US Multilateral Trade Policy Developments

Japan External Trade Organization

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US Trade Policy

President Biden Orders Review of Supply Chain Risks in Critical Sectors

On February 24, President Biden signed an Executive Order (EO) directing federal agencies to perform a 100-day review of "supply chain risks" for four classes of products: (1) semiconductors; (2) high-capacity batteries, including for electric vehicles; (3) critical and strategic minerals, including rare earths; and (4) pharmaceuticals and their active ingredients. The EO also directs agencies to perform year-long reviews of supply chains in six critical sectors: (1) defense; (2) public health; (3) information technology; (4) transportation; (5) energy; and (6) food production. The reviews will seek to identify supply chain risks that leave the United States vulnerable to reductions in the availability and integrity of critical goods, products, and services, and will include policy recommendations for mitigating such risks. The EO indicates that, among other approaches, the Biden administration will explore how trade policies and agreements can be used to strengthen the resilience of US supply chains. We provide an overview of the EO and its implications below.

Purpose of the EO

The EO is intended to support the Biden administration's policy "to strengthen the resilience of America's supply chains." The preamble to the EO identifies a range of threats that can "reduce critical manufacturing capacity and the availability and integrity of critical goods, products, and services," including "[p]andemics and other biological threats, cyber-attacks, climate shocks and extreme weather events, terrorist attacks, geopolitical and economic competition[.]" Given such threats, the United States "needs resilient, diverse, and secure supply chains to ensure our economic prosperity and national security."

The EO explains that, in the Biden administration's view, "resilient" supply chains are both "secure and diverse," facilitating "greater domestic production, a range of supply, built-in redundancies, adequate stockpiles, safe and secure digital networks, and a world-class American manufacturing base and workforce." While a key objective of the EO is to promote domestic production of critical items, the EO also acknowledges that "close cooperation on resilient supply chains with allies and partners who share our values will foster collective economic and national security and strengthen the capacity to respond to international disasters and emergencies."

100-Day Supply Chain Reviews

The EO directs the Assistant to the President for National Security Affairs (APNSA) and the Assistant to the President for Economic Policy (APEP), in coordination with the relevant agency heads, to complete reviews of "supply chain risks" for four categories of goods, as follows:

- The Secretary of Commerce, in consultation with the heads of appropriate agencies, will submit a report identifying risks in the **semiconductor manufacturing and advanced packaging** supply chains.
- The Secretary of Energy, in consultation with the heads of appropriate agencies, will submit a report identifying risks in the supply chain for **high-capacity batteries, including electric-vehicle batteries**.
- The Secretary of Defense (as the National Defense Stockpile Manager), in consultation with the heads of appropriate agencies, will submit a report identifying risks in the supply chain for **critical minerals and other identified strategic materials, including rare earth elements**.
- The Secretary of Health and Human Services, in consultation with the heads of appropriate agencies, will submit a report identifying risks in the supply chain for **pharmaceuticals and active pharmaceutical ingredients**.

These reviews must be completed within 100 days (*i.e.*, by June 5, 2021). The Order specifies that the reports containing the results of the reviews are to be submitted to the President "in an unclassified form," but may include a classified annex, indicating that at least some portion of the reports will be made public.

Sectoral Supply Chain Assessments

Within 1 year of the date of the EO, the relevant agency heads must submit the following "sectoral supply chain assessments" to the President, through the APNSA and the APEP:

- The Secretary of Defense, in consultation with the heads of appropriate agencies, will submit a report on supply chains for the **defense industrial base**, identifying areas where civilian supply chains are dependent upon competitor nations.
- The Secretary of Health and Human Services, in consultation with the heads of appropriate agencies, will submit a report on supply chains for the **public health and biological preparedness industrial base**.
- The Secretary of Commerce and the Secretary of Homeland Security, in consultation with the heads of appropriate agencies, will submit a report on supply chains for critical sectors and subsectors of the **information and communications technology (ICT) industrial base**, including the industrial base for the development of ICT software, data, and associated services.
- The Secretary of Energy, in consultation with the heads of appropriate agencies, will submit a report on supply chains for the **energy sector industrial base**.
- The Secretary of Transportation, in consultation with the heads of appropriate agencies, will submit a report on supply chains for the **transportation industrial base**.
- The Secretary of Agriculture, in consultation with the heads of appropriate agencies, will submit a report on supply chains for the production of **agricultural commodities and food products**.

Scope of "100-Day Supply Chain Reviews" and "Sectoral Supply Chain Assessments"

The EO requires that each "100-day supply chain review" and "sectoral supply chain assessment" identify risks to the covered supply chain and offer policy recommendations to mitigate such risks.

The EO requires agencies to evaluate a wide range of potential risks to the covered supply chains, including the "defense, intelligence, cyber, homeland security, health, climate, environmental, natural, market, economic, geopolitical, human-rights or forced-labor risks or other contingencies that may disrupt, strain, compromise, or eliminate the supply chain — including risks posed by supply chains' reliance on digital products that may be vulnerable to failures or exploitation[.]" Agencies must also evaluate risks resulting from "the elimination of, or failure to develop domestically," the manufacturing or other capabilities to produce the goods or materials underlying the supply chain in question. Additionally, for each covered supply chain, the agencies must assess "the resilience and capacity of American manufacturing supply chains and the industrial and agricultural base — whether civilian or defense" to support national and economic security and emergency preparedness. This will include assessments of "the location of key manufacturing and production assets" and situations where there is "exclusive or dominant supply of critical goods and materials…by or through nations that are, or are likely to become, unfriendly or unstable," among other factors.

