US & Multilateral Trade Policy Developments

Japan External Trade Organization

May 2020

Contents

US Trade Actions 4

President Trump Issues Executive Order on Securing the United States Bulk-Power System 4
US Department of Commerce Issues Proposed Rule to Establish Aluminum Import Monitoring and Analysis System 7

Section 301 Developments 9

USTR Requests Comments on Possible One-Year Extension of Section 301 Tariff Exclusions for "List 3" Goods 9
China Announces Latest Tariff Exclusions for 79 US Imports Subject to China's Retaliatory Tariffs 11

Section 232 Developments 13

US Department of Commerce to Initiate Section 232 Investigation Into Imports of Laminations and Wound Cores for Incorporation into Transformers, Electrical Transformers, and Transformer Regulators 13
US Department of Commerce Initiates Section 232 Investigation into Mobile Crane Imports 15
US Department of Commerce Seeks Public Comments on Section 232 Investigation of Imports of Certain Electrical Steel 17
US Department of Commerce Seeks Public Comments on Potential Changes to Section 232 Exclusion Process 19
US Government Urges Supreme Court to Reject Cert Petition from Steel Importers Opposing Section 232 22
US Department of Commerce Seeks Public Comments on Section 232 Investigation of Imports of Mobile Cranes 23

Anti-Circumvention Actions 25

US Department of Commerce Self-Initiates Anti-Circumvention and Scope Inquiries Involving Exports of China-Origin Stainless Steel Sheet and Strip Completed in Vietnam 25

US FTA Developments 27

United Kingdom and United States Launch Bilateral FTA Negotiations 27
President Trump Issues Executive Order Establishing USMCA Forced Labor Enforcement Task Force 30

US Trade Actions

President Trump Issues Executive Order on Securing the United States Bulk-Power System

On May 1, 2020, President Trump issued an Executive Order prohibiting the acquisition, importation, transfer, or installation of certain "bulk-power system electric equipment" where the transaction involves property in which a foreign country or national has any interest and the Secretary of Energy determines that the transaction poses risks to the US bulk-power system, critical infrastructure, or national security. The President issued the Order pursuant to the International Emergency Economic Powers Act of 1977 (IEEPA), 19 U.S.C. § 1701-1707, which authorizes the President to regulate international commerce with the United States and to freeze assets within US jurisdiction, in order to address "national emergencies" that the President declares pursuant to the National Emergencies Act (NEA, 50 U.S.C. § 1601 et seq.) The Order is effective immediately, but its precise scope and operation will be determined by implementing regulations that have not yet been issued. The Order directs the Secretary of Energy to issue such regulations within 150 days, and to establish procedures to license transactions that otherwise would be prohibited by the Order, though such licenses may be contingent upon the adoption of "mitigation" measures.

Declaration of National Emergency and Invocation of IEEPA

The Order declares a national emergency pursuant to the NEA "with respect to the threat to the United States bulk-power system." This alleged threat arises from "the unrestricted acquisition or use in the United States of bulk-power system electric equipment designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries[.]" According to the Order, such "unrestricted" acquisition and use "augments the ability of foreign adversaries to create and exploit vulnerabilities in bulk-power system electric equipment, with potentially catastrophic effects." Accordingly, the Order sets forth the President's determination that "the unrestricted foreign supply of bulk-power system electric equipment constitutes an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, which has its source in whole or in substantial part outside the United States" (a prerequisite for action under IEEPA).[1]

The Order does not identify with specificity any recent actions or threats to the US electrical grid that constitute a "national emergency." Rather, it generally asserts, without identifying specific countries, that "[t]he bulk-power system is a target of those seeking to commit malicious acts against the United States and its people, including malicious cyber activities, because a successful attack on our bulk-power system would present significant risks to our economy, human health and safety, and would render the United States less capable of acting in defense of itself and its allies." However, in describing the impetus for the order, U. government officials reportedly have cited past findings by the US intelligence community that the governments of Russia and China have allegedly sought to exploit vulnerabilities in the US electrical grid.

Scope of the Order

The merchandise covered by the Order is "bulk-power system electric equipment," which the Order defines as follows:

---

[1] See 50 U.S.C. § 1701. The President may only take action under IEEPA where two criteria are met:

(i) The action must be intended to deal with an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States"; and

(ii) Prior to taking (or concurrent with any action taken) under IEEPA, the President must declare a national emergency pursuant to the National Emergencies Act (NEA, 50 U.S.C. § 1601 et seq.) with respect to such threat. The NEA further provides that the proclamation declaring the national emergency "shall immediately be transmitted to the Congress and published in the Federal Register" (50 U.S.C. §1621(a)). The NEA also provides that the President must specify, either in the declaration of a national emergency, or by one or more contemporaneous or subsequent Executive orders published in the Federal Register and transmitted to the Congress, the provisions of law (*e.g.*, IEEPA) under which the President proposes to act (50 U.S.C. § 1631(a)).

> The term "bulk-power system electric equipment" means items used in bulk-power system substations, control rooms, or power generating stations, including reactors, capacitors, substation transformers, current coupling capacitors, large generators, backup generators, substation voltage regulators, shunt capacitor equipment, automatic circuit reclosers, instrument transformers, coupling capacity voltage transformers, protective relaying, metering equipment, high voltage circuit breakers, generation turbines, industrial control systems, distributed control systems, and safety instrumented systems. Items not included in the preceding list and that have broader application of use beyond the bulk-power system are outside the scope of this order.

The Order provides no further details on the merchandise that is subject to the prohibition. It appears the Order does not apply to the energy sources used to generate electricity (*e.g.*, fossil or nuclear fuels). The Order directs the Secretary of Energy to issue regulations implementing the prohibition within 150 days, and these regulations might further clarify the scope of the Order. The implementing regulations envisioned in the Order are described in more detail below.

Prohibition on Certain Bulk-Power System Electric Equipment

Section 1 of the Order prohibits "any acquisition, importation, transfer, or installation of any bulk-power system electric equipment (transaction) by any person, or with respect to any property, subject to the jurisdiction of the United States," where the following conditions are met:

- The transaction involves any property in which any foreign country or a national thereof has any interest (including through an interest in a contract for the provision of the equipment),
- The transaction was initiated after the date of the Order, and
- The Secretary of Energy, in coordination with the Director of the Office of Management and Budget and in consultation with the Secretary of Defense, the Secretary of Homeland Security, the Director of National Intelligence, and, as appropriate, the heads of other executive departments and agencies, has determined that:
  - The transaction involves bulk-power system electric equipment designed, developed, manufactured, or supplied, by persons owned by, controlled by, or subject to the jurisdiction or direction of a "foreign adversary"; and
  - The transaction: (i) poses an undue risk of sabotage to or subversion of the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of the bulk-power system in the United States; (ii) poses an undue risk of catastrophic effects on the security or resiliency of United States critical infrastructure or the economy of the United States; or (iii) otherwise poses an unacceptable risk to the national security of the United States or the security and safety of United States persons.

The prohibition described above will apply "except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the date of this order."

Implementation of the Order

The Order delegates to the Secretary of Energy the authority "to take such actions, including directing the timing and manner of the cessation of pending and future transactions prohibited pursuant to section 1 of this order, adopting appropriate rules and regulations, and employing all other powers granted to the President by IEEPA as may be necessary to implement this order." The Order further specifies that, within 150 days (*i.e.*, by September 28), the Secretary must issue "rules or regulations implementing the authorities delegated to the Secretary by this order." Such regulations "may":

- Determine that particular countries or persons "are foreign adversaries exclusively for the purposes of this order"; and identify "persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries exclusively for the purposes of this order;"
- Identify particular equipment or countries with respect to which transactions involving bulk-power system electric equipment "warrant particular scrutiny under the provisions of this order;"
- Establish procedures to license transactions otherwise prohibited pursuant to the Order; and
- Identify "a mechanism and relevant factors for the negotiation of agreements to mitigate [the economic and national security concerns described in the Order.]"

The Order provides the following additional authorities and directives to the Secretary of Energy:

- **Mitigation measures**. The Order expressly authorizes the Secretary to "design or negotiate measures to mitigate" the economic and national security concerns identified in the Order, and provides that "[s]uch measures may serve as a precondition to the approval by the Secretary of a transaction or of a class of transactions that would otherwise be prohibited pursuant to this order."
- **Prequalification of equipment and vendors**. The Secretary, in consultation with the heads of other agencies as appropriate, "may establish and publish criteria for recognizing particular equipment and particular vendors in the bulk-power system electric equipment market as pre-qualified for future transactions; and may apply these criteria to establish and publish a list of pre-qualified equipment and vendors."
- **Identification of equipment posing "undue risks"**. "As soon as practicable," the Secretary must identify bulk-power system electric equipment that is "designed, developed, manufactured, or supplied, by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary" that:

  (i) Poses an undue risk of sabotage to or subversion of the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of the bulk-power system in the United States;

  (ii) Poses an undue risk of catastrophic effects on the security or resiliency of United States critical infrastructure or the economy of the United States; or

  (iii) Otherwise poses an unacceptable risk to the national security of the United States or the security and safety of United States persons.

"As soon as practicable," the Secretary must develop recommendations "on ways to identify, isolate, monitor, or replace such items as soon as practicable, taking into consideration overall risk to the bulk-power system."

Outlook

The Order establishes the legal framework for a broad prohibition on transactions involving certain foreign-origin bulk-power system electric equipment, but the extent of the prohibition will depend largely on the implementing regulations promulgated by the Department of Energy (DOE), the timing of which is unclear. As indicated above, the Order delegates broad authority to the Secretary of Energy to determine, among other things, which countries and persons are considered "foreign adversaries" for purposes of the Order, which transactions pose risks and must therefore be prohibited, and which entities and equipment will be prequalified or otherwise exempted from the prohibition through licenses or other measures. Interested parties should therefore evaluate closely the implementing regulations and any other guidance from DOE regarding the scope and operation of the Order.

