public-comments-on-the-section-232-exclusions-process>.

²² “Proclamation 10328 of December 27, 2021: Adjusting Imports of Steel into the United States (87 FR 11),” January 3, 2023, accessible here: <https://www.federalregister.gov/d/2021-28516/p-21>.

supplier has commercially sold (or discussed sales) in the last 12 months. Like the changes to the exclusion request form above, BIS is specifically seeking input on how it can implement this documentation requirement.

Request for input

BIS is seeking public comments on the proposed changes, and the notice lists several aspects of the proposed revisions for which BIS is specifically seeking input. Stakeholders can submit comments on the proposed rules through October 12, 2023, through docket number BIS–2023–0021 or RIN 0694–AJ27 on the Federal eRulemaking website, [regulations.gov](https://www.regulations.gov).²³

BIS's proposed revisions to the Section 232 steel and aluminum tariff exclusions process are accessible here: <https://www.federalregister.gov/documents/2023/08/28/2023-18328/revisions-of-the-section-232-steel-and-aluminum-tariff-exclusions-process>.

²³ Rulemaking Docket: "Revisions of the Section 232 Steel and Aluminum Tariff Exclusions Process," accessible here: <https://www.regulations.gov/docket/BIS-2023-0021>.

Trade Agreements

President Biden Signs Bill on Taiwan Trade Agreement, but Resists Expanding Congressional Involvement in Negotiations

On August 7, 2023, President Biden signed the *United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act* (the “Act”), after it unanimously passed Congress in July.²⁴ The Act reasserts some of Congress’ authority over trade agreements by endorsing the first stage agreement of the US-Taiwan Initiative on 21st Century Trade (which was signed on June 1, 2023) and establishing requirements for Congressional oversight and approval of the next stage of negotiations with Taiwan. Despite signing the Act into law, President Biden pushed back on Congress’ assertion of stronger oversight powers. In a signing statement attached to his approval of the Act, he asserted that several of the new oversight measures are unconstitutional and will be treated as non-binding.²⁵ Members of Congress immediately objected to the administration’s position, showing that the debate (and the need to continue monitoring it) will continue.

President Biden’s assertions

President Biden’s statement suggests that specifically Section 7(c)(3) (allowing Congress to request that USTR delay by 15 days the transmission of negotiating texts to Taiwan to allow for further review) violates the separation of powers doctrine as explicated under *INS v. Chadha*. That 1983 case had the effect of invalidating “legislative veto” provisions by which one house of Congress could, by simple majority, halt agency action. The Act does not however grant Congress veto power over USTR’s negotiating texts, or explicitly grant Congress power in the negotiating process beyond a consulting role. For instance, Section 7(c)(2)(B) of the Act only allows that Congress shall “provide comments with respect to the texts before the Trade Representative transmits any such texts to Taiwan.”

Notwithstanding the President’s reference to the provisions of Section 7(c)(3), *INS v. Chadha* appears more relevant to Section 7(e)(2) of the law, which requires that, prior to any agreement’s entry into force, Congress enact a bill “expressly approving the Further Agreement and, if necessary, making any required changes to United States law.” This is to say, Section 7(e) purports to block the executive branch from entering into an executive agreement without Congressional approval (similar to the U.S.-Japan Digital Trade Agreement, which was unilaterally – and controversially – concluded without Congressional approval, as well as other post-Trade Promotion Authority (TPA) agreements).

It is worth noting that, as a Senator in 1984, President Biden authored a law review article²⁶ arguing that *INS v. Chadha* “will make it difficult for Congress to meet its responsibilities in a limited number of policy areas,” particularly with respect to foreign policy, but generally arguing that the legislative veto had been vastly overused.

The apparent constitutional controversy stems from the uncertain post-TPA balance of trade policymaking authority between the executive and legislative branches. This same debate is also playing out elsewhere, as with the Indo-Pacific Economic Framework for Prosperity (IPEF), which the administration argues will not require Congressional approval. Unsurprisingly, Congress disagrees.²⁷ In general, the administration would argue that Article II of the

²⁴ United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act, accessible here: <https://www.govinfo.gov/content/pkg/BILLS-118hr4004enr/pdf/BILLS-118hr4004enr.pdf>.

