WHITE & CASE

US Multilateral Trade Policy Developments

Japan External Trade Organization

November 2021

Contents

US Trade Policy

House “Build Back Better Act” Sets Stage for Trade Disputes Over Green Energy

On November 19, the House of Representatives approved a budget reconciliation bill entitled the *Build Back Better Act* (H.R. 5376), which contains President Biden’s core legislative priorities related to healthcare, the environment, education, and social spending. The bill contains ambitious new measures to address climate change, including an estimated $555 billion worth of tax credits, spending measures, and other climate-related initiatives. These provisions are intended to set the United States on course to meet its emissions reduction targets, but some of them also reflect industrial policy considerations, including a desire to promote domestic manufacturing of clean energy technologies and related goods. Several of the climate-related tax credits in the bill, including those for electric vehicles, investments in clean energy, and electricity production, contain “bonus” tax credits that are contingent upon the use of domestic content. If enacted, these provisions are likely to draw complaints from the United States’ trading partners on the grounds that they discriminate against imports in favor of domestic goods. This alert summarizes the main domestic content provisions in H.R. 5376.

Elevated tax credit for electric vehicles satisfying domestic assembly and domestic content requirements

H.R. 5376 would extend and modify an existing tax credit for purchases of “qualified plug-in electric drive motor vehicles” (“qualifying EVs”), codified at Section 30D of the Internal Revenue Code (“Section 30D”).[1] 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). Among other changes, H.R. 5376 would re-codify this provision at new Section 36C, remove the 200,000 vehicle limit, and increase the maximum value of the tax credit to $12,500. It would increase the maximum value of the tax credit by:

- Increasing the base amount of the credit, which applies to all qualifying EVs, to $4,000 (from the current $2,500);
- Providing an additional credit of $3,500 for qualifying EVs with a gasoline tank capacity not greater than 2.5 gallons and a battery capacity of not less than 40 kilowatt hours (increasing to 50 kilowatt hours after December 31, 2026);
- Providing an additional credit of $4,500 for qualifying EVs that satisfy “domestic assembly qualifications,” which require that “the final assembly of such vehicle occurs at a plant, factory, or other place which is located in the United States and operating under a collective bargaining agreement negotiated by an employee organization”; and
- Providing an additional credit of $500 for qualifying EVs that satisfy “domestic content qualifications,” which require that vehicles “are powered by battery cells which are manufactured in the United States[.]”

In addition, the bill would amend the definition of a qualifying EV so that, after December 31, 2026, an EV will be ineligible for any tax credits under new Section 36C unless it is assembled in the United States. The tax credits provided in new Section 36C would remain in effect until December 31, 2031, unless they are modified or extended.

Elevated tax credits for energy projects using domestic content

H.R. 5376 would create new tax credits related to clean energy and modify certain existing tax credits, including those related to electricity production and investment in energy projects. In some instances, the bill would provide “bonus” tax credits where an energy project satisfies domestic content requirements for iron, steel, and manufactured products, as discussed below.

[1] 26 U.S.C. § 30D.

- **Production tax credit for electricity produced from certain renewable resources ("Section 45 PTC").** H.R. 5376 would modify and extend the electricity production tax credit codified at Section 45 of the Internal Revenue Code, which allows energy producers to claim a credit for electricity produced from certain renewable resources.[2] This provision as amended by H.R. 5376 would normally provide a tax credit of up to 2.5 cents per kilowatt hour (KWh) of electricity produced and sold by a facility during its first ten years in operation (effective with respect to facilities placed in service after December 31, 2021). The types of facilities eligible for the revised credit would include wind, solar, hydropower, and geothermal energy facilities, among others. Facilities would be eligible for a "bonus credit" equivalent to 10% of the value of the credit if they satisfy domestic content requirements, which provide that: (1) any iron or steel product that is a component of the facility upon completion of construction must be produced in the United States;[3] and (2) the manufactured products that are components of the facility upon completion of construction must satisfy a domestic content threshold. For most types of facilities, the domestic content threshold for manufactured products would phase in as follows:

Date on which construction of the facility begins	Domestic content threshold
Before January 1, 2025	40%
After December 31, 2024 and before January 1, 2026	45%
After December 31, 2025 and before January 1, 2027	50%
After December 31, 2026	55%

For purposes of this requirement, the domestic content of the manufactured products in a facility would be measured by calculating the total cost of the manufactured products that are "mined, produced, or manufactured in the United States" as a percentage of the total costs across all manufactured products of the facility.