For more information, please see: https://www.whitehouse.gov/presidential-actions/executive-order-securing-united-states-bulk-power-system/

US Department of Commerce Issues Proposed Rule to Establish Aluminum Import Monitoring and Analysis System

On April 29, 2020, the US Department of Commerce (DOC) published a proposed rule that would establish an Aluminum Import Monitoring and Analysis (AIM) system, based on DOC's existing Steel Import Monitoring and Analysis (SIMA) system for steel imports. The proposed AIM system would establish an import licensing requirement applicable to all imports of basic aluminum products, and would require license applicants to provide information about such imports, including by identifying the country where the aluminum used in the manufacture of the imported aluminum product was "smelted and poured."

DOC has indicated that the proposed rule is intended "to facilitate the monitoring of imports of aluminum articles, including monitoring for import surges." Similar to DOC's recent proposed changes to the SIMA system (which also are aimed at identifying the country in which steel was "melted and poured"), the proposed requirements for aluminum reflect the agency's heightened focus on monitoring global trade patterns to identify suspected unfair trade practices. The deadline for submitting public comments on the proposed rule is **May 29, 2020**.

We provide an overview of the proposed rule below.

Aluminum Import Licensing Requirement

Under DOC's proposed rule, importers of "basic aluminum products," which include all aluminum products currently subject to Section 232 tariffs, will be required to obtain an aluminum import license for each shipment and must provide the license number to CBP as part of the submission of the entry summary, or its electronic equivalent.[2] The only exceptions to the proposed licensing requirement are (1) low-valued imports (valued under $5,000 per shipment), which would be permitted to enter pursuant to a reusable "low-value license"; and (2) shipments eligible for informal entry pursuant to 19 CFR 143.21-143.28 (*e.g.*, shipments of merchandise not exceeding $2,500 in value).[3]

Similar to steel import licenses, aluminum import licenses will be issued automatically after the completion of the application form. In order to obtain the license, the applicant must disclose certain information about the aluminum

[2] The aluminum products currently subject to Section 232 duties include:

- unwrought aluminum provided for in heading 7601:
- bars, rods and profiles provided for in heading 7604; wire provided for in heading 7605;
- plates, sheets and strip provided for in heading 7606; foil provided for in heading 7607;
- tubes, pipes and tube or pipe fittings provided for in heading 7608 and 7609;
- castings and forgings of aluminum provided for in subheading 7616.99.51;
- stranded wire, cables, plaited bands and the like, including slings and similar articles, of aluminum and with steel core, not electrically insulated; the foregoing fitted with fittings or made up into articles (described in subheading 7614.10.50);
- stranded wire, cables, plaited bands and the like, including slings and similar articles, of aluminum and not with steel core, not electrically insulated; the foregoing comprising electrical conductors, not fitted with fittings or made up into articles (described in subheading 7614.90.20);
- stranded wire, cables, plaited bands and the like, including slings and similar articles, of aluminum and not with steel core, not electrically insulated; the foregoing not comprising electrical conductors, not fitted with fittings or made up into articles (described in subheading 7614.90.40);
- stranded wire, cables, plaited bands and the like, including slings and similar articles, of aluminum and not with steel core, not electrically insulated; the foregoing fitted with fittings or made up into articles (described in subheading 7614.90.50);
- bumper stampings of aluminum, the foregoing comprising parts and accessories of the motor vehicles of heading 8701 to 8705 (described in subheading 8708.10.30); and
- body stampings of aluminum, for tractors suitable for agricultural use (described in subheading 8708.29.21)

[3] Informal entries generally do not require a posting of a Customs bond and are liquidated at the time of release.

import transaction, including basic information about the filer, importer, and exporter, as well as the country of origin of the aluminum product and the country in which the aluminum was "smelted and poured."

The aluminum import license will be required on every entry of covered aluminum products (except informal entries). Like SIMA, a single license can cover multiple products as long as the information at the top of the form (*i.e.*, importer, exporter, manufacturer, and country of origin and exportation, and the expected dates of exportation and expected date of importation) are the same for the shipment. However, separate licenses will be required if any of this information differs with respect to a given set of covered imported aluminum products.

Aluminum Import Monitoring System

Under the proposed rule, DOC would create a standalone aluminum import monitoring website. This website will report certain aggregate information on aluminum imports obtained from the aluminum licenses. Aggregate information will be reported on a monthly basis by country of origin, country of smelt and pour, and aluminum product category, and will include import quantity (metric tons), import Customs value (U.S. dollars) and average unit value (dollars per metric ton). However, DOC will not report information if it would reveal business proprietary information. Reported monthly import data will be refreshed each week with new data on licenses issued in the prior week. The monitoring system will also present a range of historical data for comparison purposes. The public import monitoring system for aluminum articles will be similar to the current monitoring system for steel.

Outlook

DOC's proposed rule was expected: the agency's fiscal year 2021 budget request envisioned the creation of an aluminum import monitoring system, and several Members of Congress recently have urged DOC to establish "new tools to identify [aluminum] trends and trade flows to determine if there is circumvention or evasion of the industry's AD/CVD orders and to swiftly address illegal activity." The US aluminum industry also has long supported the establishment of an aluminum import monitoring system, and recently has urged DOC to implement the system in light of alleged trends in global aluminum trade. For example, the industry recently has cited an alleged increase of aluminum sheet and plate from China into Mexico, and an alleged increase in US imports of flat-rolled aluminum products, as evidence of the need for new monitoring tools to identify trends in trade flows and address alleged misclassification, transshipment and evasion of duties. The industry also filed petitions in March seeking the imposition of antidumping and countervailing duties on imports of common alloy aluminum sheet from 18 countries, on top of the AD/CVD orders currently in place on imports of this product from China. The information generated from the proposed rule might therefore be used by the US government and the domestic aluminum industry to support additional allegations of unfair trade practices, such as transshipment and circumvention of any AD/CVD orders resulting from the current investigations.

DOC's proposed rule can be viewed **here**.

Section 301 Developments

USTR Requests Comments on Possible One-Year Extension of Section 301 Tariff Exclusions for "List 3" Goods

On May 5, 2020, the Office of the US Trade Representative (USTR) announced that it is considering whether to extend a wide range of Section 301 tariff exclusions for "List 3" goods for up to 12 months (*i.e.*, through August 7, 2021). The exclusions eligible for extension under the new process are set forth in 11 separate product exclusion notices that USTR issued between August 7, 2019 and March 26, 2020, and they represent the majority of the exclusions that USTR has approved for List 3 goods. These exclusions currently are scheduled to expire on August 7, 2020 (the "uniform" expiration date that USTR has adopted for all List 3 exclusions, regardless of the date of their approval). At this time, USTR is not considering the extension of the List 3 exclusions that it approved in April and May of 2020, even though these exclusions also are scheduled to expire on August 7, 2020.

USTR has issued a Federal Register notice requesting comments from interested parties on the possible extension of the covered List 3 exclusions, with a comment deadline of **June 8, 2020**. We provide an overview of the notice below.

Public Docket and Comment Deadline

On May 1, 2020, the public docket (Docket Number USTR-2020-0015) on the web portal at **https://comments.USTR.gov** opened for parties to submit comments on the possible extension of the covered exclusions. To be assured of consideration, written comments must be submitted by June 8, 2020 at 11:59 pm ET.

Exclusions Eligible for Extension

USTR is requesting comments regarding the possible extension for up to 12 months of particular exclusions granted under the 11 initial product exclusion notices under the List 3 ($200 billion) action. At this time, USTR is not considering the extension of product exclusions issued after March 26, 2020. The product exclusions eligible for extension under the new process are set forth in the following notices:

- 84 FR 38717 (August 7, 2019)
- 84 FR 49591 (September 20, 2019)

- 84 FR 57803 (October 29, 2019)
- 84 FR 61674 (November 13, 2019)
- 84 FR 65882 (November 29, 2019)
- 84 FR 69012 (December 17, 2019)
- 85 FR 549 (January 6, 2020)
- 85 FR 6674 (February 5, 2020)
- 84 FR 9921 (February 20, 2020)
- 85 FR 15015 (March 16, 2020)
- 85 FR 17158 (March 26, 2020)

USTR has specified that, for exclusions amended or corrected by a later-issued notice, parties should provide their extension comments on the docket corresponding to the initial notice of product exclusions.

Criteria for Granting Extensions

USTR is inviting public comments on whether to extend the covered List 3 exclusions "for up to 12 months." USTR will evaluate the possible extension of each exclusion "on a case-by-case basis." According to USTR, the focus of the evaluation will be whether, despite the first imposition of the additional duties on List 3 goods in September 2018, the particular product remains available only from China. In addressing this factor, USTR states that commenters should address specifically:

- Whether the particular product and/or a comparable product is available from sources in the United States and/or in third countries.
- Any changes in the global supply chain since September 2018 with respect to the particular product or any other relevant industry developments.
- The efforts, if any, the importers or U.S. purchasers have undertaken since September 2018 to source the product from the United States or third countries.

In addition, USTR will continue to consider "whether the imposition of additional duties on the products covered by the exclusion will result in severe economic harm to the commenter or other U.S. interests."