²⁵ Statement from President Joe Biden on H.R. 4004, the United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act, accessible here: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/08/07/statement-from-president-joe-biden-on-h-r-4004-the-united-states-taiwan-initiative-on-21st-century-trade-first-agreement-implementation-act/>.

²⁶ Who Needs the Legislative Veto? Symposium: Reactions to Chadha: Separation of Powers and the Legislative Veto, Biden, Joseph R. Jr., accessible here: <https://heinonline.org/HOL/P?h=hein.journals/syrlr35&i=705>.

²⁷ Wyden, Crapo and Bipartisan Senate Finance Committee Members Raise Concerns about Process to Approve and Implement Indo-Pacific Trade Pact and Other Trade Agreements, accessible here: <https://www.finance.senate.gov/chairmans-news/wyden-crapo-and-bipartisan-senate-finance-committee-members-raise-concerns-about-process-to-approve-and-implement-indo-pacific-trade-pact-and-other-trade-agreements#:~:text=While%20neither%20the%20administration%20nor,should%20be%20approved%20and%20implemented.>

Constitution allows for trade-related executive orders, not requiring Congressional approval, if they do not require any tariff changes. In addition, Constitutional scholars typically agree that Congress has no formal role in negotiations (see, e.g.: “the authority to negotiate treaties has been assigned to the President alone as part of a general authority to control diplomatic communications. Thus, since the early Republic, [Article II, Section 2] has not been interpreted to give the Senate a constitutionally mandated role in advising the President before the conclusion of the treaty”).²⁸ This common interpretation may be the basis for the administration’s focus on Section 7.

On the other hand, Congress’ opposing position was clearly laid out in lawmakers’ statements this week, reasserting Congress’ power in the realm of international trade. Sen. Wyden stated that “[t]he Constitution provides Congress with sole authority ‘to lay and collect ... duties’ and ‘to regulate commerce with foreign nations’”; Sen. Crapo stated that “[t]he Constitution vests Congress — not the President — with authority over trade policy,” and promised that “Congress will ensure the Administration fully complies with the Act.” The Section 7(c) provisions requiring that USTR share negotiating texts with Congress are certainly novel, and clearly represent an attempt by Congress to reassert its trade policymaking authority it claims under Article 1, Section 8 of the Constitution.

Should the administration proceed with negotiations without adhering to the requirements of the Act, Congress has a number of tools at its disposal to pressure the White House and USTR. For example, the House and Senate each have the power to issue expressions of disapproval, including censure. Though without any legal effect, such action could have political ramifications. While the Administrative Procedure Act (APA) directs reviewing courts to “hold unlawful and set aside agency action, findings, and conclusions” that violate the law, Congress itself probably does not have the ability to bring a lawsuit challenging agency action.²⁹ Of course, Congress has a powerful lever in its budget authority. To the extent USTR needs to expend agency resources to effectuate its obligations under an agreement, Congress may explicitly prohibit the use of federal funds for certain purposes, and could do so with respect to a further agreement in the next budget cycle (or threaten to do so). In reality, Congressional disapproval would most likely manifest as a barrage of letters and oversight hearings while the US Trade Representative (USTR) will work to manage its relationship with Congress as well as possible.

Next stage of the US-Taiwan negotiations is beginning

Negotiations on the next steps of the US-Taiwan agreement will be moving forward at the same time as this internal debate over negotiating authorities. USTR and Taiwan met on August 4 to review implementation of the first stage of the agreement and plan the future negotiations. The environment, labor, and agriculture chapters will be the next focus areas for negotiators, according to Taiwan, but the date for the next round of talks has not been set yet.

Appendix: Overview of the Taiwan bill

The first significant act of the bill is to endorse the June 1 US-Taiwan agreement. The bill would provide a pathway for the agreement to enter into force, instructing that the President “may provide for the Agreement to enter into force not earlier than 30 days after the date on which the President submits to Congress a certification” that Taiwan has taken the necessary measures to comply with the agreement. No later than 30 days before submitting the certification, the President must consult Congress on the agreement, submit a report to Congress on Taiwan’s implementation of the agreement and its economic impact, and respond to written questions from Congress.