- **Investment tax credit for energy property ("Section 48 ITC").** H.R. 5376 would extend and modify the investment tax credit codified at Section 48 of the Internal Revenue Code, which allows taxpayers to claim a credit for the cost of certain energy property.[4] This provision as amended by H.R. 5376 would normally provide tax credits valued at up to 30% of the basis of the energy property (referred to as the "energy percentage"), for facilities placed into service after December 31, 2021. The types of properties eligible for this credit would include solar, geothermal, and wind energy facilities, fuel cell property, energy storage technology, microgrid controllers, linear generators, and biogas properties, among others. Such properties would be eligible for a bonus credit if they satisfy domestic content requirements similar to those that apply to the Section 45 PTC (described above). The bonus credit would be a 2 percentage point increase to the energy percentage, or a 10 percentage point increase if the facility also meets certain prevailing wage and other labor-related requirements.

- **New tax credits for clean electricity production ("clean electricity PTC") and investment ("clean electricity ITC").** H.R. 5376 would create a new "emissions-based" tax incentive for electricity-generating facilities, codified in new Sections 45BB and 48F of the Internal Revenue Code. These provisions would allow taxpayers to choose between a production tax credit or an investment tax credit that is based on the carbon emissions of the electricity generated. Power facilities could qualify for the credits regardless of the technology they use, provided that their "greenhouse gas emissions rate" is not greater than zero.[5] Normally, the clean

---

[2] 26 U.S.C. § 45.

[3] The bill stipulates that the domestic content standard for iron and steel products must be applied in a manner consistent with the "Buy America" regulations promulgated by the US Department of Transportation – specifically 49 C.F.R. § 661.5(b), under which iron and steel products are treated as domestic only if "[a]ll steel and iron manufacturing processes . . . take place in the United States, except metallurgical processes involving refinement of steel additives[.]"

[4] 26 U.S.C. § 48.

[5] The bill defines the greenhouse gas emissions rate as "the amount of greenhouse gases emitted into the atmosphere by a facility in the production of electricity, expressed as grams of CO_{2e} per KWh." For facilities that product electricity through fuel

electricity PTC would provide a credit of up to 2.5 cents per KWh of electricity produced and sold in the 10-year period after a facility is placed in service, whereas the clean electricity ITC would provide a credit worth up to 30% of the investment in the year the facility is placed in service. Facilities that satisfy domestic content requirements would be eligible for elevated tax credits (generally equal to a 10% increase to the value of the clean electricity PTC or a 10-percentage point increase to the rate of the clean electricity ITC). The domestic content requirements would be similar to those that apply to the Section 45 PTC and the Section 48 ITC (described above).

- **"Elective payment" of applicable credits contingent on domestic content.** H.R. 5376 would make certain energy-related tax credits refundable, including those mentioned above (*i.e.*, it would allow taxpayers to elect to be treated as having made a tax payment equal to the value of the credit they would otherwise be eligible for under the relevant provision). This "elective payment" option is intended to allow entities with little or no tax liability to accelerate utilization of the credits, rather than carrying them forward to years when their credits can offset their tax liability. However, the elective payment option would phase out with respect to the above-mentioned tax credits (the Section 45 PTC, the Section 48 ITC, the clean electricity PTC, and the clean electricity ITC) if the facility at issue fails to satisfy the applicable domestic content requirements. Specifically, if a facility does not satisfy the domestic content requirements, the value of the credit for which elective payment would be available would decrease by:[6]
  - 10%, if the construction of the facility begins in 2024;
  - 15%, if the construction of the facility begins in 2025; and
  - 100% (*i.e.*, no elective payment would be permitted), if the construction of the facility begins in 2026 or thereafter.

The bill would authorize the Secretary of the Treasury to provide "appropriate exceptions" from the phase-out rule where (1) the inclusion of domestic products increases the overall costs of construction by more than 25%; or (2) relevant domestic products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.

