US Multilateral Trade Policy Developments

Japan External Trade Organization

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Contents

US Trade Actions 1

Biden Administration Announces Plans to Combat Illegal, Unreported, and Unregulated Fishing and Associated Labor Abuses, Including Forced Labor 1

Trade Agreements 4

United States Agrees to Exclude Canadian Solar Products from Safeguard Measure Following USMCA Dispute 4

United States and Canada Request Consultations Over Mexico's Energy Policies Under USMCA 5

Petitions and Investigations 9

US Department of Commerce Issues Preliminary Determinations in Antidumping Duty Investigations of Steel Nails from India, Sri Lanka, Thailand, Turkey 9

US Department of Commerce Issues Affirmative Preliminary Determinations in Antidumping Duty Investigations of Lemon Juice from Brazil and South Africa 9

US International Trade Commission Issues Negative Injury Determinations in Investigations of Urea Ammonium Nitrate Solutions from Russia and Trinidad and Tobago 10

US International Trade Commission Finds Imports of Sodium Nitrate From Russia Injure US Industry 11

US International Trade Commission Find Imports of Acrylonitrile-Butadiene Rubber from France, Mexico, and South Korea Do Not Injure US Industry 11

Legislative Developments 12

New US Climate Bill Seeks to Onshore Electric Vehicle Supply Chain 12

New US Climate Bill Seeks to Bolster Domestic Critical Minerals Supply Chain 14

US Trade Actions

Biden Administration Announces Plans to Combat Illegal, Unreported, and Unregulated Fishing and Associated Labor Abuses, Including Forced Labor

On June 27, 2022, the Biden Administration announced new initiatives to combat illegal, unreported, and unregulated (IUU) fishing and "associated labor abuses," including forced labor in the seafood industry:

- President Biden issued a National Security Memorandum directing federal agencies to take new actions to curtail the importation of seafood products derived from IUU fishing and forced labor.[1] Actions proposed in the Memorandum include the expansion of the Seafood Import Monitoring Program (SIMP) administered by the National Oceanic and Atmospheric Administration (NOAA), as well as potential enforcement actions under US trade laws (including Section 307 of the Tariff Act of 1930, which prohibits the importation of goods made with forced labor, and Section 301 of the Trade Act of 1974, which addresses "unreasonable or discriminatory" foreign trade practices).
- Concurrent with the Memorandum, NOAA issued a proposed rule that would expand its regulatory definition of IUU fishing to encompass the use of forced labor in international waters, as well as fishing in a nation's territorial waters without permission. These changes would establish additional bases for the President to prohibit seafood imports from particular countries pursuant to the High Seas Driftnet Fisheries Enforcement Act.

The Biden Administration has indicated that these proposed measures are part of a strategy "to leverage the United States' large seafood import market" to deter IUU fishing and forced labor in the seafood industry, and to advance trade policies that benefit US seafood workers.[2] Several of the measures resemble pending legislative proposals included in the America COMPETES Act (H.R. 4521), which passed the House of Representatives in February but is now the subject of a contentious conference negotiation between the House and Senate. We provide an overview of the proposed measures below.

Presidential Memorandum on Combating Illegal, Unreported, and Unregulated Fishing and Associated Labor Abuses

President Biden's Memorandum seeks to "address the problem of IUU fishing, including by distant water fishing vessels, and associated labor abuses, including the use of forced labor in the seafood supply chain." The Memorandum directs federal agencies to use a wide range of conservation, labor, trade, economic, diplomatic, law enforcement, and national security authorities in order to achieve these objectives, but places particular emphasis on trade actions given the United States' status as "the world's single largest country market for seafood[.]" The Memorandum includes the following directives:

- **Expansion of NOAA's Seafood Import Monitoring Program.** The Memorandum directs the Administrator of NOAA to initiate a rulemaking by the end of 2022 to expand the scope of the SIMP to include additional species and species groups, "as appropriate." The SIMP is a seafood "traceability program" that requires importers to obtain permits and provide chain of custody data, from the point of harvest to the point of entry into US commerce, for imported seafood products that NOAA considers to be particularly vulnerable to IUU fishing or

[1] Presidential Memorandum on Combating Illegal, Unreported, and Unregulated Fishing and Associated Labor Abuses, June 27, 2022, **https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/27/memorandum-on-combating-illegal-unreported-and-unregulated-fishing-and-associated-labor-abuses/**.

[2] Id.

"seafood fraud".[3] NOAA has stated that the SIMP's permitting, recordkeeping, and reporting requirements are intended to serve as a deterrent to IUU seafood products entering the US market, and a mechanism for identifying unlawful imports. However, some US importers and trading partners have expressed concern about the costs and complexity of complying with the SIMP's requirements.[4]

The SIMP currently applies to 13 species groups: Abalone, Atlantic cod, Blue crab (Atlantic), Dolphinfish (Mahi Mahi), Grouper, King crab (red), Pacific cod, Red snapper, Sea cucumber, Sharks, Shrimp, Swordfish, and Tuna (Albacore, Bigeye, Skipjack, Yellowfin, Bluefin). These groups presently account for approximately half of all seafood imports into the United States. President Biden's Memorandum directs NOAA to "continuously expand coverage of the program, as appropriate," but does not indicate which additional species the forthcoming rule may cover. Some Members of Congress have advocated expanding the SIMP to cover all seafood imports, and the America COMPETES Act (H.R. 4521) includes provisions that would mandate such an expansion. However, the COMPETES Act has encountered obstacles in Congress, and groups representing US seafood importers and processors have opposed the expansion of the SIMP.

- **Actions to address forced labor.** The Memorandum directs the Secretary of Homeland Security, through the Commissioner of US Customs and Border Protection (CBP), to exercise its existing authority under Section 307 of the Tariff Act of 1930 to prevent the importation into the United States of seafood produced with forced labor.[5] Section 307 prohibits the importation of all goods produced in whole or in part by convict labor, forced labor, or indentured labor (including forced child labor and indentured child labor). The Memorandum specifically directs DHS and CBP to (1) "investigate fishing vessels and operators suspected to be harvesting seafood with forced labor and issue withhold release orders [WROs], as appropriate;" (2) use the interagency Forced Labor Enforcement Task Force "to monitor United States enforcement of the prohibition under section 307" with respect to seafood; and (3) "investigate prospective civil penalty cases against importers connected to previously issued fishing vessel [WROs], as appropriate[.]" Since 2019, CBP has issued six WROs targeting specific fishing vessels suspected of using forced labor, as well as companies that own such vessels.[6] Five of these WROs remain in effect, targeting vessels flagged in China, Fiji, and Taiwan. The Memorandum is a signal that CBP will continue to prioritize the seafood sector in its enforcement of Section 307.
- **Other trade enforcement actions.** The Memorandum directs the Secretaries of State and Labor, the US Trade Representative (USTR), the Administrator of NOAA, the Commissioner of CBP and other "relevant agencies" to "explore opportunities to use existing trade tools and authorities to counter forced labor in the seafood supply chain and IUU fishing generally[.]" The Memorandum specifically suggests that agencies "explore the use, as appropriate, of countervailing duties, actions pursuant to section 301 of the Trade Act of 1974 (19 U.S.C. 2411), import declarations, certification under the Pelly Amendment to the Fishermen's Protective Act of 1967 (22 U.S.C. 1978), and due diligence requirements," but does not require further actions.

