



**Arent Fox**

International Trade & Investment

# **Arent Fox's Advance Look at Hot Button Trade Issues for 2021**

What Happens Next in Six  
Critical Areas

**Smart In  
Your World**

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# Insight From Our Trade Partners

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**Matthew Nolan**  
Partner

“We hope these ‘quick hit’ articles provide a comprehensive look at the key trade issues for 2021. While it is difficult to predict the first priority when President-elect Biden takes office, Buy America initiatives may be a top focus for the new Administration.”



**David R. Hamill**

Partner

“What is clear is that it would be unwise to operate under the assumption that the trade challenges that have materialized during the last four years will go away simply because we will have a new president in the Oval Office. Every company is unique and business leaders should prioritize these issues as part of their strategic planning and risk management objectives for 2021.”



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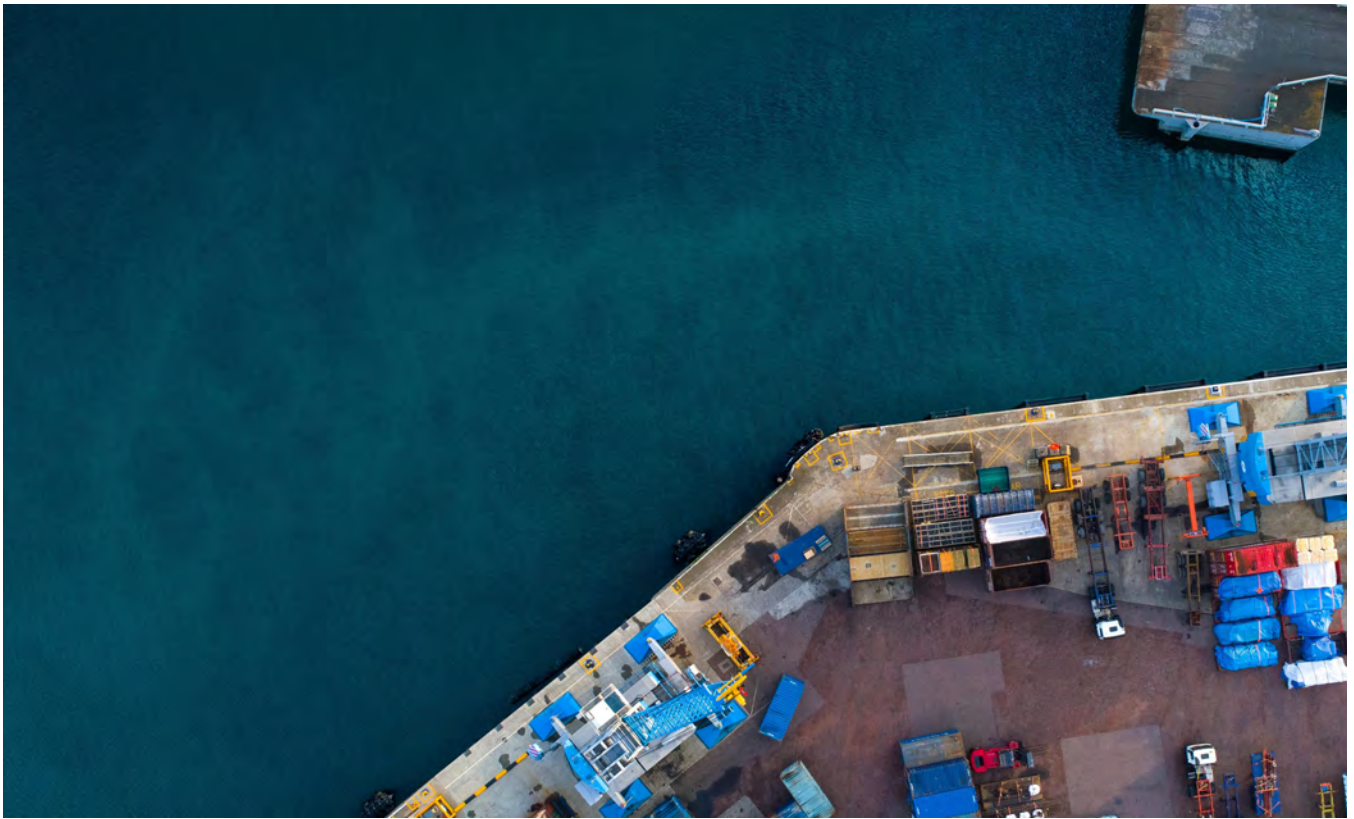
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# Smart In Your World

## **Practical Counsel. Unique Insight.**

The world is shrinking. Borders are blurring. But opportunities are growing. Foreign investment is no longer exotic - just more complicated. We make the connections.



**David R. Hamill**  
*Partner, DC*  
 202.857.8940  
[david.hamill@arentfox.com](mailto:david.hamill@arentfox.com)



**Matthew Nolan**  
*Partner, DC*  
 202.857.6013  
[matthew.nolan@arentfox.com](mailto:matthew.nolan@arentfox.com)



**Matthew J. Clark**  
*Partner, DC*  
 202.857.6066  
[matthew.clark@arentfox.com](mailto:matthew.clark@arentfox.com)



**Robert J. Ernest**  
*Partner, BOS*  
 617.973.6174  
[robert.ernest@arentfox.com](mailto:robert.ernest@arentfox.com)



**Nancy A. Noonan**  
*Partner, DC*  
 202.857.6479  
[nancy.noonan@arentfox.com](mailto:nancy.noonan@arentfox.com)



**Diana Quaia**  
*Partner, DC*  
 202.857.6291  
[diana.dimitriuc-quaia@arentfox.com](mailto:diana.dimitriuc-quaia@arentfox.com)



**Birgit Matthiesen**  
*Director, North American  
 Manufacturing, DC*  
 202.350.3620  
[birgit.matthiesen@arentfox.com](mailto:birgit.matthiesen@arentfox.com)



**Travis L. Mullaney**  
*Counsel, DC*  
 202.828.3477  
[travis.mullaney@arentfox.com](mailto:travis.mullaney@arentfox.com)



**David Salkeld**  
*Counsel, DC*  
 202.857.6478  
[david.salkeld@arentfox.com](mailto:david.salkeld@arentfox.com)



**Sylvia G. Costelloe**  
*Associate, LA*  
 213.988.6697  
[Sylvia.Costelloe@arentfox.com](mailto:Sylvia.Costelloe@arentfox.com)



**Jessica DiPietro**  
*Associate, DC*  
 202.350.3622  
[jessica.dipietro@arentfox.com](mailto:jessica.dipietro@arentfox.com)



**Friederike S. Görgens**  
*Associate, DC*  
 202.775.5769  
[friederike.goergens@arentfox.com](mailto:friederike.goergens@arentfox.com)



**Aman Kakar**  
*Associate, DC*  
 202.350.3632  
[aman.kakar@arentfox.com](mailto:aman.kakar@arentfox.com)



**Antonio J. Rivera**  
*Associate, DC*  
 202.350.3739  
[antonio.rivera@arentfox.com](mailto:antonio.rivera@arentfox.com)



**Leah Scarpelli**  
*Associate, DC*  
 202.715.8403  
[leah.scarpelli@arentfox.com](mailto:leah.scarpelli@arentfox.com)



**Natan P.L. Tubman**  
*Associate, DC*  
 202.715.8532  
[natan.tubman@arentfox.com](mailto:natan.tubman@arentfox.com)



**Russell A. Semmel**  
*Attorney, DC*  
 202.828.3468  
[russell.semmel@arentfox.com](mailto:russell.semmel@arentfox.com)



**Robert E. Shervette, IV**  
*Attorney, DC*  
 202.857.6292  
[robert.shervette@arentfox.com](mailto:robert.shervette@arentfox.com)





# Overview

What Happens Next?



# Arent Fox's Advance Look at Hot Button Trade Issues For 2021

## Our Trade Team Analyzes What Happens Next in Six Critical Areas

Looking towards 2021 and a new Administration, Arent Fox's International Trade & Investment group has prepared a series of primers on six key areas that can impact your business: The Biden Transition, Special Tariffs, Customs, Trade Litigation, Export Controls, and Trade Policy. Each section contains short overviews of the critical trends in those areas.

The last four years have been turbulent, to say the least, with more changes to come under the Biden Administration. Our aim is to help readers anticipate and prepare for these changes.

Clearly, some issues from 2020 will remain in focus: the changes brought about by the USMCA, marked increased application of trade remedies like antidumping, and the aggressive use of Sections 201, 232, and 301 tariffs will push on-shoring and regionalization of supply chains. Added to these are changes to export control rules that will complicate trade relations with China and restrict tech transfers and foreign investment. And new issues will emerge as the President-elect's focus on Buy America accelerates these trends.

Together, they are tempered by the Biden Administration's need to repair the damage done to US relations with key trading partners. We address these trends in detail below.

### The Biden Transition

This is Washington and so we start and end with US trade policy. Our team is tracking the Biden Transition, starting with the introduction of Katherine Tai, nominee for the next US Trade Representative.

[Read Our Analysis](#)

### Special Tariffs

Since trade policy almost always involves the application of tariffs, we begin with "China Tariffs – What to Expect from the Biden Administration," an issue top of mind for many executives who have business interests in China and the United States.

[Read Our Analysis](#)

### Customs

US tariffs are applied at the time of import and so the elevated role played by US Customs and Border Protection should not be underestimated. While the Customs section begins with the analysis "The Wait Is Over: USMCA Border Enforcement Begins," we also widen the focus to include CBP's proposal requiring new data sets from deeper into the international supply chain. This broader reach by the Administration is also demonstrated in "US Bans Certain Imports: Forced Labor in Focus."

[Read Our Analysis](#)

### Trade Litigation

When imports are suspected of violating US trade law or when they threaten US economic interests, trade litigation (read: trade investigation cases) kicks in. This section focuses on third-country transshipment concerns in the article "Using Third Country Components? Buyer Beware."

We also bring to readers' attention the Administration's intent to expand the scope of US trade investigations. In "Trade Investigations by Commerce on the Rise," we underscore this trend, starting with blueberries and strawberries, two agricultural commodities not historically the focus of US trade remedy law. They are now. As might be other agricultural products.

[Read Our Analysis](#)

### **Export Controls**

Turning to the business of exports from the United States, the next section is a must-read for any company doing business in the United States or from the United States. Or for that matter, any company competing with affected US entities. As is the case with many trade enforcement efforts, there are winners and there are losers. For these reasons, we highlight the article "Export Controls: Business as Usual?"

[Read Our Analysis](#)

### **Trade Policy**

Our final section returns to trade policy with three narrower but equally important articles – the first in regard to US renewal of GSP benefits and the tension between the Biden administration's promise to protect US workers while achieving climate goals. The last article, "Make Buy America Real - Biden To Seek Stronger Qualifying Rules," is a useful reminder of where we started this project: US international trade policy will reflect the priorities of an Administration taking office in a time of domestic economic turmoil.

[Read Our Analysis](#) 🇺🇸











# The Biden Transition

## Section 1

# Tracking the Biden Trade Transition and Transition Teams

This is Washington and so we start and end with US trade policy. Our team is tracking the Biden Transition, starting with the introduction of Katherine Tai, nominee for the next US Trade Representative.

President-elect Biden will be inaugurated on January 20, 2021. Here is how his trade [team](#) and agenda are shaping up.