Procedures for Submitting Requests

To submit a comment regarding the extension of a particular exclusion granted under the above referenced exclusion notices, commenters must first register on the portal at **https://comments.USTR.gov**. As noted above, the public docket (Docket Number USTR-2020-0015) on the portal will be open until June 8, 2020. After registration, the commenter may submit an exclusion extension comment form to the public docket. The form requires commenters to provide the following information:

- The number for the exclusion at issue, as provided in the annex of the Federal Register notice granting the exclusion and the description. For descriptions amended or corrected by a later issued notice of product exclusions, parties should use the amended or corrected description.

- Whether the product or products covered by the exclusion are subject to an antidumping or countervailing duty order issued by the U.S. Department of Commerce.
- Whether you support or oppose extending the exclusion and an explanation of your rationale. Commenters must provide a public version of their rationale, even if the commenter also intends to submit a more detailed BCI rationale.
- Whether the products covered by the exclusion or comparable products are available from sources in the U.S. or in third countries. USTR also requests information concerning any changes in the global supply chain since September 2018 with respect to the particular product.
- The efforts you have undertaken since September 2018 to source the product from the United States or third countries.
- The value and quantity of the Chinese-origin product covered by the specific exclusion request purchased in 2018 and 2019, and whether these purchases are from a related company (and if so, the name of and relationship to the related company).
- Whether Chinese suppliers have lowered their prices for products covered by the exclusion following the imposition of duties.
- The value and quantity of the product covered by the exclusion purchased from domestic and third country sources in 2018 and 2019.
- If applicable, the commenter's gross revenue for 2018 and 2019.
- Whether the Chinese-origin product of concern is sold as a final product or as an input.
- Whether the imposition of duties on the products covered by the exclusion will result in severe economic harm to the commenter or other U.S. interests.

Parties seeking to comment on more than one exclusion must submit a separate comment for each exclusion.

Outlook

At this time, negotiations between the United States and China on a "Phase 2" trade agreement have largely been put on hold, and it appears unlikely that the parties will reach an agreement that results in the removal of the current Section 301 tariffs in the near- to medium-term. USTR's notice therefore represents an important opportunity for interested parties to comment on the extension of the tariff exclusions that USTR has approved for List 3 goods. Given the relatively short timeframe for submitting comments and the volume of information requested by USTR, parties seeking to comment on the extension of the covered List 3 exclusions should begin preparing to do so as soon as possible.

USTR's notice is available **here**.

China Announces Latest Tariff Exclusions for 79 US Imports Subject to China's Retaliatory Tariffs

China's State Council Tariff Commission (SCTC) announced on May 12, 2020 its decision (Notice No. 4/2020) to exclude temporarily 79 US imports, including rare earth mineral ores, aircraft radar equipment, semiconductor parts, medical disinfectants, and a range of precious metals, chemical and petrochemical products, from China's retaliatory action related to the ongoing US-China trade conflict.

The 79 US imports (listed at the 8-digit tariff level in an annex to Notice No. 4/2020) are eligible for tariff waivers for a one-year period from May 19, 2020 to May 20, 2021. Importers of such merchandise subject to this exclusion action may apply to the Chinese customs authorities within six months from the date of the publication of Notice No. 4/2020 for a refund of duties already paid with regard to previous imports.

This is the second exclusion action for the second batch of goods subject to retaliatory tariffs of 5% and 10% imposed on US imports on September 2018 and then increased up to 25% for some products from June 1, 2019.

Click **here** for Notice No. 4/2020 and **here** for the 79 US imports subject to the exclusion (both in Chinese)

SCTC tariff exclusion scheme and action timeline

On May 13, 2019, the SCTC introduced an exclusion process open to Chinese companies that import, produce or use products subject to China's retaliatory tariffs. The SCTC launched an online exclusion application system on May 31, 2019 and rolled out several exclusion actions as follows:

- On September 11, 2019, the SCTC approved the first-time exclusion action of the first batch of goods subject to 25% retaliatory tariffs since July 6, 2018, which includes two separate lists covering 16 products, including among others, animal feeds, lubricants and pesticides. These 16 US imports are eligible for tariff waivers for a one-year period from September 17, 2019 to September 16, 2020.

- On December 19, 2019, the SCTC approved the second exclusion action of the first batch of goods subject to 25% retaliatory tariffs since August 23, 2018, which covers six products, including among others, certain high-density polyethylene, white oil and microcrystalline wax. These six US imports are eligible for tariff waivers for a one-year period from December 26, 2019 to December 25, 2020.

On February 21, 2020, the SCTC announced Decision No. 3/2020 to approve the first-time exclusion action of the second batch of goods subject to retaliatory tariffs since September 24, 2018, which includes two separate lists covering 55 US imports (Annex 1) and 10 US imports (Annex 2). These 65 US imports are eligible for tariff waivers for a one-year period from February 28, 2020 to February 27, 2021. For merchandise in Annex 1 (including among others, timber, lasers, microscopes, and hydraulic motors), importers may request customs to refund the additional tariffs already paid within six months from the date of the publication of Notice No. 3/2020. For merchandise in Annex 2 (including certain medical devices), however, the customs authorities will not refund the additional tariffs already paid.

Section 232 Developments

US Department of Commerce to Initiate Section 232 Investigation Into Imports of Laminations and Wound Cores for Incorporation into Transformers, Electrical Transformers, and Transformer Regulators

On May 4, 2020, the US Department of Commerce (DOC) announced that it will initiate an investigation pursuant to Section 232 of the Trade Expansion Act of 1962 (Section 232) to determine whether "laminations for stacked cores for incorporation into transformers, stacked and wound cores for incorporation into transformers, electrical transformers, and transformer regulators" are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security. DOC stated that its decision to initiate the investigation "follows inquiries and requests from multiple members of Congress as well as industry stakeholders." However, DOC's statement makes no reference to a formal petition, and it therefore appears that the agency has decided to self-initiate the investigation. DOC's findings in the Section 232 investigation, if affirmative, would provide the President with unilateral authority to impose considerable tariffs or other restrictions on imports of the subject merchandise into the United States.

DOC has not yet issued its Federal Register notice announcing the process and schedule for interested parties to participate in the investigation. However, it is expected that DOC will do so in the coming days, and that written submissions will be due relatively quickly after initiation, consistent with the Trump administration's practice in prior Section 232 investigations. The Trump administration already has used Section 232 to impose tariffs and quotas on a broad range of steel and aluminum imports into the United States on "national security" grounds, and Secretary of Commerce Wilbur Ross stated upon announcing the new investigation that "[t]ransformers are part of the U.S. energy infrastructure…An assured domestic supply of these products enables the United States to respond to large power disruptions affecting civilian populations, critical infrastructure, and U.S. defense industrial production capabilities[.]" The opening of a Section 232 investigation into transformer materials is therefore an important development for producers, exporters, importers, and consumers of these products.

This report summarizes the legal framework for Section 232 and the prospects for the new Section 232 investigation of transformer materials.

Legal Framework for Section 232

Section 232 provides the Secretary of Commerce with the authority to conduct investigations to determine the effects of imports of any article on the national security of the United States. The statute authorizes the Secretary to conduct an investigation if requested by the head of any department or agency, upon application of an interested party, or upon his own motion.[1] The Bureau of Industry and Security ("BIS"), within DOC, conducts the Section 232 investigation. BIS determines whether an article "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security[.]"[2] BIS must address three central issues in a Section 232 investigation: (1) what constitutes "national security" (for purposes of evaluating the nexus, if any, between the products in questions and US national security); (2) what "effects of imports" should be considered; and (3) when those imports "threaten to impair" the national security.

BIS must conclude its investigation no later than 270 days after initiation.[3] If BIS finds in the affirmative, the President must, within 90 days: (1) determine whether he concurs with the finding; and, if he concurs (2) "determine

[1] 19 U.S.C. § 1862(b)(1)(A).

[2] 19 U.S.C. § 1862(b)(3)(A).

[3] 19 U.S.C. § 1862(b)(3)(A).

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."[4] The President must implement any such action within 15 days after making the determination.[5]

Impetus for the Section 232 Investigation of Transformer Materials

As DOC's announcement indicates, the initiation of the Section 232 investigation follows inquiries and requests from multiple members of Congress as well as domestic producers of the subject merchandise. For example, several Members of Congress on April 15 sent a letter to President Trump urging him to expand the scope of the current Section 232 tariff on steel products to cover certain "derivative electrical steel articles," namely laminations and cores. The letter alleged that "[b]ecause the Section 232 tariffs do not apply to derivative electrical steel articles including laminations and cores (*i.e.*, simply cut and shaped electrical steel) imports of those products are now surging into the United States," and that "Mexico and Canada are being used as a staging ground for this blatant circumvention of the Section 232 program." The letter therefore urged the President to issue a Proclamation that would apply Section 232 tariffs to imports of these products, and stated that "to effectively address circumvention…tariffs must be applied to laminations and cores from Mexico and Canada." The letter referenced similar public statements by certain domestic steel producers concerning alleged unfair trade practices associated with imports of these products into the United States.

The Trump administration's decision to initiate a new Section 232 investigation covering transformer materials (rather than immediately imposing Section 232 tariffs, as requested in the April 15 letter) likely reflects legal constraints. Indeed, the Trump administration's first Proclamation imposing Section 232 tariffs on "derivative" steel products in February 2020 is currently being challenged by multiple parties at the US Court of International Trade as a violation of the Section 232 statute, and any additional Proclamations covering "derivative" products would likely face similar challenges. The decision to initiate a new Section 232 investigation of transformer materials avoids this outcome.

Next Steps in the Section 232 Investigation of Transformer Materials

DOC is expected to issue a Federal Register notice within the next two weeks outlining the schedule for public participation in the investigation. Written submissions will likely be due within two months after initiation. DOC may also hold a public hearing on the investigation, but it is not required to do so, and it declined to hold public hearings in the recent Section 232 investigations of uranium and titanium sponge. In addition, DOC may issue questionnaires to interested parties, but it is not required to do so. DOC issued questionnaires to certain interested parties in its recent Section 232 investigation of automotive goods (and reportedly did so in the uranium investigation), but declined to do so in the steel and aluminum investigations.

