

# US Multilateral Trade and Policy Developments

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**Japan External Trade Organization**

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## Trade Policy Developments

### US Treasury Issues Guidance on Inflation Reduction Act Tax Credits for Hydrogen Fuel, Aviation Fuel, and Domestic Manufacturing

In late December 2023, the US Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) published a series of proposed rules and guidance notices for Inflation Reduction Act (IRA) green energy tax credits covering hydrogen fuel production, sustainable aviation fuel use, and domestic manufacturing incentives.

With the issuance of these documents, Treasury has now provided guidance on all of the topics it had included in the phase two implementation plan for the second half of 2023.<sup>1</sup> These final actions of 2023 follow the recent publications of the Section 30D Clean Vehicle Tax Credit's Foreign Entity of Concern Restriction,<sup>2</sup> a rule for transferring the clean vehicle tax credits to dealers,<sup>3</sup> the Section 45L New Energy Efficient Home Credit,<sup>4</sup> and updates to the energy credits under the Section 48 Investment Tax Credit (ITC)<sup>5</sup> earlier in the fall. In 2024, Treasury will likely begin issuing final versions of these rules while continuing to issue new draft rules for other sections of the IRA.

#### Section 45V Credit for Production of Clean Hydrogen

Treasury published a proposed rule for the Section 45V Credit for Production of Clean Hydrogen on December 22, 2023.<sup>6</sup> The Clean Hydrogen credit provides a production tax credit for each kilogram of clean hydrogen produced in qualifying US facilities. Qualifying hydrogen must be produced in the ordinary course of business at a facility in the United States that began construction before January 1, 2033. The producer can claim the credit for 10 years after the qualifying facility enters service. The amount of the credit will scale with the emissions intensity of the hydrogen production process and the taxpayer's level of compliance with the IRA's prevailing wage and apprenticeship requirements.

The tax credit can only be claimed for production of qualified clean hydrogen, meaning the production process must result in lifecycle greenhouse gas emissions of less than four kilograms of carbon dioxide-equivalent emissions per kilogram of hydrogen. The proposed rule provides needed guidance on how hydrogen production facilities can qualify for the credit under this requirement, including how facilities should measure and document lifecycle greenhouse gas emissions. The proposed rule's process for determining lifecycle emissions is complex and controversial among industry stakeholders, requiring facilities that source electricity from the regional power grid to document that the electricity comes from local low-emission sources on an hourly basis (a transitional rule will allow companies to match on an annual basis until 2028). The NPRM also contains guidance on producing hydrogen from renewable natural gas and fugitive methane emissions.

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<sup>1</sup> Remarks by Assistant Secretary for Tax Policy Lily Batchelder on Phase Two of Implementation of the Inflation Reduction Act's Clean Energy Provisions, September 8, 2023, accessible here: <https://home.treasury.gov/news/press-releases/jy1723>.

<sup>2</sup> "Interpretation of Foreign Entity of Concern," 88 FR 84082 (December 4, 2023), accessible here: <https://www.federalregister.gov/documents/2023/12/04/2023-26479/interpretation-of-foreign-entity-of-concern>, and "Section 30D Excluded Entities," 88 FR 84098 (December 4, 2023), accessible here: <https://www.federalregister.gov/documents/2023/12/04/2023-26513/section-30d-excluded-entities>.

<sup>3</sup> "Transfer of Clean Vehicle Credits Under Section 25E and Section 30D," 88 FR 70310 (October 10, 2023), accessible here: <https://www.federalregister.gov/documents/2023/10/10/2023-22353/transfer-of-clean-vehicle-credits-under-section-25e-and-section-30d>.

<sup>4</sup> "Section 45L New Energy Efficient Home Credit," Notice 2023-65 (September 27, 2023), accessible here: <https://www.irs.gov/pub/irs-drop/n-23-65.pdf>.

<sup>5</sup> "Definition of Energy Property and Rules Applicable to the Energy Credit," 88 FR 82188 (November 22, 2023), accessible here: <https://www.federalregister.gov/documents/2023/11/22/2023-25539/definition-of-energy-property-and-rules-applicable-to-the-energy-credit>.

<sup>6</sup> "Section 45V Credit for Production of Clean Hydrogen; Section 48(a)(15) Election To Treat Clean Hydrogen Production Facilities as Energy Property," 88 FR 89220 (December 26, 2023), accessible here: <https://www.federalregister.gov/documents/2023/12/26/2023-28359/section-45v-credit-for-production-of-clean-hydrogen-section-48a15-election-to-treat-clean-hydrogen>.

Despite the challenging qualification system, which some members of the industry argue will make using the tax credit impractical, the Biden administration believes hydrogen fuel can become a major new export opportunity for the United States. The administration has recently unveiled plans to promote hydrogen exports and is supporting investment in the sector. The administration unveiled a Hydrogen Interagency Task Force and a national clean hydrogen strategy tasked with helping develop a domestic hydrogen supply chain.<sup>7</sup> Among the task force's focus areas is identifying and promoting export opportunities. The 2021 Infrastructure Investment and Jobs Act also allocated funding to support the development of regional hydrogen fuel hubs, for which the Department of Energy recently announced \$7 billion in grants.<sup>8</sup>

The Section 45V proposed rule is open for public comment until February 26, 2024, and a public hearing is scheduled for March 25, 2024. Interested stakeholders can submit comments via the federal rulemaking docket on [regulations.gov](https://www.regulations.gov). More details on the public feedback process can be found in the Federal Register notice.

### **Section 40B Sustainable Aviation Fuel Credit**

Treasury issued a guidance notice for the Section 40B Sustainable Aviation Fuel (SAF) Credit on December 15, 2023.<sup>9</sup> The new Section 40B tax credit is available for taxpayers that sell or use qualifying sustainable fuel mixtures for aircraft. The December 2023 notice builds on Notice 2023-06, which Treasury issued in December 2022 to establish initial guidelines and invite public feedback on the tax credit's development.<sup>10</sup> Taxpayers can claim the credit through either an excise tax claim or a nonrefundable general business tax credit, and it is worth \$1.25 to \$1.75 for each gallon of sustainable aviation fuel used in a qualified fuel mixture. The credit is available until the end of 2024.

The December 2023 notice provides new details on how to determine eligibility for the credit. For a fuel to qualify, it must be certified under a third-party emissions standard to reduce lifecycle greenhouse gas emissions of the fuel by at least 50%. The fuel must also be produced in the United States and transferred to the aircraft in the United States. Biomass-based diesel, cellulosic biofuel, advanced biofuels, and cellulosic diesel approved under the Environmental Protection Agency's Renewable Fuel Standard (RFS) can all qualify, as can other fuels that reduce lifecycle greenhouse gas emissions.

According to the December 2023 notice, the government intends to issue a new Greenhouse Gases, Regulated Emissions, and Energy Use in Technologies (GREET) model, which will provide SAF producers with a methodology for determining the lifecycle emissions costs (the current version of GREET does not qualify). Taxpayers may also use the already-established Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) method. The notice also includes safe harbors for using the Environmental Protection Agency's Renewable Fuel Standard (RFS), which uses a methodology similar to CORSIA.

### **Section 45X Advanced Manufacturing Production Credit**

Treasury issued the proposed rule for the Section 45X Advanced Manufacturing Production Credit on December 14, 2023.<sup>11</sup> Section 45X is a production credit for domestic manufacturing of certain components related to solar power,

<sup>7</sup> Details on the Hydrogen Interagency Task Force are accessible here: <https://www.hydrogen.energy.gov/interagency>.

<sup>8</sup> "Biden-Harris Administration Announces \$7 Billion For America's First Clean Hydrogen Hubs, Driving Clean Manufacturing and Delivering New Economic Opportunities Nationwide," Department of Energy, October 13, 2023, accessible here: <https://www.energy.gov/articles/biden-harris-administration-announces-7-billion-americas-first-clean-hydrogen-hubs-driving>.

<sup>9</sup> "Sustainable Aviation Fuel Credit; Lifecycle Greenhouse Gas Emissions Reduction Percentage and Certification of Sustainability Requirements Related to the Clean Air Act; Safe Harbors," Notice 2024-6 (December 15, 2023), accessible here: <https://www.irs.gov/pub/irs-drop/n-24-06.pdf>.

<sup>10</sup> "Sustainable Aviation Fuel Credit; Registration; Certificates; Request for Public Comments," Notice 2023-06 (December 19, 2023), accessible here: <https://www.irs.gov/pub/irs-drop/n-23-06.pdf>.

<sup>11</sup> "Section 45X Advanced Manufacturing Production Credit," 88 FR 86844 (December 15, 2023), accessible here: <https://www.federalregister.gov/documents/2023/12/15/2023-27498/section-45x-advanced-manufacturing-production-credit>.

wind power, batteries, critical minerals, and power inverters. The 45X credit is perhaps one of the largest green energy subsidy programs in the IRA. Manufacturers can also use it alongside some of the IRA's other green energy tax credits, including the clean vehicle tax credits, further incentivizing domestic production.

The new proposed rules add details to the definitions of qualifying components and specifies their credit amounts. The proposed rule also defines key terms, explains the domestic production requirement, adds flexibilities to the unrelated person sales requirement for related-person sales, clarifies applicability under contract manufacturing arrangements, and establishes anti-abuse processes.

For the domestic production requirement, the proposed rule provides a more thorough explanation of what qualifies as domestic production and a series of example situations. Under the IRA, components are eligible for the Section 45X credit if they are "produced within the United States." The proposed rule defines "produced" as "a process conducted by the taxpayer that substantially transforms constituent elements, materials, or subcomponents into a complete and distinct eligible component that is functionally different from that which would result from mere assembly or superficial modification of the elements, materials, or subcomponents." The constituent materials, materials, and subcomponents used in this production will not be subjected to the domestic production requirement, allowing manufactures to import many inputs. However, the proposed rules provide more, product-specific definitions of production for polysilicon, electrode active materials, and critical minerals that would require domestic processing and refining of those specific components. Section 45X's flexible definition of domestic production contrasts with the more restrictive domestic content bonus credit guidance for the Sections 45, 45Y, 48, and 48E tax credits issued in May 2023.<sup>12</sup>

The 45X proposed rule is open for public comment until February 13, 2024, and a public hearing is scheduled for February 22, 2024. Interested stakeholders can submit comments via the federal rulemaking docket on regulations.gov. More details on the public feedback process can be found in the Federal Register notice.