The bill also sets out requirements for the next phase of the Taiwan negotiations, establishing a strong role for Congressional oversight and approval. These provisions appear to go beyond what is usually found in TPA in ways

²⁸ Article II, Section 2: Treaty Power and Appointments, accessible here: <https://constitutioncenter.org/the-constitution/articles/article-ii/clauses/346>.

²⁹ See, *U.S. House of Representatives v. Mnuchin*, 976 F.3d 1, 15 (D.C. Cir. 2020) (“Congress does not have standing to litigate a claim that the President has exceeded his statutory authority”).

that may complicate the negotiations for the next phase of the agreement, though Congressional approval could also make any agreement deeper and more durable should one be successfully completed.

For oversight, the bill would require the executive branch to share both US and Taiwanese negotiating texts with Congress. USTR would have to provide its negotiating texts to Congress for review before sharing them with Taiwan or any other groups outside the executive branch, which would give Congress more influence over the content of the texts and would likely slow down private sector consultations and negotiating rounds. USTR would also have to share Taiwan's negotiating texts with Congress and would eventually have to share the final agreement 45 days before releasing it to the public.

Finally, any further agreements between the United States and Taiwan would not take effect until enacted into law by Congress. The bill notably does not include the expedited approval procedures that Congress usually provides under TPA, such as automatic committee discharge, limited floor debate, and a simple majority vote. Putting an agreement through the full legislative process may make passing it into law challenging, given the controversial nature of trade agreements. If Congress does find consensus on passing an agreement, however, this legal process could create the opportunity for the United States to negotiate a deeper trade agreement with more significant market access commitments than the executive branch can negotiate on its own.

Despite making negotiations on further agreements more complicated for USTR, Congress does support further agreements in principle. The bill states that it "is the sense of Congress that - (1) the United States should continue to deepen its relationship with Taiwan; and (2) any Further Agreements should be high-standard, enforceable, and meaningful to both the United States and Taiwan, as well as subject to robust requirements on public transparency and congressional consultation." The bill does not, however, provide USTR with any specific negotiating objectives, which leaves the difficult political debates over market access concessions open for another time.

The bill also includes a measure limiting the Biden administration's controversial critical mineral trade agreements. Section 8 says that the agreement "does not constitute a free trade agreement for purposes of section 30D," the Inflation Reduction Act's (IRA) electric vehicle subsidies. The current agreement has no provisions that would have qualified under the Treasury Department's Section 30D free trade agreement definition, so this provision does not change the present outcome. Even so, Congress including this limitation in the bill may be a signal that it may seek to block other critical mineral trade agreements.

Japan, Korea, and United States Hold Trilateral Summit to Deepen Security and Economic Cooperation

Japanese Prime Minister Fumio Kishida, South Korean President Yoon Suk Yeol, and US President Joe Biden met on August 18, 2023, at Camp David. The meeting, which focused on deepening security cooperation, was the first standalone trilateral summit between the three countries. In a joint statement following the summit, the three leaders hailed the meeting as "a new era of trilateral partnership" and praised improving relations between Japan and Korea.

The summit's new cooperation plans focused heavily on establishing continued multi-year engagements and communication frameworks, which the leaders hope will make the partnership resilient to shifts in domestic politics despite the agreement not being a legally binding treaty. Specific outcomes included improved coordination on ballistic missile defense, new emergency communication channels,³⁰ a long-term plan for joint military exercises, and new economic engagements. In line with other recent meetings between the United States and its allies, the

³⁰ This communication arrangement was announced in the "Commitment to Consult," accessible here: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/08/18/commitment-to-consult>.

economic policy aspects of the summit focused on addressing economic security concerns and collaborating on emerging technologies rather than promoting trade and investment.

The leaders have held three lower profile meetings on the sidelines of other events in the past few years. Some programs and themes formalized at the August 18 summit were previewed in a statement following a trilateral meeting on the sidelines of the East Asia Summit in Phnom Penh, Cambodia in November 2022.³¹

Economic and technology cooperation outcomes

Continuing from recent work in the Minerals Security Partnership (MSP), the G7, and the Indo-Pacific Economic Framework for Prosperity (IPEF), the leaders committed to strengthening trilateral cooperation and promoting a “rules-based economic order to enhance economic security.” Priority cooperation programs include an annual trilateral dialogue on economic security, a new early warning system for supply chain disruptions, enhanced coordination on export controls and other measures to protect sensitive technologies, international standards on artificial intelligence (AI), coordinating infrastructure assistance in the Asia Pacific, ensuring financial stability, collaborating on critical minerals development, and responding to economic coercion. The joint statement also mentioned clean energy, biotechnology, pharmaceuticals, and quantum computing as emerging fields of technology collaboration. Further details on these initiatives will emerge through ministerial- and staff-level meetings that will follow over the next year.