DOC's initial statement on the investigation of transformer materials does not provide detailed information on the scope of the investigation (*i.e.*, the specific Harmonized Tariff Schedule of the United States (HTSUS) subheadings associated with the subject products). The forthcoming Federal Register notice announcing the investigation might clarify its scope, but recent agency practice indicates that this information might not be provided until much later in the investigation.[6]

[4] 19 U.S.C. § 1862(c)(1)(A).

[5] 19 U.S.C. § 1862(c)(B)

[6] For example, the Section 232 investigations of steel and aluminum imports were initiated in April 2017, but detailed information on their product scope was not provided until February 2018, when DOC released its reports on its findings in the investigations. DOC also has not published detailed information on the scope of the automotive or uranium investigations.

The outcome of the new Section 232 investigation of transformer materials is difficult to anticipate. Though the Trump administration has declined to impose import restrictions in the majority of the Section 232 investigations it has initiated (including those involving automotive goods, uranium, and titanium sponge), it did impose significant tariffs and quotas based on its Section 232 investigations of steel and aluminum imports. Moreover, the initiation of the investigation appears to be a response to the concerns of domestic stakeholders regarding alleged "gaps" in the current Section 232 regime, which the Trump administration has made a central component of its trade policy. DOC's statement also highlights the Trump administration's view that the products under investigation are needed to maintain US "critical infrastructure" and defense industrial production capabilities. The initiation of a Section 232 investigation is therefore an important development for producers, exporters, importers, and consumers of transformer materials. Interested parties in the United States and abroad may therefore wish to assess (1) the risks arising from this investigation on their supply chains and trade flows; (2) factual and legal arguments protecting their commercial interests; and (3) potential near-term mitigation strategies.

DOC's statement can be viewed **here**.

US Department of Commerce Initiates Section 232 Investigation into Mobile Crane Imports

On May 6, 2020, the US Department of Commerce (DOC) announced that it will initiate an investigation pursuant to Section 232 of the Trade Expansion Act of 1962 (Section 232) to determine whether "the quantities or circumstances of mobile crane imports into the United States threaten to impair the national security." DOC stated that it is initiating the investigation in response to a petition filed by domestic producer, The Manitowoc Company, Inc. (Manitowoc), on December 19, 2019. DOC's findings in the Section 232 investigation, if affirmative, would provide the President with unilateral authority to impose considerable tariffs or other restrictions on imports of the subject merchandise into the United States.

The Trump administration already has used Section 232 to impose tariffs and quotas on a broad range of steel and aluminum imports into the United States on "national security" grounds. Manitowoc alleges that increased imports of low-priced mobile cranes, particularly from Germany, Austria, and Japan, and intellectual property (IP) infringement by foreign competitors, have harmed the domestic mobile crane manufacturing industry. DOC's statement also notes that the US Department of Homeland Security has identified mobile cranes as "a critical industry because of their extensive use in national defense applications, as well as in critical infrastructure sectors." The opening of a Section 232 investigation into mobile cranes is therefore an important development for producers, exporters, importers, and consumers of these products.

This report summarizes the legal framework for Section 232 and the prospects for the new Section 232 investigation of mobile cranes.

Legal Framework for Section 232

Section 232 provides the Secretary of Commerce with the authority to conduct investigations to determine the effects of imports of any article on the national security of the United States. The statute authorizes the Secretary to conduct an investigation if requested by the head of any department or agency, upon application of an interested party, or upon his own motion.[4] The Bureau of Industry and Security (BIS), within DOC, conducts the Section 232 investigation. BIS determines whether an article "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security[.]"[5] BIS must address three central issues in a Section 232 investigation: (i) what constitutes "national security" (for purposes of evaluating the nexus, if any,

[4] 19 U.S.C. § 1862(b)(1)(A).

[5] 19 U.S.C. § 1862(b)(3)(A).

between the products in questions and US national security); (ii) what "effects of imports" should be considered; and (iii) when those imports "threaten to impair" the national security.

BIS must conclude its investigation no later than 270 days after initiation.[6] If BIS finds in the affirmative, the President must, within 90 days: (i) determine whether he concurs with the finding; and, if he concurs (ii) "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."[7] The President must implement any such action within 15 days after making the determination.[8]

Impetus for the Section 232 Investigation of Mobile Cranes

As DOC's announcement indicates, the initiation of the Section 232 investigation follows a petition filed by domestic producer Manitowoc on December 19, 2019, requesting that DOC launch an investigation into mobile crane imports under Section 232. The petitioner claims that low-priced imports and IP infringement resulted in the closure of one of its two production facilities in the United States and eliminated hundreds of skilled manufacturing jobs in Wisconsin. Manitowoc's petition noted that imports of mobile cranes increased by 152% between 2014 and 2019, and cited a 2015 finding that a Chinese manufacturer misappropriated six trade secrets and infringed on a patent, resulting in the U.S. International Trade Commission (USITC) banning the sale of a Chinese crane in the United States.

Next Steps in the Section 232 Investigation into Mobile Crane Imports

The DOC initiated the investigation on May 19, 2020 and on May 26, 2020[9] announced that public comments are due by July 10, 2020 and that rebuttal comments are due by August 10, 2020. DOC may also hold a public hearing on the investigation, but it is not required to do so, and it declined to hold public hearings in the recent Section 232 investigations of uranium and titanium sponge. In addition, DOC may issue questionnaires to interested parties, but it is not required to do so. DOC issued questionnaires to certain interested parties in its recent Section 232 investigation of automotive goods (and reportedly did so in the uranium investigation), but declined to do so in the steel and aluminum investigations.

DOC's initial statement on the investigation into mobile crane imports does not provide detailed information on the scope of the investigation (*i.e.*, the specific Harmonized Tariff Schedule of the United States (HTSUS) subheadings associated with the subject products). The forthcoming Federal Register notice announcing the investigation might clarify its scope, but recent agency practice indicates that this information might not be provided until much later in the investigation.[10]

The outcome of the new Section 232 investigation into mobile crane imports is difficult to anticipate. Though the Trump administration has declined to impose import restrictions in the majority of the Section 232 investigations it has initiated (including those involving automotive goods, uranium, and titanium sponge), it did impose significant tariffs and quotas based on its Section 232 investigations of steel and aluminum imports. DOC's statement also highlights the Trump administration's view that the products under investigation are needed to maintain US "critical infrastructure." Interested parties in the United States and abroad may therefore wish to assess (i) the risks arising

[6] 19 U.S.C. § 1862(b)(3)(A).

[7] 19 U.S.C. § 1862(c)(1)(A).

[8] 19 U.S.C. § 1862(c)(B).

[9] See: https://www.govinfo.gov/content/pkg/FR-2020-05-26/pdf/2020-11144.pdf

[10] For example, the Section 232 investigations of steel and aluminum imports were initiated in April 2017, but detailed information on their product scope was not provided until February 2018, when DOC released its reports on its findings in the investigations. DOC also has not published detailed information on the scope of the automotive or uranium investigations.

from this investigation on their supply chains and trade flows; (ii) factual and legal arguments protecting their commercial interests; and (iii) potential near-term mitigation strategies.

For more information, please see: https://www.commerce.gov/news/press-releases/2020/05/us-department-commerce-initiate-section-232-investigation-mobile-crane

US Department of Commerce Seeks Public Comments on Section 232 Investigation of Imports of Certain Electrical Steel

On May 18, 2020, the DOC published a draft Federal Register notice seeking written comments on its Section 232 investigation concerning imports of certain electrical steel products, namely "laminations for stacked cores for incorporation into transformers, stacked cores for incorporation into transformers, wound cores for incorporation into transformers, electrical transformers, and transformer regulators" ("certain electrical steel"). The notice establishes the following deadlines, which confirm that the public input phase of the investigation will proceed rapidly:

- June 9, 2020 is the due date for filing written comments, data, analyses, or other information pertinent to DOC's investigation; and
- June 19, 2020 is the due date for rebuttal comments submitted in response to any comments filed on or before June 9, 2020.

In addition to the above deadlines, the notice sets forth the suggested criteria for public comments, which are based on the criteria set forth in DOC's regulations for determining the effect of imports on national security. The notice does not set dates for public hearings, which have been held in some (but not all) Section 232 investigations conducted by the Trump administration. Like DOC's initial press release on the investigation, the notice does not clarify the precise scope of products that are subject to the investigation.

We summarize the main elements of the notice below and offer our perspective on them.

Request for written comments and rebuttal comments

DOC is requesting that interested parties submit written comments, data, analyses, or information pertinent to the investigation by June 9, 2020. DOC "is particularly interested" in comments and information directed to the criteria listed in part 705.4 of the National Security Industrial Base Regulations (NSIBR) as they affect national security, including the following:

- The quantity of, or other circumstances related to, the importation of certain electrical steel;
- Domestic production and productive capacity needed for projected national defense requirements;
- Existing and anticipated availability of human resources, products, raw materials, production equipment, and facilities to produce certain electrical steel;
- The growth requirements of certain electrical steel industries to meet national defense requirements and/or requirements for supplies and services necessary to assure such growth including investment, exploration, and development;
- The impact of foreign competition on the economic welfare of certain electrical steel industries;
- The displacement of any domestic production of certain electrical steel causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects;

- National defense supporting uses of certain electrical steel including data on applicable contracts or sub-contracts, both past and current;
- Country of manufacture for certain electrical steel;
- Relevant factors that are causing or will cause a weakening of our national economy; and
- Any other relevant factors, including the use and importance of certain electrical steel in critical infrastructure sectors identified in Presidential Policy Directive 21 (Feb. 12, 2013).

