US & Multilateral Trade Policy Developments

Japan External Trade Organization

April 2017

Contents

US General Trade Policy Highlights

President Trump Signs Executive Order Calling for Omnibus Report on Significant Trade Deficits

On March 31, 2017, President Trump signed an Executive Order directing the Secretary of Commerce and the United States Trade Representative (USTR) to prepare an "Omnibus Report on Significant Trade Deficits".[1] The report will assess the major causes of the United States' trade deficit with several of its major trading partners, including whether alleged unfair or discriminatory trade practices contribute to US trade deficits. The report also will assess the effects of each trading relationship on the US economy and national security. Though it is not explicitly stated in the Executive Order, the report appears to be aimed at informing future unilateral trade actions by the Trump administration.

The Executive Order requires that the report examine "those foreign trading partners with which the United States had a significant trade deficit in goods in 2016." Secretary of Commerce Wilbur Ross has stated that the following countries will be included in the report: China, Japan, Germany, Mexico, Ireland, Vietnam, Italy, South Korea, Malaysia, India, Thailand, France, Switzerland, Taiwan, Indonesia and Canada. Section 2 of the Executive Order states that the report must:

> "(a) assess the major causes of the trade deficit, including, as applicable, differential tariffs, non-tariff barriers, injurious dumping, injurious government subsidization, intellectual property theft, forced technology transfer, denial of worker rights and labor standards, and any other form of discrimination against the commerce of the United States or other factors contributing to the deficit;
>
> "(b) assess whether the trading partner is, directly or indirectly, imposing unequal burdens on, or unfairly discriminating in fact against, the commerce of the United States by law, regulation, or practice and thereby placing the commerce of the United States at an unfair disadvantage;"
>
> "(c) assess the effects of the trade relationship on the production capacity and strength of the manufacturing and defense industrial bases of the United States;
>
> "(d) assess the effects of the trade relationship on employment and wage growth in the United States; and
>
> "(e) identify imports and trade practices that may be impairing the national security of the United States."

The Executive Order does not specify what actions the Trump administration will take if the report concludes that unfair or discriminatory practices of a major trading partner contribute to US trade deficits, or that certain imports or trade practices may be impairing US national security. However, the language of the Executive Order suggests that the report may be used to inform potential unilateral trade actions under statutes that have rarely been used by recent administrations – namely Section 232 of the Trade Expansion Act of 1962 and Section 301 of the Trade Act of 1974.

Section 232 authorizes the Secretary of Commerce to investigate whether imports of an article "threaten to impair the national security" of the United States.[2] Following such an investigation, the President may impose tariffs or other restrictions in order to "adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security."[3] President Trump's Executive Order seeks information on imports and trade practices that "may be impairing the national security of the United States", indicating that the administration may consider initiating new investigations under Section 232 based on the findings of the omnibus report.

---

[1] The Executive Order is available **here**.

[2] 19 U.S.C. § 1862

[3] 19 U.S.C. § 1862(c)

Section 301 authorizes USTR to impose tariffs or other import restrictions in response to unfair trade practices, including violations of trade agreements or "an act, policy, or practice of a foreign country that is unreasonable or discriminatory and burdens US commerce."[4] President Trump's Executive Order seeks information on foreign government actions that meet similar criteria ("imposing unequal burdens on, or unfairly discriminating in fact against, the commerce of the United States by law, regulation or practice"). This and other recent statements by President Trump's advisors suggest that, based on the findings of the report, the administration may pursue Section 301 challenges to foreign government actions that arguably are not covered by the WTO agreements. US law restricts USTR from taking action under Section 301 in connection with any claims covered by the WTO agreements without first bringing a challenge to the WTO and receiving WTO authorization to impose countermeasures.[5] However, USTR may use Section 301 to challenge discriminatory practices that are not covered by the WTO agreements.[6]

Neither Section 232 nor Section 301 are specifically mentioned in the Executive Order, which describes the purpose of the omnibus report in general terms: "it is essential that policy makers and the persons representing the United States in trade negotiations have access to current and comprehensive information regarding unfair trade practices and the causes of United States trade deficits." However, the information sought by the Executive Order and its use of specific terminology that parallels these statutes implies that the administration may pursue such actions, based on the findings of the omnibus report.

Terminology similar to that included in Sections 2(a) and 2(b) of the Executive Order can also be found in Section 338 of the Tariff Act of 1930, which permits the President to impose duties on imports from foreign countries that have been found to discriminate "against the commerce of the United States…in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country."[7] However, Section 338 has never actually been used to impose duties on imports from a foreign country, and significant legal and practical limitations render its future use unlikely (for example, the provision entrusts the US International Trade Commission with ascertaining whether "discrimination" by a foreign country exists, and any use of Section 338 would almost certainly be met with an immediate WTO challenge and found to be inconsistent with the United States' WTO obligations.)

Pursuant to the Executive Order, USTR and the Commerce Department must submit the omnibus report to the President within 90 days (*i.e.*, by June 29, 2017).

USTR and Department of Commerce Request Public Comments to Inform "Omnibus Review of Significant Trade Deficits"

On April 17, 2017, the US Department of Commerce (DOC) and the Office of the United States Trade Representative (USTR) published a notice in the Federal Register requesting public comments and scheduling a public hearing to inform their forthcoming "Omnibus Report on Significant Trade Deficits".[8] USTR and DOC are preparing the omnibus report pursuant to President Trump's Executive Order of March 31, 2017, and must submit the report to the President by June 29, 2017. The Federal Register notice indicates that, in addition to assessing the "unfair and discriminatory" trade practices described in the Executive Order, the omnibus report will discuss issues such as the impact of US free trade agreements (FTAs) and the perceived shortcomings of WTO dispute settlement.

The Federal Register notice states that the omnibus report will cover the following countries: Canada, China, the European Union, India, Indonesia, Japan, Korea, Malaysia, Mexico, Switzerland, Taiwan, Thailand, and Vietnam.

[4] 19 U.S.C. § 2411

[5] This practice has been codified into US law in the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA).

[6] SAA at 1035.

[7] 19 U.S.C. § 1338 (a)

[8] Click **here** to view the Federal Register notice.

According to the notice, these countries were selected because the United States had a "significant" trade in goods deficit with each of them in 2016.

Information requested by USTR and DOC

The notice requests that interested persons provide written comments and hearing testimony relating to the five "assessments" that will be made in the report. Pursuant to the Executive Order, the report must: (i) assess the major causes of each trade deficit (including tariff and non-tariff barriers and various "unfair" or discriminatory trade practices); (ii) assess whether the trading partner is imposing unequal burdens upon or unfairly discriminating against the commerce of the United States; (iii) assess the effects of the trading relationship on the US manufacturing and defense industrial bases; (iv) assess the effects of the trading relationship on US employment and wage growth; and (v) identify imports and trade practices that may impair US national security.