## Who's Who

- President-elect Biden has moved quickly to build his trade team.
- Notably, Katherine Tai, Chief Trade Counsel for the US House Committee on Ways and Means, was named as the nominee for United States Trade Representative (USTR).
- [Ms. Tai's](#) background is indicative of the incoming Administration's likely approach to taking tough stances against China. It is also a good bet that she will fully implement and enforce the strong labor provisions in the US-Mexico-Canada (USMCA) Agreement, which she was instrumental in negotiating.
- For Secretary of Commerce, we could see Biden reach [across the aisle](#) and pick a Republican nominee.
- We expect that the US relationship with China will continue to dominate the US trade agenda. The USTR and the Biden Administration will likely retain a tough stance vis a vis China, although with a different approach than the [Trump Administration](#), achieving this by rebuilding [multilateral](#) trade relationships and trust in international institutions.
- In the next months, we expect that the USTR will focus on managing existing trade initiatives, including US Section 232 and 301 tariffs, and not necessarily pursuing new projects.
- But first, President-elect Biden has vowed a US domestic focus – to [invest in](#) and protect US business against injurious trade practices, "[leveling the playing field](#)" for American workers.

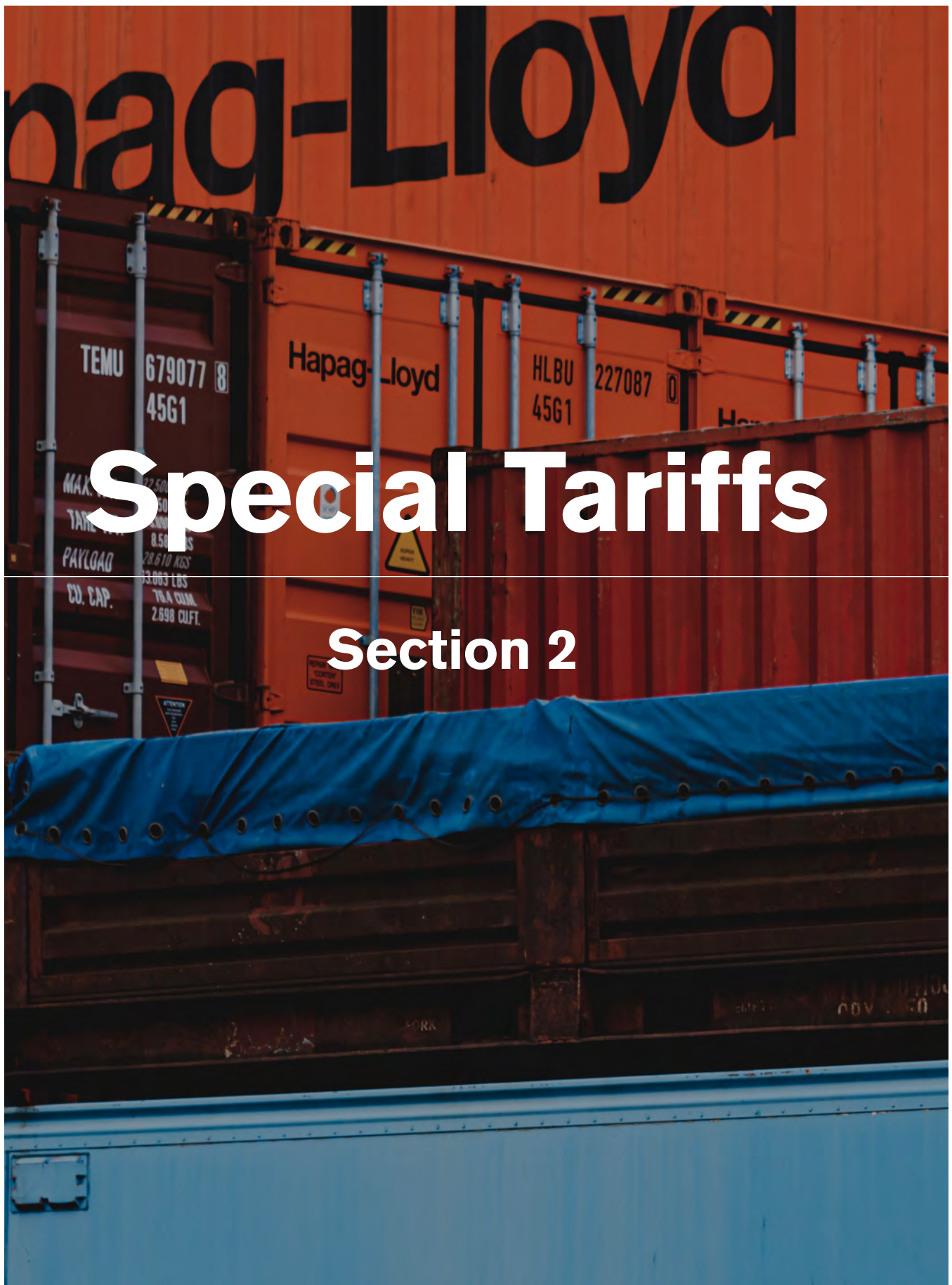
## How We Can Help

The team at Arent Fox has earned a strong reputation in the international trade community for our ability to understand and speak the language of business. Our multi-disciplinary approach is designed to provide business executives with a strategic understanding of new US trade regulations and a "connect the dots" perspective for a whole-company trade compliance program. Our aim is to reduce the risks of "not knowing" and to increase a company's competitive stance in the US marketplace. 🇺🇸

## What to Know

- Strong US trade enforcement activities will remain an important priority for the Biden era as it has been during the preceding four years – from "border enforcement" to broader US countervailing and antidumping investigations.
- Although Biden has moved quickly to build his trade team, we expect that Congressional confirmation of the nominees and any subsequent action will take some time.





# Special Tariffs

## Section 2



# US “China Tariffs” - What to Expect from a Biden Administration

Since trade policy almost always involves the application of tariffs, we begin with “China Tariffs – What to Expect from the Biden Administration,” an issue top of mind for many executives who have business interests in China and the United States.

## US “China Tariffs” - What to Expect from a Biden Administration

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The outgoing Trump Administration has aggressively applied double-digit Section 301 tariffs on numerous imports from China – costing many companies millions of dollars – with the incoming Biden Administration unlikely to unwind the tariffs in 2021.

### Ongoing Section 301 Actions Launched Under the Trump Administration

- President Trump has levied retaliatory tariffs of up to 25 percent on four “lists” of Chinese goods valued annually at \$370 billion, including both finished products and manufacturing inputs, in response to alleged Chinese intellectual property rights violations.
- The US Trade Representative (USTR) underwent a request process under which certain products were excluded from the tariffs, but most granted exclusions expired on December 31, 2020, and the few that were extended were only for COVID-19 related reasons.
- Litigation seeking to invalidate the latest two lists is pending in the US Court of International Trade, but any relief is not likely to come for several years.
- On January 7, 2021, the President was set to impose a new 25 percent tariff on \$1.3 billion worth of French handbags, cosmetics, and soaps in response to its digital services tax, but the USTR has now suspended the imposition of this tariff until further notice. Nonetheless, the USTR has imposed and still plans to impose more Section 301 tariffs against the European Union in a longstanding dispute over US WTO rights in large civil aircraft.

- The Treasury Department recently labeled Vietnam a currency manipulator, increasing the likelihood that President Trump will impose a Section 301 tariff against Vietnamese goods before the end of his term.

### A Cautious Approach Under the Biden Administration

- Although the President-elect will likely maintain the status quo with China, for the time being, it is possible that the Biden Administration will establish new exclusion processes to reduce the impact on US domestic production.
- While the Biden Administration’s multilateral approach in dealing with unfair country trade violations makes new Section 301 actions less likely, it will be very difficult politically for President-elect Biden to eliminate altogether the Section 301 tariffs already in place.
- While expressing a desire to work with China on its unfair trade practices and expressing disfavor toward the retaliatory tariffs, President-elect Biden has emphasized strengthening domestic production and has nominated former China enforcement head Katherine Tai as his USTR.

### How We Can Help

Arent Fox will continue to monitor the Trump Administration’s final Section 301 actions and the incoming Biden Administration’s actions in this area. We can assist companies in understanding the application of these tariffs and identify opportunities for tariff exclusions and other mitigation initiatives.

## 201 Food Fight in 2021 and Why You Should Care

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The Trump Administration brought back to life Section 201 safeguard measures to protect domestic industries from global imports. The move sets the groundwork for additional import investigations to come. We expect the International Trade Commission (ITC) to expedite the process.

### Ongoing Cases, Litigation, and Outlook

- The ITC recommended extending the Large Residential Washers safeguard measures.
- Domestic importers challenged actions by the US Trade Representative (USTR) with respect to bifacial modules in the Solar safeguard, which is still unresolved and will provide insight into the Executive Branch's authority to modify safeguard measures.
- More recently, the ITC instituted a global Section 201 Investigation into Blueberries, on the USTR's (not the industry's) behest.
- The ITC instituted global monitoring factfinding investigations on fresh or chilled strawberries and bell peppers. These factfinding investigations may expedite investigations into whether Section 201 safeguard measures are necessary to remedy injury by imports.
- The ITC received a request from the USTR to institute a global, monitoring factfinding investigations on squash and cucumbers for the same purpose.

### What to Know

- The ITC's determination in the Blueberries investigation will be submitted to the President by March 29, 2021. The President cannot act without first seeing this report.
- Strawberries, Bell Peppers, Squash, and Cucumbers are likely close behind.
- We believe it is possible the Biden Administration will not request any additional investigations, but these investigations already in motion will continue and recommendations will be presented to the new President.

- Still, President-elect Biden may reject any findings and recommendations by the ITC. Tariffs imposed under Section 201 often invite retaliation by the affected party so let's hope these cases disappear.

### How We Can Help

Arent Fox attorneys have been deeply involved in the ITC's Section 201 investigations, monitoring proceedings, and related litigation. We can help guide you through general questions about the investigations and all the way through the process in the event you may be impacted by these additional tariffs.

## US Steel Import Enforcement – Licensing Changes For 2021 Require Origin Where Steel is “Melted and Poured”

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As of October 13, 2020, changes to the Steel Import Monitoring and Analysis (SIMA) System are in effect.

### Changes to SIMA Requirements

- SIMA reporting now requires imports to specify the country of “melt and pour” in addition to the country of origin and the country of export for crude steel. This is defined as the original location where the raw steel is (1) first produced in a steel-making furnace in a liquid state, and then (2) poured into its first solid shape (semi-finished or finished).
- SIMA license requirements, set to expire in 2022, have been extended indefinitely and the scope of goods requiring licenses has been expanded.
- The value limit for shipments qualifying for “low value” licenses has been increased from \$250 to \$5,000.
- The Department of Commerce (DOC) has launched a modernized online platform for importers to apply for licenses. Though legacy licenses will be carried over to the new system, users will need to re-register to activate their accounts.
- DOC has announced a corresponding Aluminum Import Monitoring and Analysis (AIM) system, which will take effect on January 25, 2021. The AIM system requires importers to report the “country of smelt” for the largest and second-largest volume of primary aluminum, but not the country of pour.

## What to Know

- The addition of the country of melt and pour on SIMA licenses requires importers to track new information. We recommend adding this field to mill certificates for all shipments requiring licenses.
- The online platform should be used for qualifying shipments as of October 2020.
- This expansion of SIMA data reporting requirements is clearly designed to provide the DOC with new tools to detect US import surges which could lead to more stringent enforcement efforts and the imposition of new or increased US tariffs. These actions also permit a more targeted application of other import restrictions, such as Section 232 tariffs.
- Illegal transshipment of steel imports into the US will continue to be a priority enforcement area in the Biden era.