Outlook

The above-mentioned provisions of H.R. 5376 are partly intended to reduce greenhouse gas emissions, but proponents of the legislation acknowledge that this is not their sole objective. For example, the White House has emphasized that the legislation is intended to "[e]nsure clean energy technology – from wind turbine blades to solar panels to electric cars – will be built in the United States with American made steel and other materials, creating hundreds of thousands of good jobs here at home."[7] Foreign governments have expressed concern that the bill's domestic content provisions would place foreign suppliers of electric vehicles at a serious disadvantage in the US market, and some energy industry representatives have asserted that the provisions would cause many firms to shift to domestic suppliers of materials and components for energy projects.[8] If these provisions are enacted in their

---

combustion or gasification, the greenhouse gas emissions rate would be "the net rate of greenhouse gases emitted into the atmosphere by such facility (taking into account lifecycle greenhouse gas emissions)…expressed as grams of CO_{2e} per KWh."

[6] Facilities that do not satisfy domestic content requirements would be exempt from the phase-out of elective payment if they have a maximum net output of less than 1 megawatt.

[7] "President Biden Announces the Build Back Better Framework," The White House, October 28, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/28/president-biden-announces-the-build-back-better-framework/

[8] *See*, *e.g.,* Letter from Ambassadors of the EU, Japan, Canada, Mexico, Korea, and other Countries Regarding Electric Vehicle Tax Incentives, October 29, 2021, https://www.autosdriveamerica.org/_default_upload_bucket/EV%20Incentive%20LTR%20Ambassadors%2010%2029%2021.pdf

current form, there is a strong possibility that foreign governments will challenge them through WTO dispute settlement or similar mechanisms provided in US free trade agreements (FTAs).

In order for H.R. 5376 to become law, it must now pass the Senate, which will require unanimous support from all 50 Democratic Senators. At this stage, not all Democratic Senators have endorsed H.R. 5376, and the Senate is expected to modify the bill before voting on its passage. Several of the United States' closest trading partners have asserted that domestic content provisions in H.R. 5376 would violate the United States' commitments under the WTO Agreement and US FTAs, such as the US-Mexico-Canada Agreement (USMCA). For example, EU Trade Commissioner Valdis Dombrovskis sent a letter to congressional leaders on December 3 expressing the following concerns with the proposed tax credits for electric vehicles:

- First, the proposed conditions linking the tax credit to U.S. assembly, U.S. "local content" and workers' unionization "would effectively reduce the options for consumers to take advantage of the tax credits, thereby reducing also the effectiveness ofthe incentives in terms of emissions reduction and improved energy security."
- Second, the proposed conditions "would discriminate against EU cars and car components and would be fundamentally inconsistent with core rules of the World Trade Organization (WTO) that both the EU and the U.S. adhere to, and that we want others in the world to abide by."
- Third, "beyond the uncertainty these incentives would create in the U.S. market, by establishing a discriminatory environment between manufacturers, such measures would also risk significantly disrupting the highly interconnected transatlantic supply chains."
- Fourth, "the unionization condition effectively discriminates against EU car companies' assembly plants in the U.S, harming the tens of thousands of American workers they employ and the communities that have benefitted from their investment, as well as their extended supply and distribution chains (which include unionized workplaces)."

Canadian officials raised similar concerns directly with President Biden and Members of Congress at the North American Leaders' Summit on November 18, emphasizing their view that the tax provision concerning electric vehicles violates the USMCA and has the potential to become the "dominant issue" in US-Canada relations. On December 2, Mexico's Secretary of Economy, Ms. Tatiana Clouthier Carrillo, similarly stated that the provision violates the USMCA and emphasized that "Mexico will resort to legal instruments at its disposal to assert our rights." Nevertheless, it is unclear whether the provisions will be modified, and the Biden administration has touted them as an important part of its strategy to grow domestic supply chains in critical industries.[9]

President Biden Signs Infrastructure Bill Into Law, Expanding Domestic Content Requirements for Federally-Funded Infrastructure Projects and Government Procurement

On November 15, President Biden signed the *Infrastructure Investment and Jobs Act* (H.R. 3684) into law. The bill provides for $550 billion in new government spending to modernize and upgrade US core infrastructure including roads and bridges, ports and waterways, railroads, the electrical grid, and broadband. It also includes several provisions designed to maximize the use of domestic content in infrastructure projects that receive Federal financial assistance, and in Federal government procurements subject to the Buy American Act. Additionally, the bill establishes new domestic content requirements specific to government procurement of personal protective equipment (PPE). The Biden administration, which is undertaking its own regulatory initiatives to strengthen Buy

[9] *See, e.g.,* Letter from Canadian Trade Minister Mary Ng to Congressional Leaders, October 22, 2021, https://cdn.motor1.com/pdf-files/letter-from-canadian-trade-minister-on-ev-tax-credits.pdf

American requirements, has welcomed the bill's domestic content provisions, which the White House has argued will "further the President's commitment to revitalizing the domestic industrial base."[1]

This alert provides an overview of the domestic content requirements included in H.R. 3684.