### **Guidance for exceptions to certain domestic content requirements**

On December 28, 2023, Treasury issued initial guidance for how certain nonprofit entities can claim exceptions to the domestic content requirements in the IRA's tax credits.<sup>13</sup> The Section 45 Renewable Electricity Production Credit, the Section 45Y Clean Electricity Production Credit, the Section 48 Energy Credit, and the Section 48E Clean Electricity Investment Credit all contain phaseouts for elective payments of credits on projects that fail to meet domestic content requirements related to steel building materials and manufactured components.

Certain entities, including tax-exempt entities, state and local governments, Indian tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, and rural electric cooperatives, can claim exception to these requirements if either (1) "the inclusion of steel, iron, or manufactured products that are produced in the United States increases the overall costs of construction of qualified facilities by more than 25 percent" (known as the Increased Cost Exception) or (2) "relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality" (known as the Non-Availability Exception). The original Treasury guidance on the domestic content bonus tax credit issued in May 2023 did not contain the details on how this exception would work, creating a need for this additional guidance.

The December 28 notice provides transitional procedures for how qualifying entities can claim the exception for projects that begin construction before January 1, 2025. Under this transitional system, applicable entities can

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<sup>12</sup> "Domestic Content Bonus Credit Guidance under Sections 45, 45Y, 48, and 48E," Notice 2023-38, May 12, 2023, accessible here: <https://www.irs.gov/pub/irs-drop/n-23-38.pdf>.

<sup>13</sup> "Statutory Exceptions to Phaseout Reducing Elective Payment Amounts for Applicable Entities if Domestic Content Requirements are Not Satisfied," Notice 2024-9, December 28, 2023, accessible here: <https://www.irs.gov/pub/irs-drop/n-24-09.pdf>.

provide Treasury with attestations that one or both of the statutory exceptions to the domestic content rules are satisfied. The notice also invites public comments to inform how Treasury will write the forthcoming final rule.

Comments should be submitted by February 26, 2024, via the federal rulemaking docket on regulations.gov or mail. Further details, including specific questions on which Treasury is asking for public feedback, can be found in the notice.

## US Federal Maritime Commission Amends Carrier Automated Tariff Regulations

On January 2, 2024, the Federal Maritime Commission (FMC) announced its final rules amending the regulations governing carrier automated tariffs (the “amendments”).<sup>14</sup> The amendments update and clarify various aspects of the regulations, which govern public information systems used for announcing common carrier rates, charges, classifications, rules, and practices for waterborne foreign trade. These changes broadly reflect an effort to increase transparency around shipping prices, changing the rules for accessing tariff publications and applying pass-through charges. The amendments enter force on February 1, 2024.

The FMC is the regulator responsible for ensuring reliable international ocean transport for US traders, which includes monitoring the accessibility and accuracy of cargo pricing systems. To that end, the FMC’s carrier automated tariffs regulations<sup>15</sup> govern the publication of ocean common carrier<sup>16</sup> prices in automated systems. These regulations are intended to ensure the public has reliable and useful information on rates charged for transport services.

### Amendments to the regulations

The FMC has been developing the rule changes for several years, originally proposing them in April 2021.<sup>17</sup> Since then, the FMC has held two calls for public comments. The amendments include the following actions:

- **Banning common carriers from charging a fee to access their tariff data:** FMC tariff regulations require that the public have access to the carrier automated tariff systems, though there had been an option to charge users fees for that access. With this amendment, the FMC has removed the option for carriers to charge such fees. The FMC and traders were concerned that the fees some carriers have been charging were so high as to be limiting public access.
- **Allowing non-vessel-operating common carriers<sup>18</sup> (NVOCCs) to cross-reference certain aspects of other carriers’ terms in their tariffs:** The rule allows NVOCCs to cross-reference surcharges and other charges from the ocean common carriers. The FMC modified this amendment slightly from the original proposed version to address concerns about trade secrets protection and reporting burdens.
- **Clarifying the ability for NVOCCs to reflect increases in certain charges passed through by other entities without notice:** This change will allow NVOCCs to pass along extra charges (including general rate increases and surcharges) from ocean common carriers to shippers without notice under certain conditions. The final

<sup>14</sup> “Carrier Automated Tariffs,” 89 FR 25 (January 1, 2023), accessible here: <https://www.federalregister.gov/documents/2024/01/02/2023-27783/carrier-automated-tariffs>.

<sup>15</sup> 46 CFR Part 520 - Carrier Automated Tariffs, accessible here: <https://www.ecfr.gov/current/title-46/chapter-IV/subchapter-B/part-520>.

<sup>16</sup> An ocean common carrier provides transportation of cargo to the general public “that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country[.]”

<sup>17</sup> The draft rules and public responses (including from Japanese freight forwarders) can be found on the FMC website, accessible here: <https://www2.fmc.gov/readingroom/proceeding/21-03/>.

<sup>18</sup> Under the regulation, an NVOOC is “a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.”

version of this amendment also allows the NVOCCs to add nominal transaction fees on top of these charges, as long as they are distinguished from the underlying passed through charge.

- **Specifying regulations on permissible relationships between NVOCCs for cargo co-loading:** The amendments add a new differentiation between less-than-container-load co-loading (LCL) and full container load co-loading (FCL) by revising the previous co-loading section of the regulation. These clarifications are intended to align the regulation with industry practices and should allow LCL consolidation at the carrier-to-carrier relationship level and FCL consolidation through shipper-to-carrier relationships.
- **Making various other updates and clarifications throughout the regulation:** The amendments remove legacy parallel citations, clarify certain obligations and definitions, add a provision to clarify penalties, and clarify required tariff contents.

Notably absent from the final amendments was the FMC's earlier proposed amendment that would have required bills of lading to include the names of all NVOCCs involved in a shipping transaction. Opposition to this rule was strong among shipping industry stakeholders. These companies raised concerns about trade secret protection and argued that NVOCCs often do not know the identities of other carriers that have interacted with a shipment.

## **US Congress Introduces New Bill to Restrict Imports of Cobalt from China as Concerns About Forced Labor Grow**

On December 29, 2023, Representative Chris Smith (R-NJ) introduced the COBALT Supply Chain Act, a bill that would restrict imports of products containing cobalt refined in China based on a rebuttable presumption that such products contain inputs mined using forced labor in the Democratic Republic of the Congo (DRC).<sup>19</sup> If passed, the bill could likely amount to a de facto ban on imports of any product shown to contain cobalt refined in China, which would have far-reaching implications for electronics and battery supply chains. This is Rep. Smith's second bill targeting forced labor in DRC mines and significantly narrows the scope of targeted products and entities compared to the previous version.

Political focus on forced labor in minerals supply chains is growing in Washington, and cobalt mining in the DRC is receiving significant attention. Seventy percent of the world's cobalt is mined in the DRC, which is then primarily refined in China, which is why the bill focuses on both countries. China is the world's leading refiner of cobalt, much of which is destined for use in rechargeable lithium-ion batteries (other uses include superalloys for turbine engines, chemical manufacturing, and cemented carbides). Members of Congress from both parties are considering new actions while the Biden administration is increasing its scrutiny of the sector. Other proposals are discussed below. So far, actions as aggressive as that proposed by Rep. Smith have not gained widespread bipartisan support, though increased regulatory attention on the sector is likely.

### **Status of the bill**

Rep. Smith introduced the COBALT Supply Chain Act to the House of Representatives on December 29, 2023, at which point it was referred to the Committee on Ways and Means. It was also referred to the Committees on Foreign Affairs and Oversight and Accountability for consideration of any provisions that may fall under those two committees' jurisdictions. Reps. Jefferson Van Drew (R-NJ) and Zach Nunn (R-IA) are co-sponsoring the bill. The Senate has not yet introduced an accompanying version, nor have any Democrats endorsed the bill.

<sup>19</sup> H.R.6909 - COBALT Supply Chain Act, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/house-bill/6909>.

Rep. Smith's earlier bill, the Countering China's Exploitation of Strategic Metals and Minerals and Child and Forced Labor in the Democratic Republic of the Congo Act, was introduced in June 2023.<sup>20</sup> That bill would have applied a rebuttable presumption like that of the Uyghur Forced Labor Prevention Act (UFLPA) to block US imports from the DRC of metals, minerals, and processed mineral derivatives unless importers could affirmatively demonstrate that the products were made without forced labor and child labor. The bill accumulated 18 Republican co-sponsors along with Rep. Smith. However, it has not yet advanced past committee markup and no Democrats have co-sponsored the bill. The lack of Democrat support for this older proposal suggests it is unlikely to pass under the current divided Congress.

The COBALT Supply Chain Act takes a significantly narrower approach than this previous bill, only covering products that contain DRC-originating cobalt that was refined in China. Targeting the bill more narrowly and connecting it to China may make it more popular in Congress, where bipartisan support is growing for applying stricter rules to US trade with China.

### **Content of the bill**

The COBALT Supply Chain Act proposes three actions:

- Imposing a rebuttable presumption that products containing cobalt refined in China are made with forced labor,
- Setting a strategy for combatting forced labor in cobalt supply chains, and creating an "entity list," and
- Imposing a certification requirement to demonstrate that vehicles bought by the US government have no parts made by forced labor.

The bill argues this aggressive response to abuses in the cobalt mining sector is necessary to (1) ensure the existing US ban on imports made by forced labor is effectively enforced, (2) lead international efforts to eradicate forced labor, and (3) address national security concerns related to the large role that Chinese companies play in the cobalt industry. Rep. Smith argues he focused specifically on China-based manufacturing because most of the cobalt mined by small and artisanal mining operations in the DRC is ultimately bought and processed by Chinese manufacturers.

#### *The rebuttable presumption*

The bill would establish a rebuttable presumption that covered goods – *i.e.*, goods containing cobalt refined in China – are "goods that are made wholly or in part with forced labor or child labor." Establishing such a presumption would automatically place the covered goods in violation of Section 307 of the Tariff Act of 1930, which bans the import of goods made using forced labor.<sup>21</sup> The importer can rebut this presumption for its specific imported good by demonstrating "by clear and convincing evidence that such goods do not contain cobalt refined in the PRC."

The bill's definition of "covered goods" would include all products throughout manufacturing supply chains that contain cobalt refined in China, creating broad implications for electronics and battery manufacturing. However, the bill does not define "refined," creating some uncertainty about what stages of production coverage applies to.