The notice also invites commenters to address the following questions, some of which indicate new lines of inquiry as compared to the original Executive Order:

- Which bilateral trade deficits are structural or cyclical rather than mercantilist-driven?
- To what extent are non-market economies operating within a market based system create trade imbalances?
- To what extent does chronic industrial overcapacity resulting from government subsidies affect the US trade deficit?
- Have free trade agreements contributed to bilateral trade deficits and how?
- To what extent have weak enforcement and dispute resolution mechanisms inadequately addressed trade issues that result in trade deficits?

Hearing schedule and deadlines

The notice requests that interested persons submit written comments and requests to appear at the public hearing no later than May 10, 2017. Requests to appear at the public hearing must include a written summary of the testimony to be provided. The public hearing will be held on Thursday, May 18, 2017 at the offices of the US Department of Commerce.

Implications

The notice clarifies the report's scope, although its ultimate conclusions and impact remain uncertain. Although several of the notice's specific questions continue to reflect the concerns of some Trump administration officials regarding the harms of foreign trade barriers and the efficacy of US trade agreements, others indicate that more moderate voices in the administration may now be influencing US trade policy. Most notably, the reference to "structural or cyclical" causes of trade deficits appears to reflect the mainstream economic view – rejected by certain Trump trade advisers – that national trade balances are caused by macroeconomic factors (savings and investment) rather than "bad trade deals" or foreign trade barriers. The question on free trade agreements also would permit such discussion. Exporters and governments, particularly those in the identified "trade deficit countries," may therefore find it worthwhile to provide public comments by the May 10 deadline that include detailed data on the trade policies and broader macroeconomic forces that shape their trade balances.

In "Unprecedented" Move, Department of Commerce Finds "Particular Market Situation" in Administrative Review of Oil Country Tubular Goods from Korea

The US Department of Commerce (DOC) on April 10 announced in an "unprecedented" determination that a "particular market situation" exists in the anti-dumping duty administrative review of *Oil Country Tubular Goods (OCTG) from Korea*. This ruling has significant implications because it establishes precedent under which DOC may reject exporters' domestic sales prices as normal value and adjust record input costs that it finds to be "distorted" by

government intervention such as subsidies. DOC also indicated that it may continue to apply the "particular market situation" provision and even expand it to cover other types of allegedly distorting behavior.

The Trade Preferences Extension Act of 2015 (TPEA) amended the US anti-dumping law to grant DOC new discretion to find a "particular market situation" and thereby to reject respondent exporters' home market sales prices and actual raw material costs when calculating dumping, instead using undefined methodologies. This is the first time that DOC has made an affirmative determination of "particular market situation" under the amended TPEA provision.

Findings

DOC had issued a negative preliminary determination of "particular market situation" in *OCTG from Korea* on February 21. On April 10, DOC issued its final determination reversing the preliminary decision and stating that "record evidence supports a finding that a particular market situation exists in Korea which distorts the OCTG costs of production." DOC explained that it reversed the decision after amending its standard for determining whether a "particular market situation" exists. In the final determination, DOC analyzed the evidence "as a whole" instead of individual factors, which included allegations of price-regulated electricity and subsidized steel, and found that the combined evidence demonstrated a "particular market situation" in the Korean market for hot-rolled coil (HRC), which is a significant input to OCTG. As a result of that finding, DOC made upward adjustments to exporters' HRC costs when calculating normal value (and thus dumping). In calculating the dumping margin for mandatory respondent NEXTEEL, DOC used "constructed value" (*i.e.*, a normal value based on cost of production) and adjusted upward all of NEXTEEL's purchases of HRC from Korean companies by 3.89 percent or 47.20 percent, in order to offset the alleged effects of government subsidies that DOC found in a previous US countervailing duty investigation of HRC from Korea:

> *We made an adjustment to NEXTEEL's hot-rolled coil (HRC) cost to reflect the particular market situation. NEXTEEL reported that it purchased HRC from POSCO, Daewoo International, other Korean companies, and other trading companies. For NEXTEEL's HRC purchases from other trading companies, we made no adjustment. For NEXTEEL's HRC purchases from POSCO and its wholly-owned subsidiary, Daewoo International, we applied the rate of 47.20 percent, which represents the percentage of non-export-contingent subsidies determined for POSCO in the Department's countervailing duty (CVD) investigation on HRC from Korea. For NEXTEEL's HRC purchases from all other Korean suppliers, we applied the rate of 3.89 percent, which represents the percentage of non-export-contingent subsidies applied to "all other" companies in the Department's CVD investigation on HRC from Korea. After weight averaging based on the percentage of HRC that NEXTEEL purchased from each source, the resulting overall increase to NEXTEEL's HRC cost is [redacted] percent.*

Because much of the information in the calculation documents is redacted, we cannot determine the precise effect of these adjustments on NEXTEEL's final dumping margin, but it appears to be significant: DOC in the final determination made very few other changes to its preliminary dumping calculations, yet NEXTEEL's final antidumping duty rate jumped from 8.04 percent to 24.92 percent. By contrast, the other mandatory respondent, SeAH, was seemingly unaffected by the "particular market situation" finding because DOC did not use constructed value (instead opting for SeAH's sales to Canada, as permitted under DOC's regulations), and its final duty rate decreased from 3.80 percent to 2.76 percent.

Implications

To the extent that DOC's decision appears to be inconsistent with US law and WTO principles, the parties have recourse to litigation. Potential US court or WTO decisions overturning DOC's decision in *OCTG from Korea* could establish limits on DOC's application of "particular market situation" findings in future cases. Such challenges, in our view, are likely due to the decision, its potential implications (discussed next), and certain procedural irregularities related to the involvement of White House National Trade Council Director Peter Navarro. Moreover, the issues

covered in the *OCTG from Korea* review are the subject of several WTO disputes – including one adverse Appellate Body decision in *EU — Biodiesel* (DS473) and several other ongoing challenges to methodologies that are similar to DOC's.

