US Multilateral Trade Policy Developments

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Free Trade Agreements

United States and Brazil Sign Limited Trade Agreement on Customs and Trade Facilitation, Regulatory Practices, and Anti-Corruption Measures; Congressional Democrats Threaten "Rebalancing" of Trade Authorities

On October 19, 2020, the United States and Brazil signed a limited bilateral trade agreement with three chapters, covering Customs Administration and Trade Facilitation, Good Regulatory Practices, and Anticorruption. The agreement draws heavily from the corresponding chapters of the United States-Mexico-Canada Agreement (USMCA) and has been billed by both governments as a stepping stone to further bilateral agreements, potentially culminating in a comprehensive free trade agreement (FTA). The Trump administration has indicated that it intends to implement the new "phase one" agreement unilaterally (*i.e.*, without seeking approval from the US Congress), though the Brazilian National Congress will need to ratify the agreement before it can enter into force.

The US business community has praised the new agreement despite its omission of a digital trade chapter that some industries had sought, and has welcomed the prospect of further negotiations with Brazil. However, the agreement has engendered strong criticism from congressional Democrats, who have opposed entering into trade agreements with Brazil due to concerns about the country's alleged labor, human rights, and environmental practices. The agreement has also prompted some Democrats to renew their criticism of the Trump administration's practice of negotiating narrow, "phase one" trade agreements that it asserts are not subject to congressional approval, or to the notification and consultation requirements of the trade promotion authority (TPA) statute. These reactions raise doubts as to whether the momentum towards deeper trade relations with Brazil, and the general willingness of the United States to negotiate trade agreements in "phases," will be sustained beyond the 2020 election.

We provide an overview of the new agreement and its implications below.

US-Brazil Protocol on "Trade Rules and Transparency"

The new agreement between the United States and Brazil takes the form of a Protocol to the 2011 bilateral Agreement on Trade and Economic Cooperation (ATEC), which established a commission to explore opportunities promote trade and investment between the two countries. The Protocol would add three Annexes to the ATEC, covering (1) Customs Administration and Trade Facilitation; (2) Good Regulatory Practices; and (3) Anticorruption. The Annexes contain detailed commitments that closely resemble the corresponding provisions of the USMCA, though they will not be enforceable through state-to-state dispute settlement as is the case with the USMCA provisions. The key provisions of the Protocol may be summarized as follows:

- **Customs Administration and Trade Facilitation.** Key provisions of this Annex include (1) an obligation for each Party's customs authority to provide advance rulings with respect to the tariff classification, valuation, and origin of a good prior to its importation; (2) disciplines concerning the imposition of customs penalties, including a prohibition on remunerating government officials for penalties or duties they assess or collect; (3) an obligation to maintain a single window system that enables the electronic submission of the documentation and data that a Party requires for importation and exportation; (4) an obligation to maintain a trade facilitation partnership program for operators who meet specified security criteria, known as Authorized Economic Operator programs; and (5) requirements to allow the electronic submission of customs documents and use information technology to facilitate the clearance and release of goods.

- **Good Regulatory Practices.** Among other obligations, this Annex requires a Party's regulatory authorities to: (1) publish the proposed texts of new regulations prior to their adoption; (2) allow interested persons, regardless of domicile, to submit written comments on proposed regulations, and allow at least 60 days for the submission of such comments where the regulation would have a significant impact on trade; (3) publish any written comments received and take them into account when developing the final regulation; (4) disclose, in the final regulation, any significant revisions since the regulation was made available for public comment; and (5) respond to any substantive issues raised in the public comments.

- **Anticorruption.** Key obligations in this Annex include requirements that a Party (1) treat various forms of public corruption (*e.g.*, soliciting and accepting bribes and dealing in property known to be the proceeds of a crime) as criminal, civil, or administrative offenses under its law; (2) adopt legislative or other measures to prevent or prohibit money laundering; (3) adopt measures that permit the imposition of visa restrictions on foreign public officials who have engaged in corruption; and (4) adopt measures to protect whistleblowers from discriminatory or disciplinary treatment.

- **Consultations.** Notably, the Protocol contains no formal dispute settlement mechanism. Instead, Article 3 of the Protocol establishes a consultation mechanism whereby a Party that "has concerns with the other Party's implementation of a provision of the Annexes…may request consultations with the other Party in writing." Following a request for consultations, the Parties "shall make every attempt to arrive at a mutually satisfactory resolution." However, the Protocol provides no additional means for resolving a dispute if the Parties fail to arrive at a solution through consultations (other than terminating the agreement). This is a departure from the approach taken in most modern FTAs, which have provided for the establishment of independent dispute settlement panels where a Party alleges that another Party has violated the agreement.

- **Entry Into Force.** Article 5 of the Protocol provides that each Party will notify the other Party, in writing, once it has completed the internal procedures required for the entry into force of the Protocol. The Protocol will enter into force the day following the last notification. As noted above, the Trump administration is expected to provide the requisite notification unilaterally (*i.e.*, without first submitting the Protocol to Congress for approval). However, Brazil's internal procedures will require the approval of the National Congress (first by the Chamber of Deputies and secondly by the Federal Senate) before the Protocol can enter into force.

The US business community has supported the Trump administration's phased approach to negotiations with Brazil, but the Protocol is far narrower than the "phase one" agreement that US business groups proposed in a letter to US and Brazilian officials earlier this year. That proposal, offered by the US Chamber of Commerce and the Brazil-US Business Council, sought a broader phase one agreement covering customs, regulatory practices, anticorruption, digital trade, intellectual property, technical barriers to trade, and sanitary and phytosanitary measures, followed by a second phase of negotiations in 2021 on the remaining elements of a comprehensive FTA. Some US business groups therefore have welcomed the Protocol but expressed disappointment regarding its scope. For example, the Chamber stated that the Protocol "will support commerce, growth, and job creation in both countries," but described the omission of a digital trade chapter as "a missed opportunity[.]" The Chamber also expressed disappointment that the Annex on Customs and Trade Facilitation omits provisions on express shipments that were included in other recent trade agreements. The narrow scope of the Protocol and its lack of an enforcement mechanism will likely limit its commercial significance.

Outlook

The Trump administration has portrayed the Protocol as a stepping stone to further bilateral agreements and an eventual FTA with Brazil, but has acknowledged that the latter is unlikely to occur in the near future due to US congressional opposition. US Trade Representative (USTR) Robert Lighthizer stated this week that, although President Trump supports negotiating an FTA with Brazil, "an FTA right now is probably not in the cards" because it would require bipartisan support, and "the reality is there is no support for an FTA in the Democratic party with the United States and Brazil at this time." Instead, he proposed that the two countries continue to negotiate bilateral agreements "incrementally" using a "building-block" approach, citing as an example the sectoral negotiations on market access for ethanol, sugar, and corn that the two countries launched in September. The US Chamber of Commerce has expressed support for further negotiations, stating that it "urge[s] both governments to continue building on this momentum and to immediately commit to broader commercial advances that put Brazil and the United States on a path towards a comprehensive trade agreement." The group cited digital trade, express delivery, intellectual property, and investment as immediate priorities for further negotiations, among other issues.

On the other hand, congressional Democrats have expressed strong opposition to the Protocol and the Trump administration's broader practice of entering into narrow, "phase one" trade agreements outside of the process envisioned in the TPA statute. House Ways and Means Committee Chairman Richard Neal (D-MA) claimed that "[w]ith this trade deal, the Trump Administration has circumvented Congress to reward a Brazilian administration that lacks respect for basic human rights, the environment, and its own workers…President Trump and [USTR] chose to unilaterally move forward with this agreement and ignored congressional trade leaders' strong opposition to such action." House Ways and Means Trade Subcommittee Chairman Earl Blumenauer (D-OR) went further, warning that "Congress has delegated much of its trade authority to the USTR and this delegation depends on trust and mutual respect. Today's agreement and Lighthizer's other mini agreements entered into without Congressional buy-in are deteriorating the Congressional-Executive relationship and may force a rebalancing of delegated powers." Chairman Blumenauer's remarks are particularly noteworthy given the upcoming expiration of the TPA statute on July 1, 2021, and the possibility that the next Congress will debate new TPA legislation. As these remarks suggest, some Members of Congress may seek to modify TPA so as to expressly limit USTR's ability to negotiate and implement "executive agreements" on trade issues without congressional involvement and approval, even where the agreements are narrow in scope and purportedly do not require changes to US law.

Given these developments, it appears unlikely that the United States and Brazil will launch negotiations for a comprehensive FTA in the near- to medium-term, regardless of the outcome of the US presidential election in November. Indeed, a potential Biden administration is unlikely to pursue such negotiations, and opposition from congressional Democrats would remain a significant impediment even under a second term of the Trump administration. Efforts to negotiate further sectoral agreements with Brazil could also face obstacles next year, and could generate momentum for legislative changes designed to expand Congress's role in the negotiation and approval of narrow, interim trade agreements such as have become commonplace under the Trump administration.

The Protocol and accompanying statements from the two governments can be viewed **here**.