For each covered supply chain, the EO requires agencies to produce "specific policy recommendations for ensuring a resilient supply chain[.]" Such recommendations "may include sustainably reshoring supply chains and developing domestic supplies, cooperating with allies and partners to identify alternative supply chains, building redundancy into domestic supply chains, ensuring and enlarging stockpiles, developing workforce capabilities, enhancing access to financing, expanding research and development to broaden supply chains, addressing risks due to vulnerabilities in digital products relied on by supply chains, addressing risks posed by climate change, and any other recommendations[.]" In addition, agencies must recommend "any executive, legislative, regulatory, and policy

changes and any other actions" to strengthen necessary manufacturing and other capabilities and "to prevent, avoid, or prepare for" the contingencies identified in the EO.

General Review and Recommendations

The EO requires the APNSA and the APEP to provide a "general review" and recommendations to the President "as soon as practicable" after the submission of the sectoral supply chain assessments described above. These may take the form of "one or more reports" that review the actions taken over the previous year and provide recommendations on specified topics. The EO seeks recommendations on a wide range of potential trade, foreign, and domestic policy measures, including the following:

- Steps to strengthen the resilience of America's supply chains;
- Diplomatic, economic, security, trade policy, informational, and other actions that can successfully engage allies and partners to strengthen supply chains jointly or in coordination;
- Reforms to domestic and international trade rules and agreements needed to support supply chain resilience, security, diversity, and strength;
- Education and workforce reforms needed to strengthen the domestic industrial base; and
- Federal incentives and any amendments to Federal procurement regulations that may be necessary to attract and retain investments in critical goods and materials and other essential goods and materials.

Outlook

The EO follows President Biden's campaign promise to launch a "comprehensive review of U.S. supply chain vulnerabilities," based on his view that the United States is "dangerously dependent on foreign suppliers" in certain critical sectors. Biden administration officials have emphasized that the reports required by the EO are only the first stage of the process, and that the administration intends to take action to mitigate supply chain risks that might be identified in the reports.

As the EO makes clear, the Biden administration believes that trade policy can play a role in efforts to strengthen the resilience of supply chains, and that bolstering domestic manufacturing capabilities should be a priority. However, it is premature to conclude that the supply chain reviews will lead to the imposition of trade restrictions. The EO does not expressly contemplate the use of trade restrictions as a means of promoting supply chain resilience. Moreover, where the EO does mention trade policy, it seeks recommendations for "engag[ing] allies and partners to strengthen supply chains jointly," and for reforming trade rules and agreements (including to promote supply chain "diversity"). This could presage efforts to facilitate trade, particularly with countries that are close allies of the United States.

On the other hand, Biden administration officials have indicated that the EO was motivated in part by concerns about perceived "over-reliance" on specific countries for critical supplies. This concern is reflected in the EO's requirement for agencies to asses US reliance on countries that "are, or are likely to become, unfriendly or unstable." In practice, assessing and mitigating the United States' reliance on China in particular is likely to be a focus of the forthcoming supply chain reviews and assessments. Nevertheless, it is unclear what role the Biden administration envisions for trade policy in addressing this issue, and trade is just one of several policy areas in which the EO seeks recommendations.

US Trade Actions

President Biden Reverses Trump Administration's Decision to Exempt United Arab Emirates from Section 232 Tariff on Aluminum

On February 1, 2021, President Biden issued a Proclamation reversing the Trump administration's last-minute decision to exempt aluminum from the United Arab Emirates (UAE) from the 10% tariff on aluminum imports under Section 232 of the Trade Expansion Act. In his first official action addressing the Section 232 tariffs, President Biden revoked the exemption for the UAE on the grounds that: (i) aluminum imports from the UAE "may still displace domestic production, and thereby threaten to impair our national security;" and (ii) maintaining the 10% tariff on such imports "is likely to be more effective" in protecting national security than the quota regime envisaged by President Trump's recent Proclamation. The exemption for aluminum imports from the UAE had been scheduled to take effect on February 3, 2021.

Revocation of exemption and quota regime for aluminum from the UAE

President Biden's Proclamation states that the Section 232 tariff regime was intended "to help ensure the economic viability of the domestic aluminum industry — an industry that the Secretary of Commerce had previously identified as essential to our critical industries and national defense." It notes in particular that the Section 232 measures "aimed to revive idled aluminum facilities, open closed smelters and mills, preserve necessary skills, and maintain or increase domestic production," because "robust domestic aluminum production capacity is essential to meet our current and future national security needs[.]" The Proclamation argues that the planned exemption of the UAE from the Section 232 tariff on aluminum contradicts these objectives.