Depending on any such litigation, however, the implications of the *OCTG from Korea* determination on "particular market situation" could be significant in several respects:

- **Effect and scope**. DOC's affirmative determination could serve as precedent for rejecting exporters' home market sales prices and record costs as normal value due to government policies like subsidies or price regulations on manufacturing inputs like steel or energy, and for adjusting record input costs upward. Furthermore, DOC appears willing to expand its use of "particular market situation" to other situations not specifically alleged by the petitioner in *OCTG from Korea.* For example, DOC made broad statements in the final determination about steel overcapacity, thus suggesting that "particular market situation" could apply to *any* product under investigation that uses steel as a major input:

  > *[T]he Department notes that excess steel-production capacity has created market distortions across the globe. Excess steel-production capacity causes serious market distortions and contributes to the downturn in global steel markets, including significant price suppression, displaced markets, unsustainable capacity utilization, negative financial performance, shutdowns, and lay-offs. The deterioration in steel demand, along with continued capacity expansions, are likely to place further pressure on country-specific steel markets and create incentives for government interventions which will further distort the production costs and prices for a wide range of steel products.*

- **New US anti-dumping investigations.** The decision could encourage petitioners in new anti-dumping investigations to make "particular market situation" allegations – even those related to issues like global overcapacity that might not be directly related to events in the foreign exporters' home market – that could result in higher anti-dumping margins (and thus duties) or even affirmative findings of dumping that might not otherwise exist.

- **Administrative reviews of current antidumping duty orders.** Potentially even more significant, however, is the possible effect of DOC's new "particular market situation" standard, coupled with the United States "retrospective" approach to duty collection, on anti-dumping administrative reviews. Under the US system, an importer pays cash deposits on imports subject to an anti-dumping duty order at an estimated *ad valorem* duty rate, but its final duty liability may be assessed during a subsequent administrative review of the period in which those imports were made. According to the most recent figures from the ITC, there are approximately 170 current anti-dumping orders in place on imports from "market economy" countries like Korea and Mexico, and US importers are currently paying cash deposits at rates calculated before DOC's new "particular market situation" ruling.

  As the *OCTG from Korea* determination with respect to NEXTEEL demonstrates, allegations of "particular market situation" in future reviews of these anti-dumping duty orders could significantly increase dumping margins (and thus the assessment rates applicable to the period under review), resulting in an unexpected increase in the amounts owed by US importers that had imported subject merchandise during that time period. This could not only lead to millions of dollars in additional and unexpected duty liability for these US importers, but also discourage all US importers from importing goods subject to an anti-dumping duty order in the future (to avoid unexpected and uncontrollable expenses). It might also encourage petitioners to request more reviews in order to achieve additional protection or to seek settlements from targeted foreign exporters.

- **Other jurisdictions.** As one of the most prominent and influential Members of the WTO, the United States, through its use of "particular market situation," might also affect determinations made by investigating authorities in other importing countries that seek to address alleged market "distortions."

A copy of the determination is attached for reference.

Department of Commerce Initiates Section 232 Investigation of Imported Steel Products

On April 19, 2017, Secretary of Commerce Wilbur Ross initiated an investigation into the effects of imports of steel products on the national security of the United States, pursuant to Section 232 of the Trade Expansion Act of 1962.[9] The Department of Commerce (DOC) has not yet stated which steel products will be subject to the investigation, though Secretary Ross has indicated that the investigation will cover a wide range of them regardless of country of origin. If DOC determines in its investigation that imports of the subject steel products "threaten to impair the national security" of the United States, the President will be authorized to take action to "adjust imports" of such products, including through the imposition of tariffs.

Section 232 requires DOC to conclude its investigation and submit its findings to the President within 270 days. Notably, President Trump on April 20 signed a Presidential Memorandum directing DOC to "proceed expeditiously in conducting the investigation", and to consider when making its determination certain factors, such as the employment and "economic welfare" effects of imports.[10]

Overview of Section 232

Section 232 authorizes the Secretary of Commerce to investigate the effects of imports on the national security of the United States. Section 232 investigations are conducted by Bureau of Industry and Security (BIS) within DOC, and are subject to the following statutory requirements:

- **Initiation.** DOC is required to initiate an investigation to determine the effects of imports on national security: (i) upon the request of the head of any department or agency; (ii) upon application of an interested party; or (iii) on the Secretary's own motion. Though Section 232 investigations typically have been initiated at the request of a specific industry, the new investigation of imported steel products was, as noted above, initiated by Secretary of Commerce Wilbur Ross. Section 232 mandates that the Secretary provide notice to the Secretary of Defense that an investigation has been initiated, and Secretary Ross provided such notice to Secretary of Defense James Mattis on April 19. (A copy of the notice is available **here.**)

- **Conduct of the investigation.** During the investigation, the Secretary of Commerce must: (i) consult with the Secretary of Defense regarding the methodological and policy questions raised in the investigation; (ii) seek information and advice from, and consult with, appropriate officers of the United States; and (iii) "if it is appropriate," hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to the investigation. In its most recent **Section 232 investigation** conducted in 2001 (on imports of iron ore and semi-finished steel), BIS took the following steps:

  - Request for comments: DOC published a Federal Register notice within one week after the initiation of the investigation, requesting "written comments, opinions, data, information, or advice" relevant to the investigation. Written comments were accepted for a period of 3 months.

  - Public hearings: After the expiration of the public comment period, DOC held two public hearings to elicit further information concerning the investigation. Written submissions were accepted for approximately one month after the date of the hearings. In all, DOC received over 3000 written submissions from major stakeholders, including domestic producers and consumers, foreign exporters and governments, unions and US government officials.

  - Industry surveys and site visits: DOC sent surveys to US producers and potential consumers of the products subject to the investigation, and visited sites associated with "the production, shipment, and consumption" of such products.

[9] Secretary Ross's announcement of the new investigation is available **here**.

[10] President Trump's April 20 memorandum is available **here**.

- Interagency consultations: DOC consulted with the Department of Defense, which provided an assessment of its projected national defense requirements for the articles in question. DOC also consulted with other agencies, such as the Department of Labor, the US International Trade Commission, and the Office of the US Trade Representative.

- **Submission of report.** Within 270 days after the date of initiation, DOC must submit a report to the President describing the findings of the investigation, including whether DOC finds that the subject merchandise "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security[.]" Based on these findings, the report must also include DOC's recommendations for "action or inaction" under Section 232.

- **Presidential determination.** Within 90 days after receiving a report in which DOC has found that imports threaten to impair the national security, the President must (i) determine whether the President concurs with the finding; and (ii) "If the President concurs, determine the nature and duration of the action that…must be taken to adjust imports of the article and its derivatives so that such imports will not threaten to impair the national security." The statute places no limit on the nature of the restrictions that the President may impose or the scope or magnitude of any tariffs.