Expansion of "Buy America" requirements for infrastructure projects

Several US statutes currently place domestic content restrictions on infrastructure projects that receive Federal funding and that non-Federal government agencies, such as state and local governments, carry out.[2] These statutes are commonly referred to as "Buy America" statutes, and are distinct from the requirements of the Buy American Act of 1933, which governs purchases made directly by the Federal government. Buy America statutes often involve funds administered by the US Department of Transportation and generally require the use of domestically-produced iron and steel and other manufactured goods unless the government grants a nationwide or project-specific waiver, though the precise nature of the restrictions and exceptions can vary depending on the statute and funds involved.

H.R. 3684 extends Buy America requirements to all programs that provide Federal financial assistance for infrastructure. The bill defines infrastructure as including, "at a minimum, the structures, facilities, and equipment for, in the United States":

- Roads, highways, and bridges;
- Public transportation;
- Dams, ports, harbors, and other maritime facilities;
- Intercity passenger and freight railroads;
- Freight and intermodal facilities;
- Airports;
- Water systems, including drinking water and wastewater systems;
- Electrical transmission facilities and systems;
- Utilities;
- Broadband infrastructure; and
- Buildings and real property.

H.R. 3684 requires Federal agencies to identify all existing programs that provide Federal financial assistance for infrastructure, and to develop a list of any "deficient" programs. Deficient programs are defined as (1) those programs to which a "domestic content procurement preference," as that term is defined in the bill, does not currently apply;[3] or (2) those programs that are subject to Buy America waivers "of general applicability not limited to the use

---

[1] "FACT SHEET: The Bipartisan Infrastructure Investment and Jobs Act Creates Good-Paying Jobs and Supports Workers." *The White House*, August 3, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/03/fact-sheet-the-bipartisan-infrastructure-investment-and-jobs-act-creates-good-paying-jobs-and-supports-workers/

[2] *See*, *e.g.,* 49 U.S.C. § 5323(j) (for projects funded by the Federal Transit Administration); 23 U.S.C. § 313 (for the Federal Highway Administration); 49 U.S.C. Chapters 244, 246, and § 24405 (for the Federal Railroad Administration); 49 U.S.C. §50101 (for the Federal Aviation Administration); and 49 U.S.C. § 24305 (for Amtrak).

[3] The bill defines the term ''domestic content procurement preference'' as a requirement that no amounts made available through a program for Federal financial assistance may be obligated for a project unless—

(A) all iron and steel used in the project are produced in the United States;

of specific products for use in a specific project." The bill requires agencies to publish a report identifying any "deficient programs" within 60 days of its enactment.

Within 180 days after enactment, H.R. 3684 requires each Federal agency to ensure that "none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States." For purposes of this requirement:

- Iron or steel products will be considered "produced in the United States" where "all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;"
- Construction materials will be considered "produced in the United States" where "all manufacturing processes for the construction material occurred in the United States;" and
- Manufactured products will be considered "produced in the United States" where (1) "the manufactured product was manufactured in the United States;" and (2) the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product (unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation).

The Buy America preference established by H.R. 3684 will apply only to the extent that an existing "domestic content procurement preference," as that term is defined in the bill, does not already apply to the program at issue.[4] Additionally, like the current statute, H.R. 3684 will permit Federal agencies to waive the application of the new preference where (1) the relevant products are not produced in the United States "in sufficient and reasonably available quantities or of a satisfactory quality;" (2) application of the preference would be inconsistent with the public interest; or (3) the inclusion of domestic products would increase the cost of the overall project by more than 25 percent. Other Buy America statutes, such as those applicable to projects funded by the Federal Transit Administration, provide nearly identical exceptions.[5]

H.R. 3684 clarifies that the new Buy America preference is to be applied in a manner "consistent with United States obligations under international agreements." Relevant agreements to which the United States is a party include the WTO Agreement on Government Procurement (GPA) and certain US free trade agreements, in which the United States has assumed obligations to afford non-discriminatory treatment to goods from participating foreign countries when it conducts procurements covered by the agreement. The United States' schedule to the GPA exempts certain

---

(B) the manufactured products used in the project are produced in the United States; or

(C) the construction materials used in the project are produced in the United States.

