# US Multilateral Trade and Policy Developments

## Japan External Trade Organization

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# Contents

# Trade Policy Developments

## Senate Proposes New Trade Facilitation and De Minimis Legislation, While President Biden Asks for New Customs Enforcement Authorities

Discussions about reforming US customs procedures and limiting use of customs *de minimis* entry are continuing in Washington. At the end of July, a group of Senators led by Bill Cassidy (R-LA) circulated a draft of a long-awaited trade facilitation reform bill for stakeholder input while Sen. Ron Wyden (D-OR) circulated a proposed compromise bill for reforming the US customs *de minimis* threshold. President Biden also asked Congress for new legislation on the customs *de minimis* threshold as part of a crackdown on drug trafficking announced on July 31, 2024. Sen. Cassidy's trade facilitation bill would improve technical aspects of US import and export regulations, lowering compliance costs for traders. On the other hand, the *de minimis* reform proposals under consideration would significantly reduce access to the simplified import process, raising customs compliance costs for low-value shipments and cross-border e-commerce.

### The Senate's customs reform proposal

On July 31, 2024, Sen. Cassidy and Sen. Cortez Masto (D-NV) issued a discussion draft of the trade facilitation bill, the "Customs Facilitation Act of 2024."[1] The bill proposes various measures to streamline US customs procedures, enhance administrative systems, and improve information sharing with the private sector. Interested stakeholders in the trade community are invited to submit feedback on the discussion draft to the Senators' offices by August 30, 2024.

The bill's three titles are summarized below.

- **Creating a "One U.S. Government at the Border" (1USG):** The bill seeks to create a true single window for entry data filing and cargo release decisions, enhancing the Automated Commercial Environment (ACE) to better integrate Customs and Border Protection (CBP) and Partner Government Agencies (PGA) filing requirements.

- **Streamlining various customs processes:** The bill would simplify duty drawback processes to speed repayment, direct CBP to allow exporters to submit manifest data and documentation prior to departure, clarify that clerical errors in export data submission should not be subject to penalties, direct the executive branch to study potential simplifications to tariff and fee schedules, and instruct CBP's Centers of Excellence and Expertise to publish new compliance guidance for traders. The bill specifically instructs the Centers of Excellence and Expertise to provide guidance to importers on post-entry and clearance procedures for goods detained for allegedly including inputs made with forced labor in violation of Section 307 of the Trade Act of 1930.

- **Improving data transparency:** The bill would direct CBP to improve information sharing and cooperation with the trade community. The bill would instruct CBP to work with the private sector when adding new data disclosure requirements to import/export processes, work to avoid redundant data elements, and consider what kinds of data are actually available to businesses and are practical to transfer. The bill would also instruct CBP and the US Postal Service (USPS) to promulgate new regulations that would allow USPS to transmit data on international postal shipments from foreign postal operators to CBP.

  For companies participating in the Customs-Trade Partnership Against Terrorism (CTPAT), the bill would require CBP to provide notification when it makes minimum security criteria changes, consult CTPAT users when making

[1] Customs Facilitation Act of 2024, discussion draft, accessible here: https://www.cassidy.senate.gov/wp-content/uploads/2024/07/ROS24D56.pdf; and "Cassidy Releases Discussion Draft To Modernize Trade Facilitation, Asks For Industry Feedback," accessible here: https://www.cassidy.senate.gov/newsroom/press-releases/cassidy-releases-discussion-draft-to-modernize-trade-facilitation-asks-for-industry-feedback/.

CTPAT Handbook updates, and distribute best practices guidance to CTPAT members for mitigating risks of forced labor in supply chains. The bill would also require CBP to provide more points of contact for the trade community and improve response times for petitions, protests, customs rulings, and requests for advice.

Previously, on December 7, 2023, Senators Bill Cassidy and Sheldon Whitehouse (D-RI) introduced the Customs Modernization Act of 2023 (CMA), a bipartisan bill to strengthen customs enforcement.[2] The CMA's sponsors intend for it to increase CBP access to international supply chain data, expand the government's use of collected data, as well as make supply chains more visible and easier to target in enforcement actions and strengthen oversight of *de minimis* shipments.

The CMA built on the consultations with CBP and private sector stakeholders, but US industry representatives objected to the bill for focusing disproportionality on tightening enforcement. Sen. Cassidy acknowledged its lack of trade facilitation measures and said he would support a separate bipartisan trade facilitation bill that Congress would unveil in 2024. The Customs Facilitation Act emerged from the ensuing discussions.

If the two bills progress, they would likely eventually become part of a single package, along with other customs and trade measures that are currently under debate. With elections quickly approaching, control of Congress divided, and broader negotiations for a trade policy legislative package stalled, this customs reform effort will continue moving forward slowly.

**Customs reform for *de minimis* trade**

While work is continuing on the customs reform legislation, members of Congress are seeking quicker action on proposals to specifically reform the US customs *de minimis* entry system. Though there is general political interest in reducing use of *de minimis* entry, politicians have not come to agreement on how it should be done. Congress has spent the past few years debating several differing proposals. In the latest development, Senate Finance Committee Chair Ron Wyden (D-OR) is preparing to introduce another *de minimis* reform bill in the next few weeks, called the Fighting Illicit Goods, Helping Trustworthy Importers, and Netting Gains for America Act of 2024. Sen. Wyden hopes the bill will present a workable compromise between the differing approaches to *de minimis* reform.

Sen. Wyden's proposal would significantly narrow the types of goods that can qualify for *de minimis* treatment, excluding products that are subject to Section 201 (safeguards), Section 301, and Section 232 tariffs, as well as excluding goods that are deemed ineligible for preferential treatment under the Generalized System of Preferences (GSP).[3] The bill would also give the executive branch discretion to prohibit other goods from using *de minimis*. Using the GSP's list of qualifying products for *de minimis* treatment would exclude many import-sensitive products from using *de minimis* entry, including most textile, apparel, and leather products. Similarly, prohibiting goods that are subject to Section 301 tariffs would stop about half of low value imports from China from using *de minimis* entry, also including numerous consumer and apparel products.

Like other recent proposals, the bill would also make other administrative changes to the handling processes and entry requirements for *de minimis* shipments:

- The bill would add new data disclosure and compliance rules, which have become a common feature in recent *de minimis* reform proposals. The bill would direct CBP to require importers of *de minimis* shipments to provide additional identifying information about purchasers and sellers, payment information, Harmonized Tariff Schedule

[2] S.3431 - Customs Modernization Act of 2023, 118th Congress (2023-2024), accessible here: https://www.congress.gov/bill/118th-congress/senate-bill/3431.

[3] GSP-Eligible Products, accessible here: https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preferences-gsp/gsp-program-i-0; see also 19 U.S.C. 2463(b)(1) - Designation of eligible articles, for the list of import-sensitive products that are generally prohibited from qualifying for GSP, accessible here: https://www.govinfo.gov/content/pkg/USCODE-2023-title19/pdf/USCODE-2023-title19-chap12-subchapV-sec2463.pdf.

(HTS) classifications at the 10-digit level, and detailed article descriptions. The bill also introduces new penalties for violating the data reporting requirements.

- The bill would create a new streamlined process for disposing of detained *de minimis* shipments for when CBP does not receive timely responses from importers. A similar provision appears in the CMA's *de minimis* law updates.
- The bill would add a new user fee for *de minimis* imports, charging importers $2 for each *de minimis* entry. The Postmaster General would have authority to waive these fees for international postal shipments. The provision appears to reflect Biden administration's recent request for Congress to create a *de minimis* user fee, which CBP would use to fund expanded inspection and monitoring systems.

Republicans on the House of Representatives Committee on Ways and Means recently approved a bill which has some resemblance to Sen. Cassidy's proposal. H.R.7979, the End China's *de Minimis* Abuse Act, would prohibit goods from qualifying for *de minimis* entry if those goods are covered by Section 301, Section 201, or Section 232 actions.[4] The House will likely vote on H.R.7979 in September, though it only has support among Republicans. House Democrats, in contrast, have been advocating for bills that would completely prohibit imports from China from using *de minimis* entry. Expanding on H.R.7979's approach by also prohibiting the GSP's listed import sensitive sectors from using *de minimis* may help Sen. Wyden's proposal win support from his fellow Democrats.

**President Biden's request for new *de minimis* authorities**

The Biden administration has also now joined the discussion about legal changes for *de minimis* entries, after spending the past few years focused on internal reforms at CBP (which CBP is now finalizing). On July 31, 2024, President Biden issued a national security memorandum and proposed a package of legislative changes, largely intended to combat drug trafficking at US borders and customs checkpoints.[5] Among the various initiatives in the announcement is a request that Congress provide CBP with "the tools they need to more effectively track and target the millions of small-dollar shipments that cross our borders every day—closing a loophole that drug traffickers exploit" (it has become common among advocates for *de minimis* reform to refer to the *de minimis* entry system as a law enforcement "loophole"). According to the Biden administration, the request is based on the bipartisan proposals for *de minimis* reforms that are already introduced to Congress.

The legislation sought by the Biden administration would grant CBP more authority to "to demand additional documentation and other information about *de minimis* packages and would impose a corresponding penalty on violators." CBP expects these new documentation authorities would help improve risk assessment and inspection targeting. President Biden is also asking for the legislation to create a new user fee for importers using *de minimis* entry, which would help fund to new enforcement system.

## Congress Considering Export Control Law Expansions, Including for AI, Cloud Computing, and IP

The House of Representatives may vote on several proposed expansions to US export control laws as soon as September 2024, including measures that would create new export controls on artificial intelligence (AI) applications and cloud computing services, as well as a bill that could lead to Entity List designations for intellectual property (IP)

[4] H.R.7979 - End China's *de Minimis* Abuse Act, 118th Congress (2023-2024), accessible here: https://www.congress.gov/bill/118th-congress/house-bill/7979.

[5] "Biden-Harris Administration Announces New Actions to Counter the Scourge of Fentanyl and Other Synthetic Drugs," accessible here: https://www.whitehouse.gov/briefing-room/statements-releases/2024/07/31/fact-sheet-biden-%E2%81%A0harris-administration-announces-new-actions-to-counter-the-scourge-of-fentanyl-and-other-synthetic-drugs/; and "DHS Shows Results in the Fight to Cripple Cartels and Stop Fentanyl from Entering the U.S.," accessible here: https://www.dhs.gov/news/2024/07/31/fact-sheet-dhs-shows-results-fight-cripple-cartels-and-stop-fentanyl-entering-us.

theft. Members of Congress are also discussing potential legislation to reform and strengthen the US export control regime, though the proposal is less developed and is unlikely to be ready for a vote this year. While Congress continues its deliberations, the Biden administration is also preparing new actions that could target more AI-related activities and cloud services, though the initiative is incomplete and is unlikely to be as restrictive as some in Congress would prefer.

**Situation in Congress**

The House would consider the export control proposals alongside other bills that seek to reduce US economic engagement with China, which House leadership hopes to hold votes for in late September. Speaker of the House Mike Johnson (R-LA) raised the plan for the votes in a July 8, 2024 speech, where he also mentioned intentions to vote on bills to restrict market access for Chinese biotechnology companies, lower the US customs *de minimis*, and restrict US investment in China.[6] Most of the proposals under consideration have support from both Republicans and Democrats, and Speaker Johnson has said that he hopes that much of the initiative can be bipartisan.

Despite an aggressive agenda in the House, Congress will face challenges passing these bills through the Senate and into law by the end of the year. The most likely path forward would be for Congress to attach the bills to must-pass legislation like the 2025 National Defense Authorization Act (NDAA). If Congress does attach any of these bills to the NDAA, the bills' progress through Congress could rapidly accelerate. If the bills do not successfully pass into law, the sponsors will have to reintroduce the bills in the next legislative session.