Rebuttal comments submitted in response to comments received on or before June 9, 2020 may be filed with DOC no later than June 19, 2020. Comments will be placed in the investigation docket (BIS-2020-0015) and will be open to public inspection, except for business confidential information (BCI). Materials designated as BCI will be exempt from public disclosure as provided for by part 705.6 of the NSIBR. Parties submitting business confidential information must clearly identify the business confidential portion of the submission, file a statement justifying nondisclosure and referring to the specific legal authority claimed, and provide a non-confidential version of the submission which can be placed in the public file.

All written comments on the notice must be addressed to the "Section 232 Electrical Steel Investigation" and filed through the Federal eRulemaking Portal at http://www.regulations.gov (docket BIS-2020-0015).

Scope of the investigation

As noted above, the draft notice states that the investigation relates to certain electrical steel articles and describes the products under investigation as "imports of laminations for stacked cores for incorporation into transformers, stacked cores for incorporation into transformers, wound cores for incorporation into transformers, electrical transformers, and transformer regulators." This appears to cover the products made from GOES that were referenced in the April 15, 2020 congressional letter that precipitated the new Section 232 investigation. That letter notes that direct imports of GOES are already covered under the Section 232 steel tariff program, but that "derivative electrical steel articles including laminations and cores (i.e., simply cut and shaped electrical steel)" are not. However, the new notice provides no additional clarification (e.g., Harmonized Tariff System codes) regarding the investigation's scope.

Outlook

Based on the initiation notice, it appears likely that interested parties will not receive detailed information on the scope of the investigation before public comments are due, but they can presume the case will focus on those derivative electrical steel articles not already covered by the Section 232 program. The lack of a detailed scope description is consistent with DOC's recent practice.

With respect to public comments, DOC's notice of initiation provides a very short timeframe for interested parties to prepare and submit their input on the investigation: written submissions are due in just 22 days. It is therefore critical for interested parties who wish to have their views and data on the record in this investigation to begin working now to prepare their written submissions.

A public hearing in support of the investigation is not scheduled at this time. If a public hearing is held, a separate Federal Register notice will be published providing the date and information about the hearing.

For more information on the notice, please see: https://www.federalregister.gov/documents/2020/05/19/2020-10715/notice-of-request-for-public-comments-on-section-232-national-security-investigation-of-imports-of

US Department of Commerce Seeks Public Comments on Potential Changes to Section 232 Exclusion Process

On May 26, 2020, the US Department of Commerce, Bureau of Industry and Security (DOC) published a Federal Register notice seeking written comments on ways to improve the exclusion process for tariffs and quotas imposed on steel and aluminum imports pursuant to Section 232 of the Trade Expansion Act of 1962 ("Section 232"). In particular, the DOC is requesting comments on the appropriateness of the information requested and the factors considered in rendering decisions on requests for exclusions, and the efficiency and transparency of the process employed. The notice establishes a deadline of July 10, 2020 for filing written comments, and the DOC has indicated in a press release that it will accept rebuttal comments until August 10, 2020. In a statement concerning the new inquiry, Secretary of Commerce Wilbur Ross explained that the Commerce Department "is continually looking for ways to improve the exclusion process for Section 232 tariffs and quotas…[w]e want these critical national security measures to be applied effectively while avoiding unnecessary impacts on downstream American industries."

In addition to the above deadlines, the notice sets forth suggested topics for comments to address. We provide an overview of the notice below.

Request for written comments

The DOC is requesting that interested parties submit written comments on the appropriateness of the factors considered, and the efficiency and transparency of the process employed, in rendering decisions on requests for exclusions from the tariffs and quotas imposed on imports of steel and aluminum articles under Section 232. Suggested topics for potential comments include the following:

- The information sought on the exclusion request, objection, rebuttal and surrebuttal forms;
- Expanding or restricting eligibility requirements for requestors and objectors;
- The Section 232 Exclusions Portal;
- The requirements set forth in Federal Register Notices 83 FR 12106, 83 FR 46026, and 84 FR 26751;
- The factors considered in rendering decisions on exclusion requests;
- The information published with the decisions;
- The DOC website guidance and training videos;
- The definition of "product" governing when separate exclusion requests must be submitted; and
- Incorporation of steel and aluminum derivative products into the product exclusion process.

The DOC also invites comments on potential revisions to the exclusion process, including, but not limited to:

- One-year blanket approvals of exclusion requests for product types that have received no objections as of a baseline date;
- One-year blanket denials of exclusion requests for product types that have received 100 percent objection rates and never been granted as of a baseline date;
- Time-limited annual or semi-annual windows during which all product-specific exclusion requests and corresponding objections may be submitted and decided;

- Issuing an interim denial memo to requesters who receive a partial approval of their exclusion request until they purchase the domestically available portion of their requested quantity;
- Requiring requestors to make a good faith showing of the need for the product in the requested quantity, as well as that the product will in fact be imported in the quality and amount, and during the time period, to which they attest in the exclusion request;
- Requiring objectors to submit factual evidence that they can in fact manufacture the product in the quality and amount, and during the time period, to which they attest in the objection;
- Setting a limit on the total quantity of product that a single company could be granted an exclusion for based on an objective standard, such as a specified percentage increase over a three year average;
- Requiring that requesters citing national security reasons as a basis for an exclusion request provide specific, articulable and verifiable facts supporting such assertion;
- Clarifying that the domestic product is "reasonably available" if it can be manufactured and delivered in a time period that is equal to or less than that of the imported product, as provided by requestor in its exclusion request;
- Requiring that requestors, at the time of submission of their exclusion requests, demonstrate that they have tried to purchase this product domestically;
- In the rebuttal/surrebuttal phase, requiring that both requestor and objector demonstrate in their filings that they have attempted to negotiate in good faith an agreement on the said product.

Finally, the DOC also welcomes any specific details about the commenter's experience with the exclusion/objection process as background to their comment. The notice sets forth a deadline of July 10, 2020 for written comments on the inquiry. In addition, the May 22 press release on the inquiry states that "[r]ebuttal comments will be accepted until August 10, 2020," and that such comments "may only address issues raised in comments filed on or before July 10, 2020."

Comments will be placed in the investigation docket (BIS-2020-0012) and will be open to public inspection, except for business confidential information (BCI). Materials designated as BCI will be exempt from public disclosure as provided for by part 705.6 of the NSIBR. Parties submitting business confidential information must clearly identify the business confidential portion of the submission, file a statement justifying nondisclosure and referring to the specific legal authority claimed, and provide a non-confidential version of the submission which can be placed in the public file.

Written comments may be submitted to the Federal rulemaking portal: http://www.regulations.gov (docket BIS-2020-0012). Commenters should refer to RIN 0694-XC058 in all comments and in the subject line of email comments.

Outlook

The impetus for the inquiry is not explained in the notice, but the Section 232 exclusion process has faced criticism from both requesters (*i.e.*, US importers and consumers of steel and aluminum products) and domestic steel and aluminum producers.

- Requesters have cited, among other complaints, the burdensome nature of the process for composing and submitting exclusion requests; the lengthy waiting period for DOC's decisions (which has exceeded 90 days in many cases); the allegedly arbitrary nature of DOC's acceptances and denials; the lack of clarity regarding approved exclusions' terms; and the perception that, when a US steel or aluminum producer objects to an

exclusion request, DOC generally defers to the objection. Some stakeholders also have proposed changes to the exclusion process aimed at addressing these concerns.

For example, some Members of Congress have urged DOC to allow a broader range of products to be included in a single exclusion request, and to make groups such as trade associations eligible to file requests. In addition, one US-based importer of steel and aluminum products has filed a complaint at the US Court of International Trade alleging that DOC's practice of making exclusions available only to the requesting entity (rather than all importers of the product at issue) is unlawful.[11] DOC's notice solicits comments on some of these topics (*e.g.*, expanding or restricting eligibility to submit exclusion requests and changing the definition of a "product" meriting a separate exclusion request), but does not expressly contemplate changes to the requester-specific nature of exclusions.

- By contrast, US producers of steel and aluminum products have expressed concern that the current exclusion process undermines the effectiveness of the Section 232 measures and the competitiveness of the domestic industry. For example, in an April 22 letter to Secretary Ross, the US Aluminum Association alleged that the exclusion process as currently administered "is hurting the competitiveness of the [US] aluminum industry and incentivizing imports of aluminum products," and that "the Department continues to grant exclusions from the Section 232 tariffs on massive volumes of aluminum flat-rolled products (including imports from China)."

  As an example, the letter states that DOC in 2020 "has granted exclusions for nearly 5 billion pounds of aluminum can sheet," and that "[t]hose granted exclusion requests cover more aluminum can sheet than the entire U.S. market consumes in a year and dwarfs historical import trends for that segment." The letter further notes that there have been a number of exclusions for flat-rolled products granted this year "despite domestic producer objections." The letter proposes several reforms to the exclusion process aimed at addressing these concerns, including (i) reviewing all exclusion requests to ensure that volumes identified in each request are proportional to historical US import volumes, and applying "heightened scrutiny" to requests that exceed the requestor's historical volume of imports; (ii) restricting eligibility for exclusion requests from importers who are not manufacturers "so that only importers who are in some way transforming the aluminum are eligible for an exclusion"; and (iii) limiting exclusions only to those products outside of the capability of domestic producers or for which there is no US production.