Highlights of the cooperation agenda include the following:

- Launch of a pilot supply chain early warning system (EWS). The EWS would be an information sharing and policy coordination mechanism for disruptions to critical supply chains. The pilot will focus on several critical sectors, potentially including critical minerals, semiconductors, and rechargeable batteries, and was described as a compliment to the recently negotiated Supply Chain pillar of IPEF. Besides responding to natural disasters and shortages, the leaders also said this coordination would help the three countries respond to economic coercion.
- Improved collaboration on scientific R&D, including new trilateral National Labs cooperation and personnel exchanges. The joint statement said this collaboration should include work on outer space, open radio access network (O-RAN), and “safe, secure, and trustworthy AI” with \$6 million allocated to support this collaboration.
- Improving collaboration to protect critical technologies from theft. The parties will hold an inaugural exchange later this year between the US Disruptive Technology Strike Force³² and the Japanese and Korean justice and industry ministries to improve information sharing and coordination, which could lead to a new trilateral structure for coordinating activities to protect key technologies.
- Developing the Partnership for Resilient and Inclusive Supply-chain Enhancement (RISE) to support developing country engagement in clean energy supply chains. RISE was originally announced at the G7 meetings in Japan in May and the governments hope to launch the program with the World Bank by the end of 2023.

³¹ “Phnom Penh Statement on US – Japan – Republic of Korea Trilateral Partnership for the Indo-Pacific,” accessible here: <https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/13/phnom-penh-statement-on-trilateral-partnership-for-the-indo-pacific/>.

³² The Disruptive Technology Strike Force is a new interagency effort in the US government, established in February 2023, to prevent adversary countries from obtaining innovative, security-related technologies by strengthening enforcement of export controls and trade secrets and intellectual property protection. More information is accessible here: <https://www.justice.gov/opa/pr/justice-and-commerce-departments-announce-creation-disruptive-technology-strike-force>.

Continued engagement

As part of the increased high-level engagement between the three countries, the summit outcomes included a commitment to holding annual trilateral meetings among senior leaders. This will include meetings of the ministers responsible for trade, industry, and finance, creating opportunities for further deepening of economic cooperation.

Some of these continuing engagement initiatives are intended to broaden the partnership's activities into greater engagement with Southeast Asia and the Pacific Islands. An annual Indo-Pacific Dialogue would coordinate implementation of the three countries' Indo-Pacific diplomatic strategies and the US International Development Finance Corporation (DFC), Japan Bank for International Cooperation (JBIC), and Export-Import Bank of Korea (Korea Eximbank) will sign an agreement to collaborate on financing infrastructure, carbon-neutral technology, and supply chain resilience in the Indo-Pacific. A trilateral development and humanitarian response dialogue is scheduled for October 2023 to coordinate aid in the region.

Cooperation on these economic policy issues will also continue through the G7, with the joint statement praising Japan's leadership at the G7 Hiroshima Summit. The leaders promised to continue the G7's work to "accelerate the clean energy transition; mobilize financing for quality infrastructure and resilient supply chains, including through trilateral collaboration among our development finance institutions as well as through the Partnership for Global Infrastructure and Investment (PGII); and promote sustainable economic growth and financial stability, as well as orderly and well-functioning financial markets."

The Joint Statement can be found here: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/08/18/the-spirit-of-camp-david-joint-statement-of-japan-the-republic-of-korea-and-the-united-states/>; the "Camp David Principles," outlining the framework for trilateral cooperation, can be found here: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/08/18/camp-david-principles/>; and a fact sheet summarizing the outcomes can be found here: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/08/18/fact-sheet-the-trilateral-leaders-summit-at-camp-david/>.