Criteria for determinations

As noted above, the key requirement for action under Section 232 is a finding of a threat or impairment of "national security," which is not defined in the law or in its implementing regulations. BIS in the most recent Section 232 investigation of iron and steel found, based on the statutory language and congressional intent, that the standard would be met where imports of the product at issue threaten to impair US national security either: (i) "by fostering US dependence on unreliable or unsafe imports"; or (ii) "by fundamentally threatening the ability of US domestic industries to satisfy national security needs."

In a thorough analysis of the US iron and steel industry, imports and the needs of "critical industries" related to national security, BIS in 2001 found that neither criterion was met. In particular, BIS found that (i) US iron and steel production at that time satisfied the overwhelming majority of total domestic demand (80 percent and 93 percent, respectively) and far exceeded the highest possible estimates of future "critical industry" demand; (ii) annual Department of Defense steel requirements comprise less than 1 percent of total domestic output and are already subject to "Buy American" policies; and (iii) imports were mainly from "safe and reliable" US allies like Canada, Mexico and Brazil. President Trump's April 20 memorandum appears to expand the previous BIS standard, as it directs DOC to do the following as it conducts its investigation "as appropriate and consistent with law":

"(a) consider the domestic production of steel needed for projected national defense requirements; the capacity of domestic industries to meet such requirements; the existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense; the requirements of growth of such industries and such supplies and services, including the investment, exploration, and development necessary to assure such growth; and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements;

"(b) recognize the close relation of the Nation's economic welfare to our national security, and consider the effect of foreign competition in the steel industry on the economic welfare of domestic industries;

"(c) consider any substantial unemployment, decrease in government revenues, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive steel imports; and

"(d) consider the status and likely effectiveness of efforts of the United States to negotiate a reduction in the levels of excess steel capacity worldwide."

With the exception of item (d), each of the above factors are among those that DOC is required to "consider" or "recognize" in making its determination pursuant to Section 232(d). Notably, a White House fact sheet issued

alongside the Presidential Memorandum emphasizes the factors relating to "economic welfare", employment, and government revenues. This and the Presidential Memorandum's emphasis on the economic challenges facing the US steel industry suggest that DOC may give greater weight to economic and employment-related factors than DOC has in prior Section 232 investigations.

Outlook

Though DOC has not yet published documents describing the precise scope of the investigation, Secretary Ross indicated that it will cover a wide range of steel products and will not be limited to any particular country, stating that "conceivably, [the investigation] could result in a recommendation to take action on all steel imports." Thus, while President Trump's April 20 memorandum alludes to China being a main target of the investigation, a Section 232 action covering all or most imported steel products arguably would have more severe implications for countries such as Canada, Brazil, Korea, and Mexico, who in recent years have exported steel to the United States in far greater quantities than has China. Indeed, in 2016 China was the 10th largest source by value of US iron and steel imports under HTSUS Chapter 72 (the top ten sources, from largest to smallest, were Canada, Brazil, Korea, Mexico, Germany, Russia, Japan, Turkey, Taiwan, and China). Moreover, when US steel imports are examined at the 4-digit level of the HTSUS, China is not the largest source of imports under any 4-digit category (and in several categories, it is not among the top five sources of imports). Thus, despite the Trump administration's emphasis on China, an action resulting from the newly-initiated Section 232 investigation could have more severe economic implications for other US trading partners.

However, it is far from certain at this stage that the new Section 232 investigation will result in the actual imposition high tariffs on a broad range of steel imports. If BIS applies the same analytical framework as applied in the 2001 Section 232 investigation of iron and steel imports, a radical change in the US steel market – which does not appear to have occurred (*e.g.*, imports are now just 26 percent of US consumption) – would be required for an affirmative determination that imports threaten to imperil US national security. Furthermore, even if BIS did make an affirmative finding and recommend import restrictions, the Trump administration may seek to use the final BIS report as merely a bargaining chip in future negotiations. That said, new import restrictions are certainly possible, as the administration has in recent trade remedy proceedings already proven willing to use novel interpretations of US trade law to provide import relief to the US steel industry. In that case, such measures would provide precedent for new Section 232 investigations and indicate that the Trump administration intends to expand its import relief "toolbox" to include more aggressive measures than just the traditional anti-dumping and countervailing duties.

Department of Commerce Requests Written Comments and Schedules Public Hearing for Section 232 Investigation of Steel Imports

On April 24, 2017, the US Department of Commerce, Bureau of Industry and Security (BIS) published a draft Federal Register notice requesting written comments and announcing the hearing schedule for its Section 232 investigation into the effects of steel imports on US national security.[11] The draft notice provides guidelines for submitting written comments and hearing testimony, which are summarized below, but does not provide any additional information regarding the scope of the investigation.

Request for written comments

BIS requests that interested parties submit written comments, data, analyses, or information pertinent to the investigation by May 31, 2017. In particular, BIS is requesting that written comments address the "criteria for determining the effects of imports on national security" set forth in part 705.4 of the National Security Industrial Base Regulations ("NSIBR") (15 C.F.R. § 705.4), including the following:

(a) Quantity of steel or other circumstances related to the importation of steel;

(b) Domestic production and productive capacity needed for steel to meet projected national defense requirements;

[11] Click **here** to view the draft Federal Register notice.

(c) Existing and anticipated availability of human resources, products, raw materials, production equipment, and facilities to produce steel;

(d) Growth requirements of the steel industry to meet national defense requirements and/or requirements to assure such growth;

(e) The impact of foreign competition on the economic welfare of the steel industry;

(f) The displacement of any domestic steel causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects;

(g) The displacement of any domestic steel causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects;

(h) Relevant factors that are causing or will cause a weakening of our national economy; and

(i) Any other relevant factors.

Public hearing schedule

BIS will hold a public hearing on May 24, 2017 in Washington DC, at which interested parties are invited to present their views. Requests to appear at the hearing are due by May 17, and must include a summary of the presentation to be delivered at the hearing. BIS requests that presentations address the criteria listed in § 705.4 of the NSIBR. Written comments submitted before May 31, 2017 will be accepted as part of the hearing record.

Scope of the investigation

As noted above, the draft notice describes the product under investigation as “steel” but does not provide further clarification regarding the scope of the investigation. This and the title of the new investigation – “Section 232 National Security Investigation of Imports of Steel” – suggest that the investigation will cover most if not all steel products. Consequently, foreign producers and exporters of all varieties of steel may find it worthwhile to provide public comments by the above deadlines.

