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COMMENTARY

Potential U.S. Trade and Foreign Direct Investment Ramifications of the Trump Election

According to public statements from President Trump, reshaping U.S. trade policy will be a high priority for the Trump Administration. During the campaign, President Trump announced his intention to, among other things: (i) withdraw from the Trans-Pacific Partnership ("TPP"); (ii) renegotiate terms of the North American Free Trade Agreement ("NAFTA"), and if NAFTA partners do not agree to participate in renegotiations, submit notice that the United States intends to withdraw from NAFTA; (iii) pursue bilateral trade deals; and (iv) end unfair trade practices. This *Commentary* explores whether and to what extent the Trump Administration may be able to accomplish President Trump's U.S. trade policy goals and the associated implications for U.S. international trade and foreign direct investment review.

Trade Agreements

TPP. During his campaign, President Trump indicated that he would issue a notification of intent to withdraw from the TPP,[1] which was signed in 2015 by the United States and 11 other nations, but has not yet been approved by the U.S. Congress. In a June 2016 campaign speech, Trump stated that, "The TPP would be the death blow for American manufacturing … It would make it easier for our trading competitors to ship cheap subsidized goods into U.S. markets—while allowing foreign countries to continue putting barriers in front of our exports." On January 23, 2017, President Trump signed a memorandum withdrawing the United States from the TPP.

By its terms, the TPP would enter into force 60 days after all 12 member countries confirm domestic ratification. If all 12 countries do not confirm domestic ratification by February 4, 2018, the TPP would take effect once at least six original signatories that account for at least 85 percent of the combined gross domestic product ("GDP") of the original signatories ratify the agreement. The United States represents approximately 62 percent of the aggregate GDP of the TPP member countries. As such, it would be impossible for the TPP, in its current form, to enter into force without domestic ratification by the United States.

There could be further discussions regarding a trade agreement with one or more of the TPP member countries. With Trade Promotion Authority, which was passed in 2015 and will be available until 2018, the President can send trade agreements to Congress for an up or down vote. This authority makes it easier for trade agreements to be passed by Congress, since members of Congress cannot amend any provisions of the agreements.

NAFTA. NAFTA is a free trade agreement between Canada, Mexico, and the United States that became effective on January 1, 1994. NAFTA was the most comprehensive free trade agreement negotiated at the time and contained several key provisions, including provisions relating to removal of trade barriers, services trade, foreign investment, intellectual property rights protection, government procurement, and dispute resolution.

President Trump has stated that he will notify Canada and Mexico that the United States intends to immediately renegotiate the terms of NAFTA to "get a better deal" for U.S. workers.[2] During the campaign, Trump described NAFTA as "the worst trade deal ever signed" and said that the agreement has and continues to kill American jobs. Under Article 2202 of NAFTA, the parties are permitted to renegotiate NAFTA and amend or add provisions. Both Canada and Mexico have stated that they would renegotiate NAFTA, and some renegotiations have occurred as part of the TPP, to which Canada, Mexico, and the United States are signatories. Should it occur, the renegotiation process would be complex, as the respective legislative bodies in each country also would need to approve amendments to the agreement.

It is uncertain which of the 20 chapters of NAFTA the countries would renegotiate. The likeliest may be Chapter Three, which focuses on duties, non-dutiable barriers, rules of origin, and customs procedures. The Canadian and Mexican governments could use the opportunity to seek to reopen negotiations in areas of importance to them, including the alternative dispute resolutions mechanisms available under NAFTA. After a renegotiation, the legislative amendment process in each country could be lengthy and burdensome.

President Trump has stated that if Canada and Mexico do not agree to a renegotiation, the United States will submit notice that it intends to withdraw from NAFTA. The Trump Administration would have the authority to do so under the President's power over foreign affairs and Article 2205 of NAFTA, which states: "A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties."