US Trade Actions

Section 232

President Trump Declares National Emergency, Considers Import Restrictions to Address Reliance on Critical Minerals from "Foreign Adversaries"

On September 30, 2020, President Trump issued an Executive Order declaring a national emergency, pursuant to the National Emergencies Act (NEA, 50 U.S.C. § 1601 et seq.), with respect to the United States' "undue reliance on critical minerals, in processed or unprocessed form, from foreign adversaries[.]" The Order directs the US Department of the Interior (DOI) to develop, by November 29, 2020, recommendations for potential executive actions to respond to the alleged national emergency, which may include "the imposition of tariffs or quotas, [or] other import restrictions against China and other non-market foreign adversaries[.]" The Order specifically targets the 35 types of "critical minerals" identified by the DOI in 2018, pursuant to President Trump's 2017 Executive Order mandating the development of a federal strategy to ensure "secure and reliable supplies" of minerals that are "essential to the economic and national security of the United States[.]" However, whereas that strategy emphasized removing regulatory impediments to domestic minerals production and expanding trade with allied countries, the new Executive Order contemplates a different approach centered on import restrictions, which could significantly disrupt existing supply chains and business operations. We provide an overview of the Order and its implications below.

Background

On December 20, 2017, President Trump issued an Executive Order entitled "A Federal Strategy To Ensure Secure and Reliable Supplies of Critical Minerals."[1] Based on findings that "[t]he United States is heavily reliant on imports of certain mineral commodities that are vital to the Nation's security and economic prosperity," and that this alleged dependency "creates a strategic vulnerability," the Order directed the DOI to develop a list of "critical minerals," defined as:

> (i) a non-fuel mineral or mineral material essential to the economic and national security of the United States, (ii) the supply chain of which is vulnerable to disruption, and (iii) that serves an essential function in the manufacturing of a product, the absence of which would have significant consequences for our economy or our national security.

Additionally, the December 2017 Order directed the US Department of Commerce (DOC) to issue a report providing "a strategy to reduce the Nation's reliance" on the critical minerals identified by the DOI.

Following an interagency review and public comment process, the DOI published the required list of "critical minerals" on May 18, 2018.[2] The DOI identified 35 "critical minerals," as follows:

DOI "Critical Minerals" List, May 2018	
Aluminum (bauxite)	Manganese
Antimony	Niobium
Arsenic	Platinum group metals
Barite	Potash
Beryllium	The rare earth elements group

[1] Executive Order No. 13817, 82 Fed. Reg. 60835 (December 17, 2017) available here.

[2] Final List of Critical Minerals 2018, 83 Fed. Reg. 23295 (May 18, 2018) available here.

DOI "Critical Minerals" List, May 2018	
Bismuth	Rhenium
Cesium	Rubidium
Chromium	Scandium
Cobalt	Strontium
Fluorspar	Tantalum
Gallium	Tellurium
Germanium	Tin
Graphite (natural)	Titanium
Hafnium	Tungsten
Helium	Uranium
Indium	Vanadium
Lithium	Zirconium
Magnesium	

On June 4, 2019, DOC published its report titled "A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals."[3] The report provided several recommendations for addressing the alleged vulnerabilities described in the Executive Order, which included (1) streamlining permitting and review processes related to developing mining claims or leases and enhancing access to domestic critical mineral resources in the United States; (2) improving understanding of domestic critical mineral resources (*e.g.*, through topographical, geological, geophysical, and bathymetrical mapping of the United States); (3) supporting educational initiatives to develop the U.S. critical minerals workforce; and (4) increasing trade and cooperation with allied countries, such as Canada and Mexico, to reduce the likelihood of disruption to critical mineral supply chains. The report did not recommend the imposition of tariffs, quotas, or other import restrictions, but it alluded to potential investigations under Section 232 of the Trade Expansion Act by suggesting that the government "[c]onsider whether the circumstances of U.S. reliance on imports of high risk materials merit investigations to determine the effect on U.S. national security[.]" Section 232 authorizes the President to "adjust imports" of any article, based upon a finding by DOC that imports of the article threaten to impair U.S. national security.[4]

September 30, 2020 Executive Order on "Addressing the Threat to the Domestic Supply Chain from Reliance on Critical Minerals from Foreign Adversaries"

Declaration of National Emergency

President Trump's September 30 Executive Order goes beyond the previous Order by declaring a national emergency pursuant to the NEA with respect to "our Nation's undue reliance on critical minerals, in processed or unprocessed form, from foreign adversaries," which allegedly constitutes "an unusual and extraordinary threat, which has its source in substantial part outside the United States, to the national security, foreign policy, and economy of the United States."[5] The declaration of such an emergency under the NEA is a prerequisite for the President to

[3] Report titled "A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals" is available here.

[4] 19 U.S.C. § 1862.

[5] According to the Order, this threat arises in part from "[o]ur dependence on one country, the People's Republic of China (China), for multiple critical minerals."

exercise his emergency powers under the International Emergency Economic Powers Act (IEEPA, 19 U.S.C. § 1701-1707), which authorizes the president to regulate international commerce with the United States in response to a national emergency.[6] Among other authorities, subsection 203(a)(1)(B) of IEEPA authorizes the President to "investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States[.]"[7]

Investigation under IEEPA and Recommendations for Action

Citing to subsection 203(a)(1)(B) of IEEPA, the Order directs the Secretary of the Interior, in consultation with other government agencies, to "investigate our Nation's undue reliance on critical minerals, in processed or unprocessed form, from foreign adversaries," and to submit a report to the President by November 29, 2020 summarizing the conclusions of the investigation. In addition, the report must "recommend executive action, which may include the imposition of tariffs or quotas, [or] other import restrictions against China and other non-market foreign adversaries whose economic practices threaten to undermine the health, growth, and resiliency of the United States, or other appropriate action, consistent with applicable law."

The Order does not elaborate on these directives (*e.g.*, by defining "foreign adversaries" or describing what other "appropriate actions" might be considered). The Order also does not specify whether the proposed import restrictions would be imposed pursuant to the President's purported authority under IEEPA or, alternatively, under trade statutes such as Section 232 that generally require an agency investigation and public comment process prior to any final decision.

Other Directives

The Order contains several additional directives to be carried out by federal agencies, none of which are likely to have an immediate impact on trade. For example:

- By October 30, 2020, each agency head must identify "all legal authorities and appropriations that the agency can use" to meet the Order's stated objectives of expanding and protecting the domestic supply chain for minerals and establishing secure critical minerals supply chains. By November 29, 2020, each agency must submit a report to the President detailing its strategy for using the identified legal authorities and appropriations.
- By November 15, 2020, the Secretary of State and the US Trade Representative must submit a report to the President identifying existing and planned policy options to "reduce the vulnerability of the United States to the disruption of critical mineral supply chains through cooperation and coordination with partners and allies," among other objectives.
- By October 30, 2020, the Secretary of Energy must develop and publish guidance "clarifying the extent to which projects that support domestic supply chains for minerals" are eligible for loan guarantees pursuant to Title XVII of the Energy Policy Act of 2005, as amended (42 U.S.C. 16511 et seq.), and for funding awards and

[6] The President may only take action under IEEPA where two criteria are met (19 U.S.C. § 1701):

1) 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
2) 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)).

[7] 19 U.S.C. § 1702(a)(1)(B).

loans pursuant to the Advanced Technology Vehicles Manufacturing incentive program established by section 136 of the Energy Independence and Security Act of 2007.

Outlook

The President's declaration of a national emergency and request for a plan to impose import restrictions under IEEPA is an important development for companies involved in the exploration, mining, processing, and trade of critical minerals. The Executive Order provides only a brief, 60-day window for the DOI to complete its investigation and recommend specific trade actions to the President, and any presidential actions based thereon could commence quickly. Interested parties in the United States and abroad may therefore wish to promptly assess the risks arising from this investigation to their supply chains and trade flows, and potential mitigation strategies.

IEEPA does not expressly require Executive Branch agencies to solicit public comments on investigations and actions taken pursuant to the statute. However, given the magnitude and complexity of the issues under investigation, and the wide range of US stakeholders that might be adversely affected, the DOI may provide an opportunity for interested parties to provide input through a notice and comment process, as it did when developing the initial list of critical minerals. Moreover, the use of IEEPA to impose import tariffs as contemplated by the Executive Order would be unprecedented, and some observers (including Members of Congress) have stated that the law does not grant the President the authority to impose import tariffs or quotas. Interested parties may therefore wish to prepare factual and legal arguments to protect their commercial interests.

The Executive Order can be viewed **here**.

US Department of Commerce Establishes Temporary Section 232 Exclusion Process for Semi-Finished Steel from Brazil

On October 13, the US Department of Commerce (DOC) issued a temporary final rule establishing procedures to grant relief from the Section 232 quota on semi-finished steel products from Brazil for the remainder of 2020. The rule implements a directive set forth in President Trump's Proclamation of August 28, 2020, which reduced the Section 232 quota on semi-finished steel from Brazil for the remainder of this year in response to "significant changes in the United States steel market." In that Proclamation, President Trump: (1) reduced the quota on semi-finished steel from Brazil for the fourth quarter of 2020 to zero (from the previous level of approximately 350,000 MT); but (2) authorized DOC to allow up to 60,000 MT to enter during the fourth quarter "in certain limited circumstances" under a new exclusion process, with different criteria and procedures than DOC's existing Section 232 exclusion process for steel. The new exclusion process established by DOC's temporary final rule will be effective from October 13 through December 31, 2020, and is summarized below.

Procedure for Requesting Relief

The temporary final rule implements the President's directive to grant relief from the lowered quantitative limitation on semi-finished steel from Brazil in a limited aggregate amount and under specific circumstances related to the fulfillment of existing contracts. The rule provides that DOC will grant relief from the lowered quantitative limitation only upon receipt of a sworn statement signed by the chief executive officer and the chief legal officer of the party requesting relief. The sworn statement must attest to the following:

- The steel article for which relief is sought, and the associated contract or other written agreement, meet the following criteria:
  - The party requesting relief entered into a contract or other written agreement for the production and shipment of such steel article before August 28, 2020;
  - Such agreement specifies the quantity of such steel article that is to be produced and shipped to the United States prior to December 31, 2020;

– Such steel article is to be used in production activities in the United States and such steel article cannot be procured from another supplier to meet the delivery schedule and specifications contained in such agreement; and

– Lack of relief from the quantitative limitation on such steel article would significantly disrupt the production activity in the United States for which the steel article specified in such agreement is intended;

- The party requesting relief will accurately report to US Customs and Border Protection (CBP), in the manner that CBP prescribes, the quantity of steel articles entered for consumption, or withdrawn from warehouse for consumption, pursuant to any grant of relief; and
- The quantity of steel articles entered pursuant to a grant of relief will not exceed the quantity for which DOC has granted relief.