NOAA Proposed Rule on IUU Fishing and Forced Labor

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[3] NOAA implemented the SIMP in 2018 pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSA). See *Magnuson-Stevens Fishery Conservation and Management Act; Seafood Import Monitoring Program*, National Oceanic and Atmospheric Administration, December 9, 2016, 81 Fed. Reg. 88975.

[4] See, e.g., Statement of John P. Connelly, President, National Fisheries Institute, to the United States House of Representatives Natural Resources Committee's Water, Oceans, and Wildlife Subcommittee Hearing, November 14, 2019, **https://naturalresources.house.gov/imo/media/doc/Connelly%20Testimony%20WOW%20Ov%20Hrg%2011.14.19.pdf**

[5] 19 U.S.C. 1307.

[6] These WROs can be viewed **here**.

Concurrent with President Biden's Memorandum, NOAA issued a proposed rule designed to enhance its ability to combat IUU fishing and forced labor in the seafood supply chain.[7] Among other changes, the proposed rule would expand NOAA's definition of IUU fishing in regulations that implement the High Seas Driftnet Fishing Moratorium Protection Act[8] (Moratorium Protection Act) to cover the following activities:[9]

- Fishing activities in waters beyond any national jurisdiction that involve the use of forced labor; and
- Fishing in waters under the jurisdiction of a nation, without the permission of that nation, or in contravention of its laws and regulations.

If adopted, these changes would provide new bases for the US government to restrict imports of seafood and seafood products from particular countries. Pursuant to the Moratorium Protection Act, NOAA produces a biennial report to Congress identifying nations whose fishing industries are engaged in "IUU fishing" as defined by NOAA in its regulations.[10] If NOAA's report identifies a country for IUU fishing, and the Secretary of Commerce does not subsequently certify that country as having taken appropriate corrective actions, the President may prohibit the importation of fish and fish products from that country, pursuant to the High Seas Driftnet Fisheries Enforcement Act (Fisheries Enforcement Act).[11] The proposed rule, if adopted, could cause NOAA to identify additional countries for IUU fishing in its biennial report, creating pressure for those countries to take corrective action in order to avoid US trade restrictions. Biden Administration officials have suggested that this is an intended effect of the proposed rule.[12]

To date, the US government has rarely used its authority under the Fisheries Enforcement Act to prohibit seafood imports. In recent years, however, certain Members of Congress, non-governmental organizations, and groups representing the US seafood industry have urged the Executive Branch to use this authority more aggressively.[13] Expanding NOAA's definition of IUU fishing to include forced labor is one of several changes that

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[7] NOAA's proposed rule can be viewed **here**.

[8] 16 U.S.C. 1826d et seq.

[9] NOAA's current definition of IUU fishing, set forth at 50 C.F.R. § 300.201, encompasses the following:

> (1) In the case of parties to an international fishery management agreement to which the United States is a party, fishing activities that violate conservation and management measures required under an international fishery management agreement to which the United States is a party, including but not limited to catch limits or quotas, capacity restrictions, bycatch reduction requirements, shark conservation measures, and data reporting;
>
> (2) In the case of non-parties to an international fishery management agreement to which the United States is a party, fishing activities that would undermine the conservation of the resources managed under that agreement;
>
> (3) Overfishing of fish stocks shared by the United States, for which there are no applicable international conservation or management measures, or in areas with no applicable international fishery management organization or agreement, that has adverse impacts on such stocks; or,
>
> (4) Fishing activity that has a significant adverse impact on seamounts, hydrothermal vents, cold water corals and other vulnerable marine ecosystems located beyond any national jurisdiction, for which there are no applicable conservation or management measures or in areas with no applicable international fishery management organization or agreement.
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> (5) Fishing activities by foreign flagged vessels in U.S. waters without authorization of the United States.

[10] 16 U.S.C. 1826j.

[11] 16 U.S.C. 1826a(b)(3)(A).

[12] "Background Press Call on the President's National Security Memorandum on Illegal, Unreported, and Unregulated Fishing," The White House, June 27, 2022, **https://www.whitehouse.gov/briefing-room/press-briefings/2022/06/27/background-press-call-on-the-presidents-national-security-memorandum-on-illegal-unreported-and-unregulated-fishing/**.

[13] See, e.g., statements of the Southern Shrimp Alliance, Humanity United, and U.S. Representative Jared Huffman (D-CA) at the House Natural Resources Committee, Subcommittee on Water, Oceans, and Wildlife hearing on "Oversight of NOAA's Report on

these stakeholders have proposed with the goal of combatting the importation of IUU seafood into the United States.[14] This objective is reflected in the America COMPETES Act, which would codify into law an expanded definition of IUU fishing that, like NOAA's proposed definition, includes the use of forced labor. Some Members of Congress have contended that such a change would enable NOAA to identify China's fishing industry, among others, as engaging in IUU fishing.[15]

Trade Agreements

United States Agrees to Exclude Canadian Solar Products from Safeguard Measure Following USMCA Dispute

On July 8, 2022, the United States and Canada signed a Memorandum of Understanding (MOU) to settle their dispute on trade in solar products under the United States-Mexico-Canada Agreement (USMCA).[1] The MOU provides that the United States will suspend the application of its solar safeguard measure to solar products originating in Canada, retroactive to February 1, 2022. The MOU follows a February ruling by a USMCA dispute settlement panel that the United States violated Article 10.2.1 of the USMCA when it applied the safeguard measure to Canadian solar products.[2] This provision requires a USMCA Party to exclude imports of another Party from a safeguard measure unless such imports account for a "substantial share" of total imports of the product and "contribute importantly" to the serious injury caused by imports.

The US safeguard measure on solar products consists of an annual tariff-rate quota of 5 gigawatts (GW) on imports of crystalline silicon photovoltaic (CSPV) cells, and a tariff of 14.75 percent on imports of CSPV modules and above-quota cells.[3] On February 4, 2022, President Biden issued a Proclamation extending the safeguard measure for an additional four years, through February 2026 (the maximum period allowed under US law). The Proclamation also instructed the US Trade Representative (USTR) to enter into negotiations with Canada and Mexico concerning their CSPV exports to the United States, and authorized USTR to suspend the application of the safeguard measure to imports of Canada or Mexico, if USTR could conclude agreements ensuring that imports from either country "do not undermine the effectiveness" of the safeguard. The United States has not announced any agreement with Mexico concerning the solar safeguard measure.