Under the UFLPA, importers have the opportunity to demonstrate that *either* (1) the imported goods do not contain covered merchandise (in the case the UFLPA, any inputs from the Xinjiang region of China); *or* (2) if the product contains inputs from Xinjiang, that such inputs were not produced using forced labor. The COBALT Supply Chain Act is different, in that there does not appear to be a way for importers of products containing Chinese-refined cobalt to

<sup>20</sup> H.R.4443 - Countering China's Exploitation of Strategic Metals and Minerals and Child and Forced Labor in the Democratic Republic of the Congo Act, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/house-bill/4443>.

<sup>21</sup> 19 U.S.C. 1307, accessible here: <https://www.govinfo.gov/content/pkg/USCODE-2021-title19/html/USCODE-2021-title19-chap4-subtitle11-part1-sec1307.htm>.

rebut that the cobalt was not mined using forced labor. Therefore, in order to overcome the rebuttable presumption, importers must demonstrate that the product does not contain any cobalt refined in China (the bill does not contain a de minimis exception). It is unclear if detained imports that do not contain cobalt refined in China would be first subject to the rebuttable presumption or to an applicability review. If the bill moved forward in committee review, further edits and clarification are likely.

#### *The enforcement strategy and entity list*

The bill would direct the interagency Forced Labor Enforcement Taskforce (FLETF) to develop a strategy for enforcing the rebuttable presumption. The strategy would outline the enforcement plan, supply chain tracing methods, efforts to prevent transshipment, encourage seizure and destruction of detained goods, and propose measures to address labor abuses in the DRC.

In this strategy, the FLETF would also provide a more detailed list of covered goods and determine priority enforcement sectors. The FLETF would also name China-based cobalt refiners and miners, entities that import covered goods into the United States, and entities in the DRC that have financial linkages to Chinese entities. This listing process is likely intended to work similarly to that of the UFLPA Entity List, under which the rebuttable presumption automatically applies to any product made by a listed entity.

#### *Federal vehicle acquisitions*

The bill would introduce a supply chain tracing requirement for purchases of vehicles by the US government. Under the bill, the executive branch would have to certify that all vehicles bought by the federal government “are completely free of parts made or mined, wholly or in part, with child labor or forced labor in the DRC or the Xinjiang Uyghur Autonomous Region (XUAR).” The certification would require that the government fully trace and document the supply chains of vehicles it purchases. As the government will need data from the companies it purchases vehicles from, this mandate would likely lead to new documentation requirements for federal contractors.

#### **Growing focus on cobalt trade**

Interest in acting against forced labor in the cobalt supply chain is growing among both Democrats and Republicans. Besides Rep. Smith’s COBALT Supply Chain Act, other members of Congress have suggested legislation of their own and are pressuring the Biden administration to increase its focus on the issue.<sup>22</sup> These other bills and policy proposals are not as aggressive as Rep. Smith’s proposal, instead focusing on regulatory capacity building and supply chain transparency in the DRC. US Customs and Border Protection (CBP) also already has authority to block imports of products that contain inputs made by forced labor, though it has not acted against cobalt imports yet. Regardless of the outcome of Rep. Smith’s bill, companies in the cobalt supply chain should expect US scrutiny to increase.

#### *Other legislation*

Rep. John James (R-MI) introduced the BRIDGE to DRC Act of 2023 in July 2023, presenting another approach. The bill would order the creation of a US national strategy for cobalt and other critical minerals sourced from the DRC.<sup>23</sup> The bill would declare that it is US policy to support human rights in the DRC minerals sector and expand US presence in the sector. Building on that, it would instruct the executive branch to implement a new strategy to identify mineral supply chain risks in the DRC, assess levels of Chinese influence, and support DRC efforts to formalize the mining sector. Like Rep. Smith’s bills, the BRIDGE Act is just as concerned with Chinese influence in the DRC mining

<sup>22</sup> For example, see the January 11, 2023, House Homeland Security Committee oversight hearing on the UFLPA, accessible here: <https://democrats-homeland.house.gov/activities/hearings/exploitation-and-enforcement-part-ii-improving-enforcement-in-countering-uyghur-forced-labor>.

<sup>23</sup> H.R.4548 - BRIDGE to DRC Act of 2023, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/house-bill/4548>.

sector as it is with human rights issues within the DRC (though Rep. James does not go so far as to propose limiting trade). The bill has four Republican co-sponsors but no Democrats. A Senate version has also not yet been introduced.

As can be seen from the China framing in these bills, human rights considerations in the DRC are intersecting with concerns that the United States has become too reliant on the Chinese mining and processing industries for cobalt and other critical minerals. Members of Congress have introduced several bills in recent months aimed at promoting and subsidizing US mining, which is partly motivated by reducing US dependence on China.<sup>24</sup> The Infrastructure Investment and Jobs Act of 2021 also allocated funding for developing domestic mineral sources, under which the Biden administration has begun to issue grants.<sup>25</sup>

#### *Executive branch activities*

Recognizing both the important role of the DRC in battery supply chains and the prevalence of labor abuses in the industry, the Biden administration signed a Memorandum of Understanding with the DRC in January 2023 that seeks to promote the development of battery supply chains that are free of labor abuses.<sup>26</sup> Helping to improve conditions in the DRC has been among the executive branch's labor rights priorities for some time. The State Department's Trafficking in Persons Reports have highlighted allegations of forced labor and child labor in the DRC mining sector since 2015.<sup>27</sup>

The US Department of Labor's (DOL) Bureau of International Labor Affairs (ILAB) is also engaged with the DRC on labor rights. DOL funds enforcement capacity building, supply chain monitoring, and education programs in the country.<sup>28</sup> These kinds of economic development programs appear to be more popular than import bans among labor advocates for addressing challenges in countries like the DRC, where poverty and limited government capacity are often the source of poor working conditions.

ILAB's latest report on goods made by forced labor and child labor extensively detailed concerns with the DRC cobalt industry.<sup>29</sup> The study found that lithium-ion batteries from China include cobalt that was mined by child labor in the DRC. ILAB has connected these batteries to several downstream products, including computers, phones, electric vehicles, and hearing aids. ILAB is now funding a technical assistance program in the DRC that is tracking cobalt from small mines in the country to its end uses, which will provide the US government with more detailed information about how DRC cobalt is entering the US market. ILAB's forced labor and child labor reporting does not in itself make accusations against specific companies or directly prompt any law enforcement action. Even so, ILAB is a member of FLETF and shares information with CBP's forced labor enforcement programs.

#### *CBP enforcement*

<sup>24</sup> For examples, see, S.2031 - Critical Mineral Independence Act of 2023, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/senate-bill/2031>; H.R.2888 - ONSHORE Manufacturing Act of 2023, 118th Congress (2023-2024), accessible here; and S.1871 - Intergovernmental Critical Minerals Task Force Act, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/senate-bill/1871>.

<sup>25</sup> Biden-Harris Administration Announces \$30 Million to Build Up Domestic Supply Chain for Critical Minerals, August 21, 2023, accessible here: <https://www.energy.gov/articles/biden-harris-administration-announces-30-million-build-domestic-supply-chain-critical>.

<sup>26</sup> "The United States Releases Signed Memorandum of Understanding with the Democratic Republic of Congo and Zambia to Strengthen Electric Vehicle Battery Value Chain," January 18, 2023, accessible here: <https://www.state.gov/the-united-states-releases-signed-memorandum-of-understanding-with-the-democratic-republic-of-congo-and-zambia-to-strengthen-electric-vehicle-battery-value-chain/>.

<sup>27</sup> 2022 Trafficking in Persons Report, US Department of State, accessible here: <https://www.state.gov/wp-content/uploads/2022/10/20221020-2022-TIP-Report.pdf>.

<sup>28</sup> "ILAB in Congo, Democratic Republic of the (DRC)," accessible here: <https://www.dol.gov/agencies/ilab/country/ilab-democratic-republic-congo>.

<sup>29</sup> "2022 List of Goods Produced by Child Labor or Forced Labor," ILAB, accessible here: [https://www.dol.gov/sites/dolgov/files/ILAB/child\\_labor\\_reports/tda2021/2022-TVPR-List-of-Goods-v3.pdf](https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2021/2022-TVPR-List-of-Goods-v3.pdf).

Growing political attention could prompt increased focus on the matter by CBP under its existing authorities. Section 307 of the Tariff Act of 1930 allows CBP to detain imports and refuse entry into the United States if those goods are made wholly or in part with forced labor. CBP typically enforces this measure through Withhold Release Orders (WROs), though UFLPA implementation took priority in 2023. In 2023, CBP did not issue any new WROs or forced labor findings. During congressional hearings on UFLPA implementation on January 11, 2024, CBP witnesses suggested CBP's enforcement resources have been focused on establishing UFLPA.<sup>30</sup> As UFLPA becomes more institutionalized, CBP hires more staff, and Congressional pressure builds, other action under section 307 may increase.

## US Customs Prepares *de Minimis* Regulation Changes While Congress Explores Legal Reforms

US Customs and Border Protection (CBP) is preparing changes to the United States' simplified customs entry system for low-value (*de minimis*) shipments. CBP is currently implementing enhanced data monitoring processes under its current rules, and new regulations are expected later in 2024. The proposed changes are motivated by a desire to tighten cargo screening will likely lead to increased reporting obligations and increased inspection scrutiny but could also facilitate faster customs clearance.

CBP's actions come as interest in stricter customs rules enforcement is growing in Washington. In Congress, several proposals that would limit or eliminate the entry benefits provided to *de minimis* shipments are currently under consideration. While political support has not yet coalesced around any one of these legislative proposals, Congressional leaders are calling action on the matter a priority for 2024. Given the slow nature of this political process, new regulatory actions from CBP will be the most immediate consequence of the new law enforcement concerns about *de minimis* shipments.

