WHITE & CASE

US & Multilateral Trade Policy Developments

Japan External Trade Organization

September 2017

Contents

US General Trade Policy Highlights

USTR Holds Debriefings on TIFA Meetings with Malaysia and the Philippines

On August 23, 2017, the Office of the United States Trade Representative (USTR) held debriefings on its recent meetings with the Malaysian and Philippine governments pursuant to the US-Malaysia and US-Philippines Trade and Investment Framework Agreements (TIFAs). Mr. Karl Ehlers, Deputy Assistant USTR for Southeast Asia and the Pacific, and Ms. Christine Brown, Director for Southeast Asia and Pacific Affairs, provided an overview of the main issues discussed during the TIFA meetings, which are summarized below.

Malaysia

Mr. Ehlers indicated that the goal of the meeting was to reinvigorate the US-Malaysia TIFA discussion, and that the Malaysian government has appeared cautious towards the United States following recent developments such as the US withdrawal from the TPP, the Trump administration's "Omnibus Report on Significant Trade Deficits", and the Section 201 global safeguard investigation on solar products. USTR established five working groups with Malaysia to advance certain issues (trade in goods, opening up new sectors for services, IP, labor rights, and environment), but Mr. Ehlers indicated that USTR has fewer outstanding issues to address with Malaysia than with other countries in the region. Those outstanding issues include foreign equity limits in the insurance sector, pharmaceutical IP issues (*e.g.*, data exclusivity and compulsory licensing), import restrictions in the auto sector, and agriculture, where USTR believes the United States should be able to export more to Malaysia than it does presently.

Philippines

Ms. Brown indicated that the parties discussed a wide range of issues during the US-Philippines TIFA meeting, including investment (the definition of public utility, opening up new sectors to foreign investment, and constitutional reform), taxes on sugary beverages, tariff-rate quotas on rice, government procurement reform, customs reform in accordance with the WTO Trade Facilitation Agreement, implementation of the expanded Information Technology Agreement, continued efforts on intellectual property rights (IPR), and labor rights. Ms. Brown noted that progress was made in each of these areas, and in particular on agriculture issues. The parties agreed on certain follow-up actions, and USTR intends to monitor the Philippines' progress and address any follow-up issues by the end of this year or early next year.

USTR and Department of Commerce Request Public Comments on Impacts of U.S. International Government Procurement Obligations

On August 21, 2017, the US Department of Commerce (DOC) and the Office of the United States Trade Representative (USTR) published a Federal Register notice requesting public comments to inform their forthcoming assessment of the impacts of all U.S. trade agreements and the World Trade Organization (WTO) Agreement on Government Procurement (GPA) on the operation of Buy American laws.[1] Pursuant to President Trump's April 18 Executive Order on "Buy American and Hire American", USTR and DOC are required to complete this assessment by September 15, 2017, and must submit their findings and recommendations to the President by November 24, 2017. Although the Executive Order requires USTR and DOC to assess the impact of trade agreements only as they relate to the operation of U.S. government procurement laws, the notice indicates that these agencies also intend to evaluate whether U.S. trade agreement partners are affording the United States "truly reciprocal" access to their own government procurement markets. The final USTR report could presage U.S. efforts to seek changes to the GPA or to revise current Buy American policies.

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

Substance of the notice

The notice states that "while [the Executive Order] is focused on the acquisition of goods, products, or materials in U.S. federal government procurement, the access provided by U.S. free trade agreements and the GPA in foreign markets to U.S. manufacturers and suppliers is based on reciprocity. Discussing the impact of these agreements on the access that U.S. goods have in foreign government procurement markets helps inform whether or not the access is truly reciprocal." Consequently, USTR and DOC are requesting that interested parties provide written responses to the following questions (among others), which focus not only on U.S. federal government procurement, but also on foreign government procurement practices:

- What is your company's experience with respect to U.S. federal and/or foreign government procurement, either as prime contractor or a subcontractor?
- Please describe in a few sentences how your company's decisions to bid on or supply U.S. federal contracts (as a prime or subcontractor or company that produces goods used in procurements) are affected by U.S. free trade agreements and the WTO GPA which allow equal participation by companies from U.S. trading partners.
- Please describe in few sentences your company's experience as a prime or subcontractor in bidding on national government procurements in countries with which the U.S. has a trade agreement with government procurement obligations.[2] What are your three greatest challenges? How does this differ from your experience competing for bids in markets in countries with which the U.S. does not have a trade agreement with government procurement obligations?
- Please describe in a few sentences whether the presence of Buy American or similar foreign requirements affected positively or negatively your company's ability to bid and/or win contracts for U.S. or foreign government procurement.
- Please describe in a few sentences any experience your company has had with conflict between Buy American or similar foreign requirements and U.S. free trade agreement or WTO GPA requirements, including whether and how the conflict was resolved

The deadline for interested parties to submit written comments is September 18, 2017 at 11:59 p.m. EDT. The notice states that the written comments will be considered in the assessment as well as in the final report of findings and recommendations to strengthen the implementation of Buy American laws that DOC will submit to the President by November 24, 2017.

