US Multilateral Trade Policy Developments

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Contents

US Trade Actions 1

US Department of Commerce Establishes Aluminum Import Monitoring and Analysis System 1

USTR Issues Findings in Section 301 Investigations of Digital Services Taxes Adopted by India, Italy, and Turkey; Suspends Imposition of Tariffs on French Goods 2

US International Trade Commission Institutes Fact-Finding Investigations Concerning Effects of Imported Cucumbers and Squash on US Seasonal Markets 6

USTR Issues Findings in Section 301 Investigations Concerning Digital Services Taxes Adopted by Austria, Spain, and the United Kingdom 8

USTR Finds Vietnam's Currency Practices to be Actionable Under Section 301, Defers Decision on Remedies 11

Safeguard Measure on Large Residential Washers Extended for Two Years 13

President Biden Issues Temporary Regulatory Freeze 15

United Arab Emirates Excluded from Section 232 Tariff on Aluminum Imports in Last-Minute Move by President Trump 17

President Biden Issues “Buy American” Executive Order, Following Last-Minute Changes by Trump Administration 18

US Department of Commerce Delays Effective Date of Rule Establishing Aluminum Import Monitoring and Analysis System 22

US International Trade Commission Institutes Fact-Finding Investigation Concerning Trade and Economic Effects of Foreign Censorship on US Businesses 22

Petitions and Investigations 25

US Department of Commerce Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Vertical Shaft Engines from China 25

US Department of Commerce Issues Affirmative Final Determination in Antidumping Duty Investigation of Difluoromethane (R-32) from China 25

US International Trade Commission Issues Negative Final Determination in Antidumping Investigation of 4th Tier Cigarettes from Korea 26

US International Trade Commission Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations Concerning Fluid End Blocks from China, Germany, India, and Italy 26

US International Trade Commission Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Prestressed Concrete Steel Wire Strand from Multiple Countries 27

US International Trade Commission Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Wood Mouldings and Millwork Products from China 28

WTO Developments 30

USTR Expands Retaliatory Tariffs on EU Goods in WTO Dispute Over Airbus Subsidies 30

US Trade Actions

US Department of Commerce Establishes Aluminum Import Monitoring and Analysis System

On December 23, 2020, the US Department of Commerce (DOC) adopted a final rule establishing an Aluminum Import Monitoring and Analysis (AIM) system, which will take effect on January 25, 2021. Similar to DOC's existing Steel Import Monitoring and Analysis (SIMA) system, the AIM system will require importers to obtain an import license for covered aluminum products, and will enable DOC to collect and publish data on aluminum trade. Secretary of Commerce Wilbur Ross stated that the new AIM system "will enable DOC and the public to better detect potential transshipment and circumvention involving aluminum products – helping to ensure that domestic producers can compete on a level playing field." We provide an overview of the new requirements below.

Aluminum Import Licensing Requirement

Beginning on January 25, 2021, importers of "basic aluminum products"[1] will be required to apply for and obtain an import license for each entry of such products into the United States. To obtain an import license, companies must report the volume and value of the aluminum products to be imported, as well as their country of origin and the country where the products were most recently cast. In addition, following a one-year grace period, DOC will require importers to report the country where imported aluminum products were smelted. DOC has stated that it will offer an additional opportunity to comment on this and other aspects of the licensing requirements in the coming months.

The aluminum import license can be applied for up to 60 days prior to the expected date of import and until the date of filing of the CBP entry summary documents, or their electronic equivalent. The aluminum import license is valid for up to 75 days. However, import licenses which are valid on the date of import but expire prior to the filing of CBP entry summary documents will be accepted.

The aluminum import license will be required for every entry of covered aluminum products (with certain exceptions noted below). As with SIMA, a single license can cover multiple products, as long as the information at the top of the form (*i.e.,* importer, exporter, manufacturer, country of origin and exportation, the expected date of export, first and second country of smelt, and expected date of import) is the same for the shipment. Separate licenses will be required if any of the information above differs with respect to a given set of covered imported aluminum products. As a result, a single CBP entry may require more than one aluminum import license.

Aluminum imports valued under $5,000 per shipment may obtain a multi-use low-value license. Aluminum import licenses are not required on temporary importation bond (TIB) entries, transportation and exportation (T&E) entries or entries into a bonded warehouse. Additionally, informal entries are exempt from the licensing requirement. Covered aluminum products withdrawn for consumption from a bonded warehouse will require a license at the entry summary.

The new AIM system website became operational on January 4, 2021, and can be found **here**. Through this website, importers can register for the online license application platform and apply for licenses.

Aluminum Import Monitoring and Analysis System

Once license data are collected, the public AIM monitor will aggregate and report certain information obtained from the aluminum licenses on a monthly basis and will be refreshed each week. Additionally, outdated license information will be replaced, where available, with publicly available US import statistics. Aggregate data will be reported on a monthly basis by country of origin, country of smelt, country of most recent cast, and relevant aluminum product grouping, and will include import quantity (metric tons), import Customs value (U.S. $), and average unit value ($/metric ton). Like the public SIMA monitor, the public AIM monitor is intended to function as an "early warning system," yielding public data up to eight weeks prior to the release of publicly available import statistics by Census.

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[1] HTS product codes requiring a license are listed **here**.

The monitor will be available **here**, starting on January 25, 2021.

Outlook

DOC has indicated that it intends to use the AIM system to facilitate "the effective and timely monitoring of import surges of specific aluminum products" and to "aid in the prevention of transshipment of aluminum products." The US aluminum industry has welcomed the new system, stating that it will help domestic aluminum producers to identify trends and shifts in trade flows that might warrant industry or government action. In its statement on the new system, the US Aluminum Association referenced DOC's recent affirmative preliminary determinations in the antidumping investigations of aluminum sheet from 18 countries, as well as an alleged increase of imports of aluminum sheet and plate from China into Mexico, as evidence of the need for the new monitoring tool. The information generated from the AIM system might therefore be used by the US government and the domestic aluminum industry to support new allegations of unfair trade practices, such as transshipment and circumvention of any AD/CVD orders resulting from the current investigations of aluminum sheet.

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

USTR Issues Findings in Section 301 Investigations of Digital Services Taxes Adopted by India, Italy, and Turkey; Suspends Imposition of Tariffs on French Goods

On January 6, the Office of the US Trade Representative (USTR) announced its determinations that digital services taxes (DSTs) adopted by India, Italy, and Turkey are actionable under Section 301 of the Trade Act of 1974, because each DST "is unreasonable or discriminatory and burdens or restricts U.S. commerce[.]" However, USTR did not propose any Section 301 remedies, stating that "USTR is not taking any specific actions in connection with the findings at this time but will continue to evaluate all available options." USTR also "suspended indefinitely" its planned tariffs on certain imports from France, which were scheduled to take effect on January 6 in response to that country's adoption of a DST. USTR's actions indicate that final decisions on remedies in these and other pending Section 301 investigations involving DSTs will likely be deferred to the Biden administration. We provide an overview of USTR's decisions below.

Findings regarding DSTs imposed by India, Italy, and Turkey

USTR has issued three separate Federal Register notices setting forth its determinations that the DSTs adopted by India, Italy, and Turkey are actionable under Section 301. Specifically, USTR found that:

- Each DST, "by its structure and operation, discriminates against U.S. digital companies[.]" In the case of India, USTR made this finding based on "the selection of covered services and [the Indian DST's] applicability only to non-resident companies." In the investigations of Italy and Turkey, USTR cited "the selection of covered services and the revenue thresholds" as evidence of discrimination against US firms.
- Each DST "is unreasonable because it is inconsistent with principles of international taxation, including due to its application to revenue rather than income," as well as its "extraterritorial application[.]" In the cases of India and Turkey, USTR also cited an alleged "failure to provide tax certainty."
- Each DST "burdens or restricts U.S. commerce" by imposing an additional tax burden on US companies.

Alongside the Federal Register notices, USTR released detailed reports analyzing each country's DST and elaborating on the above conclusions. USTR made the following findings:

<u>India</u>

India's DST "is discriminatory on its face," according to USTR. USTR claims that the law "explicitly exempts Indian companies, while targeting non-Indian firms, meaning that "U.S. 'non-resident' providers of digital services are taxed, while Indian providers of the same digital services to the same customers are not." According to USTR, one Indian government official confirmed that the" purpose" of the DST is to discriminate against nonresident foreign companies,

explaining that: “[a]ll parts of the digital taxation incident should be on the foreign player, because if the incidence is passed on to the Indian player, then it doesn’t really serve the purpose.” USTR also observed that the Indian DST targets digital services, but not “similar services provided non-digitally,” and that “[b]ecause U.S. companies are global leaders in the digital services sector, U.S. companies face an inordinate share of tax burden.”

USTR found that India’s DST “unreasonably contravenes international tax principles.” According to USTR:

- Stakeholders have found the text of the DST to be “unclear and ambiguous,” which “creates uncertainty for companies regarding key aspects of the DST, including the scope of taxable services and the universe of firms liable to pay the tax.” India’s alleged failure to publish official guidance to resolve these ambiguities “amounts to a failure to provide tax certainty, which contravenes a core principle of international taxation.”

- The DST “taxes companies with no permanent establishment in India,” contravening the international tax principle that “companies should not be subject to a country’s corporate tax regime absent a territorial connection to that country.”

- The DST taxes companies’ revenue rather than their income. This “is inconsistent with the international tax principle that income—not revenue—is the appropriate basis for corporate taxation.”

USTR also found that India’s DST “burdens or restricts” US commerce, in at least four ways:

- The DST “creates an additional tax burden for U.S. companies,” which USTR estimates “could exceed US$30 million per year” in the aggregate. Several aspects of the DST allegedly exacerbate this tax burden, including its “extraterritorial application, its taxation of revenue rather than income, and its low domestic revenue threshold (which allows India to tax U.S. firms that do relatively little business in India).”

- The “unusually expansive” scope of taxable digital services under the DST makes the tax particularly burdensome for US companies, as it taxes “numerous categories of digital services that are not leviable under other digital services taxes adopted around the world.” This brings more US companies within the scope of the DST, according to USTR.

- The DST burdens US companies “by subjecting them to double taxation.”

<u>Italy</u>

According to USTR, the Italian DST’s revenue thresholds and selection of covered services discriminate against affected U.S. companies for the following reasons:

- Italy’s DST contains two revenue thresholds, a global (or “worldwide”) revenue threshold and a national threshold. Businesses, either individually or as a group, are subject to the DST when they generate €750 million or more in global (“worldwide”) revenues and €5.5 million or more in revenues in Italy “deriving from the provision of digital services[.]” According to USTR, these revenue thresholds mean that “over 62 percent of companies likely affected by Italy’s DST are U.S. companies, whereas less than seven percent of likely affected companies are Italian companies.”

- Additionally, the “narrow definition of covered services” under Italy’s DST allegedly targets services “where U.S. companies are market leaders,” namely (1) “the placing on a digital platform of advertising targeted to the users of the platforms;” (2) “the making available to users of a multi–sided digital interface which allows users to find other users and interact with them and which may also facilitate the provision of underlying supplies of goods or services;” and (3) “the transmission of data collected about users and generated from users’ activities on digital interfaces.”

USTR also found that Italy’s DST is unreasonable because “it is inconsistent with prevailing international tax principles,” as follow:

- Italy's DST "applies to revenue rather than income[.]" Specifically, taxable revenues under Italy's DST "include total gross revenues, net of value added tax and other indirect taxes."