The bill defines the term "produced in the United States" to mean:

(A) in the case of iron or steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;

(B) in the case of manufactured products, that—

(i) the manufactured product was manufactured in the United States; and

(ii) the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation; and

(C) in the case of construction materials, that all manufacturing processes for the construction material occurred in the United States.

[4] *See* Footnote 16.

[5] 49 U.S.C. § 5323(j)(2).

Buy America restrictions on mass transit and highway projects from the GPA's disciplines.[6] However, as noted above, H.R. 3684 contemplates the expansion of Buy America restrictions to a wide range of other projects that fall within the bill's definition of "infrastructure". The caveat that the new restrictions are to be applied consistent with US international obligations is likely intended to ensure that, where applying Buy America restrictions to a particular project would violate the GPA or another trade agreement, the application of the restrictions would be waived.

Buy American Act amendments and regulations

Distinct from the Buy America statutes, the Buy American Act requires the Federal government to buy domestic "articles, materials, and supplies" when they are acquired for public use, subject to exceptions for nonavailability of domestic products, unreasonable cost of domestic products, acquisitions subject to certain trade agreements, and situations where it would not be in the public interest to buy domestic products.[7] H.R. 3684 amends the Buy American Act and requires changes to its implementing regulations to increase the use of domestic content in federal procurement. These changes, described below, are again to be applied "in a manner consistent with United States obligations under international agreements," which would include the WTO GPA and US free trade agreements.[8]

New "melted and poured" standard for iron and steel products

The Buy American Act considers manufactured articles, materials, and supplies to be "domestic" if they "have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States."[9] The Federal Acquisition Regulation (FAR) implements this requirement in the form of a two-part test. For a manufactured end product or construction material to qualify as "domestic" under the FAR:[10]

- The end product or construction material "must be manufactured in the United States;" and
- A certain percentage of all component parts (determined by the cost of the components) must also be mined, produced, or manufactured in the United States. For an end product that does not consist wholly or predominantly of iron or steel or a combination of both, the cost of domestic components must exceed 55 percent of the cost of all components.[11] For an end product that consists wholly or predominantly of iron or steel or a combination of both, the cost of foreign iron and steel must constitute less than 5 percent of the cost of all the components.[12]

The Buy American Act, the Executive Orders implementing the Act, and the FAR do not define the term "manufacture." Judicial and other tribunals therefore have had to interpret whether particular activities constitute "manufacturing" in the United States for purposes of the two-part test, and in so doing have considered, of US processing that involved foreign-origin components, "whether there were 'substantial changes in physical character'; whether separate manufacturing stages were involved, or whether there was one continuous process; and whether the article is completed in the form required by the government."[13]

[6] United States Schedule to the GPA 2012, Annex 2 (WT/LET/950), at Note 5 (providing that "[f]or the state entities included in this Annex, this Agreement does not apply to restrictions attached to federal funds for mass transit and highway projects.")

[7] *See generally* 41 U.S.C. §§ 10a-10d.

[8] The Trade Agreements Act of 1979 (19 U.S.C. § 2511(a)) limits the Buy American Act's applicability by requiring US government procurements to treat as if they were domestic those materials originating in a country with which the United States has a covered trade agreement.

[9] 41 U.S.C. § 10a.

[10] 48 C.F.R. §§ 25.003 and 25.101(a).

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

[12] 48 C.F.R. § 25.105.

[13] For more information, see "Domestic Content Restrictions: The Buy American Act and Complementary Provisions of Federal Law," *Congressional Research Service*, September 12, 2016, https://crsreports.congress.gov/product/pdf/R/R43354, at p.4-5.

H.R. 3684 amends the Buy American Act to specify what constitutes being "manufactured in the United States" in the case of iron and steel products. Specifically, it deems manufactured articles, materials, and supplies of iron and steel "manufactured in the United States only if all manufacturing processes involved in the production of such iron and steel, from the initial melting stage through the application of coatings, occurs in the United States." To qualify as a "domestic" product eligible for Buy American preferences, an iron or steel product will have to satisfy this definition as well as the 95 percent domestic content threshold set forth in the FAR.

