US & Multilateral Trade Policy Developments

Japan External Trade Organization

June 2020

Contents

Free Trade Agreements **3**

USMCA Uniform Regulations Clarify Scope and Application of Steel and Aluminum Purchase Requirements for Passenger Vehicles, Light Trucks, and Heavy Trucks 3

Interagency Labor Committee Establishes Petition Process for USMCA's "Rapid Response" Labor Mechanism 6

US Trade Actions **9**

US Government Urges Supreme Court to Reject Cert Petition from Steel Importers Opposing Section 232 9

US Department of Commerce Initiates Section 232 Investigation of Imports of Vanadium in Response to Petition 11

US Department of Commerce Extends Deadlines for Public Comments on Section 232 Investigation 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 12

US Supreme Court Rejects Constitutional Challenge to Section 232 Statute 13

USTR Requests Comments on Possible One-Year Extension of Section 301 Tariff Exclusions for "List 3" Goods Granted After March 26, 2020 14

US Trade Representative Initiates Section 301 Investigations of Digital Services Taxes Adopted or Under Consideration by Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom 15

Petitions and Investigations **20**

US Department of Commerce Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Utility Scale Wind Towers from Canada, Indonesia, South Korea, and Vietnam 20

US Department of Commerce Initiates Antidumping and Countervailing Duty Investigations of Passenger Vehicle and Light Truck Tires from Korea, Taiwan, Thailand, and Vietnam 20

US Department of Commerce Initiates Antidumping and Countervailing Duty Investigations of Walk-Behind Lawn Mowers and Parts thereof from China and Vietnam 21

US Department of Commerce Issues Affirmative Preliminary Determinaton in Countervailing Duty Investigation of Vertical Shaft Engines from China 22

US International Trade Commission Issues Negative Final Determination in Countervailing Duty Investigation of Glass Containers from China 22

US Department of Commerce Announces Affirmative Circumvention Ruling on Imports of Steel Concrete Reinforcing Bar from Mexico 23

Free Trade Agreements

USMCA Uniform Regulations Clarify Scope and Application of Steel and Aluminum Purchase Requirements for Passenger Vehicles, Light Trucks, and Heavy Trucks

On June 3, 2020, the Office of the US Trade Representative (USTR) published an interim version of the Uniform Regulations concerning the interpretation, application, and administration of key provisions of the US-Mexico-Canada Agreement (USMCA), including the Agreement's rules of origin for automotive goods.[1] Among other issues, the Uniform Regulations address the scope and application of the USMCA's requirement that a passenger vehicle, light truck, or heavy truck is "originating" (and thus eligible for duty-free treatment) only if, during the previous calendar year or a comparable timeframe, at least 70% of the vehicle producer's North American purchases of steel and aluminum qualified as "originating" under the USMCA.[2] This requirement, set forth in Article 6 of the USMCA Automotive Appendix, will take effect immediately upon the Agreement's entry into force on July 1, 2020 (though an additional requirement for steel products to be "melted and poured" in the USMCA region will not take effect until July 1, 2027). The Uniform Regulations provide important details regarding the scope of the steel and aluminum purchase requirement and the methods that vehicle producers may use to demonstrate compliance, which were largely unaddressed in the USMCA text. The relevant provisions of the Uniform Regulations are analyzed below.

Scope

The Uniform Regulations clarify the specific steel and aluminum products, and the types of "purchases" by vehicle producers, that are subject to the purchase requirements set forth in Article 6:

- **Covered steel and aluminum products.** Whereas the USMCA text did not identify the specific products that constitute "steel" and "aluminum" for purposes of Article 6, the Uniform Regulations provide a list of such products and their associated 6-digit Harmonized System (HS) subheadings. The subject steel products, identified in "Table S" of the Uniform Regulations, include (1) certain flat-rolled products (both hot- and cold-rolled) under HS headings 7208-7212 and 7225-7226; (2) certain bars and rods under headings 7213-7214 and 7227-7228; (3) certain tubes, pipes, and hollow profiles under heading 7306; (4) major, secondary, and structural body panel stampings that form the "body in white" under subheading 8708.29 ; and (5) stamped frame components that form the chassis frame under subheading 8708.99. The subject aluminum products include (1) unwrought aluminum (heading 76.01); (2) aluminum waste and scrap (76.02); (3) bars, rods, and profiles (76.04); (3) wire (76.05); (4) plates, sheets, and strip (76.06); (5) tubes and pipes (76.08); (6) major, secondary, and structural body panel stampings that form the "body in white" (8708.29); and (7) stamped frame components that form the chassis frame (8708.99). The Uniform Regulations further clarify the requirements for covered body panel stampings and stamped frame components, stating that only the value of the steel or aluminum listed in Table S that is used in the production of the part will be taken into consideration (rather than the entire value of the part).[3] A copy of Table S is attached for reference.

- **Covered purchases.** The USMCA text indicated that the steel and aluminum purchase requirement would apply to all of "the vehicle producer's purchases of [steel and aluminum]…in the territories of the Parties," but the Uniform Regulations clarify that the requirement applies only to steel and aluminum "purchased for use in the production of passenger vehicles, light trucks or heavy trucks" (emphasis added).[4] The requirement therefore does not apply to steel and aluminum purchased for other uses, such as the production of other

[1] Available at **https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/uniform-regulations**.

[2] Appendix to Annex 4B, Article 6.

[3] Section 17(2).

[4] Section 17(4).

vehicles, tools, dies, or molds. Additionally, and despite the USMCA's language indicating that Article 6 applies only to "purchases" of steel and aluminum, the Uniform Regulations envision that covered steel and aluminum products that are manufactured by the vehicle producer for its own use (*i.e.*, "self-produced" products) may also be counted in a vehicle producer's calculations under Article 6, as discussed in greater detail below.[5]

Calculation Methodologies

The Uniform Regulations set forth the permissible methods for calculating whether a vehicle producer's purchases of steel and aluminum satisfy the requirements of USMCA Article 6. Specifically, the Regulations address (1) the methods for calculating the value of steel and aluminum purchases; (2) the time periods over which such purchases may be aggregated; and (3) the categories of vehicles for which purchases may be aggregated.

