US Multilateral Trade Policy Developments

Japan External Trade Organization

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US Trade Policy

The Role of the US Trade Representative and the Legal Framework for the Formulation of US Trade Policy

On February 25, the Senate Finance Committee held a hearing on the nomination of Ms. Katherine Tai to serve as United States Trade Representative (USTR).[1] The hearing followed the recent appointments of 13 individuals to serve in senior staff positions at USTR, announced on February 8.[2]

There is considerable interest in how members of President Biden's administration will shape the U.S. trade agenda going forward, particularly given the unprecedented shifts in U.S. trade policy and the multilateral trading system in recent years. USTR, a creation of Congress that is part of the Executive Office of the President, plays a central role in the development, implementation and enforcement of U.S. trade policy. Understanding the mission of the USTR, as well as its statutory role in the broader legal framework and interagency process for formulating U.S. trade policy, is of critical importance when considering how personnel decisions may influence the direction of policy.

The US Legal Framework for Trade Policy Formulation

In the United States, as in most countries, trade policy is a central component of economic policy and foreign policy. Trade policy is frequently discussed in terms of its impact on employment, wages, and industrial competitiveness. However, U.S. policymakers and the Congress have long recognized that trade policy has broader implications, including for national security, the environment, innovation and technology policy, and public health, among other considerations. Trade policy decisions necessarily impact a broad and diverse range of stakeholders within and outside the U.S. government. The U.S. legal framework for the formulation of trade policy attempts to accommodate these varied, overlapping, and sometimes competing interests.

The foundation for U.S. trade policy starts with the Constitution. Article I, Section 8 of the U.S. Constitution gives Congress authority over the key levers of trade policy, including the power to impose duties and to otherwise "regulate Commerce with foreign Nations[.]" At the same time, the President has broad authority under Article II of the U.S. Constitution to conduct foreign affairs, including the power to negotiate international treaties with the advice and consent of the U.S. Senate.

Given this constitutional framework, the advancement of U.S. trade priorities requires cooperation and compromise between Congress and the Executive Branch. For example, Congress under a series of laws, including the Trade Act of 1974[3] and various subsequent iterations of trade promotion authority ("TPA"), has delegated to the President the authority to negotiate trade agreements involving the reduction of tariff and non-tariff barriers, subject to certain statutory negotiating objectives and consultation requirements.[4] Under TPA, Congress retains its authority to approve or reject the agreements negotiated by the President, though it commits to do so via an "up-or-down" vote within specified timeframes. This enables the President to negotiate trade agreements credibly and effectively through his foreign affairs powers under Article II without having to achieve the 2/3 majority in the Senate that is needed to approve a treaty.

Congress has also played a key role in establishing the Executive Branch entities and processes that are involved in the formulation of trade policy. In the Trade Expansion Act of 1962, Congress called for the President to appoint a "Special Representative for Trade Negotiations," which later became the USTR.[5] Through subsequent legislative

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[1] The hearing can be viewed here.

[2] The list of staff appointments is available here.

[3] 19 U.S.C. § 2101 et seq.

[4] The most recent iteration of TPA, the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, is codified at 19 U.S.C. § 4201 et seq. The TPA authority provided to the President by the 2015 Act expires on June 30, 2021.

[5] 19 U.S.C. § 1801 et seq.

actions, Congress significantly expanded USTR's responsibilities, elevated the USTR to a cabinet-level position within the White House, and placed USTR in charge of the interagency process for the development and coordination of U.S. trade policy.[6]

The Role of the Office of the United States Trade Representative (USTR)

The U.S. Trade Representative is a Cabinet-level official with the rank of Ambassador. The USTR serves as the President's principal trade adviser and negotiator, and is the chief U.S. spokesperson on trade. USTR's mission is to obtain foreign market access for U.S. goods and services through the negotiation of trade agreements and, where necessary, enforcement initiatives. More broadly, USTR is responsible for coordinating, developing, and implementing trade policy through an interagency process as well as stakeholder engagement and outreach. USTR's role in the broader legal framework for the formulation of U.S. trade policy is depicted in the flowchart below.