**H.R.8924: PAID Act**

On July 2, 2024, Rep. Young Kim (R-CA), Chair of the House Foreign Affairs Subcommittee on the Indo-Pacific, and Rep. John Moolenaar (R-MI), Chair of the House Select Committee on the CCP, introduced H.R.8924, the Protecting American Innovation and Development Act of 2024 (PAID Act) to the House of Representatives.[7] The bill was then referred to the Committee on Foreign Affairs, where it was ordered to be reported by a vote of 24 to 22 on July 11, 2024. The bill now awaits a full vote on the House floor.

The PAID Act seeks to "expose foreign adversaries stealing U.S. intellectual property (IP) and trade secrets of dual-use technologies critical to national security" by directing the Bureau of Industry and Security (BIS) to identify foreign adversary entities that engage in theft of US intellectual property and trade secrets. The bill would amend Section 1752(2) of the Export Control Reform Act (ECRA) to state that it is the policy of the United States to use export controls to "ensure the continued strength and leadership of the United States in the research and development of critical and emerging technologies." The initiative would specifically target unlicensed use of dual-use technologies critical to national security and critical or emerging technologies (the bill directs the Department of Defense to develop a list of items that would be defined as critical and emerging technologies).

The bill would then insert into the ECRA a new section 1758A on "public transparency regarding foreign adversary entities using intellectual property related to critical or emerging technology without a license." Under this section, BIS would be directed to publish notices in the Federal Register that identify "a foreign adversary entity if a majority of the members of the End-User Review Committee (ERC) determines that the foreign adversary entity is using a patented invention or covered trade secret without a license" if the ERC determines the entity is either (i) "manufacturing or selling a product that incorporates a patented invention or covered trade secret without a license;" (ii) "acquired a patented invention or covered trade secret through improper means;" or (iii) disclosed a patented invention or covered trade secret without express or implied consent." The ERC is a committee composed of representatives from Departments of Commerce, State, Defense, Energy, and Treasury that makes decisions for adding or removing

[6] "Speaker Mike Johnson on the Threats to the US-Led World Order," Hudson Institute, July 9, 2024, https://www.hudson.org/events/speaker-mike-johnson-threats-us-led-world-order-rebeccah-heinrichs.

[7] H.R.8924 - PAID Act of 2024, 118th Congress (2023-2024), https://www.congress.gov/bill/118th-congress/house-bill/8924.

companies from BIS' export control Entity List. US persons would be able to petition the ERC to make a determination for a specific entity, which the ERC would have to make a determination on within 90 days. The bill would also provide processes for entities to seek removal from the list.

The listing actions would only apply to "foreign adversary entities," which are defined as individuals that are citizens of foreign adversary countries or entities that are either (i) "headquartered in, or organized under the laws of, or has its principal place of business in a foreign adversary" or (ii) are subject to the control of another foreign adversary entity. Foreign adversary entity excludes entities for which either (i) "a majority of the equity interest in the entity is owned by nationals of the United States" or by nationals of designated US allies or (ii) the "ultimate parent entity is an entity organized under the laws of, and headquartered in, the United States." The designated foreign adversary countries are China (including Hong Kong and Macau), Russia, North Korea, Iran, and the Maduro regime of Venezuela.

**H.R.8315: ENFORCE Act**

On May 8, 2024, Chair of the House Foreign Affairs Committee Michael McCaul (R-TX) introduced H.R.8315, or the Enhancing National Frameworks for Overseas Restriction of Critical Exports Act (ENFORCE Act), to the House of Representatives.[8] Cosponsoring the bill are Reps. Moolenaar and Raja Krishnamoorthi (D-IL), who lead the House Select Committee on the Chinese Communist Party (CCP), and nine other Representatives from both parties. The bill was referred to the House Committee on Foreign Affairs, where it was promptly ordered to be reported by a vote of 43 to 3 on May 22, 2024. The Biden administration has also provided input into the bill, which led to several amendments during the Foreign Affairs Committee's markup.

The ENFORCE Act would amend the ECRA to empower BIS to impose export controls on AI models and US persons controls on AI developers. According to the bill's sponsors, the bill is seeking a narrow approach that targets closed-source military-grade systems that threaten US security while still allowing innovation and trade in other AI models and open-source AI models. The sponsors of the bill argue that – though BIS can currently control exports of advanced semiconductors used to develop AI models – the agency does not have clear authority to control the transfer of an already-developed AI model. The bill is intended to remedy that perceived gap.

The bill would authorize US persons controls on activities related to AI development, which could require labs and companies to implement security guardrails before collaborating with AI developers in China. Section 3 of the bill would amend ECRA section 1753(a) to allow BIS to "control the activities of United States persons, wherever located, relating to specific covered artificial intelligence systems and emerging and foundational technologies that are identified as essential to the national security of the United States […]"

The bill would then authorize BIS to impose export license requirements on transfers of covered AI systems and related technologies. Section 4 of the bill would amend ECRA section 1754(d) to provide BIS the authority to require any United States person, no matter the location of said person, to obtain a license for the exportation, re-exportation, or in-country transfer of (i) covered artificial intelligence systems; (ii) specific emerging and foundational technologies identified through ECRA section 4817(a); and (iii) other activities that may support the "design, development, production, use, operation, installation, maintenance, repair, overhaul, or refurbishing of, or for the performance of services relating to" the covered items.

The bill's definitions of the covered items (summarized below) are written to be temporary and flexible, with an expectation that the executive branch will hold public consultations to refine and modify what products are covered as the technology evolves.

[8] H.R.8315 - ENFORCE Act, 118th Congress (2023-2024), https://www.congress.gov/bill/118th-congress/house-bill/8315.

- For the definition of "artificial intelligence" itself, the bill relies on section 5002(3) of the National Artificial Intelligence Initiative Act of 2020, which defines AI as "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. Artificial intelligence systems use machine and human-based inputs to- (A) perceive real and virtual environments; (B) abstract such perceptions into models through analysis in an automated manner; and (C) use model inference to formulate options for information or action."
- The bill then defines an "artificial intelligence system" as "any software or hardware implementation of artificial intelligence, including artificial intelligence model weights and any numerical parameters associated with the artificial intelligence implementation."
- A "covered artificial intelligence system" subject to the export controls and US persons controls in the bill would be an "artificial intelligence system" that exhibits or can be expected to exhibit high performance capabilities at tasks that pose a risk to the national security and foreign policy of the United States (even if equipped with end-user technical safeguards). The bill lists tasks related to developing weapons of mass destruction, enabling of offensive cyber operations, and permitting evasion of human control as the risky tasks of interest. The bill directs the Department of Commerce, together with the Departments of State, Defense, and Energy to regularly revisit and update the definition of covered systems.

**Department of Commerce scrutiny of dual-use and other AI models**

The AI risks that the ENFORCE Act is trying to address resembles the focus of President Biden's October 2023 Executive Order (EO) on "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence."[9] The EO, among other things, directs the Department of Commerce to develop risk mitigation frameworks for dual-use AI foundation models. In late July 2024, the Department of Commerce National Institute of Standards and Technology (NIST) issued the first public draft of a proposed guide to managing misuse risks for these AI models, which is open to public feedback until September 9, 2024.[10] Though the NIST report and EO are contemplating the public safety and national security implications of dual-use models, NIST's proposed guidance does not discuss export controls. Instead, the report focuses on voluntary best practices that developers can adopt to mitigate risks and highlights the challenges the government has faced is reliably assessing the risks of these models. The NIST report is part of a broader effort by the Department of Commerce to manage AI risk, which also includes a new global engagement strategy for developing AI-related technical standards.[11]

**H.R.8152: Remote Access Security Act**

On April 29, 2024, Mike Lawler (R-NY), Jeff Jackson (D-NC), Rich McCormick (R-GA), and Jasmine Crockett (D-TX) introduced the Remote Access Security Act to the House of Representatives.[12] The bill was referred to the House Committee on Foreign Affairs, where it was promptly ordered to be reported by unanimous consent on May 16, 2024.

[9] EO 14110 of October 30, 2023: "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence," 88 FR 75191 (November 1, 2024), accessible here: https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence.

[10] "Request for Comments on the U.S. Artificial Intelligence Safety Institute's Draft Document: Managing Misuse Risk for Dual-Use Foundation Models," 89 FR 64878 (August 8, 2024), accessible here: https://www.federalregister.gov/documents/2024/08/08/2024-17614/request-for-comments-on-the-us-artificial-intelligence-safety-institutes-draft-document-managing.

[11] See NIST's webpage on the "Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence" for more information on NIST's ongoing projects responding to EO14110, accessible here: https://www.nist.gov/artificial-intelligence/executive-order-safe-secure-and-trustworthy-artificial-intelligence.

[12] H.R.8152 - Remote Access Security Act, 118th Congress (2023-2024), accessible here: https://www.congress.gov/bill/118th-congress/house-bill/8152.

The Remote Access Security Act would empower BIS to impose export controls on remote access systems, including cloud computing services. The bill's supporters intend to use this power to prohibit Chinese companies from using US cloud services to train AI models. To do so, the bill amends various sections of the ECRA to add "remote access of such systems" to the kinds of transactions that BIS can restrict for controlled items (alongside "export, reexport, and in-country transfer"). Amended section 1742 would define "remote access" as "access to an item subject to the jurisdiction of the United States by a foreign person through a network connection, including the internet or a cloud computing service, from a location other than where the item is physically located" or in "any other form of access specified in regulations promulgated by the Secretary [of Commerce]."

**Potential executive branch activities on cloud computing**

The United States has long been seeking new tools for limiting access to high-power computing, and cloud-based provision of computing services has been a gap in those efforts. The Biden administration imposed export controls on exports of advanced semiconductors to China in 2022, which it subsequently expanded in October 2023, and which will likely expand again soon (including with new extensions of the foreign direct product rule). Preventing the Chinese government from developing advanced AI capabilities for military, intelligence, and surveillance uses is one of the objectives of the export controls.

However, the export controls only apply to physical exports of chips, and do not prevent Chinese developers from contracting third-party cloud services providers to train AI models. BIS' October 2023 update to the semiconductor export controls references the challenge, noting the agency is "concerned regarding the potential for China to use IaaS solutions to undermine the effectiveness of the October 7 IFR controls and continues to evaluate how it may approach this through a regulatory response."

Attempting to address the challenge, BIS issued a Notice of Proposed Rulemaking (NPRM) and request for comments in January 2024 outlining rules for a new know-your-customer (KYC) rule for US infrastructure as a service (IaaS, or "cloud computing services") providers and their foreign resellers.[13] The NPRM includes proposed requirements for providers to verify the identity of their foreign customers, along with procedures for BIS to grant exemptions; authorize special measures to deter foreign malicious cyber actors' use of US IaaS products; and require providers of certain IaaS products to submit a report to the Secretary when a foreign person transacts with that provider or reseller to train a large AI model with potential capabilities that could be used in malicious cyber-enabled activity. BIS is now reviewing the public response and may issue a final rule in the next few months.

BIS' proposed rule may be a step towards restricting cloud services, but the envisioned KYC standard would not be an export control in itself and would not be as restrictive as supporters of the Remote Access Security Act would like. Besides encouraging BIS to take a more restrictive approach to the sector, the bill would also clarify that BIS does in fact have the authority to apply export controls on cloud services. Opponents of cloud services export controls have argued the activity is not controllable under current law.

**Proposals for broader export control law reforms**

The House of Representatives is also discussing potential legislation for comprehensive reform of the export control system, including changes to BIS' authorities and licensing procedures. The bill is still under development and is less likely to receive a vote in September than the bills that have already passed committee markups.

One goal of the potential bill is to clarify that BIS has legal authority to enforce foreign direct product rules, which BIS uses to control trade of products made in third countries that use US inputs. Legislators appear concerned that the

[13] "Taking Additional Steps To Address the National Emergency With Respect to Significant Malicious Cyber-Enabled Activities," 89 FR 5698 (January 29, 2024), accessible here: https://www.federalregister.gov/documents/2024/01/29/2024-01580/taking-additional-steps-to-address-the-national-emergency-with-respect-to-significant-malicious.

practice could be exposed to legal challenge following the Supreme Court's overturning of Chevron deference in Loper Bright Enterprises v. Raimondo.