First, the Proclamation asserts that "the available evidence indicates that imports from the UAE may still displace domestic production, and thereby threaten to impair our national security." Specifically, the Proclamation cites statistics from the Section 232 exclusion process, which allows the Secretary of Commerce to grant exclusions from the tariffs based on specific national security considerations or if specific imported aluminum articles are determined not to be produced sufficiently in the United States. The Proclamation notes that "there have been 33 such exclusion requests for aluminum imported from the UAE, covering 587,007 metric tons of articles, and the Secretary of Commerce has denied 32 of those requests, covering 582,007 metric tons." This purportedly illustrates "the large degree of overlap between imports from the UAE and what our domestic industry is capable of producing."

The Proclamation also notes that, since the tariff on aluminum imports was imposed, such imports "substantially decreased, including a 25[%] reduction from the UAE," whereas domestic aluminum production "increased by 22[%] through 2019, before the coronavirus pandemic began." In light of this history, President Biden concluded that "maintaining the tariff is likely to be more effective in protecting our national security than the untested quota" envisioned in President Trump's Proclamation of January 20. President Trump's Proclamation would have allowed approximately 630,000,000 kg of aluminum from the UAE to enter the United States free of Section 232 duties each year, roughly in line with historical import volumes, though it would have prohibited imports in excess of that quantity.

Based on the above findings, President Biden revoked President Trump's Proclamation of January 20 in its entirety. As a result, aluminum imports from the UAE will remain 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 United Steelworkers union applauded President Biden's decision to preserve the Section 232 tariffs on the UAE, stating that President Trump's decision to exempt the country "would undermine the effectiveness of the program and essentially exempt the vast majority of aluminum imports," allowing the UAE's "state-supported aluminum producers…to flood the U.S. market[.]"

Outlook

President Biden's Proclamation expresses general alignment with the Trump administration's position that imports of aluminum may, in certain circumstances, "threaten to impair national security" within the meaning of Section 232, particularly where such imports "displace domestic production[.]" The Proclamation also takes the position that tariffs can be an effective means of protecting national security in such circumstances, mirroring the Trump administration's rationale for the Section 232 measures. These statements and the decision to maintain the tariffs on the UAE are further indications that a wholesale repeal of the Section 232 tariffs is unlikely, at least in the near term.

On the other hand, President Biden's decision on the UAE arguably says little about how his administration will approach other potential country exemptions from the Section 232 tariffs. Biden administration officials have stated that the decision concerning the UAE should not be viewed as "pre-determinative" of other tariff-related decisions, and they have emphasized that the administration is reviewing the Section 232 tariffs and other trade restrictions imposed by the Trump administration. President Biden has criticized the application of the Section 232 tariffs to imports from close allies such as the EU that are aligned with US efforts to combat overcapacity and industrial subsidies, signaling that exemptions for such countries might be considered. Acting to preserve the Section 232 tariffs on the UAE might even offset, at least in part, the political and economic ramifications of granting exemptions to the EU and similarly situated countries in the future. Thus, while the new Proclamation could be viewed as a sign that further Section 232 exemptions are unlikely, this conclusion appears premature.

For more information, please see: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/01/a-proclamation-on-adjusting-imports-of-aluminum-into-the-united-states/

US Court of International Trade Rejects Challenge to Section 232 Steel Tariffs

On February 4, 2021, the CIT issued a *per curiam* opinion denying claims made by Universal Steel Products, Inc., PSK Steel Corporation, the Jordan International Company, Dayton Parts, LLC, and Borusan Mannesman Pipe U.S. Inc. (collectively, "Plaintiffs") challenging the legality of the tariffs and quotas imposed on imported steel products pursuant to Section 232 of the Trade Expansion Act of 1962 ("Section 232"). Plaintiffs filed a complaint in December 2019 asserting that the US Department of Commerce report that recommended the restrictions, and the subsequent Presidential Proclamations that implemented the restrictions, failed to abide by the procedural requirements of Section 232 and the Administrative Procedure Act (APA).

Background

Plaintiffs in *Universal Steel Products, Inc.* made four primary arguments in their attempt to challenge the Section 232 measures on imported steel products:

1. The US Department of Commerce report that recommended the imposition of import restrictions under Section 232 (the "Commerce Report") was a reviewable agency action as defined by the APA. Its findings that steel imports "threaten to impair national security" were arbitrary, capricious, or an abuse of discretion. The Commerce Report therefore cannot lawfully support the President's proclamations imposing import restrictions on steel under Section 232.

2. The President's proclamations imposing the import restrictions failed to specify the duration of the action being taken, in violation of Section 232 requirements.

3. The President failed to base his determination upon a finding that steel imports pose an impending threat to national security, in violation of Section 232 requirements.

4. The President failed to comply with mandatory time requirements in Section 232 by (i) issuing Proclamation 9759 (which imposed quotas on steel from Argentina and Brazil and let certain other country exemptions expire) earlier than 180 days after the announcement of the President's decision to implement the steel tariffs; and (ii) issuing Proclamation 9772 (increasing tariffs on steel from Turkey) later than 90 days after the Commerce Report was delivered to the President.