Congress
President
Trade Policy
TPC (NEC/NSC)
House of Representatives
Senate
U.S. Trade Representative
TPRG
Committee on Ways and Means
COG*
Senate Finance Committee
Consultation
Trade Advisory Committees
TPSC
Oversight
Other House Committees
Other Senate Committees
Ratification
Public
Government Agencies

*Congressional Oversight Group

Interagency Process for Trade Policy

Given the wide range of interests implicated by trade policy, a key role of the USTR is to coordinate an interagency process to ensure that the Executive Branch can reach consensus and resolve policy disagreements.[7] Within the guidelines set by the laws enacted by Congress, overarching trade policy decisions of the Executive Branch are made by the President and his Cabinet, including the USTR, whereas the task of animating broad principles is developed at the Deputy, Undersecretary and Assistant Secretary level and fleshing out detailed policy positions is carried out at the agency staff level. Even at the lower levels of the process, where decisions are guided by overarching policy mandates from higher levels, there are often significant disagreements and competing viewpoints among the agencies.

The coordination of trade policy across U.S. Government agencies occurs through the following, three-tiered interagency structure:

[6] Section 141 of the Trade Act of 1974 provided a legislative charter for the "Special Representative for Trade Negotiations" as part of the Executive Office of the President, making it responsible for the trade agreements programs under the Tariff Act of 1930, the Trade Expansion Act of 1962, and the 1974 Act. Section 1601 of the Omnibus Trade and Competitiveness Act of 1988 gave the "primary responsibility" for developing and coordinating U.S. international trade policy.

[7] The interagency process was first established pursuant to Section 242 of the Trade Expansion Act of 1962 (19 U.S.C. § 1872).

Tier 1: Trade Policy Staff Committee (TPSC)

The TPSC is administered and coordinated by USTR. Its members are drawn from subcabinet, senior civil servant level staff from 20 member agencies, including the Departments of State, Treasury, Commerce, Justice, Interior, Labor, Health and Human Services, Agriculture, Energy, and Transportation, as well as the Environmental Protection Agency, the National Economic Council, the National Security Council, and the Office of Management and Budget, among others. There are more than 90 TPSC subcommittees responsible for specialized areas and several task forces that work on particular issues. Among other activities, the TPSC develops policy papers, holds meetings, and solicits input from the public through hearings and requests for written comments.

Tier 2: Trade Policy Review Group (TPRG)

When agencies cannot reach consensus on an issue at the TPSC staff level, the issue is elevated to the TPRG, which is comprised of Deputy- and Undersecretary-level officials. This is not uncommon, though efforts are made to avoid elevating issues (*e.g.*, through successive TPSC meetings).

Tier 3: Trade Policy Committee (National Economic Council (NEC) / National Security Council (NSC))

Unresolved issues of the greatest importance are elevated to Cabinet-level officials for resolution. Coordination at this level is carried out by members of the National Economic Council and the National Security Council. These officials are responsible for resolving disagreements among agencies and making recommendations to the President.

Private Sector Trade Advisory Committees and Stakeholder Engagement

The trade advisory committee system, established by Congress in the Trade Act of 1974, was created to ensure that U.S. trade policy and trade negotiating objectives adequately reflect U.S. public and private sector interests.[8] Advisory committee members represent the full span of U.S. economic interests, including manufacturing; agriculture; digital trade; intellectual property; services; small businesses; labor; environmental, consumer and public health organizations; and state and local governments.

The trade advisory committees provide information and advice on U.S. negotiating objectives, the operation of trade agreements, and other matters arising in connection with the development, implementation, and administration of U.S. trade policy. The advisory committee system is organized into three tiers:

- The President's Advisory Committee on Trade Policy and Negotiations consists of members appointed by the President, and typically is composed of CEOs representing a diverse range of industries and stakeholders.
- There are five Policy Advisory Committees (dealing with environment, labor, agriculture, Africa, and state and local governments), the members of which are appointed by USTR alone or in conjunction with other Cabinet officers.
- There are 20 Technical and Sectoral Advisory Committees in the areas of industry (ITACs) and agriculture (ATACs). Each committee is comprised of individuals with subject-matter expertise in a particular sector or policy area (e.g., services, intellectual property, energy, chemicals, and animal products). Members of these committees are appointed jointly by USTR and the Secretaries of Agriculture and Commerce.