- Italy's DST "applies to revenues unconnected to a physical presence in Italy[.]" Specifically, USTR cites paragraph 43 of the DST, which states that "[n]on-resident taxable persons, without a permanent establishment within the territory of the State, established in a State other than a Member State of the European Union or a State of the European Economic Area with which Italy has not concluded an agreement on administrative cooperation to fight against tax evasion and tax fraud and an agreement for mutual assistance for the recovery of tax claims, shall appoint a tax representative to comply with their obligation to declare and pay the digital services tax[.]"

- Italy's DST applies to revenue rather than income, and thus "will lead to double taxation of the same revenue stream."

USTR found that Italy's DST "burdens or restricts U.S. commerce" in the following ways:

- According to USTR, Italy's DST will impose "a significant tax liability on covered companies, generating as much as €708 million in tax revenue annually."

- The Italian DST's reliance on user location (instead of the location of the company providing the service) "makes the DST difficult to calculate and administer, which are burdens on covered U.S. companies."

- Italy's alleged "lack of implementing regulations or guidance" for its DST has raised "myriad burdens for affected U.S. companies."

Turkey

USTR concluded that the Turkish DST "discriminates against U.S. digital services companies." USTR identified two allegedly discriminatory aspects of the DST:

- The DST "targets only digital services (a sector in which U.S. firms are global leaders)," but exempts similar services provided non-digitally; and

- The DST's revenue thresholds shield Turkish firms from taxation, while creating tax liability "for an inordinate number of U.S. companies."

According to an analysis conducted by USTR, of the 61 companies likely subject to the Turkish DST, 42 (69%) are US companies, and none of the 61 companies is Turkish. USTR claims that the alleged discriminatory aspects of the Turkish DST are intentional, noting that "[i]n October 2019, Member of the Turkish Parliament Salih Cora stated that by including revenue thresholds in the DST, 'it is intended that domestic companies are not exposed to such tax.'"

USTR found that the Turkish DST "unreasonably contravenes international tax principles" for the following reasons:

- The DST "taxes companies with no permanent establishment in Turkey[.]" Rather, the DST "applies to revenue from digital services 'offered in Turkey,' whether or not the company offering those services maintains a Turkish permanent establishment." According to USTR this approach contravenes the international tax principle "that companies should not be subject to a country's corporate tax regime absent a territorial connection to that country."

- The DST "taxes companies' revenue rather than their income." Specifically, it "applies to gross revenues generated from covered digital services," which contravenes "the international tax principle that income—not revenue—is the appropriate basis for corporate taxation."

- According to USTR, the "adjustable nature of foundational aspects of the DST" creates considerable uncertainty. First, USTR states that "[t]he Turkish President has unilateral authority to increase or decrease [the] revenue

thresholds[.]" The President's ability "to dramatically increase or decrease the revenue thresholds at any point, …could significantly expand or contract the universe of companies subject to the DST." Moreover, because the tax rate can also change at the President's discretion, companies "cannot be certain of the amount of tax they might have to pay." USTR alleges that these features constitute a "failure to provide tax certainty," thus contravening a core principle of international taxation.

USTR found that Turkey's DST "burdens or restricts" US commerce in the following ways:

- USTR estimated that that US companies, in the aggregate, may face tax payments "in excess of US$100 million per year" under the DST.
- Turkey's base DST rate of 7.5% "currently is the highest in the world by a substantial margin," and the maximum allowable DST rate of 15% (which the Turkish President can institute at his discretion) "is even more excessive."
- US companies "face significant costs to comply with the DST's payment and reporting requirements," and the uncertainties associated with potential changes to the DST rates and revenue thresholds "will exacerbate U.S. companies' compliance challenges."
- The DST also burdens U.S. companies by subjecting them to "double, and possibly triple taxation." According to USTR, US companies that pay the DST in Turkey will still be subject to US corporate income tax "creating two layers of taxation," and might also face triple taxation "due chiefly to the DST's lack of an exemption for intragroup transactions."

Based on these findings concerning the DSTs imposed by India, Italy, and Turkey, USTR concluded that each DST "is unreasonable or discriminatory and burdens or restricts U.S. commerce, and thus is actionable under section 301(b) of the Trade Act" (19 U.S.C 2411(b)).

In a departure from its recent practice, USTR has not proposed to take any specific actions based on the above findings. By contrast, in the recent Section 301 investigations of China's intellectual property rights practices and France's digital services tax, USTR's findings of actionable conduct were accompanied by proposed determinations on action and requests for public comments on the proposed actions (which in both cases involved the imposition of retaliatory tariffs). Instead, USTR's Federal Register notices in the current DST investigations simply note that USTR is now required "to determine what action, if any, to take under Section 301(b)," and that "[t]hese matters will be addressed in subsequent proceedings under Section 301."

The Section 301 investigations of the DSTs adopted by India, Italy, and Turkey were initiated in June 2020, along with investigations of DSTs adopted or under consideration by Austria, Brazil, the Czech Republic, the European Union, Indonesia, Spain, and the United Kingdom. USTR has not yet determined whether the latter DSTs are actionable under Section 301. The deadline for USTR to complete these investigations is June 2, 2021 (12 months after initiation).

Suspension of planned Section 301 tariffs in response to France's DST

USTR has issued a Federal Register notice "suspending" its previous decision to impose tariffs on certain products of France in response to France's adoption of a DST. USTR determined in December 2019 that France's DST was actionable under Section 301, and in the same notice USTR proposed retaliatory tariffs of up to 100 percent on certain products from France. In July 2020, after receiving public comments on the proposed tariff list, USTR determined to impose a 25 percent tariff on approximately $1.3 billion in annual imports from France, but also determined to suspend the imposition of the tariffs for up to 180 days (that is, until January 6, 2021) to allow time for bilateral and multilateral discussions to resolve the issue. It did so pursuant to Section 305(a) of the Trade Act (19 U.S.C. 2415(a)), which provides, in pertinent part, that USTR may delay implementation of a Section 301 action for up to 180 days "if the Trade Representative determines that substantial progress is being made, or that a delay is necessary or desirable to obtain United States rights or satisfactory solution with respect to the acts, policies, or practices that are the subject of the action."

On January 7, USTR issued a new Federal Register notice setting forth its determination "that it is appropriate to suspend the action in the France DST investigation indefinitely." USTR explained that it is suspending the tariffs "in light of the ongoing investigation of similar DSTs adopted or under consideration in ten other jurisdictions." USTR noted that those investigations, referenced in the previous section above, "have significantly progressed, but have not yet reached a determination on possible trade actions." According to USTR, the suspension of the tariff action in the France DST investigation "will promote a coordinated response in all of the ongoing DST investigations." USTR did not explain what statutory authority permits it to "suspend" the imposition of a Section 301 remedy beyond the 180-day window envisioned in Section 305(a).

Outlook

It appears unlikely that USTR will issue decisions on potential remedies in the DST-related Section 301 investigations before President Trump leaves office. In all previous Section 301 investigations conducted by the Trump administration, USTR has issued a proposed retaliation list and afforded the public an opportunity to comment on the list before imposing any tariffs, as required by law. Completing this process before President Trump leaves office on January 20 would be difficult, if not impossible. Instead, the decision on how to proceed with the investigations will likely be left to the Biden administration.

It is not yet clear how the Biden administration will approach these Section 301 investigations, or the issue of digital services taxation more broadly. Under the Trump administration, the United States participated in negotiations at the OECD aimed at reaching a multilateral consensus on digital taxation, but those negotiations proved difficult and failed to produce an agreement by the end of 2020 as many had hoped. The Biden administration might continue to engage in the OECD process – which OECD officials hope can be concluded by mid-2021 – particularly given President-elect Biden's stated preference for multilateral approaches, rather than unilateral actions such as those the Trump administration has contemplated under Section 301. Nevertheless, given the recent proliferation of unilateral DSTs and the strong opposition to such measures in Congress and the US business community, the new administration might face pressure to act unilaterally, absent progress in the OECD discussions.

USTR's announcement regarding the France DST investigation can be viewed **here**. The announcement concerning the India, Italy, and Turkey DST investigations can be viewed **here**.

US International Trade Commission Institutes Fact-Finding Investigations Concerning Effects of Imported Cucumbers and Squash on US Seasonal Markets

On January 8, the US International Trade Commission (ITC) announced that it has instituted fact-finding investigations pursuant to Section 332(g) of the Tariff Act of 1930 (19 U.S.C. § 1332(g)) concerning the effects of imports of cucumbers and squash on the domestic seasonal markets for these products. The ITC instituted these investigations in response to a request submitted by US Trade Representative (USTR) Robert Lighthizer on December 4, 2020. Ambassador Lighthizer indicated that the request stems from the Trump administration's "comprehensive plan" to support US producers of seasonal and perishable fruits and vegetables, which USTR published in September 2020 following public consultations with the domestic industry. That plan did not include specific commitments with respect to cucumbers and squash, but Ambassador Lighthizer's letter states that the new request is a result of the plan's general commitment that "USTR, USDA, and Commerce would continue to monitor the seasonal and perishable fruit and vegetable industries and…consider potential future investigations."

Unlike Ambassador Lighthizer's previous requests to the ITC for Section 332 investigations concerning strawberries and bell peppers, the new request concerning cucumbers and squash does not seek the monitoring of imports pursuant to Section 202(d)(1) of the Trade Act of 1974 (19 U.S.C. § 2252((d)(1)) – a process that can lead to an expedited global safeguard investigation of the imports in question. Nevertheless, the ITC's findings could potentially be used to support future allegations that imports of cucumbers and squash have injured US producers. A similar Section 332 investigation concerning imported raspberries, requested by USTR in April of 2020, is underway and expected to conclude in June.

We discuss the scope, schedule, and potential impact of the ITC's investigations below.

Scope of the Investigations

Ambassador Lighthizer's letter requested that the ITC investigate "the effects of imports on the domestic seasonal markets" for cucumbers and squash, with "particular focus on production and competitiveness of cucumbers and squash grown in the Southeastern United States." The letter defined the products in question as follows:

- **Squash:** Imports that fall within the product description of U.S. Harmonized Tariff Schedule subheading 0709.93.20 (squash, fresh or chilled); and
- **Cucumbers:** Imports that fall within the product description of U.S. Harmonized Tariff Schedule subheading 0707.00 (cucumbers, including gherkins, fresh or chilled).

The ITC will conduct separate but concurrent investigations concerning imports of cucumbers and squash, and will produce two separate reports containing the findings of the investigations. As requested by USTR, each report will provide, "to the extent practical":

- A description of the effects of imports on the domestic seasonal markets of the product in question, with particular focus on production and the competitiveness of the product grown in the Southeastern United States;
- Information on recent trends in trade in the product between the United States and its trading partners, including information on seasonal patterns of trade; and
- A description of monthly price trends for the product in the United States, including an analysis and comparison of the prices of domestically produced and imported products in the U.S. market, with a focus on the 2015-2020 time period.