RCEP

Sri Lanka Submits Request to Join RCEP and Negotiate FTA with ASEAN

Sri Lankan President Ranil Wickremesinghe has revealed Sri Lanka's intention to join the Regional Comprehensive Economic Partnership Agreement (RCEP) following the conclusion of the government's review of credit optimization initiatives assessing the pros and cons of the RCEP Agreement. President Ranil made these remarks on August 8, 2023 in Colombo during a commemoration event to celebrate ASEAN's 56th anniversary. Sri Lanka officially submitted its request to join the RCEP on June 28, 2023 in line with Article 20.9 of the RCEP Agreement.³³ President Ranil's statement reiterates Sri Lanka's determination to expand its economic connectivity within the broader Asian region.

According to a source within the Thai Ministry of Commerce (MOC), the 15 RCEP Parties³⁴ are in the process of drafting terms and conditions for Sri Lanka's accession into the Agreement. The final draft of the terms and conditions will be submitted to the RCEP Economic Ministers for endorsement in late August 2023. Once endorsed, the RCEP members will undertake an information-gathering process on whether Sri Lanka can meet RCEP's standards and commitments. If approved, the RCEP Joint Committee will then decide when to commence the accession process. In

³³ Article 20.9 of the RCEP: "This Agreement shall be open for accession by any State or separate customs territory 18 months after the date of entry into force of this Agreement." The RCEP entered into force on January 1, 2022.

³⁴ The RCEP comprises the ten ASEAN member states (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Vietnam), Australia, China, Japan, Korea, and New Zealand.

parallel, Sri Lanka must engage in bilateral preparatory discussions with all RCEP member countries to seek their support. RCEP membership requires unanimous consent from all RCEP countries.

Besides Sri Lanka, Hong Kong submitted its request for RCEP accession to the ASEAN-Secretary-General in January 2022. Last month, Hong Kong Special Administrative Region (HKSAR) Chief Executive John Lee Ka-chiu travelled to Indonesia, Malaysia, and Singapore to seek and consolidate support for Hong Kong's RCEP accession.

Sri Lanka-ASEAN FTA

Besides the RCEP, President Ranil also announced his plan to initiate negotiations for the establishment of a separate free trade agreement (FTA) with ASEAN member countries. He reiterated Sri Lanka's alignment with the future vision of ASEAN for the Indo-Pacific region. As next steps, Sri Lanka will conduct regular ministerial-level meetings with ASEAN countries to address mutual concerns and discuss the way forward. In parallel, Sri Lanka is actively enhancing its bilateral relations with ASEAN partners. It already has a bilateral FTA in force with Singapore and is actively negotiating with Thailand.

Should Sri Lanka and ASEAN agree to commence separate FTA negotiations, Sri Lanka would become the eighth dialogue partner to conclude an FTA with ASEAN after China, Korea, Japan, India, Australia, New Zealand, and Hong Kong.

The Sri Lankan government's official press statement is accessible here:

<https://www.presidentsoffice.gov.lk/index.php/2023/08/10/sri-lanka-aims-for-rcep-membership-and-free-trade-agreements-with-asean/>.

Petitions & Investigations

Investigations

Commerce Initiates AD and CVD Investigations of Pea Protein from China

On August 7, 2023, Commerce announced it had initiated its less-than-fair-value³⁵ and countervailing duty³⁶ investigations into imports of pea protein from China, having found the July petition meets all conditions. The announcements included several clarifications to the product scope, which were made based on supplementary filings by the petitioner. In the initiation notice, Commerce invited further comments on the scope from all interested parties, which were due by August 21.

The product within the proposed scope of these investigations is high protein content (HPC) pea protein, which is a protein derived from peas (including, but not limited to, yellow field peas and green field peas) and which contains more than 65% protein on a dry weight basis. HPC pea protein may also be identified as, for example, pea protein concentrate, pea protein isolate, hydrolyzed pea protein, pea peptides, and fermented pea protein. Pea protein, including HPC pea protein, has the Chemical Abstracts Service (CAS) registry number 222400-29-5. The proposed scope covers HPC pea protein in all physical forms, including all liquid (e.g., solution) and solid (e.g., powder) forms, regardless of packaging or additives.