## How We Can Help

The reporting of additional import data often triggers trade facilitation or trade enforcement. The Arent Fox team has a particularly strong understanding of the global steel industry and past US trade actions in this arena. We can help company executives understand the new changes to the SIMA rules as well as provide strategic advice on how to improve a company's trade compliance and mitigate its exposure to risks of unwarranted penalties and import delays.

## US 232 Tariffs – Changes in the Exclusion Process

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On December 14, 2020, the Department of Commerce, Bureau of Industry and Security (BIS) published a [notice](#) announcing changes to the process for seeking [exclusions](#) from the 25% tariff on steel and 10% tariff on aluminum.

### Changes to the Exclusion Process

- BIS has adopted Generally Approved Exclusions (GAEs) for specific products. GAEs can be used by any importer to avoid payment of the additional tariffs without making an exclusion request. The first approved tranche of GAEs, which includes 108 steel and 15 aluminum products, will take effect on **December 29, 2020**. There is no retroactive relief for products subject to this type of exclusion.
- There is now a streamlined review process for “No Objection” requests, requiring BIS to “immediately

assess” and automatically grant requests without objections that do not pose national security concerns.

- Requesters will now need to submit a certification to ensure that the volumes listed in exclusion requests are consistent with past use of steel or aluminum. For products on which they previously received an exclusion, the requester must certify that the full amount of the prior exclusion was used or note a “legitimate business reason” for the remaining volume.
- The definition of the term “immediately” has been revised for purposes of the exclusion process to mean “produced and delivered within eight weeks or, if not possible, then produced and delivered within a time frame that is equal to or earlier than that needed by the requester as demonstrated by the time required to obtain the product from the requester’s foreign supplier.”

## What to Know

- The issuance of GAEs is a welcome development for importers. The reference to a “first” tranche means that there will be more GAEs to come. Though BIS notes that GAEs will be issued without involvement from the public, this is an area where coordinated lobbying efforts by US stakeholders will likely be focused going forward.
- New certification requirements will require better tracking of exclusion use and more targeted projections for the volumes requested in new submissions.
- President-elect Biden has said that he will conduct a review of the Section 232 tariffs, but **we do not expect** any immediate changes to the tariff rates or to the exclusion process. Given the administration’s focus on American workers and reshoring, it is likely the tariffs will remain in effect in some form, but with modifications to reduce the adverse impact on US downstream manufacturing competitiveness and to repair some key trading relationships. We expect more focus on China.

## How We Can Help

Our team at Arent Fox can provide strategic advice on duty mitigation related to Section 232 tariffs as well as the process for seeking and filing for an exclusion.



## New Subsidy Analysis Resulting in Higher Rates: Currency Undervaluation in Vietnam and China

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For the first time, and then again in quick succession, the Department of Commerce (DOC) applied its new regulations on [Treatment of Alleged Currency Undervaluation](#), published in February 2020.

### DOC's Determinations

- On October 30, 2020, the DOC [preliminarily determined](#) that both respondents in PVLIT (Passenger Vehicle and Light Truck) Tires investigation were subsidized in 2019 by the government of Vietnam's undervaluation of the Vietnamese dong.
- On November 24, 2020, the DOC [preliminarily determined](#) that China's undervaluation of the Renminbi is a countervailable subsidy.

### What to Know

- DOC's regulations were a long time in the making, however, the final rule released in February 2020 does not shed much light on the topic past its general subsidy analysis, providing the DOC with a number of "normally" escape hatches.
- It is unknown whether the DOC, at least preliminarily, will for non-market economies, analyze whether
  - a country's currency is undervalued; and
  - whether that undervaluation equates to an unfair, countervailable subsidy.
- Although we expect litigation on the issue, we do not expect a major rollback during the Biden Administration.

### How We Can Help

Arent Fox attorneys are closely monitoring how the DOC and Treasury will apply the currency undervaluation rule, and the arguments to be made that best benefit our clients. To discuss updates regarding currency undervaluation investigations and how you may be impacted by additional countervailing duty rates, please contact a member of the Arent Fox team.

## Products from Vietnam Facing Additional Tariffs: Section 301 Currency Undervaluation

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The Trump Administration pulled Vietnam deeper into its trade offensive under the guise of currency manipulation, and we do not expect the Biden Administration to provide an immediate reprieve. On October 8, 2020, the United States Trade Representative (USTR) published a [notice of initiation](#) of an investigation pursuant to Section 301 of the Trade Act of 1974 into the acts, policies, and practices of Vietnam relating to currency practices, opening the door for additional tariffs on imports from Vietnam.


### This Section 301 Investigation

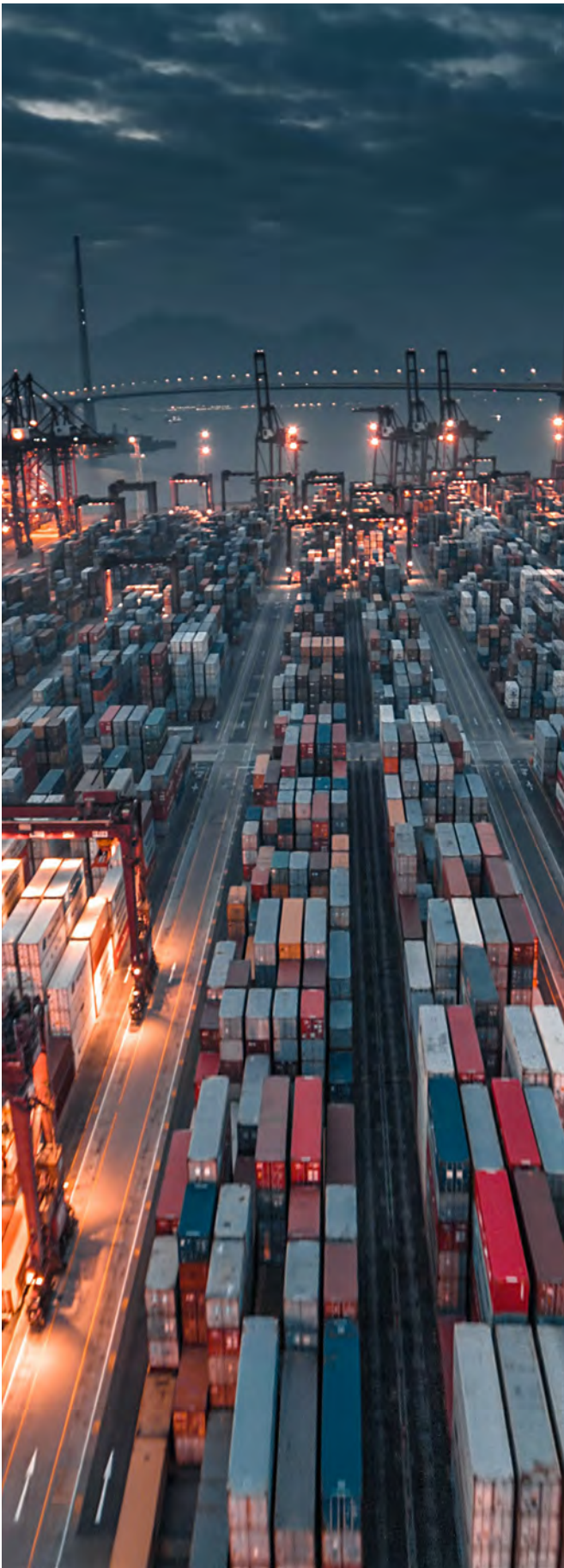
- The USTR acted on evidence showing that the Vietnamese dong was undervalued.
- A public hearing for parties to voice their opinions to the USTR was held on December 29, 2020, where many US businesses voiced opposition to the tariffs.

### What to Know

- Post-hearing briefs are due January 7, 2020, before the transition from the Trump Administration to the Biden Administration.
- Although we expect the USTR to move quickly, for recommendations to be presented to the Trump Administration, USTR must complete the investigation, providing its conclusions and proposed actions to the public, and allow for comment.
- President-elect Biden **may reject** any findings and recommendations by the USTR after inauguration.
- On December 16, 2020, the Department of the Treasury [announced](#) that both **Vietnam and Switzerland are currency manipulators**. This determination will likely inform policy actions to address the underlying causes of currency undervaluation.
- Considering the Biden Administration's strong comments to support US business and to fully consider all of the current trade actions before making any changes, we do not expect the Biden Administration to end this investigation. It remains unclear what additional actions may be taken if these currency cases proceed to a remedy phase.

**How We Can Help**

Arent Fox is an experienced advisor on the application of Section 301 tariffs and the tariff exclusion request process. Specific to this investigation, Arent Fox can provide updates regarding currency undervaluation investigations and how your company may be impacted by additional tariffs. 





# Customs

## Section 3



# Wait Is Over: USMCA Border Enforcement Begins

US tariffs are applied at the time of import and so the elevated role played by US Customs and Border Protection should not be underestimated. While the Customs section begins with the analysis “The Wait Is Over: USMCA Border Enforcement Begins,” we also widen the focus to include CBP’s proposal requiring new data sets from deeper into the international supply chain. This broader reach by the Administration is also demonstrated in “US Bans Certain Imports: Forced Labor in Focus.”

## Wait Is Over: USMCA Border Enforcement Begins

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On December 31, 2020, the “Phase I Implementation” of the [United States-Mexico-Canada Agreement \(USMCA\)](#) came to an end, marking the end of the “self-imposed” restraint from US Customs and Border Protection (CBP) on enforcing the new USMCA.

### Phase I Implementation

- CBP designed the six-month period to **show restraint** on USMCA enforcement while providing the trade community time to adjust to the new USMCA requirements.
- Restraint included allowing USMCA automotive certifications until December 31, 2020, to satisfy the corresponding documentation requirements. The benefit to non-automotive imports was ambiguous at best, and all importers were still required to act with reasonable care.

Critically, this transition period did not apply to Mexico and Canada.

### What to Know

- The fact that CBP is talking about the end of the Phase I Implementation suggests it will start enforcing the USMCA in 2021.

- Through formal audits and targeted inquiries, such as CF-28 notices addressing USMCA transactions, a CBP determination on the invalidity of USMCA claims and certifications could lead to significant duty exposure and possible financial penalties.
- **To reduce the risk of invalid USMCA certifications and claims**, companies should reaffirm the basis for qualifying the products included in the USMCA certifications they issued in 2020.
- Additional time may still be provided to automotive commodities under USMCA verifications through June 30, 2021, but any further grace period will not provide a “free pass” to the USMCA certifications automotive companies will issue during 2021.
- There is no incentive or political motivation for the incoming Biden Administration to make major changes to the USMCA, instead, we anticipate major developments to focus on the agreement’s enforcement, particularly **labor issues**.

### How We Can Help

Leading up to and after the USMCA’s implementation date of July 1, 2020, the Arent Fox trade team has performed USMCA self-audits, developed action plans for companies to address their high-risk USMCA products, and conducted company-specific USMCA training. We would be glad to discuss USMCA qualification and certification strategies specific to your company as there is not a “one-size fits all” approach.

## Ocean Shipping and the Perils of Delay

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On December 17, 2020, the US Federal Maritime Commission (FMC) issued important advice to the trade community in regard to detention and demurrage charges on containers at US seaports. As US import volumes continue to climb, especially via ocean freight, this recent announcement will be important to fully understand.

### What to Know

- The FMC regulates the practices in handling commercial property that involves ocean shipping, in particular the detention and demurrage charges/costs related to shipping containers.
  - Detention is a charge for extended use of a shipping container until it is returned empty to the shipping line.
  - Demurrage charges relate to the time that a container is inside a shipping terminal and depend on how much time a container is in port after arrival. It is a charge the terminal places on the shipment if it is held up at the terminal for some reason, such as awaiting transportation, customs clearance, etc., after a certain free time period has expired.
- The FMC has been investigating the detention and demurrage practices of ocean carriers that operate in an alliance and which call at the Port of Los Angeles, Port of Long Beach, or the Port of New York/New Jersey and whether these practices are in violation of US law (46 U.S.C. § 41102(c)).