The US-Canada MOU provides that the United States will suspend the application of the solar safeguard measure to unliquidated entries of solar products "that are originating in Canada under the [USMCA] and that are country of origin Canada pursuant to 19 CFR Part 102," effective with respect to merchandise entered for consumption, or withdrawn from warehouse for consumption on or after 12:01 a.m. on February 1, 2022. The MOU includes a surge mechanism that allows the United States to revoke the suspension in certain circumstances. Specifically, the United

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Illegal, Unreported, and Unregulated Fishing," November 24, 2019, https://naturalresources.house.gov/hearings/wow-oversight-hearing_november-14-2019.

[14] Id.

[15] Id.

[1] The text of the MOU can be viewed here.

[2] Final Report of the Panel, Crystalline Silicon Photovoltaic Cells Safeguard Measure (USMCA Dispute USA-CDA-2021-31-01), February 1, 2022.

[3] For an overview of the safeguard measure and President Biden's Proclamation extending the measure, please refer to the W&C US Trade Alert dated February 4, 2022.

States may revoke the suspension if the US International Trade Commission (ITC) determines, in response to a request from USTR, that a surge in imports of CSPV products originating in Canada "undermines the effectiveness of the solar safeguard measure." The United States has committed that USTR will not make such a request unless solar imports from Canada in the most recent 12-month period for which data are available exceed the threshold levels set forth in the MOU, which are as follows:

- 1.0 GW between February 1, 2022, and January 31, 2023;
- 1.15 GW between February 1, 2023, and January 31, 2024;
- 1.30 GW between February 1, 2024, and January 31, 2025; and
- 1.45 GW between February 1, 2025, and February 6, 2026.

These thresholds allow for considerable growth in US solar imports from Canada, which totaled approximately 0.2 GW in 2020.[4] The MOU specifies that imports of CSPV modules from Canada that are otherwise excluded from the safeguard measure (for example, bifacial modules) will not be included in the quantities of imports originating in Canada in the determination of whether the volume of imports from Canada exceeds the threshold level.

The United States' decision to exclude Canadian solar products from the safeguard measure averts the imposition of retaliatory tariffs on US exports to Canada. Canada and the United States have jointly notified the USMCA Secretariat and the dispute settlement panel that the MOU constitutes a resolution of their dispute under Chapter 31 of the Agreement. Additionally, Canada has committed in the MOU that it will not impose rebalancing measures against the United States under Article 10.2.6 of the USMCA "as long as the solar safeguard measure is not applied to imports of CSPV products originating in Canada." Article 10.2.6 allows a USMCA Party whose goods are subject to another Party's safeguard measure to "take action having trade effects substantially equivalent" to the safeguard measure, if the Parties cannot agree on trade liberalizing compensation.

United States and Canada Request Consultations Over Mexico's Energy Policies Under USMCA

On July 20, 2022, the United States requested consultations with Mexico under the Dispute Settlement chapter of the United States-Mexico-Canada Agreement (USMCA), arguing that several of Mexico's energy policies are inconsistent with the USMCA.[1] The measures challenged by the United States affect a wide range of energy resources and technologies, including natural gas, electricity, renewable sources such as wind and solar, and diesel fuel. The United States claims that the measures at issue favor Mexican state-owned enterprises over US companies and US-produced energy, thereby violating Mexico's commitments under the USMCA chapters on Market Access, Investment, and State-Owned Enterprises, while also undermining climate objectives. The Government of Canada has stated that it agrees with the US position and has filed a parallel request for consultations, the text of which is not yet public.

If the parties are unable to resolve the dispute through consultations within 75 days, the complaining parties (the United States and Canada) may request the establishment of a dispute settlement panel to examine the measures at issue and potentially authorize retaliatory actions. This alert provides an overview of the US request for consultations and the next steps in the dispute settlement process.

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[4] US International Trade Commission, Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled Into Other Products, Investigation No. TA-201-075 (Extension), Publication 5266, December 2021, at Table H-6.

[1] The US request for consultations can be viewed **here**.

US Request for Consultations

The US request covers four aspects of Mexican energy policy that allegedly "favor [Mexico's] state-owned electrical utility, Comisión Federal de Electricidad (CFE), and petroleum company, Petróleos Mexicanos (Pemex), and negatively impact U.S. companies operating in Mexico and U.S.-produced energy":

1. **The Electric Power Industry Law, as amended (alleged violation of USMCA Market Access and Investment chapters)**

The US request challenges a March 2021 amendment to Mexico's Electric Power Industry Law that allegedly "require[s] its grid operator Centro Nacional de Control de Energía (CENACE) to prioritize in various ways electricity produced by CFE over private competitors in dispatching electricity into Mexico's grid." Among other examples, the request cites Article 26 of the amended law, which "requires that CENACE prioritize dispatch of power generated by plants 'owned by State agencies, entities, or enterprises;'" and Article 4(V), which "'guarantee[s], in the first instance' electricity contracts of a type that only CFE can hold or enter into[.]"

The United States alleges that this measure appears to be inconsistent with provisions of the USMCA's Market Access and Investment Chapters. Specifically, the request alleges violations of Article 2.3 of the USMCA (because Mexico "has failed to accord national treatment to U.S. goods"), as well as Article 14.4 of the USMCA (because Mexico "has failed to accord to U.S. investors and their investments treatment that is no less favorable than that it accords, in like circumstances, to Mexican investors and their investments."

2. **"Inaction, Delays, Denials, and Revocations of Private Companies' Abilities to Operate in Mexico's Energy Sector" (alleged violation of USMCA Chapters on Market Access, Investment, State-Owned Enterprises, and Publication and Administration)**

The US request alleges that Mexico "hinders the ability of private companies to operate in Mexico's energy sector," including by "delaying, denying or failing to act on applications for new permits or permit modifications; suspending or revoking existing permits; or otherwise blocking private companies' ability" to:

- Operate renewable energy facilities, such as wind and solar installations;
- Import and export electricity and fuel;
- Store or transload fuel; and
- Build or operate retail fuel stations.

The United States claims that these measures appear to be inconsistent with the following provisions of the USMCA chapters on Market Access, Investment, State-Owned Enterprises, and Publication and Administration:

- Article 2.3, because the measures provide treatment less favorable than that accorded to like products of national origin;
- Article 2.11, because, and to the extent, they prohibit or restrict imports or exports of a good;
- Article 14.4, because they favor Mexican investors and their investments over US investors and their investments;
- Article 22.5.2, because the relevant administrative body "is not exercising its regulatory discretion in an impartial manner with respect to enterprises that it regulates, including enterprises that are not state-owned enterprises"; and

- Article 29.3, because Mexico "is not administering its laws in a consistent, impartial, and reasonable manner."

3. **Postponement of Requirement to Supply Ultra-Low Sulfur Diesel for Pemex Only (alleged violation of USMCS Market Access and State-Owned Enterprise Chapters)**

The US request challenges a regulation issued by Mexico's Energy Regulatory Commission (Comisión Reguladora de Energía, or CRE) in 2019 that "grant[ed] only Pemex a five-year extension to comply with maximum sulfur content requirements under its applicable automotive diesel fuel standard[.]" The United States alleges that the measure appears inconsistent with provisions of the USMCA's Market Access and State-Owned Enterprises chapters, namely Article 2.3 (because Mexico "has failed to accord national treatment to U.S. goods") and Article 22.5.2 (because CRE "has not exercised its regulatory discretion in an impartial manner with respect to enterprises that it regulates, including enterprises that are not state-owned enterprises[.]")