Opinion & Order

The CIT rejected all four of Plaintiffs' claims in an order granting the United States' motion for judgment on the pleadings. The Court rejected Plaintiffs' claims for the following reasons:

1. The Court rejected Plaintiffs' first claim after finding that the Commerce Report was not a final agency action as defined by the APA, and is therefore not subject to judicial review. The Court concluded that the Commerce Report is not a final agency action because Section 232 "gives the President the discretion to disagree with the Commerce Department's recommendation and not take any action" based thereon. Moreover, the Court found that "[e]ven if Plaintiffs' challenge to the [Commerce Report] were reviewable (under the APA or otherwise), and even if the court were to find that the [Commerce Report] was procedurally flawed, precedent reveals that such a finding would not allow the court to invalidate the subsequent Presidential action." *See Universal Steel Products, Inc, et al. v. United States,* No. 19-00209, Slip Op. 21-12 at 13 and 14 n.9 (Ct. In'tl Trade Feb 4, 2021).

2. Section 232 requires that the President determine the "nature and *duration* of the action that, in the judgement of the President, must be taken to adjust the imports." 19 U.S.C. § 1862(c)(1)(A)(ii) (emphasis added). The United States argued that the President met the Section 232 duration requirement in Proclamation 9705 – the first Proclamation related to Section 232 steel tariffs – by stating that the tariffs would remain in effect "until and unless such actions are expressly reduced, modified, or terminated." *See* Proclamation 9705, 83 Fed. Reg. 11,628 (March 15, 2018). The Court agreed with the United States, finding that "more finite terms than the Proclamation provides in this case are not necessary." *See Universal Steel Products,* No. 19-00209, Slip Op. 21-12 at 20.

3. Plaintiffs' third claim was predicated on the argument that the word "threaten," as applied in Section 232, should be interpreted using its ordinary meaning, including that to "threaten" involves "an indication of something impending." Plaintiffs claimed that the Commerce Report was invalid because it contained no consideration of whether the perceived threat of steel imports was likely to occur in the reasonably near future, and was therefore impending. The Court rejected this argument because the statutory language of Section 232 "makes clear that the list of factors to be considered in determining if a threat exists is nonexclusive." *See Universal Steel Products,* No. 19-00209, Slip Op. 21-12 at 17(citing 19 U.S.C. § 1862(d)).

4. The Court found that Plaintiffs misinterpreted the time requirements of Section 232 in arguing that Proclamation 9759 (issued by the President on May 31, 2018) was procedurally deficient. Proclamation 9759 provided long-term tariff exemptions and imposed quotas on steel imports from Brazil and Argentina based on agreements with those countries, and took no action to extend temporary exemptions that had previously been granted to Canada, Mexico, and the EU. As a result, the temporary exemptions for Canada, Mexico and the EU expired as scheduled on June 1, 2018. Plaintiffs argued that Proclamation 9759 was inconsistent with 19 U.S.C. § 1862(c)(3)(A), which provides in the relevant part that:

> If—
>
> (i) the action taken by the President . . . is the negotiation of an agreement which limits or restricts [] import[s] . . . to, the United States of the article that threatens to impair national security, and . . .
>
> (I) no such agreement is entered into before the date that is 180 days after the date on which the President makes the determination under paragraph (1)(A) to take such action . . .
>
> the President shall take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security.

Plaintiffs argued that "the only rational construction of [19 U.S.C. § 1862(c)(3)(A)] requires the President to negotiate for the entire 180-day period[.]" Based on this interpretation, they alleged that the law precluded the President from allowing the temporary exemptions for imports from Canada, Mexico and the EU to expire on June 1, as this was

"earlier than 180 days after the announcement of the President's decision[.]" The Court disagreed, finding that "Plaintiffs are incorrect that [the Section 232 timing] provision sets 180 days as a minimum amount of time that the President must wait before taking alternative action, rather than the maximum amount of time that he can wait." In the Court's view, "it is likely that Congress would have chosen language that more clearly required the President to negotiate for 180 days before choosing alternate action if that were Congress's intention." *See Universal Steel Products,* No. 19-00209, Slip Op. 21-12 at 24-25. In the Court's view, "the language used, read plainly, does not suggest that waiting 180 days before modifying the action is a requirement."

At the request of the parties, the Court stayed Plaintiffs' challenge to Proclamation 9772, pending final resolution of an identical challenge in a separate case (*Transpacific Steel LLC v. United States*). Like the Plaintiffs in *Transpacific*, Plaintiffs in *Universal Steel Products* alleged that Proclamation 9772 (which doubled the Section 232 tariff rate on steel from Turkey) was unlawful, because it was issued after the statutory deadline for the President's determination on action in the Section 232 investigation. *See Universal Steel Products,* No. 19-00209, Slip Op. 21-12 at 7 n.4.

Outlook

The CIT's rejection of Plaintiffs' claims in *Universal Steel Products* leaves in place the existing Section 232 measures on steel. The decision follows the rejection last year of another broad legal challenge to the Section 232 measures, which sought to invalidate the measures on the grounds that the Section 232 statute itself is unconstitutional (*American Institute for International Steel, Inc. et al v. United States*). Both the CIT and the US Court of Appeals for the Federal Circuit (CAFC) rejected that claim, and the Supreme Court declined to take up the case. Plaintiffs in *Universal Steel Products* have indicated that they may appeal the CIT's ruling to the Court of Appeals for the Federal Circuit (CAFC), but they have not yet done so.

