

## CLIENT ALERT

### The Month in International Trade – November 2018

Dec.10.2018

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*This news bulletin is provided by the International Trade Group of Crowell & Moring. If you have questions or need assistance on trade law matters, please contact [Jeff Snyder](#) or any member of the [International Trade Group](#).*

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#### **TOP TRADE DEVELOPMENTS**

##### **Latest U.S. Trade Actions/Tariffs and Other Countries Retaliatory Measures**

Finding it hard to stay on top of the latest in tariff increases?

[Please click here anytime](#) for the latest actions, covered products rate increases, and effective dates.

*For more information, contact: Dan Cannistra, Robert Holleyman, Bob LaFrankie, Spencer Toubia, Ru Xiao-Graham, Cherie Walterman*

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##### **Stage Set for USMCA Debate in 2019**

On December 1, a day after signing the new U.S.-Mexico Canada Agreement (USMCA), President Trump suggested to the press that he would formally notify Canada and Mexico of U.S. withdrawal from the existing NAFTA, in order to pressure Congress to pass USMCA in 2019.

Meanwhile, on December 6, U.S. Trade Representative Robert Lighthizer met with Rep. Nancy Pelosi (D-California), House Democratic Leader and expected Speaker of the House for the 116th Congress, on USMCA. Lighthizer had expressed the wish during the USMCA negotiations that the final agreement would attract substantial bipartisan support. Following the meeting, Pelosi noted a number of positive aspects of the new agreement, but concluded that the USMCA lacked “real enforcement on the labor and environmental protection[s].” Other House Democrats, including Rep. Richard Neal (D-Massachusetts) and Rep. Bill Pascrell, Jr. (D-New Jersey), expected to be chairs of the House Ways and Means Committee and the Ways and Means Trade Subcommittee respectively, have made similar statements.

These events set the stage for the debate in Congress over the fate of the newly signed USMCA in 2019.

While some Republicans have expressed concerns about the agreement, USMCA will likely face a greater challenge in the Democratic-majority House than in the Republican Senate. Despite some changes to NAFTA that may appeal to Democrats (such as limitations on investor-state dispute settlement and a wage-based rule of origin for autos), we expect the Democrats to seek additional concessions from the administration, in particular on the enforceability of USMCA’s labor and environmental provisions.

Depending on the scope and magnitude of the changes sought by Democrats, any concessions might not require formally reopening negotiations with Canada and Mexico, which would likely delay USMCA passage. Democrats could seek to include any such changes in the implementing legislation or through side-letters or other types of political agreements with Mexico and Canada. The Democrats led by Pelosi have struck an agreement on labor and trade with Republicans in the past—the so called “May 10” Agreement in 2007 with the George W. Bush Administration that added a labor provision to pending and future U.S. trade agreements.

If needed in renewed talks with Canada and Mexico, the United States could use another point of leverage—prior to the USMCA entering into force, the President must certify both Canada and Mexico have taken the necessary domestic steps to comply with their respective Free Trade Agreement (FTA) commitments on “day one” of the agreement, according to Trade Promotion Authority (TPA) procedures. Accordingly, implementation of the agreement can be delayed until all such steps have been taken.

If domestic disagreements over USMCA escalate, however, and lawmakers are not able to reach a resolution with the Trump Administration, we may see the President continue to raise the possibility of U.S. withdrawal from NAFTA. As we’ve previously [noted](#), the President initiating NAFTA withdrawal would likely come with significant obstacles, both legal and political, and there is significant uncertainty over how Congress and in particular the Democrats will react. Congress would have a number of tools to oppose the President’s unilateral withdrawal from NAFTA—the question is if it would have the will to use them.

*For more information, contact: Melissa Morris, Evan Yu*

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## **U.S. and China Agree to 90-Day Trade Truce to Negotiate “Structural” Trade Issues**

On December 1, President Trump and President Xi reached agreement on the margins of the G20 in Buenos Aires to delay an increase on the third, \$200 billion tranche of Section 301-related tariffs from 10 percent to 25 percent, which was originally set to take place January 1. According to the White House, the two sides will now begin a 90-day period of talks to resolve

“structural” issues around IP theft, non-tariff barriers, and forced technology transfer. The White House said the tariff increase would be implemented at the end of the 90-day period if no agreement is reached.

According to the White House, China has also agreed to “purchase a not yet agreed upon, but very substantial amount of agricultural, energy, industrial and other product from the United States to reduce the trade imbalance.” Soybeans, other agricultural products, and energy products were reportedly included. China has not yet indicated whether this commitment will take the form of a policy change (such as a reduction in retaliatory tariffs on U.S. agriculture exports) or whether it will be left up to private-sector entities (as when EU Commission President Jean-Claude Juncker committed to purchasing U.S. soybeans as part of its agreement last July).

Following the meeting, President Trump said China also agreed to reduce 40 percent tariffs (25 percent of which is retaliation for U.S. tariffs) on U.S. automobile exports, though China has not confirmed that it will do so.

The latest agreement is a small, but positive step toward repairing the U.S.-China trade relationship. It likely postpones the risk of a fourth tranche of tariffs on another \$267 billion in Chinese imports, which the Trump administration has previously threatened to impose, beyond the 90-day period. President Trump’s appointment of U.S. Trade Representative (USTR) Robert Lighthizer, who managed to conclude the renegotiation of NAFTA, as the lead for the 90-day talks suggests that serious negotiations will take place.