Given the importance of the Section 232 exclusion process and the competing views regarding potential reforms, it is expected that many importers and domestic producers of steel and aluminum products will respond to DOC's request for public comments with specific proposals – particularly given that the Trump administration appears to have no intention of terminating the Section 232 measures in the near term. However, DOC's notice provides only a brief window of 45 days before comments are due, even though changes to the exclusion process could have substantial and longstanding implications for US producers and importers, as well as global trade patterns. It is therefore critical for interested parties who wish to have their views on the record in this proceeding to begin working now to prepare their written submissions.

For more information, please see:
https://www.federalregister.gov/documents/2020/05/26/2020-11173/notice-of-inquiry-regarding-the-exclusion-process-for-section-232-steel-and-aluminum-import-tariffs
https://www.commerce.gov/news/press-releases/2020/05/department-commerce-asks-public-input-section-232-steel-and-aluminum

[11] Thyssenkrupp Materials NA Inc., et al v. United States, et al, (Ct. Int'l Trade Apr 21, 2020).

US Government Urges Supreme Court to Reject Cert Petition from Steel Importers Opposing Section 232

The Trump administration last week urged the United States Supreme Court to reject the petition of *certiorari* in *American Institute For International Steel, Inc. et al., v. United States* (No. 19-1177), which was filed by American Institute for International Steel, Inc. and two of its members, Kurt Oban Partners LLC and Sim-Tex LP (collectively "AIIS"). AIIS has sought to enjoin the President's use of Section 232 of the Trade Expansion Act of 1962 on imported steel products, claiming that Section 232 is a facially unconstitutional violation of the US constitution's prohibition against the broad delegation of Congress' legislative duties (*i.e.*, the "non-delegation doctrine"). AIIS has appealed its case to the Supreme Court following losses before both the US Court of International Trade (USCIT) and the US Court of Federal Appeals for the Federal Circuit (CAFC). A Court ruling that Section 232 is unconstitutional would likely terminate current US Section 232 tariffs on steel and aluminum and eliminate a key tool of the Trump administration's trade policy.

Background

USCIT & First Petition for Writ of Certiorari

In June 2018, AIIS filed suit against the United States in the USCIT claiming that Section 232 violates the non-delegation doctrine. On March 25, 2019, the USCIT ruled in the Government's favor and rejected the AIIS' claims. The USCIT found that it was required to follow the Supreme Court's 1976 ruling in *Fed. Energy Admin. v. Algonquin SNG, Inc.* which concluded that Section 232 did not violate the non-delegation doctrine.

AIIS filed a petition for a writ of certiorari to the Supreme Court on April 15, 2019 immediately following the 2019 USCIT ruling in this case. AIIS argued that the Supreme Court should hear this case before waiting for a decision from the CAFC, in part because the steel tariffs had caused "irreparable and ongoing harm" to the companies and individuals affected. The Supreme Court denied the petition on June 24, 2019 in a decision that was generally anticipated.

CAFC

AIIS appealed the CIT decision to the CAFC in 2019 on two primary grounds: (i) that the Supreme Court's holding in *Algonquin* considered only "the narrow question whether interpreting Section 232 to authorize the remedy of imposing licensing fees would render the statute unconstitutional," and not the question of whether the broader application of Section 232 to restrict steel imports renders the statute unconstitutional; and (ii) that *Algonquin* was no longer binding precedent in light of more recent Supreme Court decisions. The CAFC issued its decision on February 28, 2020, affirming the ruling of the USCIT. The CAFC rejected both of AIIS' primary arguments and found that *Algonquin's* holding was not limited to the narrow issue of license fees, nor was it rendered inapposite by more recent Supreme Court precedents.

Petition for Writ of Certiorari before the Supreme Court

AIIS filed a petition for a writ of *certiorari* to the Supreme Court on March 25, 2020. AIIS's petition made two primary arguments:

- First, that "[t]his case is an ideal vehicle for the Court to make clear that the nondelegation doctrine has continued vitality where the statute has no boundaries and Congress has delegated unbridled discretion to tax imports." The Court's recent decision in *Gundy v. United States,* 139 S. Ct. 2116 (2019) (plurality opinion), in which it reaffirmed the limits of delegations, is evidence that the non-delegation doctrine is "alive and essential to maintain[ing] the proper separation of powers." The "uniquely broad delegation of power" contained in Section 232 is therefore the appropriate instance for the Court to revisit the non-delegation doctrine and "set its proper limits."

- Second, that the Court should distinguish, limit, or overrule *Algonquin* because "the statutory claim in *Algonquin* bears no resemblance to the delegation challenge here." With regard to any potential claim that the court is bound by *stare decisis*, "*Algonquin* was decided in 1976, but it has been cited by [the Supreme Court] only a dozen times and only once in a case challenging a congressional delegation."

On May 26, 2020, the US government filed its opposition brief, which likewise made two main arguments:

- First, *Algoniquin* establishes that the President's use of Section 232 poses no improper delegation concerns. Congress may not delegate its legislative authority to the executive branch unless a statute sets forth an "intelligible principle to which the person or body authorized to [act] is directed to conform." *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928). The Supreme Court's ruling in *Algonquin* shows that such an "intelligible principle" exists in the case of Section 232. Moreover, "the Court in *Algonquin* rejected the contention that Section 232 raised 'a serious question of unconstitutional delegation of legislative power,' holding instead that the statute 'easily fulfils' the intelligible principle requirement." Also, "'[o]nly twice in this country's history' has the Court 'found a delegation excessive,' and the Court has 'over and over upheld even broad delegations'" (citing *Gundy,* 139 S. Ct. at 2129).
- Second, AIIS has failed to demonstrate any justification for overruling or limiting *Algonquin*. The Court is bound by the doctrine of *stare decisis*, and AIIS must identify a "special justification" for the Court to revisit the question resolved in *Algonquin*. Section 232 also complies with the Court's more recent precedents following *Algonquin*.

Outlook

The Supreme Court will next determine whether to grant AIIS' petition for a writ of *certiorari* and hear the case. Some experts believe that the Court is more likely to deny the petition, adhering to past precedent and Court practice of finding delegations excessive only in rare instances. If the Court takes this route, the CAFC ruling in favor of the government will be left in place, and the most formidable court challenge to Section 232 will end.

It is possible, however, that the Supreme Court will agree to hear the case. The CAFC noted in its decision in this case that five members of the Supreme Court in *Gundy* "have recently expressed interest in at least exploring a reconsideration" of the "intelligible principle" standard set forth in *J.W. Hampton, Jr.* This case might therefore serve as the medium for reconsidering the "intelligible principle" standard. If the Court does grant *certiorari*, both AIIS and the government are required to submit new briefs on the merits of the case. The Petitioner's brief (AIIS in this case) is typically due within forty-five days after *certiorari* is granted. Unless expedited, the Court would be unlikely to hear oral arguments until the 2020-2021 term. A decision in the case, should the court decide to take it on, would likely be rendered during the 2020-2021 term, by the time the Court recesses in June or early July at the latest. As noted above, a Supreme Court ruling that Section 232 is unconstitutional would have significant implications for both the current tariffs on steel and aluminium imports, pending Section 232 cases on certain electrical steel products and mobile cranes, and a core pillar of the Trump administration's trade policy. In the meantime, however, the tariffs will remain in effect and the investigations will continue.

For more information, please see:
https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1177.html

US Department of Commerce Seeks Public Comments on Section 232 Investigation of Imports of Mobile Cranes

On May 22, 2020, the US Department of Commerce (DOC) published a draft Federal Register notice seeking written comments on its investigation into the effects of imports of mobile cranes on US national security, pursuant to Section

232 of the Trade Expansion Act of 1962. The notice establishes the following deadlines, which confirm that the public input phase of the investigation will proceed rapidly:

- **July 10, 2020** is the due date for filing written comments, data, analyses, or other information pertinent to DOC's investigation; and
- **August 9, 2020** is the due date for rebuttal comments submitted in response to any comments filed on or before July 10, 2020.

In addition to the above deadlines, the notice lists the suggested criteria for public comments, which are based on those set forth in DOC's regulations for determining the effect of imports on national security. The notice does not clarify the precise scope of products that are subject to the investigation. The notice also does not schedule any public hearings, which have been held in some (but not all) Section 232 investigations conducted by the Trump administration.

We summarize the main elements of the notice below and offer our perspective on them.

Request for written comments and rebuttal comments

DOC is requesting that interested parties submit written comments, data, analyses, or information pertinent to the investigation by July 10, 2020. DOC "is particularly interested" in comments and information directed to the criteria listed in part 705.4 of the National Security Industrial Base Regulations ("NSIBR") as they affect national security, including the following:[1]

- The quantity of, or other circumstances related to, the importation of mobile cranes;
- Domestic production and productive capacity needed for mobile cranes to meet projected national defense requirements;
- Existing and anticipated availability of human resources, products, raw materials, production equipment, and facilities to produce mobile cranes;
- The growth requirements of the mobile crane industry to meet national defense requirements and/or requirements for supplies and services necessary to assure such growth including investment, exploration, and development;
- The impact of foreign competition on the economic welfare of the mobile crane industry;
- The displacement of any domestic mobile crane production causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects;
- Relevant factors that are causing or will cause a weakening of our national economy; and
- Any other relevant factors, including the use and importance of mobile cranes in critical infrastructure sectors identified in Presidential Policy Directive 21 (Feb. 12, 2013).

Rebuttal comments submitted in response to comments received on or before July 10, 2020 may be filed with DOC no later than August 9, 2020. Comments will be placed in the investigation docket (BIS-2020-0009) and will be open to public inspection, except for business confidential information (BCI). Materials designated as BCI will be exempt from public disclosure as provided for by part 705.6 of the NSIBR. Parties submitting business confidential information must clearly identify the business confidential portion of the submission, file a statement justifying

nondisclosure and referring to the specific legal authority claimed, and provide a non-confidential version of the submission which can be placed in the public file.