Withdrawal from NAFTA would not, by itself, increase U.S. tariffs on imports from Canada and Mexico, which, prior to NAFTA, averaged approximately 4.3 percent on imports from Mexico.[3] Instead, raising tariffs on Canadian or Mexican goods following a U.S. withdrawal from NAFTA would require a presidential proclamation. Past proclamations have lowered duties. However, by issuing a new proclamation, or by revoking President Clinton's earlier proclamation eliminating duties upon implementation of NAFTA,[4] President Trump could increase tariffs pursuant to Section 201 of the NAFTA Implementation Act, which authorizes the President to, following consultations with Congress, proclaim additional duties as necessary and appropriate to maintain the general level of reciprocal concessions with Canada and Mexico.[5] Any such actions could face Congressional criticism and court challenges by affected parties. Given that the United States is a member of the World Trade Organization ("WTO") and, therefore, is bound by the Most Favored Nation ("MFN") clauses under the WTO agreements, the Trump Administration would be required to apply the preferential rates set forth in the Harmonized Tariff Schedule, the rejection of which could result in a complaint by Canada or Mexico before the WTO.

TTIP. Although President Trump has not publicly discussed the Transatlantic Trade and Investment Partnership ("TTIP"), which is being negotiated with the European Union, as much as the TPP, the future of negotiations for TTIP also are uncertain given President Trump's statements that he would review and renegotiate all trade agreements. Prospects of a successful conclusion of the negotiations, which have already been fraught with opposition from several actors, seem increasingly unlikely in the foreseeable future. In that regard, following the election, the EU Commissioner for Trade stated that the TTIP negotiations would be placed "in the freezer" for "quite some time."

Bilateral Trade Agreements. Although, as noted above, the Trump Administration's support for multilateral trade agreements (i.e., agreements involving the United States and more than one other country) may be uncertain, President Trump has stated that he will pursue bilateral trade agreements (i.e., agreements between the United States and one other country).[6] For example, if the United States withdraws from NAFTA, the Trump Administration could seek bilateral trade agreements with Canada and/or Mexico. In addition, in the wake of a British exit from the European Union, the Trump Administration may pursue a bilateral trade agreement between the United States and the United Kingdom.

Trade Remedies and Tariffs

President Trump has stated that he will direct the Secretary of Commerce and U.S. Trade Representative ("USTR") to identify all foreign trading abuses that unfairly affect American workers and direct them to use every tool under American and international law to end those abuses immediately.[7] President Trump also has stated that he will use every presidential power to remedy trade disputes, including the application of tariffs,[8] to combat unfair trade. It appears that President Trump would have the authority to use trade remedies without Congressional approval under one or more legal authorities summarized below, certain of which President Trump has specifically indicated he would use. That said, any such actions could face Congressional criticism and court challenges by adversely affected parties, as well as action by affected trading partners before the WTO.

- Section 122 of the Trade Act of 1974 ("Trade Act") authorizes the President to handle "large and serious United States balance-of-payments deficits" by imposing temporary import surcharges up to 15 percent, temporary quotas, or both on imported merchandise. Such surcharges, which could remain in effect only for 150 days unless extended by Congress, would be imposed in addition to existing U.S. duties.

- Section 125 of the Trade Act gives the President authority to raise U.S. duties or other import restrictions after terminating trade agreements to which the United States is a party, such as NAFTA. However, any such increase in duties would be limited to a 20–50 percent increase on tariffs in place on January 1, 1975. Accordingly, any tariff increases pursuant to this section of the statute likely would be minimal, and President Trump may then rely on other legal authority to impose duties above these levels.

- Section 301 of the Trade Act authorizes USTR, at the direction of the President, to respond to unfair trade practices. Under this authority, the President can direct USTR to impose higher tariffs on imports in response to, for example, violations of trade agreements or unreasonable or discriminatory practices by foreign countries that burden or restrict U.S. commerce.

- Section 232(b) of the Trade Expansion Act of 1962 authorizes the U.S. Department of Commerce to investigate whether imports pose a threat to U.S. national security. Based on the results of any such investigation, the President can negotiate agreements to limit or restrict imports or take other actions deemed necessary to adjust imports to no longer threaten or impair U.S. national security.