All requests for relief under the new exclusion process must be in electronic form and submitted as an attachment by email to **steel232-exp@bis.doc.gov**. The only information required to be submitted for these requests is the sworn statement.

Notably, and unlike DOC's general Section 232 exclusion process, the temporary final rule does not provide for the submission of objections, rebuttals, or surrebuttals with respect to pending exclusion requests. It also provides that, where a party has received relief under the Brazil-specific exclusion process, it will not be eligible for further relief for the same steel article under DOC's general Section 232 exclusion process until January 1, 2021.

Criteria for Granting or Denying Relief

DOC will grant requests for relief that meet the criteria specified above until such time as the maximum quantity set forth in the Proclamation is met. The volume of imports for which DOC grants relief may not exceed 60,000,000 kilograms in the aggregate. DOC will use a "first submitted, first approved" process until such time as the maximum aggregate limit has been approved and will not accept submissions after that limit is reached.

DOC will deny a request for relief under the new process if the sworn statement does not meet the requirements specified above. Requests for relief will also be denied to the extent that granting the request would result in the aggregate amount of imports for which relief is granted exceeding 60,000,000 kilograms. DOC will revoke any such grant of relief if it determines at any time after relief is granted that the criteria for relief have not been met. Once the aggregate amount of approved grants for relief reaches 60,000,000 kilograms, the DOC will post a statement on the BIS website under **www.bis.doc.gov/232-steel-Brazil** to alert requesters that the aggregate limit has been reached.

Any relief granted under the temporary final rule will only be valid if the subject steel article is entered for consumption, or withdrawn from warehouse for consumption, on or before December 31, 2020.

DOC's temporary final rule can be viewed **here**.

USTR Extends Certain Section 301 Tariff Exclusions for "List 1" and "List 2" Goods Through December 31, 2020

On September 30, 2020, the Office of the US Trade Representative (USTR) issued two Federal Register notices extending certain product-specific exclusions from the United States' Section 301 tariffs on China-origin goods through December 31, 2020. The exclusions extended by the two notices cover certain "List 1" and "List 2" goods, and were originally scheduled to expire on October 2, 2020. Consistent with its recent practice, USTR decided to extend the covered exclusions only through December 31, 2020, even though it had requested public comments on the possible extension of the covered exclusions "for up to 12 months". The exclusions being extended cover 9 products on "List 1" and 28 products on "List 2," and are described in the Annexes to USTR's notices.

USTR has not ruled out potential future extensions of the exclusions covered by its September 30 notices. Rather, each notice clarifies that USTR "may consider further extensions of exclusions" and "will take account of the cumulative effect of exclusions in considering the possible further extension of the exclusions covered by this notice, as well as possible extensions of exclusions of other products covered by the action in this investigation." In addition, USTR takes into account "advice from advisory committees and any public comments concerning extension of the pertinent exclusion[.]"

USTR's September 30 notices can be viewed **here** (for List 1 goods) and **here** (for List 2 goods). They are scheduled to be published in the Federal Register on October 5, 2020.

USTR Initiates Section 301 Investigations Concerning Vietnam's Currency, Timber Policies

On October 2, 2020, the Office of the US Trade Representative (USTR) self-initiated two investigations pursuant to Section 301 of the Trade Act of 1974 concerning alleged acts, policies, and practices of the Government of Vietnam. The first investigation concerns Vietnam's alleged acts, policies, and practices related to the valuation of its currency, whereas the second investigation concerns its alleged acts, policies, and practices related to "the import and use of timber that is illegally harvested or traded." If USTR makes affirmative findings in either investigation, it may unilaterally impose tariffs or other import restrictions on goods originating in Vietnam, similar to the actions it has taken against China-origin goods based on the Section 301 investigation of that country's intellectual property rights practices. The investigations therefore are an important development in the US-Vietnam trading relationship.

This alert provides an overview of Section 301, the next steps in the investigations targeting Vietnam, and the process by which interested parties can participate in the investigations.

Background

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. In Section 301 investigations not involving trade agreements, USTR must issue its determination within 12 months of initiation.

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. Since 2018, USTR has imposed additional tariffs on approximately $360 billion in annual imports from China based on a Section 301 investigation of that country's intellectual property rights practices. More recently, USTR has initiated Section 301 investigations targeting other countries (including Brazil, the European Union, France, India, and Indonesia) in response to their imposition of "digital services taxes" that allegedly discriminate against US technology companies. Those investigations remain ongoing.

Vietnam Currency Investigation

In a Federal Register notice, USTR announced that it is initiating a Section 301 investigation concerning Vietnam's "acts, policies, and practices related to the valuation of its currency" because: (1) "[a]vailable analysis indicates that Vietnam's currency has been undervalued over the past three years"; and (2) "[a]vailable evidence also indicates that the Government of Vietnam, through the [State Bank of Vietnam (SBV)], actively intervened in the exchange market, which contributed to the [Vietnamese dong's] undervaluation in 2019." Specifically, USTR alleges the following:

[T]he evidence indicates that in 2019, the SBV undertook net purchases of foreign exchange totaling approximately $22 billion, which had the effect of undervaluing the dong's exchange rate with the U.S. dollar during that year. Analysis suggests that Vietnam's action on the exchange rate in 2019 caused the average nominal bilateral exchange rate against the dollar over the year, 23,224 dong per dollar, to be undervalued by approximately 1,090 dong per dollar relative to the level consistent the equilibrium real effective exchange rate.

USTR's Federal Register notice does not cite a source for the above assertions. However, they appear to be derived from an August 2020 memorandum provided by the US Treasury Department in connection with the ongoing US countervailing duty (CVD) investigation of passenger vehicle and light truck tires from Vietnam.[8] In that proceeding, the US Department of Commerce (DOC) is investigating whether Vietnam's allegedly undervalued currency constitutes a countervailable subsidy. Consistent with DOC's regulations,[9] which were amended in February of 2020 to establish a process by which DOC may treat "currency undervaluation" as a countervailable subsidy, the Treasury Department on August 24 provided a memo to DOC containing its "evaluation and conclusion" as to whether (1) Vietnam's currency was undervalued during the relevant period; and (2) there has been "government action on the exchange rate" that contributes to such undervaluation. Consistent with USTR's assertions above, Treasury's memorandum claims that the Vietnamese government "undertook net purchases of foreign exchange in 2019 totaling about $22 billion," which "had the effect of undervaluing Vietnam's [Real Effective Exchange Rate]" by 4.7%, or 1,090 dong per US dollar.

USTR's notice states that its investigation will focus on whether Vietnam's alleged interventions in exchange markets and "other related actions" that contribute to the undervaluation of Vietnam's currency "are unreasonable or discriminatory and burden or restrict U.S. commerce." USTR states that it "will consult with the Department of the Treasury as to matters of currency valuation and Vietnam's exchange rate policy." However, the ultimate determinations as to whether Vietnam's alleged conduct is actionable under Section 301, and what actions, if any, should be taken, will be made by USTR.

To inform its investigation, USTR is requesting written comments from the public regarding:

- Whether Vietnam's currency is undervalued, and the level of the undervaluation.
- Vietnam's acts, policies, or practices that contribute to undervaluation of its currency.
- The extent to which Vietnam's acts, policies, or practices contribute to the undervaluation.
- Whether Vietnam's acts, policies and practices are unreasonable or discriminatory.
- The nature and level of burden or restriction on U.S. commerce caused by the undervaluation of Vietnam's currency.
- The determinations required under section 304 of the Trade Act, including what action, if any, should be taken.

The deadline for submitting written comments on the investigation is November 12, 2020.

[8] Memorandum from Andy Baukol, Principal Deputy Assistant Secretary, International Monetary Policy, US Department of the Treasury, to James Maeder, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, US Department of Commerce, August 24, 2020, Investigation No. C-552-829.

[9] 19 C.F.R. § 351.528

Vietnam Timber Investigation

In a Federal Register notice, USTR states that it is initiating an investigation of Vietnam's "acts, policies, and practices related to the import and use of timber" because Vietnam "relies on imports of timber harvested in other countries" to supply its wood products manufacturing sector, and "[a]vailable evidence suggests that a significant portion of that imported timber was illegally harvested or traded[.]" According to USTR "[r]eports indicate that a significant amount of the timber exported from Cambodia to Vietnam was harvested on protected lands, such as wildlife sanctuaries, or outside of and therefore in violation of legal timber concessions." In addition, according to USTR, "it appears that most timber exported from Cambodia to Vietnam crosses the border in violation of Cambodia's log export ban." USTR further states that "timber sourced from other countries, such as Cameroon and the Democratic Republic of the Congo (DRC), may have been harvested against those countries' laws." USTR's Federal Register notice does not provide the basis for these assertions.