Investigation Schedule

The ITC expects to complete its investigations and transmit its reports to USTR within 12 months (*i.e.*, by December 7, 2021), as requested by Ambassador Lighthizer. USTR intends to make the ITC's reports available to the public in their entirety. The ITC's notices of institution provide the following schedule for interested parties to participate in the investigations:

- **March 25, 2021:** Deadline for filing requests to appear at the public hearing.
- **March 29, 2021:** Deadline for filing prehearing briefs and statements.
- **April 1, 2021:** Deadline for filing electronic copies of oral hearing statements.
- **April 8, 2021:** Public hearing.
- **April 15, 2021:** Deadline for filing post-hearing briefs and statements.
- **April 27, 2021:** Deadline for filing all other written submissions.
- **December 7, 2021:** Transmittal of Commission report to the USTR.

The ITC has indicated that, rather than holding separate public hearings for cucumbers and squash, it will hold a single public hearing for the two investigations. Because COVID-19 mitigation measures are in effect, the public hearing will be held by videoconference. Information about how to participate in the hearing will be posted on the ITC's **website** no later than March 11, 2021.

Outlook

As noted above, the new fact-finding investigations concerning cucumbers and squash stem from the Trump administration's broader plan to "address the threat posed by increased foreign imports to American producers of seasonal and perishable fruits and vegetables." Pursuant to that plan, USTR requested a Section 201 global safeguard investigation concerning blueberries, which the ITC instituted in October 2020. USTR also requested, pursuant to Section 202(d)(1), that the ITC institute investigations under Section 332 to collect information that could expedite global safeguard investigations of strawberries and bell peppers, which the ITC did in December 2020. Compared to these other initiatives, USTR's most recent request for general fact-finding investigations concerning cucumbers and squash is more preliminary in nature. Nevertheless, the ITC's findings could be used by domestic producers of cucumbers and squash to support future petitions for safeguard measures or other forms of import relief. Interested parties may therefore wish to participate in the ITC's investigations.

It is not yet clear whether the Biden administration will attach the same priority to trade issues affecting US growers of seasonal and perishable goods. The Trump administration developed its plan to assist such growers after certain industry representatives and Members of Congress, located primarily in the Southeastern United States, expressed dissatisfaction with the outcome of the US-Mexico-Canada Agreement (USMCA) negotiations, arguing that the USMCA failed to address longstanding concerns about the effects of import competition on US growers of seasonal and perishable goods. The Trump administration's commitments to pursue other trade actions to support the industry was among the compromises that facilitated Congress's approval of the USMCA, but the Biden administration might not feel bound by those commitments. Nevertheless, the ongoing ITC investigations involving seasonal and perishable produce are likely to proceed. Some of these investigations – namely the safeguard investigation of blueberries and the potential safeguard investigations of strawberries and bell peppers – could present President-elect Biden with difficult early decisions on whether to grant import relief to the domestic industry, should the ITC reach affirmative findings.

The ITC's notices of institution can be viewed **here** (for cucumbers) and **here** (for squash). Ambassador Lighthizer's letter requesting these investigations can be viewed **here**.

USTR Issues Findings in Section 301 Investigations Concerning Digital Services Taxes Adopted by Austria, Spain, and the United Kingdom

On January 14, the Office of the US Trade Representative (USTR) announced its determinations that digital services taxes (DSTs) adopted by Austria, Spain, and the United Kingdom are actionable under Section 301 of the Trade Act of 1974, because each DST "is unreasonable or discriminatory and burdens or restricts U.S. commerce[.]" However, USTR did not propose any Section 301 remedies, stating that "USTR is not taking any specific actions in connection with the findings at this time but will continue to evaluate all available options." Last week, USTR reached similar decisions in its Section 301 investigations concerning DSTs adopted by India, Italy and Turkey, finding that the measures were actionable under Section 301 but declining to propose or implement any remedies (*please refer to the W&C US Trade Alert dated January 8, 2020.*)

Alongside its Federal Register notice, USTR issued detailed reports setting forth its findings with respect to the DST's imposed by Austria, Spain, and the United Kingdom. USTR reached the following findings:

<u>Austria</u>

USTR concluded that Austria's DST "discriminates against U.S. digital services companies," citing the following findings:

- Austria's DST only applies to digital services companies that meet or exceed two revenue thresholds. Specifically, if a company did not, within a financial year: (i) generate at least €25 million in revenue in Austria for covered digital advertising services; and (ii) generate at least €750 million globally for all services, it is not subject to the tax. According to USTR, these revenue thresholds "shield smaller firms from taxation (including many Austrian firms), while creating tax liability for an inordinate number of large, U.S.-based companies." USTR

alleges that this “targeting of U.S. companies” was deliberate, citing statements from Austrian officials who identified certain large US internet companies as the targets of the DST.

USTR found that two aspects of Austria’s DST “are inconsistent with international tax principles, and thus, unreasonable under Section 301”:

- USTR noted that the DST “applies to digital advertising with a nexus to Austria,” i.e., advertising that: (i) is received on a device belonging to a user with a domestic IP address; and (ii) is aimed at domestic, Austrian users.” However, no physical presence in Austria is required for the DST to apply. USTR concluded that “this taxation of revenue absent a physical presence in Austria is inconsistent with principles of international tax policy.”
- USTR noted that the DST “applies to gross revenues generated from covered digital advertising services,” and found that this approach “is inconsistent with prevailing principles of international taxation, which recognize income—not gross revenue—as an appropriate basis for taxation.”

USTR found that Austria’s DST “burdens or restricts U.S. commerce” in the following ways:

- According to USTR’s analysis, US companies, in the aggregate, may face “tens of millions of dollars” in new tax payments each year under the DST.
- US companies also face “significant costs to comply with the DST’s payment and reporting requirements,” including costs “to revamp their systems to capture and track the information needed” to comply with the tax.
- The DST subjects US companies to double taxation, because US companies that pay the DST in Austria will still be subject to US corporate income tax.

<u>Spain</u>

USTR concluded that Spain’s DST, “by its structure and operation,” discriminates against US digital companies. USTR made the following findings:

- Spain’s DST applies to companies that generate €750 million or more in worldwide revenues and €3 million or more in covered digital services revenues, as defined by the DST. According to USTR “both the percentage and absolute number of U.S. companies affected by Spain’s DST increases when compared with lower revenue thresholds.” Applying the threshold of Spain’s DST, USTR “identified 60 companies, of which 2 (3%) had an ultimate parent in Spain and 34 (56.7%) had an ultimate parent in the United States.”
- Spain’s DST “targets categories of services where U.S. companies are dominant—namely, online advertising services, online intermediary services and data transmission services.” However, the DST “does not tax companies that provide the same or very similar services in non-digital format,” which is “inconsistent with admonishments against targeting the digital economy for different tax treatment.”

USTR concluded that Spain’s DST is “unreasonable,” based on the following findings:

- Spain’s DST “is neither an income tax nor a consumption tax,” but rather “is a tax on gross revenues,” which is “inconsistent with prevailing principles of corporate taxation.”
- Because Spain’s DST “applies to revenue rather than income,” it will lead to double taxation of the same revenue stream (*e.g.*, a company’s revenues would be subject to domestic corporate income taxes in addition to Spain’s DST.)
- Spain’s DST “creates circumstances where revenues arising out of users or economic activity not in Spain is taxed by Spain,” and “create[s] the likelihood that Spain’s DST will tax transactions with no territorial relationship

to Spain[.]" This, according to USTR, "is not consistent with a key principle of international taxation, as identified by taxation based on permanent establishments."

USTR concluded that Spain's DST "burdens or restricts U.S. commerce" in the following ways:

- According to USTR, Spain's DST will impose a significant tax liability on covered U.S. companies by "generating – according to Spain – as much as €968 million in tax revenue in calendar year 2021."
- In order to establish a link between taxable revenues and Spain's taxable jurisdiction, Spain's DST's relies on "complicated user location rules," instead of the location of the company providing the service. The Spanish DST's reliance on "user location" is a burden to covered US companies, according to USTR.
- Spain's DST "imposes administrative and compliance burdens on covered U.S. companies," including the burden of re-engineering systems to comply with Spain's DST.

United Kingdom

USTR concluded that the UK DST "discriminates against and unfairly targets U.S. companies," based on the following findings:

- UK officials, "including the UK Prime Minister, Chancellor of the Exchequer, and members of Parliament," have indicated that the DST is targeted towards U.S. companies" by referring, *inter alia*, to "established tech giants[.]"
- The UK DST "targets three categories of services where U.S. companies are market leaders," namely internet search engines, social media services and online marketplaces. However, "[i[t appears unlikely that the DST will cover certain digital services where similar UK or European firms are successful," according to USTR.
- The UK DST applies only to companies with annual digital services revenues over £500 million and "UK digital services revenues" over £25 million. According to USTR, statements by UK officials responsible for creation of the DST and UK policy documents "indicate that the DST revenue thresholds were designed to target U.S. companies." In USTR's view, "aside from separating large U.S. companies from others, there is no particular significance to the DST threshold levels chosen by the UK."

USTR concluded that the UK DST is unreasonable because it "is inconsistent with principles of international taxation," citing the following findings:

- USTR asserts that, although the UK "attempts to make the DST sound like a consumption tax," the DST in fact "is a gross revenue tax," and thus is inconsistent with principles of international corporate taxation.
- US companies may be subject "to both national taxes, such as the UK Corporation Tax, as well as the DST," because of the "gross-revenue design of the UK DST[.]" This, in USTR's view, "is inconsistent with the tax principle of avoiding double taxation."
- Although the UK DST was adopted on July 22, 2020, DST tax liability "obligates as of April 1, 2020." Thus, according to USTR, the UK DST "is inconsistent with the principle of tax certainty by attaching liability for the DST before the DST was adopted."
- The UK DST "is a tax on the gross revenues that a group receives from providing a digital services activity to UK users." As such, the UK DST is "unconnected to a permanent establishment and unconnected to revenues related to such a permanent establishment," and thus is "inconsistent with prevailing international tax principles, which provide that a company is subject to income-type taxation only to the extent that company has a permanent establishment in the taxing country."

USTR found that the UK DST "burdens or restricts" US commerce in the following ways:

- USTR notes that the UK DST "is expected to raise approximately £1.9 billion to £2.145 billion" from 2019 through 2025, and takes the view that "U.S. companies are likely to incur the greatest burden under the DST."
- The UK DST's application to revenue "results in an effective tax rate more than twice the UK Corporation Tax rate," and thus "effectively extracts more taxes from leading U.S. companies than from UK companies subject only to the UK Corporation Tax[.]"
- The UK DST "incurs high compliance and administrative costs, which burdens leading U.S. digital companies in comparison to UK competitors that are not subject to the DST." Specifically, the DST "requires significant data collection, maintenance, and calculation" and "the information required is different than what was previously required for tax compliance[.]"
- The UK DST's relationship to the UK Corporation Tax "burdens covered U.S. companies." Specifically, USTR cites a policy document in which HM Revenue & Customs identified that "[t]he DST will be deductible as a normal business expense but not creditable against UK Corporation Tax". According to USTR, this provision "increases the tax burden on U.S. companies, while limiting or eliminating the same tax burden on UK companies."
- USTR states that, although some US companies "initially attempted to absorb" the costs of the DST, "the decision of some firms to increase the price of the targeted activities shows that unilateral DSTs, such as the UK DST, may increase costs to consumers," and thus "may also result in higher prices and costs for small- and medium-sized U.S. companies."

Based on the above findings concerning the DSTs imposed by Austria, Spain, and the UK, USTR concluded that each DST "is unreasonable or discriminatory and burdens or restricts U.S. commerce[.]"