Petitions and Investigations Highlights

Department of Commerce Initiates AD and CVD Investigations of Silicon Metal from Australia, Brazil, Kazakhstan and Norway

On March 29, 2017, the US Department of Commerce (DOC) announced the initiation of antidumping duty (AD) investigations concerning imports of silicon metal from Australia, Brazil, and Norway, and the initiation of countervailing duty (CVD) investigations concerning imports of the same from Australia, Brazil, and Kazakhstan.[12]

The petitioner for these investigations is Globe Specialty Metals, Inc. The petitioner has alleged that imports of silicon metal were sold in the United States at dumping margins of 28.58 – 52.81 percent (for Australia); 15.41 – 134.92 percent (for Brazil); and 32.25 – 45.66 percent (for Norway). The petitioner also has alleged that imports of silicon metal from Australia, Brazil, and Kazakhstan received countervailable subsidies.

The merchandise subject to the investigation is silicon metal of all forms and sizes, including silicon metal powder. Silicon metal contains at least 85 percent but less than 99.99 percent silicon, and less than 4 percent iron, by actual weight. The subject merchandise is currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 2804.69.1000 and 2804.69.5000. Semiconductor grade silicon (merchandise containing at least 99.99 percent silicon by actual weight and classifiable under HTSUS subheading 2804.61.0000) is excluded from the scope of the investigation.

The US International Trade Commission (ITC) is scheduled to make its preliminary injury determinations on or before April 24, 2017. If the ITC determines that there is a reasonable indication that imports of silicon metal from the subject countries materially injure, or threaten material injury to, the domestic industry, the investigations will continue. DOC will be scheduled to announce its preliminary CVD determinations in June 2017 and its preliminary AD determinations in August 2017, unless the statutory deadlines are extended.

According to DOC, imports of silicon metal from Australia, Brazil, Kazakhstan, and Norway in 2016 were valued at an estimated USD 33.9 million, USD 60 million, USD 17.5 million, and USD 26.1 million, respectively.

Department of Commerce Initiates AD and CVD Investigations of Aluminum Foil from China

On March 28, 2017, the US Department of Commerce (DOC) announced the initiation of antidumping (AD) and countervailing duty (CVD) investigations concerning imports of aluminum foil from China.[13] The petitioner, the Aluminum Association Trade Enforcement Working Group, has alleged that imports of aluminum foil from China were sold in the United States at dumping margins of 38.40 – 140.21 percent and received countervailable subsidies.

The merchandise subject to the investigations is aluminum foil having a thickness of 0.2 mm or less, in reels exceeding 25 pounds, regardless of width. Aluminum foil is made from an aluminum alloy that contains more than 92 percent aluminum. The products under investigation are currently classifiable under Harmonized Tariff Schedule of the U.S. (HTSUS) subheadings 7607.11.3000, 7607.11.6000, 7607.11.9030, 7607.11.9060, 7607.11.9090, and 7607.19.6000, and may also be entered under HTSUS subheadings 7606.11.3060, 7606.11.6000, 7606.12.3045, 7606.12.3055, 7606.12.3090, 7606.12.6000, 7606.91.3090, 7606.91.6080, 7606.92.3090, and 7606.92.6080.

The US International Trade Commission (ITC) is scheduled to make its preliminary injury determinations on or before April 24, 2017. If the ITC determines that there is a reasonable indication that imports of aluminum foil from China materially injure or threaten material injury to the domestic industry, the investigations will continue. DOC will then be scheduled to announce its preliminary CVD determination in June 2017 and its preliminary AD determination in August 2017, unless the statutory deadlines are extended.

[12] Click **here** to view the DOC fact sheet on this investigation.

[13] Click **here** to view the DOC fact sheet on this investigation.

According to DOC, imports of aluminum foil from China in 2016 were valued at an estimated USD 389 million.

US Department of Commerce Initiates AD/CVD Investigations of Biodiesel from Argentina and Indonesia

On April 13, 2017, the US Department of Commerce (DOC) announced the initiation of anti-dumping (AD) and countervailing duty (CVD) investigations concerning imports of biodiesel from Argentina and Indonesia.[14] The petitioner, the National Biodiesel Fair Trade Coalition, alleges that imports of biodiesel from Argentina and Indonesia received countervailable subsidies and were sold in the United States at dumping margins of 26.54 percent and 28.11 percent, respectively.

The merchandise subject to the investigations, biodiesel, is a fuel comprised of mono-alkyl esters of long chain fatty acids derived from vegetable oils or animal fats, including biologically-based waste oils or greases, and other biologically-based oil or fat sources. The investigations cover biodiesel in pure form (B100) as well as fuel mixtures containing at least 99 percent biodiesel by volume (B99). For fuel mixtures containing less than 99 percent biodiesel by volume, only the biodiesel component of the mixture is covered by the scope of the investigations. The B100 product subject to the investigation is currently classifiable under subheading 3826.00.1000 of the Harmonized Tariff Schedule of the United States (HTSUS), while the B99 product is currently classifiable under HTSUS subheading 3826.00.3000.

The US International Trade Commission (ITC) is scheduled to make its preliminary injury determinations on or before May 8, 2017. If the ITC determines that there is a reasonable indication that imports of biodiesel from Argentina and Indonesia materially injure or threaten material injury to the domestic industry, the investigations will continue. DOC will then be scheduled to announce its preliminary CVD determination in June 2017 and its preliminary AD determination in August 2017, unless the statutory deadlines are extended.

According to DOC, imports of biodiesel from Argentina and Indonesia in 2016 were valued at USD 1.2 billion and USD 268 million, respectively.

Department of Commerce Initiates AD and CVD Investigations of Carbon and Alloy Steel Wire Rod from Belarus, Italy, Korea, Russia, South Africa, Spain, Turkey, Ukraine, the United Arab Emirates, and the United Kingdom

On April 18, 2017, the US Department of Commerce (DOC) announced the initiation of anti-dumping investigations concerning imports of carbon and alloy steel wire rod from Belarus, Italy, Korea, Russia, South Africa, Spain, Turkey, Ukraine, the United Arab Emirates and the United Kingdom.[15] DOC also announced the initiation of countervailing duty investigations concerning imports of the same merchandise from Italy and Turkey. The petitioners, Gerdau Ameristeel US Inc., Nucor Corporation, Keystone Consolidated Industries, and Charter Steel, have alleged that imports of the subject merchandise from the above countries were sold in the United States at the following dumping margins and subsidy rates:

Country	Alleged Dumping Margin
Belarus	161.75 – 280.02 percent
Italy	18.89 percent
Korea	33.96 – 43.25 percent
Russia	214.06 – 756.92 percent
South Africa	128.66 – 142.26 percent
Spain	32.70 percent

[14] Click **here** to view the DOC fact sheet on this investigation.