Outlook

Historically, input from Congress and the interagency and advisory committee processes have played important roles in the formulation of U.S. trade policy. However, not all administrations have approached trade policymaking in same

[8] 19 U.S.C. § 2155.

way. During the Trump administration, the White House played a more assertive role in the formulation of trade policy – a signature campaign issue for President Trump – with input from Congress, the interagency process, and external stakeholders taking on less significance than in the past. It is expected that the Biden administration will return to a more traditional approach in which trade policy decisions are more often deliberated through the interagency process, and consultations with Congress and other stakeholders play a more prominent role.

President Biden's nominee for USTR, Ms. Katherine Tai, has significant experience representing Members of Congress in discussions with the Executive Branch concerning trade policy. In her recent position as Chief Trade Counsel to the House Ways and Means Committee, Ms. Tai was actively involved in consultations with USTR concerning the US-Mexico-Canada Agreement and other trade issues. She is also intimately familiar with USTR's mission, the dynamic of its internal operations, and its central role in coordinating the interagency process from her time as chief counsel for China trade enforcement and as associate general counsel at USTR under the Obama administration. In addition, Ms. Tai understands the collaboration that Congress will expect in connection with future trade negotiations, the possible renewal of TPA, and other potential trade actions.

This experience was evident during Ms. Tai's confirmation hearing before the Senate Finance Committee. The hearing revealed little about the specific trade policies the Biden administration intends to pursue, including with respect to the trade conflict with China, possible efforts to join the CPTPP, and WTO reform. Rather than offer a specific course of action on these and several other issues raised during the hearing, Ms. Tai instead focused on the broad principles and approaches that would guide her decision-making. Her responses placed heavy emphasis on consultations with Congress, other Executive Branch agencies, and the public to inform trade policy decisions and balance the interests of different stakeholders. Ms. Tai cited this as a key distinction between her approach to trade policymaking and the approach taken by her predecessor, which she noted caused "a lot of disruption and consternation." She expressed her desire "to accomplish similar goals in a more effective, process-driven manner." Her extensive prior experience working with Congress may be a key factor if the Biden administration decides to seek an extension or renewal of the TPA which is set to expire this June.

The Finance Committee voted to advance Ms. Tai's nomination on March 3, and Ms. Tai is expected to be confirmed with broad bipartisan support. Katherine Tai's tenure as USTR portends close collaboration between Congress and the Biden administration, and a more robust interagency process, with respect to the formulation of trade policy.

US Trade Actions

US Court of International Trade Suggests Customs May Reject Declared Value Based on "First Sale" Rule or "Related-Party" Prices If Non-Market Economy Might Have "Influenced" Buyer or Seller

A recent (March 1, 2021) Court of International Trade ("CIT") opinion, *Meyer Corp. v. United States*,[1] has potentially wide-ranging implications for global supply chains, because it calls into question use of the "first sale" rule with respect to "related-party" transactions involving non-market economies such as China or Vietnam.

The importer in *Meyer* purchased China-origin cookware sets and Thailand-origin cookware sets including China-origin components. Both sales channels involved a related middleperson in Thailand, although a second middleperson in China also sometimes participated. One of the questions at issue was whether the importer's calculation of dutiable vale could lawfully use the "transaction value" price that a related middleperson paid to a related manufacturer, even if both were located in Thailand (*i.e.*, the "first sale" price).

The court in *Meyer* suggests that U.S. customs law might prohibit importers from basing reported dutiable value on the "transaction value" of the goods, if the sale to a middleperson is between related parties and the goods were either—

- Produced in a non-market-economy country like China and Vietnam;
- Produced in a market-economy country like Thailand, but incorporating non-market-economy inputs; or
- Bought or sold by a non-market-economy entity, regardless of where the goods or the inputs that they incorporate originated.

The language at issue is broad with potentially widespread implications for global supply chains: ". . . this court has doubts over the extent to which, if any, the 'first sale' test . . . was intended to be applied to transactions involving non-market economy participants or inputs."[2]

If subsequently upheld by a higher court for the same reasons that the CIT expressed, the decision could affect many global supply chains, which often involve not only related-party transactions but also non-market-economy inputs, processing, suppliers, and middlepersons Importers may have to reassess either their valuation methodologies or their sourcing patterns.