4. **Actions Regarding the Use of Mexico's Natural Gas Transportation Service (alleged violation of USMCA Market Access chapter)**

The US request challenges an "official letter" sent by Mexico's Secretary of Energy to CRE and Mexico's National Natural Gas Control Center (Centro Nacional de Control del Gas Natural, or CENAGAS) in June 2022. According to the US request, the letter announced an energy policy and "supply guarantee strategy" that "would incentivize or require current or future users of Mexico's natural gas transportation service to source natural gas from CFE or Pemex and would impose restrictions on the importation of U.S. natural gas." For example, the US cites statements in the letter that "require" CENAGAS to "demand" that users or those interested in using Mexico's natural gas transportation service prove "that they receive the supply of Natural Gas from any of the productive companies of the State or its subsidiaries or affiliates[.]" The letter also "requires" CENAGAS to "demand" that "[a]t those points where CFE, its productive companies, or subsidiaries have reserved capacity in the upstream transportation systems, contracting with them shall be given precedence," according to the US request.

The United States claims that this measure appears to violate provisions of the USMCA's Market Access chapter, namely Article 2.3 (because it provides treatment to imported products that is less favorable than that accorded to like products of national origin), and Article 2.11 (because it is a prohibition or restriction on the importation of a good of the United States destined for Mexico.)

Next steps

The US and Canadian requests begin what could be a lengthy process of consultations and dispute settlement proceedings under Chapter 31 of the USMCA. This process could result in the United States and Canada imposing retaliatory measures, in the event that (1) the dispute proceeds to the panel stage; (2) the panel finds that Mexico's measures are inconsistent with the USMCA; (3) and the parties are unable to agree on a resolution. The next steps in the dispute settlement process are as follows:

- In accordance with Article 31.6 of the USMCA, the parties will have 75 days to resolve the matter through bilateral consultations (*i.e.*, until October 3, 2022), unless they agree on a different time period. If they fail to resolve the matter during the applicable timeframe, the complaining Parties (the United States and Canada) will be permitted to request the establishment of a dispute settlement panel to determine whether the measures covered by the request are inconsistent with the terms of the Agreement. The process of arriving at a panel ruling would involve several procedural steps, including a panel composition process,[2] and the issuance of a

[2] In disputes involving two Parties, Panels will consist of five members (unless the Parties agree to a panel comprised of three members), selected from a pre-determined roster established by the Parties. The USMCA Parties established the Roster of Panelists for Chapter 31 Dispute Settlement Panels on July 2, 2020. *See* FTC Decision No. 1, Annex IV (July 2, 2020).

panel report within prescribed time frames.[3] In total, the issuance of a final panel report would likely occur no earlier than 315 days after the date on which the request for consultations was submitted.

- USMCA panel reports must contain (1) "findings of fact"; (2) determinations as to whether the measure at issue is inconsistent with obligations in the Agreement, or a Party has otherwise failed to carry out its obligations in the Agreement; and (3) recommendations, if the disputing Parties have jointly requested them, for the resolution of the dispute.[4] If the panel finds that Mexico's measures are inconsistent with the USMCA, the parties "shall endeavor to agree on the resolution of the dispute."[5] If the disputing Parties are unable to agree on a resolution within the 45-day period, the complaining parties would be permitted to suspend the application to the Mexico of benefits "of equivalent effect to the non-conformity" until the disputing Parties agree on a resolution.[6] Typically, this involves the imposition of retaliatory tariffs on goods of the responding party.

In the United States, there is strong political support for the Biden Administration's decision to pursue the dispute, both from the business community and Members of Congress. These stakeholders have argued that the Mexican policies at issue not only disadvantage US companies, but also raise concerns about whether Mexico can meet its climate goals under the Paris Agreement.[7] The latter issue is of particular concern to the Biden Administration and Democratic Members of Congress.

Whether this dispute is resolved through consultations or a formal panel proceeding, it may have important implications for the North American energy sector, particularly given that the challenged measures affect a wide range of energy resources and technologies from renewables to fossil fuels. Importantly, the USMCA's Rules of Procedure allow a Panel to consider written views submitted by non-governmental entities during the course of the dispute, in addition to hearing the views of the disputing Party governments.[8] Companies should examine the implications of this USMCA dispute and consider strategies to protect their commercial interests.

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[3] The Panel must present an initial report to the disputing Parties no later than 150 days after the date of the appointment of the last panelist, except in "exceptional cases," in which the report may be delayed by an additional 30 days. USMCA Art. 31.17(1)-(2). The 30-day deadline may be altered if the disputing Parties agree. See also USMCA Arts. 31.18 and 31.19. The Panel reports must contain (1) "findings of fact"; (2) determinations as to whether the measure at issue is inconsistent with obligations in the Agreement, or a Party has otherwise failed to carry out its obligations in the Agreement; and (3) recommendations, if the disputing Parties have jointly requested them, for the resolution of the dispute. USMCA Art. 31.13.1.

[4] USMCA Art. 31.13.1.

[5] USMCA Art. 31.18.

[6] USMCA Art. 31.19.1.

[7] "U.S. Chamber Commends USTR Decision on Mexican Energy Policy," US Chamber of Commerce, July 20, 2022, https://www.uschamber.com/international/u-s-chamber-commends-ustr-decision-on-mexican-energy-policy. *See also* "Wyden Statement on U.S. Requesting Consultations Over Mexico's Protectionist, Fossil Fuel-Promoting Energy Policies," Senator Ron Wyden (D-OR), July 20, 2022, https://www.finance.senate.gov/chairmans-news/wyden-statement-on-us-requesting-consultations-over-mexicos-protectionist-fossil-fuel-promoting-energy-policies; and "Brady Applauds Enforcement Action Against Mexico Flaunting USMCA Energy Commitments, Harming American Competitiveness," Representative Kevin Brady (R-TX), July 20, 2022, https://gop-waysandmeans.house.gov/brady-applauds-enforcement-action-against-mexico-flaunting-usmca-energy-commitments-harming-american-competitiveness/.

[8] Article 20, USMCA Rules of Procedure for Chapter 31, available at https://ustr.gov/sites/default/files/files/agreements/usmca/AnnexIIIUSMCARulesProcedure.pdf.