- **Value of purchases.** Where steel or aluminum is "imported or acquired" in the territory of a USMCA country, the value of such purchases may be based on: (1) the price paid or payable by the producer in the USMCA country where the producer is located; (2) the net cost of the material at the time of importation; or (3) the transaction value of the material at the time of importation.[6] For steel or aluminum that is "self-produced," the value must include (1) all costs incurred in the production of materials, which includes general expenses, and (2) an amount equivalent to the profit added in the normal course of trade, or equal to the profit that is usually reflected in the sale of goods of the same class or kind as the self-produced material that is being valued.[7]

- **Time Period.** The USMCA provides that, for purposes of determining compliance with Article 6, a producer may calculate the value of its purchases over (1) the previous fiscal year of the producer; (2) the previous calendar year; (3) the quarter or month to date in which the vehicle is exported; (4) the producer's fiscal year to date in which the vehicle is exported; or (5) the calendar year to date in which the vehicle is exported.[8] The Uniform Regulations clarify that, where one of the latter three methods is used, the calculation may be based on the producer's estimated purchases for the applicable period.[9] However, where estimates are used, the producer must conduct an analysis at the end of its fiscal year of the actual purchases made over the period with respect to the production of the relevant vehicle.[10] If the producer determines based on this analysis that the relevant vehicle does not satisfy the steel or aluminum requirement on the basis of the actual purchases, the producer must "immediately inform any person to whom the producer has provided a certification of origin for the vehicle, or a written statement that the vehicle is an originating good, that the vehicle is a non-originating good."[11]

  In addition, the Uniform Regulations clarify that a producer may choose different time periods for purposes of its steel and aluminum calculations.[12] For example, a producer may choose to calculate its steel purchases based on the previous calendar year while calculating its aluminum purchases based on its previous fiscal year, in order to comply with the requirements of Article 6.

- **Basis for Calculation (Categories of Vehicles).** As noted above, the Uniform Regulations clarify that the requirement set forth in Article 6 applies only to steel and aluminum "purchased for use in the production of

---

[5] Section 17(6)(b).

[6] Section 17(6)(a).

[7] Section 17(6)(b).

[8] Appendix to Annex 4B, Article 6.2.

[9] Section 17(8).

[10] Section 17(11).

[11] Section 17(11).

[12] Section 17(10).

passenger vehicles, light trucks or heavy trucks." However, the Regulations permit a vehicle producer to base its calculations on only a subset of the vehicles it produces (*e.g.*, by performing separate calculations for passenger vehicles and light trucks) if it so chooses. Specifically, a vehicle producer may calculate its steel and aluminum purchases on the basis of:[13]

(1) All motor vehicles produced in one or more plants in the territory of one or more USMCA countries;

(2) All motor vehicles exported to the territory of one or more USMCA countries;

(3) All motor vehicles in a category set out in subsection 16(1) of the Uniform Regulations that are produced in one or more plants in the territory of one or more USMCA countries; or

(4) All motor vehicles in a category set out in subsection 16(1) exported to the territory of one or more USMCA countries.

Subsection 16(1) of the Uniform Regulations, which pertains to the calculation and averaging of regional value content (RVC), describes several categories of vehicles, including vehicles within "the same model line" or "the same class" produced in the USMCA territory.[14] A "model line" is defined as a group of vehicles "having the same platform or model name" whereas a "class" is defined more broadly (for example, "passenger vehicles of subheading 8703.21 through 8703.90" constitute a class, as do "light trucks of subheading 8704.21 or 8704.31[.]")[15]

(5) Thus, while the Uniform Regulations permit a producer to perform a single calculation to determine the valueof the steel and aluminum it has purchased for use in the production of all vehicles it manufactures in the USMCA region, they also provide flexibility by allowing a producer to perform separate calculations for each model line or class of vehicles it produces.

"Melted and poured" requirement

The Uniform Regulations do not elaborate significantly on the USMCA's requirement that, beginning seven years after the Agreement's entry into force, steel will only be considered "originating" under Article 6 where "all steel manufacturing processes…occur in one or more of the Parties, except for metallurgical processes involving the refinement of steel additives."[16] The provision of the Uniform Regulations addressing this issue largely repeats the corresponding USMCA provision, though it provides some additional clarity by listing the HS codes associated with certain raw materials that are exempt from the melted and poured requirement, as follows: (1) iron ore or reduced,

[13] Section 17(9).

[14] The full list of vehicle categories set out in Section 16(1) is as follows:

(a) the same model line of motor vehicles in the same class of vehicles produced in the same plant in the territory of a USMCA country;

(b) the same class of motor vehicles produced in the same plant in the territory of a USMCA country;

(c) the same model line or same class of motor vehicles produced in the territory of a USMCA country;

(d) all vehicles produced in one or more plants in the territory of a Party that are exported to the territory of one or more of the other USMCA countries: or

(e) any other category as the USMCA countries may decide.

[15] Section 12(1).

[16] Appendix to Annex 4B, Footnote 74.

processed, or pelletized iron ore of heading 26.01; (2) pig iron of heading 72.01; (4) raw alloys of heading 72.02; or (5) steel scrap of heading 72.04.[17] The Regulations confirm that the melted and poured requirement will take effect "beginning on July 1, 2027."

Outlook

The introduction of a steel and aluminum purchase requirement is a change from the NAFTA that will have important implications for the steel, aluminum, and automotive industries both in and outside of North America. The Uniform Regulations provide significant clarifications on how this requirement will operate in practice, but given their complexity, gathering the necessary information to demonstrate compliance will likely be a time-consuming process. For this reason, the Uniform Regulations provide a six-month grace period for vehicle producers to demonstrate compliance with Article 6 and other aspects of the USMCA's automotive rules of origin. Specifically, they provide that "for the period from July 1, 2020 to December 31, 2020, additional time will be provided to producers, exporters, and importers of [automotive goods] to respond to requests seeking information, including documents in support of a certification of origin[.]"[18] This will include "permitting flexibility with respect to the timing necessary to secure such documentation during this period." Thus, while the steel and aluminum requirement will take effect immediately upon the USMCA's entry into force on July 1, vehicle producers will have additional time to review the Uniform Regulations, determine the calculation method that best suits their business needs, and gather the necessary documentation to demonstrate compliance.

The Uniform Regulations can be viewed **here**.

Interagency Labor Committee Establishes Petition Process for USMCA's "Rapid Response" Labor Mechanism

Enforcement ("Committee") established procedures allowing the public to petition the US government to initiate proceedings under the US-Mexico-Canada Agreement's (USMCA) new "rapid response" mechanism for labor disputes. The rapid response mechanism is a novel feature of the USMCA that allows Parties to bring dispute settlement actions against individual companies suspected of labor violations, and to penalize companies that are found by an independent panel to have denied free association and collective bargaining rights to workers. The creation of the rapid response mechanism was a key demand of US labor organizations during the USMCA negotiation process, and it is expected that several petitions will be filed against Mexican facilities under the mechanism soon after the USMCA enters into force on July 1. The mechanism and the new US petition process may therefore have important implications for companies with operations in Mexico, particularly in the sectors designated by the USMCA as "priority sectors." We provide an overview of the mechanism and the new petition process below.