The bill could also seek to harmonize the various licensing policies that are applied to US adversaries. Members of Congress believe the inconsistent approach to export controls on countries like Russia and China is creating openings for cooperation between industries in the two countries, reducing the effectiveness of US export controls.

One (more targeted) administrative reform bill that is ready for a vote is H.R.7151, the Export Control Enforcement and Enhancement Act, which Reps. Ann Wagner (R-MO) and Michael McCaul (R-TX) introduced in January 2024.[14] The bill seeks to streamline the process for altering the items included on BIS' Commerce Control List by expediting the proposal and review process. The bill would also impose a presumption of denial for exports of items on the Commerce Control List to countries subject to embargo or entities that are on the Entity List (BIS can waive the presumption). The House Foreign Affairs Committee approved the bill by voice vote on July 11, 2024.

## USTR Issues Calls for Input on Annual China and Russia Market Access Reports

On August 5, 2024, the United States Trade Representative (USTR) issued requests for comment and public hearing notices for its annual reports on compliance with World Trade Organization (WTO) commitments by China and Russia. The annual reports discuss US concerns about WTO compliance and more general market access challenges with the two countries. USTR publishes the China report every February, while the Russia report is usually released earlier.

- **Report to Congress on China's WTO Compliance**

  The deadline for submission of written comments for the China report is September 10, 2024. USTR will hold a public hearing to gather input on September 24, 2024. The Federal Register notice describes the procedures for filing comments and joining the hearing.[15]

  In recent years, attention has been especially focused on the China report.[16] USTR's recent China reports have criticized China for its specific trade restrictions and state-led economy, while also explaining Biden administration's strategy for handling the policy dispute. USTR has argued in these reports that its efforts within the WTO and in bilateral dialogues have failed to secure fundamental changes to China's policies.

- **Report on the Implementation and Enforcement of Russia's WTO Commitments**

  The deadline for submission of written comments for the Russia report is September 18, 2024. USTR will hold a public hearing to gather input on October 10, 2024. The Federal Register notice describes the procedures for filing comments and joining the hearing.[17]

[14] H.R.7151 - Export Control Enforcement and Enhancement Act, 118th Congress (2023-2024), accessible here: https://www.congress.gov/bill/118th-congress/house-bill/7151.

[15] "Request for Comments and Notice of Public Hearing Concerning China's Compliance With WTO Commitments," 89 FR 63462 (August 5, 2024), accessible here: https://www.federalregister.gov/documents/2024/08/05/2024-17235/request-for-comments-and-notice-of-public-hearing-concerning-chinas-compliance-with-wto-commitments.

[16] The latest China report, the "2023 Report to Congress on China's WTO Compliance," is accessible here: https://ustr.gov/sites/default/files/2023%20USTR%20Report%20on%20China's%20WTO%20Complaince%20(Final)%20(USTR%20Website).pdf.

[17] "Request for Comments and Notice of Public Hearing Concerning Russia's Implementation of Its WTO Commitments," 89 FR 63463 (August 5, 2024), accessible here: https://www.federalregister.gov/documents/2024/08/05/2024-17229/request-for-comments-and-notice-of-public-hearing-concerning-russias-implementation-of-its-wto.

US-Russia trade and the diplomatic relationship (both bilaterally and at the WTO) have halted since Russia's invasion of Ukraine in 2022.[18] Despite the stalling of the relationship, USTR has maintained that it will "continue to consult with domestic stakeholders, monitor Russia's actions, and, as appropriate endeavor to encourage Russia to meet its WTO commitments."

## Copper, Magnesium, and Construction Materials Companies Added to the UFLPA Entity List

On August 8, 2024, the United States announced new additions to the Uyghur Forced Labor Prevention Act (UFLPA) Entity List,[19] listing five companies from the copper, magnesium, and construction materials sectors:

- **Kashgar Construction Engineering (Group) Co., Ltd.**: A company based in Kashgar, Xinjiang, China, that manufactures structural components and materials for construction, and is also engaged in general construction, construction engineering and operations, and real estate development and operations
- **Xinjiang Habahe Ashele Copper Co., Ltd**. (also known as **Ashele Copper):** A company located in the Xinjiang Uyghur Autonomous Region that mines nonferrous metals.
- **Xinjiang Tengxiang Magnesium Products Co., Ltd.**: A company based in Hami, Xinjiang, China, that manufactures magnesium and magnesium alloy products.
- **Century Sunshine Group Holdings, Ltd.**: A company based in Hong Kong that manufactures magnesium fertilizer and magnesium alloys.
- **Rare Earth Magnesium Technology Group Holdings, Ltd.**: A company based in Hong Kong that manufactures and sells magnesium alloy products.

### Application of the rebuttable presumption

The Entity List designation for these companies entered effect on August 9, 2024. With their addition to the Entity List, US Customs and Border Protection (CBP) will begin applying the UFLPA rebuttable presumption that goods mined, produced, or manufactured, wholly or in part, by these companies are made with forced labor, and therefore, prohibited from importation into the United States under 19 USC section 1307. CBP will begin detaining imported merchandise that is suspected of either originating from these companies or of containing inputs that originated from these companies.

### Growing focus on the metals sector

CBP's UFLPA enforcement focus on metals is increasing. In the first half of 2024, CBP detained 134 metals shipments worth a total of $61.30 million, making it the third largest category of detentions after electronics and cotton products. In last month's update to the UFLPA enforcement strategy, the Forced Labor Enforcement Taskforce (FLETF) added aluminum to CBP's list of priority enforcement sectors and expressed concern that production of nonferrous metals is increasing in Xinjiang.[20] Concern with the growth of the sector in Xinjiang could prompt a stronger enforcement focus.

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[18] The latest Russia report, "2023 Report on the Implementation and Enforcement of Russia's WTO Commitments," is accessible here: https://ustr.gov/sites/default/files/2023%20Report%20on%20the%20Implementation%20and%20Enforcement%20of%20Russia's%20WTO%20Commitments.pdf.

[19] "Notice Regarding the Uyghur Forced Labor Prevention Act Entity List," 89 FR 65374 (August 9, 2024), accessible here: https://www.federalregister.gov/documents/2024/08/09/2024-17509/notice-regarding-the-uyghur-forced-labor-prevention-act-entity-list.

[20] "2024 Updates to the Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China," July 2024, Department of Homeland Security, accessible here: https://www.dhs.gov/sites/default/files/2024-

## Senator Introduces Bill to Renew Generalized System of Preferences

Senator Maria Cantwell (D-WA), member of the Senate Finance Committee and chair of the Senate Commerce, Science, and Transportation Committee, introduced a new bill to the Senate on July 31, 2024that would renew the Generalized System of Preferences (GSP).[21] The bill, S.4915, was referred the Finance Committee for consideration. An unrelated proposal to expand low-income housing subsidies, a long-time priority of Sen. Cantwell, is also part of the bill. Like a few other recent GSP renewal proposals, S.4915 does not include renewals to the Miscellaneous Tariff Bill (MTB), Trade Promotion Authority (TPA), or Trade Adjustment Assistance (TAA).

### Situation in Congress

GSP is a preferential and non-reciprocal trade program that provides duty-free access for certain imports from eligible developing countries to the US market. The program expired at the end of 2020 and several attempts to renew it have since failed. The United States Innovation and Competition Act (USICA), passed by the Senate in June 2021, included renewals for GSP and the MTB. Renewal was also part of the America COMPETES Act passed by the House of Representatives in February 2022. However, the provisions were abandoned in the reconciled compromise legislation that became the CHIPS and Science Act of 2022. Though there was a last-minute effort to pass a GSP renewal bill at the end of the legislative session, efforts ultimately failed. Notably, the core provisions of S.4915 are mostly identical to the renewal proposal the Senate included in USICA.

Renewal proposals have re-emerged in the current legislative session, but partisan disagreements over specific reforms proposed in the bills are persisting. Democrats are generally seeking requirements that GSP beneficiary countries adhere to stricter labor standards, and new environmental, good governance, and human rights standards. Republicans, on the other hand, are seeking more aggressive market access commitments from the beneficiary countries, using the threat of a withdrawal of GSP benefits to pressure developing countries to reciprocally open their own markets. Multiple partisan bills that elevate these differing objectives are now circulating in Congress, and the parties will have to find a compromise that merges their partisan proposals if a renewal is to succeed in the current legislative session.

Broader disagreements about the trade policy legislative package that the GSP renewal bill would be included in have also persisted, making it increasingly unlikely that Congress can pass a GSP renewal bill before the end of the current legislative session. Democrats want to pair GSP and MTB renewal with renewing TAA. TAA, which expired in June 2022, provides financial assistance to US workers who lose their jobs because of import competition. Democrats have always sought to pair TAA with the reauthorization of these other trade programs. Republicans, on the other hand, have opposed including TAA renewal. Republicans see TAA as tied more closely with renewal of TPA, a bill that gives the president authority to negotiate free trade agreements and is also usually renewed as part of this trade legislation package. Democrats have shied away from renewing TPA amid a broader political turn against free trade agreements and a lack of support from the Biden administration.

The House Ways and Means Committee passed a Republican proposal for renewing GSP — H.R.7986, or the Generalized System of Preferences Reform Act — along partisan lines in April 2024.[22] Republicans added several of the Democrats' policy priorities to the bill during committee markup, in a late attempt to make the bill bipartisan.

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07/2024%20Updates%20to%20the%20Strategy%20to%20Prevent%20the%20Importation%20of%20Goods%20Mined%2C%20Produced%2C%20or%20Manufactured%20with%20Forced%20Labor%20in%20the%20People%E2%80%99s%20Republic%20of%20China.pdf.

[21] S.4915 - A bill to amend the Internal Revenue Code of 1986 to modify the low-income housing credit and to reauthorize and reform the Generalized System of Preferences, and for other purposes, 118th Congress (2023-2024), accessible here: https://www.congress.gov/bill/118th-congress/senate-bill/4915.

[22] H.R.7986 - Generalized System of Preferences Reform Act, 118th Congress (2023-2024), accessible here: https://www.congress.gov/bill/118th-congress/house-bill/7986; the latest text of the bill, as amended by the House Ways and Means Committee, accessible here: https://gop-waysandmeans.house.gov/wp-content/uploads/2024/04/H.R.-7986-AINS.pdf.

Despite that effort, the bill's lack of TAA renewal appears to have motivated Democrats to oppose the Republican renewal effort. The House has not yet taken up H.R.7986for a full floor vote. The House Democrats' proposed renewal bill (which also includes TAA and MTB renewal), H.R.4276, or the American Worker and Trade Competitiveness Act, has not moved forward either.[23]

**S.4915's GSP reauthorization**

S.4915would renew GSP through December 31, 2029, with retroactive effect for goods entered since December 31, 2020. The bill would also add new standards the United States Trade Representative (USTR) must consider in its reviews of eligibility, commissions studies on the effects of GSP, establishes a biennial study of worker rights in beneficiary countries, and makes a few changes to process and transparency.

Like previous late reauthorizations of the GSP (and the other current reauthorization proposals), this reauthorization is retroactive to the date of the GSP's last expiration. Imports that would have qualified for GSP on December 31, 2020, but that entered the United States between December 31, 2020 and the date on which this bill enters effect will be eligible for refunds on any tariffs paid. To receive the refund, the importer would have to apply to US Customs and Border Protection (CBP) for liquidation or reliquidation within 180 days of the bill's enactment.