Petitions and Investigations

US Department of Commerce Issues Preliminary Determinations in Antidumping Duty Investigations of Steel Nails from India, Sri Lanka, Thailand, Turkey

On July 29, 2022, the US Department of Commerce (DOC) announced its preliminary determinations in the antidumping duty (AD) investigations of steel nails from India, Sri Lanka, Thailand, and Turkey. In its investigations, DOC preliminarily determined that imports of the subject merchandise from Sri Lanka were not sold in the United States at less than fair value, and that imports from the remaining countries were sold in the United States at the following dumping margins:

Country	Dumping Margin
India	2.91 to 3.97 percent
Thailand	17.12 to 65.87 percent
Turkey	22.72 to 38.38 percent

The petitioner in these investigations is Mid Continent Steel & Wire, Inc. (Poplar Bluff, MO). The merchandise covered by these investigations is certain steel nails having a nominal shaft or shank length not exceeding 12 inches. Certain steel nails include, but are not limited to, nails made from round wire and nails that are cut from flat-rolled steel or long-rolled flat steel bars. Certain steel nails may be of one piece construction or constructed of two or more pieces. Examples of nails constructed of two or more pieces include, but are not limited to, anchors comprised of an anchor body made of zinc or nylon and a steel pin or a steel nail; crimp drive anchors; split-drive anchors, and strike pin anchors. Also included in the scope are anchors of one piece construction. A complete description of the scope can be found in DOC's Federal Register notices on the preliminary determinations.

Certain steel nails subject to these investigations are currently classified under HTSUS subheadings 7317.00.5501, 7317.00.5502, 7317.00.5503, 7317.00.5505, 7317.00.5507, 7317.00.5508, 7317.00.5511, 7317.00.5518, 7317.00.5519, 7317.00.5520, 7317.00.5530, 7317.00.5540, 7317.00.5550, 7317.00.5560, 7317.00.5570, 7317.00.5580, 7317.00.5590, 7317.00.6530, 7317.00.6560, and 7317.00.7500. Certain steel nails subject to these investigations also may be classified under HTSUS subheadings 7318.15.5090, 7907.00.6000, 8206.00.0000, or other HTSUS subheadings.

DOC is scheduled to issue its final determinations in these investigations by October 19, 2022 (for Turkey) and December 19, 2022 (for all other investigated countries). If DOC issues affirmative final determinations, the investigations will continue, and the US International Trade Commission (ITC) will be scheduled to issue its final injury determinations by December 12, 2022 (for Turkey) and February 7, 2023 (for all other investigated countries).

According to DOC, the value of imports of certain steel nails from the investigated countries in 2021 was approximately $43.8 million (for India); $33.9 million (for Sri Lanka); $66.8 million (for Thailand); and $56.3 million (for Turkey).

US Department of Commerce Issues Affirmative Preliminary Determinations in Antidumping Duty Investigations of Lemon Juice from Brazil and South Africa

On July 29, 2022, the US Department of Commerce (DOC) announced its affirmative preliminary determinations in the antidumping duty (AD) investigations of lemon juice from Brazil and South Africa. In its investigations, DOC preliminarily determined that imports of the subject merchandise were sold in the United States at the following dumping margins:

Country	Dumping Margin
Brazil	4.45 to 21.49 percent
South Africa	55.67 to 74.04 percent

The petitioner is Ventura Coastal, LLC (Ventura, CA). The product covered by these investigations is certain lemon juice. Lemon juice is covered: (1) with or without addition of preservatives, sugar, or other sweeteners; (2) regardless of the GPL (grams per liter of citric acid) level of concentration, brix level, brix/acid ratio, pulp content, clarity; (3) regardless of the grade, horticulture method (*e.g.,* organic or not), processed form (*e.g.,* frozen or not-from-concentrate), the size of the container in which packed, or the method of packing; and (4) regardless of the U.S. Department of Agriculture Food and Drug Administration (FDA) standard of identity (as defined under 19 CFR 146.114 *et seq.*) (*i.e.,* whether or not the lemon juice meets an FDA standard of identity). A complete description of the scope can be found in DOC's Federal Register notices on the preliminary determinations.

The product subject to these investigations is currently classifiable under subheadings 2009.31.4000, 2009.31.6020, 2009.31.6040, 2009.39.6020, and 2009.39.6040 of the Harmonized Tariff Schedule of the United States (HTSUS).

DOC is scheduled to issue its final determinations in these investigations by October 11, 2022 (for South Africa) and December 19, 2022 (for Brazil). If DOC issues affirmative final determinations, the investigations will continue, and the US International Trade Commission (ITC) will be scheduled to issue its final injury determinations by November 25, 2022 (for Turkey) and February 1, 2023 (for Brazil).

According to DOC, the value of imports under the above HTSUS subheadings in 2021 was approximately $16.3 million (for Brazil) and $11.2 million (for Sri Lanka).

US International Trade Commission Issues Negative Injury Determinations in Investigations of Urea Ammonium Nitrate Solutions from Russia and Trinidad and Tobago

On July 18, 2022, the US International Trade Commission (ITC) determined that a US industry is not materially injured or threatened with material injury by reason of imports of urea ammonium nitrate solutions from Russia and Trinidad and Tobago that the U.S. Department of Commerce (DOC) has determined are subsidized and sold in the United States at less than fair value. Chairman David S. Johanson and Commissioners Rhonda K. Schmidtlein, Jason E. Kearns, Randolph J. Stayin, and Amy A. Karpel voted in the negative.

As a result of the ITC's negative determinations, DOC will not issue countervailing duty orders and antidumping duty orders on imports of this product from Russia and Trinidad and Tobago. In its antidumping and countervailing duty investigations, DOC had determined that imports of these products were sold in the United States at the following dumping margins and subsidy rates:

Country	Dumping Margin	Subsidy Rate
Russia	8.16 to 122.93 percent	6.27 to 9.66 percent
Trinidad and Tobago	111.71 percent	1.83 percent

The ITC's public report on these investigations will be available by August 22, 2022. According to the ITC, the value of subject imports in 2021 was approximately $539.9 million.

US International Trade Commission Finds Imports of Sodium Nitrate From Russia Injure US Industry

On July 27, 2022, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of sodium nitrite from Russia that the US Department of Commerce (DOC) has determined are subsidized by the government of Russia. Chairman David S. Johanson and Commissioners Rhonda K. Schmidtlein, Jason E. Kearns, Randolph J. Stayin, and Amy A. Karpel voted in the affirmative. As a result of the ITC's affirmative determinations, DOC will issue a countervailing duty (CVD) order on imports of this product from Russia.

In its CVD investigation, DOC determined that imports of the subject merchandise from Russia received countervailable subsidies valued at 386.24 percent. The product covered by the investigation is sodium nitrite in any form, at any purity level. In addition, the sodium nitrite covered by this investigation may or may not contain an anti-caking agent. Examples of names commonly used to reference sodium nitrite are nitrous acid, sodium salt, anti-rust, diazotizing salts, erinitrit, and filmerine. Sodium nitrite's chemical composition is $NaNO_2$, and it is generally classified under subheading 2834.10.1000 of the Harmonized Tariff Schedule of the United States (HTSUS).

The ITC's public report on this investigation will be available by August 24, 2022. According to the ITC, the value of subject imports in 2021 was $6.7 million.