Rapid Response Labor Mechanism

The USMCA provides for traditional state-to-state dispute settlement to enforce the Agreement's labor obligations, but also includes a "Facility-Specific Rapid Response Labor Mechanism" ("Mechanism") that will apply between the United States and Mexico.[19] The stated goal of the Mechanism is to ensure workers in the two countries are not denied the right of free association and collective bargaining. The Mechanism permits a USMCA Party to bring a complaint alleging that a specific facility of another Party is denying such rights to workers, and establishes a two-stage process for addressing such allegations: (1) an initial review period, during which the Parties may attempt to resolve the issue through bilateral consultations; and (2) a formal dispute settlement process, in which an

---

[17] Section 17(5)(b).

[18] Uniform Regulations Regarding the Interpretation, Application, and Administration of Chapter 5 (Origin Procedures) at p.5, available at https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/UniformRegulations.pdf.

[19] USMCA Annex 31-A.

independent "Rapid Response Labor Panel" will determine whether the alleged "Denial of Rights" exists. An overview of the procedures for bilateral consultations and panel proceedings under the Mechanism is available **here**.

Covered Facilities and Priority Sectors

A Party may bring an action under the Mechanism only where it concerns an alleged violation of free association and collective bargaining rights at a "Covered Facility", defined as a facility in the territory of a Party that (1) produces a good or supplies a service that is traded between the Parties (or competes in the territory of a Party with a good or service of the other Party); and (2) is a facility in a "Priority Sector", *i.e.*, a sector that produces manufactured goods, supplies services, or involves mining. Manufactured goods are defined as including, but not limited to (1) aerospace products and components; (2) autos and auto parts; (3) cosmetic products; (4) industrial baked goods; (5) steel and aluminum; (6) glass; (7) pottery; (8) plastic; (9) forgings; and (10) cement.

Remedies

Where a Rapid Response Labor Panel determines that a Denial of Rights exists, the complaining Party will be authorized to impose remedies targeting imports of goods or services from the facility at issue. Remedies may include (1) suspension of preferential tariff treatment for goods manufactured at the Covered Facility; or (2) the imposition of "penalties" (which are not defined in the Agreement) on goods manufactured at or services provided by the Covered Facility. The Agreement places few limitations on the form or severity of any penalties, except that they must be "proportional to the severity of the Denial of Rights and shall take the panel's views on the severity of the Denial of Rights into account[.]" In cases where a Covered Facility (or a Covered Facility owned or controlled by the same person producing the same or related goods) has received a prior Denial of Rights determination on at least two occasions, remedies may also include the denial of entry of goods (*i.e.*, an import ban on goods produced by the Covered Facility).

US implementing law

The US implementing law for the USMCA mandated the establishment of the Interagency Labor Committee and the creation of a process by which the Committee can accept petitions from the public concerning alleged labor violations that warrant action under the Mechanism. The law also authorizes the Executive Branch to impose potentially severe penalties on imported goods from Mexico that are the subject of an adverse panel finding under the Mechanism, including by denying entry to such goods or subjecting them to additional tariffs.

New US Petition Process

In a June 30 Federal Register notice, the Interagency Labor Committee established interim procedures for the public to submit petitions concerning alleged labor violations in Mexico that warrant US action under the Mechanism. The interim procedures are as follows:

- **Eligibility.** Any "person" of a USMCA Party (*i.e.*, a natural person or an enterprise of the United States, Canada, or Mexico) may file a Rapid Response Petition with the Committee through the US Department of Labor, Office of Trade and Labor Affairs (OTLA). The procedures confirm that the term "person" includes labor organizations and non-governmental organizations.
- **Content of petitions.** Any Rapid Response Petition must identify the facility to which the petition pertains and provide "a description, including facts with sufficient specificity, of the matter alleged to constitute a denial of rights." The Committee recommends that, "as relevant and to the extent possible", each petition should be accompanied by information that supports the petitioner's allegation and addresses (1) whether the facility to which the petition pertains is a "covered facility" as defined in the USMCA; (2) the laws, and specific provisions thereof, of Mexico with which there is alleged non-compliance; (3) whether relief has been sought under the

domestic laws or procedures of Mexico, and, if so, the status of any proceeding; and (4) whether any matter referenced in the petition has been addressed by, or is pending before, any international body.

- **Review of petitions.** When the Committee receives a Rapid Response Petition with accompanying information, the Committee will review the petition and information within 30 days of their receipt by the OTLA and determine whether there is "sufficient, credible evidence of a denial of rights at the covered facility to enable the good-faith invocation of enforcement mechanisms." If the Committee decides that such evidence exists, the Committee will inform USTR, and USTR is required by law to initiate proceedings under the Mechanism.[20] If the Committee decides that such evidence does not exist, the Committee will certify that determination to Congress and the petitioner.
- **Process and considerations for determinations.** In making a determination with regard to a petition, the Committee "may consider," among other things, whether (1) the petition and accompanying information enable a determination of the "scope and nature" of the alleged non-compliance and "permit an appropriate review"; (2) relief has been sought under the domestic laws of the other Party; and (3) the matter or a related matter has been addressed by, or is pending before, any international body. The Committee may also consider views expressed by the public and consult with labor organizations, US and foreign government officials, and non-government representatives.
- **Confidentiality.** Information provided by a person or another Party to the Committee in confidence will be treated as exempt from public inspection if the information meets the requirements of 5 U.S.C. 552(b) of the Freedom of Information Act, or if otherwise permitted by law. The Committee recommends that each person or Party requesting such treatment clearly mark "provided in confidence" on each page or portion of a page so provided and furnish an explanation as to the need for exemption from public inspection. The OTLA and the Committee "will make every effort to protect a natural person's identity pursuant to the law."

Outlook

Several US trade agreements include labor obligations that are subject to state-to-state dispute settlement, but the new Mechanism and US petition process depart from this approach and introduce new legal risks for companies whose operations qualify as "covered facilities" under the USMCA. Whereas state-to-state dispute settlement aims to determine whether government measures or patterns of behavior violate a trade agreement, the Mechanism is aimed at identifying and remedying isolated instances in which labor rights are being denied by a specific private company. Thus, allegations under the Mechanism might occur more frequently than state-to-state disputes concerning labor obligations (which are relatively rare), particularly given that the new US procedures are designed to allow any person of a USMCA Party, including labor unions, to submit petitions. Indeed, US labor experts and unions have indicated that multiple petitions are likely to be filed against Mexican facilities soon after the USMCA enters into force on July 1, and the USMCA Implementation Act requires USTR to initiate proceedings whenever a petition contains "sufficient, credible evidence[.]" Moreover, the new procedures established by the Committee do not provide any formal process for interested parties to dispute the information set forth in a petition before USTR initiates proceedings.