[15] Click **here** to view the DOC fact sheet on the investigations.

Country	Alleged Dumping Margin
Turkey	37.67 percent
Ukraine	21.23 – 44.03 percent
United Arab Emirates	84.10 percent
United Kingdom	147.63 percent

Country	Alleged Subsidy Rate
Italy	Above *de minimis*
Turkey	Above *de minimis*

The products subject to these investigations are certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, less than 19.00 mm in actual solid cross sectional diameter. The products under investigation are currently classifiable under subheadings 7213.91.3011, 7213.91.3015, 7213.91.3020, 7213.91.3093, 7213.91.4500, 7213.91.6000, 7213.99.0030, 7227.20.0030, 7227.20.0080, 7227.90.6010, 7227.90.6020, 7227.90.6030, and 7227.90.6035 of the Harmonized Tariff Schedule of the United States (HTSUS). Products entered under subheadings 7213.99.0090 and 7227.90.6090 of the HTSUS also may be included in the scope if they meet the physical description of subject merchandise.

The US International Trade Commission (ITC) is scheduled to make its preliminary injury determinations on or before May 12, 2017. If the ITC determines that there is a reasonable indication that imports of the subject merchandise materially injure or threaten material injury to the domestic industry, the investigations will continue. DOC will then announce its preliminary CVD determinations in June 2017 and its preliminary AD determinations in September 2017, though these dates may be extended.

International Trade Commission Issues Affirmative Final Determination in AD Investigation of Ferrovanadium from Korea

On April 19, 2017, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of ferrovanadium from Korea.[16] The US Department of Commerce (DOC) determined in March 2017 that imports of ferrovanadium from Korea were sold in the United States at dumping margins ranging from 3.22 to 54.69 percent.

As a result of the ITC's affirmative final determination, DOC will issue an anti-dumping duty order on imports of ferrovanadium from Korea. According to the ITC, imports of these products from Korea were valued at an estimated USD 15.6 million in 2015. The ITC's public report on this investigation will be available by May 30, 2017.

International Trade Commission Issues Affirmative Final Determination in AD/CVD Investigation of HEDP from China

On April 21, 2017, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of 1-hydroxyethylidene-1, 1-diphosphonic acid (HEDP) from China.[17] The US Department of Commerce (DOC) determined in March 2017 that imports of HEDP from China were sold in the United States at dumping margins ranging from 167.58 to 184.01 percent and received countervailable subsidies of 0.75 to 54.11 percent.

As a result of the ITC's affirmative final determination, DOC will issue anti-dumping and countervailing duty orders on imports of HEDP from China. The ITC's public report on this investigation will be available by May 29, 2017.

[16] Click **here** to view ITC's press release on the investigation.

[17] Click **here** to view the ITC's press release on the investigation.

US Department of Commerce Initiates AD Investigation of Carton-Closing Staples from China

On April 21, 2017, the US Department of Commerce (DOC) announced the initiation of an anti-dumping investigation concerning imports of carton-closing staples from China.[18] The petitioner, North American Steel & Wire, Inc./ISM Enterprises, alleges that imports of carton-closing staples from China were sold in the United States at dumping margins ranging from 13.76 to 263.43 percent.

The merchandise subject to the investigation, carton-closing staples, may be manufactured from carbon, alloy, or stainless steel wire, and are included in the scope of the investigation regardless of whether they are uncoated or coated, and regardless of the type of coating. Carton-closing staples subject to the investigation are currently classifiable under subheadings 8305.20.00.00 and 7317.00.65.60 of the Harmonized Tariff Schedule of the United States ("HTSUS").

The US International Trade Commission (ITC) is scheduled to make its preliminary injury determination on or before May 15, 2017. If the ITC determines that there is a reasonable indication that imports of carton-closing staples from China materially injure or threaten material injury to the domestic industry, the investigations will continue. DOC will then be scheduled to announce its preliminary AD determination in September 2017, unless the statutory deadlines are extended.

According to DOC, imports of carton-closing staples from China in 2016 were valued at USD 73.2 million.

Safeguard Petition Filed on Crystalline Silicon Photovoltaic Cells and Modules

On April 26, 2017, Suniva, Inc. filed a petition with the US International Trade Commission (ITC) under Section 201 of the Trade Act of 1974 seeking global safeguard relief from imports of crystalline silicon photovoltaic cells and modules (CSPV). The petitioner seeks relief in the form of a tariff and a price floor on imports of CSPV from all countries. Should the ITC decide to institute an investigation of CSPV under Section 201, its injury determination will be due within 120 days and its final report to the President (including any recommendations for import restrictions) will be due within 180 days, unless the ITC extends these deadlines. The United States has not imposed a safeguard measure under Section 201 since 2002, when President George W. Bush instituted tariffs on certain steel products.

Scope of the petition

The merchandise covered by the petition is CSPV cells, and modules, laminates, and panels, consisting of CSPV cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials. CSPV cells are most commonly used in solar modules, which are also known as solar panels. The products covered by the petition are classified in the Harmonized Tariff Schedule of the United States under subheadings 8541.40.6030, 8541.40.6020, 8501.61.0000, 8507.20.80, and 8501.31.8000. The current general rate of duty for imports of these products ranges from zero to 3.5 percent.

Main differences between safeguard and AD/CVD investigations

Unlike antidumping (AD) and countervailing duty (CVD) investigations, which target imports of the covered merchandise from select countries, safeguard investigations such as that requested by Suniva are global, targeting imports of the covered merchandise from all countries. The petition identifies Malaysia, China, Korea, Mexico, Thailand, Vietnam, Singapore, Taiwan, Germany, and the Philippines as the ten largest exporters of CSPV to the United States. Pursuant to the NAFTA Implementation Act, the ITC may recommend that the President exclude imports from a NAFTA country from a safeguard measure, provided that the imports do not account for a substantial share of total imports and do not contribute significantly to the injury of the domestic industry. The Suniva petition argues that neither Mexican nor Canadian exports of CSPV to the United States should be excluded from the proposed safeguard measure.

[18] Click **here** to view the DOC fact sheet on this investigation.

Safeguard investigations also differ from AD/CVD investigations in that (i) they do not require findings of dumping or subsidization; and (ii) they require a finding of "serious injury" to the domestic industry (as opposed to the lower "material injury" standard in AD/CVD cases). The Suniva petition alleges that "the sharp increase in imports of CSPV cells and modules that has occurred since 2012" has seriously injured the domestic industry and is threatening further serious injury.