Current Legal Framework for U.S. Customs Valuation

The statutorily preferred method for appraising imported goods' dutiable value is the "transaction value" method.[3] "Transaction value" is defined as "the price actually paid or payable for the merchandise when sold for exportation to the United States," plus certain enumerated additions and minus certain statutorily required deductions. An importer may use the "transaction value" method, however, only in certain circumstances. Specifically, the importer ordinarily must be able show:

(1) That the invoiced transaction used to determine the imported goods' value was a bona fide sale—*i.e.*, that in the transaction, someone actually "sold" the imported goods;

[1] Slip Op. 21-26 (Ct. Int'l Tr. No. 13-00154, Mar. 1, 2021).

[2] Slip Op. at 120.

[3] 19 U.S.C. §§ 1401a(a)(1)(A) and 1401a(b).

(2) If so, that this sale of the imported goods—even when located at the upstream end of a multi-tiered chain of sales and resales—was “for exportation to the United States” (a.k.a. the “first sale” rule);

(3) That “sufficient information” supports any statutorily required additions to and deductions from invoiced prices for this sale; and

(4) If the imported goods’ buyer and seller were “related” entities, that “the price actually paid or payable” nevertheless reflects arm’s-length principles.[4]

***Meyer* Court’s Reframing of the Current Legal Framework Regarding Goods That Non-Market Economies Might “Influence”**

Regarding the four main prerequisites for applying the “transaction value” method, the *Meyer* court ultimately held that the “first” sales at issue in the case:

(1) Were bona fide, and

(2) Were for exportation to the United States; but

(3) Did not have sufficient documentation to *dis*prove the existence of any possibly hidden subsidy resulting from China’s non-market economy, and

(4) Did not have prices that the importer could prove reflected arm’s-length principles.[5]

The *Meyer* court’s decision on points (3) and (4) relies on an expansive reading of one phrase in *Nissho Iwai Am. Corp. v. United States*,[6] which states that the buyer and seller must have reached their price “at arm’s length, *in the absence of any non-market influences that affect the legitimacy of the sales price*.”[7] The *Meyer* court interprets the phrase to refer to larger economic forces and seemingly treats the “absence of non-market influence on price” as an additional required element, distinguishable from the fourth element. CBP and the courts have previously interpreted that fourth element as requiring only that the relationship between the seller and buyer not improperly cause one of them to act against its own best interests.[8]

In addition, the *Meyer* court assumed that, because the United States does not yet recognize China as a market economy, an importer of goods either (a) originating in China, (b) incorporating China-origin inputs, or (c) obtained from a China-based middleperson has an added “burden of demonstrating” that the buyer procured the goods “at undistorted prices.”[9] The court seemed to *presume* distortion, writing, “the *real* costs of inputs from the PRC are suspect, given its status as a nonmarket economy country.”[10]

Due to this presumed distortion, the court concludes that the non-market-economy context makes it too difficult to determine if a related-party price truly reflects arm’s-length principles. That said, the decision examines only related-party pricing, the facts of the case having presented no sales between an unrelated buyer and seller. Thus, the court questioned the costs of China-origin inputs because they are “obviously critical” to the “all costs plus profit test,” which concerns related-party pricing only.[11] Similarly, when the court notes that “the broader concern here is over

[4] 19 U.S.C. § 1401a(b).

[5] Slip Op. at 116-20.

[6] 982 F.2d 505, 509 (Fed. Cir. 1992).

[7] Slip Op. at 13 (quoting *Nissho Iwai*, 982 F.2d at 509) (emphasis added).

[8] *See* Slip Op. at 2-3, 106, and 115.

[9] Slip Op. at 15-16 and 106.

[10] Slip Op. at 117 (emphasis added).

[11] Slip Op. at 107 and 117.

market-distortive influence, either with respect to the plaintiff directly or the provision of inputs generally," it is within the context of analyzing the holding parent company's possible influence over its subsidiaries.[12]

Outlook

Importers should take note of the *Meyer* decision (and any ensuing history) but need not necessarily act on it yet, for several reasons.