The Mechanism also provides few express limitations on the types of "penalties" that Parties may impose against the goods or services of facilities that are the subject of an adverse panel finding. Whereas WTO and FTA dispute settlement systems traditionally limit the form and dollar value of any countermeasures authorized thereunder (and do not permit the targeting of specific facilities), the Mechanism gives a complaining Party discretion to suspend preferential tariff treatment and to impose additional, undefined "penalties" targeting offending facilities. Though the Mechanism requires remedies to be "proportional" to the violation at issue, it does not include a specific methodology

[20] 19 USC 4646(b)(3)

for calibrating remedies, and Parties may therefore disagree on whether a remedy is truly "proportional." The new Mechanism and US petition process may therefore prompt a wave of new allegations and potentially severe trade restrictions targeting Mexican facilities, particularly in the "priority sectors" specified in the Agreement.

The interim procedures established by the Committee can be viewed **here**.

US Trade Actions

Section 232

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.

This alert explains the background of the case, the issues at stake, and likely next steps.

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: 1) 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 2) 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 non-delegation 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.

The AIIS' and the government's briefs are available **here**.

US Department of Commerce Initiates Section 232 Investigation of Imports of Vanadium in Response to Petition

On June 2, 2020, the US Department of Commerce (DOC) announced that it has initiated an investigation into the effects of imports of Vanadium on US national security, pursuant to Section 232 of the Trade Expansion Act of 1962. DOC stated that it is initiating the investigation in response to a petition filed by domestic producers AMG Vanadium LLC and U.S. Vanadium LLC in November 2019, alleging that the domestic industry is being harmed by "unfairly traded low-priced imports, limited export markets due to value-added tax regimes in other vanadium producing countries, and the distortionary effect of Chinese and Russian industrial policies." In a draft Federal Register notice, DOC has established the following deadlines for public comments, which confirm that the public input phase of the investigation will proceed rapidly:

- **July 18, 2020** is the due date for filing written comments, data, analyses, or other information pertinent to DOC's investigation; and
- **August 17, 2020** is the due date for rebuttal comments submitted in response to any comments filed on or before July 18, 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 set a date for 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.

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 18, 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 vanadium;
- Domestic production and productive capacity needed for vanadium to meet projected national defense requirements;
- Existing and anticipated availability of human resources, products, raw materials, production equipment, and facilities to produce vanadium;
- The growth requirements of the vanadium 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 vanadium industry;

- The displacement of any domestic vanadium 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 vanadium 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 18, 2020 may be filed with DOC no later than August 17, 2020. Comments will be placed in the investigation docket (BIS-2020-0002) 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 Vanadium Investigation" and filed through the Federal eRulemaking Portal: **http://www.regulations.gov** (docket BIS-2020-0002).

Scope of the investigation

The draft notice does not clarify the precise scope of products that are subject to the investigation and states only that the investigation relates to imports of vanadium. However, DOC's accompanying press release provides the following additional details:

> Vanadium is a metal used in production of metal alloys and as a catalyst for chemicals across aerospace, defense, energy, and infrastructure sectors. Designated a strategic and critical material, vanadium is used for national defense and critical infrastructure applications. Examples include aircraft, jet engines, ballistic missiles, energy storage, bridges, buildings, and pipelines. Vanadium is a key component in aerospace applications due to its strength-to-weight ratio, the best of any engineered material. U.S. demand is supplied entirely through imports.

Neither the draft notice nor the press release provides the relevant Harmonized Tariff System codes or other details regarding the investigation's scope. The lack of a detailed scope description is consistent with DOC's recent practice.

Next steps

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 46 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 press release and notice of initiation may be viewed **here** and **here**, respectively.

US Department of Commerce Extends Deadlines for Public Comments on Section 232 Investigation 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

On June 9, 2020, the US Department of Commerce (DOC) announced that is postponing the deadlines for interested parties to submit written comments and rebuttal comments on its Section 232 investigation concerning 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. DOC's notice of initiation, published on May 19, had established deadlines of June 9, 2020 for written comments and June 19, 2020 for rebuttal comments. In a Federal Register notice issued today, DOC has postponed the deadlines for written comments and rebuttal comments to July 3 and July 24, respectively. DOC indicated that it is extending these deadlines in response to requests from two trade associations.

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

US Supreme Court Rejects Constitutional Challenge to Section 232 Statute

On June 22, 2020, the U.S. Supreme Court rejected a petition for *certiorari* filed by the American Institute for International Steel, Inc. and two of its members, Kurt Orban Partners LLC and Sim-Tex LP (collectively "AIIS") in *American Institute For International Steel, Inc. et al., v. United States* (No. 19-1177). AIIS' petition sought to enjoin the President's use of Section 232 of the Trade Expansion Act of 1962 to restrict steel imports by arguing that the Section 232 statute is a violation of the U.S. constitution's prohibition against broad delegations of Congress' legislative authority (*i.e.* the "non-delegation doctrine"). As a result of the Supreme Court's decision, Section 232 and the tariffs imposed on steel and aluminum imports thereunder will remain in place, and the Trump administration's ongoing Section 232 investigations will proceed. Other legal challenges concerning Section 232 remain pending before the U.S. Court of International Trade (CIT), but these cases primarily concern the consistency of specific Presidential actions with the Section 232 statute, and thus have narrower implications than the AIIS case. This alert provides an update on the status of legal challenges to Section 232 and current congressional efforts to reform the law.

American Institute For International Steel, Inc. et al., v. United States

AIIS' petition for *certiorari* mirrored arguments made in its prior cases before the CIT and the U.S. Court of Appeals for the Federal Circuit (CAFC). In particular, its petition contained two primary arguments:

- First, AIIS argued that the "uniquely broad delegation of power" contained in Section 232 made this case the appropriate instance for the Court to revisit the non-delegation doctrine. AIIS argued that "[t]his case is an ideal vehicle for the Court to make clear that the non-delegation doctrine has continued vitality where the statute has no boundaries and Congress has delegated unbridled discretion to tax imports."
- Second, AIIS argued that the Court should distinguish, limit, or overrule its 1976 decision in *Fed. Energy Admin. v. Algonquin SNG, Inc.*, which found that Section 232 did not violate the non-delegation doctrine. AIIS argued that the Court should distinguish *Algonquin* from *American Institute For International Steel, Inc. et al.* because "the statutory claim in *Algonquin* bears no resemblance to the delegation challenge here."

The Supreme Court **denied** *certiorari* without any opinion or discussion of the merits of the case, as is typical for the Court in denying *certiorari* petitions. This action effectively denies both of AIIS' arguments and leaves the ruling of the CAFC in favor of the government in place.