In addition to this new statutory standard for iron and steel products, H.R. 3684 requires the FAR Council (whose members include the Administrator for Federal Procurement Policy, the Secretary of Defense, the Administrator of National Aeronautics and Space, and the Administrator of General Services) to issue regulations that clarify the definition of "manufactured in the United States" in the case of other end products, including "guidelines to ensure that manufacturing processes involved in production of the end product occur domestically." The Far Council must issue such regulations within one year after the enactment of H.R. 3684.

Regulations and guidance on the Buy American Act

H.R. 3684 further requires the Office of Management and Budget (OMB) and the FAR Council to issue regulations or other guidance within one year concerning the enforcement of the Buy American Act. The regulations or guidance must include the following provisions, among others:

- "An increase to the price preferences for domestic end products and domestic construction materials." Regulations that the FAR Council proposed in July 2021 would increase price preferences for domestic goods under the Buy American Act, pursuant to President Biden's Executive Order of January 25, 2021. However, the proposed increases have not yet been adopted, and they would be limited to products that OMB deems to be "critical" in future rulemakings informed by the Biden administration's ongoing review of critical supply chains. Notably, H.R. 3684 does not expressly limit the required increase of price preferences to "critical" products.
- "Amending the definitions of 'domestic end product' and 'domestic construction material' to ensure that iron and steel products are, to the greatest extent possible, made with domestic components." As noted above, iron and steel products already are subject to a 95 percent domestic content threshold under the FAR. Additionally, if adopted, H.R. 3684 would couple this threshold with a new requirement that "all manufacturing processes" involved in production of the product occur in the United States, as described above. Nevertheless, H.R. 3684 requires further changes to the regulatory definition of domestic iron and steel products to promote the use of US content.

In addition to these changes, the bill requires OMB and the FAR Council to issue guidelines for Federal agencies detailing the circumstances in which certain exceptions to the Buy American Act are applicable (*e.g.*, because acquisition of domestic products is "inconsistent with the public interest" or because domestic products are not available.) These agencies must also issue guidelines to ensure that projects are not "disaggregated for purposes of avoiding the applicability of the requirements under the Buy American Act."

"Make PPE in America Act"

Entitled the Make PPE in America Act, legislation that H.R. 3684 incorporates seeks to foster a domestic PPE supply chain by providing "a strong and consistent demand signal from the Federal Government[.]" The bill requires that any contract for the procurement of PPE entered into by the Secretaries of Homeland Security, Health and Human Services, or Veterans Affairs ("covered Secretaries"):

(1) "be issued for a duration of at least 2 years, plus all option periods necessary," to incentivize investment in domestic production; and

(2) "be for personal protective equipment, including the materials and components thereof, that is grown, reprocessed, reused, or produced in the United States."

The legislation permits the covered Secretaries to procure PPE from foreign sources that manufacture PPE using US components, but only "after maximizing to the extent feasible" domestic sources for the relevant items. In such circumstances, the covered Secretary may "maximize[] sources for [PPE] that is assembled outside the United States containing only materials and components that are grown, reprocessed, reused, or produced in the United States[.]" The bill requires the covered Secretary to certify every 120 days that procuring PPE from these alternative sources is necessary "to respond to the immediate needs of a public health emergency."

The government could waive this requirement to procure PPE from domestic sources (or, alternatively, from foreign sources that use US components) with respect to an item of PPE, or a component or material thereof:

- That is, or that includes, a material listed in section 25.104 of the FAR as one for which a non-availability determination has been made under the Buy American Act;[14] or
- As to which the covered Secretary determines "that a sufficient quantity of a satisfactory quality that is grown, reprocessed, reused, or produced in the United States cannot be procured as, and when, needed at United States market prices."

Importantly, H.R. 3684 anticipates conflicts between the legal requirement to procure domestic PPE and certain of the United States' obligations under the WTO GPA and other trade agreements. Accordingly, the bill directs the President or his designee to "take all necessary steps, including invoking the rights of the United States under Article III of the [WTO GPA] and the relevant exceptions of other relevant agreements to which the United States is a party, to ensure that the international obligations of the United States are consistent with the provisions of [the Make PPE in America Act]." Article III of the GPA 2012 sets forth security and general exceptions for certain measures that otherwise would be inconsistent with the Agreement, including (1) measures that a Party "considers necessary for the protection of its essential security interests relating to ... procurement indispensable for national security or for national defence purposes;" and (2) measures "necessary to protect human, animal or plant life or health," provided that they are not applied "in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade[.]"