US International Trade Commission Find Imports of Acrylonitrile-Butadiene Rubber from France, Mexico, and South Korea Do Not Injure US Industry

On July 11, 2022, the US International Trade Commission (ITC) determined that a US industry is not materially injured or threatened with material injury by reason of imports of Acrylonitrile-Butadiene Rubber from France, Mexico, and South Korea that the US Department of Commerce (DOC) has determined are sold in the United States at less than fair value. Chairman David S. Johanson and Commissioners Rhonda K. Schmidtlein, Jason E. Kearns, Randolph J. Stayin, and Amy A. Karpel voted in the negative.

As a result of the ITC's negative determinations, DOC will not issue antidumping duty orders on imports of this product from France, Mexico, and South Korea. In its antidumping investigations, DOC had determined that imports of the subject merchandise were sold in the United States at the following dumping margins:

Country	Dumping Margin
France	81.86 percent
Mexico	18.45 percent
South Korea	18.80 to 35.31 percent

The ITC's public report on this investigation will be available by August 22, 2022. According to the ITC, the value of subject imports in 2021 was $89.8 million.

Legislative Developments

New US Climate Bill Seeks to Onshore Electric Vehicle Supply Chain

On July 27, Senate Majority Leader Chuck Schumer (D-NY) unveiled a budget reconciliation bill entitled the *Inflation Reduction Act of 2022* ("IRA"), which would implement core components of President Biden's agenda on healthcare, tax reform, and climate change.[1] The bill includes an estimated **$369 billion in expenditures related to "climate change and energy security,"** including tax and other incentives to promote US production of electric vehicles (EVs), renewable energy technologies, and critical minerals, representing the "single biggest climate investment in U.S. history[.]"[2] These provisions are intended to put the United States on a path to roughly 40% emissions reduction by 2030, but they also reflect economic and geopolitical objectives, including a desire to "lessen our reliance on China, ensuring that the transition to a clean economy creates millions of American manufacturing jobs, and is powered by American-made clean technologies."[3]

Consistent with these goals, the IRA would extend and make major revisions to the existing US tax credit for electric vehicles. Eligibility for the revised credit would be contingent on (1) final assembly of the vehicle occurring in North America, (2) specified percentages of the vehicle battery's critical minerals originating from a US free trade agreement (FTA) partner; and (3) specified percentages of the battery's components being manufactured in North America. Moreover, after a short transition period, the IRA would make vehicles ineligible for the credit if the vehicle battery contains "any" critical minerals or components sourced from countries such as China and Russia. These changes would have significant implications for EV producers and supply chains. We provide an overview of the legislation below.

Revised "Clean Vehicle" Tax Credit

Section 13401 of the IRA would revise the existing US tax credit of $7,500 for purchases of "qualified plug-in electric drive motor vehicles" ("qualifying EVs"), codified at Section 30D of the Internal Revenue Code ("Section 30D").[4] Section 30D currently provides tax credits of up to $7,500 to individuals who purchase qualifying EVs, subject to a limit of 200,000 vehicles per manufacturer (i.e., once a manufacturer has sold 200,000 qualifying EVs, the tax credit begins to phase out with respect to qualifying EVs sold by that manufacturer). The IRA would eliminate the 200,000 vehicle limit (effectively extending the credit indefinitely) and make substantial changes to the types of vehicles eligible for the credit, as follows:

- **North American assembly required.** The revised credit under the IRA would apply to qualifying "clean vehicles," which the IRA defines to include fuel cell vehicles as well as EVs. In order to qualify as a "clean vehicle" eligible for the revised credit, the "final assembly" of the vehicle must occur "within North America".

[1] The text of the legislation can be viewed **here**.

[2] "Summary of the Energy Security and Climate Change Investments in the Inflation Reduction Act of 2022," Senate Majority Leader Chuck Schumer, July 27, 2022, **https://www.democrats.senate.gov/imo/media/doc/inflation_reduction_act_of_2022.pdf**.

[3] Id.

[4] 26 U.S.C. § 30D.

- **$7,500 tax credit contingent on sourcing of critical minerals and battery components**. Like the current law, the IRA would provide a maximum tax credit of $7,500 for qualifying vehicles. However, the IRA does not include a "base credit" that is available to all qualifying vehicles (whereas the current law includes a base credit of $2,500). Instead, in order to receive credits under the IRA, a "clean vehicle" must meet one or both of the following requirements:
  - Tax credit of $3,750 for clean vehicles that satisfy a "critical minerals" requirement. To satisfy the "critical minerals" requirement, a certain percentage of the value of the critical minerals[5] contained in the vehicle's battery must be: (1) "extracted or processed in any country with which the United States has a free trade agreement in effect;"[6] or (2) "recycled in North America." The required percentage would start at 40 percent and increase gradually to 80 percent by 2027.
  - Tax credit of $3,750 for clean vehicles that satisfy a "battery components" requirement. To satisfy the "battery components" requirement, a certain percentage of the value of the components contained in the vehicle's battery must be "manufactured or assembled in North" America." The percentage would start at 50 percent and increase gradually to 100 percent by 2029.
- **Exclusion of vehicles with inputs sourced from "foreign entities of concern".** The IRA would prohibit the application of the above tax credits where a vehicle's battery contains "any" components or critical minerals sourced from countries such as China and Russia. Specifically, a vehicle would be ineligible for the tax credits if either of the following apply:
  - "[A]ny of the applicable critical minerals" contained in the vehicle's battery were "extracted, processed, or recycled" by a "foreign entity of concern" (as defined by the Infrastructure Investment and Jobs Act, (42 U.S.C. § 18741(a)(5)). A foreign entity of concern includes, among other things, any foreign entity that is "owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country that is a covered nation" (*i.e.*, China, Russia, Iran, or North Korea). This prohibition would take effect with respect to vehicles placed in service after December 31, 2024.
  - "[A]ny of the components" contained in the vehicle's battery were "manufactured or assembled" by a foreign entity of concern. This prohibition would take effect with respect to vehicles placed in service after December 31, 2023.

In addition to revising the existing tax credit for new EVs, the IRA would establish a tax credit for purchases of previously-owned clean vehicles. The tax credit would be equivalent to 30 percent of the vehicle's sale price or $4,000, whichever is lower. However, the tax credit for previously-owned clean vehicles would not be contingent on regional assembly or sourcing requirements.

Outlook

The IRA's passage is not yet assured, but the bill enjoys strong support from President Biden and Congressional Democrats, and there is a strong chance that Congress will approve the bill in the coming weeks. If enacted in its

[5] "Critical minerals" subject to this requirement include specified forms of aluminum, antimony, barite, beryllium, cerium, cesium, chromium, cobalt, dysprosium, europium, fluorspar, gadolinium, germanium, graphite, lithium, manganese, neodymium, nickel, niobium, tellurium, tin, tungsten, vanadium, yttrium, and certain other minerals purified to a minimum purity of 99 percent (arsenic, bismuth, erbium, gallium, hafnium, holmium, iridium, lanthanum, lutetium, magnesium, palladium, platinum, praseodymium, rhodium, rubidium, ruthenium, samarium, scandium, tantalum, terbium, thulium, titanium, ytterbium, zinc, zirconium).