**Changing eligibility criteria**

The bill makes several expansions to the basis for ineligibility and the other factors affecting country designation under 19 USC 2462[24] that USTR considers when evaluating GSP-beneficiary countries for inclusion or removal from the program. Like other recent proposals from the Democrats, the changes include new labor rights and environmental protection standards. The bill also incorporates good governance standards used for the African Growth and Opportunity Act's (AGOA) qualifying criteria, a change that appears to be popular in both parties. Sen. Cantwell has also included a requirement that beneficiary countries refrain from imposing digital trade barriers, which has surfaced in other recent proposals to increase the reciprocal market access conditions in both GSP and AGOA. Unlike the House Republican proposal, S.4915 does not include new conditions for agriculture market access or conditions related a country's diplomatic relations with China.

For the conditions that are bases for ineligibility, the bill makes two notable additions:

- Adds a condition stating a country is ineligible if "such country has failed, in a manner affecting trade or investment— (i) to effectively enforce its environmental laws or regulations through a sustained or recurring course of action or inaction; or (ii) to adopt and maintain measures implementing its obligations under common multilateral environmental agreements." The common multilateral environment agreements that beneficiaries would have to adopt and maintain measures implementing their commitments under are any of the following agreements to which the country is party: the Convention on International Trade in Endangered Species of Wild Fauna and Flora; the Montreal Protocol on Substances that Deplete the Ozone Layer; the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships; the Convention on Wetlands of International Importance, Especially as Waterfowl Habitat; the Convention on the Conservation of Antarctic Marine Living Resources; the International Convention for the Regulation of Whaling; and the Convention for the Establishment of an Inter-American Tropical Tuna Commission.
- Adds a condition stating a country is ineligible if "such country engages in gross violations of internationally recognized human rights in that country (including any designated zone in that country)."

[23] 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.

[24] 19 USC 2462: Designation of beneficiary developing countries, accessible here: https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title19-section2462.

Like the current ineligibility conditions under 19 USC 2462(b)(2) (D), (E), (F), (G), and (H), the two new conditions "shall not prevent the designation of any country as a beneficiary developing country under this subchapter if the President determines that such designation will be in the national economic interest of the United States."

The bill would then make a series of additions to the other factors affecting country designation:

- To the existing worker rights conditions, the bill would replace "whether or not" with "the extent to which" a country affords "workers in that country (including any designated zone in that country) internationally recognized worker rights."
- Adds a new factor for "the extent to which such country is effectively enforcing its environmental laws and regulations and adopting and maintaining measures implementing its obligations under common multilateral environmental agreements."
- Adds a new factor for "the extent to which such country is achieving the goals described in section 3(b) of the Women's Entrepreneurship and Economic Empowerment Act of 2018."
- Adds a new factor for good governance, based on the more detailed qualifying conditions for AGOA beneficiary countries:[25] "the extent to which such country has established, or is making continual progress toward establishing— (A) the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law; (B) economic policies to reduce poverty, increase the availability of health care and educational opportunities, expand physical infrastructure, promote the development of private enterprise, and encourage the formation of capital markets through micro-credit or other programs; and (C) a system to combat corruption and bribery, such as signing and implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, done at Paris December 17, 1997, and entered into force February 15, 1999."
- Adds a new factor for "the extent to which such country— (A) has refrained from imposing, or has eliminated, digital trade barriers, including unnecessary or discriminatory data localization or data transfer restrictions; and (B) has taken steps in the digital environment to support consumer protections, the privacy of personal information, and open digital ecosystems."

For both the ineligibility factors and the other factors affecting designation standards on worker rights, the bill would expand the definition of "internationally recognized worker rights" to include "the elimination of all forms of discrimination with respect to occupation and employment." The House Democrats' proposal also includes this change.

GSP already includes general provisions stating that a lack of market access, investor protection, and intellectual property protection can affect GSP eligibility. USTR has selectively used those provisions to pressure developing countries into making policy changes. The Trump administration was especially aggressive in leveraging GSP to improve US market access. The new market access conditions included in this bill and others – especially for digital trade – are far more specific than these past conditions and may push USTR to be more aggressive in monitoring GSP eligible countries.

**Process changes for beneficiary reviews**

Like other recent renewal proposals, S.4915 would require increased transparency for country eligibility determinations. The provisions would require USTR to hold public hearings and public comment periods when considering suspending, terminating, or limiting benefits. USTR would have to publish its determinations on petitions

[25] 19 USC 3703: Eligibility requirements, accessible here: https://uscode.house.gov/view.xhtml?req=(title:19%20section:3703%20edition:prelim).

for eligibility review to the Federal Register. The bill would also require USTR to review the compliance of beneficiary countries with the eligibility requirements, including making determinations as to whether it should initiate full eligibility reviews, at least once every three years. These provisions are similar to the review process reforms proposed by the House Republican and House Democrat proposals (the House Democrat proposal sets reviews at every two years).

**New studies and future policy considerations**

The bill would direct the US International Trade Commission (ITC) to prepare a report studying the rules of origin, utilization rates, and product eligibility standards GSP. The study would assess (i) utilization of GSP by least developed beneficiary countries, (ii) the effectiveness of the rules of origin in promoting trade benefits to the least-developing beneficiary countries and preventing transshipment from countries that are not members of GSP, and (iii) the procedures for designating articles as eligible for GSP, including the competitive need limitation (CNL) and the process for waiving the competitive need limitation.

The policy measures that the bill instructs the ITC to study pertain to the changes proposed by the Republican House bill. The Republican House proposal would gradually raise the origin value threshold from the current rate of 35% to 50%, which they believe will reduce the use of Chinese-manufactured inputs. The CNLs are provisions which require USTR to suspend GSP eligibility when a country's GSP-qualifying exports exceed certain dollar value and import share thresholds. The House Republican proposal would significantly increase the CNL thresholds and expand certain waiver authorities, providing investors in developing countries with better assurances that they will have continued preferential access to the US market.

The bill would also require USTR and the Department of Labor to report every two years on the effectiveness of using GSP to promote worker rights and women's economic empowerment. The House Democrat's proposal would establish a similar reporting program.

**Status of Miscellaneous Tariff Bill renewal**

S.4915 does not include a reauthorization of the MTB. The MTB is a companion bill to the GSP that temporarily reduces or suspends import tariffs on certain products that are not manufactured in the United States. Political support appears to be falling away from reauthorization of MTB, with some members of Congress objecting to how the tariff cuts would apply to imports from China.

The House Democrats' H.R.4276 included an MTB reauthorization, but only for intermediate goods used in US manufacturing. Finished goods (including consumer products) would be excluded from the bill's tariff reductions, which the sponsors believe would make the MTB less favorable to Chinese exporters.

House Ways & Means Trade Subcommittee Chair Adrian Smith (R-NE) introduced a Republican proposal to renew the MTB on May 14, 2024.[26] H.R.8398, or the Miscellaneous Tariff Bill Reform Act, would renew the MTB through December 31, 2025 with retroactive effect for subject imports that have entered the United States since January 1, 2021 (H.R.4276, in contrast, would not be fully retroactive). H.R.8398 does not include a blanket exclusion on finished goods like the Democrat proposal, but it does exclude imports that are subject to the China Section 301 tariffs. Under the previous version of the MTB, about 15% of covered imports were subject to Section 301 tariffs.[27] Though sponsoring both this MTB renewal bill and the House Republican's GSP renewal bill, Rep. Smith introduced the MTB renewal bill separately. Unlike the GSP renewal bill, the MTB renewal bill has not been approved by the Ways and Means Committee.

[26] H.R.8398 - Miscellaneous Tariff Bill Reform Act, 118th Congress (2023-2024), accessible here: https://www.congress.gov/bill/118th-congress/house-bill/8398.

[27] "Miscellaneous Tariff Bills (MTBs)," Congressional Research Service, last updated December 1, 2021, accessible here: https://crsreports.congress.gov/product/pdf/IF/IF10478.

## New Court Case Raises Pressure Over Delayed Fisheries Import Ban

Debates are continuing in Washington about how the United States should implement a significant and long-delayed seafood import restriction. The Marine Mammal Protection Act (MMPA) prohibits the taking, sale, and importation of marine mammals and marine mammal products, as well as fish and fish products that are harvested in ways that generate marine mammal bycatch. Though the law has been in force since 1972, US regulators have not attempted to aggressively enforce the importation prohibition. To strengthen enforcement, the Department of Commerce National Oceanic and Atmospheric Administration (NOAA) National Marine Fisheries Service (NMFS, or "NOAA Fisheries") issued a new regulation in 2016 prohibiting importation of fish and fish products from foreign fisheries that cannot demonstrate marine mammal bycatch protections comparable to those enforced in US fisheries.

The regulation is currently scheduled to enter force on January 1, 2026, following several delays. In the latest development, environmental activists filed a complaint at the US Court of International Trade (CIT) in August 2024 seeking a firm commitment from the government to implement the prohibition, which could lead to changes in the implementation timeline.

### Import provisions of the MMPA

Section 101 of the MMPA generally prohibits the taking,[28] importation, and sale of marine mammals and marine mammal products.[29] The law allows limited exceptions for certain scientific and conservation activities (for which directed taking permits must be issued) and incidental takings in commercial fishing and certain other specified maritime activities. According to the law, the regulatory system governing incidental takings should have the goal of reducing incidental takings and serious injuries of marine mammals to "insignificant levels approaching a zero mortality and serious injury rate."

MMPA section 101(a)(2) specifically prohibits "the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." To apply the import restriction, the government should ask for information from fish exporting countries on the effects of commercial fishing technologies on marine mammals.

MMPA section 102(c) also establishes that it is unlawful to import (i) marine mammals taken in violation of the MMPA or the laws of the country of harvest, (ii) marine mammal products that are derivative of illegally harvest marine mammals or which are illegal to sell in the country of origin, or (iii) "any fish, whether fresh, frozen, or otherwise prepared, if such fish was caught in a manner which the Secretary [of Commerce] has proscribed for persons subject to the jurisdiction of the United States, whether or not any marine mammals were in fact taken incident to the catching of the fish."

### The 2016 fisheries import prohibition Final Rule

Following several years of discussions, the NMFS issued the final rule implementing the fish and fish product import prohibition on August 15, 2016 (the "Final Rule").[30] The Final Rule creates a regulatory comparability finding system that will determine whether foreign fisheries that export to the United States have marine mammal bycatch regulatory protections comparable to US bycatch protections. Fish and fish products originating from foreign fisheries, which fail to obtain an affirmative comparability finding from the NMFS, will be prohibited from importation into the United

[28] "Taking" is to "harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal."

[29] For purposes of the MMPA's takings rules, marine mammals are "those specimens of the following orders, which are morphologically adapted to the marine environment, and whether alive or dead, and any part thereof, including but not limited to, any raw, dressed or dyed fur or skin: Cetacea (whales, dolphins, and porpoises) and Pinnipedia, other than walrus (seals and sea lions)."

[30] "Fish and Fish Product Import Provisions of the Marine Mammal Protection Act," 81 FR 54390 (August 15, 2016), accessible here: https://www.federalregister.gov/documents/2016/08/15/2016-19158/fish-and-fish-product-import-provisions-of-the-marine-mammal-protection-act; *see also*, 50 CFR Parts 216.3 and 216.24, accessible here: https://www.ecfr.gov/current/title-50/part-216.

States. The Final Rule sets forth the regulatory conditions that foreign fisheries must meet to demonstrate comparability and the procedure for the NMFS to issue the comparability findings.

The foreign fisheries that export to the United States are identified in the NMFS' List of Foreign Fisheries (LOFF).[31] The NMFS issued the first edition of the LOFF in 2020, identifying approximately 2,800 foreign commercial fisheries in 131 countries. Each listed fishery must individually receive a comparability finding to continue exporting fish and fish products to the United States after the import prohibition's entry into force. Fisheries that are not listed in the LOFF but that are seeking to export to the United States would have to apply for a provisional comparability finding, which lasts up to 12 months.

To receive a comparability finding, the fishery regulator must show it has prohibited the killing or serious injury of marine mammals (or has a system that can certify exports to the United States are not the product of intentional killing or serious injury of marine mammals) and that it has implemented a regulatory program governing the incidental taking and serious injury of marine mammals in the course of commercial fishing (bycatch) that is comparable in effectiveness to US bycatch regulations.