However, the gulf between what the U.S. is purportedly seeking—structural and meaningful economic reform—and what China seems currently prepared to offer remains wide. Much will depend on the Trump administration’s level of ambition. Companies with interest in China should ensure that the U.S. government is aware of opportunities to address their trade issues in China as well as the specific business risks arising from the current trade conflict (in particular any risks to U.S. jobs and economic growth).

*For more information, contact: Melissa Morris, Evan Yu*

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## **APEC Chairs Statements Released**

The Chair’s Statements of the Asia Pacific Economic Cooperation (APEC) Economic Leaders Meeting (AELM) and APEC Ministerial Meeting (AMM) were released last week, after concluding on 18 November and 15 November respectively without consensus statements. Disagreements were primarily between the United States and China and revolved around a narrow set of issues, notably how the multilateral trading system should be characterized, with the United States pressing for reform and others advocating that the institution be strengthened. These differing views will continue to play front and center in multilateral settings, most immediately the G20 Summit on 30 November – 1 December in Buenos Aires.

Due to these differing views, there is growing recognition that trade liberalizing platforms such as APEC are now more important than ever. APEC brings together 21 economies that collectively represent 3 billion consumers, half of global trade and 60 percent of global GDP. U.S. Vice President Pence remarked in his speech at the APEC CEO summit that President Trump sent him there to demonstrate the United States’ “continued commitment to APEC and its mission of promoting open markets, free, fair and reciprocal trade.” To support continued U.S. engagement in APEC, Vice President Pence announced a five-year technical

assistance program with an initial tranche of \$9 million in U.S. funding to build capacity in APEC economies to adopt policies that promote fair trade, open markets for U.S. business, and increase economic growth.

Indeed, the Chair's Statements of the AELM and AMM that were released a few days later captured the prevailing view among all 21 APEC member economies in a number of areas of practical and immediate importance to companies. The statements included important commitments to spur innovation in the digital economy, promote health trade, and drive regulatory coherence and convergence in the region, among other areas.

To learn more about notable highlights from the statements, [please see Crowell & Moring's Client Alert](#).

*For more information, contact: Robert Holleyman, John Brew, Ryan MacFarlane, Patricia Wu, Clark Jennings, Andrew Blasi, Michael Schmitz*

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## **European Commission Announces New Framework for Foreign Direct Investment Screening**

On Tuesday, November 20, the European Commission announced a political agreement with EU member states on a new framework for foreign direct investment (FDI) screening. The legal text for the framework still needs to be finalized and released. The announcement can be found [here](#).

According to the Commission, the new framework will provide a mechanism for the Commission and EU member states to request information and raise concerns related to FDI screening, without restricting the ultimate authority of an individual EU member state to determine who can invest within its borders. The framework will also provide for “short business-friendly deadlines” and confidentiality requirements for EU members’ FDI screening regimes and will permit the Commission to issue opinions on FDI cases involving several Member states or EU-wide interests.

Currently only 12 of the 28 EU member states—Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain, and the UK—have formal FDI screening systems in place. The new framework could provide a basis for the remaining EU members to develop such systems.

After the legal text is finalized, the framework still needs to be submitted for formal approval by the European Parliament and the Council of the European Union. Separately, the Commission is still conducting an in-depth technical study on current FDI flows related to strategic sectors and technologies for expected release before the end of the year.

*For more information, contact: Robert Holleyman, Addie Cliffe, Evan Yu*

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## **Identifying and Defining “Emerging Technologies” Subject to Control for Export and Foreign Investment**

On November 19, 2018, the Bureau of Industry and Security (BIS) published an [advance notice of proposed rulemaking](#) (ANPRM) seeking comments on implementation of Section 1758 of the Export Control Reform Act of 2018. This section requires Commerce, in consultation with DoD and other CFIUS member agencies, to define “emerging technologies” sufficiently

significant to U.S. national security interests to impose some level of export controls over the technology and potentially to trigger mandatory declarations of any foreign investment in companies involved in the development and production of such technology.

This ANPRM identifies certain broad categories of emerging technologies (largely consistent with technologies identified in the [2018 DIUx China Report](#)) and seeks recommendations on defining specific technologies within these categories or others to control considering such factors as on the status of the technology development in the U.S. and other countries and the potential impact – pro or con – of such controls on U.S. technological superiority.

Comments are due by December 19, 2018; BIS will issue a separate ANPRM for “foundational technologies.”

*For more information, contact: Alan W.H. Gourley, Addie Cliffe, Jana del-Cerro*

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## **CROWELL & MORING SPEAKS**

[John Brew](#) will be a speaker at The International Surface Event in Las Vegas, NV on January 22-25, 2019. He will be discussing “The Impact of International Trade on the Surface Industry”. John will examine the current state of affairs on how government actions are impacting the global supply chains of the surface industry, including a review of the US dispute with China under Section 301, unfair trade proceedings, the USMCA, and other free trade agreements.

[Chris Monahan](#) will be speaking at the International Compliance Professionals Association’s 2019 Annual Conference on March 25, 2019 in Orlando, FL. His topic is “Anatomy of an Internal Investigation.”

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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