[6] The United States currently has free trade agreements in effect with Israel, Canada, Mexico, Jordan, Singapore, Chile, Australia, Morocco, Bahrain, Oman, Peru, Panama, South Korea, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic.

current form, the IRA would place EVs assembled outside North America at a competitive disadvantage in the US market, and therefore may prompt trade disputes with countries such as Japan, South Korea, and the European Union. The IRA seeks to avoid disruption of the North American automotive industry by allowing vehicles to qualify based on North American content and assembly (unlike previous versions of the legislation, which would have required US content and assembly). However, even vehicle producers within North America would have to make substantial changes to their sourcing practices to benefit from the IRA's revised tax credit. Many of the minerals and inputs needed to produce EV batteries are not widely available in North America, and this has been cited as a major obstacle to producing batteries that satisfy the regional content requirements of the US-Mexico-Canada Agreement ("USMCA").[7] The same resource constraints will make it difficult (and potentially costly) to comply with the regional sourcing requirements envisioned in the IRA, absent substantial increases in North American production of critical minerals and battery components.

New US Climate Bill Seeks to Bolster Domestic Critical Minerals Supply Chain

On July 27, Senate Majority Leader Chuck Schumer (D-NY) unveiled a budget reconciliation bill entitled the *Inflation Reduction Act of 2022* ("IRA"), which would implement core components of President Biden's agenda on healthcare, tax reform, and climate change.[1] The bill includes an estimated $369 billion in investments related to "climate change and energy security," including tax and other incentives to promote US production of electric vehicles (EVs), renewable energy technologies, and critical minerals, representing the "single biggest climate investment in U.S. history[.]"[2] These provisions are intended to put the United States on a path to roughly 40% emissions reduction by 2030, but they also reflect economic and geopolitical objectives, including a desire to "lessen our reliance on China, ensuring that the transition to a clean economy creates millions of American manufacturing jobs, and is powered by American-made clean technologies."[3]

Consistent with these goals, the IRA includes several provisions aimed at bolstering domestic and regional production of critical minerals. These include (1) substantial revisions to the electric vehicle (EV) tax credit to require regional sourcing of critical minerals used in EV batteries; (2) a new "advanced manufacturing" tax credit for domestic production of critical minerals; (3) a $500 million appropriation for "enhanced" use of the Defense Production Act, which President Biden recently invoked to support critical minerals production; and (4) new authorization for $40 billion in loan guarantees under Title XVII of the Energy Policy Act of 2005, which could be used to support critical minerals projects. We provide an overview of these provisions below.

Revision of EV tax credit to require regional sourcing of critical minerals

Section 13401 of the IRA would revise the existing US tax credit of $7,500 for purchases of new electric vehicles, codified at Section 30D of the Internal Revenue Code.[4] Eligibility for the revised credit (which would apply to both EVs and fuel cell vehicles ("clean vehicles")) would be contingent on (1) final assembly of the vehicle occurring in North America; (2) specified percentages of the vehicle battery's critical minerals originating from a US free trade agreement (FTA) partner, or being recycled in North America; and (3) specified percentages of the battery's

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[7] "Report to Congress on the Operation of the United States-Mexico-Canada Agreement With Respect to Trade in Automotive Goods," Office of the US Trade Representative, July 1, 2022, at p 12. **https://ustr.gov/sites/default/files/2022%20USMCA%20Autos%20Report%20to%20Congress.pdf**

[1] The text of the legislation can be viewed **here**.

[2] "Summary of the Energy Security and Climate Change Investments in the Inflation Reduction Act of 2022," Senate Majority Leader Chuck Schumer, July 27, 2022, **https://www.democrats.senate.gov/imo/media/doc/summary_of_the_energy_security_and_climate_change_investments_in_the_inflation_reduction_act_of_2022.pdf**.

[3] Id.

[4] 26 U.S.C. § 30D.

components being manufactured in North America. Moreover, after a short transition period, the IRA would make vehicles ineligible for the credit if the vehicle battery contains "any" critical minerals or components sourced from countries such as China and Russia.

To satisfy the IRA's critical minerals requirement, at least 40 percent the value of the critical minerals[5] contained in the vehicle's battery must be "extracted or processed in any country with which the United States has a free trade agreement in effect"[6] or be "recycled in North America." The required percentage would increase gradually to 80 percent by 2027. Vehicles that satisfy this requirement would receive a tax credit of $3,750, provided that they otherwise qualify as a "clean vehicle" as defined in the IRA. A similar rule in the IRA would provide an additional tax credit of $3,750 if at least 50 percent of the battery's components are manufactured or assembled in North America (increasing to 100 percent by 2029).

The IRA would prohibit the application of the above tax credits where a vehicle's battery contains "any" critical minerals sourced from countries such as China and Russia. Specifically, a vehicle would be ineligible for the tax credits if any of the critical minerals contained in the battery were "extracted, processed, or recycled" by a "foreign entity of concern" (as defined by the Infrastructure Investment and Jobs Act, (42 U.S.C. § 18741(a)(5)). A foreign entity of concern includes, among other things, any foreign entity that is "owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country that is a covered nation" (*i.e.*, China, Russia, Iran, or North Korea). This prohibition would take effect with respect to vehicles placed in service after December 31, 2024. A similar rule would exclude vehicles from eligibility if any components contained in the battery were manufactured or assembled by a foreign entity of concern, effective with respect to vehicles placed in service after December 31, 2023.

Advanced Manufacturing Production Tax Credit available for critical minerals

Section 13502 of the IRA would establish a new Advanced Manufacturing Production Tax Credit at Section 45X of the Internal Revenue Code. This tax credit would apply with respect to each "eligible component" that is produced by the taxpayer within the United States and sold by the taxpayer to an unrelated person during the taxable year. Critical minerals are among the eligible components to which the tax credit would apply. In the case of critical minerals, the amount of the tax credit would be equivalent to 10 percent of the costs incurred by the taxpayer with respect to production of the critical mineral.

The new tax credit would apply to several downstream products as well, including solar energy components, wind energy components, power inverters, and battery components. For these downstream products, the tax credit would begin to phase out in 2030 and would phase out completely by 2033. However, the tax credit for production of critical minerals would not be subject a phase out. The sponsors of the IRA estimate that this tax credit will result in tax expenditures of approximately $30 billion.

$500 million for "enhanced use" of Defense Production Act

[5] "Critical minerals" subject to this requirement include specified forms of aluminum, antimony, barite, beryllium, cerium, cesium, chromium, cobalt, dysprosium, europium, fluorspar, gadolinium, germanium, graphite, lithium, manganese, neodymium, nickel, niobium, tellurium, tin, tungsten, vanadium, yttrium, and certain other minerals purified to a minimum purity of 99 percent (arsenic, bismuth, erbium, gallium, hafnium, holmium, iridium, lanthanum, lutetium, magnesium, palladium, platinum, praseodymium, rhodium, rubidium, ruthenium, samarium, scandium, tantalum, terbium, thulium, titanium, ytterbium, zinc, zirconium).