All written comments on the notice must be addressed to the "Section 232 Mobile Crane Investigation" and filed through the Federal eRulemaking Portal: **http://www.regulations.gov** (docket BIS-2020-0009).

Scope of the investigation

As noted above, the draft notice states that the investigation relates to imports of mobile cranes. DOC has previously stated that its decision to initiate the investigation follows a petition by a domestic producer, The Manitowoc Company. However, DOC has not published the petition, and the new notice provides no additional clarification (*e.g.*, Harmonized Tariff System codes) regarding the investigation's scope.

Outlook

Based on the initiation notice, it appears likely that interested parties will not receive detailed information on the scope of the investigation before public comments are due. The lack of a detailed scope description is consistent with DOC's recent practice.

With respect to public comments, DOC's notice of initiation provides a short timeframe for interested parties to prepare and submit their input on the investigation: written submissions are due in just 49 days. It is therefore critical for interested parties who wish to have their views and data on the record in this investigation to begin working now to prepare their written submissions.

A public hearing in support of the investigation is not scheduled at this time. If a public hearing is held, a separate Federal Register notice will be published providing the date and information about the hearing.

The notice of initiation can be viewed **here**.

Anti-Circumvention Actions

US Department of Commerce Self-Initiates Anti-Circumvention and Scope Inquiries Involving Exports of China-Origin Stainless Steel Sheet and Strip Completed in Vietnam

The US Department of Commerce ("Commerce") announced on May 12, 2020 that it has self-initiated an inquiry to determine whether imports of stainless steel sheet and strip completed in Vietnam using certain flat-rolled stainless steel inputs from China are circumventing the antidumping (AD) and countervailing duty (CVD) orders in place on stainless steel sheet and strip from China. In addition to the circumvention inquiry, Commerce also self-initiated a concurrent scope inquiry to determine if stainless steel sheet and strip produced in China that undergoes further processing[12] in Vietnam before being shipped to the United States is within the scope of the AD/CVD orders currently imposed on China.

[12] This includes, among others, cold-rolling, annealing, tempering, polishing, aluminizing, coating, painting, varnishing, trimming, cutting, punching, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the AD and CVD orders.

Since March 2017, the United States has imposed antidumping and countervailing duties on stainless steel sheet and strip, whether in coils or straight lengths,[13] from China at rates as high as 76.64% and 190.71%, respectively. According to Commerce's press release, shipments of stainless steel sheet and strip from Vietnam to the United States have increased by 180.4% when compared with import data taken before and after the initiations of the original AD and CVD investigations in March 2016 on imports of the subject merchandise from China.

This latest action is the seventh circumvention inquiry self-initiated by Commerce.

Investigation process

Pursuant to Section 781(b)(1) of the Tariff Act of 1930, Commerce will consider in its investigations whether:

(1) the merchandise imported in the United States is of the same class or kind as the merchandise produced in a foreign country that is the subject of an AD or CVD order or finding;

(2) before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which (i) is subject to such order or finding; or (ii) is produced in the foreign country with respect to which such order or finding applies;

(3) the process of assembly or completion in the foreign country is minor or insignificant;[14]

(4) the value of the merchandise produced in the foreign country to which the AD and/or CVD order applies is a significant portion of the total value of the merchandise exported to the United States;[15] and

(5) action is appropriate to prevent evasion of an order.

Commerce intends to issue questionnaires to solicit information from producers and exporters in Vietnam concerning their shipments of stainless steel sheet and strip to the United States and the origin of any imported stainless steel flat-rolled inputs being processed into stainless steel sheet and strip.

If Commerce issues preliminary affirmative determinations in these inquiries, it will then instruct US Customs and Border Protection (CBP) to suspend liquidation and require a cash deposit of estimated AD and CVD duties, at the applicable rate, for each unliquidated entry of the merchandise at issue, entered or withdrawn from warehouse for consumption on or after the date of initiation of the inquiries. In accordance with Section 781(f) of the Tariff Act, the final scope and circumvention determinations are expected within 120 days and 300 days, respectively, from the date of publication of the initiation notice.

Outlook

Since the beginning of the Trump administration, anti-circumvention inquiries have increased in parallel with AD and CVD investigations. According to Commerce's press release, the agency has "initiated 27 new circumvention

[13] The products are classified under these HTSUS subheadings: 7219.13.0031, 7219.13.0051, 7219.13.0071, 7219.13.0081, 7219.14.0030, 7219.14.0065, 7219.14.0090, 7219.23.0030, 7219.23.0060, 7219.24.0030, 7219.24.0060, 7219.32.0005, 7219.32.0020, 7219.32.0025, 7219.32.0035, 7219.32.0036, 7219.32.0038, 7219.32.0042, 7219.32.0044, 7219.32.0045, 7219.32.0060, 7219.33.0005, 7219.33.0020, 7219.33.0025, 7219.33.0035, 7219.33.0036, 7219.33.0038, 7219.33.0042, 7219.33.0044, 7219.33.0045, 7219.33.0070, 7219.33.0080, 7219.34.0005, 7219.34.0020, 7219.34.0025, 7219.34.0030, 7219.34.0035, 7219.34.0050, 7219.35.0005, 7219.35.0015, 7219.35.0030, 7219.35.0035, 7219.35.0050, 7219.90.0010, 7219.90.0020, 7219.90.0025, 7219.90.0060, 7219.90.0080, 7220.12.1000, 7220.12.5000, 7220.20.1010, 7220.20.1015, 7220.20.1060, 7220.20.1080, 7220.20.6005, 7220.20.6010, 7220.20.6015, 7220.20.6060, 7220.20.6080, 7220.20.7005, 7220.20.7010, 7220.20.7015, 7220.20.7060, 7220.20.7080, 7220.90.0010, 7220.90.0015, 7220.90.0060, and 7220.90.0080.

[14] To determine this, Commerce will consider a number of factors in the foreign country, including levels of investment, research and development, nature of the production process, extent of productions facilities, and whether or not the value of the processing undertaken in the foreign country represents a small proportion of the value of the goods imported into the United States (Section 781(b)(2) of the Tariff Act of 1930).

[15] Commerce will consider such factors as the pattern of trade, affiliations of the manufacturer or exporter, and whether imports have increased following the initiation of the investigation and which resulted in the issuance of an order.

inquiries – a 125[%] increase from the number of circumvention initiations made during the comparable period in the previous administration." Several of these cases have targeted products exported from Vietnam, which has increasingly become a focus of the Trump administration's efforts to counteract circumvention of US trade remedies.

For more information, please see: https://www.trade.gov/press-release/us-department-commerce-self-initiates-circumvention-inquiry-involving-exports

US FTA Developments

United Kingdom and United States Launch Bilateral FTA Negotiations

The United States and the United Kingdom (UK) have formally launched negotiations on a bilateral free trade agreement (FTA) after two years of preparatory consultations. Both attach high political importance to the exercise.

For the UK, closer trade relationships with the United States, Japan, Australia, and New Zealand are priorities as it negotiates the terms of its exit from the EU Customs Union and Single Market this year. The United States is the UK's largest trading partner (followed by Germany) and investment partner (followed by France). Estimates of trade creation for the UK resulting from an FTA with the United States are relatively small in comparison to estimates of UK trade that could be lost with the European Union (EU) as a result of Brexit. However, the UK government has justified the exercise also in terms of projected additional gains from opening up its economy to competition with the United States, diversifying its trade and integrating the UK more closely with countries and regions that have higher growth prospects than the EU.

Negotiating mandates

The United States and the UK have published their mandates for negotiations. Both are seeking a comprehensive trade and investment agreement.

- **US negotiating mandate**[16]

  The United States is aiming for the elimination of tariffs and for the reduction of non-tariff barriers on trade in manufactured goods, in particular through greater regulatory compatibility and cooperation. A key objective is comprehensive market access for US exports of agricultural products once the UK is no longer bound by the EU's Common Agricultural Policy and its contingent import restrictions, particularly sanitary and phytosanitary (SPS) measures and tariff-rate quotas (TRQs). The United States is also seeking improved access and greater legal security in the UK for US services suppliers, particularly of telecommunications and financial services, and a state-of-the-art agreement on digital trade. Other major objectives are strong intellectual property protection and better access to procurement by the UK public sector, including its state-controlled enterprises supplying public services.

- **UK negotiating mandate**[17]

  The UK's mandate is set out in more general terms than that of the United States, but it aims also for broad coverage of an FTA. Most of the elements of an FTA that it proposes match those of the United States. This overlap should facilitate the negotiations. There are differences, however. The UK is somewhat more cautious than the United States on the liberalization of trade in agricultural products, reflecting its policy of protecting UK farming and of defending UK standards of food safety and animal welfare that have strong popular support in the UK. On the other hand, the UK is somewhat more ambitious than the United States on liberalizing trade in services (where it is targeting business services, financial services, transport, and digital trade) and government procurement. The UK has set down an emphatic red line on the exclusion of its public health system, including drug purchases, from the scope of the negotiation, but that has not been viewed by USTR Robert Lighthizer as likely to prevent an agreement on an FTA being reached.

Analysis

The United States and the UK share a similar view on the desirability of more trade liberalization and their economies are already well-integrated, in particular through high levels of bilateral investment. That should facilitate the negotiation of the FTA.