USTR's notice states that the Section 301 investigation will "examine whether Vietnam's acts, policies, and practices related to the import and use of illegal timber are unreasonable or discriminatory and burden or restrict U.S. commerce." The investigation "initially will focus on the following issues":

- The claims that Vietnamese imports of illegal timber may (1) be inconsistent with Vietnam's domestic laws, the laws of exporting countries, or international rules, and (2) indicate that Vietnam is not enforcing its own laws concerning the import and processing of timber; and
- The claim that Vietnam "at least tacitly may support the import and use of illegal timber" (*e.g.*, by failing to record the origin of timber crossing the Cambodia-Vietnam border).

To inform its investigation, USTR is requesting written comments from the public regarding:

- The extent to which illegal timber is imported into Vietnam.
- The extent to which Vietnamese producers, including producers of wooden furniture, use illegal timber.
- The extent to which products of Vietnam made from illegal timber, including wooden furniture, are imported into the United States.
- Vietnam's acts, policies, or practices relating to the import and use of illegal timber.
- The nature and level of the burden or restriction on U.S. commerce caused by Vietnam's import and use of illegal timber.
- The determinations required under section 304 of the Trade Act, including what action, if any, should be taken.

The deadline for submitting written comments on the investigation is November 12, 2020.

Outlook

As noted above, Section 301 prohibits USTR from taking unilateral action where the act, policy, or practice under investigation is covered by a trade agreement (*e.g.*, the WTO Agreements). Where the conduct under investigation does not involve a trade agreement, but is "unreasonable or discriminatory and burdens or restricts United States commerce," the law allows USTR to take unilateral action by imposing tariffs or other trade restrictions. USTR's initiation notices concerning Vietnam's currency and timber practices do not mention trade agreement obligations, and instead state only that USTR will determine whether the practices at issue "are unreasonable or discriminatory and burden or restrict U.S. commerce." By highlighting only the provisions of Section 301 that pertain to actions not covered by trade agreements, the notices indicate that USTR intends to take unilateral action in the form of tariffs or other import restrictions on goods originating in Vietnam. Given that many companies have recently shifted or made plans to shift production activities from China to Vietnam, due in part to USTR's recent imposition of Section 301 tariffs on China-origin goods, this threat is particularly significant. Interested parties may therefore wish to participate in USTR's investigations by submitting written comments.

More broadly, USTR's decision to initiate new Section 301 investigations highlights the Trump administration's increasing propensity to use the law to address alleged unfair trade practices, even though a WTO panel recently concluded that certain of USTR's Section 301 actions against China violate WTO rules. USTR's decision to investigate a country's currency practices under Section 301 is also a major departure from longstanding U.S. government policy, which has given the Treasury Department primary authority over foreign exchange matters and has sought to address disputes over currency undervaluation through international fora such as the IMF, rather than the United States' trade laws. It is therefore uncertain whether a potential Biden administration would continue the Section 301 investigations against Vietnam, or take unilateral actions based thereon.

USTR's Federal Register notices on the Vietnam Section 301 investigations can be viewed **here**.

President Trump Issues Memorandum Aimed at Preventing Counterfeit Trafficking on E-Commerce Platforms Through Fines and Civil Penalties

On October 13, 2020, President Trump issued a Memorandum for the Attorney General and the Secretary of Homeland Security entitled "Stopping Counterfeit Trafficking on E-Commerce Platforms Through Fines and Civil Penalties." The Memorandum directs US Customs and Border Protection (CBP) to use existing statutory authorities to seize counterfeit goods imported into the United States in connection with e-commerce transactions, and to impose the maximum fines and civil penalties on e-commerce platforms that are "in any way concerned" in the importation of counterfeit goods. The Memorandum also directs the relevant agency heads to develop a legislative proposal within 120 days that would "clarify and strengthen" the executive branch's authority to combat alleged counterfeit trafficking on e-commerce platforms.

The Memorandum is the latest in a series of actions by the Trump administration aimed at addressing the importation and sale of counterfeit merchandise, with a particular focus on e-commerce. These include an April 2019 Presidential Memorandum that sought agency recommendations for addressing the sale of counterfeit goods through "online third-party marketplaces,"[10] and a resulting report by the Department of Homeland Security detailing interim steps and recommendations to ensure that "e-commerce platforms that operate third-party marketplaces…assume greater responsibility, and therefore greater liability for their roles in the trafficking of counterfeit and pirated goods."[11] The Office of the US Trade Representative (USTR) has also increasingly included e-commerce platforms in its recent annual reviews of "notorious markets" for counterfeit merchandise.[12] President Trump's new Memorandum builds on these efforts, focusing on border enforcement by CBP.

We provide an overview of the Memorandum and its implications below.

Memorandum on "Stopping Counterfeit Trafficking on E-Commerce Platforms"

The Memorandum emphasizes that it is the Trump administration's policy to "protect consumers, intellectual property rights holders, businesses, and workers from counterfeit goods trafficked through e-commerce," and asserts that e-commerce platforms "serve as key contributors to counterfeit trafficking by acting as intermediaries and providing marketplaces that match up buyers and sellers." For these reasons, the Memorandum states that the executive

[10] Presidential Memorandum on Combating Trafficking in Counterfeit and Pirated Goods (Apr. 3 2019), https://www.whitehouse.gov/presidential-actions/memorandum-combating-trafficking-counterfeit-pirated-goods/.

[11] Report on Combating Trafficking in Counterfeit and Pirated Goods (Jan. 24, 2020), https://www.dhs.gov/publication/ combating-trafficking-counterfeit-and-pirated-goods.

[12] 2019 Review of Notorious Markets for Counterfeiting and Piracy (Apr. 29, 2020), https://ustr.gov/sites/default/files/2019_Review_of_Notorious_Markets_for_Counterfeiting_and_Piracy.pdf.

branch "should focus enforcement efforts on e-commerce platforms involved in counterfeit trafficking, and should pursue legislation that would clarify and strengthen the executive branch's authority and increase its resources to deter and address counterfeit trafficking on e-commerce platforms." The Memorandum directs federal agencies to take the following actions:

<u>Seizure of Counterfeit Goods and Imposition of Fines and Civil Penalties</u>

Section 2(a) of the Memorandum directs the Secretary of Homeland Security, through the Commissioner of CBP and in consultation with the Attorney General, to "consider taking all appropriate action, consistent with applicable law, under sections 526 and 596 of the Tariff Act of 1930 (19 U.S.C. § § 1526 and 1595a), as amended," to:

- Seize counterfeit goods imported into the United States "in connection with a transaction on an e-commerce platform;" and
- "[I]impose the maximum fines and civil penalties permitted by law on any e-commerce platform that directs, assists with, or is in any way concerned in the importation into the United States of counterfeit goods."

The above-mentioned provisions of the Tariff Act authorize CBP to seize imported goods that bear a counterfeit mark, and to impose fines and civil penalties on certain parties involved in such importations, as follows:

- Section 526 directs CBP to seize any imported merchandise "bearing a counterfeit mark" and provides that "[a]ny person who directs, assists financially or otherwise, or aids and abets the importation" of such merchandise "shall be subject to a civil fine."[13] For the first such seizure, the fine may not exceed the value that the merchandise would have had if it were genuine, according to the manufacturer's suggested retail price (MSRP) in the United States at the time of seizure.[14] For all subsequent seizures, the fine is capped at twice the value that the merchandise would have had if it were genuine, according to the MSRP in the United States at the time of seizure.[15]
- Section 596 enumerates the activities that constitute "aiding unlawful importation" of merchandise, and provides that "[e]very person who directs, assists financially or otherwise, or is in any way concerned in" such activities "shall be liable to a penalty equal to the value of the article or articles introduced or attempted to be introduced."[16] The activities covered by Section 596 include "the importation, bringing in, unlading, landing, removal, concealing, harboring, or subsequent transportation of any article which is being or has been introduced, or attempted to be introduced, into the United States contrary to law[.]"[17]

Though CBP currently uses its authorities to seize suspected counterfeit merchandise and impose penalties on the importer of the goods, it has not typically used them to penalize e-commerce platforms that are neither the importer nor the owner of the goods at issue, and whose involvement is limited to providing an online platform on which buyers may purchase such goods from third-party sellers. By directing CBP to "consider" subjecting e-commerce platforms to fines and penalties, the Memorandum appears to encourage CBP to take an expansive view the types of parties and activities that can be considered to "aid and abet" or be "concerned in" the importation of counterfeit merchandise, and thus become subject to fines and penalties, under Sections 526 and 596.

Additionally, the Memorandum defines a "counterfeit" good more broadly than the above-referenced statutes. Sections 526 and 596 apply to imports bearing a "counterfeit" mark as that term is defined in Section 45 of the

[13] 19 U.S.C. § 1526(e) and (f)(1).

[14] 19 U.S.C. § 1526(f)(2) and 19 C.F.R. § 133.27(a).

[15] 19 U.S.C. § 1526(f)(3) and 19 C.F.R. § 133.27(b).

[16] 19 U.S.C. § 1595a(a) and (b).

[17] 19 U.S.C. § 1595a(a).

Lanham Act (15 U.S.C. § 1127), *i.e.*, as "a spurious mark which is identical with, or substantially indistinguishable from, a registered mark." By contrast, a "counterfeit good" for purposes of the Memorandum is defined as follows:

"Counterfeit good" means the deceptive and misleading use in commerce of marks, including trademarks, goods that are trademarked, and trade names. This definition includes the deceptive and misleading use of reproductions, copies, counterfeits, or colorable imitations.

The Memorandum further stipulates that the above definition "should be construed consistent with the intent of the Congress set forth in [Section 45 of the Lanham Act]." This language appears to encourage CBP to adopt a broad interpretation of the statutory definition of a counterfeit good for purposes of enforcing Sections 526 and 596. Industry groups supportive of the Memorandum's objectives have welcomed this broader definition, stating that it will provide US manufacturers with greater protection from counterfeiting.