In addition to the above findings, USTR has issued a "status update" on four other pending Section 301 investigations, which involve DSTs "adopted or under consideration" by Brazil, the Czech Republic, the European Union, and Indonesia. USTR has not yet reached decisions on whether these DSTs are actionable under Section 301, and its report acknowledges that, with the exception of the Indonesian DST, these measures have not yet been enacted into law. Nevertheless, USTR's report states that it is "conducting a detailed examination of the measures" and identifies "preliminary concerns" that each measure may be actionable under Section 301. The report states that USTR "will continue to investigate these and other related issues" and "will continue to engage with Brazil, the Czech Republic, the EU, and Indonesia on these important matters."

USTR's actions indicate that it is unlikely issue decisions on remedies in its DST-related Section 301 investigations before President Trump leaves office. Instead, the decision on how to proceed will likely be left to the incoming Biden administration, which has not indicated how it plans to respond to the proliferation of unilateral DSTs or to the obstacles that have arisen in negotiations at the OECD that aim to reach a multilateral consensus on digital services taxation. The deadline for USTR's determinations in the above-mentioned Section 301 investigations is June 2, 2021, though the law permits a further postponement of 180 days that could provide additional time for the new administration to pursue a negotiated solution.

USTR's findings in the Section 301 investigations concerning Austria, Spain, and the United Kingdom can be viewed **here**. The status update concerning the remaining Section 301 investigations involving DSTs can be viewed **here**.

USTR Finds Vietnam's Currency Practices to be Actionable Under Section 301, Defers Decision on Remedies

On January 15, the Office of the US Trade Representative (USTR) announced its determination that Vietnam's acts, policies, and practices related to currency valuation are actionable under Section 301 of the Trade Act of 1974, because they are "unreasonable and burden or restrict U.S. commerce." However, USTR did not propose any Section 301 remedies, stating that "USTR is not taking any specific actions in connection with the findings at this time but will continue to evaluate all available options." USTR recently took the same approach in several other pending Section 301 investigations, finding that the measures at issue were actionable under the law but declining to propose

any remedies (*please refer to the W&C US Trade Alerts dated January 8 and 14, 2021.*) USTR's decisions will allow the incoming Biden administration to determine how to proceed with the Section 301 investigation of Vietnam.

In a Federal Register notice, USTR explained that it found Vietnam's acts, policies, and practices with respect to currency valuation, "including excessive foreign exchange market interventions and other related actions," to be unreasonable in light of "U.S. and international norms" that exchange rate policy: (1) should not be undertaken to gain an unfair competitive advantage in international trade; (2) should not artificially enhance a country's exports and restrict its imports in ways that do not reflect the underlying competitiveness; (3) should not prevent exchange rates from reflecting underlying economic and financial conditions; and (4) should not prevent balance of payments adjustment. Alongside the Federal Register notice, USTR published a report containing its assessment of Vietnam's currency practices. The report included the following findings:

Finding of "unreasonable" acts, policies, and practices

USTR determined that Vietnam's currency practices are "unreasonable" within the meaning of 19 U.S.C. § 2411(d)(3), based on the following findings:

- Vietnam – through the State Bank of Vietnam (SBV) – "tightly manages the value of the [Vietnamese Dong (VND)], particularly against the USD[.]" Specifically, the SBV (1) "announces a daily VND/USD central exchange rate on its website," (2) sets "a tight +/-3 percent band within which licensed credit institutions can trade VND and USD in Vietnam," and (3) "engages in the accumulation or decumulation of FX reserves to maintain the VND/USD exchange rate within +/-3 percent of the central exchange rate that it sets." Moreover, according to USTR, one of the roles of the SBV is "to participate in the elaboration of national socio-economic strategies and plans," and the SBV therefore has both "the opportunity and incentive to adopt exchange rate policies that further policies of making Vietnam a major exporter of manufactured goods."

- Vietnam's currency "has been undervalued for several years," according to the US Treasury Department and the International Monetary Fund (IMF). Specifically, USTR noted that: (1) the IMF found in its last three Article IV consultations with Vietnam, covering the period of 2016-2018, that the VND was undervalued by 7 to 10.3 percent; and (2) the Treasury Department found that the VND was undervalued during 2019. According to USTR, the IMF since 2017 "has consistently assessed that Vietnam's external position is substantially stronger than warranted by fundamentals and desirable policies and that the VND has been undervalued on a real effective basis."

- Vietnam "has taken concrete steps in FX markets that have contributed to the undervaluation of the VND[.]" For example, the Treasury Department found that the SBV's net FX purchases, which by Treasury's calculation totaled about $22 billion in 2019, "had the effect of undervaluing Vietnam's [Real Effective Exchange Rate] by 4.2 percent, and of undervaluing the VND on a bilateral basis against the USD by 4.7 percent that year." USTR explained that these figures "represent the amount of undervaluation of the VND (both on a real effective basis and against the USD) that is directly attributable to Vietnam's 'net purchases of foreign exchange in 2019 totaling about $22 billion.'" The SBV allegedly "continued its trend of making significant net purchases of FX during early- to mid-2020," according to USTR.

- Vietnam's large-scale FX market interventions "have taken place in the context of a sustained current account surplus, record goods trade surpluses (including with the United States), and rapid productivity growth in the tradable goods sector." USTR acknowledged that "Vietnam's growing goods trade surplus with the United States reflects some degree of production and supply chain shifting from China to Vietnam," stating that "[t]here is a correlation between rising imports from Vietnam to the United States and falling imports from China between 2018 and 2020." Nevertheless, USTR emphasized that "it remains the case that exports from Vietnam have been increasing during a time period in which the VND has been undervalued, including bilaterally against the USD in 2019, and during which time Vietnam was rapidly making significant purchases of FX that held down appreciation of its currency."

- Under "widely accepted norms reflected in international agreements and U.S. law," exchange rate action "should not be undertaken to derive an unfair advantage in international trade," and "should not prevent balance of payments adjustment." As evidence of such norms, USTR cited Article IV of the IMF Articles of Agreement, which provides that members shall "avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members." USTR also cited provisions of US law that aim to deter currency manipulation, namely Section 701 of the Trade Facilitation and Trade Enforcement Act of 2015 and Section 3004 of the Omnibus Trade and Competitiveness Act of 1988.

USTR concluded that, when examined in light of the "U.S. and international norms" regarding currency practices, the above factors "support a finding that Vietnam's acts, policies, and practices regarding the valuation of its currency, including excessive foreign exchange market interventions and other related actions, taken in their totality, are unreasonable under section 301."

Finding of burden or restriction on US commerce

USTR's report contains a brief section asserting that Vietnam's currency practices "burden or restrict U.S. commerce" within the meaning of Section 301, because (1) currency undervaluation effectively lowers the price of exported products from Vietnam into the United States; and (2) currency undervaluation raises the price of United States exports to Vietnam. However, USTR did not attempt to quantify the extent of the burden or restriction.

Outlook

USTR has not proposed to take any specific actions based on the above findings. Instead, its Federal Register notice simply acknowledges that USTR is now required to "determine what action, if any, to take under Section 301(b)," and that "[t]hese matters will be addressed in subsequent proceedings under Section 301." As a result, the determination on what action, if any, to take based on USTR's findings will be left to the incoming Biden administration. USTR will not be required to make this determination until October 2, 2021, and the implementation of any Section 301 action could be delayed for up to 180 days thereafter.

Incoming Biden administration officials have not indicated how they plan to proceed with the Section 301 investigation of Vietnam's currency practices, nor have they disclosed in detail their broader strategy for responding to alleged currency manipulation. During the campaign, President-elect Biden pledged to "[t]ake aggressive trade enforcement actions" in response to currency manipulation, but he did not specify whether he views the unilateral imposition of tariffs under Section 301 as an appropriate remedy. He also did not indicate whether he would continue the Trump administration's policy of using the countervailing duty statute to impose tariffs on specific imported goods that are found to benefit from foreign currency undervaluation and that cause material injury to a US industry. Though both approaches would be controversial, the former would be particularly so, given the recent finding of a WTO panel that the Trump administration's unilateral use of Section 301 against China violated WTO rules. The US business community has also expressed concern that a Section 301 action against Vietnam would result in retaliatory tariffs against US exports, as was the result of the Section 301 action targeting China. The Biden administration might therefore seek to resolve the issue through other means, such as diplomatic engagement.

Safeguard Measure on Large Residential Washers Extended for Two Years

On January 14, President Trump issued a Proclamation extending the global safeguard measure on imports of large residential washers for an additional two years (*i.e.*, until February 7, 2023). The safeguard measure has been in effect since February 7, 2018, and consists of tariff-rate quotas (TRQs) on imports of large residential washers and certain parts thereof. The Proclamation adopts the remedies recommended by the US International Trade Commission (ITC) in its December 2020 report to the President, in which the Commission: (1) found that the extension of the safeguard measure was necessary to prevent or remedy serious injury to the domestic industry; and (2) found evidence that the domestic industry is making a positive adjustment to import competition. The ITC initiated

its investigation in response to a petition filed by Whirlpool Corporation, which had sought a three-year extension of the safeguard measure.

We provide an overview of the ITC's findings and the Proclamation extending the safeguard measure below.

ITC Report on Extension of the Global Safeguard Measure

Following receipt the petition filed by Whirlpool Corporation, the Commission, effective August 3, 2020, instituted an investigation under section 204(c) of the Tariff Act to determine (1) whether the safeguard action on large residential washers and parts continues to be necessary to prevent or remedy serious injury; and (2) whether there is evidence that the domestic industry is making a positive adjustment to import competition. Section 203(e)(1)(B) of the Act permits the President to extend a safeguard measure where the Commission reaches affirmative findings in an investigation under Section 204(c), provided that the total duration of the measure, including any extensions, may not exceed 8 years.

On December 8, 2020, the Commission issued a report containing the following findings:

- The Commission determined that the safeguard action continues to be necessary to prevent or remedy serious injury to the domestic industry. The Commission cited "LG's and Samsung's history of filling [the TRQs] quickly, maintaining large inventories of imported LRWs, and selling imported LRWs at low prices," concluding that these producers likely "will continue to import LRWs in substantial volumes and at low prices after expiration of the measure[.]" The Commission also took the view that LG's and Samsung's new US plants, which became operational in 2018, "did not actually prevent LG and Samsung from importing large volumes of low-priced LRWs during the remedy period." To the contrary, LG and Samsung "remained dependent on imported LRWs, rapidly filling the TRQ in each period and importing substantial volumes of LRWs at high above-quota tariff rates, and plan to continue importing LRWs." The Commission therefore expects "that LG and Samsung will seek to expand their market share after expiration of the measure using imported LRWs[.]"

  In examining the domestic industry's performance over the period of relief, the Commission chose to consider "the differing performance of two groups of producers, the continuous producers (Whirlpool and GE) and the start-up producers (LG and Samsung)," as the two groups "are differently situated and faced different impacts from imports over the period." The Commission found that, although the performance of the domestic industry as whole improved according to many measures, these improvements "largely resulted from the commencement of production and shipments by LG's and Samsung's new U.S. plants in 2018[.]" The ramping up of those plants "masked some of the deteriorating performance of the continuous producers Whirlpool and GE," who experienced declining production and US shipments that "contributed to weak financial performance during the remedy period." At the same time, LG and Samsung also faced "unanticipated challenges" in ramping up their new US plants.