Outlook

H.R. 3684 makes important changes to US law that are intended to maximize the use of domestic content in infrastructure projects that receive Federal financial assistance, and in Federal government procurements subject to the Buy American Act. Importantly, however, the bill specifies that these requirements are to be applied in a manner consistent with the United States' obligations under international agreements. This should mitigate the impact of the new requirements on foreign suppliers from countries that are parties to the WTO GPA (which includes Japan, the EU, Canada, Korea, and Australia, among others), or that have FTAs with the United States. However, the obligations set forth in such agreements do not extend to all categories of US government procurement, and H.R. 3684 directs the President to consider invoking exceptions to the agreements to justify restrictions on procurement of foreign-sourced PPE. Therefore, companies should carefully evaluate how the new domestic content requirements established by H.R. 3684 will affect their commercial interests.

[14] This refers to a finding that a particular product is "not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality," in which case the Buy American Act does not apply to that product. 48 C.F.R. § 25.103(b).

US Trade Actions

Section 232

United States and European Union Agree to De-Escalate Section 232 Tariff Dispute, Pursue New "Global Arrangements" on Excess Capacity and Carbon Emissions

On October 31, the United States (US) and the European Union (EU) reached an agreement to de-escalate their bilateral dispute over steel and aluminum tariffs and pursue new "global arrangements" governing steel and aluminum trade. As an initial step, the EU will suspend retaliatory tariffs it imposed on US goods that were scheduled to increase on December 1, and the US will replace its Section 232 tariffs on EU steel and aluminum products with tariff-rate quotas (TRQs) that will allow "historically-based" volumes of those products to enter the US market free of Section 232 tariffs. In addition, the two governments intend to negotiate new global arrangements by 2024 to address excess capacity and carbon emissions in the steel and aluminum sectors, with the goal of persuading like-minded economies to join the arrangements. These initiatives are intended to shift the focus of the US and EU governments from trade disputes between them to shared concerns about the industrial and environmental policies of third countries, particularly China. This alert provides an overview of the new outcomes announced by the US and the EU.

Section 232 tariff-rate quota, suspension of EU retaliatory tariffs, and enforcement initiatives

Beginning on January 1, 2021, the US will replace its existing Section 232 tariffs on EU steel and aluminum products with TRQs, which will allow "historically-based" volumes of those products to enter the US free of Section 232 duties. The details of each TRQ are as follows:

- **Steel.** The aggregate annual import volume under the TRQ will be set at 3.3 million metric tons (MMT), split among 54 product categories and allocated on an EU member state basis "in line with the 2015-2017 historical period." In order to be eligible for duty-free treatment under the TRQ, steel imports must be "melted and poured" in the EU. The interaction between the TRQ and the US tariff exclusion process for steel products will be as follows: (1) the US will maintain its Section 232 tariff exclusion process for steel products imported from the EU, but will not count imports of excluded steel products from the EU against the TRQ; and (2) the US will extend the application of exclusions granted in US fiscal year 2021 for steel products imported from the EU for a period of two calendar years without the need to reapply, *i.e.*, until December 31, 2023.[10] Published sources estimate that these exclusions will allow an additional 1.1 MMT of EU steel to enter the US free of Section 232 duties in 2022 and 2023, on top of the 3.3 MMT quota contemplated in the agreement. EU steel products that enter the US in excess of the quota will continue to be subject to a Section 232 duty of 25%, provided that they are not subject to an exclusion.

  The steel TRQ will be calculated for each calendar year and administered on a quarterly basis. Any unused TRQ volume from the first quarter of the year, up to 4% of the allocated quota for that quarter, will roll over to the third quarter; up to 4% of any unused TRQ volume from the second quarter of the year will roll over into the fourth quarter; and up to 4% of any unused TRQ volume from the third quarter will roll over into the first quarter of the following year.

  The US also will review and adjust the TRQ annually to account for the level of US steel demand (apparent consumption) in the previous year. Specifically, for each 6% that US steel demand is above or below US steel demand in 2021, the TRQ volume for the next year would increase or decrease, respectively, by 3% relative to the initial level of 3.3 MMT.