Next steps and implications

The notice clarifies the USTR report's scope, although its ultimate conclusions and impact remain uncertain. The questions posed in the notice appear to reflect two Trump administration concerns: (i) that U.S. trade agreements hinder the U.S. government's ability to maximize the use of domestic content in government procurement; and (ii) that U.S. trade agreement partners are not affording the United States "truly reciprocal" access to their own government procurement markets. The final USTR report may therefore recommend actions to address these concerns, such as renegotiating U.S. commitments under, or withdrawing from, the GPA; demanding that other GPA parties expand their commitments under the Agreement; or revising current Buy American policies. Such

[2] These countries are: Armenia, Aruba, Australia, Bahrain, Canada, Chile, Chinese Taipei (Taiwan), Colombia, Costa Rica, Dominican Republic, El Salvador, the European Union (which includes Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, and the United Kingdom), Guatemala, Honduras, Hong Kong, Iceland, Israel, Japan, the Republic of Korea, Liechtenstein, Mexico, the Republic of Moldova, Montenegro, Morocco, New Zealand, Nicaragua, Norway, Oman, Panama, Peru, Singapore, Switzerland, and Ukraine.

recommendations and actions would be controversial, but they cannot be ruled out, given the Trump administration's stated support for Buy American requirements and its stated goal of achieving "reciprocity" in trade relations.

Department of Energy Proposes Rule on Small-Scale Natural Gas Exports to Non-FTA Countries

On September 1, 2017, the U.S. Department of Energy (DOE) issued a proposed rule, under its "public interest" authority, that establishes a special process for "small-scale natural gas exports" to countries with which the United States does not have a free trade agreement ("non-FTA countries").[3] The proposed rule aims to expedite the application and approval process for small-scale exports of natural gas to non-FTA countries, and may therefore benefit natural gas consumers in those countries. DOE is seeking public comments on the proposed rule and is expected to issue the final rule later this year.

Details of the proposed rule

DOE's proposed rule would require DOE to issue an export authorization (license) upon the agency's receipt of any complete application that seeks to export natural gas, including LNG, to non-FTA countries and satisfies two criteria: (1) the application proposes to export a volume not exceeding 0.14 billion cubic feet per day (approximately one million metric tons per year); and (2) DOE's approval of the application does not require an environmental impact statement (EIS) or an environmental assessment (EA) under the National Environmental Policy Act of 1969 (NEPA). Criterion (2) would be satisfied where, for example, the natural gas export activities require only minor operational changes to existing projects, and no new construction. DOE proposes that qualifying applications for "small-scale natural gas exports" will be "deemed to be consistent with the public interest" under the U.S. Natural Gas Act, which permits natural gas exports to non-FTA countries unless DOE finds that the proposed exportation will not be consistent with the "public interest." For any such shipments, DOE would not apply its current regulations regarding notice and review of natural gas export applications, and would expedite processing of these applications.

The proposed rule also underscores the potential WTO concerns raised by the current U.S. system. For example, the proposed rule expressly confirms (1) that DOE retains broad discretion to define the "public interest" and whether natural gas exports meet that standard, and (2) DOE's discretionary "public interest" standard is almost entirely based on economic, not security-related, factors.

Potential implications

Although the export quantities at issue are relatively small (accounting for less than 1 percent of total non-FTA country export authorizations since 2012), the new streamlined procedures could, if adopted, benefit natural gas consumers in non-FTA countries. DOE explains in the preamble to the proposed rule that "the emerging small-scale export market involves exports of small volumes of natural gas from the United States to countries primarily in, but not limited to, the Caribbean, Central America, and South America. Many of these countries do not generate enough natural gas demand to support the economies of scale required to justify large volumes of LNG imports from large-scale LNG terminals via conventional LNG tankers. The small-scale natural gas export market has developed as a solution to the practical and economic constraints limiting natural gas exports to these countries." DOE further explains that the expedited procedures envisioned in the proposed rule are aimed at "reducing administrative burdens for the small-scale natural gas export market."

Public comments

DOE will accept public comments on the proposed rule until October 16, 2017. Guidelines for submitting public comments electronically are provided in the Federal Register notice. DOE will likely issue the final rule later this year.