While these broad legal and constitutional challenges have thus far been rejected, procedural challenges to specific Section 232 actions have shown more promise. The CIT ruled in favor of Plaintiffs in *Transpacific Steel LLC v. United States* (currently on appeal at the CAFC), finding that President Trump's Proclamation doubling the Section 232 tariff rate on steel imports from Turkey was issued in violation of mandated statutory deadlines. Similar claims are at issue in *PrimeSource Building Products, Inc. v. United States et al* (currently before the CIT), in which Plaintiffs allege that President Trump's January 2020 Proclamation expanding the Section 232 tariffs to certain "derivative" products was issued after the statutory deadline (and is therefore unlawful). These cases may clarify the procedural limits on the President's authority to impose and modify Section 232 measures.

For more information, please see: https://www.cit.uscourts.gov/sites/cit/files/21-12-A.pdf

US Court of International Trade Upholds Deduction of Section 232 Duties in Antidumping Cost Calculations

On February 17, 2021, the CIT issued an opinion in *Borusan Mannesmann Boru Sanayi Ve Ticaret AS et al. v. United States*, ruling on a matter of first impression regarding the impact of duties imposed under Section 232 of the Trade Expansion Act of 1962 ("Section 232") on antidumping duty (AD) cost calculations. The case came before the CIT after steel importers Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. and Borusan Mannesmann Pipe U.S. Inc. (collectively, "Borusan") challenged the US Department of Commerce's ("Commerce's") cost calculations in an administrative review of the AD order covering circular welded carbon standard steel pipe and tube (CWP) products from Turkey.

The CIT's ruling in *Borusan* upholds Commerce's practice of deducting Section 232 duties from investigated exporters' export prices and constructed export prices in AD investigations – a practice that can lead to increased dumping margins.

Background

Borusan's complaint

Borusan's complaint before the CIT focused on the manner in which Commerce compared home market sales with sales in the United States market during the administrative review of the AD order covering CWP products from Turkey, in which Borusan was a mandatory respondent. Borusan specifically objected to Commerce's decision to treat Section 232 duties as "United States import duties." Commerce is required to reduce export price (EP) and constructed export price (CEP) in AD calculations by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and *United States import duties*, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." 19 U.S.C. § 1677a(c)(2)(A) (emphasis added). Reducing Borusan's EP and CEP by deducting Section 232 duties had the ultimate impact of increasing its AD margin calculation, thereby increasing the AD duties it was required to pay as a result of the administrative review of the AD order.

Borusan's objection to Commerce's classification of Section 232 duties as "U.S. import duties" was based primarily on Commerce's decision to classify duties imposed under Section 201 of the Trade Act of 1974 ("Section 201") as "special duties," akin to AD and countervailing duties (CVD), which are not deducted from EP and CEP calculations. *See Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 19,153, 19,159–61 (Dep't Commerce Apr. 12, 2004) ("SSWR from Korea"). In SSWR from Korea, Commerce determined that Section 201 duties (commonly known as "safeguard" duties) are not "United States import duties" because the former are remedial and temporary in nature. Commerce also determined that classifying Section 201 duties as "United States import duties" and deducting these duties from EP and CEP calculations would result in inappropriate double remedies. Borusan applied this same reasoning to argue that Section 232 duties should be excluded from the definition of "United States import duties," and consequently should not be deducted from EP and CEP calculations, because Section 232 duties are remedial and temporary.

Separately, Borusan challenged Commerce's decision to make an upward adjustment to Borusan's costs of production (COP) for purposes of the sales-below-cost test set forth in 19 U.S.C. § 1677b(b). Commerce made the adjustment based on its finding that a particular market situation (PMS) in Turkey had distorted the cost of production of CWP. Commerce's finding of a PMS was based on its determination that the cost of hot-rolled-coil ("HRC") in Turkey is distorted. Because HRC is a component of CWP, Commerce found that the cost of production of CWP in Turkey does not reflect the COP in the ordinary course of trade. Borusan alleged that Commerce's adjustment to COP when conducting the sales-below-cost test violated the plain language of the statute, was unsupported by substantial evidence, and was otherwise not in accordance with law.

The CIT's determination

Section 232 duties

The CIT rejected Borusan's arguments and upheld Commerce's determination that Section 232 duties are "U.S. import duties" and therefore must be deducted from EP and CEP calculations in accordance with 19 U.S.C. § 1677a(c)(2)(A). The CIT upheld Commerce's decision for two reasons:

1. The CIT found the phrase "U.S. import duties" as applied in 19 U.S.C. § 1677a(c)(2)(A) to be ambiguous. The CIT considered that the statutory text and legislative history offered no reason why Section 232 duties could not be classified as "U.S. import duties."

2. The CIT applied the same three factors used by Commerce in SSWR from Korea in the Section 201 context to find that Section 232 duties are distinct and should be deducted from EP and CEP. Namely, the CIT considered (i) whether the duties are remedial, (ii) whether the duties are temporary, and (iii) whether the duties would result in an impermissible double remedy.