- First, the decision could be interpreted as limited to the factual circumstances in the case (*i.e.*, the importer did not provide sufficient documentation in the form of financial statements to show that related-party prices reflected arm's-length principles). Under this interpretation, the *Meyer* court's broad concluding statements constitute mere *dictum* or speculation and do not stand for the proposition that similarly situated importers may *never* use "related-party" prices or apply the "first sale" rule.

- Second, the importer may appeal the decision to the U.S. Court of Appeals for the Federal Circuit, which could overturn it.

Third, even if it upheld the decision, the higher court could provide different reasoning, focusing on specific information and documents that the circumstances here lacked, rather than suggesting that importers' calculations of dutiable value may never use the "first sale" rule when related-party transactions involve non-market economies such as China or Vietnam.

United States Suspends Retaliatory Tariffs on EU, UK Goods to Facilitate Resolution of Boeing and Airbus WTO Disputes

On March 11, 2021, the Office of the US Trade Representative (USTR) published a Federal Register notice suspending the additional tariffs imposed on products of the European Union (EU) as part of the long-running WTO dispute over the provision of subsidies to European aircraft manufacturer Airbus. The United States will suspend its WTO-authorized retaliatory tariffs for four months, pursuant to a Joint Statement adopted by the United States and the EU on March 5. The EU also will suspend the retaliatory tariffs it has imposed on US goods as part of the parallel WTO dispute concerning US subsidies for Boeing. The mutual suspension of these retaliatory tariffs is intended to facilitate negotiations for a resolution of the Airbus and Boeing disputes.

The United States adopted a similar Joint Statement with the United Kingdom (UK) on March 4, and accordingly will suspend its retaliatory tariffs on UK goods for four months. The UK already had suspended its retaliatory tariffs on US goods as of January 1, 2021, in an effort to de-escalate the issue and create space for a negotiated settlement to the two disputes.

USTR's Federal Register notice provides that the United States' retaliatory tariffs on EU goods will cease to apply with respect to goods that are entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern standard time on March 11, 2021, and before 12:01 a.m. eastern daylight time on July 11, 2021. The EU similarly has suspended the application of its retaliatory tariffs through July 11. A separate Federal Register notice issued by USTR provides that the US retaliatory tariffs on UK goods will cease to apply with respect to goods that are entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern standard time on March 4, 2021, and before 12:01 a.m. eastern daylight time on July 4, 2021.

The Joint Statement between the United States and the EU states that the two governments are committed to reaching "a comprehensive and durable negotiated solution to the Aircraft disputes." Key elements of a negotiated solution will include "disciplines on future support in this sector, outstanding support measures, monitoring and enforcement, and addressing the trade distortive practices of and challenges posed by new entrants to the sector

[12] Slip Op. at 118.

from non-market economies, such as China." The Joint Statement with the UK also expresses a desire to negotiate a balanced settlement of the disputes and to "begin seriously addressing the challenges posed by new entrants to the civil aviation market from non-market economies, such as China."

Completing negotiations in all of the areas identified in the joint statements will be difficult to achieve within the four-month period for which tariffs have been suspended. However, the suspensions could potentially be extended further, and both sides have strong incentives to reach a negotiated settlement. Each side's retaliatory tariffs have targeted the aircraft sector, which is among those that have been harmed the most during the COVID-19 pandemic, and a negotiated solution is strongly favored by US and EU business interests unrelated to the aircraft sector to which tariff countermeasures have been applied. As the joint statements indicate, shared concern about China's efforts to enter the civil aircraft market (and its potential use of subsidies and other measures in support of this objective) is another motivating factor. Negotiating new disciplines on subsidies in the aircraft sector is likely to be a longer-term objective, and some observers have suggested that the discussions eventually will need to include other aircraft-producing nations, such as China, Brazil, and Canada, in order to be successful. Nevertheless, the joint statements represent an early effort to reduce trans-Atlantic trade tensions and present a more united front on issues of mutual concern (particularly those involving China), as both sides have been eager to do following the election of President Biden.