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

Petitions and Investigations Highlights

US Department of Commerce Issues Affirmative Preliminary Determinations in Countervailing Duty Investigations of Carbon and Alloy Steel Wire Rod from Italy and Turkey

On August 28, 2017, the US Department of Commerce (DOC) announced its affirmative preliminary determinations in the countervailing duty (CVD) investigations concerning imports of carbon and alloy steel wire rod from Italy and Turkey.[4] In its investigations, DOC preliminarily determined that imports of the subject merchandise received countervailable subsidies at the following rates:

Country	Subsidy Rates
Italy	1.70 to 44.18 percent
Turkey	2.27 percent

The merchandise covered by these investigations is 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.

DOC is scheduled to announce its final determinations on or around November 9, 2017, unless the statutory deadline is extended. If DOC makes affirmative final determinations, and the US International Trade Commission (ITC) makes affirmative final determinations that imports of the subject merchandise from Italy and/or Turkey materially injure or threaten material injury to the domestic industry, DOC will issue CVD orders.

According to DOC, imports of carbon and alloy steel wire rod from Italy and Turkey in 2016 were valued at an estimated USD 12.2 million and 41.4 million, respectively.

US International Trade Commission Issues Affirmative Final Determination in Antidumping Investigation of Steel Concrete Reinforcing Bar from Taiwan

On August 30, 2017, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of steel concrete reinforcing bar from Taiwan. The US Department of Commerce (DOC) determined in July 2017 that imports of steel concrete reinforcing bar from Taiwan were sold in the United States at dumping margins ranging from 3.50 to 32.01 percent.[5]

As a result of the ITC's affirmative final determination, DOC will issue an antidumping duty order on imports of the subject merchandise from Taiwan, which is classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) primarily under item numbers 7213.10.0000, 7214.20.0000, and 7228.30.8010. According to the ITC, imports of the subject merchandise in 2016 were valued at an estimated USD 700.7 million.

The ITC's public report on the investigation will be available by October 3, 2017.

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

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

US Department of Commerce Initiates AD/CVD Investigations of Stainless Steel Flanges from China and India

On September 6, 2017, the US Department of Commerce (DOC) announced the initiation of antidumping (AD) and countervailing duty (CVD) investigations concerning imports of stainless steel flanges from China and India.[6] The petitioner, the Coalition of American Flange Producers, alleges that imports of stainless steel flanges from China and India received above *de minimis* countervailable subsidies and were sold in the United States at the following dumping margins:

Country	Alleged dumping margins
China	99.23 – 257.11 percent
India	78.49 – 145.25 percent

The merchandise subject to the investigations is certain forged stainless steel flanges, whether unfinished, semi-finished, or finished (certain forged stainless steel flanges). Certain forged stainless steel flanges are generally manufactured to, but not limited to, the material specification of ASTM/ASME A/SA182 or comparable domestic or foreign specifications. Certain forged stainless steel flanges are made in various grades such as, but not limited to, 304, 304L, 316, and 316L (or combinations thereof). Unfinished stainless steel flanges possess the approximate shape of finished stainless steel flanges and have not yet been machined to final specification after the initial forging or like operations. These machining processes may include, but are not limited to, boring, facing, spot facing, drilling, tapering, threading, beveling, heating, or compressing. Semi-finished stainless steel flanges are unfinished stainless steel flanges that have undergone some machining processes.

The scope includes six general types of flanges. They are: (1) weld neck, generally used in butt-weld line connection; (2) threaded, generally used for threaded line connections; (3) slip-on, generally used to slide over pipe; (4) lap joint, generally used with stub-ends/butt-weld line connections; (5) socket weld, generally used to fit pipe into a machine recession; and (6) blind, generally used to seal off a line. The sizes and descriptions of the flanges within the scope include all pressure classes of ASME B16.5 and range from one-half inch to twenty-four inches nominal pipe size. Specifically excluded from the scope of these investigations are cast stainless steel flanges. Cast stainless steel flanges generally are manufactured to specification ASTM A351.

Merchandise subject to the investigations is typically imported under headings 7307.21.1000 and 7307.21.5000 of the Harmonized Tariff Schedule of the United States (HTSUS).

The US International Trade Commission (ITC) is scheduled to make its preliminary injury determinations on or before October 2, 2017. If the ITC determines that there is a reasonable indication that imports of stainless steel flanges from China and India 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 November 2017 and its preliminary AD determination in January 2018, unless the statutory deadlines are extended.

According to DOC, imports of stainless steel flanges from China and India in 2016 were valued at an estimated USD 16.3 million and 32.1 million, respectively.