   The CIT found that Section 232 duties are remedial in the same manner as Section 201. "Neither 232 nor 201 requires a finding of an unfair trade practice," and Section 232 duties "more closely reflect the sense of remediation reflected in Section 201" than AD and CVD duties. *Borusan Mannesmann Boru Sanayi ve Ticaret*

A.S. et al v. United States, No. 20-00015, Slip Op. 21-18 at 14-15 (Ct. Int'l Trade Feb. 17, 2021). Similarly, the CIT found that "Section 232 duties and Section 201 duties are both temporary in that no Congressional action is needed to end them." *Id.* at 15.

The key difference between Section 232 and Section 201 duties, according to the CIT, was their potential to lead to an impermissible double remedy. The CIT cited a "clear statutory interplay between Section 201 duties and antidumping duties" that does not exist in the Section 232 context. Specifically, the CIT noted that Section 201 investigations require the International Trade Commission (ITC) to find that an increase in imports is a substantial cause of injury, and to refer cases to Commerce in this process if the ITC believes that an increase in imports may be the result of dumping. In contrast, "there is no such requirement of complimentary treatment with normal unfair trade laws in Section 232." *Id.* at 16. The CIT therefore concluded that Commerce provided "a reasonable decision based on crucial differences between Sections 201 and 232, namely that Section 201 duties are more akin to antidumping duties and that there is an interplay between antidumping duties and Section 201 duties, which is not present with Section 232 duties."

PMS Adjustment

The CIT ruled in favor of Borusan on the separate question concerning Commerce's upward adjustment to Borusan's costs of production for purposes of the sales-below-cost test. The Court cited to several recent opinions in which it has "explained in detail that no adjustment for PMS is permitted when Commerce is using the sales-below-cost test to eliminate such sales from the pool of home market sales used for comparison to sales in the United States market." (See Saha Thai Steel Pipe Pub. Co. v. United States, 476 F. Supp. 3d 1378, 1383, 1386 (CIT 2020); Dong-A Steel Co. v. United States, 475 F. Supp. 3d 1317, 1337–41 (CIT 2020); Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States, 426 F. Supp. 3d 1395, 1411–12 (CIT 2020); Husteel Co. v. United States, 426 F. Supp. 3d 1376, 1383–89 (CIT 2020); Saha Thai Steel Pipe Pub. Co. v. United States, 422 F. Supp. 3d 1363, 1368–71 (CIT 2019)).

The CIT reiterated its view that "the plain language and construction of [19 U.S.C. §1677b] authorizes PMS adjustments only when determining normal value using constructed value methodology under §1677b(e), not when determining whether to disregard sales below the cost of production under §1677b(b)." *Id* at 9. The Court therefore determined that Commerce's adjustments to Borusan's COP on account of a PMS for the purpose of the sales-below-cost test "do not give effect to the unambiguously expressed intent of Congress and are therefore contrary to law." The Court remanded this matter to Commerce "to eliminate any adjustment to COP based on a PMS in the sales below-cost test[.]"

Outlook

The CIT's ruling that Section 232 duties can be deducted from EP and CEP calculations hinges on the determination such a deduction would not result in an "impermissible double remedy." In effect, however, imports subject to both antidumping and Section 232 duties can be penalized twice: once when Section 232 duties are imposed on imports, and a second time when that importer's margin calculation is increased in AD investigations and reviews because Section 232 duties are deducted from EP and CEP calculations. Borusan may still appeal the CIT's decision to the Court of Appeals for the Federal Circuit (CAFC), although it has made no indication that it intends to at this time.

For more information, please see: https://www.cit.uscourts.gov/sites/cit/files/21-18.pdf

Petitions and Investigations

US International Trade Commission Issues Affirmative Final Injury Determination in Antidumping and Countervailing Duty Investigations of Large Vertical Shaft Engine from China

On February 2, 2021, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of large vertical shaft engines from China that the US Department of Commerce (DOC) has determined are subsidized and sold in the United States at less than fair value. 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 determinations, DOC will issue antidumping and countervailing duty orders on imports of these products from China. DOC determined in January that exporters from China 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 Commission made a negative finding concerning critical circumstances with regard to imports of this product from China that are sold in the United States at less than fair value. As a result, these imports will not be subject to retroactive antidumping duties.

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 these investigations 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 these investigations enter under HTSUS 8409.91.9990. Engines subject to these investigations may also enter under HTSUS 8407.90.9060 and 8407.90.9080.

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

US International Trade Commission Issues Affirmative Final Injury Determination in Antidumping and Countervailing Duty Investigations of Corrosion Inhibitors from China

On February 23, 2021, the United States International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of corrosion inhibitors from China that the US Department of Commerce (DOC) has determined are subsidized and sold in the United States at less than fair value. 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 determinations, DOC will issue antidumping and countervailing duty orders on imports of this product from China. On January 26, 2021, the DOC announced its affirmative final determinations that imports of this product from China received countervailable subsidies ranging from 60 to 239 percent and were sold in the United States at dumping margins ranging from 72 to 241 percent.

The merchandise covered by this investigation is tolyltriazole and benzotriazole. This includes tolyltriazole and benzotriazole of all grades and forms, including their sodium salt forms. Tolyltriazole is technically known as Tolyltriazole IUPAC 4,5 methyl benzotriazole. It can also be identified as 4,5 methyl benzotriazole, tolutriazole, TTA, and TTZ.