### How We Can Help

Arent Fox can provide guidance and assistance to shippers, freight forwarders, marine terminal operators, and trucking operations in engaging with the FMC Bureau of Enforcement on potential violations and monetary penalties. More broadly, for company executives, our goal is to help mitigate FMC cost problems and reduce excessive charges for a more efficient transportation of container traffic.

## A Not So Modern US Customs Modernization Act – Will a Biden Administration Bring It into the New Century?

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The decades-old Customs Modernization Act, or “Mod Act,” was the last significant overhaul of the US Customs regime in recent years. The evolution of international trade in the years since has spurred calls for a new reform package that might find support from the incoming Biden administration.

### The Mod Act Is No Longer So Modern

- The Mod Act, passed in 1993 as part of the NAFTA implementation process, reoriented the burdens of US import compliance by introducing the concepts of “shared responsibility” and “informed compliance.” Shared responsibility requires the trade community to exercise reasonable care in reporting information to the government, while informed compliance refers to the government’s responsibility to make importers aware of their import obligations.
- While the Act increased US Customs and Border Protection’s (CBP) enforcement capabilities post-import entry, it also provided for increased automation and efficiency in the entry process to benefit importers.
- Emerging technologies, new national security threats, and increased trade volumes over the past thirty years have not been matched by new legislation to address these developments. Some of these challenges involve the rise of e-commerce and rapid fulfillment, the use of illegal forced labor in supply chains, and intellectual property rights. CBP has kept up with such developments operationally, but its ability to adapt is limited by statutory inaction from Congress

### Proposals for Reforming Customs Administration

- CBP has recently proposed required legal changes in an initiative called the 21st Century Customs Framework (21CCF). The 21CCF has the pronounced goals of achieving end-to-end supply chain transparency to improve safety and speed, driving data-centric decision making in the entry process, and diversifying reasonable care liability beyond just the importer of record.
- Now, with the “new NAFTA” – USMCA/CUSMA/T-MEC, CBP is seeking authority to



require product and country data deeper into an import's production and supply chain.

## How We Can Help

Readers of these posts will have noticed a common theme when it comes to US trade and import enforcement – that is the reliance and expansion in the use of corporate and supply chain data. As these trigger most if not all US import enforcement actions such as audits and verification requests, the team at Arent Fox can assist company executives “read between the lines” to understand the broader implications. Our longstanding reputation in the field of US import and trade rules can provide executives with a cornerstone for a strategic and modern competitiveness agenda, one which can adopt new US trade rules while mitigating the risk of costly delays and penalties.

## FTA Update: Not so Fast, Biden To Prioritize “Investments Here at Home”

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In an about-face from the intense focus on bilateral trade deals under the Trump Administration, President-elect Biden [has said](#) that he intends to focus first on “major investments” in the US before entering any new free trade agreements (FTAs).

### What the Future Holds For US FTAs

- The US Trade Representative (USTR) is currently engaged in ongoing formal and informal negotiations with the EU, the UK, and others (Kenya, Japan, and India), which are unlikely to be completed before President Trump leaves office.
- Though US negotiations with the EU were formally launched in October 2018, they have been largely stalled since negotiating objectives were approved by the EU Council in April 2019. However, the Biden administration intends to prioritize re-engagement with traditional allies like the EU.
- The US and the UK formally launched trade negotiations on May 5, 2020 and have held four sets of negotiating sessions thus far, which are expected to continue. While the UK deal is further along, it is unlikely to be completed before mid-2021 and appears to be a stronger priority for President Trump than for President-elect Biden.

## What to Know

- US trade negotiations will take a back seat to domestic policies in the initial months of the Biden administration. Its priorities will instead be on the COVID-19 pandemic, protection of American workers, and education.
- We believe the Biden administration will ultimately focus on existing negotiations and FTAs with US allies like the EU and the UK and will seek coordination to combat perceived adversaries like China.
- Biden has nominated Katherine Tai as the US Trade Representative. She currently is the Democratic Chief Trade Counsel for the US House Ways and Means Committee, and previously served as chief counsel for USTR China trade enforcement, Ms. Tai will lead future FTA negotiations.

## How We Can Help

As with global supply chains, international trade agreements are complicated and not easily understood. The team at Arent Fox can help companies “walk through” the provisions of new FTAs tailored to specific company production, locations, and supply chains. Our goal is to improve a company's access to the US market and reduce or mitigate both risk and costs in the arena of international trade.

## CBP Ratchets Up Forced Labor Import Ban Enforcement

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The US Government is cracking down on goods from China suspected of being produced with forced labor. Sweeping enforcement actions through US Customs and Border Protection (CBP) are aimed at both direct imports into the US as well as third countries where illicit transshipment may be occurring.

### Existing and Upcoming Enforcement Actions

- **Targeting China:** Bipartisan legislation, making its way through Congress, will expand CBP's authority to stop suspected imports from China's Xinjiang Uighur Autonomous Region (XUAR) and require corporate data on the importer's international supply chain.
- **Withhold Release Orders (WROs):** Under existing authority, CBP moves aggressively with WROs to ban wide swaths of imports at the border. While the current focus is on


China, especially XUAR, it is likely these monitoring efforts will expand to other areas.

- **Risk Analysis and Survey Assessment (RASA):** CBP has already started leveraging forced labor compliance by issuing RASA inquiries – mini-audits – to major cotton importers from the XUAR, as well as imports from countries suspected of transshipment, such as Malaysia.
- **Custom Trade Partnership Against Terrorism (C-TPAT):** Currently, C-TPAT only suggests rather than mandates a forced labor compliance program. However, if this becomes mandatory, as is being discussed, C-TPAT participants would be required to establish a documented social compliance program that addresses how the company ensures its US imports were not mined, produced, or manufactured, with prohibited forms of labor.
- **Other Forced Labor Measures to Be Announced in 2021:** At a recent Commercial Operations Advisory Committee (COAC) meeting, CBP reported several new forced labor initiatives. Specifically, CBP announced that the agency is working on a notice of proposed rulemaking (NPRM) to be issued in early 2021, and is updating the CBP “Informed Compliance Publication” and other guidance on this issue.

### What to Know

- Imports are increasingly being scrutinized at the border, and supply chains are being probed for goods made with forced labor, especially from China.
- CBP will continue to leverage existing programs like RASA and C-TPAT to achieve social responsibility goals.
- Importers of raw material, component parts, or finished goods should carefully evaluate their supply chains for forced labor risk and engage with their foreign suppliers to increase their compliance and reduce risk exposure in this area.
- Non-compliance can result in significant delays, detained and seized goods, and other supply chain disruptions.

### How We Can Help

Arent Fox can advise companies on how the new focus on forced labor should be understood and how a company’s internal controls can be shaped to comply with these new regulations. 



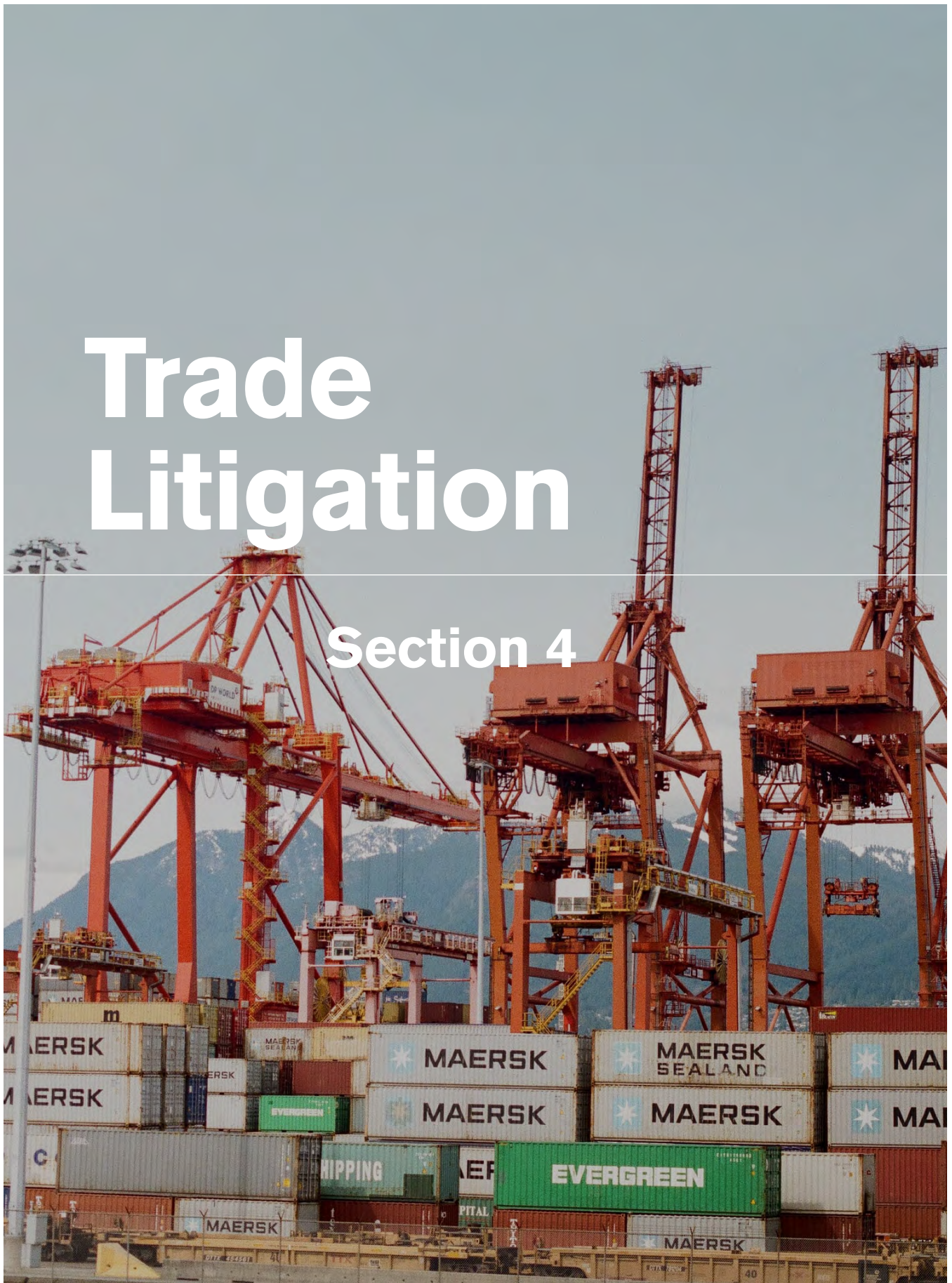






# Trade Litigation

## Section 4





# Using Third-Country Components? Buyer Beware – New AD/CVD Orders Target Third Country Production

When imports are suspected of violating US trade law or when they threaten US economic interests, trade litigation (read: trade investigation cases) kicks in. This section focuses on third-country transshipment concerns in the article “Using Third Country Components? Buyer Beware.” We also bring to readers’ attention the Administration’s intent to expand the scope of US trade investigations. In “Trade Investigations by Commerce on the Rise,” we underscore this trend, starting with blueberries and strawberries, two agricultural commodities not historically the focus of US trade remedy law. They are now. As might be other agricultural products.