The Final Rule specifies several general features that the foreign regulatory programs must have, all of which are also features of the US domestic regulations: (i) stock assessments of marine mammals that are incidentally killed; (ii) registers of fishing vessels; (iii) regulatory requirements that the vessel operators report marine mammal bycatch and implement measures to reduce bycatch; (iv) monitoring procedures for estimating incidental mortality; (v) calculated bycatch limits; (vi) and a method for comparing the incidental mortality to the bycatch limit. Additional requirements apply to fisheries that are outside the harvesting country's territory.

The NMFS' assessments of regulatory equivalence are incomplete and whether foreign fisheries will be able to meet the requirements is uncertain. Recent assessments from academic and environmentalist groups predict that most countries (even countries with relatively robust fisheries management systems like the United Kingdom and Norway) will be unable to meet the standards without making significant regulatory changes.[32]

**The delayed implementation timeline**

The Final Rule included a five-year exemption to the import prohibition, which was originally set to expire on December 31, 2021. According to the NMFS, the implementation delay was necessary to allow exporting countries to modify their domestic regulatory systems to meet the US standards and then process the comparability findings. On November 3, 2020, the NMFS extended the deadline by one year.[33] The NMFS stated that, based on its experience reviewing, issuing, and revoking comparability findings, that it did not have enough time to complete the work under the initial five-year plan.[34] The extension notice stated that the NMFS had received applications for comparability findings from 132 countries for 2,504 fisheries. On October 21, 2022, the NMFS announced another one-year

[31] The List of Foreign Fisheries is accessible here: https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries.

[32] *See, e.g.*, "Ban Bycatch: The United States Must Ban Seafood Imports from Countries Failing To Protect Marine Mammals," November 2023, accessible here: https://www.nrdc.org/sites/default/files/2023-11/ban-bycatch-seafood-imports-protect-marine-mammals-ib.pdf; and "Will unilateral action improve the global conservation status of marine mammals? A first analysis of the U.S. Marine Mammal Protection Act's Import Provisions Rule," January 2022, accessible here: https://doi.org/10.1016/j.marpol.2021.104832.

[33] "Modification of Deadlines Under the Fish and Fish Product Import Provisions of the Marine Mammal Protection Act," 85 FR 69515 (November 3, 2020), accessible here: https://www.federalregister.gov/documents/2020/11/03/2020-24210/modification-of-deadlines-under-the-fish-and-fish-product-import-provisions-of-the-marine-mammal.

[34] Since the Final Rule entered effect, the NMFS has issued a few comparability findings. In several cases (sometimes in response to legal challenges by environmental activists), the NMFS revoked these comparability findings. *See, e.g.*, "Implementation of Fish and Fish Product Import Provisions of the Marine Mammal Protection Act-Notification of Revocation of Comparability Findings and Implementation of Import Restrictions; Certification of Admissibility for Certain Fish Products From Mexico," 85 FR 13626 (March 9, 2020), accessible here: https://www.federalregister.gov/documents/2020/03/09/2020-04692/implementation-of-fish-and-fish-product-import-provisions-of-the-marine-mammal-protection; *see also*, Sea Shepherd New Zealand et al. v. Ross et al., Case No. 1:20-cv-00112-GSK (CIT).

extension of the deadline, citing delays to administrative processes in both the United States and foreign countries caused by the COVID-19 pandemic.[35]

On November 17, 2023, the NMFS announced a third delay to the implementation of the import provisions, extending the exemption through December 31, 2025.[36] According to this latest extension notice, the NMFS still needs more time to evaluate applications for the comparability findings and "ensure that comparability determinations are fairly and consistently applied across harvesting nations and their fisheries." The NMFS also pointed out that, if it cannot extend the deadline to complete the comparability findings process, then "importation of fish and fish products from all fisheries in the 134 countries that have applied for a comparability finding would be banned [...]." Judging by the NMFS' pattern of repeatedly extending the exemption period, further extensions are possible.

On August 8, 2024, the environmentalist groups that originally petitioned the NMFS to create the import prohibition system filed a complaint with the CIT alleging the Department of Commerce is violating the MMPA by not implementing the prohibition.[37] The plaintiffs are seeking a court order that would directing the government to implement the ban. The case could lead to additional changes to the implementation timeline.

### Japanese fisheries

The United States imported $469 million of fishery products from Japan in 2023.[38] The 2020 LOFF lists dozens of Japanese exempt and export fisheries. The economic impact of the import prohibition will depend on the extent to which Japanese fisheries regulators can successfully establish regulatory equivalence for each specific fishery. The process for conducting the comparability findings has been underway for several years, and Japan is likely among the 134 countries that have filed comparability finding applications. Information on the status of the NMFS' reviews is not publicly available.

## House Democrats Introduce Bill for Green Steel Subsidies and Tariffs

On August 9, 2024, Democrats in the House of Representatives introduced H.R.9334, the Steel Modernization Act of 2024 (SMA), which proposes a new system of domestic subsidies and import tariffs to support the US iron and steel industry.[39] The bill contains two policy titles, with the first providing production and investment subsidies to support the iron and steel manufacturing facilities decarbonize and the second raising tariffs on imported iron and steel from countries that have higher GHG emissions than the United States. Revenue from the tariffs would help fund the domestic subsidy programs and supplement foreign aid programs that support decarbonization efforts in developing countries. The bill's supporters argue the measures would rejuvenate the US steel industry, while also shifting the sector to lower greenhouse gas (GHG) emissions technologies.[40]

### Situation in Congress

[35] "Modification of Deadlines Under the Fish and Fish Product Import Provisions of the Marine Mammal Protection Act," 87 FR 63955 (October 21, 2022), accessible here: https://www.federalregister.gov/documents/2022/10/21/2022-22965/modification-of-deadlines-under-the-fish-and-fish-product-import-provisions-of-the-marine-mammal.

[36] "Modification of Deadlines Under the Fish and Fish Product Import Provisions of the Marine Mammal Protection Act," 88 FR 80193 (November 17, 2024), accessible here: https://www.federalregister.gov/documents/2023/11/17/2023-25399/modification-of-deadlines-under-the-fish-and-fish-product-import-provisions-of-the-marine-mammal.

[37] NRDC et al. v. Raimondo et al., Case No. 1:24-cv-00148 (CIT).

[38] Data from US Census Bureau via NOAA.

[39] H.R.9334 - Steel Modernization Act of 2024, 118th Congress (2023-2024), accessible here: https://www.congress.gov/bill/118th-congress/house-bill/9334; an unofficial copy of the bill circulated by the sponsors is accessible here: https://khanna.house.gov/sites/evo-subsites/khanna.house.gov/files/evo-media-document/KHANNA_056_xml%20FINAL%20118th.pdf.

[40] Covered greenhouse gas emissions are carbon dioxide-equivalent (CO2-e) units of greenhouse gases (expressed in metric tons), including carbon dioxide, hydrofluorocarbons, methane, nitrous oxide, perfluorocarbons, and sulfur hexafluoride (based on the Clean Air Act, 42 USC 7545(o)(1)(G)).

Representatives Ro Khanna (D-CA), Summer Lee (D-PA), and 10 other House Democrats introduced the SMA on August 9, 2024. The bill was then referred to the House Committee on Ways and Means and the House Committee on Energy and Commerce for consideration. Though popular among Democrats who are trying to unite a coalition of environmentalists and economic populists ahead of the November elections, the bill has no support among Republicans and will not succeed in the current legislative session.

The bill's approach to blending climate change response with protectionist tariffs and trade distorting subsidies continues a new pattern in Democrat-led economic policy proposals that first emerged with the Inflation Reduction Act (IRA), suggesting this general policy stance will persist past the Biden administration. Domestic steel industry interests, including the American Iron and Steel Institute (AISI), Cleveland-Cliffs, and the United Steel Workers union endorsed the bill upon its introduction. The Sierra Club and several other environmentalist groups have also endorsed the bill. The Sierra Club compared the bill to the IRA, pointing to how the proposal both supports domestic industry and promotes decarbonization.[41] The steel and environmental interest groups backing the bill joined the Representatives for an unveiling event in Pennsylvania, a state that will be important to deciding the outcome of the November elections.

**Domestic subsidy programs**

Similar to the methods used in the IRA to incentivize green energy manufacturing, the SMA would provide investment and production tax credits and competitive grants to incentivize the development of low-GHG emissions iron and steel production facilities. The proposed domestic industry support measures are summarized below:

- **Competitive grant program for installation of advanced iron and steel technologies (Section 101):** The bill would create a competitive grant program for advanced industrial iron and steel projects that reduce GHG emissions, including through adoption of clean hydrogen fuel-powered direct reduced iron furnaces, to be led by the Department of Energy (DOE). The bill appropriates $10 billion for the grants, which can individually be as large as $500 million for qualifying facilities. Qualifying projects would include (i) construction of new low-emissions facilities; (ii) purchase, installation, or implementation of emissions-reducing technologies at existing facilities; (iii) upgrading of existing facilities to use emissions-reducing technologies; (iv) demonstration projects for new emissions-reducing technologies; and (v) engineering studies to prepare for construction or installation of new emissions-reducing technologies.

  Companies seeking the subsidies would file applications with the DOE, adhering to a process designed by the DOE. In reviewing applications, the DOE would consider the economic viability of the project, how the project supports its local community, and how much the project will reduce GHG emissions. Specific factors include the amount of new steel production capacity generated, number of jobs created, amount of GHG emissions abated, whether the project will source construction materials from domestic sources, efforts to employ women and minorities, whether the project employs registered apprentices, whether the project is in a legacy iron- and steel-production community and employs workers from those communities, whether the project can source electricity from green electricity sources, and assurances that the projects will pay construction workers at Davis-Bacon Act prevailing wage levels. Larger projects would be subject to additional criteria, such as requirements to engage in project labor agreements, fund workforce training programs, and provide other benefits to local communities.

- **Pilot program for subsidizing production or purchase of near-zero emission steel (Section 102):** The DOE would establish a pilot program to provide competitive grants that support the production and purchase of near-

[41] "Sierra Club Endorses Modern Steel Act, Led by Rep. Ro Khanna, to Revolutionize US Iron and Steel Industry," July 26, 2024, accessible here: https://www.sierraclub.org/press-releases/2024/07/sierra-club-endorses-modern-steel-act-led-rep-ro-khanna-revolutionize-us.

zero emissions steel. At least one of these pilot projects would involve funding production of steel from a direct reduced iron furnace facility. The bill would provide $500 million to fund these pilot programs.

- **Near-zero emissions intensity iron production credit (Section 103):** The bill would amend the Internal Revenue Code (IRC) to establish a new Section 45BB Near-Zero Emissions Intensity Iron Production Credit. The production tax credit would provide $89 per ton of near-zero emissions intensity iron that is produced by the taxpayer at an eligible facility.
- **Green iron and steel facility energy investment credits (Section 104):** The bill would amend the IRC to establish a new Section 48F On-Site Zero-Emission Energy Investment Credit and a new Section 48G Iron and Steel Green Energy and Grid System Upgrade Investment Credit, which are intended to help iron and steel facilities access low-emissions electricity. The new Section 48F provides an investment credit equal to 10% of the qualified investment in on-site zero emission energy facilities. A facility project qualifying for this tax credit is one that re-equips, expands, or establishes a zero-carbon electricity or heat generating or storage facility on-site at a qualifying iron- or steel-making facility. The new Section 48G provides an investment credit equal to 10% of the qualified investment in power grid upgrades that provide access to grid-based green energy sources for qualifying iron- or steel-making facilities.
- **Study opportunities for generating new demand for US steel and iron (Section 105):** The bill would direct the DOE to study options for how the government can help stimulate demand for low GHG emissions steel. The bill references shipbuilding, railroad, and offshore wind facilities as options for finding new demand sources but does not go into specifics.
- **Study on delivering zero-emission electricity through power grids (Section 106):** The bill would direct the DOE to produce a report to Congress that would propose a whole of government strategy to increase the supply of zero-emission electricity and improve power grid transmission so the steel industry can access zero-emissions electricity. The DOE would also examine how the United States can domestically produce the equipment needed for the power grid upgrades.