USTR's Federal Register notices can be viewed **here** (for the EU tariff suspension) and **here** (for the UK tariff suspension).

US Court of International Trade Rejects Legal Challenge of Section 232 Exclusion Process

On March 10, 2021, the US Court of International Trade ("CIT") issued its opinion in *Thyssenkrupp Materials NA, Inc. et al v. United* States, dismissing a challenge to the process for requesting exclusions from duties imposed on steel and aluminum imports under Section 232 of the Trade Expansion Act of 1962 ("Section 232"). Plaintiffs Thyssenkrupp Materials NA Inc., Thyssenkrupp Materials NA Inc. – Copper & Brass Sales Division, Thyssenkrupp Materials NA Inc. – Materials Trading Division, Thyssenkrupp Materials NA Inc. – Ken-Mac Metals Division, and Thyssenkrupp Presta Danville LLC, (collectively, "Thyssenkrupp") challenged the constitutionality of the Section 232 exclusion process and alleged that the Department of Commerce ("Commerce") exceeded the authority granted to the agency under Proclamations 9704 and 9705, which imposed the tariffs on aluminum and steel, respectively.

We provide an overview of the CIT's decision and its implications below.

Complaint

Thyssenkrupp made two challenges to the Section 232 exclusion request process:

1. ThyssenKrupp alleged that Commerce's exclusion process for the Section 232 duties on aluminum and steel articles "results in a dis-uniform tax whereby individual importers pay different duty rates on the same merchandise, in violation of the Uniformity Clause of the U.S. Constitution." *Thyssenkrupp Materials NA, Inc. et al v. United States*, No. 20-00093, Slip Op. 21-29 at 5 (Ct. Int'l Trade Feb. 10, 2021). Thyssenkrupp further alleged that the exclusion process "results in geographic discrimination because Commerce grants exclusions to importers that import goods through one state, thereby discriminating against importers that import the same goods through other states." *Id.* at 6.

2. Thyssenkrupp also argued that Commerce's Interim Final Rule of March 19, 2018, which created the Section 232 exclusion process, impermissibly grants exclusions to specific importers rather than specific articles, contrary to the requirements of Proclamations 9704 and 9705. *See Interim Final Rule: Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations*, 83 Fed. Reg. 12,106 (Dep't Commerce Mar. 19, 2018). Thyssenkrupp relied on the language contained in the

Proclamations that directs Commerce to provide relief "for any aluminum article" and "for any steel article" rather than for any individual importer.

Thyssenkrupp requested relief in the form of 1) a refund for all duties paid, including interest, on the importation of goods imported under Harmonized Tariff Schedule of the United States ("HTSUS") classifications for which other parties have been granted exclusions, and 2) an injunction preventing U.S. Customs and Border Protection ("CBP") from collecting duties under Section 232 on products "for which any requestor has received an exclusion."

Opinion & Order

The CIT rejected both of Thyssenkrupp's arguments in an order granting Defendants' motion to dismiss the complaint.

Applying the test set forth under *United States v. Ptasynski*, the Court found that the Section 232 exclusion request process does not violate the Uniformity Clause of the U.S. Constitution. 462 U.S. 74, 84 (1983). Under *Ptasynski*, "[w]here Congress defines the subject of a tax in nongeographic terms, the Uniformity Clause is satisfied." 462 U.S. at 84. The Court found that both the Proclamations and the Interim Final Rule, which apply generally to businesses, parties, or activities "in the United States," are defined in non-geographic terms. For example, the Court noted that the Proclamations allow any "directly affected party located in the United States" to apply for an exclusion, and they allow exclusions to be granted for products "determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality" or "based upon specific national security considerations." Slip Op. 21-29 at 12. Commerce's Interim Final Rule uses "the same non-geographic criteria[.]" Thus, even though importers must provide some geographic information when applying for an exclusion, the Court found that "the subject of the tax and the exclusion are both defined in nongeographic terms." Slip Op. 21-29 at 13. On this basis, the Court concluded that the exclusion request process satisfied the requirements of the Uniformity Clause under the *Ptasynski* test.