Other legal challenges concerning Section 232

Several additional legal challenges concerning Section 232 remain pending before the CIT. These cases primarily concern the lawfulness of the Trump administration's practice of modifying Section 232 import restrictions after the

statutory deadlines for imposing such restrictions have passed. For example, the Plaintiffs in *Transpacific Steel LLC v. United States* challenged the lawfulness of President Trump's August 2018 Proclamation increasing from 25 to 50 percent the Section 232 tariff applicable to imports of steel articles from Turkey. Plaintiffs' complaint in this case focused on two primary arguments: that the Proclamation: 1) violates equal protection under the U.S. Constitution's Fifth Amendment due process clause because it imposes more burdensome treatment on importers of Turkish steel than steel from other sources, and 2) is contrary to the requirements of the Section 232 statute because the President increased tariffs on Turkish steel without following the procedures and timelines mandated by the statute. In November 2019, the CIT rejected the government's motion to dismiss the case, paving the way for a ruling on the merits of Plaintiffs' claims later this year.

In addition, several U.S. importers have filed complaints at the CIT challenging the lawfulness of President Trump's January 2020 Proclamation expanding the scope of the Section 232 tariffs to cover certain "derivative" steel and aluminum products (see, *e.g.*, *PrimeSource Building Products, Inc. v. United States et al* and *Trinity Steel Private Limited v. United States et al.*) Like the Plaintiffs in *Transpacific*, these importers argue that President Trump's Proclamation modifying the steel and aluminum tariffs was issued long after the expiration of the 90-day period envisioned in the law and therefore violates the Section 232 statute. The CIT has granted several temporary restraining orders exempting Plaintiffs from the Section 232 duties on derivative goods while these cases proceed.

Outlook

The Supreme Court's rejection of AIIS' petition for *certiorari* effectively ends AIIS' constitutional challenge to Section 232, leaving in place the existing Section 232 tariffs and permitting the administration to continue its ongoing Section 232 investigations of electrical steel, vanadium, and mobile cranes. The rejection of the petition serves as an implicit affirmation of the Court's ruling in *Algonquin*, which both the CIT and the CAFC found precluded a finding that Section 232 violated the non-delegation doctrine.

Congressional efforts to reform Section 232 through the enactment of new legislation have also stalled in recent months. Though Senate Finance Committee Chairman Chuck Grassley (R-IA) identified Section 232 reform as a priority for the Committee at the beginning of the current Congress, he acknowledged recently that the effort has failed because "it's difficult to get bipartisan agreement on what to do and, secondly, there's some Republicans who don't want to advance [the bill] because they might be seen as doing it in an anti-Trump fashion." Legislative efforts to curtail the President's authority under Section 232 therefore appear unlikely to gain momentum in the near future.

On the other hand, the CIT's November 2019 preliminary opinion in Transpacific expressed doubt about the President's legal authority to modify significantly import restrictions imposed under Section 232 once they have been decided and the statutory deadlines for imposing the restrictions have passed. It is therefore possible that the CIT's forthcoming decision in Transpacific will establish at least some limits on the President's authority to implement such modifications, even though it is unlikely to curtail his broader authority to impose import restrictions under Section 232.

Section 301

USTR Requests Comments on Possible One-Year Extension of Section 301 Tariff Exclusions for "List 3" Goods Granted After March 26, 2020

On June 2, 2020, the Office of the US Trade Representative (USTR) announced that it is now considering whether to extend for up to 12 months the Section 301 tariff exclusions for "List 3" goods that were granted after March 26, 2020. USTR had previously announced on May 6, 2020 that it was considering the extension of only the initial 11 tranches of List 3 product exclusions, which were granted on or before March 26, 2020. The remaining exclusions now eligible for possible extension are set forth in 3 separate product exclusion notices issued by USTR after March 26, 2020:

- 85 FR 23122 (April 24, 2020)
- 85 FR 27489 (May 8, 2020)
- 85 FR 32094 (May 28, 2020)

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). USTR's notice contemplates the potential extension of these exclusions through August 7, 2021.

Public Docket and Comment Deadline

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 July 7, 2020.

On June 8, 2020, the public docket (Docket Number USTR-2020-0016) on the web portal at **https://comments.USTR.gov** will open for parties to submit comments on the possible extension of the covered exclusions. Parties should follow the same submission guidelines and criteria for comments as are described in the attached W&C Trade Alert detailing USTR's May 6 notice.

USTR's June 2, 2020 notice is available **here**.

US Trade Representative Initiates Section 301 Investigations of Digital Services Taxes Adopted or Under Consideration by Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom

On June 2, 2020, the Office of the United States Trade Representative (USTR) announced that it has initiated an investigation under Section 301 of the Trade Act of 1974 to determine whether Digital Services Taxes (DSTs) adopted or under consideration by Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom are "unreasonable or discriminatory" or otherwise actionable under Section 301. This is the second Section 301 investigation that the Trump administration has initiated concerning digital services taxes, and the prior investigation, which concerns France's DST, remains ongoing. If USTR's findings in the new investigation are affirmative, the United States may take unilateral actions against imports of goods and services originating in the targeted countries (*e.g.*, by imposing retaliatory tariffs), or it may initiate World Trade Organization (WTO) dispute settlement proceedings challenging the WTO-consistency of the DST, among other actions. In its June 5, 2020 *Federal Register* notice USTR has invited written comments on any issue covered by the investigation by July 15, 2020.

We provide an overview of Section 301, the next steps in the investigation, and USTR's request for comments below.

Background

Section 301 investigations and recent US practice

Section 301 provides the US executive branch with the authority and procedures to enforce US rights under international trade agreements and to respond to certain "unfair" foreign government practices not covered by trade agreements. Section 301 is the principal statutory mechanism under which the President may impose retaliatory measures against foreign countries that violate existing trade agreements or engage in acts that are "unjustifiable" or "unreasonable" and burden US commerce. USTR makes determinations, initiates and conducts investigations, and implements action under Section 301.

When a Section 301 investigation involves an alleged violation of a trade agreement, US law requires that USTR follow the consultation and dispute settlement procedures set forth in the applicable agreement. For example, if the

investigation involves a violation of the WTO Agreements, USTR must follow WTO dispute settlement procedures. However, when USTR determines that a Section 301 investigation does not involve an alleged trade agreement violation, the agency may investigate the foreign practices and retaliate unilaterally in the case of affirmative findings. Remedies authorized by the law include (1) the imposition of duties or other import restrictions on goods; (2) the imposition of fees or restrictions on services; and (3) the negotiation of binding agreements to eliminate the conduct in question or compensate the United States with satisfactory trade benefits.

Prior to 2018, the United States had not taken unilateral action under Section 301 in several decades, having ceased the practice upon the implementation of the WTO Agreements and the creation of the WTO dispute settlement system in 1995. However, the Trump administration has revived the use of Section 301 as a unilateral enforcement mechanism, using the law as the principal means of carrying out its ongoing trade dispute with China.