### A new political skepticism of *de minimis*

The *de minimis* entry process allows an importer to bring shipments into the United States without filing formal entry paperwork or paying taxes and duties so long as the total daily value of these shipments is below \$800. *De minimis* entry gives Americans access to a wider variety of goods from international markets, facilitates trade, supports the e-commerce industry, and decreases inspection burdens for CBP. Congress raised the *de minimis* level from \$200 to \$800 in the bipartisan Trade Facilitation and Trade Enforcement Act (TFTEA) of 2015, making the US *de minimis* among the highest in the world. In 2019, Congress recommitted to the policy in the United States-Mexico-Canada Agreement (USMCA). At the time Congress took these actions, concerns with law enforcement challenges less pronounced and shipping volumes were lower. From 2015 to 2022, *de minimis* entries increased from 134 million to 685 million shipments per year. The increase was driven by growing cross-border e-commerce retail (mostly between the United States and China) and accelerated dramatically during the COVID-19 pandemic.<sup>31</sup>

Members of Congress have become concerned about the presence of forced labor, counterfeiting, illicit drugs, unsafe products, and illegally harvested commodities in international trade, as well as how such illegal business practices could harm US-based competitors.<sup>32</sup> The rapid growth of lightly monitored *de minimis* e-commerce retail imports are

<sup>30</sup> See, testimony by Eric Choy, US Customs and Border Protection, accessible here: <https://democrats-homeland.house.gov/activities/hearings/exploitation-and-enforcement-part-ii-improving-enforcement-in-counteracting-uyghur-forced-labor>.

<sup>31</sup> More background on the *de minimis* program and CBP's recent activities can be found in a 2023 "De Minimis 101" presentation by CBP, accessible here: <https://www.dhs.gov/medialibrary/assets/video/43009>.

<sup>32</sup> "Wyden Hearing Statement on Stopping Illegal Trade at the Border to Protect American Workers," February 16, 2023, Senate Committee on Finance, accessible here: <https://www.finance.senate.gov/chairmans-news/wyden-hearing-statement-on-stopping-illegal-trade-at-the-border-to-protect-american-workers>.

playing into these law enforcement interests.<sup>33</sup> In 2023, members of Congress submitted at least three bipartisan bills that would limit use of *de minimis* and increase scrutiny of the program. Though the proposals may help address law enforcement challenges, increased enforcement also risks raising trading costs, increasing compliance risks for business, straining CBP's limited resources, and reducing access to foreign retail options for US households.

### Increasing CBP scrutiny

Despite enforcement concerns, *de minimis* shipments are still subject to most US entry rules. CBP has legal authority to enforce intellectual property (IP), forced labor, consumer safety, and other laws against *de minimis* shipments. Furthermore, imports subject to Internal Revenue Code taxes, trade remedies proceedings, and quotas are not allowed to use *de minimis* entry. CBP is actively detaining *de minimis* shipments for import rule violations, including for forced labor and IP violations. That said, limited customs declaration data for *de minimis* shipments and limited inspection capacity at CBP have made law enforcement challenging. Recognizing the political demands to strengthen enforcement, CBP is focusing on strategies that could improve how its inspectors target *de minimis* shipments under its current legal authorities.

In recent engagements, officials from CBP and the Department of Homeland Security (DHS) have said CBP intends to improve risk-based targeting for inspections of *de minimis* shipments through a series of administrative and regulatory changes in 2024. The government could implement this approach faster than legislative change, and it may be less burdensome to businesses than the bills Congress has proposed. Improved inspection targeting resulting from these proposed actions could allow customs officers to prioritize higher risk shipments but would also require more detailed data collection from shippers than current processes provide. During recent engagements, including Congressional testimony about imports of products made by forced labor on January 11, 2024,<sup>34</sup> DHS and CBP officials have described a three-step reform plan, described below.

- **Data improvements:** In the short term, CBP is improving data management and risk targeting for *de minimis* inspections. This includes internal software and technical upgrades. For example, CBP's public agenda for updates to the Automated Commercial Environment (ACE) includes a plan to introduce new automated *de minimis* entry filing fields in October 2024. The new system will automatically track *de minimis* entries in ACE to ensure traders are not entering more than \$800 in declared value per day under the program.<sup>35</sup>
- **Tightening regulations:** Medium-term actions involve creating a new entry process for *de minimis* shipments that will better enable rules enforcement. According to recent filings with the Office of Management and Budget (OMB), these changes could involve updated regulations that would require "additional data elements that would assist CBP in verifying eligibility for duty- and tax-free entry of low-value shipments and bona-fide gifts."<sup>36</sup> The CBP is expected to issue a Notice of Proposed Rulemaking (NPRM) by the end of April 2024 in this regard (though this timeline is subject to change). NPRMs usually include details of the proposed regulation and a call for public input.

CBP officials have said the new standardized entry system will be a combination of the currently active Section 321 Data Pilot and Entry Type 86 Test. These voluntary, experimental systems are intended to both facilitate

<sup>33</sup> See, for example, the House Select Committee on the Chinese Communist Party's recent report recommending ending *de minimis* treatment of shipments from China, accessible here: <https://selectcommitteeontheccp.house.gov/media/press-releases/select-committee-ccp-overwhelmingly-adopts-proposals-uyghur-genocide-taiwan>.

<sup>34</sup> See the January 11, 2024, House Homeland Security Committee oversight committee hearing, accessible here: <https://democrats-homeland.house.gov/activities/hearings/exploitation-and-enforcement-part-ii-improving-enforcement-in-counteracting-uyghur-forced-labor>.

<sup>35</sup> ACE Development and Deployment Schedule, CBP, December 19, 2023, accessible here: <https://www.cbp.gov/document/guidance/ace-development-and-deployment-schedule>.

<sup>36</sup> Fall 2023 Unified Agenda of Regulatory and Deregulatory Actions, Entry of Low-Value Shipments, accessible here: <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=1515-AE84>.

entry and increase data disclosure. About half of *de minimis* imports already enter under one of these systems and companies that already participate in them will be better prepared for the forthcoming regulations. As the broader reform project develops, CBP continues to modify regulations for these test systems. On January 16, 2024, CBP issued modifications to the Entry Type 86 Test that clarified the enforcement of certain rules.<sup>37</sup> CBP also expanded the Section 321 Data Pilot in 2023, allowing more shippers to participate.

- **Consider legislation:** Over the longer-term, CBP officials have said they are open to working with Congress on potential legislative changes. The Biden administration has not backed any of the *de minimis* reform bills introduced in Congress, but CBP has been engaged with some aspects of these bills' development. The Customs Modernization Act (CMA), for example, has been heavily informed by CBP's 21st Century Customs Framework (21CCF) modernization strategy.

### Congressional interest in reforming *de minimis* entry

In June 2023, members of the Senate and House of Representatives introduced two bills that would reduce what kinds of shipments qualify under US customs *de minimis* entry rules. The bills, the Import Security and Fairness Act<sup>38</sup> and the *De Minimis* Reciprocity Act of 2023,<sup>39</sup> would limit certain countries' access to *de minimis* entry, expand data reporting requirements, and add various other conditions to use of *de minimis*. Those bills were followed in December 2023 by the introduction of the CMA.<sup>40</sup> The CMA proposes broad reforms to US customs enforcement, including stricter scrutiny of *de minimis* shipments. Congressional support has not yet coalesced around any of these proposals and negotiations are continuing.

The three bills unveiled in 2023 may only be the start of the lengthy process to decide how to strengthen trade rules enforcement. With time limited and the November 2024 elections approaching, supporters of the *de minimis* restrictions and other proposed trade bills are looking for a legislative vehicle that can carry the measures through Congress. Though passage of any of the current bills is not yet imminent, further developments in 2024 are likely.

### US Congress Introduces New Bill on Critical Mineral Supply Chain Security

On January 18, 2024, a bipartisan group of Senators introduced the Critical Minerals Security Act (the "bill"), a bill aimed at reducing US reliance on China for rare earth elements and other critical minerals.<sup>41</sup> The bill would increase US government scrutiny of international mineral supply chains, examine the corporate relationships of mines with foreign entities of concern (FEOC), and offer assistance for preventing mines from falling under the control of US adversaries. Though the bill only increases monitoring and offers cooperative support to the private sector, the bill's sponsors believe the US government could leverage the information gathered by the bill's reports to inform more aggressive future actions.

### Content of the Critical Minerals Security Act

<sup>37</sup> "Test Concerning Entry of Section 321 Low-Value Shipments Through the Automated Commercial Environment (ACE) (Also Known as Entry Type 86); Republication With Modifications," 89 FR 2630 (January 16, 2024), accessible here: <https://www.federalregister.gov/documents/2024/01/16/2024-00698/test-concerning-entry-of-section-321-low-value-shipments-through-the-automated-commercial>.

<sup>38</sup> S.2004 - Import Security and Fairness Act, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/senate-bill/2004>, and H.R.4148 - Import Security and Fairness Act, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/house-bill/4148>.

<sup>39</sup> S.1969 - *De Minimis* Reciprocity Act of 2023, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/senate-bill/1969>.

<sup>40</sup> S.3431 - Customs Modernization Act of 2023, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/senate-bill/3431>.

<sup>41</sup> "Cornyn, Colleagues Introduce Bill to Secure Critical Mineral Supply Chains, Counter Chinese Dominance," January 18, 2024, accessible here: <https://www.cornyn.senate.gov/news/cornyn-colleagues-introduce-bill-to-secure-critical-mineral-supply-chains-counter-chinese-dominance/>.

The bill includes three key provisions intended to improve critical mineral and rare earth element supply chain security, requiring the government to (1) conduct regular studies on critical mineral supply chain dependencies, (2) help prevent FEOCs from acquiring critical mineral facilities, and (3) work with allies to develop new mining technologies.

#### *Key provisions of the bill*

The bill would require the Department of the Interior to prepare regular reports on global critical mineral and rare earth element resources. These reports would include assessments of where mineral resources are under the control of FEOCs or the United States and its allies, the status of commercial mining, details of mine operators and production levels, and information about foreign government interference in mine ownership. The report would also require the government to assess options for ensuring US access to mines. The US Geological Survey (USGS) currently tracks and maps mining activities and mineral reserves, though not at the level of detail envisioned by this bill.<sup>42</sup>

The bill would also establish a process for the US government to help the private sector keep mines out of the hands of FEOCs. Under this system, US entities seeking to divest mining and processing operations in foreign countries may notify the US government of their intent. The government may then help find purchasers that are not FEOCs, though the bill does not explain what kinds of support the government could provide.