Legislative Proposal on Counterfeit Goods

Section 2(b) of the Memorandum directs the Secretary of Homeland Security and the Attorney General to develop a legislative proposal "to promote the policy objectives" of the Memorandum, with a deadline of February 10, 2021. The Memorandum provides no further guidance regarding the contents of the legislative proposal, except that its purpose would be to "clarify and strengthen the executive branch's authority and increase its resources" to deter counterfeit trafficking through e-commerce. Such a proposal could seek to expand the types of entities and activities that may be subject to enforcement actions under Sections 526 and 596, to increase the maximum fines and penalties that may be imposed thereunder, or to broaden the current statutory definition of counterfeiting.

The proposal could also draw from pending legislation with objectives similar to the Memorandum, such as the Stopping Harmful Offers on Platforms by Screening Against Fakes in E-Commerce Act of 2020 (the "SHOP SAFE Act") and the Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act of 2020 (INFORM Consumers Act). The former bill would subject e-commerce platforms to contributory trademark liability for sales of counterfeit goods, unless they adhere to certain anti-counterfeiting "best practices" set forth in the legislation. The latter bill would require online marketplaces to verify high-volume third-party sellers by acquiring the seller's government ID, tax ID, bank account information, and contact information, and to disclose certain information about such sellers to consumers.

Outlook

President Trump's Memorandum is an important development for companies operating in the e-commerce sector. Though the legislative proposal envisioned in the Memorandum is unlikely to be completed until after the US election (and perhaps the inauguration), factors such as the COVID-19 pandemic have heightened concerns about the importation of counterfeit merchandise into the United States, and the extent to which e-commerce platforms are involved in the sale of such merchandise to US consumers. While the legislative priorities of the next Congress and administration remain uncertain, this trend could generate momentum for new anti-counterfeiting legislation next year.

The Memorandum's directives to CBP regarding border enforcement present more immediate concerns for the e-commerce sector. As noted above, the Memorandum encourages CBP to take an expansive view of its enforcement authorities under the Tariff Act with the apparent goal of holding e-commerce platforms liable for third party importations involving counterfeit merchandise when the merchandise is sold through online marketplaces. This approach, if implemented, would present new legal and financial risks for e-commerce platforms operating in the United States.

Trade Remedies

US International Trade Commission Institutes Global Safeguard Investigation Concerning Fresh, Chilled, and Frozen Blueberries

On October 6, the US International Trade Commission (ITC) instituted a global safeguard investigation concerning imports of fresh, chilled, or frozen blueberries, pursuant to Section 201 of the Trade Act of 1974. In its investigation, the ITC will determine whether fresh, chilled, or frozen blueberries are being imported into the United States in such increased quantities as to be "a substantial cause of serious injury, or the threat thereof" to the domestic industry producing like or directly competitive products. If the ITC makes an affirmative finding, it may recommend, and the President may impose, tariffs or other restrictions on imports of the subject merchandise for up to 4 years, with a possible extension to 8 years. The initiation of a global safeguard investigation is therefore an important development for the sector.

This alert provides an overview of Section 201, the next steps in the investigation, and the process by which interested parties can participate in the investigation.

Background

Section 201 permits the United States to impose import relief measures when increased imports are found to cause or threaten to cause serious injury to a domestic industry. Based on a petition by members of a domestic industry, a request by the President or US Trade Representative, a resolution by either the House Committee on Ways and Means or the Senate Finance Committee, or on its own motion, the ITC investigates whether increased imports cause or threaten to cause serious injury to a domestic industry. If the ITC makes an affirmative injury determination, the ITC then makes a recommendation to the President as to what kind of import relief is appropriate. The President may then implement the recommendation, take a different action, or take no action.

This is the third global safeguard investigation that the ITC has instituted since the beginning of the Trump administration. Unlike the two most recent safeguard investigations, which the ITC instituted in response to petitions from domestic producers, the ITC instituted the investigation of blueberries in response to a request from the Office of the US Trade Representative (USTR). USTR announced its intention to request the investigation in September, as part of a broader report detailing the Trump administration's plans to address alleged "threats that increased imports pose to American producers of seasonal and perishable fruits and vegetables."[18]

USTR formally requested the initiation of the global safeguard investigation on September 29. In its letter, USTR stated that it was requesting the investigation because "U.S. import statistics indicate that blueberry imports have greatly increased in recent years and are sourced in major quantities from multiple countries." USTR also referenced recent hearing testimony by "interested persons" claiming that "increased blueberry imports are driving down prices for domestically grown blueberries and leading to a drastic reduction in market share for domestic growers." USTR also discussed these claims in its September report, which identified Peru, Chile, Mexico, Canada, and Argentina as the largest sources of US imports of blueberries in 2019, based on US Census data.

Investigation Scope and Process

The imported articles covered by the ITC's investigation are fresh, chilled, or frozen blueberries. For Customs purposes, the blueberries covered by the investigation are provided for under Harmonized Tariff Schedule of the United States ("HTSUS") statistical reporting numbers 0810.40.0024; 0810.40.0026; 0810.40.0029; 0811.90.2010; 0811.90.2024; and 0811.90.2030. Unlike antidumping (AD) and countervailing duty (CVD) investigations, which target imports of the covered merchandise from select countries, safeguard investigations under Section 201 are global, covering imports of the subject merchandise from all countries.

[18] USTR's report is available here.

Persons wishing to participate in the ITC's investigation as parties must file an entry of appearance within 21 days after the ITC's notice of institution is published in the Federal Register (*i.e.*, by October 30, 2020). The investigation process will be as follows:

Injury Phase

Normally, the ITC is required to make its injury determination within 120 days after the petition was filed. However, the law permits the ITC to take up to 30 additional days to make its injury determination where it determines that the investigation is "extraordinarily complicated." In this instance, the ITC has determined that the investigation is "extraordinarily complicated" in light of "the need to collect data and other information from a large number of firms involved in the domestic production, processing, and/or marketing of blueberries." Accordingly, the ITC intends to take fifteen extra days and make its injury determination by February 11, 2021.

The ITC's hearing on injury will be held on January 12, 2021. Requests to appear at the hearing must be filed on or before December 30, 2020. The deadline for filing prehearing briefs on injury is December 29, 2020.

The ITC's injury analysis in safeguard investigations is similar to the injury analysis it applies in AD/CVD investigations. However, safeguard investigations differ from AD/CVD investigations in that (1) they require a finding of "serious injury" to the domestic industry (as opposed to the lower "material injury" standard in AD/CVD cases); and (2) they do not require findings of dumping or subsidization. If the ITC determines that the subject blueberries are being imported "in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry," the investigation will proceed to the remedy phase.

Remedy Phase

During the remedy phase, the ITC must develop recommendations for action "that would address the serious injury, or threat thereof, to the domestic industry and be most effective in facilitating the efforts of the domestic industry to make a positive adjustment to import competition." The law authorizes the ITC to recommend tariff increases, quantitative import restrictions (quotas), tariff-rate quotas, trade adjustment assistance for workers displaced as a result of imports, or a combination of these measures. The ITC must submit its report and recommendation to the President within 180 days of the filing of the petition (*i.e.*, by April 5, 2021 in the current case).

In the event the ITC makes an affirmative injury determination or is equally divided on the question of injury, a hearing on the question of remedy will be held on February 25, 2021. Requests to appear at the hearing must be filed on or before February 19, 2021. The deadline for filing prehearing briefs on remedy is February 18, 2021.

Presidential Determination

If the ITC makes an affirmative finding of "serious injury," the President must determine, within 60 days after receiving the ITC's report, whether to implement the ITC's recommendations, take alternative action, or take no action. If the President determines to impose a tariff, tariff-rate quota, or quantitative restriction, such action will take effect within 15 days after the date on which the President proclaims the action, unless the President announces on the decision date an intention to negotiate an agreement with foreign countries limiting the export of the relevant articles to the United States (in which case the implementation of the action can be delayed by up to 90 days). Any safeguard measures imposed by the President may not remain in effect for more than 4 years, unless subsequently extended by the President up to a maximum of 8 years.

If the action taken by the President differs from the ITC's recommendation, or if the President takes no action with respect to the domestic industry, the action recommended by the ITC will nonetheless take effect if Congress enacts a joint resolution of disapproval within 90 days after the President's report is transmitted to Congress. In such circumstances, the President must proclaim the action recommended by the ITC within 30 days after the enactment of the joint resolution.

Special Treatment of Canada and Mexico

Notably, the United States-Mexico-Canada Agreement (USMCA) affords special rights to Canada and Mexico with respect to safeguard actions taken by the United States, and vice-versa. Specifically, Article 10.2.1 of the USMCA provides that a Party taking a safeguard action must exclude the goods of each other USMCA Party from that action unless: (1) "imports from a Party, considered individually, constitute a substantial share of total imports;" and (2) "imports from a Party considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports." The USMCA also limits the degree to which a Party's safeguard action can restrict imports of another Party's goods, if such goods are not excluded from the action. Article 10.2.5(b) prohibits a USMCA Party from imposing restrictions on a good in a safeguard action that would have the effect of reducing imports of that good from another Party "below the trend of imports of the good from that Party over a recent representative base period with allowance for reasonable growth."