## Using Third-Country Components? Buyer Beware – New AD/CVD Orders Target Third Country Production

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The US Department of Commerce has begun to include “third country processing” language in the scope of Antidumping/Countervailing Duty (AD/CVD) orders to prevent circumvention of the orders in the first instance.

### Circumvention Investigation Trends

- Companies that change their supply chain such that the merchandise is completed or assembled in a third country or the US may still have to pay US anti-dumping or countervailing duties even if the country of origin is different from the country named in the AD/CVD order.
- Products that are subject to AD/CVD orders from certain countries can be investigated by the Department of Commerce (DOC) for circumvention where those products were made from parts from a subject country and completed or assembled

in a third country or the United States.

- The DOC has the authority to instruct CBP to collect AD/CVD duties on such products, which can include import entries prior to the initiation of the circumvention investigation.

### What to Know

- The DOC may initiate an anti-circumvention inquiry when it receives an initiation request (or through self-initiation by the DOC) if it determines, based on available information, that an inquiry is warranted to determine whether imports are circumventing an AD/CVD order.
- **This means** that companies involved in such an investigation need to respond fully and timely to all requests for information.
- **We believe** that circumvention investigations can be an effective tool to prevent circumventing of AD/CVD duties to protect US producers that have petitioned for the AD/CVD duties and importers that are paying the duties from other importers that should also be paying the duties.

- **We caution** companies who have changed their suppliers due to AD/CVD duties (or also become aware of changes in suppliers of their competitors) to **carefully and continuously monitor suppliers** because any circumvention by a supplier is attributed to the importer regardless of the importer's knowledge of circumvention.
- Companies establishing downstream manufacturing operations in third countries should be watchful regarding the origin and AD/CVD status of critical inputs that may be caught in circumvention actions.

### How We Can Help

If your company has changed suppliers due to AD/CVD duties, the Arent Fox team can help discuss steps to prevent a successful circumvention allegation. If your company suspects that a competitor is circumventing AD/CVD orders, a member of the Arent Fox team can help you with your initiation request. If your company becomes subject to a circumvention investigation, Arent Fox can represent you in the investigation.

## China's RCEP Victory: New Import and Export Challenges

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On November 15, 2020, a China-led, 15-country trading bloc signed the Regional Comprehensive Economic Partnership Agreement (RCEP), establishing common regional country of origin rules, incentivizing supply chain changes and reorientation of trading partners away from the United States.

### Changing Terrain

- The fact that there is now a China-led regional trade agreement with nations such as Australia, Japan, Vietnam and Indonesia suggests that the United States will need to reconsider its regional and global strategies in 2021.
- In addition to challenging the American geopolitical stature among allies and partners, the expansion of regional trade that results under the RCEP raises numerous import compliance challenges.

### What to Know

- **For US exports** to RCEP countries, the US will need to either join TPP-11 or negotiate an alternative agreement to ensure the competitiveness of US-origin exports in the region.

- **For imports** from RCEP countries, the increased viability of regional supply chains may lead to increased transshipment investigations by the US Commerce Department as well as requests for information and duty evasion investigations by the US Customs and Border Protection.
- **We believe** the Biden Administration, although more open to a multilateral approach to trade, will likely seek to expand enforcement of import laws to ensure that companies exporting goods from RCEP members' companies cannot avoid duty liability or circumvent bans on particular products.

### How We Can Help

The Arent Fox team is well versed to provide strategic advice on either export- or import-related questions in relation to the RCEP. Not only will "country of origin" determinations be important in this analysis, but so will the understanding of US enforcement of imports from these countries.

## "Self-Initiated" Trade Investigations by the US Department of Commerce on the Rise

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As widely anticipated, the US Department of Commerce (DOC) is increasingly relying and acting on its authority to self-initiate investigations. The aim is to "level the playing field" for the domestic industry.

### What to Know

- The DOC has the authority to self-initiate antidumping and countervailing duty investigations, circumvention inquiries.
- Typically, these investigations are initiated in response to a petition or inquiry from the domestic industry, but the DOC may initiate on its own if available information shows that an investigation is warranted.
- There was certainly an uptick in self-initiated investigations during the Trump Administration (overall, there was a **200+ percent increase** in antidumping and countervailing duty cases).
- We expect this trend to continue under the Biden Administration, considering its promises to protect and improve US industry.



## How We Can Help

Arent Fox can help “walk” executives through updates regarding the DOC’s investigations and whether a product or product line may be impacted by additional antidumping and/or countervailing duty rates.

## Risk or Opportunity? US Customs Becoming Increasingly Aggressive in Enforcing US AD/CVD Orders

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**Risk:** Companies that receive US Customs and Border Protection (CBP) information requests (CF-28) should be aware they could be under investigation pursuant to an allegation made by a competitor under the Enforce and Protect Act (EAPA).

- **Opportunity:** US producers who compete with foreign exporters subject to an antidumping (AD) or countervailing duty (CVD) order can further protect themselves against such competitors by making allegations under the EAPA if they believe AD/CVD orders are being evaded.

### EAPA Investigation Trends

- CBP has increasingly used its authority to investigate whether a company or other entity has evaded AD/CVD duties through an EAPA investigation.
- US manufacturers may confidentially provide allegations to CBP to support the initiation of such an investigation. In response, CBP typically issues a CF-28 to the importer with questions regarding the country of origin and supply chain of the named product(s).
- **CBP has the authority to impose interim measures without warning on the US importer. This requires the immediate deposit of the AD/CVD duties on future entries, and depending on the outcome of the case, may reach back one year to collect duties on prior entries.**

### What to Know

- An EAPA investigation is fast-paced, with any interim measures being imposed within 90 days of initiation, and the final determination is made within one year of initiation.
- **This means** that companies involved in such an investigation need to respond fully and

timely to all requests for information.

- **Importantly** EAPA cases can be an effective tool to prevent evasion of AD/CVD duties to protect US producers that have petitioned for the AD/CVD duties and US importers that are paying the duties from other US importers not paying the duties.
- We caution US importers who have changed their suppliers due to AD/CVD duties to **carefully and continuously monitor their suppliers** because any evasion by the supplier is attributed to the US importer regardless of the importer’s knowledge of evasion.

## How We Can Help

If your company is a US importer that has changed a supplier due to AD/CVD duties, the Arent Fox team can discuss steps to prevent a successful EAPA allegation. If you suspect that your competitor is evading AD/CVD duties, a member of the Arent Fox team can help assess legal strategies against your competitor. If your company becomes subject to interim measures, Arent Fox can represent you in any EAPA investigation.

## Country of Origin Determinations: Differing Standards for Customs and Border Protection and the US Department of Commerce

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Although the tests to determine country of origin by the US Department of Commerce (DOC) and the US Customs and Border Protection (CBP) are similar, the agencies occasionally reach different conclusions. This uncertainty is likely to continue in the months ahead.

### Commerce’s Test(s)

- The DOC has historically applied its own “substantial transformation test” to determine the country of origin for AD/CVD purposes.
- The Court of Appeals for the Federal Circuit (Federal Circuit) recently confirmed the continued validity of Commerce’s substantial transformation test. *Bell Supply* involved a scope ruling by the DOC finding that oil country tubular goods (OCTG) finished in third countries from Chinese green tubes are still subject to AD/CVD orders on China. However, CBP earlier had determined that OCTG finished in Korea or Japan from unfinished Chinese material had a country of origin of Korea or Japan

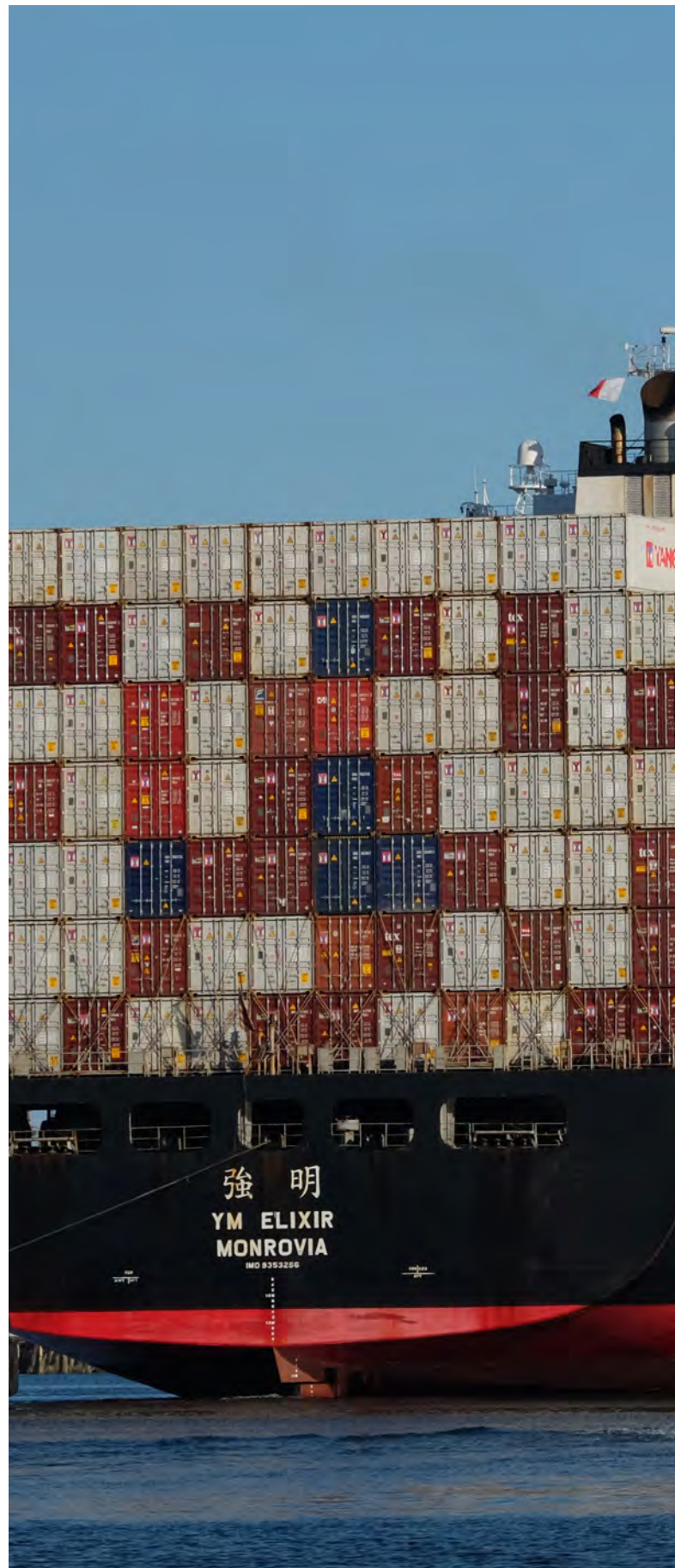
- In *Canadian Solar*, the Federal Circuit upheld the DOC's decision to depart from the substantial transformation test and determine the country of origin of solar panels based on the country of assembly, although it earlier found that the solar cells are the origin-conferring component.

### What to Know

- Adding more complexity to the debate is the fact that the DOC may change its substantial transformation test to better serve the purpose of the AD/CVD laws.
- The courts look to the DOC's explanations of **shifts in supply chains, possible evasion of duties and a concern that the established origin rule would exclude the very imports found to injure the domestic industry.**

### How We Can Help

This is an ever-evolving area of law where importers need to be aware of the potential for overlapping and conflicting origin rules on their merchandise. The International Trade Group at Arent Fox has the experience to assist importers to evaluate and mitigate these risks. 🇺🇸









An aerial photograph of a large container yard. The yard is filled with stacks of colorful shipping containers in shades of red, blue, green, and white. A yellow gantry crane is positioned in the center, with its long jibs extending over the stacks. The ground is marked with white lines and numbers, indicating different sections or lanes. The overall scene depicts a busy port or logistics hub.