  Based on the above and other factors, the Commission concluded that "the domestic industry will confront intense-low priced import competition after expiration of the measure," and that such imports "are likely to cause further financial losses that will force the domestic industry to curtail the capital and research and development expenditures essential to complete a positive adjustment to import competition."

- The Commission found that the domestic industry is making progress in its efforts to make a positive adjustment to import competition. Specifically, it noted that "Whirlpool and GE implemented various aspects of their respective adjustment plans, developing and introducing new models and enhancing their production facilities, and LG and Samsung constructed and began ramping up their new U.S. LRW production facilities." However, the "continuous producers'" weak performance during the remedy period prevented the industry from making "additional necessary adjustments," particularly Whirlpool's plans to increase the productivity of its LRW production facility. The Commission therefore concluded that, although the domestic industry is making a positive adjustment to import competition, that adjustment remains incomplete.

- Having made an affirmative determination, the Commission recommended that the President:
  - Extend the action for an additional two years, or until February 7, 2023, maintaining the TRQ on imports of LRWs with an in-quota volume level of 1.2 million units, an in-quota tariff rate of 15 percent in the fourth year, decreasing to 14 percent in the fifth year, and an above-quota tariff rate of 35 percent in the fourth year, decreasing to 30 percent in the fifth year;
  - Maintain the separate TRQ on imports of covered parts, with a tariff of 35 percent on imports above 110,000 units in the fourth year and a tariff of 30 percent on imports above 130,000 units in the fifth year; and
  - Continue to administer the annual quota on a quarterly basis.

Presidential Proclamation Extending Safeguard Relief

In the Proclamation, President Trump concurred with the ITC's findings that the safeguard measure continues to be necessary and that the domestic industry is making a positive adjustment to import competition. Accordingly, the Proclamation extends the safeguard measure for two years, following the ITC's recommendations with respect to the applicable TRQ volumes and tariff rates, as shown below:

	Initial Safeguard Measure			Extension	
Period	**Year 1** 2/7/2018–2/6/2019	**Year 2** 2/7/2019–/6/2020	**Year 3** 2/7/2020–2/7/2021	**Year 4** 2/8/2021–2/7/2022	**Year 5** 2/8/2022–2/7/2023
First 1.2 million units of imported finished washers	20%	18%	16%	15%	14%
All subsequent imports of finished washers	50%	45%	40%	35%	30%
Tariff on covered parts	50%	45%	40%	35%	30%
Covered parts excluded from tariff	50,000 units	70,000 units	90,000 units	110,000 units	130,000 units

The Proclamation does not modify the list of countries subject to the safeguard measure. Accordingly, imports of washers and covered washer parts that are the product of Canada will continue to be excluded and will not be counted towards the TRQ limits, as will imports from certain developing country WTO Members. However, the Proclamation authorizes the US Trade Representative (USTR) to terminate the exclusion of a developing country where (1) the country accounts for more than 3 percent of total imports; (2) imports from all developing countries with less than 3 percent import share collectively account for more than 9 percent of total imports; or (3) a country no longer qualifies as a developing country. USTR may also modify the TRQ on washer parts "with a quantitative restriction on covered washer parts at a level that USTR considers appropriate," if USTR determines that the out-of-quota quantity of imports "has increased by an unjustifiable amount and undermines the effectiveness of the safeguard measure[.]"

President Biden Issues Temporary Regulatory Freeze

On January 20, 2021, President Biden, through the White House Chief of Staff, issued a memorandum to direct the heads of Executive departments and agencies to freeze currently pending regulatory review processes and

submission of rules for review. Additionally, with respect to rules that have been published in the *Federal Register* but have not yet taken effect, the memorandum requests agencies to consider postponing the implementation of such rules for at least 60 days. As one of the first executive actions by the President following his inauguration, the memorandum stated that the purpose of the directive is to "ensure that the President's appointees or designees have the opportunity to review any new or pending rules."

The memorandum directs that, consistent with applicable law and applicable Executive Orders (EO) concerning regulatory management and subject to any exceptions allowed by the Director of the Office of Management and Budget (the "OMB Director"),[1] agency heads do as follows:

- Propose or issue no rule in any manner — including by sending a rule to the Office of the Federal Register (the "OFR") — until a department or agency head appointed or designated by the President after noon on January 20, 2021, reviews and approves the rule.[2]
- For rules that have been sent to the OFR but not published in the *Federal Register*, immediately withdraw them from the OFR for review and approval as described above.
- For rules that have been issued in any manner (including publication in the *Federal Register*), but have not taken effect, consider postponing the rules' effective dates for 60 days from the date of this memorandum, for the purpose of reviewing any questions of fact, law, and policy the rules may raise. Where appropriate,
    - Consider opening a 30-day public comment period about issues of fact, law, and policy raised by those rules, and consider pending petitions for reconsideration involving such rules. Where appropriate and necessary to continue review of said questions, consider further extending the initial 60-day postponement, including public comment period.
        - For those rules that raise substantial said questions, agencies should notify the OMB Director and take further appropriate action in consultation with the OMB Director.
- Notify the OMB Director promptly of any rules that should be excluded from the above directives because those rules affect critical health, safety, environmental, financial, or national security matters, or for some other reason. The OMB Director will review any such notifications and determine whether such exclusion is appropriate under the circumstances.
- Exclude from the above directives any rules subject to statutory or judicial deadlines and identify such exclusions to the OMB Director as soon as possible.

The memorandum defines "rule" as set forth in 5 USC 551(4)[3] and also to include any "regulatory action," as defined in section 3(e) of EO 12866 as amended,[4] and any "guidance document" as defined in section 3(g) of EO 13422.[5]

The memorandum also indicates that it could be modified or extended in the future to "request that agency heads consider taking steps to address actions" that the Biden administration considers were undertaken by the Trump

[1] The OMB Director allows certain exceptions for emergency situations or other urgent circumstances relating to health, safety, environmental, financial, or national security matters, or otherwise.

[2] This power of review and approval can be delegated to any other person so appointed or designated by the President, consistent with applicable law.

[3] Per 5 USC 551(4), "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

[4] "Regulatory action" means any substantive action by an agency (normally published in the *Federal Register*) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

[5] "Guidance document" means any agency statement of general applicability and future effect that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.

administration to "frustrate the purpose underlying this memorandum" (i.e., to circumvent review of any new or pending rules by the incoming Biden administration's appointees or designees).

The memorandum can be found **here**.

United Arab Emirates Excluded from Section 232 Tariff on Aluminum Imports in Last-Minute Move by President Trump

On January 20, President Trump announced that the United States will exclude aluminum articles from the United Arab Emirates (UAE) from the 10% tariff applied to aluminum imports under Section 232 of the Trade Expansion Act. In a Proclamation issued just prior to his departure from office, President Trump stated that that the two countries have agreed on "alternative means to address the threatened impairment to [US] national security posed by aluminum article imports from the United Arab Emirates." Specifically, aluminum imports from the UAE will be subject to annual quotas that will allow such imports to "remain close to historical levels without meaningful increase," instead of being subject to the 10% tariff. The UAE is a major supplier of aluminum to the United States, ranking behind Canada as the second-largest source of the United States' aluminum imports in 2019.

The Proclamation establishes three separate "annual aggregate limits" (*i.e.*, absolute quotas) on aluminum imports from the UAE, which will apply for the period starting with calendar year 2021 and for subsequent years, unless modified or terminated. All aluminum article imports since January 1, 2021 will count towards the annual aggregate limits for the 2021 calendar year. As with other Section 232 quota regimes, imports in excess of the quota volumes will not be permitted. The quota volumes are as follows:

Product Category	Quota
Wrought aluminum, provided for in headings 7604, 7605,7606,7607, 7608 or 7609; and castings and forgings of aluminum provided for in subheading 7616.99.51	26,467,182 kilograms
Unwrought aluminum, not alloyed, provided in subheading 7601.10	149,482,620 kilograms
Unwrought aluminum, alloyed, provided for in subheading 7601.20	454,050,450 kilograms

Imports of aluminum articles from the UAE will no longer be subject to the 10% Section 232 tariff as of 12:01 a.m. eastern standard time on February 3, 2021.

According to President Trump's Proclamation, the new quota regime will provide "effective, long-term alternative means to address the contribution of the United Arab Emirates to the threatened impairment to our national security by restraining aluminum article exports from the United Arab Emirates to the United States, limiting export surges by the United Arab Emirates, and discouraging excess aluminum capacity and excess aluminum production." The change also will make it "more likely that domestic capacity utilization will be reasonably commensurate with the target level recommended in the [Commerce Department's] report" on the Section 232 investigation of aluminum imports. The Proclamation indicates that the Trump administration negotiated the quota agreement with the UAE in light of the "important security relationship" between the two countries, including their "shared commitment to supporting each other in addressing national security concerns in the Middle East, particularly in countering Iran's malign influence there; combatting violent extremism around the world; and maintaining the strong economic ties between {the} countries."

The Biden administration has not commented publicly on President Trump's last-minute decision to exclude the UAE from the Section 232 tariff on aluminum. During the campaign, President Biden criticized the application of the Section 232 tariffs to the the United States' "closest allies" and pledged to "review" them upon taking office, but he has not yet committed to any particular course of action.

President Biden Issues "Buy American" Executive Order, Following Last-Minute Changes by Trump Administration

On January 25, President Biden signed an Executive Order that contemplates increasing the domestic content thresholds and price preferences for domestic goods under the Buy American Act ("BAA," 41 U.S.C. §§ 8301-8305).[6] The Order follows the Federal Acquisition Regulatory Council's issuance of a final rule on January 19 (the Trump administration's last full day in office) that increased the domestic content thresholds and price preferences under the BAA pursuant to a July 2019 Executive Order issued by President Trump.[7] President Biden's Order directs the FAR Council to "consider" proposing further increases, along with changes to the methodology used to measure domestic content under the BAA. The Order also establishes a new, centralized process aimed at minimizing federal agencies' use of the waivers and exceptions authorized by the BAA, and by other statutes that require or give preference to the use of domestic content in federal procurement. These changes are intended to advance the Biden administration's policy to utilize "the full force of current domestic preferences to support America's workers and businesses[.]"

We provide an overview of the Order below.

Policy and Scope

The Order establishes the Biden Administration's policy "that the United States Government should, consistent with applicable law, use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States." Certain provisions of the Order relate specifically to the calculation of domestic content and price preferences for domestic goods under the BAA, which requires federal agencies to purchase "domestic end products" and use "domestic construction materials," subject to various exceptions. Other directives set forth in the Order, including the new waiver review process, apply more broadly to "all statutes, regulations, rules, and Executive Orders relating to Federal financial assistance awards or Federal procurement, including those that refer to 'Buy America' or 'Buy American,' that require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured goods offered in the United States." Such statutes would include the various "Buy America" laws (*e.g.*, 49 U.S.C. § 5323(j) and 23 U.S.C. § 313) that require the use of domestic content in certain federally funded infrastructure projects. The Order also specifies that such statutes "include laws requiring domestic preference for maritime transport, including the Merchant Marine Act of 1920 (Public Law 66-261), also known as the Jones Act." The Jones Act generally prohibits foreign-flag, foreign-constructed, foreign-owned, or foreign-crewed vessels from engaging in "Coastwise Trade" (*i.e.*, from carrying goods from one U.S. port to another U.S. port).[8]

Changes to Domestic Content Threshold and Price Preferences Under the Buy American Act

Section 8 of the Executive Order concerns the Buy American Act only, whose requirements, exceptions, and benefits can differ from those of other government-procurement rules. For example, waivers under the Trade Agreements Act ("TAA"), 19 U.S.C. § 2511 and 48 C.F.R. §§ 25.400 through 25.408, can limit Buy American Act's applicability by requiring equal treatment of U.S. and foreign inputs when the procurement uses materials from a country that has signed a relevant trade agreement with the United States, is by a governmental unit that the agreement positively

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[6] *Ensuring the Future Is Made in All of America by All of America's Workers*, Executive Order 14005, January 25, 2021 (86 Fed. Reg. 7475).