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

US Department of Commerce Issues Affirmative Preliminary Determinations in Antidumping Investigations of Carbon and Alloy Steel Wire Rod from Belarus, Russia, and the United Arab Emirates

On September 6, 2017, the US Department of Commerce (DOC) announced its affirmative preliminary determinations in the antidumping (AD) investigations concerning imports of carbon and alloy steel wire rod from Belarus, Russia, and the United Arab Emirates (UAE).[7] In its investigations, DOC preliminarily determined that imports of the subject merchandise were sold in the United States at the following dumping margins:

Country	Exporter/producer	Dumping margins
Belarus	Belarus-wide entity	280.02 percent
Russia	Abinsk Electric Steel Works Ltd.	756.93 percent
	JSC NLMK-Ural	756.93 percent
	All others	436.80 percen
UAE	Emirates Steel Industries PJSC	84.10 percent
	All others	84.10 percent

The merchandise covered by these investigations is 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. Specifically excluded are steel products possessing the above-noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (HTSUS) definitions for (a) stainless steel; (b) tool steel; (c) high-nickel steel; (d) ball bearing steel; or (e) concrete reinforcing bars and rods. Also excluded are free cutting steel (also known as free machining steel) products (i.e., products that contain by weight one or more of the following elements: 0.1 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorous, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium).

The subject merchandise is 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). Merchandise entered under subheadings 7213.99.0090 and 7227.90.6090 of the HTSUS also may be included in the scope.

DOC is scheduled to announce its final determination on November 21, 2017, unless the statutory deadline is extended. According to DOC, imports of carbon and alloy steel wire rod from Belarus, Russia, and the UAE were valued at an estimated USD 10.4 million, 32.3 million and 7 million, respectively.

US Department of Commerce Issues Affirmative Preliminary Determination in Countervailing Duty Investigation of Tool Chests and Cabinets from China

On September 12, 2017, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the countervailing duty (CVD) investigation concerning imports of tool chests and cabinets from China.[8] In its investigation, DOC preliminarily determined that imports of the subject merchandise received countervailable subsidies at the following rates:

Country	Exporter/Producer	Subsidy Rate

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

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

China	Jiangsu Tongrun Equipment Technology Co., Ltd.	17.32 percent
	Zhongshan Geelong Manufacturing CO., Ltd.	32.07 percent
	All others	27.13 percent

The products covered by this investigation are certain metal tool chests and tool cabinets, with drawers (tool chests and cabinets) from China. The scope covers all metal tool chests and cabinets, including top chests, intermediate chests, tool cabinets and side cabinets, storage units, mobile work benches, and work stations that have the following physical characteristics: (1) a body made of carbon, alloy, or stainless steel and/or other metals; (2) two or more drawers for storage in each individual unit; (3) a width (side to side) exceeding 15 inches for side cabinets and exceeding 21 inches for all other individual units but not exceeding 60 inches; (4) a body depth (front to back) exceeding 10 inches but not exceeding 24 inches; and (5) prepackaged for retail sale.

Merchandise subject to the investigation is classified under the Harmonized Tariff Schedule of the United States (HTSUS) categories 9403.20.0021, 9403.20.0026, 9403.20.0030 and 7326.90.8688, but may also be classified under HTSUS category 7326.90.3500.

DOC is scheduled to announce its final determination by November 23, 2017, unless the statutory deadline is extended. If DOC makes an affirmative final determination, and the US International Trade Commission (ITC) makes an affirmative final determination that imports of tool chests and cabinets from China materially injure, or threaten material injury to, the domestic industry, DOC will issue a CVD order.

According to DOC, imports of tool chests and cabinets from China were valued at an estimated USD 989.9 million in 2016.

US Department of Commerce Initiates Trade Remedy Investigations Concerning Titanium Sponge from Japan and Kazakhstan

On September 14, 2017, the US Department of Commerce (DOC) announced the initiation of antidumping and countervailing duty investigations concerning imports of titanium sponge from Kazakhstan, and the initiation of an antidumping investigation concerning imports of the same from Japan.[9] The petitioner, Titanium Metals Corporation, alleges that imports of the subject merchandise were sold in the United States at dumping margins of 69.69 to 95.20 percent (for Japan) and 42.22 percent (for Kazakhstan). The petitioner also alleges that the subject merchandise received countervailable subsidies from the government of Kazakhstan in excess of the *de minimis* level.

The merchandise subject to the investigations includes all forms and grades of titanium sponge, except as specified below. Titanium sponge is unwrought titanium metal that has not been melted. Expressly excluded from the scope of the investigations are: 1) loose particles of unwrought titanium metal having a particle size of less than 20 mesh (0.84mm); 2) alloyed or unalloyed briquettes of unwrought titanium metal that contain more than 0.2 percent oxygen on a dry weight basis; and 3) ultra-high purity titanium sponge. Titanium sponge is currently classified under subheading 8108.20.0010 of the Harmonized Tariff Schedule of the United States (HTSUS).