# Export Controls

## Section 5

# US Export Controls: Business as Usual?

Turning to the business of exports from the United States, the next section is a must-read for any company doing business in the United States or from the United States. Or for that matter, any company competing with affected US entities. As is the case with many trade enforcement efforts, there are winners and there are losers. For these reasons, we highlight the article “Export Controls: Business as Usual?”

## US Export Controls: Business as Usual?

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The Trump Administration has used export controls as part of its aggressive anti-China policy, notably by expanding the military end-use/user rules, revoking license exceptions, and by placing Chinese tech company Huawei and its affiliates and many more Chinese companies on the US Department of Commerce, Bureau of Industry and Security’s (BIS) Entity List. This prohibits most exports and reexports to those entities without a license. While a dramatic policy change is not expected, the Biden Administration is likely to work more closely with allies to pursue its foreign policy goals vis-à-vis China.

### Export Control Issues to Watch

- In June 2020, BIS announced the suspension of certain license exceptions for exports, reexports, and transfers (in-country) to and within Hong Kong that treated Hong Kong differently than the People’s Republic of China.
- In November 2020, BIS proposed another control on a so-called emerging technology: software that is capable of being used to operate nucleic acid assemblers and synthesizers due to concerns the software could be used to create pathogens and toxins as biological weapons.
- In 2019, BIS added Huawei and several of its affiliates to the Entity List, effectively prohibiting all exports to those entities without a license. In May and August 2020, BIS expanded the scope of items subject to the EAR for export, reexport or transfer where a Huawei listed entity was a party to the transaction.
- Effective December 18, 2020, BIS also added, among others, Semiconductor Manufacturing International Corporation Incorporated (SMIC) and Chinese drone manufacturer SZ DJI Technology Co to the Entity List.
- We expect the Biden Administration to continue to employ export controls as a critical part of its foreign policy and to take a firm stance against China.
- The Biden Administration is likely to take a more multilateral approach with respect to China and Huawei in particular. In addition, his trade officials may attempt to get key allies on board with a single multilateral approach as opposed to going it alone.
- The Biden Administration may well roll back or rein in the highly extraterritorial Foreign Direct Product Rule (FDPR) applicable to Huawei transactions as this approach has the potential to damage the US defense industrial base.
- It is not expected that the Biden Administration will reverse course with respect to its treatment of Hong Kong vis-à-vis China.
- We expect the Biden Administration to leave in place the expanded Military End-Use/User rules for China, Russia, and Venezuela, but to provide a greater deal of clarity regarding who is a Military End-User, an effort begun under the Trump Administration.



## How We Can Help

To discuss whether your company is in compliance with recently announced export control changes such as the new entity listings, and to investigate how changes by the Biden Administration may impact your business, please contact a member of the Arent Fox team.

## Economic Sanctions: Reversal or a New Way?

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Under the Trump Administration, sanctions were used as a part of a unilateral “America First” approach to take aim at foreign adversaries and address humanitarian concerns. We are expecting a more measured multilateral approach under the Biden Administration, but not necessarily a decline in sanctions activity.

### Sanctions Issues to Watch

- **Iran.** The [Trump Administration withdrew](#) the US from the Joint Comprehensive Plan of Action (JCPOA), [re-imposed sanctions](#) that had been removed, and continued to increase sanctions [pressure](#) on Iran throughout the Administration.
  - We expect the Biden Administration to continue to impose targeted sanctions against human rights abuses and support for terrorism both in Iran and worldwide, but perhaps to take a step back from the threats of “secondary sanctions” against third-country companies doing business with sectors of Iran’s economy outside the military and oil sectors.
- **China.** China has been a frequent target of sanctions actions as a part of a “Whole of Government” approach that includes actions by other Federal Agencies. Sanctions actions were taken due to the People’s Republic of China’s increasing assertion of control over Hong Kong, forced labor and human rights issues related to the Xinjiang Uyghur Autonomous Region, and the increasing role of government military companies.
  - The Biden Administration is expected to review the Trump Administration’s China actions and be deliberate in its changes to current sanctions actions. Sanctions will remain a critical tool but are likely to be recalibrated to have maximum impact through multilateral cooperation.
- **Cuba.** While leaving a good portion of the Obama loosening intact, the Trump Administration made major changes towards Cuba including the addition of the State Cuba Restricted List, which greatly restricted the use of many existing authorizations by making an expanding set of key Cuban Government entities mostly off-limits. The Trump Administration also removed many travel and remittance authorizations and allowed suits to be brought against third-country companies doing business in Cuba under the Helms Burton statute.
  - The Biden Administration is likely to reverse some travel and remittance rules early on, especially ones that benefit Cuban Americans supporting their families in Cuba, but with the President-elect Biden losing the Florida vote in the Presidential election, he may take a careful approach to relaxing other sanctions on Cuba
- **Venezuela.** Venezuelan Government and President Nicolás Maduro were also targeted by the Trump Administration through sanctions including secondary sanctions on shipping lines that carried petroleum products to/from Venezuela.
  - It is not clear whether President-elect Biden will continue to pressure the Maduro regime through secondary sanctions.
- **Russia.** The Trump Administration targeted the construction of Russian energy export pipelines and designated Russian entities under Cyber sanctions and for interference in US elections.
  - The Biden Administration is likely to take an even tougher approach to Russia but may well back off threats of Nordstream II sanctions given the reality that these would alienate European allies.
- **Turkey.** The Trump Administration delayed but finally imposed sanctions on Turkey under the CAATSA statute for its purchase of missile systems from Russia.
  - President-elect Biden has had very harsh words for Turkey’s President, so we expect continued and perhaps increasing pressure on Turkey to disincentivize its relations with Russia and its “go it alone” approach to regional issues.
- **International Criminal Court.** Perhaps most surprising of the Trump Administration’s sanctions actions was the declaration of a national emergency and imposition of sanctions related to investigations of the International Criminal Court (ICC).
  - We think the Biden Administration is likely to either terminate this emergency early on or allow it to lapse when it comes up for its annual renewal in June.



- **Human rights abuse and corruption.** The Trump Administration also imposed increasing sanctions under the Global Magnitsky (GLOMAG) Sanctions regime, which targets companies and individuals involved with the parties that may be engaged in human rights violations or corrupt activities.
- We expect the Biden Administration to continue with GLOMAG sanctions due to its focus on human rights and corruption and possibly seek a multilateral approach with similarly minded countries.

### What to Know

Under the Trump Administration, sanctions actions were often unilateral. With the Biden Administration we expect a return to a more measured and coordinated approach.

We expect the Biden Administration to continue to employ sanctions as a critical part of its foreign policy and, outside of the Iran JCPOA, Cuba, and ICC areas, not immediately move to reverse course on Trump economic sanctions actions.

### How We Can Help

Arent Fox has a team of sanctions lawyers, including a recent Deputy Chief Counsel of the Office of Foreign Assets Control (OFAC), to evaluate whether your company is in compliance with current sanctions measures and how changes by the Biden Administration will impact your business.

## Foreign Investment Screening: More Scrutiny, More Reviews

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The Trump Administration completed the last major step in the implementation of the 2018 Foreign Investment Risk Review Modernization Act (FIRRMA), in which Congress expanded the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS). This will allow a continued increase in the number of reviews of US acquisitions involving foreign investors.

### Export Control & CFIUS Review

- FIRRMA expanded CFIUS jurisdiction to include non-passive minority-position investments in US businesses involving critical technologies, critical infrastructure, and sensitive personal data of US citizens. It also gave CFIUS jurisdiction over certain purchases or leases of US real estate near sensitive facilities.
- For technology-related transactions to fall under CFIUS jurisdiction depends upon 1) whether the technology is considered “critical” based on the CFIUS definition and 2) whether transferring the US business’s critical technology to either the relevant foreign investor or parties holding significant interests in the foreign investor would require an export authorization

### What to Know

- Increasing screening of foreign investment in US companies was a key component of the Trump Administration’s approach to China, particularly in the technology area. Due in part to the bipartisan nature of US policymakers’ concerns regarding China, we do not anticipate any big changes in approach at CFIUS under the Biden Administration.
- We expect relative stability in the CFIUS process for the foreseeable future, including how it looks at modern-day national security risks.
- In light of the COVID-19 pandemic, going forward CFIUS is likely to consider public health to be a part of national security.

### How We Can Help

Arent Fox’s team of CFIUS lawyers includes David Hanke, the former Counsel for National Security Affairs to Senator John Cornyn. David was the chief strategist behind the FIRRMA’s enactment. David would be delighted to discuss with you whether an investment in a US business is subject to CFIUS review and how the regulations might apply.

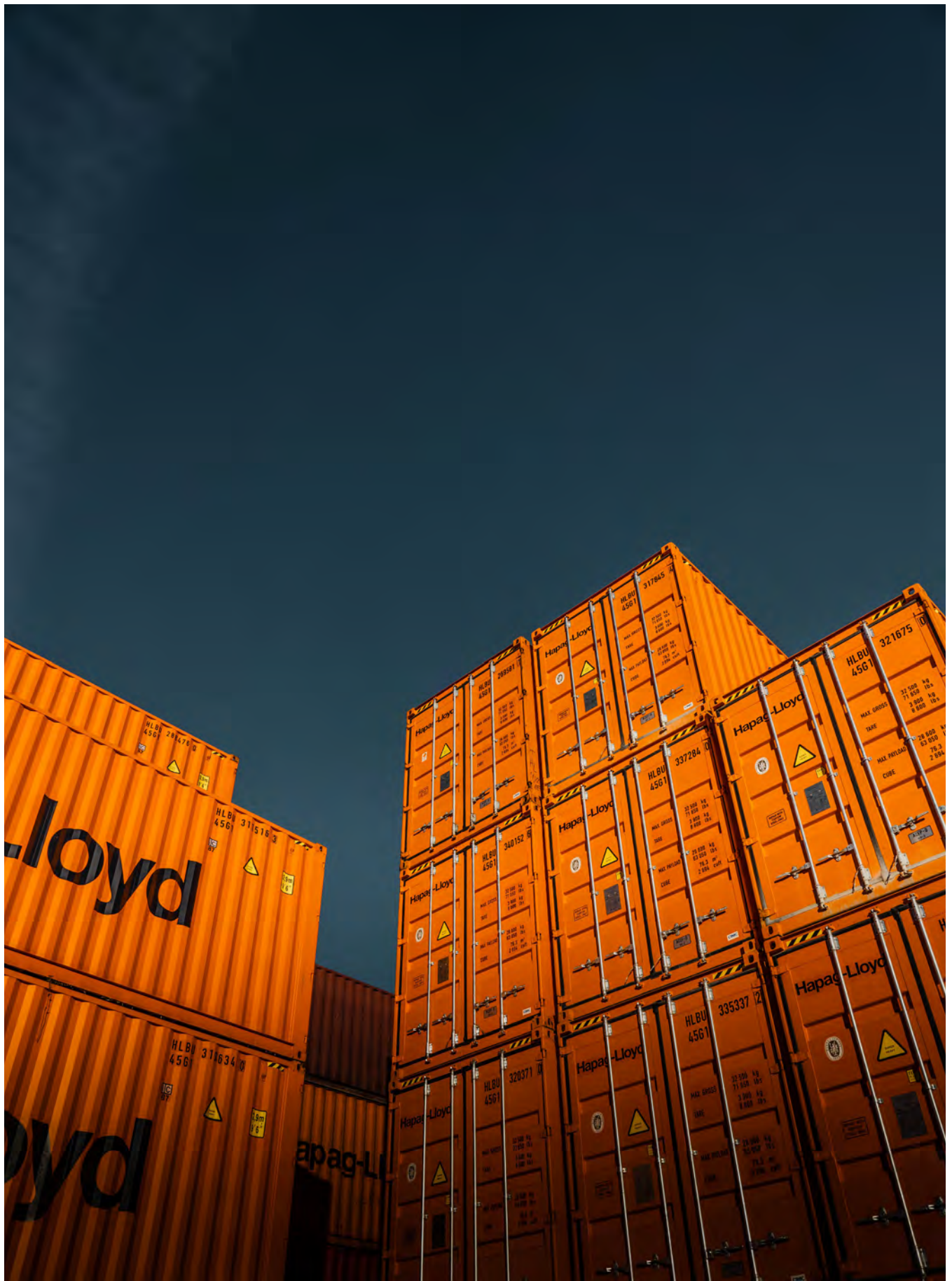
## Telecommunication Equipment: A Continued Legacy With China

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The bipartisan support in Congress that resulted in the restrictions on US government purchasing of equipment and services from Huawei and other Chinese-owned telecommunications companies, as demonstrated in Section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 and its implementing regulations, is likely to outlive the Trump Administration’s broader emphasis on China and continue in the Biden Administration under a more multilateral approach. No major changes are expected, but there is much to watch going forward.