[7] *Federal Acquisition Regulation: Maximizing Use of American-Made Goods, Products, and Materials*, Department of Defense, General Services Administration, and National Aeronautics and Space Administration, January 19, 2021 (86 Fed. Reg. 6180). This rule implements President Trump's Executive Order 13881 of July 15, 2019 on *Maximizing Use of American-Made Goods, Products, and Materials*.

[8] 46 U.S.C. §§ 861-889.

lists and does not expressly exclude, is sufficiently high in value (because agreements sometimes exclude procurements below monetary thresholds), and involves supplies or services that the agreement does not expressly exclude. But importantly, the TAA does not affect the applicability of certain other statutes to other procurements. Moreover, country-of-origin rules for government procurement purposes differ from country-of-origin rules for purposes of determining ordinarily, preferential, and trade-remedies duties, as well as for evaluating "Made in USA" claims that the Federal Trade Commission oversees. To determine whether the following rules might affect a particular procurement, therefore, contractors must carefully examine the granting agency, the project's nature, the statutory source of the funds, the country from which any foreign inputs used in the project originate, and the like.

Section 8 of the Executive Order provides that, by July 24, 2021, the FAR Council "shall consider" proposing for notice and public comment amendments to the applicable provisions in the Federal Acquisition Regulation ("FAR," Title 48 C.F.R), "consistent with applicable law," that would do the following:

- Replace the current cost-based "component test" with a value-based methodology. The FAR currently uses a two-part test to define a "domestic end product" or "domestic construction material" for purposes of the BAA.[9] The first part of the test considers whether the good was "manufactured in the United States[.]" The second part of the test, referred to in the FAR as the "component test," considers whether the cost of the good's components mined, produced, or manufactured in the United States exceeds a specified percentage of the cost of all of the good's components. President Biden's Order directs the FAR Council to consider proposing regulations that would replace the current component test with a new test "under which domestic content is measured by the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity," rather than cost.

- Increase domestic content thresholds. The FAR Council's January 19 Final Rule increased the domestic content threshold[10] for most "domestic end products" and "domestic construction materials" to 55% of the cost of all components, from the previous level of 50%.[11] The Final Rule also established a new, higher threshold for iron and steel products, providing that, to meet the definition of a "domestic end product" or "domestic construction material," the cost of foreign iron and steel must constitute "less than 5 percent of the cost of all the components used" in the end product or construction material.[12] These increases were adopted pursuant to President Trump's Executive Order of July 2019. President Biden's Order directs the FAR Council to consider proposing regulations that would further "[i]ncrease the numerical threshold for domestic content requirements for end products and construction materials," though it does not specify any target percentages.

- Increase the price preferences for domestic goods. The BAA does not prohibit federal agencies from purchasing foreign end products or using foreign construction materials. Instead, it encourages the use of domestic end products and construction materials by imposing a "price preference" for such goods, applied when the procuring agency assesses the "reasonableness" of the cost of domestic offers.[13] Where a domestic offer is not the "low offer," the price preference is applied by adding a specified percentage to the price of the foreign low offer, inclusive of duty.[14] Previously, the FAR provided a price preference of 6 percent (where the lowest domestic offer was from a large business concern) or 12 percent (where the lowest domestic offer was from a small business concern). However, the FAR Council's January 19 Final Rule increased the price preference to 20 percent for large businesses and 30 percent for small businesses.[15] President Biden's Order directs the FAR

[9] 48 C.F.R. §§ 25.003 and 25.101(a). The FAR Council's January 19 Final Rule renamed the "component test," which is now described in the FAR as the "domestic content test," though the methodology remains the same.

[10] This term refers to the percentage of domestic content required to satisfy the component test.

[11] 48 C.F.R. § 25.003, 25.101(a)(2)(i), and 25.201(a)(2)(i).

[12] 48 C.F.R. § 25.003, 25.101(a)(2)(ii), and 25.201(a)(2)(ii).

[13] 48 C.F.R. § 25.105.

[14] 48 C.F.R. § 25.105(b).

[15] 48 C.F.R. § 25.105(b)(1) and (2).

Council to consider proposing regulations that would further "increase the price preferences for domestic end products and domestic construction materials," but does not specify any target percentages.

The Order does not require the FAR Council to adopt any of the changes proposed above. The Order provides that the FAR Council "shall consider and evaluate public comments on any regulations proposed" and "shall promptly issue a final rule, if appropriate and consistent with applicable law and the national security interests of the United States."

The Order does not rescind or reference the FAR Council's January 19 Final Rule, which took effect on January 21 and applies to solicitations issued on or after February 22, 2021 and resultant contracts. Moreover, the Final Rule does not appear to have been revoked or delayed by the Biden administration's "regulatory freeze" Memorandum of January 20, which directed federal agencies to "consider" postponing the effective dates of "rules that have been published in the *Federal Register*, or rules that have been issued in any manner, but have not taken effect," for the purpose of reviewing any questions of fact, law, and policy the rules may raise.[16] At this stage, there is not yet a clear indication that the Biden administration will, in accordance with the Memorandum, postpone or reconsider the application of the Final Rule. Thus, the amendments provided for in the Final Rule will likely become applicable on February 22, and the FAR Council will likely consider proposing further revisions of the FAR in line with President Biden's Order.

"Updating and Centralizing" Waiver Processes

As mentioned above, several procurement statutes covered by the Order contain waiver provisions that allow agencies to deviate from the requirement to purchase or give preference to domestic goods. For example, the BAA and its implementing regulations identify several circumstances in which an agency may purchase foreign end products, or permit the use of foreign construction materials (*e.g.*, where the procurement of domestic goods or the use of domestic construction materials would be "impracticable" or "inconsistent with the public interest";[17] or where such goods are unavailable "in sufficient and reasonably available commercial quantities and of a satisfactory quality[.]"[18] Certain "Buy America" statutes applicable to infrastructure projects provide for similar waivers, including where consistent with the "public interest," where the materials are not produced in the United States in sufficient quantities or of a satisfactory quality, or where the inclusion of domestic materials will raise the cost of the overall project by more than 25%.[19]

President Biden's Order mandates the establishment of a new "Made in America Office" within the Office of Management and Budget ("OMB") that will review proposed agency decisions to grant waivers from the Buy American Act and the other procurement statutes covered by the Order. Under the new, "centralized" process established by the Order, an agency must provide the Director of the Made in America Office with a description of any proposed waiver and "a detailed justification for the use of goods, products, or materials that have not been mined, produced, or manufactured in the United States." The Director may then review (or decline to review) the submission to determine whether issuing the proposed waiver "would be consistent with applicable law" and with the Biden administration's policy "to maximize the use of goods, products, and materials produced in, and services offered in, the United States."

A negative determination by the "Made in America Director" would not necessarily preclude the issuance of a waiver. Rather, in the event of a negative determination, the proposed waiver will be returned to the head of the relevant agency "for further consideration." In the event that there are "disagreements or conflicts between the Made in America Director and the head of any agency" regarding a proposed waiver, the administration will resolve such

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[16] *Memorandum from Ronald A. Klain, Assistant to the President and Chief of Staff, for the Heads of Executive Departments and Agencies on Regulatory Freeze Pending Review*, January 20, 2021 (86 Fed. Reg. 7424).

[17] 41 U.S.C. §8302(a)(1); 41 U.S.C. §8303(b)(3); 48 C.F.R. §25.103(a); 48 C.F.R. §25.202(a)(1).

[18] 41 U.S.C. §8302(a)(2)(B); 41 U.S.C. §8303(b)(1)(B); 48 C.F.R. §25.103(b); 48 C.F.R. §25.202(a)(2).

[19] 22 U.S.C. § 313(b).

conflicts "in accordance with procedures" set forth in Executive Order 12866 of September 30, 1993. Those procedures provide that, where the Administrator of the OMB's Office of Information and Regulatory Affairs cannot resolve a disagreement between OMB and any agency, it shall be resolved "by the President, or by the Vice President acting at the request of the President[.]"

Other Requirements

Section 5 of the Order contains additional language aimed at discouraging the use of public interest waivers to procure products that benefit from alleged unfair trade practices. Section 5 states that, "[t]o the extent permitted by law, before granting a waiver in the public interest, the relevant granting agency shall assess whether a significant portion of the cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured goods or the use of injuriously subsidized steel, iron, or manufactured goods." The granting agency "shall integrate any findings from the assessment into its waiver determination as appropriate." However, this requirement is unlikely to have any substantive impact, as federal agencies already face a nearly-identical requirement pursuant to President Trump's "Buy American, Hire American" Executive Order of April 18, 2017.[20]

Other provisions of President Biden's Order seek further to limit the use of waivers and exceptions. For example, Section 9 would enhance scrutiny of any additions to the list of domestically nonavailable articles set forth in section 25.104(a) of the FAR and would thus provide that any proposed updates to the list must be reviewed in advance "in consultation with the Secretary of Commerce and the Made in America Director[.]" Section 10 directs the FAR Council to review the existing constraints in the FAR "on the extension of the requirements in Made in America Laws to information technology that is a commercial item," and to develop recommendations for lifting those constraints.[21]

Outlook

Though President Biden's Order will have little immediate effect, it sets the stage for potentially significant changes to the U.S. government's implementation and enforcement of the Buy American Act. The Order contemplates not only the further increase of domestic content thresholds and price preferences (on top of the recent increases), but also a potential overhaul of the methodology for assessing domestic content. Depending on the extent of any such changes, they may force some companies to alter their sourcing and manufacturing practices to continue benefiting from domestic preferences under the BAA. Signaling more stringent enforcement of the BAA and similar statues going forward, the Biden administration has also made clear that the purpose of its new waiver review process is to "crack down on unnecessary waivers."

On the other hand, the Order makes clear that its directives are to be implemented "consistent with applicable law," and some applicable statutes will limit the Order's reach. As mentioned above, applicable law here would include the Trade Agreements Act, which in certain circumstances can limit the Buy American Act's applicability by requiring US government procurements to treat as if they were domestic those materials originating in a country with which the United States has a covered trade agreement (*e.g.*, the WTO Government Procurement Agreement (GPA)) or a free trade agreement).

During the 2020 campaign, President Biden suggested that he would renegotiate existing trade agreements to facilitate an expansion of Buy American preferences, pledging that he would "work with allies to modernize international trade rules and associated domestic regulations regarding government procurement to make sure that the U.S. and allies can use their own taxpayer dollars to spur investment in their own countries." The Executive Order does not mention this plan. However, the Order does require federal agencies to prepare new bi-annual reports assessing, among other things "spending as a result of waivers issued pursuant to the Trade Agreements Act…separated by country of origin," indicating that the administration intends to further study the issue.