Funding distributed under the bill's grant programs and new tax credits would be prohibited from supporting facilities outside the United States. Entities in the United States that are partly or wholly owned by the government of China or by a foreign entity of concern (FEOC) would also be prohibited from accessing funding. The FEOC prohibition adopts the definition established in section 40207(a)(5) of the Infrastructure Investment and Jobs Act (IIJA), which is the same definition used by the DOE for existing critical mineral mining grants and the IRA's Section 30D new clean vehicle tax credit.[42]

**Import tariffs**

The second key provision of the SMA is a title directing the president to develop and impose tariffs on iron and steel and iron- and steel-derivative products imported from other countries. The size of the tariff would vary based on the level of GHG emissions in the country in which the imported iron and steel was originally melted and poured. Though the tariff is tied to relative GHG emissions levels, the bill does not include an equivalent domestic emissions pricing system.

**ITC tariff study**

[42] "Interpretation of Foreign Entity of Concern," 89 FR 37079 (May 6, 2024), accessible here: https://www.federalregister.gov/documents/2024/05/06/2024-08913/interpretation-of-foreign-entity-of-concern.

To design the tariff, the bill would direct the US International Trade Commission (ITC) to study the GHG emissions of the iron and steel industries in the United States and in US trading partners.[43] The ITC would prepare the two reports (one for domestic industry emissions and one for foreign industry emissions) every two years, with the first due by June 30, 2026. The domestic industry study would calculate (i) the average GHG emissions intensity of US iron and steel production, (ii) average GHG emissions intensity of manufacturing the specific covered iron and steel products and covered finished goods products, and (iii) estimates of the 90$^{th}$ percentiles of emissions intensity for all product categories. The foreign industry study would examine emissions intensity in countries that exported more than $200 million of iron and steel products (including finished products) to the United States in any one of the preceding five years.

The bill provides two methods by which the ITC could assess foreign emissions:

- First, if the ITC determines that reliable industry specific data is unavailable for a country or if that country is designated as a non-market economy,[44] then the ITC will use an estimate of the overall emissions intensity of the exporting country's economy as a proxy measure for the industry. The bill does not specify how the ITC should calculate national emissions intensity, making the exact outcome of this approach up to accounting choices made by the ITC. The bill simply states the calculation should be the GHG emissions of the country divided by its gross domestic product (GDP). One dataset from Climate Watch[45] estimates the emissions intensity per million US dollars of GDP in 2021 at 238.68 metric tons of CO2-e for the United States and 212.8 metric tons for Japan.
- Second, if the ITC determines that transparent, verifiable, and reliable information is available for a country's steel and iron industry and that the country is a market economy, then ITC could use emissions intensity data specific to the iron and steel industry or particular covered products instead. An individual company that imports covered products into the United States may also petition the ITC to calculate a unique emissions level for its production. Iron and steel product-specific emissions data would include both the emissions from the manufacturing of the product and greenhouse gas emissions associated with production of iron and steel inputs used in that product.

The ITC reports would also include recommendations to the president for tariffs that could be imposed on each assessed country "in order to compensate for any greater emissions intensity of production in such a market." The bill does not explain how the tariff should be set, other than that it is based on the difference between the US industry's emissions and the foreign industry's emissions. As the bill does not include a domestic GHG emissions tax, it is unclear what the tariff is intended to compensate for. Typical emissions pricing systems (like the EU's Carbon Border Adjustment Mechanism (CBAM) and Emissions Trading System (ETS)) include both a domestic emissions fee and a border adjustment fee.

**Imposing the tariff**

The bill directs the president to impose tariffs on the covered iron and steel products 90 days after the date the ITC publishes its first study. The bill states the tariffs would be based on the recommendations made by the ITC, but also allows the president to make additional modifications to the tariff levels. The tariffs would be based on the emissions of the country in which the steel or iron input was melted and poured, rather than the country of origin for the final

[43] Another bill under consideration, the PROVE IT Act of 2024, would instruct the ITC to carry out a similar study, but does not implement tariffs. See, S.1863 - PROVE IT Act of 2024 118th Congress (2023-2024), accessible here: https://www.congress.gov/bill/118th-congress/senate-bill/1863.

[44] The Department of Commerce currently lists Armenia, Azerbaijan, Belarus, China, Georgia, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan, and Vietnam as non-market economies.

[45] A range of estimation methods can be viewed on the World Resources Institute website at "4 Charts Explain Greenhouse Gas Emissions by Countries and Sectors," accessible here: https://www.wri.org/insights/4-charts-explain-greenhouse-gas-emissions-countries-and-sectors. This alert uses Climate Watch's estimates of total emissions (including land use changes) for all GHGs emitted per million US dollars of GDP.

product. For non-market economies, the bill also requires that the president double the final calculated tariff rate. The tariff would not apply to imports from least developed countries, so long as the country produces less than 3% of global exports of the product. Products meeting the definition of covered product but for which there is no US like product would be exempt from the tariff.

If the ITC delivers the first study on June 30, 2026, then the iron and steel tariffs would enter effect on September 28, 2026. Tariffs on covered finished goods would enter effect a few months later, on January 1, 2027. The finished goods tariff would be "an amount equal to the sum of the rates determined in accordance with paragraph (1) [the tariffs on iron and steel products] with respect to each covered iron or steel product that is a component part of such finished good."

The bill would allow the president to reciprocally waive the tariffs for countries that impose similar emissions-based tariffs on iron and steel, which the bill calls a "carbon club waiver." To qualify, countries would have to demonstrate that the emissions level of their iron and steel industries are no more than 50% higher than the US emissions level. The carbon club proposal is similar to what the United States Trade Representative (USTR) has sought in the Global Arrangement on Sustainable Steel and Aluminum (GASSA) negotiations with the European Union. Though this provision would waive the emissions-based tariff, the bill does not provide any compensation for the potential trade distortions caused by the bill's production and investment subsidies.

**Products covered by the tariff**

Covered iron and steel products would include those classified under the following Harmonized Tariff Schedule of the United States (HTSUS) headings:

- 7206.10 through 7216.50,
- 7216.99 through 7301.10,
- 7302.10,
- 7302.40 through 7302.90, and
- 7304.10 through 7306.90.

The president may add other products to the coverage list by assessing the product's relative GHG emissions in an update to the ITC studies.

Covered finished goods are goods that contain certain amounts of covered iron and steel products, with weight and percentage of value thresholds increasing over time according to the schedule below:

- For 2027-2028: Goods that contain more than 500 lbs. of covered iron or steel products or for which 90% of the material input value is covered iron or steel products.
- For 2029-2030: Goods that contain more than 100 lbs. of covered iron or steel products or for which 75% of the material input value is covered iron or steel products.
- For years after 2030, the executive branch would determine new thresholds, which must be lower than 100 lbs. of weight and 75% of material input value.

Waste and scrap products would be excluded from the finished goods designation.

**Tariff revenue and foreign development assistance**

Along with the money that is directly appropriated by the bill for the subsidy programs, implementation of the bill would be funded by revenue from the tariff. The bill would provide 75% of the revenue from the tariff to the DOE to finance its work carrying out the programs under the SMA.

The other 25% of the tariff revenue would fund bilateral and multilateral economic assistance programs that support decarbonization work and other climate and clean energy goals. The funding would be provided through the Department of State's Economic Support Fund (ESF), an assistance program that helps countries of strategic importance to the United States address political, economic, development, and security needs.

The amount raised by the tariff will depend heavily on the tariff rates selected, specific products the tariff is applied to, and how other countries respond. In theory, the tariff could raise several billion dollars in revenue per year. For comparison, the current 25% Section 232 tariff on steel products assessed a total of US$11.6 in tariffs between March 2018 and June 2024, an average of $2.2 billion per year.[46]

**Ongoing discussions of emissions based tariffs**

The SMA is the latest is a series of proposals that have come from both Democrats and Republicans for new global tariffs based on GHG emissions. Though a tariff is still far from becoming law, the proposals show the potential policy directions and key themes of the US debate. These proposals are all notable for their discriminatory implications for non-US producers and support for creating common tariff clubs. Unlike emissions pricing systems in other economies like the EU, the US proposals do not match the border fee to a comparable domestic emissions charge. Several of the US proposals also include measures that would use economic development assistance programs to finance decarbonization efforts in developing countries, an idea that has recently gained traction in Washington.[47]

The Biden administration is negotiating GASSA as part of a permanent settlement to the US Section 232 tariffs on steel and aluminum imports. Under the US proposal, GASSA would be a global club of countries that apply a common GHG emissions-weighted tariff on imports of steel and aluminum from countries outside the club. Initial deadlines for the deal passed with little progress. The EU and United States have extended the current tariff truce until after the 2024 US elections to create more space for negotiations. It is unclear when, or if, the parties will reach a successful settlement. The United States has stated that it will only abolish its tariffs on EU steel and aluminum imports if the EU commits to imposing similar tariffs on China through the new club. The EU, on the other hand, has emphasized its obligations to international trade rules and preference for maintaining its current emissions pricing system.

Two proposals for GHG emissions tariff legislation were introduced to Congress in late 2023. First, Senator Bill Cassidy (R-LA) introduced an emissions-based tariff bill to the Senate on November 2, 2023.[48] The "Foreign Pollution Fee Act of 2023" would direct the United States to impose an import tariff that scales with the GHG emissions intensity of a covered product's manufacturing processes. Like GASSA and the SMA, other countries could avoid the tariff by adopting a common emissions-based tariff with the United States. The bill excludes several non-market economies, most notably China and Russia, from joining the tariff club (the SMA's tariff club, in contrast, appears to be open to all countries). Sen. Cassidy described the bill as "Republican climate policy," claiming it would compel other countries to adopt tougher GHG emissions regulations without creating any new costs for US business while

[46] CBP Trade Statistics, https://www.cbp.gov/newsroom/stats/trade.

[47] See, for example, Brian Deese's "The Case for a Clean Energy Marshall Plan" in the September/October 2024 edition of *Foreign Affairs* magazine, accessible here: https://www.foreignaffairs.com/united-states/case-clean-energy-marshall-plan-deese. Brian Deese was Director of the White House National Economic Council from 2021 to 2023 and is now advising the Harris presidential campaign.

[48] S. 3198 - Foreign Pollution Fee Act of 2023, 118th Congress, accessible here: https://www.congress.gov/bill/118th-congress/senate-bill/3198.

also protecting US manufacturing from foreign competition. The bill would not establish a domestic carbon price or an SMA-style subsidy program.

Democrats in Congress introduced the Clean Competition Act on December 6, 2023.[49] The bill would establish a partial domestic GHG emissions tax paired with a broader border tax. Rather than applying a GHG tax to all emissions, this bill's approach would establish a performance standard for GHG emissions intensity for each covered industry, then tax producers and importers that exceed the standard. Covered sectors include fossil fuels, refined petroleum products, petrochemicals, fertilizer, hydrogen, adipic acid, cement, iron, steel, aluminum, glass, pulp, paper, and ethanol. The border adjustment would also apply the tax to downstream products that contain inputs from the covered sectors. The methods by which the bill proposes to apply the emissions tax would impact importers more than domestic producers and would also create additional challenges for exporters from non-market economies. Like the SMA, the bill would spend the proceeds of the emissions tax to subsidize decarbonization programs for both US industry and for industry in developing countries.

[49] S.3422 - Clean Competition Act, 118th Congress (2023-2024), accessible here: https://www.congress.gov/bill/118th-congress/senate-bill/3422.