Digital services taxes

Over the past two years, various jurisdictions have taken under consideration or adopted taxes on revenues that certain companies generate from providing certain digital services to, or aimed at, users in those jurisdictions. According to the USTR, available evidence suggests these Digital Services Taxes (DSTs) are expected to target large, U.S.-based technology companies.

In July 2019, USTR initiated a Section 301 investigation of a DST approved by the French Parliament. USTR determined in December 2019 that France's DST discriminates against U.S. companies, is inconsistent with prevailing principles of international tax policy, and is unusually burdensome for affected U.S. companies. Specifically, USTR's investigation found that the French DST discriminates against U.S. digital companies, such as Google, Apple, Facebook, and Amazon. In addition, USTR found that the French DST is inconsistent with prevailing tax principles on account of its retroactivity, its application to revenue rather than income, its extraterritorial application, and its alleged purpose of penalizing particular U.S. technology companies. USTR also proposed to take action in response to the DST by imposing tariffs "of up to 100 percent" on a list of French-origin goods with an annual import value of $2.4 billion, and possibly by imposing fees or restrictions on unspecified French services. Thus far, however, USTR has not taken action due to France's apparent willingness to resolve the issue in the context of ongoing multilateral negotiations towards a consensus solution on digital taxation. These negotiations are taking place under the auspices of the Organisation for Economic Co-operation and Development (OECD).

Initiation of Section 301 Investigation

USTR has initiated a Section 301 investigation into digital services taxes adopted or under consideration by Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom. In the initiation notice, USTR seeks public comments in connection with the investigation and describes the DST measures as follows:

- **Austria**: In October 2019, Austria adopted a DST that applies a 5% tax to revenues from online advertising services. The law went into force on January 1, 2020. The tax applies only to companies with at least €750 million in annual global revenues for all services and €25 million in in-country revenues for covered digital services.
- **Brazil**: Brazil is considering a legislative proposal entitled the "Contribution for Intervention in the Economic Domain" or CIDE. If adopted, CIDE would apply to the gross revenue derived from digital services provided by large technology companies.
- **The Czech Republic**: The Parliament of the Czech Republic is considering a draft law that would apply a 7% DST to revenues from targeted advertising and digital interface services. The tax would apply only to

companies generating €750 million in annual global revenues for all services and CZK 50 million in in-country revenues for covered digital services.

- **The European Union**: The European Commission is considering a DST as part of the financing package for its proposed COVID-19 recovery plan. The EU DST is based on a 2018 DST proposal that was not adopted. The 2018 EU proposal included a 3% tax on revenues from targeted advertising and digital interface services, and would have applied only to companies generating at least €750 million in global revenues from covered digital services and at least €50 million in EU-wide revenues for covered digital services.
- **India**: In March 2020, India adopted a 2% DST. The tax only applies only to non-resident companies, and covers online sales of goods and services to, or aimed at, persons in India. The tax applies only to companies with annual revenues in excess of approximately Rs. 20 million (approximately US $267,000). The tax went into effect on April 1, 2020.
- **Indonesia**: Earlier this year, Indonesia adopted an electronic transaction tax that targets cross-border, digital transactions. Further implementing measures are required for the new tax to go into effect.
- **Italy**: Italy has adopted a DST. The measure includes a 3% tax on revenues from targeted advertising and digital interface services. This tax applies only to companies generating at least €750 million in global revenues for all services and €5.5 million in in-country revenues for covered digital services. The tax applies as of January 1, 2020.
- **Spain**: Spain is considering a draft DST. The measure would apply a 3% tax to revenues from targeted advertising and digital interface services. This tax would apply only to companies generating at least €750 million in global revenues for all services and €3 million in in-country revenues for covered digital services.
- **Turkey**: Turkey has adopted a DST. The measure applies a 7.5% tax to revenues from targeted advertising, social media and digital interface services. The tax applies only to companies generating €750 million in global revenues from covered digital services and TL20 million in in-country revenues from covered digital services. The Turkish President has authority to increase the tax rate up to 15%. The law went into effect on March 1, 2020.
- **The United Kingdom**: The United Kingdom is considering a DST proposal as part of its Finance Bill 2020. The measure would apply a 2% tax on revenues above £25 million to internet search engines, social media, and online marketplaces. The tax applies only to companies generating at least £500 million in global revenues from covered digital services and £25 million in in-country revenues from covered digital services. The bill is in the final stages of adoption by Parliament, and if passed, payments would be due from affected companies in 2021.

Possible basis for action under Section 301

As noted above, Section 301 authorizes USTR to take unilateral action where the matter under investigation does not involve a trade agreement, but prohibits USTR from doing so where the matter is covered by a trade agreement (*e.g.*, the WTO Agreements). USTR's notice does not clearly state whether it believes the DSTs at issue violate (or may violate) the implementing countries' obligations under the WTO Agreements. Instead, the notice merely states that USTR will determine whether the measure is "actionable" under Section 301 and notes that "[a]ctionable matters under section 301 include, *inter alia*, acts, policies, and practices of a foreign country that are unreasonable or discriminatory and burden or restrict U.S. commerce…[a]n act, policy, or practice is unreasonable if the act, policy, or practice, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable." By highlighting only the provisions of Section 301 that pertain to foreign

government actions not covered by trade agreements, the notice appears to emphasize the possibility that USTR may take unilateral action in response to the DSTs.

On the other hand, USTR's notice (as explained below) requests comments from the public on, *inter alia,* "[w]hether one or more of the covered DSTs is inconsistent with obligations under the WTO Agreement or any other international agreement[.]" The notice therefore leaves open the possibility that USTR's Section 301 investigation will find the DST to be inconsistent with commitments under, for example, the WTO's General Agreement on Trade in Services (GATS) and thus lead to a WTO dispute settlement case, rather than unilateral US action, on the DST. This outcome appears unlikely, however, given that USTR's proposed response to the French DST was unilateral retaliation.

Focus of the investigation

USTR's notice states that the investigation "initially will focus on the following concerns with the DSTs: discrimination against U.S. companies; retroactivity; and possibly unreasonable tax policy." With respect to tax policy, the notice suggests that the DSTs may diverge from the norms reflected in the U.S. tax system and the international tax system with regard to extraterritoriality, taxing revenue rather income, and an alleged purpose of "penalizing particular technology companies for their commercial success."