### Issues to Watch

- In August 2019, an interim rule went into effect



that prohibited contractors from providing covered telecommunications equipment and services to the government. This restriction was required to flow down to any contractor in the supply chain.

- In August 2020, an [interim rule](#) went into effect that implemented the second part of the restriction on covered telecommunications equipment and services that precludes the government from entering into a contract with contractors that “use” such equipment or services.
- Effectively, the August 2020 rule precludes prime contractors from using such equipment or services anywhere in their business, even if unrelated to government contracts.
- In October 2020, a separate interim rule went into effect that requires contractors to represent annually in the System for Award Management (SAM) whether they use covered telecommunications equipment or services or any equipment, system, or service that uses covered telecommunications equipment or services. This rule provided further clarity for contractors, however, by providing that **parties subject to the restrictions would be listed as excluded in SAM.**

### What to Know

- Contractors throughout both government and non-government supply chains have been bombarded with requests for certification of compliance, and it is expected that this trend will continue.
- A number of agencies, including the Department of Defense (DoD), sought waivers and delayed implementation of the Section 889 restrictions. As we grow further removed from the implementation deadlines, broader implementation and enforcement is expected in the coming months and years.
- Recent DoD activity in adding parties to a list of “Communist Chinese military companies” pursuant to Section 1237 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 suggests these entities may be added to the covered telecommunications equipment and services excluded entity list in the future based on the overlapping designation process that mirrors that under Section 889.
- The Biden Administration is not expected to depart from these restrictions but may work more closely with European and NATO allies in crafting specifics of implementation.

### How We Can Help

To discuss whether your company is in compliance with the Section 889 restrictions, how you may accurately represent compliance, and how changes by the Biden Administration may impact your business, please contact a member of the Arent Fox team.

## Personal Data & Technology: New Frontiers in Global Competition

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President Trump issued a 2019 [Executive Order](#) (EO) on Information and Communications Technology and Services (ICTS) supply chain, established a brand new interagency framework for technology supply chain screening and took [actions against Chinese investment](#) in some US technology companies that handle personal data.

### Supply Chain & Personal Data Related Actions

- The Department of Commerce (DOC) issued vague and far-reaching proposed rules in November 2019 to implement the ICTS supply chain EO. When they are adopted, the rules could result in the imposition of what are essentially **national security import controls**, covering a wide array of hardware, software, and associated services. As of the time of this writing, no interim or final rule has been issued.
- President Trump prohibited a Chinese company’s investment in US-based TikTok, ordered the Chinese company to divest from TikTok and prohibited unspecified transactions related to the TikTok and WeChat apps.
- The DOC identified transactions that would be prohibited under the WeChat and TikTok EOs and were promptly enjoined by federal courts from implementing the restrictions. Appeals from these decisions are outstanding in the Third, Ninth, and DC Circuits.
- The Biden Administration will have the opportunity either to defend these appeals, not to defend them, and thereby ensure the death of the DOC’s implementation of the TikTok and WeChat EOs, or reverse Trump’s EOs.

### What to Know

- The ICTS supply chain EO is a part of the legislative and administrative measures the US Government has taken to limit (and perhaps end altogether) the proliferation of Chinese-origin telecommunications technology in US infrastructure. We expect that the

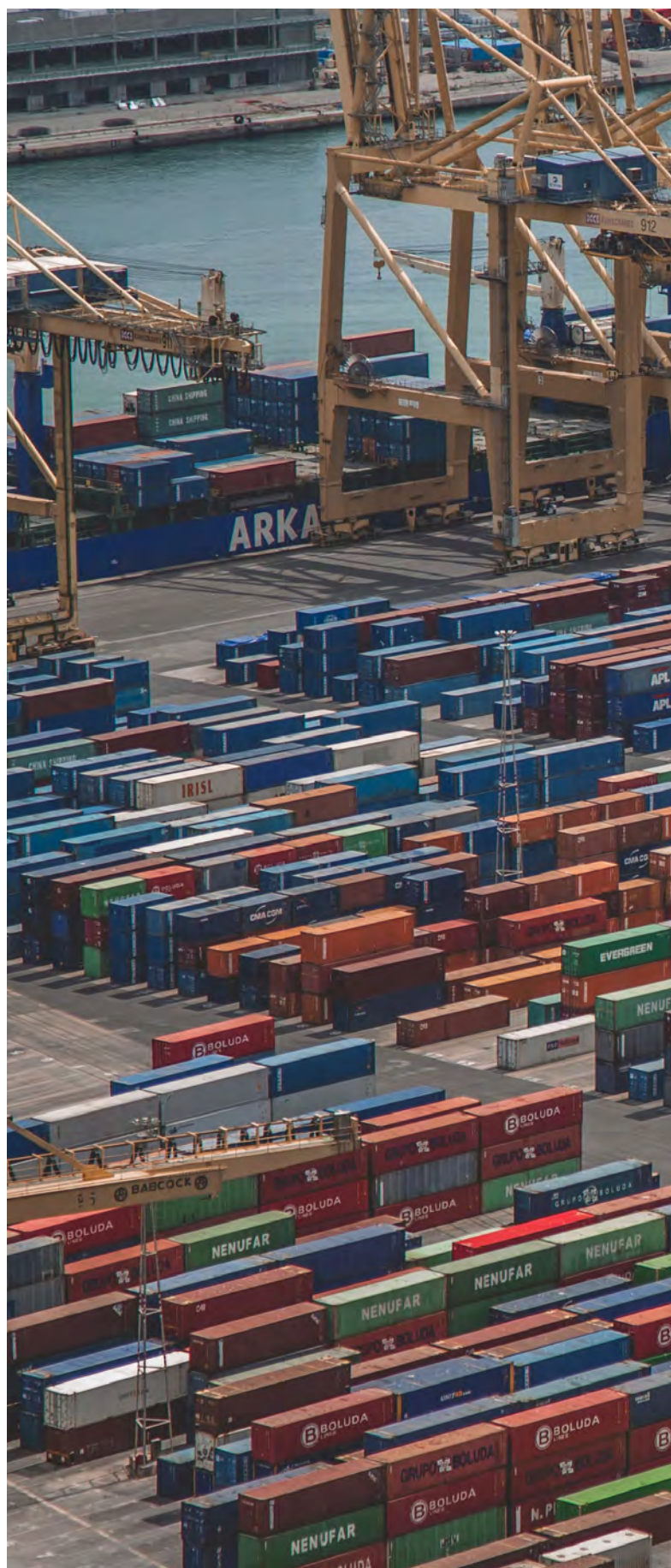


Biden Administration will review the draft regulation and will ultimately publish a final rule that may look different from the latest Trump Administration draft.

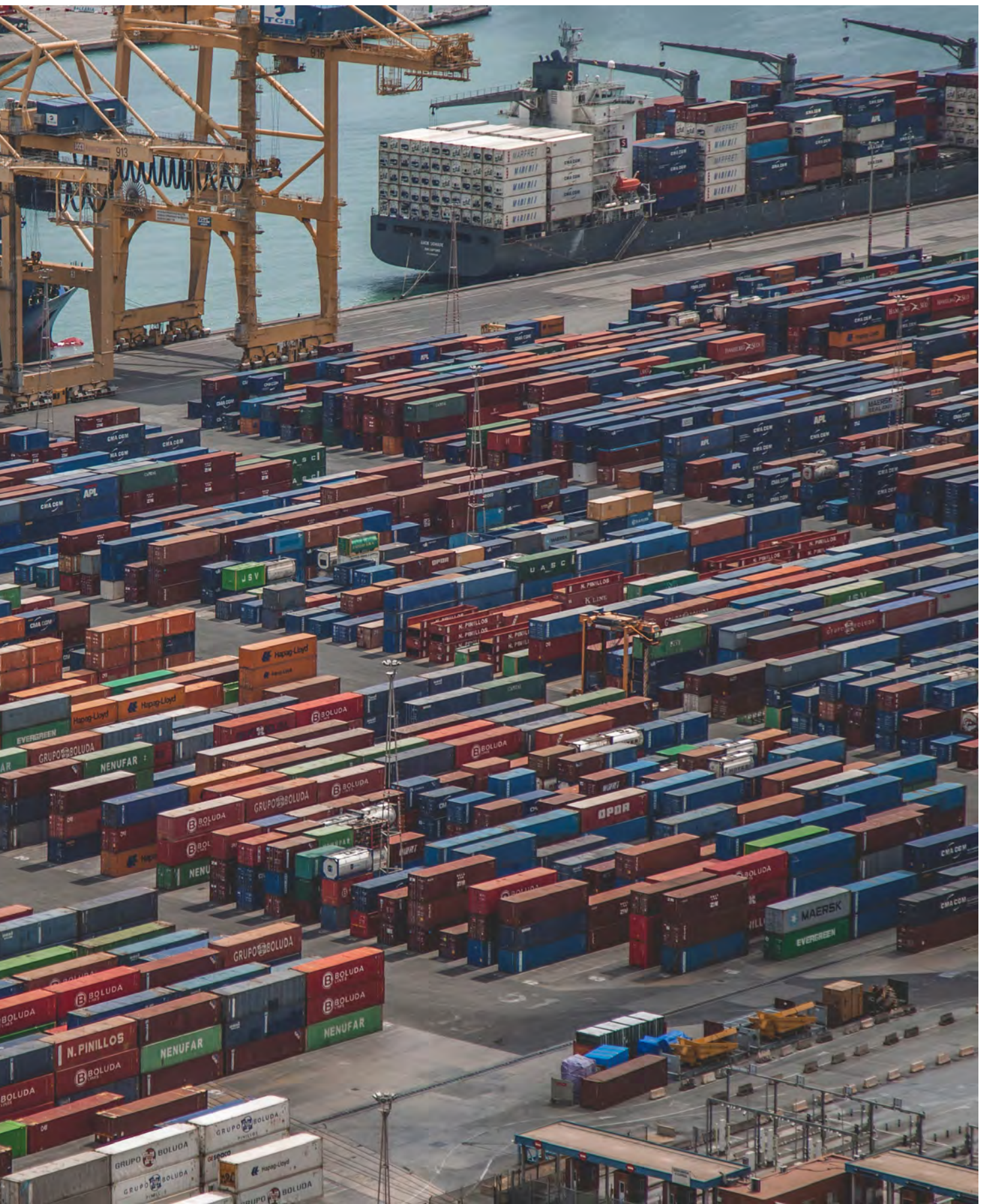
- We expect the Biden Administration will cease aggressively defending the TikTok and WeChat appeals and reevaluate what to do with the DOC prohibitions, and possibly also the TikTok and WeChat EOs, in light of judicial concerns expressed to date.
- Phasing out of domestic US deployment of Chinese telecom technology has bipartisan support in Congress and is expected to continue under the Biden Administration.
- The Committee on Foreign Investment in the United States will continue to review investment in US companies that collect personal data.