Finally, the bill would require the executive branch to implement a strategy to collaborate with US allies to develop advanced mining and processing technologies, and to share such technologies among the allies. A mining technology cooperation program could function as an extension of the Minerals Security Program (MSP), a recent partnership between Australia, Canada, Finland, France, Germany, India, Italy, Japan, Norway, Korea, Sweden, the United Kingdom, the United States, and the European Union to develop a more diverse critical mineral supply chain.<sup>43</sup>

#### *Definition of foreign entity of concern*

The bill is concerned with resources that are “under the control of a foreign entity of concern.” To define FEOC, the bill uses the now familiar definition from the 2021 Infrastructure Investment and Jobs Act (IIJA).<sup>44</sup> The IIJA generally defines FEOC as a foreign entity that is owned by, controlled by or subject to the jurisdiction or direction of a government of a foreign country that is a covered nation (*i.e.*, China, Russia, Iran, or North Korea), or a foreign entity that is subject to various listed US sanctions and export control designations. The IIJA’s FEOC definition is used for battery and critical mineral national origin restrictions under the Inflation Reduction Act’s amended section 30D new clean vehicle tax credit and the IIJA section 40207 battery processing and manufacturing grant program. The Department of Energy issued a draft interpretive rule to explain the details of the IIJA’s FEOC definition in December 2023.<sup>45</sup>

#### *Definition of covered critical minerals and rare earth elements*

The coverage of the bill encompasses critical minerals and rare earth elements, which the bill defines separately.

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<sup>42</sup> Critical Minerals Mapping Initiative (CMMI), USGS, accessible here: <https://www.usgs.gov/centers/gggsc/science/critical-minerals-mapping-initiative-cmmi#overview>.

<sup>43</sup> Information on the Minerals Security Partnership is accessible here: <https://www.state.gov/minerals-security-partnership/>.

<sup>44</sup> Public Law 117–58, Infrastructure Investment and Jobs Act, accessible here: <https://www.congress.gov/117/plaws/publ58/PLAW-117publ58.pdf>.

<sup>45</sup> “Interpretation of Foreign Entity of Concern,” 88 FR 84082 (December 4, 2023), accessible here: <https://www.federalregister.gov/documents/2023/12/04/2023-26479/interpretation-of-foreign-entity-of-concern>.

The bill uses the definition of critical minerals that Congress established in the Energy Act of 2020.<sup>46</sup> The Energy Act defines critical minerals as minerals, elements, substances, and materials that the Department of the Interior determines are (i) essential to economic or national security, (ii) the supply chain of which is vulnerable to disruption, (iii) serve an essential manufacturing purpose. The Department of the Interior's current list of critical minerals includes aluminum, antimony, arsenic, barite, beryllium, bismuth, cerium, cesium, chromium, cobalt, dysprosium, erbium, europium, fluor spar, gadolinium, gallium, germanium, graphite, hafnium, holmium, indium, iridium, lanthanum, lithium, lutetium, magnesium, manganese, neodymium, nickel, niobium, palladium, platinum, praseodymium, rhodium, rubidium, ruthenium, samarium, scandium, tantalum, tellurium, terbium, thulium, tin, titanium, tungsten, vanadium, ytterbium, yttrium, zinc, and zirconium.<sup>47</sup>

The bill provides a specific list of rare earth elements: cerium, dysprosium, erbium, europium, gadolinium, holmium, lanthanum, lutetium, neodymium, praseodymium, promethium, samarium, scandium, terbium, thulium, ytterbium, and yttrium.

### Status of the bill

Senators John Cornyn (R-TX), Mark Warner (D-VA), Todd Young (R-IN), Angus King (I-ME), James Lankford (R-OK), and John Hickenlooper (D-CO) introduced the bill to the Senate on January 18, 2024.<sup>48</sup> It was referred to the Committee on Energy and Natural Resources, of which Sens. Cornyn, King, and Hickenlooper are members. Whether any legislation – even with bipartisan support – can succeed in a divided Congress during an election year remains to be seen. Some members of Congress are discussing assembling a package of trade-related measures later in 2024 or attaching economic security proposals like this bill to the 2025 National Defense Authorization Act.

There is not yet an equivalent companion bill in the House of Representatives, but other bills with similar intentions are under consideration. For example, the Securing America's Critical Minerals Supply Act, approved by the House Committee on Energy and Commerce in March 2023, would require the government to conduct ongoing supply chain security assessments for critical energy and mineral resources.<sup>49</sup>

The bill is the latest proposal in a growing effort to reduce US minerals supply chain dependence on China and other potentially adversarial countries. Most recently, the National Defense Authorization Act for Fiscal Year 2024 (which President Biden signed into law on December 22, 2023) introduced new requirements for critical mineral security in the defense industrial base. The new programs include a requirement that the Department of Defense develop a strategy for reducing reliance on China and Russia for critical minerals in defense acquisitions, establish new research centers for critical minerals, and expand Defense Department mineral stockpiles with minerals processed in the United States or select allied countries.<sup>50</sup>

## US-EU Trade and Technology Council Meets in Washington, DC

Leaders of the United States and the European Union met in Washington on January 30-31, 2024, for the fifth EU-US Trade and Technology Council (TTC). The meeting included US Secretary of State Antony Blinken, US Secretary of

<sup>46</sup> Section 7002(a) of the Energy Act of 2020 (30 U.S.C. 1606(a)), accessible here: <https://www.govinfo.gov/content/pkg/USCODE-2022-title30/pdf/USCODE-2022-title30-chap28-sec1606.pdf>.

<sup>47</sup> "Notice of Final Determination on 2023 DOE Critical Materials List," 88 FR 51792 (August 4, 2023), accessible here: <https://www.federalregister.gov/documents/2023/08/04/2023-16611/notice-of-final-determination-on-2023-doe-critical-materials-list>.

<sup>48</sup> "S.3631 - A bill to require reports on critical mineral and rare earth element resources around the world and a strategy for the development of advanced mining, refining, separation, and processing technologies," 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/senate-bill/3631>.

<sup>49</sup> H.R.1068 - Securing America's Critical Minerals Supply Act, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/house-bill/1068>.

<sup>50</sup> H.R.2670 - National Defense Authorization Act for Fiscal Year 2024, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/house-bill/2670>.

Commerce Gina Raimondo, US Trade Representative Katherine Tai, European Commission Executive Vice Presidents Margrethe Vestager and Valdis Dombrovskis, and European Commissioner for Internal Market Thierry Breton. The parties continued discussing economic, technology, and security cooperation at the meeting but did not release a joint statement or any significant policy outcomes. The European Commission described the meeting as an opportunity “to take stock of the progress of the TTC’s work and to provide political steer on key priorities for the next TTC Ministerial meeting, which will take place in Belgium in spring.”<sup>51</sup> The sixth TTC meeting, planned for April, will likely be last meeting before EU and US elections later in 2024.

### Main takeaways

Leaders see the TTC process as a useful platform for facilitating trans-Atlantic cooperation on sanctions and export controls, coordinating supply chain security policies, and harmonizing approaches to emerging technologies. Secretary of State Blinken described the meeting as focused on economic security and emerging technology, as well as preparing for the next (and possibly final) meeting.<sup>52</sup>

#### □ Economic security

Economic security and de-risking discussions have become a central theme of the TTC. The parties have leveraged the platform to coordinate the economic response to Russia’s invasion of Ukraine, while the United States has also tried to convince the EU to adopt a more aggressive policy stance towards China. Strengthening coordination on investment screening, export controls, new outbound investment controls, and dual-use technologies were all on the agenda for the latest meeting. The meeting also included discussions of the EU’s new security agenda and plans to increase export control coordination among EU Members States.<sup>53</sup> The EU Commission’s proposed policy reforms, circulated earlier in January, would bring the EU’s economic security policies closer to those of the United States.

#### □ Emerging technology cooperation

Another area of cooperation at the TTC has been efforts to shape norms and standards for emerging technologies.

Semiconductors have been a large focus area, with the two economies sharing information about their semiconductor industry subsidy programs and discussing supply chain risks. The leaders are now discussing extending their administrative arrangements for cooperation on semiconductor supply chain issues. At the January meeting, the parties also had early discussions about their concerns around Chinese competitiveness in the legacy semiconductor sector and potential future policy responses to subsidized Chinese oversupply. Secretary Raimondo and Vice President Vestager met with semiconductor industry representatives on the sidelines of the meeting to discuss the issue.<sup>54</sup>

The TTC has also served as a platform for coordinating initial efforts on developing AI governance. The parties are now preparing a TTC Joint Roadmap on Trustworthy AI and Risk Management. The TTC could consider

<sup>51</sup> “EU and US take stock of trade and technology cooperation,” January, 30, 2024, accessible here: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_24\\_575](https://ec.europa.eu/commission/presscorner/detail/en/IP_24_575).

<sup>52</sup> “Secretary Antony J. Blinken And European Commission Executive Vice President Margrethe Vestager At The Fifth U.S.-EU Trade and Technology Council Ministerial Meeting,” January 30, 2024, accessible here: <https://www.state.gov/secretary-antony-j-blinken-and-european-commission-executive-vice-president-margrethe-vestager-at-the-fifth-u-s-eu-trade-and-technology-council-ministerial-meeting/>.

<sup>53</sup> “New tools to reinforce the EU’s economic security,” January 24, 2024, accessible here: [https://commission.europa.eu/news/new-tools-reinforce-eu-economic-security-2024-01-24\\_en](https://commission.europa.eu/news/new-tools-reinforce-eu-economic-security-2024-01-24_en).

<sup>54</sup> The US Commerce Department is currently reviewing sourcing patterns for mature-node semiconductors over concerns that subsidized Chinese exporters are gaining influence over this segment of the semiconductor market. See, “BIS Deploys Assessment On The Use Of Mature-node Chip,” January 18, 2024, accessible here: <https://beta.bis.gov/press-release/bis-deploys-assessment-use-mature-node-chip>.

similar approaches to other emerging technologies, focusing on developing compatible standards and supporting the work of international standards development organizations. A joint working group on quantum technology development recently began work.

The parties also welcomed a new industry-led joint roadmap for cooperating on 6G mobile network development.<sup>55</sup> The roadmap is intended to inform efforts by the United States and EU to develop a common plan for 6G development.

#### □ **Green trade facilitation**

Green trade has been another area of discussion, focusing on building common standards that can facilitate more trade in green products. According to the EU, the parties at the January meeting “agreed to continue to explore ways to facilitate trade in goods and technologies that are vital for the green transition, including by strengthening the cooperation on conformity assessment.” There is interest between the parties in extending the US-EU Mutual Recognition Agreement to include green technologies, which would ease the costs of trading between the two markets.

Alongside the TTC, the parties also held a green trade stakeholder event, gathering public input on the Transatlantic Initiative on Sustainable Trade (TIST).<sup>56</sup> The parties developed TIST during earlier meetings of the TTC, seeking to facilitate trade and investment in products that support the green energy transitions.