Request for Comments

USTR is inviting interested persons to submit written comments on any issue covered by the investigation. In particular, USTR invites comments on aspects that may warrant a finding that one or more of the covered DSTs are actionable under Section 301. Additionally, USTR invites comments with respect to:

- Concerns with one or more of the of the DSTs adopted or under consideration by the jurisdictions covered in these investigations;
- Whether one or more of the covered DSTs is unreasonable or discriminatory;
- The extent to which one or more of the covered DSTs burdens or restricts U.S. commerce;
- Whether one or more of the covered DSTs is inconsistent with obligations under the WTO Agreement or any other international agreement; and
- The determinations USTR is required to make under the law, including what action, if any, should be taken.

In light of the COVID-19 pandemic, USTR Is not at this time scheduling a public hearing in these investigations. USTR will provide further information in a subsequent notice if a hearing is to be held in these investigations.

USTR has requested that interested parties submit written comments by July 15, 2020. All comments should be submitted through the Federal eRulemaking Portal: **http://www.regulations.gov** (docket USTR-2020-0022).

Outlook

USTR's initiation of a Section 301 investigation concerning the DSTs highlights the widespread and bipartisan opposition to such measures within the U.S. government and the U.S. digital services industry, as well as the Trump administration's willingness to use the threat of unilateral trade actions, namely tariffs, to deter foreign government practices that are perceived to disadvantage U.S. interests. The action may also be aimed in part at pressuring the targeted countries to reach a multilateral solution in the context of the ongoing negotiations under the auspices of the OECD's Base Erosion and Profit Shifting ("BEPS") project. The OECD indicated in March that the participants are

aiming to reach a political decision on the key components of a multilateral solution by the time of the G20/OECD Inclusive Framework on BEPS plenary meeting scheduled for July 1-2, 2020.

Absent a negotiated solution, unilateral actions taken by USTR as a result of the Section 301 investigation could have implications not only for the digital services industry, but potentially for a wide range of industries unrelated to digital services. In its investigation of France's DST, USTR proposed the imposition of retaliatory tariffs on a wide range of French goods, including dairy products, cosmetics, sparkling wine, and leather goods. USTR may similarly seek to target sensitive exports of other countries targeted by the new DST investigation. Though such actions would raise serious questions regarding their consistency with the United States' obligations under the WTO Agreements, such concerns have not deterred the Trump administration from taking significant unilateral actions in its Section 301 investigation of China's intellectual property rights practices. Interested parties may therefore wish to monitor and provide comments on USTR's investigation.

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

Petitions and Investigations

US Department of Commerce Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Utility Scale Wind Towers from Canada, Indonesia, South Korea, and Vietnam

On June 30, 2020, the US Department of Commerce (DOC) announced affirmative final determinations in the antidumping duty (AD) and countervailing duty (CVD) investigations of imports of utility scale wind towers from Canada, Indonesia, South Korea (AD only), and Vietnam. In its investigations, DOC determined that producers and/or exporters from Canada, Indonesia, South Korea, and Vietnam have sold utility scale wind towers at less than fair value in the United States at rates of 4.94 percent for Canada, 8.53 percent for Indonesia, 5.41 percent for South Korea, and 65.96 percent for Vietnam. In addition, DOC determined that producers and/or exporters from Canada, Indonesia, and Vietnam received countervailable subsidies at rates of 1.18 percent for Canada, 5.90 percent for Indonesia, and 2.84 percent for Vietnam.

The petitioner in these investigations is the Wind Tower Trade Coalition, whose members are Arcosa Wind Towers, Inc. (Dallas), and Broadwind Towers, Inc. (Manitowoc, Wisc.). The merchandise covered by these investigations consists of certain wind towers, whether or not tapered, and sections thereof. Certain wind towers support the nacelle and rotor blades in a wind turbine with a minimum rated electrical power generation capacity in excess of 100 kilowatts and with a minimum height of 50 meters measured from the base of the tower to the bottom of the nacelle (i.e., where the top of the tower and nacelle are joined) when fully assembled. Merchandise covered by these investigations is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheading 7308.20.0020 or 8502.31.0000. Wind towers of iron or steel are classified under HTSUS 7308.20.0020 when imported separately as a tower or tower section(s). Wind towers may be classified under HTSUS 8502.31.0000 when imported as combination goods with a wind turbine (i.e., accompanying nacelles and/or rotor blades).

The US International Trade Commission (ITC) is currently scheduled to make its final injury determinations on or about August 13. If the ITC makes affirmative final injury determinations, DOC will issue antidumping and countervailing duty orders. If the ITC makes negative final injury determinations, the investigations will be terminated, and no orders will be issued.

In 2019, imports of utility scale wind towers from Canada, Indonesia, South Korea, and Vietnam were valued at an estimated $56.6 million, $108.8 million, $78.7 million, and $106.1 million, respectively, according to DOC.

US Department of Commerce Initiates Antidumping and Countervailing Duty Investigations of Passenger Vehicle and Light Truck Tires from Korea, Taiwan, Thailand, and Vietnam

On June 23, 2020, the US Department of Commerce (DOC) announced the initiation of new antidumping (AD) and countervailing duty (CVD) investigations to determine whether passenger vehicle and light truck (PVLT) tires from the Republic of Korea (Korea), Taiwan, Thailand, and the Socialist Republic of Vietnam (Vietnam) are being dumped in the United States, and to determine if producers in Vietnam are receiving countervailable subsidies. The petitions were filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (Pittsburgh).

The dumping margins alleged in the petitions are as follows:

- 42.95 – 195.20 percent for Korea
- 20.57 – 116.14 percent for Taiwan

- 106.36 – 217.50 percent for Thailand
- 5.48 – 22.30 percent for Vietnam

In the CVD investigation for Vietnam, DOC will investigate 20 alleged subsidy programs, including "Vietnam's allegedly undervalued currency." This is the first time that DOC has initiated an investigation of alleged currency subsidies in relation to a foreign currency with a single exchange rate.

The scope of this investigation is passenger vehicle and light truck tires. Passenger vehicle and light truck tires are new pneumatic tires, of rubber, with a passenger vehicle or light truck size designation. Tires covered by this investigation may be tube-type, tubeless, radial, or non-radial, and they may be intended for sale to original equipment manufacturers or the replacement market. The products covered by this investigation are currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4011.10.10.10, 4011.10.10.20, 4011.10.10.30, 4011.10.10.40, 4011.10.10.50, 4011.10.10.60, 4011.10.10.70, 4011.10.50.00, 4011.20.10.05, and 4011.20.50.10. Tires meeting the scope description may also enter under the following HTSUS subheadings: 4011.90.10.10, 4011.90.10.50, 4011.90.20.10, 4011.90.20.50, 4011.90.80.10, 4011.90.80.50, 8708.70.45.30, 8708.70.45.46, 8708.70.45.48, 8708.70.45.60, 8708.70.60.30, 8708.70.60.45, and 8708.70.60.60.