### How We Can Help

To discuss what impact the ICTS supply chain and the actions against TikTok and WeChat will have on your business, please contact a member of the Arent Fox team. 🇺🇸



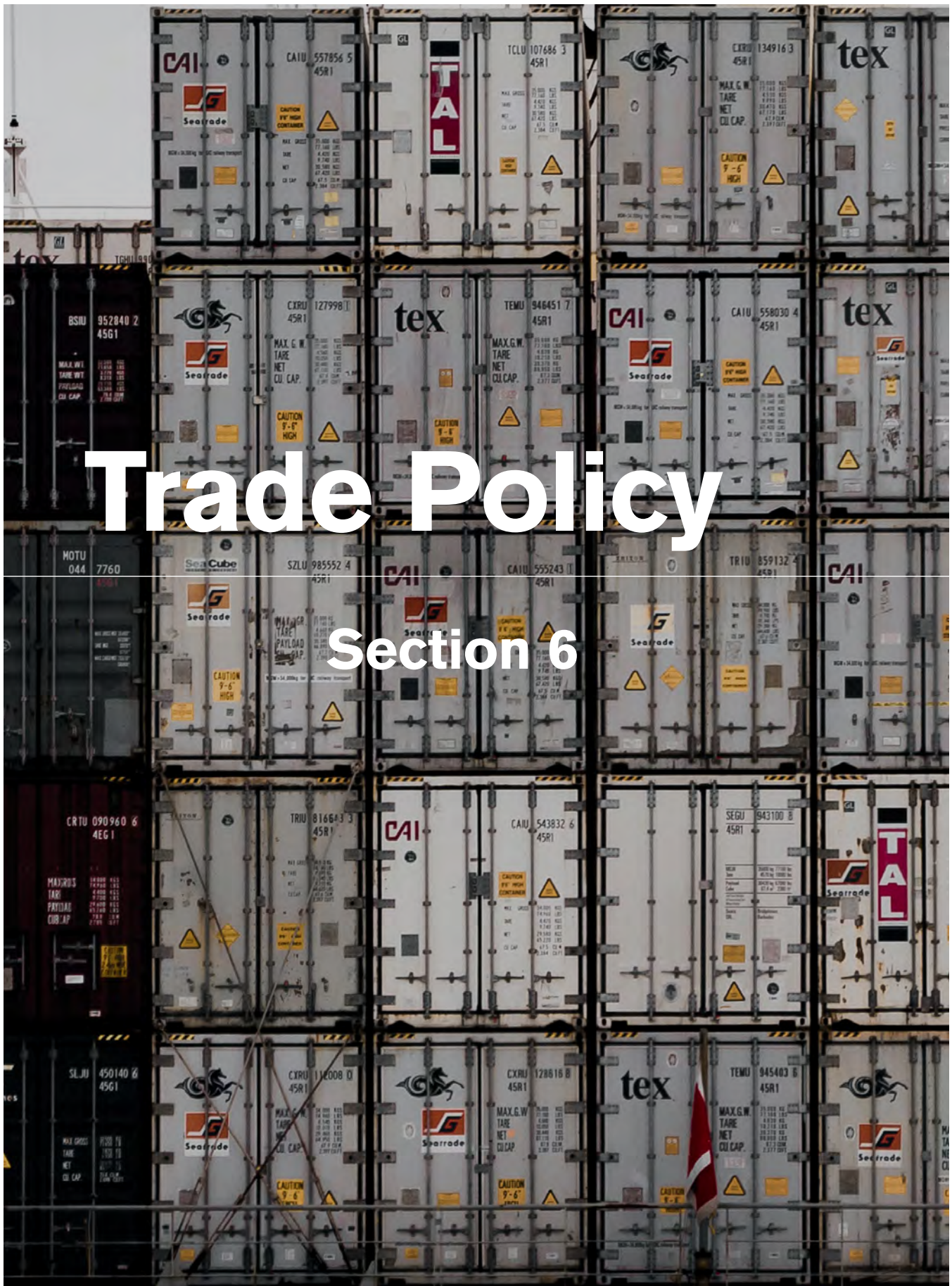






# Trade Policy

## Section 6



# GSP Reauthorization Up in the Air

Our final section returns to trade policy with three narrower but equally important articles – the first in regard to US renewal of GSP benefits and the tension between the Biden administration’s promise to protect US workers while achieving climate goals. The last article, “Make Buy America Real - Biden To Seek Stronger Qualifying Rules,” is a useful reminder of where we started this project: US international trade policy will reflect the priorities of an Administration taking office in a time of domestic economic turmoil.

## GSP Reauthorization Up in the Air

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The Generalized System of Preferences (GSP) program expired on December 31, 2020. Congress could renew it in 2021, although the retroactivity of the renewal would need to be specifically addressed in the renewal. The roles of the United States Trade Representative (USTR) and the president may also impact GSP benefits.

### GSP Benefits and Renewal Status

- GSP provides nonreciprocal, duty-free tariff treatment to certain products imported from qualifying developing countries. It is the largest and oldest US trade preference program, allowing duty-free entry into the US for over 3,500 products from 119 designated beneficiary countries.
- **GSP Reauthorization Bill.** There is a debate in Congress on whether to reauthorize the program “as is” or revise the GSP eligibility criteria to include environmental and labor conditions. Because these differences could not be worked out in time, the program has lapsed temporarily. This is not the first temporary lapse in benefits and Congress has typically granted retroactive relief in these situations.
- **USTR Eligibility Reviews.** The USTR conducts eligibility reviews of GSP beneficiary countries on its own initiation or based on stakeholder petitions.

As a result of these reviews, the USTR suspended GSP benefits for **\$817 million in US imports** from Thailand based on lack of market access for US pork products, effective December 30, 2020. USTR also concluded reviews for Georgia, Uzbekistan, Indonesia, and Laos with no changes in status, and opened two new GSP reviews for Eritrea and Zimbabwe-based on worker rights concerns.

- **Presidential Authority.** The president may suspend, terminate, withdraw, or limit a country’s GSP status through a 60-day prior notice to Congress based upon a country’s lack of compliance with one or more of the GSP statute’s eligibility requirements. Such changes to GSP country eligibility or product coverage are made at the discretion of the president, drawing on the advice of the International Trade Commission (ITC) and the USTR.

### What to Know

- Although the GSP program expired on December 31, 2020, Congressional practice has been to extend the program retroactively from the expiration date, allowing refunds on the duties incurred during the program’s lapse.
- USTR GSP eligibility reviews for Eritrea and Zimbabwe are ongoing, and this could affect the duty-free status of certain imports as was the case with Thailand.



- Last year, President Trump terminated India's eligibility for GSP for failure to provide equitable and reasonable market access, and the question now is whether the Biden administration will look to leverage this into a trade deal with India.

### How We Can Help

If you would like to learn more about the GSP program or have imports that may be impacted by the lapse in the program, the Arent Fox International Trade Team is available to assist.

## A Hidden Cost of Curbing Carbon Emissions - Countervailing Duties

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The US Department of Commerce (DOC) recently issued a pair of final decisions finding the European Union's Emissions Trading System to confer countervailable subsidies to companies who receive more than a baseline level of carbon credits. These decisions add to a line of decisions in which governmental programs designed and proven to curb greenhouse gas emissions have been found to confer countervailable subsidies.

- Like most cap-and-trade systems, the ETS awards a level of CO<sub>2</sub> emission credits free of charge based on industry or sector-specific emission profiles. Free credits prime the trading market and enable political support to initiate the programs.
- For the ETS, the base-line level of free credits equals 44.2% of the emissions for the most efficient installation in an industry or economic sector.
- Companies or installations deemed to be at the greatest risk of "carbon leakage" are awarded credits equal to 100% of the emissions from the most efficient installation in their sector. This group consists of installations and industries for which the cost of compliance with the base-line standard would likely cause production to shift to countries with less demanding or no emissions standards.
- The EU's list of industries and activities presenting a significant risk of carbon leakage includes: steel, aluminum, cement, mining, textiles, and a wide array of manufacturing. The current significant carbon leakage list is [here](#).

### What to Know

- The DOC ruled that the widely available base-line level of free credits (the 44.2% level) is not countervailable. But the **additional credits**

**provided to companies on the list of industries and activities posing a significant risk of carbon leakage were found to be specific and to confer a countervailable benefit.**

- We expect that the DOC's decision will be appealed and so is not the last word on the issue.
- We also expect to see more decisions applying countervailing duties to programs and incentives designed to limit GHG emissions.
- Companies buying, selling, producing, importing, or exporting manufactured goods should be aware that government incentives to help them convert to greener processes or reduce GHG emissions may raise the specter of offsetting countervailing duties, thereby raising the cost of compliance.
- The current pattern of program-by-program litigation putting **trade interests ahead of environmental concerns** is cumbersome, time and resource-consuming, and inconsistent with the larger public goal of reducing GHG emissions.

### How We Can Help

Arent Fox attorneys have the experience to help navigate DOC's countervailing duty investigations, particularly when the DOC is analyzing new government subsidy programs. If you find that you may be subject to a DOC investigation, please contact your Arent Fox counsel.

## "Make Buy American Real" - Biden To Seek Stronger Qualifying Rules

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President-elect Joe Biden's plan to ensure that future US government purchases are "[Made in all of America](#)" presents new considerations for companies selling to the federal government, particularly those procured from foreign countries. While short on specifics, the plan does present important clues.

### What to Know from the Biden Administration's Plan for Buy American

- The objective will be to "crackdown on waivers to Buy American requirements".
- The plan proposes to "tighten domestic content rules," "require more legitimate US content," and "update the trade rules" on the international stage.

- In short, company executives should be prepared for:
  - Fewer “eligible” products for waivers in US federal procurement opportunities
  - Higher content thresholds to satisfy other exceptions to the Buy American Act (BAA)
  - More scrutiny of products claiming to qualify under the Trade Agreements Act (TAA) waiver exception

### Current Waivers to the BAA

- The longstanding BAA sets specific rules of product origin for government procurement by establishing a preference for US goods and adding an increased cost differential to certain foreign bids.
- To qualify as a US domestic end product, goods must satisfy a certain level of domestic content or qualifying content threshold and be “produced” in the United States.
- Under the TAA, Buy American restrictions for certain products can be waived but these only under already severe conditions.

### How We Can Help

Understanding what the current BAA requires of the international manufacturing chain and how pending rule changes will impact contractual obligations are powerful tools in a highly competitive and complex US procurement industry.

Our team at Arent Fox can work with company executives to determine whether the current BAA requirements apply to products destined to US federal procurement markets. Our advice is able to cover analysis regarding BAA exemptions (waivers) and a strategic submission of waiver requests for consideration by US federal agencies. 🇺🇸





## About Us

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Founded in 1942, Arent Fox is internationally recognized in core practice areas where business and the law intersect. With more than 450 lawyers and professionals, the firm provides strategic legal counsel and multidisciplinary solutions to a global roster of corporations, governments, and trade associations.

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