The Court also found the Interim Final Rule to be consistent with the requirements of Section 232 and Proclamations 9704 and 9705, contrary to Thyssenkrupp's claims. The Court made this determination by finding Commerce's interpretation of the Proclamations reasonable, and deferring to this interpretation under an analysis similar to that applied under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*, 467 U.S. 837 (1984). Under *Chevron*, a court defers to an agency's interpretation of a statute "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 842-43. Although Commerce in this instance interpreted the text of a Proclamation and not a statute, deference also extends to an agency's interpretation of Presidential action through promulgated regulations under similar conditions. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). The Court found that "Commerce has broad discretion" when implementing a process for requesting exclusions, and that "there is no indication that Congress in Section 232 or the President in the Proclamations required broader product-based exclusions" than those implemented by Commerce. Slip Op. 21-29 at 21.

Outlook

The CIT's decision in *Thyssenkrupp* leaves the existing Section 232 exclusion process unaltered. As Thyssenkrupp argued, the existing exclusion process can result in different treatment of importers of the same article subject to Section 232 aluminum or steel duties. Nevertheless, the CIT found no legal basis to invalidate Commerce's existing procedures for this or any other reason argued by Thyssenkrupp. Thyssenkrupp has the opportunity to appeal the CIT's decision to the Court of Appeals for the Federal Circuit, although it has made no indication that it intends to do so.

USTR Extends Section 301 Exclusions for Certain Medical Care Products

On March 5, 2021, the Office of the US Trade Representative (USTR) issued a Federal Register notice extending the Section 301 tariff exclusions on certain medical-care products originating from China. The decision was based on USTR's determination that "[i]n light of the continuing efforts to combat COVID-19…it is inappropriate to allow the exclusions for certain products to lapse."

USTR's decision follows a previous Federal Register notice, issued on December 29, 2020, that: (1) extended 80 product exclusions on medical-care and/or COVID response products; and (2) made further modifications in the form of 19 product exclusions to remove Section 301 duties from additional medical-care and/or COVID response products. However, USTR extended these exclusions only through March 31, 2021. USTR's latest Federal Register notice extends these same 99 product exclusions through September 30, 2021. The products covered by these exclusions include blood pressure monitors, ultrasonic scanning machines, magnetic resonance imaging ("MRI") devices, oxygen tubes, and face masks, among other items. USTR has stated that it may continue to consider further extensions of these exclusions and additional modifications to the Section 301 duties, as appropriate.

USTR's Federal Register notice can be viewed **here**.

Petitions and Investigations

US Department of Commerce Announces Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations Covering Common Alloy Aluminum Sheet from 18 Countries

On March 2, 2021, the US Department of Commerce (DOC) announced affirmative final determinations in the antidumping duty (AD) investigations of common alloy aluminum sheet from Bahrain, Brazil, Croatia, Egypt, Germany, India, Indonesia, Italy, Oman, Romania, Serbia, Slovenia, South Africa, Spain, Taiwan, and Turkey, and affirmative final determinations in the countervailing duty (CVD) investigations of common alloy aluminum sheet from Bahrain, India, and Turkey. In its investigations, DOC determined that imports of the subject merchandise were sold in the United States at the following dumping margins and subsidy rates:

Country	Dumping Margin	Subsidy Rate
Bahrain	4.83 percent	4.83 to 6.44 percent
Brazil	49.61 to 137.06 percent	
Croatia	3.19 percent	
Egypt	12.11 percent	
Germany	49.40 to 242.80 percent	
Greece	0.00 to 2.72 percent	
India	0.00 to 47.92 percent	4.89 to 35.25 percent
Indonesia	32.12 percent	
Italy	0.00 to 29.13 percent	
Oman	5.29 percent	
Romania	12.51 to 37.26 percent	
Serbia	11.67 to 25.84 percent	
Slovenia	13.43 percent	
South Africa	8.85 percent	
South Korea	0.00 to 5.04 percent	
Spain	3.80 to 24.23 percent	
Taiwan	17.50 percent	
Turkey	2.02 to 13.56 percent	2.56 to 4.34 percent