#### **Section 232 and critical minerals negotiations**

Though the TTC has been useful for facilitating cooperation on economic security issues and technology standards, there has been little progress on market access issues that are important to the private sector. Ambassador Katherine Tai and Vice President Valdis Dombrovskis met during the meeting to discuss negotiations on the US-EU critical minerals agreement and the Global Arrangement on Sustainable Steel and Aluminum (GASSA).<sup>57</sup> The parties did not announce any progress on either of the agreements, leaving EU exporters subject to US tariff-rate quotas on steel and aluminum and excluded from the Inflation Reduction Act’s electric vehicle subsidies.

The United States and EU negotiated a truce on the section 232 steel and aluminum tariffs in October 2021 to make way for negotiating a permanent settlement on steel and aluminum trade. The intended outcome was to be the GASSA. Ambassador Tai and Vice President Dombrovskis met monthly in 2023 to settle the arrangement before the October 2023 deadline. Despite those extensive negotiations, the parties remained far apart on the deal’s details and have failed to find a workable compromise. The parties agreed in December 2023 to extend the suspension of tariffs through 2025 to accommodate continued negotiations, which will likely not make substantial progress until after this year’s elections.

#### **Approaching the last TTC meeting?**

The United States and EU intend to convene the sixth TTC meeting in April in Belgium. According to the US readout of the January meeting, this next meeting will “review progress to inform priorities, identify new areas for collaboration, and further deepen the transatlantic partnership on shared priorities.” Secretary Blinken called the sixth meeting “the capstone TTC,” suggesting they will unveil the final policy outcomes of the partnership there. Similarly,

<sup>55</sup> “EU-US Beyond 5G/6G Roadmap,” December 2023, accessible here: <https://6g-ia.eu/wp-content/uploads/2024/01/eu-us-aligned-6g-roadmap-joint-paper.pdf?x44222>.

<sup>56</sup> “Annex I: Transatlantic Initiative on Sustainable Trade - work programme,” accessible here: <https://futurium.ec.europa.eu/en/EU-US-TTC/pages/annex-i-transatlantic-initiative-sustainable-trade-work-programme>.

<sup>57</sup> “Readout of Ambassador Katherine Tai’s Meeting with European Commission Executive Vice President Valdis Dombrovskis,” January 29, 2024, accessible here: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/january/readout-ambassador-katherine-tai-meeting-european-commission-executive-vice-president-valdis>.

Vice President Margrethe Vestager said the parties have high ambitions for this next meeting, and that observers can expect it to be different from the more subdued January meeting. Outcomes could reportedly include action on joint AI standards, funding for telecom projects in developing countries, and the critical minerals trade agreement.

After the April meeting, the EU will hold elections in June and the United States will hold elections in November. Any ensuing change in leadership could lead to changes in the structure of trans-Atlantic cooperation, leaving the future of the TTC as the central forum for trans-Atlantic cooperation uncertain.

## Trade Actions

### No developments

## Trade Agreements

### OECD Minimum Tax Negotiations Approach Conclusion, But Questions Remain on US Commitment

Negotiations for a global minimum tax and a settlement to digital services tax disputes are proceeding among members of the Organization for Economic Cooperation and Development (OECD)/G20 Inclusive Framework on Base Erosion and Profit Shifting (Inclusive Framework). Most recently, in December 2023, the OECD announced a new timeline for Pillar One negotiations and further guidance for Pillar Two implementation. At the same time, however, the Biden administration's difficulties with winning Congressional support for the Inclusive Framework in the United States is challenging the deal's viability.

The Multilateral Convention to Implement Amount A of Pillar One (MLC), a compromise which would create a global system for reallocating tax revenue from large multinational enterprises (MNEs) between jurisdictions while banning digital services taxes (DSTs), is close to completion. Several challenging aspects of the MLC that negotiators need to settle over the coming months remain. There is also a risk that the United States will be unable to ratify the MLC, meaning the arrangement may never enter into force regardless of the outcome of the negotiations. If the MLC fails, governments risk returning to a system of complex, overlapping DSTs and tariff retaliation.

While Pillar One negotiations continue, countries will begin implementing domestic tax code changes for Pillar Two in 2024. Pillar Two, a global agreement for countries to adopt minimum tax rules that will reduce corporate tax avoidance, does not require a multilateral treaty. Implementing Pillar Two will be challenging in the United States, however, where Republicans in Congress strongly oppose the arrangement.

#### Key elements of the Pillar One MLC

On July 11, 2023, the 138 members of the Inclusive Framework released the Outcome Statement on the Two-Pillar Solution to address tax challenges arising from the digitalization of the economy.<sup>58</sup> The event was a key milestone in concluding the text of the Pillar One MLC and conditionally extended the DST moratorium to make room for the continued negotiations. The outcome statement summarized the package of deliverables developed by the members to address the remaining elements of the Two-Pillar Solution in four parts:

<sup>58</sup> The outcome statement on the Two-Pillar Solution is accessible here: <https://www.oecd.org/tax/beps/outcome-statement-on-the-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2023.pdf>.

- MLC on Amount A of Pillar One: a taxing right for market jurisdictions on the residual profits of large MNEs that meet certain revenue and profitability thresholds operating in their markets;
- Amount B of Pillar One: a framework that simplifies and streamlines the transfer pricing of in-country baseline marketing and distribution activities;
- Subject to Tax Rule (STTR) under Pillar Two: a treaty-based rule, which will likely be used more often by developing countries, makes it possible for countries to tax inter-company payments that would be under-taxed, allowing source jurisdictions to impose limited source taxation on certain related party payments subject to tax below a minimum rate; and
- implementation support: a commitment by the OECD Secretariat to assist developing countries in implementing the Two-Pillar Solution.

Pillar One and its MLC on Amount A seek to change where MNEs pay taxes. Under the current global taxation system, countries can only tax corporations that have a physical presence within their jurisdiction. As technological advancements make it possible for companies to sell goods and services globally without a physical presence, many countries have lost the opportunity to collect taxes from foreign MNEs that generate revenue from their jurisdictions. To help remedy this, the MLC is expected to reallocate more than \$125 billion of profits from 100 of the world's largest and most profitable MNEs to those end market countries.

The MLC will also require all parties to remove unilateral tax measures imposed on non-resident companies, including DSTs. DSTs are a gross revenue tax that some jurisdictions have adopted unilaterally to tax the digital services provided by companies that do not have a local physical presence. DSTs also seek to remedy the challenge of taxing MNEs; however, they are complex, overlapping, and have been countered with retaliatory tariffs from the countries where large MNEs are headquartered (most notably the United States). Pillar One's framework provides an alternative to DSTs and is meant to avoid both double taxation and tariff retaliation.

### **Status of the Pillar One MLC negotiations**

Under the July Outcome Statement, the parties intended for countries to begin signing the MLC by the end of 2023 and to implement the system in 2025. However, outstanding disagreements on several key components of the MLC and opposition in the United States Senate have further delayed the resolution. As the end of the year approached, on December 18, 2023, the OECD announced that members have recommitted to finalizing negotiations by March 2024.<sup>59</sup>

Negotiations remain open on a few critical provisions of the MLC. Importantly, negotiators have still not settled the exact share for Amount A – the portion of companies' profit that would be reallocated to countries where the customers are located. The negotiation on Amount A is challenging, as it is the key point that will decide how much revenue market countries will receive from the deal and what the cost of the deal will be for the United States and other countries that are home to the subject MNEs. There is also an ongoing disagreement about how the MLC should treat certain non-state jurisdictions that are not directly party to the Inclusive Framework, which is relevant to certain US territories like Puerto Rico. These and other remaining differences are highlighted in the footnotes to the Pillar One MLC draft text circulated by the OECD in October 2023.<sup>60</sup> The footnotes mark objections and

<sup>59</sup> "Update to Pillar One timeline by the OECD/G20 Inclusive Framework on BEPS," OECD, December 18, 2023, accessible here: <https://www.oecd.org/tax/beps/update-pillar-one-timeline-beps-inclusive-framework-december-2023.pdf>.

<sup>60</sup> "The Multilateral Convention To Implement Amount A Of Pillar One," draft (October 11, 2023), accessible here: <https://www.oecd.org/tax/beps/multilateral-convention-to-implement-amount-a-of-pillar-one.pdf>.

disagreements raised by India, Colombia, and Brazil, as well as the United States. US negotiators have said they will not commit to signing the agreement until all these footnotes and brackets are resolved.

The July Outcome Statement would have also extended the Inclusive Framework's temporary DST moratorium through the end of 2024 if enough countries (including the United States) signed the MLC by the end of 2023. As the United States did not sign the MLC by the end of 2023, the DST moratorium had been expected to expire in January 2024. With the expiration approaching, some countries (most notably Canada) began to move forward with implementing new DSTs. The US Treasury however is pressuring other parties to the Inclusive Framework to extend the DST moratorium while the negotiations and ratification processes continue.

The MLC's entry into force and its permanent prohibition on DSTs require a certain critical mass of support among member jurisdictions. At least 30 parties, including parties that are headquarter jurisdictions for at least 60% of covered MNEs, deposit instruments of ratification, acceptance or approval. Given the large share of digital services companies headquartered in the United States, the agreement can only overcome the 60% threshold and enter into force if the United States ratifies it.<sup>61</sup>

### **The US Congress' position on the Pillar One MLC**

Implementing Pillar One in the United States will require Senate ratification of the MLC as a treaty and accompanying changes to US tax law. Senate treaty ratification requires a two-thirds majority vote, meaning Senators from both parties would have to support the deal negotiated by the Biden administration. The House Committee on Ways & Means, meanwhile, has the authority to originate all changes to the US Internal Revenue Code and is currently controlled by the Republicans. Though the Biden administration argues it can ratify the agreement in the first half of 2024, navigating this complex political process may require more time.

Eliminating DSTs is an important point of success for the United States and will be a strong argument in favor of the agreement among both Democrats and Republicans. The Biden administration joined the Pillar One negotiations as a compromise to stop other countries from implementing DSTs on US digital services companies. US companies and the US Treasury (through decreased US tax revenue) would have borne a substantial share of the global cost from mass adoption of DSTs.