Relief sought by the petitioner

The petitioner seeks relief in the form of a tariff and a price floor on imports of the subject merchandise in the following amounts:

- A tariff of $0.40/watt per CSPV cell, with a minimum floor price of $0.78/watt per module, during the first year after the final determination;
- A tariff of $0.37 /watt per CSPV cell, with a minimum floor price of $0.72/watt per module during year two;
- A tariff of $0.34/watt per CSPV cell, with a minimum floor price of $0.69/watt per module during year three; and
- A tariff of $0.33/watt per CSPV cell, with a minimum floor price of $0.68/watt per module during year four.

In addition to seeking a tariff and a price floor, the petitioner requests:

- That antidumping and countervailing duties collected by, and still under suspension with, the US government pursuant to the AD/CVD orders on CSPV from China and Taiwan be distributed "equitably" among US CSPV producers;
- That the US Department of Commerce create an "economic investment development program" funded with the tariffs collected under the proposed safeguard action; and
- That the US government engage in bilateral and multilateral negotiations to "reduce global excess capacity and restore a supply and demand balance in the global market."

Investigation process and timeline

- **Initiation.** The ITC currently is evaluating the petition "for legal sufficiency and compliance with its rules". When that review is completed, the ITC will decide whether to institute the investigation and will publish a notice of its decision in the Federal Register. Section 201 and the ITC's regulations provide that safeguard petitions may be filed by a firm that is "representative of an industry"; however, they do not specify a percentage threshold (*e.g.*, a minimum percentage of total domestic production) that is required to establish the petitioner's representativeness of the industry. According to Suniva's petition, the ITC has initiated cases where the petitioner represented as little as 33 percent of total domestic production of the covered merchandise. Suniva claims to represent just 20.6 percent of domestic production of CSPV cells and modules, and thus has argued that the ITC should also consider production capacity when assessing representativeness:

  > In terms of CSPV cells and CSPV modules combined, Suniva represented 20.6 percent of domestic production and 23.6 percent of domestic capacity in 2016. Given the brutal impact of imports on the domestic industry, which has forced unprecedented declines in domestic production, the Commission should take into account capacity when looking at representativeness. Relying solely or even primarily on domestic production for determining representativeness creates an illogical fact pattern in which a domestic industry could be denied standing to file a petition because imports forced significant reductions in domestic production. Suniva is thus representative of the domestic industry producing CSPV cells and modules.

- **Injury determination.** The ITC must make its injury determination within 120 days after receiving the petition (or within 150 days, if it determines that the investigation is extraordinarily complicated). If the injury

determination is negative, the investigation will be terminated. If the injury determination is affirmative, the investigation will proceed to the remedy phase.

- **Remedy phase.** In the event of an affirmative injury determination, the ITC must recommend to the President actions that would address the serious injury or threat thereof (such as tariffs, tariff-rate quotas, or quantitative restrictions). The ITC must submit to the President a report including its recommendations within 180 days after receiving the petition.
- **Presidential determination.** Within 60 days after receiving a report from the ITC that includes an affirmative injury determination, the President must take "all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition[.]" In determining what actions to take, the President must "take into account" the ITC's recommendations, though he is free to take actions that differ from those recommended by the ITC. Section 201 authorizes the President to impose import restrictions (*e.g.*, tariffs, tariff-rate quotas, or quantitative restrictions), or to take other actions that do not involve import restrictions (*e.g.*, providing trade adjustment assistance or initiating international negotiations). The deadline for the Presidential determination can be extended by an additional 15 days if the President requests supplemental information from the ITC.

A copy of the petition is attached for reference.

Free Trade Agreement

Trump Administration Sends Draft of NAFTA Negotiating Objectives to Congress

On March 28, 2017, Acting United States Trade Representative (USTR) Stephen Vaughn sent Members of Congress a draft notification announcing President Trump's intention to "initiate negotiations related to the North American Free Trade Agreement (NAFTA) and its architecture". The draft notification includes a list of the administration's "specific objectives" for the negotiation, and therefore provides important insights into how the Trump administration intends to modify NAFTA and how it might approach future free trade agreement (FTA) negotiations. Pursuant to the trade promotion authority (TPA) law enacted by Congress in 2015, the Trump administration must submit a final version of the notification and the objectives to Congress 90 days before initiating negotiations with the other NAFTA parties.

Overall, the Trump administration's draft negotiating objectives for NAFTA do not represent a radical departure from those that recent administrations have pursued in FTA negotiations, or from the negotiating objectives that Congress approved in the TPA legislation enacted in 2015. Indeed, many of the objectives appear similar to the outcomes negotiated by the Obama administration in the Trans-Pacific Partnership (TPP). However, a few of the objectives do appear to reflect the Trump administration's economic nationalist objectives or are so ambiguous as to permit the pursuit of such objectives during the negotiations themselves. Furthermore, it is possible that, following congressional review of the draft document, the listed objectives are clarified, amended or supplemented.

The draft negotiating objectives that might differ from past US FTAs include the following:

- Trade in goods. The administration will "seek to maintain and expand current market access on trade between each NAFTA country and the United States on the broadest possible basis…*while addressing U.S. import sensitivities*" (emphasis added). This objective might not represent a departure from recent US policy, as there are a small number of import-sensitive products that the United States has routinely shielded from tariff elimination or other forms of liberalization in trade agreements. On the other hand, given President Trump's rhetoric regarding import restrictions, this objective might presage efforts to negotiate the reinstatement of tariffs or other import restrictions on products that were subject to liberalization under NAFTA.
- Tax treatment. The administration will "seek to level the playing field on tax treatment," but the document does not specify how US negotiators will seek to achieve this objective. The reference could therefore be benign – for example merely ensuring "national treatment" for internal taxation equivalent to that under the WTO's General Agreement on Tariffs and Trade. On the other hand, it could refer to some Trump administration officials' belief that the "border adjusted" value-added tax (VAT) systems of Mexico and Canada (*i.e.*, which tax import sales but exempt export sales) disadvantage US goods, and that the United States should seek to address this supposed imbalance through trade agreement measures such as offsetting border taxes. Pursuing this objective could therefore be controversial.
- Rules of origin. The administration will "seek rules of origin that ensure that the Agreement supports production and jobs in the United States…without creating unnecessary obstacles to trade". This appears to be a reference to the Trump administration's desire to tighten the NAFTA rules of origin (*i.e.*, to require a higher level of regional value content) for products such as automobiles and electronics, though this is not explicitly stated in the objective. Many critics have warned that, while Canada and Mexico may welcome certain revisions to the current NAFTA rules of origin, onerous rules (*e.g.*, those requiring high levels of originating content or a

certain proportion of content for each NAFTA party) might be impossible for domestic manufacturers of sophisticated goods and thus might discourage companies from using NAFTA or investing in North America.