The US International Trade Commission (ITC) is scheduled to make its preliminary injury determinations on or before October 10, 2017. If the ITC determines that there is a reasonable indication that imports of titanium sponge from Japan and Kazakhstan 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 November 2017 and its preliminary AD determinations in January 2018, unless the statutory deadlines are extended.

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

According to DOC, imports of titanium sponge from Japan and Kazakhstan in 2016 were valued at an estimated USD 144.8 million and 374 thousand, respectively.

US Department of Commerce Issues Affirmative Preliminary Determinations in Countervailing Duty Investigations of Cold-Drawn Mechanical Tubing from China and India

On September 19, 2017, the US Department of Commerce (DOC) announced its affirmative preliminary determinations in the countervailing duty (CVD) investigations of imports of cold-drawn mechanical tubing from China and India.[10] In its investigations, DOC preliminarily determined that imports of the subject merchandise received countervailable subsidies in the following amounts:

Country	Producer/Exporter	Subsidy Rates
India	Goodluck Industries Limited	8.09 percent
	Tube Investments of India Limited	3.04 percent
	All-Others	5.99 percent
China	Jiangsu Hongyi Steel Pipe Co., Ltd.	35.69 percent
	Zhangjiagang Huacheng Import & Export Co., Ltd.	33.31 percent
	All-Others	34.50 percent

As a result of the preliminary affirmative determinations, DOC will instruct US Customs and Border Protection (CBP) to require cash deposits based on these preliminary rates.

The merchandise covered by the investigations is cold-drawn mechanical tubing of carbon and alloy steel (cold-drawn mechanical tubing) of circular cross-section, in actual outside diameters less than 331mm, and regardless of wall thickness, surface finish, end finish or industry specification. The subject cold-drawn mechanical tubing is a tubular product with a circular cross-sectional shape that has been cold-drawn or otherwise cold-finished after the initial tube formation in a manner that involves a change in the diameter or wall thickness of the tubing, or both.

The products subject to the investigation are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7304.31.3000, 7304.31.6050, 7304.51.1000, 7304.51.5005, 7304.51.5060, 7306.30.5015, 7306.30.5020, 7306.50.5030. Subject merchandise may also enter under numbers 7306.30.1000 and 7306.50.1000.

DOC is scheduled to announce its final determinations on or around December 4, 2017, unless the statutory deadline is extended. If DOC makes affirmative final determinations, and the US International Trade Commission (ITC) makes affirmative final determinations that imports of cold-drawn mechanical tubing from China and/or

India materially injure, or threaten material injury to, the domestic industry, DOC will issue CVD orders.

In 2016, imports of cold-drawn mechanical tubing from China and India were valued at an estimated USD 29.4 million and 25 million, respectively.

US International Trade Commission Makes Affirmative Injury Determination in Safeguard Investigation of Crystalline Silicon Photovoltaic Cells

On September 22, 2017, the US International Trade Commission (ITC) determined that imports of crystalline silicon photovoltaic (CSPV) cells (whether or not partially or fully assembled into other products) are being imported into the

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

United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry in the United States.[11] The ITC made the determination in the context of an investigation initiated on May 17, 2017 under Section 201 of the Trade Act of 1974, in response to a petition filed by Suniva, Inc. As a result of the affirmative injury determination, the ITC will proceed to the remedy phase of the investigation. The details of the ITC's determination and the next steps in the investigation are summarized below.

Injury determination

All four sitting Commissioners (Chairman Rhonda K. Schmidtlein, Vice Chairman David S. Johanson, and Commissioners Irving A. Williamson and Meredith M. Broadbent) made affirmative injury determinations, except with respect to the specific findings for FTA countries noted below. Consequently, the investigation will proceed to the remedy phase, and the ITC will hold a public hearing regarding potential remedies on October 3, 2017. The ITC will then submit to the President, by November 13, 2017, a report containing its injury determination, remedy recommendations, and additional findings. The ITC may recommend tariff increases, quantitative import restrictions (quotas), tariff-rate quotas, trade adjustment assistance for workers displaced as a result of imports, or a combination of the above.