- Tolyltriazole has the Chemical Abstracts Service (CAS) registry number 299385-43-1. Tolyltriazole is classified under Harmonized Tariff Schedule of the United States (HTSUS) subheading 2933.99.8220.
- Sodium Tolyltriazole has the CAS registry number 64665-57-2 and is classified under HTSUS subheading 2933.99.8290.
- Benzotriazole has the CAS registry number 95-14-7 and is classified under HTSUS subheading 2933.99.8210.
- Sodium Benzotriazole has the CAS registry number 15217-42-2. Sodium Benzotriazole is classified under HTSUS subheading 2933.99.8290.

According to DOC, imports of certain corrosion inhibitors from China were valued at an estimated $16.3 million in 2019.

US International Trade Commission Issues Affirmative Final Injury Determination in Antidumping Investigation of Diflouromethane from China

On February 10, 2021, the United States International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of difluoromethane (R-32) from China that the US Department of Commerce (DOC) has determined are sold in the United States at less than fair value. 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 determination, DOC will issue an antidumping duty order on imports of this product from China. DOC determined in January 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 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_2F_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 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 petitioner in the investigation alleged that imports of R-32 from China were valued at approximately $21.5 million in 2018.

US Department of Commerce Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Twist Ties from China

On February 16, 2021, the US Department of Commerce (DOC) issued its affirmative final determinations in the antidumping and countervailing duty investigations concerning imports of twist ties from China. In its investigations, DOC determined that imports of the subject merchandise were sold in the United States at dumping margins of 72.96 percent, and received countervailable subsidies of 111.96 percent.

The petitioner in these investigations is Bedford Industries, Inc. The merchandise covered by these investigation sconsists of twist ties, which are thin, bendable ties for closing containers, such as bags, bundle items, or identifying objects. A twist tie in most circumstances is comprised of one or more metal wires encased in a covering material, which allows the tie to retain its shape and bind against itself. However, it is possible to make a twist tie with plastic and no metal wires. The metal wire that is generally used in a twist tie is stainless or galvanized steel and typically measures between the gauges of 19 (.0410″ diameter) and 31 (.0132″) (American Standard Wire Gauge).

Twist ties are imported into the United States under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 8309.90.0000 and 5609.00.3000. Subject merchandise may also enter under HTSUS subheadings 3920.51.5000, 3923.90.0080, 3926.90.9990, 4811.59.6000, 4821.10.2000, 4821.10.4000, 4821.90.2000, 4821.90.4000, and 4823.90.8600.

The US International Trade Commission (ITC) will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of twist ties from China no later than April 2, 2021. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated. If the ITC determines that such injury does exist, DOC will issue a CVD order.

The petitioner estimated the value of twist ties imported from China in 2019 at $4.15 million.

US Department of Commerce Issues Affirmative Final Determination in Countervailing Duty Investigation of Standard Steel Wire Mesh from Mexico

On February 10, 2021, the US Department of Commerce (DOC) issued its affirmative final determination that countervailable subsidies are being provided to producers and exporters of standard steel welded wire mesh (wire mesh) from Mexico. In its investigation, DOC determined that imports of the subject merchandise from Mexico received countervailable subsidies ranging from 1.03 to 102.10 percent.

The petitioners in this investigation are Insteel Industries Inc., Mid-South Wire Company, National Wire LLC, Oklahoma Steel & Wire Co., and Wire Mesh Corp. The scope of this investigation covers uncoated standard welded steel reinforcement wire mesh (wire mesh) produced from smooth or deformed wire. Subject wire mesh is produced in square and rectangular grids of uniformly spaced steel wires that are welded at all intersections. Sizes are specified by combining the spacing of the wires in inches or millimeters and the wire cross-sectional area in hundredths of square inch or millimeters squared. Subject wire mesh may be packaged and sold in rolls or in sheets. Merchandise subject to this investigation are classified under Harmonized Tariff Schedule of the United States (HTSUS) categories 7314.20.0000 and 7314.39.0000.

The US International Trade Commission (ITC) will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of wire mesh from Mexico no later than March 28, 2021. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated. If the ITC determines that such injury does exist, DOC will issue a CVD order.

The 2019, imports of standard steel welded wire mesh from Mexico were valued at approximately $46.7 million, according to DOC.

US Department of Commerce Issues Affirmative Final Determinations in Countervailing Duty Investigations Concerning Imports of Phosphate Fertilizers from Russia and Morocco

On February 8, 2021, the US Department of Commerce (DOC) announced its affirmative final determinations that imports of phosphate fertilizers from Russia and Morocco have benefited from countervailable subsidies. In its investigation, DOC determined that imports of the subject merchandise from Russia received countervailable subsidies ranging from 9.19 to 47.05 percent, and that imports from Morocco received countervailable subsidies ranging from 19.97 percent.

The petitioner in these investigations is The Mosaic Company (Plymouth, Minn.) The merchandise covered by this investigation is phosphate fertilizers in all physical forms (i.e., solid or liquid form), with or without coating or additives such as anti-caking agents. Phosphate fertilizers in solid form are covered whether granular, prilled (i.e., pelletized), or in other solid form (e.g., powdered).