Despite the promise to relieve DST challenges, some Republicans have expressed outright opposition to the MLC, complaining that the Biden administration excluded Congress from the negotiations despite Congress having primary authority over US tax policy. Republicans have also expressed concern that the Pillar One compromise might be more harmful to US business interests than DSTs, and that it would still be discriminatory against US businesses.<sup>62</sup> A large share of the companies covered by the tax will be US MNEs, which these Republicans argue is arbitrary and unfair. Lack of comprehensive analysis of where Pillar One's tax burden will fall (and important outstanding questions on Amount A) is likely contributing to the uncertainty about these effects.<sup>63</sup>

### **Biden administration gathering public input**

<sup>61</sup> Under the MLC, each country's ratification is worth a certain number of points, which are calculated based on the number of covered MNEs that are headquartered in the country. For the MLC to enter force, the total points from all ratifications must sum to 600 out of the 999 points available (a 60% majority). The United States is assigned 486 points (49%), making US ratification necessary. See "Annex I – Points Attributed To Jurisdictions For Purposes Of Certain Provisions," accessible here: <https://www.oecd.org/tax/beps/multilateral-convention-to-implement-amount-a-of-pillar-one.pdf#page=212>.

<sup>62</sup> "Crapo: Congress Still in the Dark on OECD Pillar One Global Tax Deal Impact on U.S.," October 11, 2023, Senate Committee on Finance, accessible here: <https://www.finance.senate.gov/ranking-members-news/crapo-congress-still-in-the-dark-on-oecd-pillar-one-global-tax-deal-impact-on-us>.

<sup>63</sup> "Global Deal Disputes Prevent Exact Revenue Estimate, Yellen Says," March 10, 2023, Bloomberg, accessible here: <https://news.bloombergtax.com/daily-tax-report-international/global-deal-disputes-prevent-exact-revenue-estimate-yellen-says>.

Recognizing the political challenge, the US Treasury intends to spend several months socializing the treaty domestically before closing negotiations and requesting Senate ratification. The Biden administration likely hopes that these consultations will help build public support for the MLC and assuage previous concerns about the administration's lack of consultation with Congress. Endorsement of the MLC by the US business community or negotiating new modifications to the MLC to address business concerns could help the Biden administration garner support in Congress for ratification.

As part of this review, the US Treasury issued a request for public input (RFI) on October 11, 2023, following the OECD's publication of the first full draft of the MLC.<sup>64</sup> Though the OECD has gathered input on certain aspects of the negotiations, this publication was the first opportunity for the public to review the entire text. The Treasury RFI asked for public input on how the administration should seek to resolve the remaining open issues in the MLC and whether the proposed system is practical for US taxpayers. The US Treasury concluded the RFI on December 11, 2023, and published the responses for public review on December 19, 2023.<sup>65</sup>

### Risks of Section 301 actions on DSTs

Before the Two-Pillar compromise at the OECD, the United States Trade Representative (USTR) had attempted to deter countries from adopting DSTs with the threat of Section 301 tariff actions. This began in July 2019 with USTR's initiation of a Section 301 investigation of France's DST.<sup>66</sup> As other jurisdictions began adopting similar DSTs, USTR launched additional investigations into Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom.

The investigations found DSTs implemented by Austria, France, India, Italy, Spain, Turkey, and the United Kingdom discriminated against US business, and USTR announced retaliatory tariffs. USTR however delayed imposing these tariffs while it negotiated with the target countries. The compromise on Pillar One that countries reached in 2021 led to the cancellation of the retaliatory tariffs.<sup>67</sup>

USTR's decision to terminate the Section 301 actions is based on a provision of the Tariff Act allowing USTR to modify or terminate such actions if the action is no longer considered appropriate.<sup>68</sup> These Section 301 termination rules also require USTR to monitor implementation of the agreed measures to remove the DSTs and to consider further actions under Section 301 if the agreements are not implemented to USTR's satisfaction.<sup>69</sup> However, the Tariff Act does not explicitly require a resumption of Section 301 tariffs, and the Biden administration may also seek other approaches to deterring DSTs instead.

The first test of whether the United States is willing to resume tariff retaliation on countries that adopt DSTs may come from Canada. Canada is moving forward with its DST sometime in 2024,<sup>70</sup> having refused to join the July

<sup>64</sup> "Treasury Seeks Public Input on Draft OECD/G20 Inclusive Framework Pillar One Multilateral Convention Text," October 11, 2023, accessible here: <https://home.treasury.gov/news/press-releases/jy1789>.

<sup>65</sup> "Public Input on Draft OECD/G20 Inclusive Framework Pillar One Multilateral Convention Text," December 19, 2023, accessible here: <https://home.treasury.gov/public-input-on-draft-oecd-g20-inclusive-framework-pillar-one-multilateral-convention-text>.

<sup>66</sup> See USTR's website for the documentation of these investigations, accessible here: <https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-digital-services-taxes>.

<sup>67</sup> "Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy," October 8, 2023, accessible here: <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>.

<sup>68</sup> 19 U.S.C. 2417 - Modification and termination of actions, accessible here: <https://www.govinfo.gov/app/details/USCODE-2022-title19/USCODE-2022-title19-chap12-subchapIII-sec2417>.

<sup>69</sup> 19 U.S.C. 2416 - Monitoring of foreign compliance, accessible here: <https://www.govinfo.gov/app/details/USCODE-2022-title19/USCODE-2022-title19-chap12-subchapIII-sec2416>.

<sup>70</sup> Bill C-59, accessible here: <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-59/first-reading>.

Outcome Statement's conditional extension of the DST moratorium. Though the United States has not yet begun a new Section 301 investigation targeting Canada, a USTR official recently suggested it could still be an option. USTR has urged Canada to delay its actions, and some members of Congress<sup>71</sup> and the US business community<sup>72</sup> are calling for aggressive action.

### Status of Pillar Two

Pillar Two aims to limit tax competition and the so-called “race to the bottom” on corporate tax rates. Pillar Two consists of two main rules: (i) the Global Anti-Base Erosion (GLoBE) Rules<sup>73</sup> and (ii) the STTR. Both sets of rules seek to ensure that MNEs pay a minimum level of tax on their income in respect of every jurisdiction where they operate.

Pillar Two does not require a multilateral instrument. Instead, each participating jurisdiction will implement the tax code changes through domestic legislation. The OECD intends to monitor implementation to ensure legislation is aligned with the agreement and issue additional guidance as needed. Major economies, including the European Union, the United Kingdom, Korea, and Japan, have all recently moved forward with implementing legislation. These rules will begin to enter force in 2024. As countries implement Pillar Two's GLoBE Rules into domestic law individually, a situation may emerge where some countries have adopted Pillar Two and others have not. Such an incomplete implementation of Pillar Two may create new challenges for international companies and tax agencies, though it also may encourage other countries to comply with the system.

#### *US implementation*

Pillar Two has been particularly controversial in Washington and has faced significant Republican opposition. Along with general objections to the Biden administration's unsatisfactory engagement with Congress and questions over the agreement's revenue impact, Republicans are concerned that the agreement would reduce the effectiveness of US investment subsidies and limit Congress' power to freely set corporate taxes. These debates are further complicated by technical uncertainties about how the Pillar Two structure affects the United States' already existing minimum tax system and certain provisions of US bilateral tax treaties.

The Biden administration and most other Democrats maintain that they intend to implement both pillars of the agreement. Regardless of Democrat support, Republican opposition makes passing a law to implement GLoBE Rules unlikely during the current legislative session. The outcome of the 2024 national elections will probably decide how the United States resolves this debate.<sup>74</sup>

Until the United States decides its position on Pillar Two, US-based companies face the added challenge of complying with both the new Pillar Two minimum taxes and the United States' existing minimum tax system. On December 11, 2023, the US Treasury issued a notice announcing forthcoming regulations that would help clarify how US tax rules will interact with Pillar Two.<sup>75</sup> According to the notice, the government is developing new rules for how

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<sup>71</sup> Senate Committee on Finance Letter to USTR, October 10, 2023, accessible here: <https://www.finance.senate.gov/imo/media/doc/20231010wydencrapolettertoustroncanadadst.pdf>.

<sup>72</sup> “Multi-Association Letter on Canada's Unilateral Digital Services Tax Proposal,” November 20, 2023, accessible here: <https://www.uschamber.com/taxes/multi-association-letter-on-canadas-unilateral-digital-services-tax-proposal>.

<sup>73</sup> The GLoBE Rules are accessible here: <https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two.htm>.

<sup>74</sup> Given these difficulties with implementing Pillar Two, some groups in Washington have begun proposing possible renegotiations and other compromises that could win Congressional support. See, for example, “How the U.S. Can Piece Together a Solution for Pillar Two,” September 6, 2023, Tax Foundation, accessible here: <https://taxfoundation.org/blog/us-pillar-two-response/>.

<sup>75</sup> “Guidance Regarding the Foreign Tax Credit and Dual Consolidated Losses in Relation to the GLoBE Model Rules, and Extension and Modification of Temporary Relief in Notice 2023-55,” Notice 2023-80 (December 11, 2023), accessible here: <https://www.irs.gov/pub/irs-drop/n-23-80.pdf>.

companies can claim foreign tax credits on several Pillar Two-based taxes, among other issues. Because the United States has not implemented the GLoBE Rules into domestic law, the US Treasury will face legal limits on how much it can do to align its rules.

#### *Potential for new trade disputes over Pillar Two*

The Republican Party is also becoming increasingly alarmed by the costs the United States would incur if the rest of the world adopts the GLoBE Rules without the participation of the United States. A recent study on revenue effects of Pillar Two implementation by the Joint Committee on Taxation estimated that the US Treasury would lose \$120 billion in tax revenue over the next decade if the rest of the world adopts the GLoBE Rules in 2025 and the United States does not.<sup>76</sup> Companies operating in the United States could also face GLoBE's Under-Taxed Payment Rule (UTPR) in jurisdictions where they have subsidiaries. Applying UTPR in such a way would reduce the effectiveness of certain US tax credits, harming essential elements of the US fiscal policy system.

To prevent that costly split outcome, these Republicans are attempting to deter other countries from implementing the GLoBE Rules. Speaking at an OECD meeting in September 2023, Chairman of the House Ways and Means Committee Jason Smith (R-MO) warned that countries using the GLoBE Rules to claw back US tax credits that fall below GLoBE minimums, "can expect economic consequences in the future."<sup>77</sup> Earlier in May 2023, Chairman Smith and other Republicans on the House Ways and Means committee introduced H.R.3665, the Defending American Jobs and Investment Act, which would empower the US Treasury to charge a retaliatory tax on the investors and corporations of any country that applies the UTPR to US companies.<sup>78</sup>

The bill is sponsored by 24 other Republicans and was referred to the House Committee on Ways and Means and to the Committee on Oversight and Accountability. Democrats oppose the bill, and it is unlikely to move forward during the 2023-2024 legislative session. If Republicans gain clear majorities in the November 2024 elections, this legislation may re-emerge with a greater likelihood of success. A Republican majority would also likely end any chance of the United States adopting Pillar Two in the near term.