The proposed scope also includes HPC pea protein described above that is blended, combined, or mixed with non-subject pea protein or with other products, to make products such as protein powders, dry beverage blends, and protein fortified beverages. For any such blended, combined, or mixed products, only the HPC pea protein component is covered by the proposed scope of these investigations. HPC pea protein that has been blended, combined, or mixed with other products is included within the proposed scope, regardless of whether the blending, combining, or mixing occurs in third countries. HPC pea protein that is otherwise within the proposed scope is covered when commingled (i.e., blended, combined, or mixed) with HPC pea protein from sources not subject to this investigation. Only the subject component of the commingled product is covered by the proposed scope. A blend, combination, or mixture is excluded from the proposed scope if the total HPC pea protein content of the blend, combination, or mixture (regardless of the source or sources) comprises less than 5% of the blend, combination, or mixture on a dry weight basis. Some specific products, including “burgers, snack bars, bakery products, sugar and gum confectionary products, milk, cheese, baby food, sauces and seasonings, and pet food;” “textured pea protein;” “pea protein crisp[s];” and chickpea protein.

The merchandise covered by the proposed scope are currently classified under Harmonized Tariff Schedule of the United States (HTSUS) categories 3504.00.1000, 3504.00.5000, and 2106.10.0000. Such merchandise may also enter the US market under HTSUS category 2308.00.9890.

On August 28, 2023, the USITC issues its preliminary determination that there is a reasonable indication the industry in the United States is materially injured or threatened with material injury by reason of subject imports. With this

³⁵ Certain Pea Protein From the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation (88 FR 52124),” August 7, 2023, <https://www.federalregister.gov/documents/2023/08/07/2023-16816/certain-pea-protein-from-the-peoples-republic-of-china-initiation-of-less-than-fair-value>.

³⁶ “Certain Pea Protein From the People's Republic of China: Initiation of Countervailing Duty Investigation (88 FR 52116),” August 7, 2023, <https://www.federalregister.gov/documents/2023/08/07/2023-16817/certain-pea-protein-from-the-peoples-republic-of-china-initiation-of-countervailing-duty>.

preliminary determination settled, the USITC will now comments its final phase investigation while Commerce will continue with its investigations.³⁷

Commerce Initiates AD and CVD Investigations into Imports of Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan

On August 23, 2023, Commerce announced it had initiated its less-than-fair-value investigations into imports of mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan³⁸ and a countervailing duty investigation into mattress imports from Indonesia,³⁹ having found the July petition meets all conditions. The announcements included several clarifications to the product scope, which were made based on supplementary filings by the petitioner. In the initiation notices, Commerce invited further comments on the scope from all interested parties, which are due by September 6.

The products within the proposed scope of these investigations include all types of youth and adult mattresses. The term “mattress” denotes an assembly of materials that at a minimum includes a “core,” which provides the main support system of the mattress, and may consist of innersprings, foam, other resilient filling, or a combination of these materials. Mattresses also may contain (1) “upholstery,” the material between the core and the top panel of the ticking on a single-sided mattress, or between the core and the top and bottom panel of the ticking on a double-sided mattress; and/or (2) “ticking,” the outermost layer of fabric or other material (e.g., vinyl) that encloses the core and any upholstery, also known as a cover.

The scope of these petitions is restricted to only “adult mattresses” and “youth mattresses.” “Adult mattresses” are frequently described as “twin,” “extra-long twin,” “full,” “queen,” “king,” or “California king” mattresses. “Youth mattresses” are typically described as “crib,” “toddler,” or “youth” mattresses. All adult and youth mattresses are included regardless of size and size description.

The scope encompasses all types of “innerspring mattresses,” “non-innerspring mattresses,” and “hybrid mattresses.” “Innerspring mattresses” contain innersprings, a series of metal springs joined together in sizes that correspond to the dimensions of mattresses. Mattresses that contain innersprings are referred to as “innerspring mattresses” or “hybrid mattresses.” “Hybrid mattresses” contain two or more support systems as the core, such as layers of both memory foam and innerspring units.

“Non-innerspring mattresses” are those that do not contain any innerspring units. They are generally produced from foams (e.g., polyurethane, memory (viscoelastic), latex foam, gel infused viscoelastic (gel foam), thermobonded polyester, polyethylene) or other resilient filling.