Additionally, Article 10.2.6 of the USMCA affords a Party the right to compensation for safeguard measures taken against it by another USMCA Party. In the event that the Parties cannot mutually agree upon "trade liberalizing compensation," a USMCA Party whose goods are subject to a safeguard measure is afforded the right to immediately take action "having trade effects substantially equivalent" to the safeguard measure. Article 8 of the WTO Agreement on Safeguards similarly affords WTO Members the right to respond to global safeguard actions by suspending substantially equivalent concessions or other obligations under the General Agreement on Tariffs and Trade (GATT), but this remedy is only available after a safeguard measure has been in place for three years.

Outlook

The institution of a global safeguard investigation of blueberry imports is an important development with potential long-term implications for producers, exporters, and importers of blueberries, and other market participants. However, the outcome of the investigation is far from guaranteed, and the ITC has found the existence of "serious injury" in less than half of the Section 201 investigations it has conducted. Interested parties in the United States and abroad may therefore wish to assess the risks arising from the ITC's investigation to their supply chains and trade flows, and consider participating in the investigation.

As noted above, Canada and Mexico will have certain special rights in this safeguard proceeding due to their participation in the USMCA, and these rights will have to be considered at the injury, and, if affirmative, the remedy stage of the proceeding. Should the United States ultimately impose safeguard measures on imports from Canada or Mexico as a result of this proceeding, discussions will likely ensue regarding the "trade liberalizing compensation" envisioned in the USMCA, which could take the form of tariff concessions on other products. As the first US safeguard proceeding since the USMCA's entry into force in July, the investigation of blueberries represents the first opportunity to test the USMCA's new provisions on safeguards. As a result, both current and future FTA partners of the United States will likely have a high level of interest in the manner in which the United States implements its obligations under the USMCA's safeguards provisions, and the manner in which Canada and Mexico seek to exercise their rights under those provisions.

Importantly, USTR's request for a safeguard investigation of blueberries might presage similar actions targeting other "seasonal and perishable" goods identified in the agency's September report. In that report, USTR stated that it intends to work with domestic producers to request that the ITC commence an investigation under Section 332(g) of the Tariff Act of 1930 to monitor US imports of strawberries and bell peppers. According to USTR, such actions "could enable an expedited Section 201 global safeguard investigation later this year."

The administration's plans involving Section 201, while significant, fall short of what some US lawmakers and producers of seasonal and perishable goods had requested in public hearings conducted by USTR earlier this year. In those proceedings, several Members of Congress and US agricultural producers asked USTR to consider taking action against imports of seasonal and perishable goods under Section 301 of the Trade Act. Unlike the safeguard actions contemplated by Section 201, which are permissible under WTO rules and require an affirmative injury finding by the ITC prior to any import restrictions, Section 301 permits USTR to impose trade restrictions unilaterally where it determines that a foreign trade practice is “unreasonable or discriminatory” and burdens US commerce. The Trump administration’s recent use of Section 301 as a unilateral enforcement mechanism has significantly heightened trade tensions with China, leading to retaliatory tariffs on US exports, and was recently found by a WTO panel to violate WTO rules. The use of Section 301 against imports of seasonal and perishable goods from Mexico, Canada, and other close trading partners would likely have had similar results. Viewed in this context, the administration’s decision to pursue Section 201 actions on seasonal produce appears to reflect a reluctance to further exacerbate trade tensions with close US allies and trading partners, rather than a newfound confidence in the effectiveness of Section 201 as a trade remedy.[19]

The ITC’s notice of institution can be viewed **here**.

President Trump Modifies Safeguard Measure on Solar Products by Increasing Fourth Year Tariff Rate, Terminating Exclusion for Bifacial Panels

On October 10, President Trump issued a Proclamation making two important modifications to the United States’ global safeguard action on imports of certain crystalline silicon photovoltaic (CSPV) cells, whether or not partially or fully assembled into other products. First, the Proclamation terminates the exclusion of bifacial solar panels from the safeguard action, on the grounds that the exclusion allegedly “has impaired and is likely to continue to impair the effectiveness” of the action. For the same reason, and in order to achieve “the full remedial effect envisaged” for the safeguard action, the Proclamation increases the tariff rate that will apply during the fourth year of the action to 18 percent, from the previous rate of 15 percent. The Proclamation cites two reports completed by the US International Trade Commission (ITC) earlier this year, as well as the President’s authority to modify a safeguard measure under Section 204(b) of the Trade Act, as the basis for these modifications. Additionally, the Proclamation authorizes USTR to request that the ITC begin an investigation concerning the possible extension of the CSPV safeguard beyond its current four-year term, though the law will not permit USTR to make such a request until mid-2021. We provide an overview of the Proclamation and its implications below.

Background

The Trump administration’s exclusion of bifacial solar panels from the CSPV safeguard has generated controversy within the solar industry and is currently the subject of litigation before the US Court of International Trade (CIT). On June 13, 2019, USTR approved an exclusion from the CSPV safeguard measure for “bifacial solar panels that absorb light and generate electricity on each side of the panel and that consist of only bifacial solar cells that absorb light and generate electricity on each side of the cells[.]” The exclusion was requested by three solar companies, Pine Gate Renewables, Sunpreme, Inc., and SolarWorld Industries GmBH. On October 19, 2019, USTR issued a Federal Register notice withdrawing the bifacial panels exclusion (“First Withdrawal”), stating that it had received “multiple inquiries, requests, and other comments from members of the public” and had concluded based thereon that the exclusion “will likely result in significant increases in imports of bifacial solar panels” that compete with monofacial and bifacial CSPV products. Based on this information, USTR concluded that continuing the exclusion would “undermine the objectives of the safeguard measure.”

On October 21, 2019, Invenergy Renewables LLC (“Plaintiff”) filed a complaint with the CIT alleging that USTR failed to provide notice and comment required under the Administrative Procedure Act (APA) before withdrawing the exclusion of bifacial solar panels.[20] Plaintiff further alleged that the withdrawal of the exclusion violated the US safeguard law (Section 201 of the Trade Act) and the regulatory process established thereunder in February 2018 for

[19] Section 201 fell into disuse for approximately 15 years following the imposition of safeguard measures on steel products in 2002, and the United States’ subsequent termination of those measures after the WTO Appellate Body found them to be inconsistent with WTO rules. Prior safeguard actions taken by the United States had similarly been found to be inconsistent with the United States’ WTO obligations, and only about one-third of the Section 201 investigations initiated between 1974 and 2016 resulted in import relief for the domestic industry. As a result, many US industries began to view Section 201 as an ineffective trade remedy. This began to change at the outset of the Trump administration, when US producers of solar panels and residential washers successfully used Section 201 to obtain import relief. However, Section 201 petitions remain a rare occurrence.

[20] *Invenergy Renewables LLC et al v. United States et al*, Docket No. 1:19-cv-00192 (Ct. Int'l Trade Oct 21, 2019).

establishing exclusions from the CSPV safeguard. The CIT issued a preliminary injunction on December 5, 2019, enjoining USTR from withdrawing the exclusion "until entry of final judgment as to Plaintiffs' claims against Defendants in this case."[21] The CIT's decision was based on its preliminary finding that USTR "likely did not follow" the notice and comment rulemaking procedures under the APA, and that Plaintiff had "a fair likelihood of success on the merits of its claim that the Withdrawal was arbitrary and capricious[.]"

On January 27, 2020, USTR initiated a new notice and comment proceeding in which it requested public comments on whether to withdraw the bifacial panels exclusion. On April 27, 2020, USTR announced that, based on its evaluation of the public comments, it had determined again to withdraw the bifacial panels exclusion ("Second Withdrawal"). USTR indicated in its notice that it would request that the CIT lift the preliminary injunction, and that the Second Withdrawal would take effect if the CIT were to lift the preliminary injunction. However, the CIT on October 15 denied the Government's request to lift the preliminary injunction.[22] Instead, the CIT modified the preliminary injunction so as to enjoin USTR from enforcing the Second Withdrawal, based on the court's finding that "the Second Withdrawal is likely arbitrary and capricious" and that such modification was necessary "to avoid inequity to Plaintiffs[.]" The CIT's opinion did not mention President Trump's October 10 Proclamation concerning the bifacial panels exclusion.

October 10 Proclamation to "Further Facilitate Positive Adjustment to Competition From Imports of Certain Crystalline Silicon Photovoltaic Cells"

<u>Modifications to Four-Year Action on CSPV Products</u>

President Trump's October 10 Proclamation makes several modifications to the CSPV safeguard, citing the President's authority under Section 204(b)(1)(B) of the Trade Act to "reduce, modify, or terminate" a safeguard action where he (1) has received the ITC's mid-term report on developments in the domestic industry and its efforts to make a positive adjustment to import competition; and (2) has determined, after a majority of the representatives of the domestic industry submits to the President a petition requesting such reduction, modification, or termination, that the domestic industry has made a positive adjustment to import competition.

The Proclamation states that the President, having received the requisite ITC report and industry petition, has determined that "the domestic industry has begun to make positive adjustment to import competition[.]" In support of this determination, the Proclamation cites the ITC's finding in its February 2020 mid-term report that "multiple CSPV module producers opened production facilities in the United States, particularly in the first half of 2019, leading to increases in domestic CSPV module production capacity, production, and market share." Accordingly, the Proclamation implements the following modifications to the CSPV safeguard action:

- **Termination of Bifacial Panels Exclusion.** The Proclamation terminates the exclusion of bifacial panels from the safeguard measure, effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on October 25, 2020. The Proclamation states that the President is taking this action based on his determination that the exclusion "has impaired and is likely to continue to impair the effectiveness of the action…in light of the increased imports of competing products such exclusion entails[.]" In support of this finding, the Proclamation cites an additional report issued by the ITC on March 6, 2020, in response to a request from USTR pursuant to Section 204(a)(4) of the Trade Act. Though USTR's request concerned the probable economic effect of increasing the level of the tariff-rate quota (TRQ) on CSPV cells (and did not mention the bifacial panels exclusion), the ITC made certain observations regarding bifacial panels in its analysis, which the Proclamation summarizes as follows: "[a]ccording to the ITC, bifacial modules are likely to account for a greater share of the market in the future and can substitute for monofacial products in the various market segments, such that exempting imports of bifacial modules from the safeguard tariff would apply significant downward pressure on prices of domestically produced CSPV

[21] *Invenergy Renewables LLC v. United States*, Court No. 19-00192, Slip Op. 19-153 (Ct. Int'l Trade 2019).