Findings relating to FTA countries

When the ITC makes an affirmative injury determination in a Section 201 investigation, it is required to make certain additional findings under the implementing statutes for the North American Free Trade Agreement (NAFTA), the US-Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), and the United States' bilateral trade agreements with Australia, Korea, Colombia, Jordan, Panama, Peru, and Singapore. These implementing statutes generally require the ITC to find whether imports from the relevant FTA country contribute importantly to the serious injury or threat thereof, and to include these findings in its report the President.[12] After receiving the ITC's findings, the President may determine to exclude imports from an FTA country from the scope of the safeguard action. However, a negative finding by the ITC with respect to imports from an FTA country (*i.e.*, a finding that such imports do not contribute importantly to the serious injury) is not binding on the President, who makes the final decision concerning whether to provide relief to the U.S. industry with respect to imports from FTA countries.

The ITC's findings with respect to imports of CSPV cells from FTA partner countries were as follows:

- **Mexico.** All four Commissioners found that imports of the subject merchandise from Mexico account for a substantial share of total imports and contribute importantly to the serious injury caused by imports.
- **Canada.** Vice Chairman Johanson and Commissioners Williamson and Broadbent made a negative finding with respect to imports from Canada. Chairman Schmidtlein found that imports from Canada account for a substantial share of total imports and contribute importantly to the serious injury caused by imports.

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

[12] The NAFTA Implementation Act requires the ITC to find whether:

(i) Imports of the article from a NAFTA country, considered individually, account for a substantial share of total imports; and

(ii) Imports of the article from a NAFTA country, considered individually or, in exceptional circumstances, imports from NAFTA countries considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.

The President is required to make the same determinations before taking a safeguard action. If the President makes a negative determination, the President must exclude from the safeguard action articles from the relevant NAFTA country. *See* 19 U.S.C. §§ 3371-3372.

The implementing statutes for the other trade agreements listed above generally require the ITC to find whether imports of the article from the FTA partner country "constitute a substantial cause of serious injury or threat thereof." If the ITC's finding is negative, the President may exclude from the safeguard action articles from the relevant FTA partner country. *See* 19 U.S.C. § 3805 note.

- **Korea.** All four Commissioners found that imports of the subject merchandise from Korea are a substantial cause of serious injury or threat thereof.
- **Other FTA countries.** All four Commissioners found that imports of the subject merchandise from Australia, the CAFTA-DR countries, Colombia, Jordan, Panama, Peru, and Singapore individually are not a substantial cause of serious injury or threat thereof.

Presidential determination and potential actions

Once the ITC submits its report, the President has 60 days to decide whether to implement the ITC's recommendations, take alternative action, or take no action. The granting and form of import relief are discretionary, but in cases where the ITC has found industries to have suffered serious injury by imports, the President nearly always has granted at least some remedy. Statutory provisions limit the scope of the relief that the President can grant, however:

- In determining what is an appropriate and feasible remedy, the President is required to take into account the effect of remedial actions on consumers.
- The relief must not be more restrictive than is necessary, and the safeguard restrictions (if effective for more than one year) must be phased down at regular intervals during the period in which they are in effect.
- The period of relief may not exceed 4 years (unless subsequently extended by the President up to a maximum period of 8 years).
- No action may be taken that would increase the rate of duty to more than 50 percent *ad valorem* above the rate (if any) existing at the time the action is taken.
- Any action imposing quantitative restrictions must allow the importation of a quantity or value of the subject article that is not less than the average quantity or value entered during the most recent three years that are representative.

In addition to the remedies described above, the President also may negotiate agreements with the affected foreign countries to reduce imports, negotiate a solution to the underlying problem internationally, or seek new legislation to assist the US industry to adjust.

If the remedy proclaimed by the President is (i) an increase in, or imposition of, any duty on the imported article; (ii) a tariff-rate quota on the article, or (iii) a modification or imposition of any quantitative restriction on the importation of the article, the action will take effect within 15 days after the President proclaims the action. If the action taken by the President differs from the ITC's recommendation or if the President takes no action, the action recommended by the ITC nonetheless could take effect upon the enactment of a joint Congressional resolution within a 90-day period beginning on the date the President's report is transmitted to Congress. In such an event, the President must proclaim the action recommended by the ITC within 30 days of the joint resolution.

Assuming the ITC submits its report and recommendations to the President on November 13, 2017, President Trump will be required to issue a determination in this investigation by January 12, 2018.

US Department of Commerce Issues Affirmative Preliminary Determination in Countervailing Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada

On September 26, 2017, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the countervailing duty (CVD) investigation of imports of 100- to 150-seat large civil aircraft from

Canada.[13] In its investigation, DOC calculated a preliminary subsidy rate of 219.63 percent for Bombardier, Inc., the Canadian producer of the subject merchandise. DOC initiated this investigation in May in response to a petition filed by the Boeing Company.