[6] The United States currently has free trade agreements in effect with Israel, Canada, Mexico, Jordan, Singapore, Chile, Australia, Morocco, Bahrain, Oman, Peru, Panama, South Korea, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic.

Section 30001 of the IRA would appropriate $500 million for “enhanced use” of the Defense Production Act (DPA), on top of the funds made available for the DPA through the normal appropriations process.[7] The DPA gives the President broad authority to use economic incentives to create, maintain, protect, expand, or restore domestic sources for critical components, critical technology items, and industrial resources.[8]

The IRA would not limit the use of the $500 million appropriation to any particular DPA initiative. However, the sponsors of the bill have indicated that this appropriation is intended in part to support President Biden’s recent DPA action concerning critical minerals.[9] On March 31, 2022, President Biden invoked Section 303 of the DPA to increase federal support for “domestic mining, beneficiation, and value-added processing of strategic and critical materials for the production of large-capacity batteries,” including materials “such as lithium, nickel, cobalt, graphite, and manganese.”[10] This action enabled the Department of Defense (DOD) to use DPA funds to encourage domestic mining and processing of such materials. President Biden’s Memorandum specifically directed DOD to use its DPA authorities to support: (1) feasibility studies for mature mining, beneficiation, and value-added processing projects; (2) by-product and co-product production at existing mining, mine waste reclamation, and other industrial facilities; and (3) mining, beneficiation, and value-added processing modernization to increase productivity, environmental sustainability, and workforce safety.

$40 billion commitment authority for Innovative Technology Loan Guarantee Program (Title XVII)

Section 50141 of the IRA authorizes the Department of Energy (DOE) to make commitments for an additional $40 billion in loan guarantees under Title XVII of the Energy Policy Act of 2005, on top of DOE’s existing commitment authority of approximately $24 billion. Title XVII (also known as the Innovative Technologies Loan Guarantee Program) authorizes the Secretary of Energy to make loan guarantees for projects that (1) “avoid, reduce, utilize, or sequester” air pollutants or anthropogenic emissions of greenhouse gases; and (2) employ “new or significantly improved technologies” as compared to commercial technologies in service in the United States at the time the guarantee is issued.[11] The $40 billion authorization under the IRA could bolster recent efforts to leverage the Title XVII program to support domestic production of critical minerals.

Successive administrations have shown interest in using the Title XVII program to support domestic production of critical minerals, and Congress has recently taken steps to support those efforts. During the Trump Administration, DOE issued guidance interpreting Title XVII “broadly” to authorize loan guarantees for critical minerals projects, and “encourage[d] applications from potential projects involving the production, manufacture, recycling, processing, recovery, or reuse of Critical Minerals and other minerals.”[12] Subsequently, in the Infrastructure Investment and Jobs Act of 2021, Congress amended Title XVII to expressly authorize the provision of loan guarantees for “[p]rojects that increase the domestically produced supply of critical minerals . . . including through the production, processing,

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[7] In Fiscal Year 2022, the US Department of Defense (DOD) received appropriations of $988 million to implement the DPA, plus a balance of approximately $158 million carried forward from the previous year.

[8] 50 U.S.C. §§ 4501-4568.

[9] “Summary of the Energy Security and Climate Change Investments in the Inflation Reduction Act of 2022,” Senate Majority Leader Chuck Schumer, July 27, 2022, https://www.democrats.senate.gov/imo/media/doc/summary_of_the_energy_security_and_climate_change_investments_in_the_inflation_reduction_act_of_2022.pdf, at p.2.

[10] “Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended,” Presidential Determination No. 2022-11, March 31, 2022, **https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/31/memorandum-on-presidential-determination-pursuant-to-section-303-of-the-defense-production-act-of-1950-as-amended/**.

[11] 42 U.S.C. § 16513.

[12] “Notice of Guidance for Potential Applicants Involving Critical Minerals and Related Activity,” US Department of Energy, December 1, 2020, 85 Fed. Reg. 77202.

manufacturing, recycling, or fabrication of mineral alternatives."[13] The Biden Administration is currently considering how regulations implementing Title XVII could be improved to facilitate applications for loan guarantees for critical minerals projects, among other changes.[14]

Outlook

The IRA's passage is not yet assured, but the bill enjoys strong support from President Biden and Congressional Democrats, and there is a strong chance that Congress will approve the bill in the coming weeks. If enacted in its current form, the IRA would represent a major expansion of tax and other financial incentives for domestic production of critical minerals. However, the IRA would not address impediments arising from the complex system of US federal and state environmental laws, regulations, and permitting processes applicable to mining operations.[15] Some experts consider these permitting obstacles to be the single largest impediment to expanding domestic production of critical minerals at a scale needed to support the energy transition.[16] Such obstacles, if left unaddressed, could limit the effectiveness of the policies envisioned in the IRA.

As part of their political agreement on the IRA, Majority Leader Schumer and Senator Joe Manchin (D-WV) announced that they have reached agreement with President Biden and Speaker Pelosi to separately "pass comprehensive permitting reform legislation before the end of this fiscal year."[17] While the details of the forthcoming bill are not yet available, this effort could complement the IRA by streamlining regulatory processes that impede critical minerals production in the United States.

[13] 42 U.S.C. § 16513(b)(13), as added by Public Law 117-58, sec. 40401(a)(2)(A) (2021).

[14] "Innovative Technologies Loan Guarantee Program," US Department of Energy, June 1, 2022, 87 Fed. Reg. 33141.

[15] The Biden Administration acknowledged this challenge in its June 2021 review of the large-capacity battery supply chain. In that review, DOE "identified permitting issues, which arise in part from the lack of modern mining laws and regulations, as one of the hindrances to increasing domestic mineral production." DOE acknowledged that independent analyses "consistently give[] the U.S. very low marks related to permitting risk, citing approximately seven to ten years to obtain the relevant permits for full-scale operations." *See* "Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth," The White House, June 2021, **https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf**.

[16] *See, e.g.,* "Biden mining order won't change biggest hurdle: Permits," E&E News, April 8, 2022, **https://www.eenews.net/articles/biden-mining-order-wont-change-biggest-hurdle-permits/**.

[17] "Joint Statement From Leader Schumer And Senator Manchin Announcing Agreement To Add The Inflation Reduction Act Of 2022 To The FY2022 Budget Reconciliation Bill And Vote In Senate Next Week," Senate Majority Leader Chuck Schumer, July 27, 2022, https://www.democrats.senate.gov/newsroom/press-releases/senate-majority-leader-chuck-schumer-d-ny-and-sen-joe-manchin-d-wv-on-wednesday-announced-that-they-have-struck-a-long-awaited-deal-on-legislation-that-aims-to-reform-the-tax-code-fight-climate-change-and-cut-health-care-costs.