[22] *Invenergy Renewables LLC v. United States*, Court No. 19-00192, Slip Op. 20-144 (Ct. Int'l Trade 2020).

modules." The Proclamation does not mention the ongoing litigation before the CIT, described above, in which USTR's efforts to withdraw the exclusion are being challenged.

- **Increase of Year 4 Tariff Rate.** The Proclamation increases to 18% (from the previously-announced level of 15%) the safeguard tariff that will apply to imports of CSPV modules, and to imports of CSPV cells in excess of the 2.5 Gigawatt TRQ, during the fourth year of the safeguard action. The fourth year will begin on February 7, 2021, as shown in the table below. The Proclamation states that the President is taking this action because "the exclusion of bifacial panels…has impaired the effectiveness of the 4-year action," making the tariff increase necessary "to achieve the full remedial effect envisaged for that action[.]"

Safeguard on CSPV Cells and Modules, as Modified by Proclamation 10101				
Period	**Year 1** 2/7/2018 – 2/6/2019	**Year 2** 2/7/2019 – 2/6/2020	**Year 3** 2/7/2020 – 2/6/2021	**Year 4** 2/7/2021 – 2/6/2022
Tariff on cells and modules	30%	25%	20%	18%
In-quota quantity (cells only)	2.5 GW	2.5 GW	2.5 GW	2.5 GW

Delegation of Authority to USTR to Request ITC Investigation on Extension

In addition to modifying the current, four-year CSPV safeguard action, the Proclamation delegates to USTR the President's authority to request, pursuant to Section 204(c) of the Trade Act, that the ITC commence proceedings concerning the possible extension of the action. Section 204(c) authorizes the President to request that the ITC "investigate to determine whether [a safeguard action] continues to be necessary to prevent or remedy serious injury and whether there is evidence that the industry is making a positive adjustment to import competition." If the ITC finds in the affirmative or is equally divided in its determination, the President may extend the effective period of the action, pursuant to Section 203(e). The effective period of any safeguard action may not exceed 8 years in the aggregate. Thus, the CSPV safeguard action could potentially be extended for an additional four years (*i.e.*, until February 6, 2026).

Though the Proclamation authorizes USTR to request an ITC investigation concerning the possible extension of the CSPV safeguard, the law will not permit USTR to make such a request until May 6, 2021, at the earliest. Section 204(c) provides that the ITC will commence an investigation on the possible extension of a safeguard action "[u]pon request of the President…filed with the Commission not earlier than the date which is 9 months, and not later than the date which is 6 months, before the date any [safeguard action] is to terminate[.]" Thus, the window during which USTR may file its request for an ITC investigation under Section 204(c) will run from May 6, 2021 to August 6, 2021.

Outlook

President Trump's decision to modify the CSPV safeguard measure is an important development for the solar industry. The ITC noted in its March 2020 report that bifacial modules play a significant role in the US solar market, with some estimates indicating that they will account for approximately 40 percent of US demand this year. The ITC further stated that bifacial modules are projected to gain a large share of total demand for CSPV products over the next several years, particularly in the utility sector, and that firms therefore are increasingly transitioning existing production lines from monofacial to bifacial products. Moreover, the ITC indicated that the expected increase in US consumption of bifacial panels was driven in part by the exclusion of these products from the safeguard measure.

Viewed in this context, President Trump's termination of the bifacial panels exclusion, and the accompanying increase in the fourth year tariff rate for all covered products, represent a significant tightening of the CSPV safeguard. This action could prove particularly significant if the CSPV safeguard is extended beyond its current four-year term. Though USTR will be unable to request an ITC investigation concerning the possible extension of the safeguard until mid-2021 – after the US election and a potential change in the US administration – the Proclamation can be viewed as an early signal that the Trump administration intends to seek the extension of the measure.

President Trump’s Proclamation can be viewed **here**.

US Department of Commerce Initiates Antidumping Duty Investigations of Thermal Paper from Germany, Japan, Korea, and Spain

On October 28, 2020, the US Department of Commerce (DOC) announced the initiation of new antidumping duty (AD) investigations concerning imports of thermal paper from Germany, Japan, Korea, and Spain. The petitions were filed by Appvion Operations, Inc. (Appleton, WI) and Domtar Corporation (Fort Mill, SC).

The scope of these investigations covers thermal paper in the form of “jumbo rolls” and certain “converted rolls.” The scope covers jumbo rolls and converted rolls of thermal paper with or without a base coat (typically made of clay, latex, and/or plastic pigments, and/or like materials) on one or both sides; with thermal active coating(s) (typically made of sensitizer, dye, and coreactant, and/or like materials) on one or both sides; with or without a top coat (typically made of pigments, polyvinyl alcohol, and/or like materials), and without an adhesive backing. The merchandise subject to these investigations may be classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 4811.90.8030 and 4811.90.9030.

The dumping margins alleged in the petitions are as follows:

- 9.20 – 58.90 percent for Germany;
- 129.86 – 140.25 percent for Japan;
- 56.60 – 58.24 percent for Korea; and
- 32.68 – 41.45 percent for Spain.

The US International Trade Commission (ITC) will make its preliminary determinations on or before November 23, 2020. If the ITC preliminarily determines that there is a reasonable indication of material injury or threat of material injury to the domestic industry, DOC’s investigations will continue, with the preliminary determinations scheduled for March 16, 2021, unless these deadlines are extended. If DOC issues an affirmative preliminarily determination, it will instruct US Customs and Border Protection to start collecting cash deposits from all US companies importing thermal paper from the investigated countries, as appropriate.

DOC’s final determinations in these cases are scheduled for June 1, 2021, although these dates may be extended. If DOC’s final determinations are negative, or if the ITC finds in its final determinations that there is no injury to the US industry, the investigations will be terminated and no duties will be applied. If DOC makes affirmative findings in these investigations, and the ITC determines that US imports of thermal paper from Germany, Japan, Korea, and/or Spain materially injure or threaten material injury to the US industry, DOC will impose duties on those imports in the amount of dumping found to exist.

According to DOC, imports of thermal paper from the countries under investigation were valued as follows in 2019:

- $127.3 million for Germany;
- $31.7 million for Japan;
- $133.6 million for Korea; and
- $29.3 million for Spain.

US Department of Commerce Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Forged Steel Fittings from Korea and India

On October 14, 2020, the US Department of Commerce (DOC) announced its affirmative final determinations in the antidumping duty (AD) investigations of forged steel fittings from India and Korea, and its affirmative final determination in the countervailing duty (CVD) investigation of imports of the same from India. In its investigations, DOC determined that producers and/or exporters from Korea and India have sold forged steel fittings in the United States at dumping margins ranging from 17.08 percent to 198.38 percent (for Korea) and 0.00 percent to 293.40 percent (for India). In addition, DOC determined that producers and/or exporters from India received countervailable subsidies at rates ranging from 2.64 percent to 300.77 percent.

The petitioners in these investigations are Bonney Forge Corporation (Mount Union, PA) and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union. The merchandise covered by these investigations is carbon and alloy forged steel fittings, whether unfinished (commonly known as blanks or rough forgings) or finished. Such fittings are made in a variety of shapes including, but not limited to, elbows, tees, crosses, laterals, couplings, reducers, caps, plugs, bushings, unions (including hammer unions), and outlets. Subject carbon and alloy forged steel fittings are normally entered under Harmonized Tariff Schedule of the United States (HTSUS) numbers 7307.92.3010, 7307.92.3030, 7307.92.9000, 7307.99.1000, 7307.99.3000, 7307.99.5045, and 7307.99.5060. They may also be entered under HTSUS numbers 7307.93.3010, 7307.93.3040, 7307.93.6000, 7307.93.9010, 7307.93.9040, 7307.93.9060, and 7326.19.0010.

The U.S International Trade Commission (ITC) is scheduled to make its final injury determinations on or around November 27, 2020. If the ITC makes affirmative final injury determinations, DOC will issue AD and CVD orders. If the ITC makes negative final determinations of injury, the investigations will be terminated, and no orders will be issued.

In 2019, imports of forged steel fittings from Korea and India were valued at an estimated $62.6 million and $104.2 million, respectively, according to DOC.

US Department of Commerce Initiates Antidumping and Countervailing Duty Investigations Concerning Imports of Aluminum Foil from Armenia, Brazil, Oman, Russia, and Turkey

On October 20, 2020, the US Department of Commerce (DOC) announced the initiation of new antidumping (AD) and countervailing duty (CVD) investigations to determine whether imports of aluminum foil from Armenia, Brazil, Oman, Russia, and Turkey are being dumped in the U.S. market, and to determine whether producers in Oman and Turkey are receiving countervailable subsidies. The petitions were filed by the Aluminum Association Trade Enforcement Working Group and its individual members, Gränges Americas Inc. (Franklin, TN), JW Aluminum Company (Daniel Island, SC), and Novelis Corporation (Atlanta, GA).