The scope of this investigation covers aircraft, regardless of seating configuration, that have a standard 100- to 150-seat two-class seating capacity and a minimum 2,900 nautical mile range. Notably, the Canadian aircraft subject to this investigation have not yet been imported into the United States. However, DOC notes that "an April 2016 press release announcing the sale of Canadian aircraft to a U.S. airline valued the order to be in excess of $5 billion", and that "if and when Bombardier exports these planes to the United States, CBP will require cash deposits in amounts equal to the preliminary subsidy rate." The subject merchandise is classifiable under HTSUS subheadings 8802.40.0040 and 8802.40.0090.

The petitioner has requested that DOC's final determination in the CVD investigation be aligned with the final determination of the concurrent antidumping duty investigation. Accordingly, DOC is scheduled to announce its final determination on or around December 19, 2017. If DOC makes an affirmative final determination, and the US International Trade Commission (ITC) makes an affirmative final determination that imports of the subject merchandise from Canada threaten material injury to the domestic industry, DOC will issue a CVD order.

WTO & Multilateral Highlights

WTO Appellate Body Issues Report in US – Conditional Tax Incentives for Large Civil Aircraft (DS487)

The WTO Appellate Body has ruled that certain tax incentives provided by the State of Washington in the aerospace sector are not prohibited import substitution subsidies under the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement). The Appellate Body rejected the appeal by the European Union on these issues, while upholding a cross-appeal by the United States.

This decision is the latest but by no means the final iteration in the longstanding aircraft subsidy dispute between Boeing and Airbus.

The main issue in the current appeal related to certain tax breaks granted by the State of Washington for aircraft production, estimated by the EU to be worth several billion dollars. This case focused on so-called "siting" provisions. One set of tax incentives was available "upon the siting of a significant commercial airplane manufacturing program" in Washington State, a condition met by Boeing's 777X aircraft program. The other siting provision stated that certain incentives would no longer apply if any final assembly or wing assembly of a commercial airplane was "sited outside of Washington". The EU argued that the siting provisions were prohibited import substitution subsidies, i.e., subsidies contingent upon the use of domestic over imported goods.

The Appellate Body disagreed, reasoning that in order to establish a violation of the prohibited import substitution subsidy disciplines of the SCM Agreement, it was necessary to demonstrate a condition requiring the use of domestic

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

over imported goods. The Appellate Body found no such requirement in the Washington State laws. It stressed that the prohibited subsidies rules do "not prohibit the subsidization of domestic 'production' per se but rather the granting of subsidies contingent upon the 'use', by the subsidy recipient, of domestic over imported goods". It added that even if Boeing would "likely" use some domestically produced wings and fuselages, this was insufficient to establish the existence of a condition requiring the use of domestic over imported goods.

The Appellate Body's decision thus hinged on the meaning of contingency, i.e., when a subsidy will be considered to be "contingent" on the use of domestic over imported goods. Consistent with its prior rulings, the Appellate Body interpreted "contingent" to mean a condition or a requirement for receiving the subsidy. As it found that no such condition existed under the Washington State measures, it ruled in favour of the United States on all issues.

In a related case (DS353), the EU has established that a Washington State tax incentive has caused "serious prejudice" to the EU, and thus – even if not prohibited – is an actionable subsidy under SCM Agreement. This dispute has now reached the Appellate Body as a compliance matter and will subject to a separate ruling.

Background: Washington State tax incentives

In this dispute, the EU challenged certain tax-related measures provided by Washington State:

- a reduction in the business and occupation ("B&O") tax rate that applies to business activities involved in the manufacture and sale of commercial airplanes (the "B&O aerospace tax rate"); and
- a series of other tax credits or exemptions (the "aerospace tax measures").

The EU pointed to two "siting" provisions in the Washington State law that governed the availability of the incentives. The "First Siting Provision", which pertained to all of the aerospace tax measures, stated that the tax incentives would take effect "upon the siting of a significant commercial airplane manufacturing program" in Washington. The disputing parties agreed that the First Siting Provision had been fulfilled by Boeing's 777X aircraft program, and that "the challenged tax incentives are therefore in effect". The "Second Siting Provision" concerned the continued availability of the B&O aerospace tax rate, providing that the reduced tax rate would no longer apply if there were a determination by the State of Washington that any final assembly or wing assembly of a commercial airplane under the First Siting Provision "has been sited outside of Washington".

The EU argued that these measures constituted prohibited import substitution subsidies. In the EU view, these measures were in breach of Article 3.1(b) of the SCM Agreement as "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods".

In November 2016, a WTO Panel dismissed the claim that the aerospace tax measures were de jure contingent (i.e., contingent in law) on the use of domestic over imported goods, a ruling challenged on appeal by the EU. The Panel upheld the EU claim that the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under Boeing's 777X program was de facto contingent upon the use of domestic over imported goods. This latter ruling was the subject of a cross-appeal by the United States.