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[20] *Buy American and Hire American*, Executive Order No. 13788, April 18, 2017 (82 Fed. Reg. 18837) at Sec. 4(c).

[21] Such constraints are set forth in 48 C.F.R. §25.103(e) (supplies) and 48 C.F.R. §25.202(a)(4) (construction materials).

The Order can be viewed **here**

US Department of Commerce Delays Effective Date of Rule Establishing Aluminum Import Monitoring and Analysis System

On January 22, 2021, the US Department of Commerce (DOC) announced that it is delaying the effective date of its January 25 final rule establishing an "Aluminum Import Monitoring and Analysis System" (AIM system) until March 29, 2021. DOC also is soliciting comments on the final rule. This rule originally was scheduled to take effect on January 25, 2021. Similar to DOC's existing Steel Import Monitoring and Analysis (SIMA) system, the AIM system would require importers to obtain an import license for covered aluminum products, and will enable DOC to collect and publish data on aluminum trade.

DOC stated the delay of the rule's effective date "is necessary to allow the incoming Administration time to review the Final Rule and consider any additional comments before implementation." It further stated that, "unless otherwise announced, the majority of the final rule will be effective on March 29, 2021" and that "[t]he remaining portions of the final rule concerning an option to state "unknown" for certain fields on the aluminum license form will be effective on December 24, 2021, as originally stated in the final rule."

The Final Rule provided that license applicants may, until December 24, 2021, state "unknown" in the field that requires identification of (1) the country of smelt for the largest volume of primary aluminum (i.e., the country where the largest volume of new aluminum metal is produced from alumina (or aluminum oxide) by the electrolytic Hall-Héroult process); and (2) the country of smelt for the second largest volume of primary aluminum. It further provided that, beginning on December 24, 2021, filers will no longer be able to state "unknown" and will be required to enter the requested information in these fields. DOC's new Federal Register notice indicates that this grace period will not be affected by the delay of the effective date of the Final Rule.

The delay of Final Rule's effective date follows the Biden administration's "Regulatory Freeze" memorandum of January 20, which directed agency heads to "consider" postponing the implementation rules that had been published in the Federal Register, but had not yet taken effect, as of January 20, in order to review any questions of fact, law, and policy the rules may raise. The memorandum also suggested that agency heads consider opening a 30-day public comment period about issues of fact, law, and policy raised by such rules.

DOC has invited interested parties to comment on all aspects of the Final Rule and the AIM system. All written comments on the final rule must be filed through the Federal eRulemaking Portal: **http://www.regulations.gov** (docket ITA-2021-0001). Comments must be received no later than **February 26, 2021**. DOC will not accept comments containing confidential information.

The AIM system website (https://www.trade.gov/aluminum) continues to be operational. However, licenses will not be required for covered aluminum imports until on or after March 29, 2021.

The Federal Register notice is available **here**.

US International Trade Commission Institutes Fact-Finding Investigation Concerning Trade and Economic Effects of Foreign Censorship on US Businesses

On January 26, the US International Trade Commission (ITC) announced that it has instituted a fact-finding investigation under Section 332 of the Tariff Act concerning "the effects of foreign censorship policies and practices on businesses in the United States." Former Senate Finance Committee Chairman Chuck Grassley (R-IA) requested the investigation on behalf of the Finance Committee in a January 4 letter to the ITC.

Sen. Grassley's letter cites a June 30, 2020 hearing held by the Senate Finance Subcommittee on International Trade, Customs and Global Competitiveness, concerning "Censorship as a Non-Tariff Barrier to Trade," as the impetus for the Committee's request. According to Sen. Grassley, this hearing revealed "how foreign government censorship adversely impacts U.S. businesses and citizens[.]" Sen. Grassley expressed particular concern that "it

appears foreign governments in some cases try to apply their censorship practices extraterritorially." In light of these concerns, the letter requested that the ITC produce a report containing "detailed information" on the following:

- Identification and descriptions of various foreign censorship practices, in particular any examples that U.S. businesses consider to impede trade or investment in key foreign markets. The description should include to the extent practicable:
    - the evolution of censorship policies and practices over the past 5 years in key foreign markets;
    - any elements that entail extraterritorial censorship; and
    - the roles of governmental and non-governmental actors in implementation and enforcement of the practices.
- To the extent practicable, including through the use of survey data, an analysis of the trade and economic effects of such policies and practices on affected businesses in the United States and their global operations. The analysis should include to the extent practicable, quantitative and qualitative impacts of the identified policies, including by reference, where identifiable, to:
    - impact on employment;
    - direct costs (e.g., compliance and entry costs);
    - foregone revenue and sales;
    - self-censorship; and
    - other effects the Commission considers relevant for the Committee to know.

Sen. Grassley's letter defines "censorship" as "the prohibition or suppression of speech or other forms of communication[.]" It also specifically identifies "technological measures that restrict digital trade" as among the "many tools" that foreign governments use to carry out censorship. Sen. Grassley has requested that the ITC deliver its report on the investigation within 18 months.

The ITC instituted its Section 332 investigation on January 26. Consistent with the Committee's request that the investigation be informed by a survey of businesses in the United States, the ITC will hold a public hearing and will accept written comments on the investigation. The schedule for the investigation is as follows:

- August 24, 2021: Deadline for filing requests to appear at the public hearing.
- September 2, 2021: Deadline for filing prehearing briefs and statements.
- September 7, 2021: Deadline for filing electronic copies of oral hearing statements.
- September 14, 2021: Public hearing.
- September 21, 2021: Deadline for filing posthearing briefs and statements.
- October 1, 2021: Deadline for filing all other written submissions.
- July 5, 2022: Transmittal of Commission report to the Committee.

The ITC intends to make its final report abvailable to the public "in its entirety."

As noted above, the Finance Committee's request for the investigation stems from a June 30, 2020 hearing of the Subcommittee on International Trade, Customs and Global Competitiveness concerning "Censorship as a Non-Tariff Barrier to Trade." During that hearing, then-Subcommittee Chairman John Cornyn (R-TX) expressed concern in

particular about the alleged “unfair trade practices of foreign governments and especially China and Russia[.]” He took the position that, although WTO rules provide exceptions to the principles of National Treatment and Most-Favored Nation Treatment for reasons related to “public morals” and national security, there is “no exception for a country to restrict trade because it deems something ‘politically unacceptable.’” Accordingly, Sen. Cornyn expressed interest in exploring whether “the suppression of information, data, goods, and services via digital media by countries such as China constitutes a trade barrier in violation of WTO, multilateral, and bilateral agreements and practices,” and “what remedies are available to address the abuse of censorship as a non-tariff barrier to trade.” The Office of the US Trade Representative (USTR) also touched on this issue in its most recent annual report on China’s WTO compliance, alleging that “China’s Internet firewall and the Party’s regular censorship of audio-visual and print media…create distortions in China’s economy, and these distortions affect the ability of foreign companies to operate and compete effectively in China’s market.” Though the ITC’s findings in the Section 332 investigation may spur greater interest in these issues, the United States historically has not sought to address concerns about alleged foreign censorship through trade policy.

Petitions and Investigations

US Department of Commerce Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Vertical Shaft Engines from China

On January 5, 2021, the US Department of Commerce (DOC) announced affirmative final determinations in the antidumping duty (AD) and countervailing duty (CVD) investigations of vertical shaft engines between 225cc and 999cc and parts thereof (large vertical shaft engines) from China. In its investigations, DOC determined that exporters have sold large vertical shaft engines in the United States at dumping margins ranging from 177.65 percent to 468.33 percent. In addition, DOC determined that exporters of these products received countervailable subsidies at rates ranging from 17.75 percent to 19.29 percent.

The petitioner in these investigations is the Coalition of American Vertical Engine Producers, whose members are Kohler Co. (Kohler, WI) and Briggs & Stratton Corporation (Wauwatosa, WI). The merchandise covered by this investigation consists of spark-ignited, non-road, vertical shaft engines, whether finished or unfinished, whether assembled or unassembled, primarily for riding lawn mowers and zero-tum radius lawn mowers. Engines meeting this physical description may also be for other non-hand-held outdoor power equipment such as, including but not limited to, tow-behind brush mowers, grinders, and vertical shaft generators. The subject engines are spark ignition, single or multiple cylinder, air cooled, internal combustion engines with vertical power take off shafts with a minimum displacement of 225 cubic centimeters (cc) and a maximum displacement of 999cc. Typically, engines with displacements of this size generate gross power of between 6.7 kilowatts (kw) to 42 kw.

The engines subject to this investigation are typically classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings: 8407.90.1020, 8407.90.1060, and 8407.90.1080. The engine subassemblies that are subject to this investigation enter under HTSUS 8409.91.9990. Engines subject to this investigation may also enter under HTSUS 8407.90.9060 and 8407.90.9080.

The US International Trade Commission (ITC) is currently scheduled to make its final injury determinations in these investigations on or about February 18, 2021. If the ITC makes affirmative final injury determinations, DOC will issue AD and CVD orders on imports of these products from China. If the ITC makes negative final determinations of injury, the investigations will be terminated, and no orders will be issued.

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

US Department of Commerce Issues Affirmative Final Determination in Antidumping Duty Investigation of Difluoromethane (R-32) from China

On January 12, 2021, the US Department of Commerce (DOC) announced its affirmative final determination in the antidumping duty (AD) investigation of difluoromethane (R-32) from China. In its investigation, DOC determined that exporters from China have sold R-32 in the United States at dumping margins ranging between 161.49 percent to 221.06 percent.

The petitioner in this investigation is Arkema, Inc. (King of Prussia, PA). The merchandise covered by this investigation is difluoromethane (R-32), or its chemical equivalent, regardless of form, type or purity level. R-32 has the Chemical Abstracts Service (CAS) registry number of 75-10-5 and the chemical formula $CH_2 F_2$. R-32 is also referred to as difluoromethane, HFC-32, FC-32, Freon-32, methylene difluoride, methylene fluoride, carbon fluoride hydride, halocarbon R32, fluorocarbon R32, and UN 3252. Subject merchandise also includes R-32 and unpurified R-32 that are processed in a third country or the United States, including, but not limited to, purifying or any other processing that would not otherwise remove the merchandise from the scope of this investigation if performed in the country of manufacture of the in-scope R-32. R-32 that has been blended with products other than pentafluoroethane (R-125) is included within this scope if such blends contain 85% or more by volume on an actual percentage basis of R-32. Excluded from the current scope is merchandise covered by the scope of the antidumping

order on hydrofluorocarbon blends from the People's Republic of China. *See Hydrofluorocarbon Blends from the People's Republic of China: Antidumping Duty Order,* 81 FR 55436 (August 19, 2016) (the Blends Order).

R-32 is classified under Harmonized Tariff Schedule of the United States (HTSUS) subheading 2903.39.2035. Other merchandise subject to the current scope, including certain blends that are outside the scope of the Blends Order, may be classified under 2903.39.2045 and 3824.78.0020.

The US International Trade Commission (ITC) is currently scheduled to make its final injury determination on or around February 25, 2021. If the ITC makes an affirmative final injury determination, DOC will issue an AD order. If the ITC makes a negative final determination of injury, the investigation will be terminated, and no order will be issued.

The petitioner in the investigation alleged that imports of R-32 from China were valued at approximately $21.5 million in 2018.