The petitioners in these investigations are the Aluminum Association Common Alloy Aluminum Sheet Trade Enforcement Working Group and its individual members, Aleris Rolled Products, Inc. (Richmond, VA), Arconic, Inc. (Pittsburgh, PA), Constellium Rolled Products Ravenswood, LLC (Ravenswood, WV), JW Aluminum Company (Williamsport, PA), Novelis Corporation (Atlanta, GA), and Texarkana Aluminum, Inc. (Texarkana, TX). The merchandise subject to the investigations is common alloy aluminum sheet, which is a flat-rolled aluminum product having a thickness of 6.3 mm or less, but greater than 0.2 mm, in coils or cut-to-length, regardless of width. Common alloy sheet within the scope of this investigation includes both not clad aluminum sheet, as well as multi-alloy, clad aluminum sheet. With respect to not clad aluminum sheet, common alloy sheet is manufactured from a 1XXX-,

3XXX-, or 5XXX-series alloy as designated by the Aluminum Association. With respect to multi-alloy, clad aluminum sheet, common alloy sheet is produced from a 3XXX-series core, to which cladding layers are applied to either one or both sides of the core.

Common alloy sheet is currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7606.11.3060, 7606.11.6000, 7606.12.3096, 7606.12.6000, 7606.91.3095, 7606.91.6095, 7606.92.3035, and 7606.92.6095. Subject merchandise may also be entered into the United States under HTSUS subheadings 7606.11.3030, 7606.12.3015, 7606.12.3025, 7606.12.3035, 7606.12.3091, 7606.91.3055, 7606.91.6055, 7606.92.3025, 7606.92.6055, 7607.11.9090.

The US International Trade Commission (ITC) is currently scheduled to make its final injury determinations on or around April 15, 2021. If the ITC makes affirmative final injury determinations, Commerce will issue AD and/or CVD orders. 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 common alloy aluminum sheet in 2019 were valued as follows:

- $241.2 million from Bahrain;
- $97 million from Brazil;
- $25.2 million from Croatia;
- $43.8 million from Egypt;
- $286.6 million from Germany;
- $102 million from Greece;
- $123.3 million from India;
- $139.2 million from Indonesia;
- $85.3 million from Italy;
- $200.2 million from Oman;
- $29.4 million from Romania;
- $9.8 million from Serbia;
- $35.3 million from Slovenia;
- $119.1 million from South Africa;
- $121.7 million from South Korea;
- $57.1 million from Spain;
- $146.3 million from Taiwan; and
- $122.8 million from Turkey.

US International Trade Commission Finds Imports of Standard Steel Wire Mesh from Mexico Injure US Industry

On March 17, 2021, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of standard steel welded wire mesh that the US Department of Commerce (DOC) has determined are receiving countervailable subsidies from the Government of Mexico. 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 a countervailing duty order on imports of standard steel welded wire mesh from Mexico.

In its countervailing duty investigation, DOC determined that imports of the subject merchandise from Mexico received countervailable subsidies ranging from 1.03 to 102.10 percent. The subject merchandise is 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. In 2019, imports of standard steel welded wire mesh from Mexico were valued at approximately $46.7 million, according to DOC.

The ITC's public report on this investigation will be made available by April 13, 2021.

US International Trade Commission Finds Imports of Phosphate Fertilizers from Morocco and Russia Injure US Industry

On March 11, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of phosphate fertilizers from Morocco and Russia that the US Department of Commerce (DOC) has determined are receiving countervailable subsidies. Chair Jason E. Kearns, Vice Chair Randolph J. Stayin, and Commissioners Rhonda K. Schmidtlein and Amy A. Karpel voted in the affirmative. Commissioner David S. Johanson voted in the negative. As a result of the ITC's affirmative determinations, DOC will issue countervailing duty orders on imports of phosphate fertilizers from Morocco and Russia.

In its countervailing duty investigations, 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 subject merchandise 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 subject 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. Subject merchandise may also enter under subheadings 3103.90.0010, 3105.10.0000, 3105.60.0000, 3105.90.0010, and 3105.90.0050. According to DOC, imports of phosphate fertilizers in 2019 were valued at approximately $729.4 million for Morocco and $299.4 million for Russia.

The ITC's public report on this investigation will be made available by April 13, 2021.