- The International Emergency Economic Powers Act ("IEEPA") provides the President with broad authority to deal with any "unusual and extraordinary threat, which has as its source in whole or in substantial part outside the United States, to the national security, foreign policy, or economy of the United States." Although the President historically has used this power to maintain the U.S. export control system and issue economic sanctions, IEEPA authority is not necessarily limited to such actions. While the President is required to consult with and submit reports to Congress, the statute does not require Congressional approval for actions taken under IEEPA.

- Although certain conditions would need to be satisfied and the typical administrative processes would need to be completed, President Trump has stated that he will instruct USTR to bring (i.e., self-initiate) trade cases against China, both in the United States and at the WTO.[9] In particular, the Trump Administration could, for example, seek to impose antidumping or countervailing duties on imports or impose safeguard measures to temporarily restrict imports if a domestic industry is seriously injured or threatened with serious injury caused by a surge in imports. To impose, for example, antidumping duties, the U.S. government would need to prove, among other things, that products are being sold in the United States at less than fair value and are causing material injury or threat of material injury to a U.S. industry.

President Trump also said he would direct the U.S. Secretary of the Treasury to label China a "currency manipulator." As he argued in a November 2015 *Wall Street Journal* op-ed, "[e]conomists estimate that the yuan is undervalued anywhere from 15% to 40%. Through manipulation of the yuan, the Chinese government has been able to tip the trade balance in their direction by imposing a de facto tariff on all imported goods." Earlier this year President Obama signed the Trade Facilitation and Trade Enforcement Act, which included certain provisions addressing currency manipulation. The statute requires: (i) increased government monitoring and reporting on possible currency manipulation and the establishment of a nine-member advisory committee to counsel the U.S. Department of the Treasury on currency issues; and (ii) enhanced bilateral engagement with countries labeled as currency manipulators with certain steps to be taken if offending countries do not initiate remedial action within one year. An October 2016 report from the U.S. Department of the Treasury stopped short of naming China a currency manipulator but kept China on the watch list for manipulation activities.

Under the Trump Administration, the U.S. government could treat currency manipulation as a subsidy that would be countervailable under U.S. trade remedies law. This could benefit certain U.S. manufacturers but could also result in an adverse effect on entities involved in exporting goods from China to the United States. The consistency with WTO law of treating currency manipulation as a countervailable subsidy is contested by some, including China, which may react to such action by initiating a WTO dispute against the United States.

Foreign Direct Investment Review

A recurring theme of President Trump's campaign was that the United States' trading partners, particularly China, have taken advantage of the United States in trade. A significant area of trade involves foreign direct investment in the United States. Indeed, Chinese companies have led a "blockbuster year of dealmaking in 2016,"[10] tripling the amount spent on acquisitions during the same period last year, with the bulk of the money being spent in the United States.

China's level of investment in the United States, along with a perceived targeting of certain industries,[11] has led to increased scrutiny by the Committee on Foreign Investment in the United States ("CFIUS"),[12] an interagency committee authorized to review transactions where a foreign person will acquire control over a U.S. business that raise national security or critical infrastructure concerns. Under the Trump Administration, it is conceivable—though far from certain—that CFIUS could expand the scope of reviewable transactions by taking a broader view of national security or critical infrastructure. In addition, CFIUS could subject transactions to stricter scrutiny, resulting in more mitigation or, potentially, blocked transactions.

As the Trump Administration begins to articulate its views on these issues, we will monitor other potentially related developments in this area, certain of which are described in the bullet points below.

- A November 16, 2016, report to Congress from the U.S.-China Economic and Security Review Commission, a bipartisan Congressional committee, calls for "Congress to amend the statute authorizing the Committee on Foreign Investment in the United States to bar Chinese state-owned enterprises from acquiring or otherwise gaining effective control of U.S. companies."[13]

- During the campaign, President Trump highlighted his desire for U.S. companies to obtain increased access to China's growing market. As such, the Trump Administration could encourage the introduction of legislation that adopts a recommendation in the 2015 U.S.-China Economic and Security Review Commission report—that the law be amended to condition the provision of market access to Chinese investors in the United States on a reciprocal, sector-by-sector basis to provide a level playing field for U.S. investors in China.[14]

- A bill previously was introduced to allow CFIUS to review a deal "to determine whether such transaction is of net benefit to the United States."[15] This expanded scope of review for foreign direct investment occurs in other countries, such as Canada.