- Government procurement. The administration will seek rules that require government procurement to be conducted in a manner that is consistent with US law and "the Administration's policy on domestic procurement preferences." Given that the Trump administration has emphasized its support for "Buy American" policies in government procurement, this objective likely indicates a desire to reduce the scope of the US procurement market that is available under the NAFTA. On the other hand, the United States also will seek to open the procurement markets of Canada and Mexico to US companies. It is unclear how both of these objectives will be achieved in the negotiations.
- Safeguard mechanism. The administration will seek "a safeguard mechanism to allow a temporary revocation of tariff preferences, if increased imports from NAFTA countries are a substantial cause of serious injury or threat of serious injury to the domestic industry." A similar safeguard mechanism was included in Chapter 8 (Emergency Action) of the NAFTA, but was available to the NAFTA parties only during specified "transition periods" (*i.e.*, during the period in which duties on NAFTA-origin goods were being phased out). Chapter 8 also required that the party taking the safeguard action provide to the party against whose good the action was taken "mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the action". While a proposal to reinstate the original safeguard mechanism might not be regarded as controversial, an effort by the Trump administration to modify the mechanism (*e.g.*, by removing the requirement to provide trade liberalizing compensation or lowering the injury threshold) might encounter resistance from the other NAFTA parties.
- Dispute settlement. The document includes an objective to "eliminate Chapter 19 dispute settlement of antidumping and countervailing duty determinations, in light of US experiences where panels have ignored the appropriate standard of review and applicable law[.]" More recent US FTAs, such as those negotiated by the Obama administration, have not included a review mechanism for AD/CVD determinations such as that included in Chapter 19 of the NAFTA.

Notably absent from the document are objectives regarding currency manipulation, or the investor-state dispute settlement (ISDS) mechanism, which permits private investor suits against government decisions affecting their investments.

Most of the remaining negotiating objectives – including on trade in goods, services, and investment – are similar to those set forth in TPA and the outcomes negotiated in recent US FTAs. Notably, the negotiating objectives on state-owned enterprises, digital trade, intellectual property, labor and environment, technical barriers to trade, and sanitary and phytosanitary measures appear similar to the rules included in the TPP. These similarities were not unexpected, given that USTR nominee Robert Lighthizer, Treasury Secretary Steven Mnuchin, and Commerce Secretary Wilbur Ross have each suggested that various elements of the TPP should be used as a starting point for the renegotiation of NAFTA.

Outlook

Most of the Trump administration's draft negotiating objectives appear to be aimed at updating NAFTA to incorporate provisions that have been included in more recent US trade agreements, and thus do not represent a major shift in policy. Many of these objectives also appear to be consistent with the goals set forth by Congress in TPA. While some of the objectives do not fall into this category and suggest the possibility of tariffs or other protectionist measures, they are described only in general terms and do not necessarily indicate that the administration will seek a substantial reversal of the trade liberalization achieved under NAFTA. However, caution is still warranted with respect to these and other objectives due to their current ambiguity.

Furthermore, the objectives described above are in draft form, and USTR officials have noted that the final objectives will be the result of negotiations between the administration and Congress. It is possible, therefore, that the objectives will be changed or clarified to reflect congressional priorities.

A copy of the draft objectives is attached for reference.

Multilateral Policy Highlights

New Proposal to Increase WTO Disciplines on Certain Industrial Subsidies

WTO Members have proposed in the WTO Committee on Subsidies and Countervailing Measures (SCM) new but undefined anti-subsidy disciplines to address industrial overcapacity. The proposal from the United States, the European Union, and Canada combines their concerns about inadequate disciplines over certain subsidies in the SCM Agreement, the role of state-owned enterprises (SOEs) in supporting uneconomic industrial capacity, and the poor state of the notification of subsidies to the WTO. The proposal suggests that certain subsidies (those that "create and maintain excess capacity") should be considered for more stringent WTO disciplines, and in that regard it might open up a new front for negotiations in the WTO on subsidies, and possibly also the activities of SOEs. However, the proposal is, in the first instance, for a discussion rather than a negotiation.

The new proposal draws on an earlier document from the United States, the European Union, Japan and Mexico that suggested the WTO should contribute to action called for in 2016 by G20 Trade Ministers to study the extent to which subsidies contribute to industrial overcapacity and how they could be further disciplined. China is clearly a key target of the concerns raised there and in the new proposal, but it is not mentioned by name. The document suggests that governments more broadly have contributed to global overcapacity, particularly those that have championed national strategic industries such as steel, aluminium and solar panels, through central and sub-central government subsidies as well as through state control or influence and the provision of cheap financing from SOEs to key enterprises.

The result, according to the new proposal, is that subsidization, direct and indirect, has become a dominant contributor to excess capacity, which spills over through exports to create a global problem. The proposal suggests that some of the subsidies employed may be prohibited under Article 3 of the SCM Agreement, but many others are not even though they can have trade-distorting effects that are the same as – if not worse than – export subsidies. The Members propose, therefore, that these subsidies should be considered for "more stringent disciplines," though they do not elaborate on what those disciplines might be or the specific types of subsidies that might be subject thereto.

As a first step to clarifying these issues, the Members propose that all WTO Members address and correct the problem of poor notification of their subsidy programs. The proposal notes that "an alarming 65% of the Members" have failed to meet their notification obligations for the 2015 cycle and that some Members do not notify their sub-central subsidy programs at all. In that regard there is an oblique reference to China's recent notification of its sub-central government subsidy programs, and a suggestion that the quality of Members' notifications deserves attention.

The proposal will be tabled formally and discussed for the first time at the SCM Committee meeting at the end of April, along with the latest United States questions on China's recent notification of its sub-central government subsidy programs. While the proposal is expected to receive a hostile reception from some other Members, it may nonetheless survive the first round of discussion and become a standing item on the agenda of the SCM Committee.

The proposal from the United States, the European Union, and Canada is attached for reference.

Contact us

Washington

White & Case LLP
701 Thirteenth Street NW
Washington
DC 20005-3807

Scott Lincicome, Esq
Counsel

T +1 202 626 3592
E slincicome@whitecase.com

Singapore

White & Case Pte. Ltd.
8 Marina View #27-01
Asia Square Tower 1
Singapore 018960

Samuel Scoles
Regional Director Asia, International Trade Advisory Services

T +65 6347 1527
E sscoles@whitecase.com

WHITE & CASE

whitecase.com