The merchandise covered by these investigations is aluminum foil having a thickness of 0.2 mm or less, in reels exceeding 25 pounds, regardless of width. Aluminum foil is made from an aluminum alloy that contains more than 92 percent aluminum. The products under investigation are currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7607.11.3000, 7607.11.6090, 7607.11.9030, 7607.11.9060, 7607.11.9090, and 7607.19.6000. Further, merchandise that falls within the scope of these proceedings may also be entered into the United States under HTSUS subheadings 7606.11.3060, 7606.11.6000, 7606.12.3045, 7606.12.3055, 7606.12.3091, 7606.12.3096, 7606.12.6000, 7606.91.3095, 7606.91.6095, 7606.92.3035, and 7606.92.6095.

The dumping margins alleged in the petitions are as follows:

- 45.65 percent for Armenia;
- 63.05 percent for Brazil;
- 57.74 percent for Oman;
- 62.18 percent for Russia; and
- 34.27 percent for Turkey.

For Oman, there are eight subsidy programs alleged in the petitions, including income tax programs, preferential lending programs, a grant program, and the provision of land and electricity for less than adequate remuneration.

For Turkey, there are 25 subsidy programs alleged in the petitions, including tax programs, investment incentive schemes, lending schemes, the provision of land and natural gas for less than adequate remuneration, grant programs, and research and development incentive programs.

The US International Trade Commission (ITC) will make its preliminary injury determinations on or before November 13, 2020. 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 December 23, 2020, and preliminary AD determinations scheduled for March 8, 2021, unless these deadlines are extended. If DOC's preliminary determinations are affirmative, it will instruct US Customs and Border Protection to start collecting cash deposits from all US companies importing aluminum foil from these countries, as appropriate.

DOC's final determinations in these cases are scheduled for March 8, 2021 for the CVD investigation, and May 24, 2021 for the AD investigations, although these deadlines may be extended. If DOC's final determinations are affirmative, and if the US International Trade Commission (ITC) determines that imports of the subject merchandise materially injure, or threaten material injury to, the US industry, DOC will impose duties on those imports in the amount of dumping and/or countervailable subsidization found to exist.

According to DOC, imports of aluminum foil from the countries under investigation were valued as follows in 2019:

- $21.6 million for Armenia;
- $68.4 million for Brazil;
- $48.1 million for Oman;
- $59.0 million for Russia; and
- $82.9 million for Turkey.

US International Trade Commission Issues Negative Injury Determination in Antidumping Investigation of Glass Containers from China

On October 20, 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 sold in the United States at less than fair value. As a result of the ITC's negative determination, no antidumping duty order will be issued on imports of glass containers from China. The ITC's decision was unanimous, with Chair Jason E. Kearns, Vice Chair Randolph J. Stayin, and Commissioners David S. Johanson, Rhonda K. Schmidtlein, and Amy A. Karpel voting in the negative.

DOC in September 2020 determined that exporters from China had dumped certain glass containers in the United States at margins ranging from 31.07 to 255.68 percent.

The ITC's public report on the investigation will contain the views of the Commission and information developed during the investigation, and will be published by November 23, 2020.

WTO Developments

United States and European Union Seek Negotiated Settlement in WTO Disputes Concerning Aircraft Subsidies

The United States and the EU have expressed a strong preference to negotiate a settlement to their long-running dispute over their respective aircraft subsidies to Boeing and Airbus, with the United States saying that it had presented the EU with "proposals for a reasonable settlement that would provide a level playing field" and that "we should be able to find a solution in a short period of time". Their statements were made following the decision of the WTO Dispute Settlement Body (DSB) on October 26 to authorize the EU to take countermeasures against the United States of up to $4 billion annually because of the United States' failure to comply with a DSB ruling that it must withdraw subsidies to Boeing that contravene the Agreement on Subsidies and Countervailing Measures (ASCM). A similar decision was taken by the DSB in October 2019, authorizing the United States to take countermeasures of up to $7.5 billion annually against the EU for failing to withdraw subsidies to Airbus that were inconsistent with the ASCM. Both sides have claimed that they have now brought their subsidies into compliance with the ASCM. One way forward would be for them to ask for verification of compliance from the DSB, but in the absence of the Appellate Body the results of compliance proceedings could be inconclusive. Rather than prolong the dispute settlement process, therefore, both sides appear willing now to negotiate a bilateral solution. That appears to be driven in part by their desire to present a united front on the rules of the ASCM and prevent other countries, notably China, from using subsidies to capture large shares of the global market for civil aircraft.

Background

The United States and the EU have been engaged in dispute settlement over their support for the development, production and sale of civil aircraft by Boeing and Airbus since 2004-05. The two disputes have each gone through dispute panel and Appellate Body proceedings, compliance proceedings under Article 21.5 of the Dispute Settlement Understanding (DSU), and finally arbitration proceedings under Article 22.6 of the DSU to establish the levels of concessions which each party is entitled to suspend against the other for failure to comply fully with the dispute panel and the Appellate Body rulings that both of their subsidy programs were in breach of provisions of the ASCM.

<u>Arbitration on the complaint of the United States (DS316)</u>

Arbitration proceedings were completed in October 2019 for the United States' complaint against the EU's subsidies to Airbus. The United States was authorized by the DSB to impose countermeasures on EU exports in the form of 100% tariffs on up to $7.5 billion annually of EU imports because of the EU's failure to withdraw subsidies to Airbus that had been found to be inconsistent with the rules of the ASCM. At about the same time, the EU announced its decision to appeal against a second ruling on its compliance with the findings of the original dispute panel and Appellate Body, but that appeal remains in abeyance because the activities of the Appellate Body have been suspended since December 2019 when it ceased to have enough members to conduct new appeals.

The United States imposed a substantial range of tariffs on imports from the EU in October 2019, including on aircraft, food and drink, tools and apparel. It did not impose measures up to the limit that had been authorized by the DSB – around $2.5 billion of EU imports were targeted originally – but it raised some of the tariffs in March 2020 and in June 2020 it announced its intention to expand the list of products subject to the tariffs by up to $3 billion. The EU reacted by stating that its priority was "… to find a balanced, negotiated solution to the aircraft disputes".

In August 2020, the EU informed the DSB that it had implemented additional measures to comply with the dispute settlement findings against it and had withdrawn all remaining subsidies that had been the subject of the United States' complaint and had therefore removed all adverse effects of the subsidies, specifically those caused by launch aid loans by France and Spain to Airbus (WT/DS316/44). The EU stated that it was now the time to draw a line under its disputes on this issue with the United States, and indicated that it was not in anyone's interests that they should implement countermeasures against each other, even though these had been authorized by the DSB. The EU said that the action it had taken represented its contribution to both parties moving rapidly to eliminate the countermeasures. However, the United States disputed the EU's claim that it had brought all of its measures into compliance with its ASCM obligations and alleged that parts of the EU's aircraft subsidy program remain incompatible with the ASCM.

Arbitration on the complaint of the EU (DS353)

Arbitration proceedings were expected to be completed in March 2020 for the EU's complaint against the United States' subsidies to Boeing, but they were delayed by technical difficulties at the WTO associated with the Covid-19 pandemic and the arbitration report was issued finally in October 2020. The EU was authorized by the DSB to impose countermeasures on United States' exports of goods and services up to $4 billion annually, substantially less than the $10 billion that the EU had been seeking and less than the level of retaliation awarded to the United States against the EU because the United States' subsidies were found to be less damaging to EU interests.

The EU has indicated that it will delay, at least temporarily, imposing new duties and will engage intensively with the United States to achieve its preferred solution of a negotiated settlement and the removal of all countermeasures. The United States has said that it, too, "strongly favors" a negotiated solution. However, it also maintains that the EU has "no legal basis" to impose countermeasures since Boeing no longer benefits from the remaining subsidy that had been found non-compliant with the ASCM – a tax rate reduction provided by the state of Washington. The United States told the DSB that if the EU were to impose the countermeasures, this would "… force a U.S. response that would move us away from finding a solution to [the] Aircraft disputes", for example by imposing countermeasures up to the full level that had been authorized.

Prospects for negotiating a settlement

Both the United States and the EU have claimed that Boeing and Airbus no longer benefit from subsidies that were found to contravene the ASCM. If one or both decided to continue with dispute settlement proceedings in the WTO, they could request that the DSB carry out new compliance proceedings to examine the validity of each other's claims. However, that approach could be long drawn-out and inconclusive if it led to an appeal of the findings of a compliance panel when the Appellate Body is not able to function. The prospect, then, would be for the countermeasures that have been approved already by the DSB to remain in place for at least an extended time and to add further tension to the already complex trans-Atlantic trade relationship.

A negotiated solution to avoid any further trade restrictions and remove those that are already in place is strongly favored by US and EU business interests that are targets of countermeasures but are unrelated to the aircraft industry. However, the starting positions of the United States and the EU for a negotiated settlement appear still to be far apart. USTR Lighthizer has said that the United States will seek two conditions for a settlement: (i) a pledge from the EU to end all of its subsidies to Airbus, and (ii) monetary compensation by requiring Airbus to repay at least a proportion of the subsidies that it has received and that were found to have contravened the ASCM. The second of those conditions would appear to be very difficult to satisfy, and could invite a counterclaim by the EU for Boeing also to have to repay the subsidies that it received. For its part, the EU has made withdrawal by the United States of the tariffs they imposed as a result of the Airbus ruling a condition for opening negotiations on a settlement.

It is considered unlikely that the EU will take action to impose countermeasures against the United States until the results of the Presidential election are known. It may become clearer then whether the basis for a negotiated settlement exists. In the meantime, however, both the United States and the EU have reiterated their willingness to impose countermeasures up to the limit authorized by the DSB.