- In July 2016, legislation was introduced to add the U.S. Department of Agriculture to CFIUS following two high-profile transactions involving Chinese acquisitions in the U.S. agricultural industry.

A concern over the scope of the CFIUS review process also underlies the ongoing Government Accountability Office's planned review of the CFIUS process to ensure that CFIUS has the tools needed to do its job. The results of that review also could lead to changes in the law. Should the law change, we will have to wait to see how CFIUS interprets the new law in its reviews. Parties considering transactions by foreign investors should follow these developments closely.

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Certain of the potential actions noted above involve the United States reconsidering or rejecting provisions in multilateral, regional trade agreements, which could lead to renegotiation or to withdrawal. The scope of any renegotiations, and their priority and timetable, are difficult to predict. The attendant uncertainty could affect the risk profile, timing, and content of cross-border investment initiatives or, in the case of NAFTA, the potential viability of current production and supply-chain initiatives. Additionally, several of the potential actions noted above could create legal questions likely to be resolved either domestically or internationally. Jones Day's International Trade and National Security Group will continue to monitor and report on these issues.

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Endnotes

1 *See* Donald J. Trump's 7 Point Plan to Rebuild the American Economy by Fighting for Free Trade.

2 *See id*.

3 Duty rates on imports from Canada differed from duty rates on imports from Mexico prior to NAFTA due to the preexisting free trade agreement between the United States and Canada.

4 Preferential NAFTA tariff rates were originally proclaimed by President Clinton (Proclamation 6641, issued Dec. 15, 1993) pursuant to Section 201 of the NAFTA Implementation Act.

5 *See* Marcus Noland, Gary Clydge Hufbauer, Sherman Robinson, and Tyler Moran, Peterson Institute for International Economics, 16-6, "Assessing Trade Agendas in the US Presidential Campaign," Sept. 2016. In this context, "consultations with Congress" likely would not require Congressional approval. Further, the "general level of reciprocal concessions" is vague and open for interpretation. President-elect Trump could take the position that termination of NAFTA required a return to Most Favored Nation ("MFN") rates on imports from Mexico because, for example, Mexican exports to the United States exceed U.S. exports to Mexico. *See id*.

6 *See* Donald J. Trump's 7 Point Plan to Rebuild the American Economy by Fighting for Free Trade.

7 *See* Donald Trump's Contract with the American Voter.

8 *See* Donald J. Trump's 7 Point Plan to Rebuild the American Economy by Fighting for Free Trade.

9 *See id*.

10 *See* Alex Sherman and Jonathan Browning, "China Pumps the Brakes on U.S. Dealmaking After Trump Win," November 16, 2016.

11 The most recent CFIUS Annual Report to Congress states that "the U.S. Intelligence Community (USIC) believes there may be an effort among foreign governments or companies to acquire U.S. companies involved in research, development, or production of critical technologies for which the United States is a leading producer." *See* Committee on Foreign Investment in the United States, Annual Report to Congress, Report Period: CY 2014.

12 When the acquisition involves a foreign entity that obtains a five percent or greater interest and the U.S. business holds facility security clearances, the transaction would also be reviewed by the Defense Security Service.

13 *See* 2016 Report to Congress of the U.S.-China Economic and Security Review Commission, Executive Summary and Recommendations, One Hundred Fourteenth Congress, Second Session, November 2016.

14 *See* 2015 Report to Congress of the U.S.-China Economic and Security Review Commission, One Hundred Fourteenth Congress, First Session, November 2015.

15 *See* H.R. 5665: Foreign Investment and Economic Security Act of 2016.