During DOC's investigations, the US International Trade Commission (ITC) will conduct its own investigations into whether the US industry and its workforce are being injured by imports of the subject merchandise. The ITC will make its preliminary determinations by July 17. If the ITC preliminarily determines that there is a reasonable indication of material injury or the threat of material injury, DOC's investigations will continue, with the preliminary CVD determination scheduled for August 26 and preliminary AD determinations scheduled for November 9, unless these deadlines are extended.

According to DOC, imports of PVLT tires in 2019 were valued at $1.17 billion for Korea, $373.0 million for Taiwan, $1.96 billion for Thailand, and $469.6 million for Vietnam.

US Department of Commerce Initiates Antidumping and Countervailing Duty Investigations of Walk-Behind Lawn Mowers and Parts thereof from China and Vietnam

On June 16, 2020, the US Department of Commerce (DOC) announced the initiation of new antidumping (AD) and countervailing duty (CVD) investigations to determine whether walk-behind lawn mowers and parts thereof (walk-behind lawn mowers) from China and Vietnam are being dumped in the United States, and to determine if producers in China are receiving countervailable subsidies. The petitions were filed by MTD Products, Inc. (Valley City, Ohio).

The dumping margins alleged in the petitions range from 274.29 to 313.58 percent for China and 289.63 to 416.00 percent for Vietnam. In the CVD investigation for China, DOC will investigate 17 alleged subsidy programs, including tax programs, government provision of goods for less than adequate remuneration, export programs, grants, and government provided loans.

The merchandise covered by this investigation consists of certain rotary walk-behind lawn mowers, which are grass-cutting machines that are powered by internal combustion engines. The scope of the investigation covers certain walk-behind lawn mowers, whether self-propelled or non-self-propelled, whether finished or unfinished, whether assembled or unassembled, and whether containing any additional features that provide for functions in addition to mowing. The lawn mowers subject to this investigation are typically at subheading: 8433.11.0050. Lawn mowers subject to this investigation may also enter under Harmonized Tariff Schedule of the United States (HTSUS) 8407.90.1010 and 8433.90.1090.

During DOC's investigations, the US International Trade Commission (ITC) will conduct its own investigations into whether the US industry and its workforce are being injured by reason of imports of the subject merchandise. The ITC will make its preliminary determinations by July 10. If the ITC preliminarily determines that there is a reasonable indication of material injury or threat of material injury, DOC's investigations will continue, with the preliminary CVD determination scheduled for August 19, and the preliminary AD determinations scheduled for November 2, unless these deadlines are extended.

According to DOC, imports of walk-behind lawn mowers in 2019 were valued at $24.6 million for China and $135,090 for Vietnam.

US Department of Commerce Issues Affirmative Preliminary Determinaton in Countervailing Duty Investigation of Vertical Shaft Engines from China

On June 16, 2020, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the countervailing duty (CVD) investigation of imports of vertical shaft engines 225cc to 999cc and components thereof (vertical shaft engines) from China. In its investigations, DOC preliminarily determined that imports of the subject merchandise from China received countervailable subsidies ranging from 19.61 to 37.75 percent. As a result of the determination, US Customs and Border Protection will collect cash deposits based on these preliminary rates.

The merchandise covered by this investigation consists of spark-ignited, non-road, vertical shaft engines, whether finished or unfinished, whether assembled or unassembled, primarily for riding lawn mowers and zero-tum radius lawn mowers. Engines meeting this physical description may also be for other non-hand-held outdoor power equipment such as, including but not limited to, tow-behind brush mowers, grinders, and vertical shaft generators. The engines subject to this investigation are typically classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings: 8407.90.1020, 8407.90.1060, and 8407.90.1080. The engine subassemblies that are subject to this investigation enter under HTSUS 8409.91.9990. Engines subject to this investigation may also enter under HTSUS 8407.90.9060 and 8407.90.9080.

DOC is scheduled to make its final CVD determinations on October 26. If DOC makes an affirmative final determination, the US International Trade Commission (ITC) will be scheduled to make its final injury determination on or about December 10. If DOC makes an affirmative final determination in this investigation and the ITC makes an affirmative final injury determination, DOC will issue a countervailing duty order. If either agency makes a negative final determination, the investigation will be terminated, and no order will be issued.

In 2019, imports of vertical shaft engines from China were valued at an estimated $45.1 million, according to DOC.

US International Trade Commission Issues Negative Final Determination in Countervailing Duty Investigation of Glass Containers from China

On June 9, 2020, the US International Trade Commission (ITC) determined that a US industry is not materially injured or threatened with material injury by reason of imports of glass containers from China that the US Department of Commerce (DOC) has determined are subsidized by the government of China. DOC in May 2020 determined that imports of this product from China received countervailable subsidies ranging from 25.46 to 320.53 percent. However, as a result of the ITC's negative determination, no countervailing duty order will be imposed on imports of this product from China.

ITC Chairman David S. Johanson and Commissioners Rhonda K. Schmidtlein, Jason E. Kearns, Randolph J. Stayin, and Amy A. Karpel voted in the negative. The ITC's public report on this investigation will contain the views of the Commission and will be available by July 14, 2020.

US Department of Commerce Announces Affirmative Circumvention Ruling on Imports of Steel Concrete Reinforcing Bar from Mexico

On June 1, 2020, the US Department of Commerce (DOC) announced an affirmative circumvention ruling involving the antidumping duty (AD) order on imports of steel concrete reinforcing bar (rebar) from Mexico. Specifically, DOC determined that imports of rebar that is bent at one or both ends (hooked or bent rebar) and produced and/or exported by Deacero S.A.P.I. de C.V. (Deacero) circumvent the existing AD order, which covers rebar from Mexico that is straight or coiled.

This inquiry was initiated in response to a request from US domestic producers of rebar. The petitioner in this case is the Rebar Trade Action Coalition, whose members are Nucor Corporation (Charlotte, N.C.), Gerdau Ameristeel U.S. Inc. (Tampa, Fla.), Commercial Metals Company (Irving, Texas), Cascade Steel Rolling Mills, Inc. (McMinnville, Ore.), Byer Steel Group, Inc. (Cincinnati), and Steel Dynamics, Inc. (Fort Wayne, Ind.).

As a result of DOC's ruling, US Customs and Border Protection will continue suspending liquidation and collecting AD cash deposits on imports of rebar from Mexico produced and/or exported by Deacero that are bent at one or both ends at the cash deposit rate in effect at the time of entry for imports of rebar from Mexico produced and/or exported by Deacero. Suspension and cash deposit requirements will apply to any unliquidated entries since October 18, 2019 (the date on which DOC initiated the circumvention inquiry) and future imports. However, cash deposits are not required for hooked rebar produced and/or exported by Deacero that has been sold in connection with a specific, identified construction project and produced according to an engineer's structural design, consistent with industry standards.