# Trade Actions

## Biden Administration Raises Solar Cell Tariff-Rate Quota Limit

On August 12, 2024, President Biden ordered an increase to the safeguard tariff-rate quota (TRQ) limit on crystalline silicon photovoltaic (CSPV) cell imports from 5.0 gigawatts (GW) per year to 12.5 GW per year. The new limit entered effect retroactively for imports that have entered the United States on or after August 1, 2024. CSPV cells imported in early August above the 5.0 GW limit (but under the new 12.5 GW limit) will no longer be subject to the safeguard measure.

The increased TRQ limit is the latest in a series of recent actions by the Biden administration to support the US solar industry. The White House previewed the actions in a May 16, 2024 announcement, which stated the administration was considering modifications to the solar safeguard, had updated the Inflation Reduction Act's (IRA) domestic content bonus tax credits guidance to better support the industry, were expanding trade enforcement actions against solar imports, and were considering other unspecified policy actions.[50]

### Background on the safeguard action

Following an investigation by the US International Trade Commission (ITC), President Trump approved safeguard measures in January 2018 to protect the domestic solar industry under Section 201 of the Trade Act of 1974. Under this action, the United States imposed tariffs of 30% on imports of CSPV cells exceeding a 2.5 GW annual TRQ, and on all CSPV panels and modules (with certain exceptions). On February 4, 2022, President Biden issued Proclamation 10339, extending the safeguard measure for four years (the maximum period allowed by law) and doubling the volume of the TRQ limit on imported CSPV cells to 5.0 GW. The tariffs are gradually phasing out and will expire on February 6, 2026. The tariff rate is currently 14.25% through February 6, 2025 and will then be 14% from February 7, 2025 through February 6, 2026.

### Raising the tariff-rate quota

The safeguard TRQ on CSPV cells, not partially or fully assembled into other products, provided for in HTS subheading 8541.42.00, had allowed 5.0 GW of cells to be imported every year before importers would begin paying the safeguard tariff. The Biden administration stated in the May announcement that it was considering raising the quota to 7.5 GW if importers reached the 5.0 GW limit in 2024, though the announcement did not make a firm commitment.

The Biden administration followed through on the proposal in an August 12, 2024 Presidential Proclamation, in which President Biden directed the government to increase the annual TRQ limit from 5.0 GW to 12.5 GW.[51] CSPV cell imports reached the 5.0 GW limit in the week between August 5 and August 12, with any above-limit imports becoming subject to the tariff. The increased TRQ level is backdated to August 1 and the Presidential Proclamation states that imports which entered above the 5.0 GW limit on or after August 1 will be treated as being within the new 12.5 GW limit and will not have to pay the tariff.

[50] "Fact Sheet: Biden-Harris Administration Takes Action to Strengthen American Solar Manufacturing and Protect Manufacturers and Workers from China's Unfair Trade Practices," May 16, 2024, accessible here: https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/16/fact-sheet-biden-harris-administration-takes-action-to-strengthen-american-solar-manufacturing-and-protect-manufacturers-and-workers-from-chinas-unfair-trade-practices/.

[51] Proclamation 10790 of August 12, 2024: To Further Facilitate Positive Adjustment to Competition From Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products), 89 FR 66181, accessible here: https://www.federalregister.gov/d/2024-18444.

US Customs and Border Protection (CBP) issued guidance to importers shortly after the President Biden issued the proclamation,[52] explaining that the expanded quota does not modify the current procedure for entering goods under the TRQ and that filers should continue using the same HTS codes. For accounting purposes, the additional 7.5 GW in the quota limit will appear in a separate row in the Commodity Status Report through February 6, 2025.

The US solar industry petitioned for an increase in the TRQ limit (or an outright elimination of the safeguard on CSPV cells) in September 2023. The petition argued that domestic CSPV module production had outgrown domestic CSPV cell production, forcing manufacturers to rely on imported cells that are subject to the TRQ. The Solar Energy Industries Association praised the Biden administration's announced increase to the TRQ limit on August 13, saying it provided "an important bridge for module producers to access the supply they need while the United States continues to progress on solar cell manufacturing."[53]

**Ending the bifacial panels exception**

The Section 201 safeguard tariffs on assembled CSPV modules and panels had previously excluded bifacial solar panels. The Trump administration originally issued the bifacial panel exception in June 2019, along with exceptions for several other products. In its May 2024 statement, the Biden administration announced that "it plans to imminently remove this exclusion." The statement argued that "imports of bifacial panels have surged, now making up nearly all U.S. solar panel imports and undercutting the effectiveness of the Section 201 safeguard."

The Biden administration issued a proclamation to implement the proposed change on June 21, 2024, removing bifacial solar panels from the safeguard action's exclusions list.[54] The change entered effect on June 26, 2024, five days after the proclamation. The proclamation also waived the tariffs for imports of certain bifacial panels that entered the United States within 90 days of the May 17 announcement. Ending the exception applies a tariff of 14.25% to imports of bifacial panels through February 6, 2025 and then a tariff of 14% from February 7, 2025 through February 6, 2026.

**Other potential actions**

The Biden administration noted in the May 16 statement that US solar imports from Southeast Asia have expanded significantly in recent years and that Chinese manufacturers are expanding production in the region. In response, the announcement warns that the administration is monitoring imports from Southeast Asia and will "ensure the U.S. market does not become oversaturated and will explore all available measures to take action against unfair practices."

What actions the Biden administration may be considering (beyond the ongoing antidumping and countervailing duty investigations and the China circumvention duties targeting imports from Southeast Asia) are unclear from the announcements. One suggestion from representatives of the US domestic industry is for the US government to implement an import monitoring system for solar panels similar to the steel and aluminium import monitoring systems that are in use today.

[52] CSMS # 61775059 - INFORMATION: Expanded Tariff Rate Quota limit for Crystalline Silicon Photovoltaic (CSPV) Solar Cells: QB 24-507 2024 Solar Cells and Modules Amended August 13, 2024, accessible here: https://content.govdelivery.com/bulletins/gd/USDHSCBP-3ae9cd3.

[53] "SEIA Statement on President Biden Action to Support U.S. Manufacturers by Raising Section 201 Tariff Rate Quote on Imported Solar Cells," SEIA, August 13, 2024, accessible here: https://www.seia.org/news/seia-statement-president-biden-action-support-us-manufacturers-raising-section-201-tariff-rate.

[54] Proclamation 10779 of 21 June 2024: "To Further Facilitate Positive Adjustment to Competition From Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products)," 89 FR 53333 (June 26, 2024), accessible here: https://www.federalregister.gov/documents/2024/06/26/2024-14143/to-further-facilitate-positive-adjustment-to-competition-from-imports-of-certain-crystalline-silicon.

## Department of Commerce Maintains Vietnam's Non-Market Economy Status

On August 2, 2024, the Department of Commerce (Commerce) confirmed that Vietnam remains a non-market economy (NME) for US antidumping laws.[55] This decision is seen as a victory for many US industries and workers, as it allows Commerce to address economic distortions in Vietnam when calculating dumping margins. The NME determination is final and cannot be appealed in US courts, meaning Vietnam will retain its NME status unless it proves its economy operates on market-based principles.

The decision follows a request from the Government of Vietnam (GOV) on September 8, 2023, to reconsider its NME status, which was first designated in 2002. Commerce based its decision on six statutory criteria, finding significant government intervention in currency convertibility, labor rights, foreign investment, state ownership, resource control, and corruption. Accordingly, these factors collectively support Vietnam's continued NME status due to extensive government involvement distorting prices and costs.

The GOV's request faced strong opposition from various US industries, including steel, aluminum, catfish, solar, and others. Over 36,000 pages of comments highlighted the GOV's control over the economy and the potential negative impact on US manufacturing if Vietnam were treated as a market economy. Had Commerce reclassified Vietnam as a market economy, Chinese companies would likely have been more incentivized to expand their operations in Vietnam to gain greater access to the US market.

This decision represents a significant victory for US industries, particularly given the significant growth in imports from Vietnam, which rose from $24.4 billion in 2013 to $112.4 billion in 2023.

[55] Department of Commerce, International Trade Administration, "Department of Commerce Final Decision in Review of the Non-Market Economy Status of Vietnam," August 2, 2024, accessible here: https://www.trade.gov/press-release/department-commerce-final-decision-review-non-market-economy-status-vietnam.

# Trade Agreements

## United States and Kenya Continue Trade Negotiations; Publish Proposed Inclusivity Chapter Summary

Negotiations on the US-Kenya Strategic Trade and Investment Partnership (STIP) continued in August 2024. On August 27, 2024, the United States Trade Representative (USTR) published a partial summary of its new proposed chapter on inclusivity, after completing the seventh negotiating round earlier in the month.[56] The new inclusivity chapter – the first the United States has ever proposed – commits the parties to intensifying engagement with underrepresented communities and proposes voluntary best practices for business conduct. The parties discussed the new chapter at the latest negotiating round earlier in August 2024, along with several other chapters.

### Inclusivity chapter

According to USTR, the new inclusivity chapter would "ensure that the benefits of the Partnership are broadly shared and to promote economic growth and sustainable development in both countries." USTR described the chapter as advancing a shared goal of supporting "economic empowerment and participation of all segments of society, including women and other gender marginalized groups, youth, persons with disabilities, the African Diaspora, Indigenous Peoples, local communities, rural and remote communities, and other traditionally underserved communities." The summary mentions two broad policy measures, summarized below.

First, the chapter would commit the parties to developing cooperative activities that could address barriers to international trade and investment that underserved communities face. The summary notes the activities could include engagements that would help the governments better understand the challenges faced by marginalized communities and sharing information between the governments. The summary does not mention any specific policy actions or market access reforms.

Second, USTR is proposing a responsible business conduct pledge, which seeks to encourage US and Kenyan companies to "adopt and implement voluntary best practices of responsible conduct." The measure "aims to improve cooperation to promote objectives related to responsible business practices and inclusivity." The summary references "internationally recognized standards and guidelines," but does not specify any standards in particular. USTR notes the chapter would include exceptions so the standards would not burden small businesses, on top of the code of conduct being voluntary.

USTR will likely circulate more information on other policies that it wants to include in the chapter, describing the August 27 summary as a "first tranche."

The proposal is the first time the United States has proposed a trade agreement chapter focused specifically on inclusivity. That said, past agreements have included chapters on topics like worker rights, small business promotion, environmental protection, and anticorruption, all of which are relevant to questions of inclusivity. For responsible business conduct, the environment chapter of the United States – Mexico – Canada Agreement (USMCA) states in Article 24.13 that the parties "recognize the importance of promoting corporate social responsibility and responsible business conduct" and "shall encourage enterprises organized or constituted under its laws, or operating in its territory, to adopt and implement voluntary best practices of corporate social responsibility that are related to the environment, such as those in internationally recognized standards and guidelines that have been endorsed or are supported by that Party, to strengthen coherence between economic and environmental objectives."

[56] "USTR Releases Summaries from U.S. – Kenya Strategic Trade and Investment Partnership Negotiations," USTR, August 27, 2024, accessible here: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/august/ustr-releases-summaries-us-kenya-strategic-trade-and-investment-partnership-negotiations.

**Latest negotiating round**

US and Kenyan negotiators met for the seventh STIP negotiating round from August 6-9 in Nairobi.[57] Assistant USTR Constance Hamilton and Principal Secretary for Trade Alfred K'Ombudo led the US and Kenyan delegations, respectively. USTR's readout characterized the round as productive but offered little detail.

According the USTR, this latest round discussed the proposed texts for agriculture; customs, trade facilitation, and enforcement; environment; good regulatory practices; workers' rights and protections; as well as the new inclusivity chapter. The delegations also held a stakeholder listening session alongside the negotiations, which has become a frequent practice in recent negotiating rounds.

**Previous chapter proposals and negotiating rounds**

Unlike the Trade Pillar of the Indo-Pacific Economic Framework for Prosperity (IPEF), the US-Kenya negotiations are continuing uninterrupted as US elections approach. US and Kenyan negotiators have been meeting almost every month in 2024, with negotiating round locations alternating between Washington and Nairobi. Negotiators still appear to be targeting the end of 2024 for completion of the agreement. Kenyan Investments, Trade, and Industry Cabinet Secretary Salim Mvurya said after the August meeting that the two countries are planning another negotiating round for September, and suggested the meeting will focus on issues that have been tougher to resolve.