US International Trade Commission Issues Negative Final Determination in Antidumping Investigation of 4th Tier Cigarettes from Korea

On January 5, 2021, 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 4th tier cigarettes from Korea that the US Department of Commerce (DOC) has determined are sold in the United States at less than fair value. In its investigation, DOC determined that exporters from South Korea had sold 4th tier cigarettes in the United States at a dumping margin of 5.48 percent.

As a result of the Commission's negative determination of injury, no antidumping duty order will be issued on 4th tier cigarettes from Korea. Chair Jason E. Kearns and Commissioners David S. Johanson and Amy A. Karpel voted in the negative. Vice Chair Randolph J. Stayin and Commissioner Rhonda K. Schmidtlein voted in the affirmative.

The merchandise covered by this investigation is certain tobacco cigarettes, commonly referred to as "4th tier cigarettes." The subject cigarettes are composed of a tobacco blend rolled in paper, have a nominal minimum total length of 7.0 cm but do not exceed 12.0 cm in total nominal length, and have a nominal diameter of less than 1.3 cm. Merchandise covered by this investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheading 2402.20.8000.

According to DOC, imports of 4th tier cigarettes from South Korea were valued at an estimated $82 million in 2019.

The ITC's public report on its investigation will be made available by February 9, 2021.

US International Trade Commission Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations Concerning Fluid End Blocks from China, Germany, India, and Italy

On January 6, 2021, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of fluid end blocks from China, Germany, India, and Italy. The US Department of Commerce (DOC) determined in December 2020 that exporters from Germany and Italy had sold fluid end blocks in the United States at dumping margins ranging from 3.82 to 70.84 percent, and 0.00 to 58.48 percent, respectively. In addition, DOC determined that exporters of these products from China, Germany, India, and Italy received countervailable subsidies at the following rates:

- 16.80 to 337.07 percent for China;
- 5.86 to 14.81 percent for Germany;
- 5.20 percent for India; and
- 3.12 to 44.86 percent for Italy.

As a result of the Commission's affirmative determinations, DOC will issue countervailing duty orders on imports of this product from China, Germany, India, and Italy and antidumping duty orders on imports of this product from Germany and Italy. ITC Chair Jason E. Kearns, Vice Chair Randolph J. Stayin, and Commissioners David S. Johanson, Rhonda K. Schmidtlein, and Amy A. Karpel voted in the affirmative.

The products covered by these investigations are forged steel fluid end blocks, whether in finished or unfinished form, and which are typically used in the manufacture or service of hydraulic pumps. The products included in the scope of this investigation may enter under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7218.91.0030, 7218.99.0030, 7224.90.0015, 7224.90.0045, 7326.19.0010, 7326.90.8688, or 8413.91.9055.

The petitioners in these investigations estimated that the value of imports of forged steel fluid end blocks in 2018 from China, Germany, India, and Italy was approximately $17.8 million, $23.3 million, $44.4 million, and $46.4 million, respectively.

The ITC's public report on its investigation will made available by February 9, 2021.

US International Trade Commission Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Prestressed Concrete Steel Wire Strand from Multiple Countries

On January 8, 2021, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of prestressed concrete steel wire strand from Argentina, Colombia, Egypt, Netherlands, Saudi Arabia, Taiwan, Turkey, and the United Arab Emirates that the U.S. Department of Commerce (DOC) has determined are sold in the United States at less than fair value and are subsidized by the government of Turkey. Chair Jason E. Kearns, Vice Chair Randolph J. Stayin, and Commissioners David S. Johanson, Rhonda K. Schmidtlein, and Amy A. Karpel voted in the affirmative.

As a result of the ITC's affirmative final determinations, DOC will issue a countervailing duty order on imports of this product from Turkey and antidumping duty orders on imports of this product from Argentina, Colombia, Egypt, Netherlands, Saudi Arabia, Taiwan, Turkey, and the United Arab Emirates. In December 2020, DOC issued its final determinations that exporters from the countries under investigation have sold PC strand in the United States at the following dumping margins:

- 60.40 percent for Argentina,
- 86.09 percent for Colombia,
- 29.72 percent for Egypt,
- 30.86 percent for the Netherlands,
- 194.40 percent for Saudi Arabia,
- 23.89 percent for Taiwan,
- 53.65 percent for Turkey, and
- 170.65 percent for the United Arab Emirates.

In addition, DOC determined that exporters from Turkey received countervailable subsidies at rates ranging from 30.78 percent to 158.44 percent.

The merchandise covered by these investigations is prestressed concrete steel wire strand (PC strand), produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand. PC strand is normally sold in the United States in sizes ranging from 0.25

inches to 0.70 inches in diameter. PC strand made from galvanized wire is only excluded from the scope if the zinc and/or zinc oxide coating meets or exceeds the 0.40 oz./ft2 standard set forth in ASTM-A-475. The PC strand subject to these investigations is currently classifiable under subheadings 7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (HTSUS).

According to DOC, imports of PC strand from the countries under investigation were approximately valued as follows in 2019:

- $2.3 million for Argentina;
- $9.6 million for Colombia;
- $345.9 thousand for Egypt;
- $1.6 million for the Netherlands;
- $1.4 million for Saudi Arabia;
- $3.0 million for Taiwan;
- $13.1 million for Turkey; and
- $2.3 million for the United Arab Emirates.

The ITC's public report on these investigations will be available by February 11, 2021.

US International Trade Commission Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Wood Mouldings and Millwork Products from China

On January 22, 2021, the US International Trade Commission (ITC) determined that a U.S. industry is materially injured by reason of imports of wood mouldings and millwork products from China that the U.S. Department of Commerce (DOC) has determined are subsidized and sold in the United States at less than fair value. Chair Jason E. Kearns and Commissioners David S. Johanson, Rhonda K. Schmidtlein, and Amy A. Karpel voted in the affirmative. Vice Chairman Randolph J. Stayin did not participate in these investigations.

As a result of the ITC's affirmative determinations, DOC will issue antidumping and countervailing duty orders on imports of these products from China. DOC determined in December 2020 that exporters from China have sold wood mouldings and millwork products in the United States at dumping margins ranging from 44.60 percent to 230.36 percent. In addition, DOC determined that exporters from China received countervailable subsidies at rates ranging from 20.56 percent to 252.29 percent.

The merchandise subject to these investigations consists of wood mouldings and millwork products that are made of wood (regardless of wood species), bamboo, laminated veneer lumber (LVL), or of wood and composite materials (where the composite materials make up less than 50 percent of the total merchandise), and which are continuously shaped wood or finger-jointed or edge-glued moulding or millwork blanks (whether or not resawn). The merchandise subject to this investigation can be continuously shaped along any of its edges, ends, or faces. Imports of wood mouldings and millwork products are primarily entered under the following Harmonized Tariff Schedule of the United States (HTSUS) numbers: 4409.10.4010, 4409.10.4090, 4409.10.4500, 4409.10.5000, 4409.22.4000, 4409.22.5000, 4409.29.4100, and 4409.29.5100. Imports of wood mouldings and millwork products may also enter under HTSUS numbers: 4409.10.6000, 4409.10.6500, 4409.22.6000, 4409.22.6500, 4409.29.6100, 4409.29.6600, 4418.20.4000, 4418.20.8030, 4418.20.8060, 4418.99.9095 and 4421.99.9780.

According to DOC, imports of wood mouldings and millwork products from Brazil and China in 2019 were valued at an estimated $315 million and $193 million, respectively.

The ITC's public report on these investigations will be available by March 1, 2021.

WTO Developments

USTR Expands Retaliatory Tariffs on EU Goods in WTO Dispute Over Airbus Subsidies

On December 30, 2020, the Office of the US Trade Representative (USTR) announced that it is expanding the list of EU goods that are subject to the United States' WTO-authorized retaliatory tariffs in the long-running dispute over subsidies provided to the European aircraft manufacturer Airbus (*European Communities and Certain member States — Measures Affecting Trade in Large Civil Aircraft* – DS316). The products added to the retaliation list include certain aircraft parts from France and Germany, certain non-sparkling wine from France and Germany, and certain cognac and other grape brandies from France and Germany. USTR stated that it is expanding the list because the EU's recent retaliatory tariffs on $4 billion worth of US exports – which the EU imposed as a result of the parallel WTO dispute over US subsidies to Boeing – were calculated using methodologies that "unfairly increased the amount of retaliation[.]"[1] The expansion of the United States' retaliation list will take effect on January 12.

In a Federal Register notice scheduled to be published on January 6, USTR raised two concerns about the methodologies used by the EU to exercise its WTO-authorized retaliation against the United States in the Boeing dispute:

- First, USTR asserts that "the methodology used by the EU to exercise its $4 billion authorization relies on a benchmark reference period affected by the economic downturn caused by the COVID pandemic." Under this methodology, the EU allegedly "was able to cover a greater volume of imports than if, like the United States, it had used data from a period when trade was not affected by the pandemic[.]" USTR therefore disputed the EU's assertion that its retaliatory action mirrors that taken by the United States in the Airbus case.

- In addition, USTR claims that the EU's valuation of its trade action "does not account for U.S. exports to the United Kingdom," even though US goods are subject to additional EU duties "up to and until the exit of the United Kingdom from EU customs territory is finalized." Therefore, in USTR's view, "the value of U.S. exports subject to tariffs is greater than the trade value the EU ascribes to the various covered tariff lines."

The Federal Register notice claims that the EU declined to address the aforementioned issues in recent discussions with the United States. USTR therefore has determined "to mirror the EU approach to exercising its [WTO Dispute Settlement Body] authorization by adjusting the reference period used for the U.S. trade action to mirror the August 2019 to July 2020 reference period used by the EU." According to USTR, the value of the US trade action as last revised on August 12, 2020 "is well below the $7.5 billion level authorized by the DSB" when calculated using this reference period. USTR accordingly "has determined to add products to the list of products currently subject to additional duties, while otherwise maintaining the trade action as last revised on August 12, 2020." USTR decided that the additional products "should be goods of France and Germany, as these countries have provided the greatest level of WTO-inconsistent large civil aircraft subsidies."

The products added to the US retaliation list include certain aircraft components from France and Germany (*i.e.*, fuselages and fuselage sections, wings and wing assemblies), which will be subject to a retaliatory tariff of 15%. Also added to the list are various non-sparkling wines, cognacs and other grape brandies from France and Germany, which will be subject to a retaliatory tariff of 25%. These additional tariffs will be effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern standard time on January 12, 2021.

The United States and the EU have expressed a strong preference to negotiate a settlement to their long-running dispute over aircraft subsidies, and such a settlement is strongly favored by US and EU business interests unrelated to the aircraft sector to which countermeasures have been applied. In its statement on the expanded retaliation list, USTR claimed that, "in order to not escalate the situation," it is adjusting the product coverage "by less than the full amount that would be justified utilizing the EU's chosen time period." Nevertheless, the European Commission

[1] *United States – Measure Affecting Trade in Large Civil Aircraft* (DS353).

stated that the latest US action “unilaterally disrupts the ongoing negotiation between the commission and USTR to find a settlement[.]” The Commission also appeared to downplay the likelihood of a negotiated settlement before President Trump leaves office on January 20, stating that “[t]he EU will engage with the new U.S. administration at the earliest possible moment to continue these negotiations and find a lasting solution.”