Tariffs

[16] The US mandate is here: https://ustr.gov/countries-regions/europe-middle-east/europe/united-kingdom/us-uk-trade-agreement-negotiations

[17] The UK mandate is here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869592/UK_US_FTA_negotiations.pdf

Trans-Atlantic tariffs on manufactured goods are relatively low, although there are specific opportunities for substantial liberalization such as trade in textiles and clothing and the UK's 10% import duty on automobiles which the United States is targeting. Tariffs on agricultural products in the UK are far higher – this is a legacy of the EU's agricultural policies, and the UK may be able to offer significant tariff reductions to the United States once it is no longer tied to the EU's Common Agricultural Policy.

Non-tariff measures

Negotiations on regulatory and non-tariff measures between the United States and the UK could prove to be more difficult. For example, the European (and therefore UK) and US approaches to the regulation and certification of automobiles are substantively different in areas such as permitted emissions levels and fuel economy requirements, and they also have different rules on conformity assessment – the EU system rests on government-supervised type approval certification, while the United States relies on self-certification. The UK may find itself pulled in two different directions on regulatory issues in its negotiations with the United States and the EU.

Agriculture

Resolving regulatory differences for trade in agricultural products could be particularly problematic if the UK decides to continue following EU food and SPS regulations and applying the EU's "precautionary principle" in assessing risk. The United States has demanded that the UK should rely instead on science-based risk assessment in order to comply with WTO rules. The way in which the UK handles food and agricultural regulations in its negotiation of an FTA with the United States could decide whether high-value US meat exports are able to enter the UK market for the first time, and if not, whether an FTA that does not have the backing of the powerful US farm lobby is able to gain US Congressional approval.

Next steps and outlook

The UK is aiming to conclude its new trade partnership with the EU by the end of this year and it is targeting agreement on an FTA with the United States within a similar timeframe on an "accelerated" negotiating track. The Trump Administration has endorsed that target. However, the US Chamber of Commerce and a number of other US business associations have cautioned against trying to wrap up an FTA with the UK before the terms of the UK's new trade relationship with the EU are known. In their view, the strategic value of an FTA with the UK will depend in part on how much access US businesses based in the UK will continue to have to the EU market for goods and services.

In contrast to the US farm lobby, which is pressing the UK to break away from the EU's regulatory system and its policy on the protection of geographical indications, US business associations from the manufacturing and the services sectors have stressed the importance of the UK maintaining a close trading relationship with the EU in order to build a strong economic partnership with the United States. They have emphasized the value that US business based in the UK attaches to continued liberal access to the EU market, and suggested that if this were to be lost the UK would become a less attractive candidate for an FTA with the United States. In that respect, US business is expected to want to see the outcome of the UK's negotiations with the EU on their new economic partnership before giving its support to the conclusion of a US-UK FTA.

Meanwhile, a number of bilateral frictions between the United States and the UK are expected to be taken up on the margins of the FTA negotiations. The UK is seeking the removal of the US Section 232 restrictions on steel and of the tariffs the United States imposed on certain UK exports, such as Scotch whisky, following the WTO ruling against subsidies provided by the EU to Airbus. The United States is pressing the UK to abandon its plan to impose a digital services tax targeted at US companies such as Google and Amazon, and to reverse its decision to allow Huawei to participate in the UK's 5G network.

There is strong political support from President Trump and Prime Minister Johnson to wrap up a US/UK FTA quickly ahead of the US presidential elections and the end of the UK's Transition period with the EU. A considerable amount of preparatory work has taken place already which should facilitate the negotiations. However, US business associations have taken a more cautious approach to sealing a deal with the UK before the outcome of the UK's negotiations on a new trade agreement with the EU are known. The UK's negotiations with the EU are struggling to make headway at present, and the possibility remains that there could be a "no deal" outcome or only a shallow trade agreement to replace the UK's full economic integration with the EU. That would be likely to dampen the interest of US business in an FTA with the UK and could lead it to switch its attention to trying to negotiate a new US/EU trade agreement instead, although the prospects on that front are currently rather poor.

President Trump Issues Executive Order Establishing USMCA Forced Labor Enforcement Task Force

On May 15, 2020, President Trump issued an Executive Order establishing a Forced Labor Enforcement Task Force ("Task Force") pursuant to the United States-Mexico-Canada Agreement (USMCA) Implementation Act (Pub. L. No. 116-113). The Task Force will be responsible for monitoring the enforcement of the United States' prohibition on imports of goods produced by forced labor under Section 307 of the Tariff Act of 1930. In addition, the Task Force will deliver reports to Congress regarding these enforcement actions, develop "enforcement plans" regarding goods allegedly produced with forced labor in Mexico and elsewhere, and establish timelines for US Customs and Border Protection (CBP) to respond to petitions alleging that imported goods are being produced with forced labor. Although the Task Force was established pursuant to the USMCA implementing legislation, nothing in the law or the Executive Order limits its focus to the USMCA region, and it appears that the Task Force will have a broader focus on bolstering the overall enforcement of Section 307.

Background

Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307), which operates independently of the USMCA, prohibits the importation into the United States of all goods produced in whole or in part by convict labor, forced labor, and indentured labor under penal sanction. The USMCA Implementation Act, which was signed into law on January 29, 2020, required the President establish a task force, chaired by the head of the Department of Homeland Security (DHS), to "monitor United States enforcement of the prohibition under section 307 of the Tariff Act[.]"[18] The Act requires the Task Force to:

- Establish timelines for responding to petitions submitted to CBP alleging that goods are being imported by or with forced labor;[19]
- Submit a biannual report to the appropriate congressional committees describing the enforcement activities of the DHS under Section 307, and providing an "enforcement plan" for goods allegedly produced with forced labor;[20]
- Develop an enforcement plan for goods produced in whole or in part by forced labor in Mexico, and report concerns relating to potential violations of Section 307 to the Interagency Labor Committee;[21] and

[18] USMCA Implementing Act § 741.

[19] USMCA Implementing Act § 742.

[20] USMCA Implementing Act § 743.

[21] USMCA Implementing Act § 744.

- Meet on a quarterly basis to discuss active Withhold Release orders, ongoing investigations, petitions received, and other enforcement priorities.[22]

The USMCA text does not require the three parties to create a forced labor task force or other monitoring body as envisioned in the US implementing legislation. However, the Agreement requires each party to "prohibit the importation of goods into its territory from other sources produced in whole or in part by forced or compulsory labor,"[23] and demands for stringent enforcement of labor rules figured prominently in discussions between the Trump administration and congressional Democrats last year regarding the finalization of the USMCA text and implementing legislation. The implementing law's requirement for the creation of the Task Force may therefore be intended to demonstrate the United States' compliance with the USMCA's labor rules, and to provide assurances to Congress that the enforcement of Section 307 will be a priority for the administration.

The Executive Order

President Trump's May 15 Executive Order formally establishes the Task Force and addresses its composition and decision-making process. Specifically, the Order provides that the Task Force will be comprised of representatives of the Department of State, the Department of the Treasury, the Department of Justice, the Department of Labor, and the Office of the United States Trade Representative, and may also invite representatives from other executive departments or agencies to participate. The Order further provides that the Task Force should "endeavor" to act by consensus, but may decide matters by majority vote where it cannot reach a consensus on a proposed action. However, the Order provides no guidance or directives concerning the Task Force's execution of the functions assigned to it by the USMCA Implementation Act.

Outlook

The President's Executive Order establishes the Task Force with immediate effect, though the group likely will not begin formal operations for at least several more weeks. Once operational, the Task Force will face a statutory deadline of August 13, 2020 for completing one of the actions required by the implementing law, namely the establishment of timelines for responding to petitions submitted to CBP alleging that imported goods are produced with forced labor. CBP's current regulations governing the receipt and investigation of allegations under Section 307 do not include such timelines, and this omission has been criticized by labor organizations who have urged more stringent enforcement of the prohibition and the adoption of more formal investigative procedures by CBP.[24] The Task Force's mandate to establish binding timelines for action by CBP appears aimed at responding to such concerns.

Other actions required of the Task Force (*e.g.*, reporting on enforcement actions under Section 307 and providing an "enforcement plan" regarding goods made with forced labor) must be completed biannually, with the first reports expected later this year, whereas the law sets no deadline for the Mexico-specific enforcement plan. As indicated above, nothing in the law or the Executive Order limits the scope of these activities to the USMCA region (except the requirement for a Mexico-specific plan), and it therefore appears that most of the Task Force's initiatives will be aimed at bolstering the overall enforcement of the Section 307 prohibition.

[22] USMCA Implementing Act § 741.

[23] USMCA Article 23.6:1.

[24] 19 C.F.R. §§ 12.42-12.45.

The United States already has begun to enforce Section 307 more aggressively in recent years, following the enactment of statutory changes in 2016 that eliminated the "consumptive demand" exception to the prohibition.[25] Following these legislative changes, CBP has issued 13 Withhold Release Orders (WROs) targeting goods allegedly made with forced labor (including several in September 2019 targeting imports from Brazil, China, the Democratic Republic of the Congo, Malaysia, and Zimbabwe); whereas CBP had not issued any WROs in the decade prior. Moreover, Congress has continued to prioritize efforts to combat the use of forced labor, including in the National Defense Authorization Act for Fiscal Year 2020, which directed the administration to investigate the use of forced labor in seafood supply chains. Thus, the creation of the Task Force is part of a broader trend towards more aggressive US government efforts to combat the use of forced labor in global supply chains, including by means of import restrictions.

For more information, please see: https://www.whitehouse.gov/presidential-actions/eo-establishment-forced-labor-enforcement-task-force-section-741-united-states-mexico-canada-agreement-implementation-act/

[25] Section 307 previously permitted the importation of products of forced labor if no comparable product was made in the United States or the level of domestic production did not meet domestic demand. This exception was eliminated by the Trade Facilitation and Trade Enforcement Act of 2015 (P.L. 114-125).