Since 2023, USTR has been publicly circulating summaries of the chapters it has proposed for the STIP, IPEF, and the US-Taiwan Initiative on 21st Century Trade. USTR describes the publications as part of the Biden administration's "commitment to the highest levels of transparency in trade agreement negotiations." Previous STIP proposal publications have covered the customs, trade facilitation, and enforcement; environment; agriculture; good regulatory practices; workers' rights and protections; anticorruption; micro-, small-, and medium-sized enterprises (MSMEs); and services domestic regulation chapters.

Like other agreements the Biden administration has pursued, the STIP is not a comprehensive trade agreement. USTR's proposals focus on promoting improved regulatory practices and government-to-government collaboration instead of market access commitments. The STIP would also not be ratified by Congress, which may create challenges for sustaining the partnership under future US presidents.

## CPTPP

### United Kingdom's Accession to CPTPP Set to Enter into Force by December 15, 2024

Peru's President Dina Boluarte issued a Presidential Decree on August 20, 2024 (published in the Official Gazette *El Peruano* on August 21, 2024), ratifying the UK's accession protocol to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

The UK's Protocol of Accession to the CPTPP states that entry into force would take place 60 days after all existing members have given notice that they have completed their domestic ratification procedures. However, if that process has not been completed within 15 months (*i.e.*, by mid-October 2024) then the Protocol would come into force 60 days after the UK and at least six CPTPP members have completed the ratification process. This condition has now been met with the conclusion by Peru of its ratification procedures. Peru notified New Zealand, the Treaty Depository, that it has completed its internal legal procedures.[58]

[57] "Readout of August 5-9 Negotiating Round Under the U.S.-Kenya Strategic Trade and Investment Partnership," USTR. August 9, 2024, accessible here: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/august/readout-august-5-9-negotiating-round-under-us-kenya-strategic-trade-and-investment-partnership.

[58] See New Zealand's Ministry of Foreign Affairs and Trade website, " Membership (States Eligible to become Party) here: https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/comprehensive-and-progressive-agreement-for-tpp.

The five other CPTPP members that have concluded their ratification procedures are Japan, Singapore, Chile, New Zealand, and Vietnam. The UK's CPTPP accession will therefore enter into force for these members by December 15, and subsequently with five more members once they ratify, namely Australia, Brunei, Canada, Malaysia, and Mexico. The timing of ratification by Canada appears to be the most uncertain because of the breakdown earlier this year in Canada's negotiations of a post-Brexit "rollover" free trade agreement (FTA) with the UK.

With the UK as a member, the CPTPP will have a combined GDP of US $15.7 trillion, representing 15% of the global GDP. For the time being, the benefits to the UK of CPTPP accession are likely to be mostly strategic since the UK already has in place bilateral trade agreements with nine of the eleven CPTPP members. The UK government has estimated that the benefits of accession will amount to an increase in its GDP of only 0.08%. However, accession is expected to strengthen the UK's economic ties with Asia in particular, and the UK is eager to play a formative role in shaping the CPTPP's future. This will include having a role in deciding on future new accessions to the CPTPP, most particularly that of China.

Peru's Presidential Decree ratifying the UK's CPTPP accession protocol (in Spanish) is attached below.

Peru's UK CPTPP Protocol_Official Gaze

# Petitions & Investigations

## Regulations

### Commerce Department Proposes Technical Changes to Trade Remedy Regulations

On July 12, 2024, the US Department of Commerce issued a *Federal Register* notice proposing updates to antidumping duty (ADD) and countervailing duty (CVD) regulations.[59] The 28 specific changes proposed in the notice seek to enhance the administration of the regulations by clarifying and/or codifying existing procedures and introducing new regulatory provisions.

#### Key proposed updates

- **Cash deposit rates for specific producer/exporter combinations** (Proposed Regulation Modification 3): Commerce proposes an exception to the normal cash deposit rate calculation methodology to enable Commerce to apply a cash deposit rate only to imported merchandise both produced by an identified producer and exported by an identified exporter in a producer/exporter combination rather than all the subject merchandise exported or produced by an examined entity.
- **Clarifying non-market economy determinations** (Proposed Regulation Modification 4): Commerce proposes new criteria for determining *de jure* or *de facto* nonmarket economy government control, and to clarify the treatment of entities located in a non-market economy but owned by a market economy foreign entity.
- **Changes to Commerce's Specificity Requirement for Countervailable Programs** (Proposed Regulation Modification 18): Commerce proposes eliminating and altering multiple existing exceptions to its requirement that programs be specific in order to be found countervailable.
- **Changing the treatment of loans in countervailing duty proceedings** (Proposed Regulation Modification 20): Commerce's proposed revisions standardize the benefit calculation for long-term loans, remove the cap on loan benefits, and set a lower standard for specificity allegations relating to loans provided by government-owned policy banks.
- **Providing guidance for subsidies resulting from the government's purchase of goods for more than adequate remuneration** (Proposed Regulation Modification 23): Commerce proposes regulations providing guidance on subsidies resulting from the purchase of a good for more than adequate remuneration (MTAR), including how to measure adequate remuneration in this context, how to calculate the benefit, and how to calculate a benefit when the government is both a provider and purchaser of the good.

#### Request for comments

The proposed regulations are open to public comment until September 10, 2024. Interested stakeholders can submit comments via the federal rulemaking docket on regulations.gov. More information on the comment process can be found in the Federal Register notice. Regulators must address public comments in any final rule, so participating in the public comment process can help shape the final outcome.

[59] "Regulations Enhancing the Administration of the Antidumping and Countervailing Duty Trade Remedy Laws," 89 FR 57286 (July 12, 2024), accessible here: https://www.federalregister.gov/documents/2024/07/12/2024-15086/regulations-enhancing-the-administration-of-the-antidumping-and-countervailing-duty-trade-remedy.

## Investigations

### Commerce and ITC Initiate Five-Year Sunset Review of ADD Order on Certain Welded Large Diameter Line Pipe from Japan

On September 3, 2024, the US Department of Commerce (Commerce) and the US International Trade Commission (ITC) published initiation notices for the fourth five-year (sunset) review of the ADD order on certain welded large diameter line pipe from Japan.[60] The ITC review will seek to determine whether revocation of the ADD order would likely lead to continuation or recurrence of material injury. Commerce review will examine whether revocation of the ADD order would likely lead to the continuation or recurrence of dumping.

Commerce originally instituted the ADD order on certain welded large diameter line pipe from Japan in December 2021. The order has been renewed in three five-year reviews since then.

**Covered product**

The product covered by this order is certain welded carbon and alloy line pipe, of circular cross section and with an outside diameter greater than 16 inches, but less than 64 inches, in diameter, whether or not stenciled. This product is normally produced according to American Petroleum Institute (API) specifications, including Grades A25, A, B, and X grades ranging from X42 to X80, but can also be produced to other specifications. The product is classified under Harmonized Tariff Schedule of the United States (HTSUS) codes 7305.11.1030, 7305.11.1060, 7305.11.5000, 7305.12.1030, 7305.12.1060, 7305.12.5000, 7305.19.1030, 7305.19.1060, and 7305.19.5000. HTSUS codes are provided for convenience and customs purposes and the written description of the scope is dispositive.

Not included within the scope of this investigation is American Water Works Association (AWWA) specification water and sewage pipe and the following size/grade combinations of line pipe:

- Having an outside diameter greater than or equal to 18 inches and less than or equal to 22 inches, with a wall thickness measuring 0.750 inch or greater, regardless of grade;
- Having an outside diameter greater than or equal to 24 inches and less than 30 inches, with wall thickness measuring greater than 0.875 inches in grades A, B, and X42, with wall thickness measuring greater than 0.750 inches in grades X52 through X56, and with wall thickness measuring greater than 0.688 inches in grades X60 or greater;
- Having an outside diameter greater than or equal to 30 inches and less than 36 inches, with wall thickness measuring greater than 1.250 inches in grades A, B, and X42, with wall thickness measuring greater than 1.000 inches in grades X52 through X56, and with wall thickness measuring greater than 0.875 inches in grades X60 or greater;
- Having an outside diameter greater than or equal to 36 inches and less than 42 inches, with wall thickness measuring greater than 1.375 inches in grades A, B, and X42, with wall thickness measuring greater than 1.250 inches in grades X52 through X56, and with wall thickness measuring greater than 1.125 inches in grades X60 or greater;
- Having an outside diameter greater than or equal to 42 inches and less than 64 inches, with a wall thickness measuring greater than 1.500 inches in grades A, B, and X42, with wall thickness measuring greater than 1.375

[60] "Certain Welded Large Diameter Line Pipe From Japan; Institution of a Five-Year Review," 89 FR 71417 (September 3, 2024), accessible here: https://www.federalregister.gov/documents/2024/09/03/2024-19665/certain-welded-large-diameter-line-pipe-from-japan-institution-of-a-five-year-review; and "Initiation of Five-Year (Sunset) Reviews," 89 FR 71252 (September 3, 2024), accessible here: https://www.federalregister.gov/documents/2024/09/03/2024-19716/initiation-of-five-year-sunset-reviews.

inches in grades X52 through X56, and with wall thickness measuring greater than 1.250 inches in grades X60 or greater;

- Having an outside diameter equal to 48 inches, with a wall thickness measuring 1.0 inch or greater, in grades X-80 or greater;
- In API grades XI00 or above, having an outside diameter of 48 inches to and including 52 inches, and with a wall thickness of 0.54 inch or more; and
- An API grade X-80 having an outside diameter of 21 inches and wall thickness of 0.625 inch or more.

## Commerce and ITC Initiate Five-Year Sunset Review of ADD Order on Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan

On September 3, 2024, Commerce and the ITC published initiation notices for the second five-year (sunset) review of the ADD order on diffusion-annealed, nickel-plated flat-rolled steel products from Japan.[61] The ITC review will seek to determine whether revocation of the ADD order would likely lead to continuation or recurrence of material injury. Commerce review will examine whether revocation of the ADD order would likely lead to the continuation or recurrence of dumping.

Commerce originally instituted the ADD order on certain welded large diameter line pipe from Japan in May 2024. The order was renewed in the first five-year review in 2019.

### Covered product

The products covered by this order are flat-rolled, cold-reduced steel products, regardless of chemistry; whether or not in coils; either plated or coated with nickel or nickel-based alloys and subsequently annealed (*i.e.*, "diffusion-annealed"); whether or not painted, varnished or coated with plastics or other metallic or non-metallic substances; and less than or equal to 2.0 mm in nominal thickness. For purposes of this order, "nickel-based alloys" include all nickel alloys with other metals in which nickel accounts for at least 80% of the alloy by volume.

Imports of merchandise included in the scope of this order are classified primarily under HTSUS codes 7212.50.0000 and 7210.90.6000, but may also be classified under HTSUS codes 7210.70.6090, 7212.40.1000, 7212.40.5000, 7219.90.0020, 7219.90.0025, 7219.90.0060, 7219.90.0080, 7220.90.0010, 7220.90.0015, 7225.99.0090, or 7226.99.0180. HTSUS codes are provided for convenience and customs purposes and the written description of the scope is dispositive.

[61] "Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products From Japan; Institution of a Five-Year Review," 89 FR 71424 (September 3, 2024), accessible here: https://www.federalregister.gov/documents/2024/09/03/2024-19640/diffusion-annealed-nickel-plated-flat-rolled-steel-products-from-japan-institution-of-a-five-year; and "Initiation of Five-Year (Sunset) Reviews," 89 FR 71252 (September 3, 2024), accessible here: https://www.federalregister.gov/documents/2024/09/03/2024-19716/initiation-of-five-year-sunset-reviews.