Prohibited import substitution subsidies under the SCM Agreement

Article 3.1 of the SCM Agreement prohibits two types of subsidies: export-contingent subsidies, which were not at issue in this case, and import substitution subsidies. Article 3.2 adds that a WTO Member "shall neither grant nor maintain" either type of prohibited subsidy.

In the current dispute, the Appellate Body noted that a subsidy would be "contingent" on the use of domestic over imported goods "if the use of those goods were a condition, in the sense of a requirement, for receiving the subsidy". It also recalled its earlier rulings that "the legal standard expressed by the term 'contingent' is the same for *de jure* and *de facto* contingency". [Original emphasis for this and all italicized quotes below.] It stated that a subsidy will be *de jure* contingent upon the use of domestic over imported goods "when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure", or can "be derived by necessary implication from the words actually used in the measure". By contrast, the existence of *de facto* contingency "must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case".

The Appellate Body found that Article 3.1(b) prohibits "the use of domestic goods in preference to, or instead of, imported goods as a condition for receiving the subsidy". It stressed that "by its terms, Article 3.1(b) does not prohibit the subsidization of domestic 'production' *per se* but rather the granting of subsidies contingent upon the 'use', by the subsidy recipient, of domestic over imported goods". It added that "[s]ubsidies that relate to domestic production are therefore not, for that reason alone, prohibited under Article 3 of the SCM Agreement".

EU appeals dismissed: Washington State "siting" provisions did not require the use of domestic goods

The European Union argued that, in its *de jure* assessment of the First and Second Siting Provisions, the Panel erroneously confined the applicability of Article 3.1(b) "to those situations where the subsidy recipient is required under the terms of the subsidy measure, for a given good, to use domestic goods to the complete exclusion of imported goods". It similarly argued that "the error in the Panel's interpretation of Article 3.1(b) in the context of its *de jure* assessment carries over to its *de facto* assessment of the First Siting Provision".

The Appellate Body dismissed these arguments. It ruled that "the Panel did not articulate a legal standard under Article 3.1(b) of the SCM Agreement requiring the use of domestic goods to the complete exclusion of imported goods". Instead, the Panel found that the First and Second Siting Provisions "relate to the location of certain assembly operations within Washington and are silent as to the use of domestic or imported goods".

The EU also argued that the Panel erred in its application of Article 3.1(b) by finding that the First Siting Provision does not make the aerospace tax measures *de jure* contingent upon the use of domestic over imported goods.

The Appellate Body rejected this argument. It reasoned that "the relevant question in determining the existence of *de jure* contingency under Article 3.1(b) is not whether the production requirements… may *result* in the use of more domestic and fewer imported goods, but whether the measure, by its terms or by necessary implication therefrom, sets out *a condition requiring* the use of domestic over imported goods". It followed, according to the Appellate Body, that "even if… Boeing would likely use some amount of domestically produced wings and fuselages, this observation is not in itself sufficient to establish the existence of a condition, reflected in the measure's terms or arising by necessary implication therefrom, requiring the use of domestic over imported goods".

The Appellate Body similarly dismissed the EU claim that the Panel had failed to make an "objective assessment" of the matter under Article 11 of the Dispute Settlement Understanding.

U.S. cross appeal allowed: de facto contingency not established

The U.S. argued in its cross-appeal that the Panel erred in finding that the B&O aerospace tax rate was *de facto* contingent upon the use of domestic over imported goods. The Appellate Body upheld this U.S. claim.

The Appellate Body noted that "it is the location of production, not the imported or domestic origin of the resulting product, that would trigger the loss of the B&O aerospace tax rate". The Appellate Body "consider[ed] it significant that the Second Siting Provision is focused on the 'siting' of assembly activities". It reiterated that "although conditions for eligibility and access to a subsidy may entail certain consequences for a domestic producer's sourcing decisions between domestic and imported goods, this alone does not equate to *a condition requiring* the use of domestic over imported goods".

The Appellate Body found that the Panel failed to establish that the Second Siting Provision, "in addition to the conditions relating to the siting of production activities, also entails a condition requiring the use of domestic over imported goods". It concluded that "we do not consider that the Panel's analysis and reasoning provided a sufficient basis for its finding that the Second Siting Provision makes the B&O aerospace tax rate *de facto* contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement". It reversed the Panel's finding that the U.S. had acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement.

The Appellate Body thus found that the challenged Washington State tax measures were consistent with the import substitution subsidy disciplines of the SCM Agreement.

The Report of the WTO Appellate Body in *United States – Conditional Tax Incentives for Large Civil Aircraft* (DS487) was circulated on 4 September 2017.