## CPTPP

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### **Singapore Ratifies UK's CPTPP Membership**

On January 23, 2024, Singapore became the second member of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) to ratify the accession of the United Kingdom (UK).<sup>79</sup> Japan was the first CPTPP member to ratify the UK's membership in December 2023.

The provisions of the CPTPP will enter into force formally for the UK once ratification procedures have been completed by the UK and the remaining nine CPTPP members, *i.e.*, Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, and Vietnam. The UK's Protocol of accession states that entry into force will take place 60 days after all existing members of the CPTPP give notice that they have completed their domestic ratification procedures, although if that process has not been completed within 15 months (*i.e.*, by mid-October 2024) then the

<sup>76</sup> "Possible Effects of Adopting the OECD's Pillar Two, Both Worldwide and in the United States," Joint Committee on Taxation, June 2023, accessible here: [https://www.finance.senate.gov/imo/media/doc/118-0228b\\_june\\_2023.pdf](https://www.finance.senate.gov/imo/media/doc/118-0228b_june_2023.pdf).

<sup>77</sup> "At OECD, Chairman Smith Warns That Congress Will Reject New Job-Killing Global Tax Surrender," House Committee on Ways and Means, September 1, 2023, accessible here: <https://gop-waysandmeans.house.gov/at-oecd-chairman-smith-warns-that-congress-will-reject-new-job-killing-global-tax-surrender/>.

<sup>78</sup> H.R.3665 - Defending American Jobs and Investment Act, 118<sup>th</sup> Congress, accessible here: <https://www.congress.gov/bill/118th-congress/house-bill/3665>.

<sup>79</sup> The press release of the UK's Foreign, Commonwealth & Development Office and the Department for Business and Trade is accessible here: <https://www.gov.uk/government/news/singapore-becomes-second-country-to-ratify-uk-membership-to-cptpp#:~:text=Singapore%20has%20formally%20ratified%20the,after%20Japan%20late%20last%20year>.

Protocol will come into force 60 days after the UK and at least six CPTPP members have completed the ratification process.

In the UK, ratification involves parliamentary scrutiny of the CPTPP in accordance with the Constitutional Reform and Governance Act 2010, which is used to ratify international treaties as well as the passage of any necessary implementing legislation. There is no requirement in the 2010 Act for a formal parliamentary debate or vote on ratification, but the UK government has stated that it would allow a debate if one is recommended by one or more of the parliamentary select committees reviewing the protocol.

As part of the King's Speech in November 2023, the Trade (Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Bill [HL]: HL Bill 4 of 2023-24 was announced in the House of Lords.<sup>80</sup> This bill enables implementation of the CPTPP, including amendment of domestic legislation, *e.g.*, government procurement, intellectual property, and technical barriers to trade, to ensure the UK's compliance once the CPTPP enters into force. The bill underwent its first reading in the House of Commons on January 24, 2024.

Most important will be a conclusion from the Trade and Agriculture Commission (TAC) that membership of the CPTPP is consistent with the maintenance of UK levels of statutory protection on animal health, animal welfare, and environmental protection. The TAC has already delivered positive advice on the treatment of these issues in the provisions of the UK's recent bilateral free trade agreements (FTAs) with Australia and New Zealand, but it may take some time for the TAC to complete an assessment of the agri-food legislation in force in the nine other CPTPP members. Nonetheless, the UK government is aiming to complete its ratification process this year.

## GSP

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### US Congress Reintroduces Bill to Add Digital Trade Standards to Generalized System of Preferences

On January 16, 2024, Representative Darin LaHood (R-IL) reintroduced his Digital Trade for Development Act (the "bill"), which would add requirements that developing countries must refrain from imposing digital trade barriers to qualify for the Generalized System of Preferences (GSP).<sup>81</sup> Rep. LaHood is a co-chair of the House Digital Trade Caucus and a member of the Ways and Means trade subcommittee, a subcommittee that will have an important role in renewing GSP. Though the bill is not a full reauthorization of GSP, the bill's language could be incorporated into a future GSP reform and reauthorization bill.

#### Overview of the bill

The bill would add new eligibility conditions related to facilitating digital trade to the process for designating GSP-beneficiary countries in section 502 of the Trade Act of 1974,<sup>82</sup> described below.

- To the rules on bases for ineligibility (subsection (b)(2)), the bill would require that that a country not be designated as a GSP beneficiary if it "restricts digital trade to the detriment of United States development goals, strategic interests, or competitiveness."
- To the rules on factors affecting country designation (subsection (c)), the bill would require that, in determining whether to designate a country as a GSP beneficiary, the president should consider how well the country "has

<sup>80</sup> Trade (Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Bill [HL]: HL Bill 4 of 2023-24 is accessible here: <https://bills.parliament.uk/bills/3509>.

<sup>81</sup> "LaHood Reintroduces Digital Trade for Development Act," January 16, 2024, accessible here: <https://lahood.house.gov/2024/1/lahood-reintroduces-digital-trade-for-development-act>.

<sup>82</sup> See 19 U.S.C. 2462, subsections b and c, on designation of beneficiary developing countries, accessible here: <https://www.govinfo.gov/content/pkg/USCODE-2022-title19/pdf/USCODE-2022-title19-chap12-subchapV-sec2462.pdf>.

refrained from imposing digital trade barriers, such as unnecessary or discriminatory data localization or data transfer restrictions, discriminatory treatment of digital products, or forced disclosure of proprietary source code;” and “has taken steps in the digital environment to support consumer protections, the privacy of personal information, and open digital ecosystems [sic].”

- Rep. LaHood does not directly name any specific GSP beneficiaries that he believes should be excluded based on these new standards in his announcement. His statement simply notes that “evidence suggests that several developing countries are enacting similar digital trade policies to China’s restrictive Cybersecurity Law and related measures at the detriment to their own economic interests” and that these measures “undermine American values, jobs, and exports.”

Rep. LaHood introduced a similar bill in May 2021, shortly after the GSP’s expiration.<sup>83</sup> The bill’s principles became part of the GSP renewal section of the trade title of the Senate’s United States Innovation and Competition Act of 2021 (USICA). USICA ultimately became the CHIPS Act of 2022 after Congress removed the trade title as part of a compromise between the House and Senate.<sup>84</sup>

The new bill is substantively the same as the 2021 version, only making a few clarifications to the proposed digital trade obligations. Among those clarifications, the new bill adds “discriminatory treatment of digital products or forced disclosure of proprietary source code” to the examples of digital trade barriers countries should refrain from. Rep. LaHood has been a strong critic of the Biden administration’s abandonment of the United States’ historical positions on digital trade, including protection of source code, and the changes to the bill may be meant as a response.

### **GSP renewal efforts**

There is an ongoing effort in Congress to renew GSP before the end of the current legislative session, though a bipartisan bill that could pass in both chambers of Congress has not yet emerged. House Ways & Means trade subcommittee ranking member Earl Blumenauer (D-OR) and 10 Democrat co-sponsors have unveiled a new bill, The American Worker and Trade Competitiveness Act, to reauthorize the Generalized System of Preferences (GSP), the Miscellaneous Tariff Bill (MTB), and the Trade Adjustment Assistance program (TAA).<sup>85</sup> The GSP section of the bill would reauthorize tariff reductions through the end of 2026, with retroactive effect. The bill also adds new standards that the US Trade Representative (USTR) must consider in its annual reviews of eligibility, commissions new studies on the effects of GSP, establishes an annual study of worker rights in beneficiary countries, and makes several changes to administrative process and transparency.

The new qualifying conditions proposed by Rep. Blumenauer’s bill are stricter than what Republicans have supported in the past. Debates on these requirements led to the bill being removed from the final CHIPS Act in 2022. It is possible that a rival GSP renewal bill that does not include the controversial qualifying conditions will emerge later in 2024. Rep. Adrian Smith (R-NE) has said he was working on such a bipartisan approach.

Another recent bill proposing targeted reforms to the GSP is the Competitive Need Limitation (CNL) Update Act of 2023, introduced by a bipartisan group of Representatives on December 1, 2023.<sup>86</sup> The CNL Update Act would increase how much countries can export to the United States under GSP by raising the CNL threshold values,

<sup>83</sup> H.R.3052 - Digital Trade for Development Act, 117th Congress (2021-2022), accessible here: <https://www.congress.gov/bill/117th-congress/house-bill/3052>.

<sup>84</sup> H.R.4521 - United States Innovation and Competition Act of 2021, 117th Congress (2021-2022), accessible here: <https://www.congress.gov/bill/117th-congress/house-bill/4521/text/eas>.

<sup>85</sup> H.R.4276 - American Worker and Trade Competitiveness Act, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/house-bill/4276>.

<sup>86</sup> H.R.6555 - CNL Update Act of 2023, 118th Congress (2023-2024), accessible here: <https://www.congress.gov/bill/118th-congress/house-bill/6555>.

increasing the rate at which CNLs increase from year to year, and making it easier for countries to regain benefits if trade levels fall back below CNLs. The GSP's CNLs cause beneficiary countries to lose tariff-free access for certain products if total imports exceed certain dollar thresholds.

Rep. LaHood's bill itself does not reauthorize GSP or engage with the wider debate about other potential reforms to GSP. The bill's supporters likely intend for their proposal to contribute to the wider debate by advancing one specific criterion that they want included in the final renewal bill, as they did with USICA. Prominent digital industry trade associations, including BSA / The Software Alliance and the Information Technology Industry Council have endorsed the bill.

A draft of the Digital Trade for Development Act circulated by Rep. LaHood's office is accessible here:

[https://lahood.house.gov/\\_cache/files/2/7/275ec652-b6f5-4fe5-8aa7-2dacc4d65e8d/5A0AB56C654E0A89E727E5E9914BD294.lahooi-038-xml-002-.pdf](https://lahood.house.gov/_cache/files/2/7/275ec652-b6f5-4fe5-8aa7-2dacc4d65e8d/5A0AB56C654E0A89E727E5E9914BD294.lahooi-038-xml-002-.pdf).

## Petitions & Investigations

No developments