The Chemical Abstracts Service (CAS) numbers for covered phosphate fertilizers include, but are not limited to: 7722-76-1 (MAP); 7783-28-0 (DAP); and 65996-95-4 (TSP). The covered products may also be identified by Nitrogen-Phosphate-Potash composition, including but not limited to: NP 11-52-0 (MAP); NP 18-46-0 (DAP); and NP 0-46-0 (TSP).

The covered merchandise is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings 3103.11.0000; 3103.19.0000; 3105.20.0000; 3105.30.0000; 3105.40.0010; 3105.40.0050; 3105.51.0000; and 3105.59.0000. Phosphate fertilizers subject to this investigation may also enter under subheadings 3103.90.0010, 3105.10.0000, 3105.60.0000, 3105.90.0010, and 3105.90.0050.

The US International Trade Commission (ITC) will determine by March 26, 2021 whether the domestic industry in the United States is materially injured or threatened with material injury by reason of imports of phosphate fertilizers from Russia and Morocco.

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

- $729.4 million for Morocco
- $299.4 million for Russia

US Department of Commerce Issues Affirmative Final Determinations in Countervailing Duty Investigation Concerning Silicon Metal from Kazakhstan; Antidumping Investigation Concerning Silicon Metal from Boznia and Herzegovina and Iceland

On February 22, 2021, the US Department of Commerce (DOC) announced its affirmative final determinations in the antidumping duty (AD) investigations concerning imports of silicon metal from Iceland and Bosnia and Herzegovina. In addition, DOC announced its affirmative final determination in the countervailing duty (CVD) investigation concerning imports of silicon metal from Kazakhstan. In its investigations, DOC determined that imports of the subject merchandise were sold in the United States at a dumping margins of 21.41 percent (for Bosnia and Herzegovina) and 37.83 to 47.54 percent (for Iceland). DOC determined that imports of the subject merchandise from Kazakhstan received countervailable subsidies of 160.00 percent.

The petitions were filed by Globe Specialty Metals, Inc. (Beverly, Ohio) and Mississippi Silicon LLC (Burnsville, Miss.). The scope of this investigation covers all forms and sizes of silicon metal, including silicon metal powder. Silicon metal contains at least 85.00 percent but less than 99.99 percent silicon, and less than 4.00 percent iron, by actual weight. Semiconductor grade silicon (merchandise containing at least 99.99 percent silicon by actual weight and classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheading 2804.61.0000) is

excluded from the scope of the investigation. Silicon metal is currently classifiable under subheadings 2804.69.1000 and 2804.69.5000 of the HTSUS.

The US International Trade Commission (ITC) will determine, by April 9, 2021, whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of the imports subject to these investigations. If the ITC determines that such injury does not exist, these proceedings will be terminated. If the ITC determines that such injury does exist, DOC will issue antidumping and countervailing duty orders.

US Department of Commerce Initiates Antidumping and Countervailing Duty Investigations Concerning Imports of Pentafluoroethane (R-125) from China

On February 1, 2021, the US Department of Commerce (DOC) announced the initiation of antidumping (AD) and countervailing duty (CVD) investigations concerning imports of pentafluoroethane (R-125) from China. DOC initiated these investigations in response to petitions filed by Honeywell International, Inc., the sole domestic producer of R-125.

The merchandise covered by these investigations is pentafluoroethane (R-125), or its chemical equivalent, regardless of form, type or purity level. R-125 has the Chemical Abstracts Service (CAS) registry number of 354-33-6 and the chemical formula C_2HF_5. R-125 is also referred to as Pentafluoroethane, Genetron HFC 125, Khladon 125, Suva 125, Freon 125, and Fc-125. Subject merchandise includes R-125, whether or not incorporated into a blend. When R-125 is blended with other products, only the R-125 component of the mixture is covered by the scope of this investigation. Subject merchandise also includes R-125 and unpurified R-125 that is processed in a third country or otherwise outside the customs territory of the United States, including, but not limited to, purifying, blending, 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-125. Excluded from the scope is merchandise covered by the scope of the antidumping order on *Hydrofluorocarbon Blends from the People's Republic of China.*

R-125 is classified under Harmonized Tariff Schedule of the United States (HTSUS) subheading 2903.39.2035. Merchandise subject to the scope may also be entered under HTSUS subheadings 2903.39.2045 and 3824.78.0020.

The petitioner in these investigations alleges that import of the subject merchandise from China were sold in the United States at dumping margins ranging from 149.09 percent to 238.83 percent. There are five alleged subsidy programs at issue in the CVD investigation, including policy loans to the chemical industry, export loans from Chinese state-owned banks (government-directed lending), the provision of land-use rights for less than adequate remuneration (LTAR), the provision of electricity for LTAR, and currency undervaluation.

On February 25, the US International Trade Commission (ITC) determined that there is a reasonable indication that a US industry is materially injured by reason of imports of pentafluoroethane (R-125) from China. As a result of the ITC's affirmative determinations, DOC will continue its investigations of imports of pentafluoroethane from China, with its preliminary countervailing duty determination due on or about April 7, 2021, and its preliminary antidumping duty determination due on or about June 21, 2021.