Mattresses covered by the scope of these petitions may be imported independently, as part of furniture or furniture mechanisms (e.g., convertible sofa bed mattresses, sofa bed mattresses imported with sofa bed mechanisms, corner group mattresses, day-bed mattresses, roll-away bed mattresses, high risers, trundle bed mattresses, crib mattresses), or as part of a set (in combination with a “mattress foundation”). “Mattress foundations” are any base or support for a mattress. Mattress foundations are commonly referred to as “foundations,” “boxsprings,” “platforms,”

³⁷ “Investigation Nos. 701-TA-692 and 731-TA-1628 (Preliminary) Certain Pea Protein from China,” August 28, 2023, https://www.usitc.gov/secretary/fed_reg_notices/701_731/701_692_notice_08282023sgl.pdf.

³⁸ “Mattresses From Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan: Initiation of Less-Than-Fair-Value Investigations (88 FR 57433),” August 23, 2023, <https://www.federalregister.gov/documents/2023/08/23/2023-18165/mattresses-from-bosnia-and-herzegovina-bulgaria-burma-india-italy-kosovo-mexico-the-philippines>.

³⁹ “Mattresses From Indonesia: Initiation of Countervailing Duty Investigation (88 FR 57412),” August 23, 2023, <https://www.federalregister.gov/documents/2023/08/23/2023-18164/mattresses-from-indonesia-initiation-of-countervailing-duty-investigation>.

and/or “bases.” Bases can be static, foldable, or adjustable. Only the mattress is covered by the scope if imported as part of furniture, with furniture mechanisms, or as part of a set, in combination with a mattress foundation.

Excluded from the scope of these petitions are “futon” mattresses. A “futon” is a bi-fold frame made of wood, metal, or plastic material, or any combination thereof, that functions as both seating furniture (such as a couch, love seat, or sofa) and a bed. A “futon mattress” is a tufted mattress, where the top covering is secured to the bottom with thread that goes completely through the mattress from the top through to the bottom, and it does not contain innersprings or foam. A futon mattress is both the bed and seating surface for the futon. Also excluded from the scope are airbeds (including inflatable mattresses) and waterbeds, which consist of air- or liquid-filled bladders as the core or main support system of the mattress. Also excluded is certain multifunctional furniture that is convertible from seating to sleeping, regardless of filler material or components, where such filler material or components are upholstered, integrated into the design and construction of, and inseparable from, the furniture framing, and the outermost layer of the multifunctional furniture converts into the sleeping surface. Such furniture may, and without limitation, be commonly referred to as “convertible sofas,” “sofabeds,” “sofa chaise sleepers,” “futons,” “ottoman sleepers,” or a like description. Also excluded from the scope of these petitions are any products covered by the existing antidumping duty orders on uncovered innerspring units from China, South Africa, and Vietnam. Also excluded from the scope of these orders are bassinet pads with a nominal length of less than 39 inches, a nominal width of less than 25 inches, and a nominal depth of less than 2 inches. Additionally, also excluded from the scope of these petitions are “mattress toppers.” A “mattress topper” is a removable bedding accessory that supplements a mattress by providing an additional layer that is placed on top of a mattress. Excluded mattress toppers have a height of four inches or less.

The products subject to these petitions are currently classifiable under HTSUS subheadings: 9404.21.0010, 9404.21.0013, 9404.21.0095, 9404.29.1005, 9404.29.1013, 9404.29.1095, 9404.29.9085, 9404.29.9087, 9404.29.9095. Products subject to these petitions may also enter under HTSUS subheadings: 9401.41.0000, 9401.49.0000, and 9401.99.9081.

On August 3, 2023, the USITC published a notice of institution of the preliminary phase investigation. The USITC must determine by September 11, 2023, whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of subject imports. If so, the USITC and US Department of Commerce investigations will proceed.⁴⁰

⁴⁰ Mattresses From Bosnia and Herzegovina, Bulgaria, Burma, India, Indonesia, Italy, Kosovo, Mexico, Philippines, Poland, Slovenia, Spain, and Taiwan; Institution of Anti-Dumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations, 88 FR 51351 (August 3, 2023), accessible here: <https://www.federalregister.gov/documents/2023/08/03/2023-16571/mattresses-from-bosnia-and-herzegovina-bulgaria-burma-india-indonesia-italy-kosovo-mexico>.