- **Aluminum.** The aggregate annual import volume under the aluminum TRQ will be set at 18 thousand metric tons (TMT) for unwrought aluminum under two product categories, and 366 TMT for semi-finished

[10] The statement defines the US fiscal year 2021 as corresponding to "the period October 1, 2020 to September 30, 2021."

(wrought) aluminum under 14 product categories. The import volumes will be allocated on an EU member state basis in line with the 2018-19 historical period, with the exception of aluminum foil (HS 7607), for which 2021 annualized data will be utilized. The US "will maintain its exclusions process" for EU aluminum products, and exclusions will not be counted against the quota, but the US will not extend granted exclusions for EU aluminum products through 2023 as it has agreed to do for granted steel exclusions. EU aluminum products entering above-quota will continue to be subject to a Section 232 duty of 10%, provided that they are not subject to an exclusion.

The aluminum TRQ will be calculated for each year and administered on a semi-annual basis, with no more than 60% of the TRQ to be filled in the first half of the year. The parties have not provided a specific formula that will determine the annual adjustment of the aluminum TRQ, as they have done for the steel TRQ.

In addition to the TRQ arrangement, the two governments have pledged in a Joint Statement to monitor steel and aluminum trade between them, to expand their cooperation on trade remedies and customs matters, and to develop "additional actions in order to contribute to adjustments and solutions and address non-market excess capacity in the global steel and aluminum sectors." The two governments will meet annually to review their efforts in these areas.

Based on the United States' decision to ease its Section 232 restrictions on EU steel and aluminum, the EU has agreed to "suspend" its retaliatory tariffs on US goods, which were scheduled to increase substantially on December 1, 2021. As a result of the suspension, the existing retaliatory duties that the EU applied to US goods will be removed while the agreement is in effect. The two governments have also agreed to suspend, by November 5, 2021, the WTO disputes they have initiated against each other regarding the US Section 232 measures (DS548) and the EU's retaliatory tariffs (DS559).

The document setting forth the details of the TRQ arrangements, including the product categories, is available **here**. The Joint Statement concerning monitoring, cooperation on customs and trade remedies, and the suspension of the WTO disputes can be viewed **here**. The EU statement regarding the suspension of its retaliatory tariffs can be viewed **here**.

New "global arrangements" on excess capacity and carbon intensity

Alongside the TRQ arrangement, the US and the EU have jointly announced their intention to negotiate "global arrangements" to address carbon intensity and excess production capacity in the steel and aluminum sectors. The two governments "will invite like-minded economies to participate in the arrangements," which "will be open to any interested country that shares our commitment to achieving the goals of restoring market-orientation and reducing trade in carbon intensive steel and aluminium products." Each participant in the arrangements would be required to undertake the following actions:

1. Restrict market access for non-participants that do not meet conditions of market orientation and that contribute to non-market excess capacity, through application of appropriate measures including trade defense instruments;
2. Restrict market access for non-participants that do not meet standards for low-carbon intensity;
3. Ensure that domestic policies support the objectives of the arrangements and support lowering carbon intensity across all modes of production;
4. Refrain from non-market practices that contribute to carbon-intensive, non-market oriented capacity;
5. Consult on government investment in decarbonisation; and
6. Screen inward investments from non-market-oriented actors in accordance with their respective domestic legal frameworks.

The EU and the US will seek to conclude the negotiations on these arrangements within two years. The two governments intend for the new arrangements to be "[c]ompatible with international obligations and the multilateral rules, including potential rules to be jointly developed in the coming years," and they will consult with respect to bringing these matters "into relevant international fora for discussion[.]" As an initial step, the US and the EU have agreed to form a technical working group that will share relevant data and confer on methodologies for calculating the carbon-intensity of steel and aluminum production.

On October 31, the US Department of Commerce (DOC) signaled that the US may invite Japan and the United Kingdom (UK) to participate in the global arrangements. DOC issued a statement noting that the US and Japan "are consulting closely" on excess capacity and the climate impacts of the steel and aluminum sectors, and that the US "looks forward to working with Japan and other partners to restore market-orientation and tackle carbon-emissions across all types of production in the steel and aluminum industry." DOC made a similar statement regarding the UK. However, neither statement mentions the possibility of easing Section 232 restrictions on Japan or the UK (*e.g.*, through TRQs) while the global arrangements are negotiated, as the US has done for the EU.

The Joint Statements addressing the proposed global arrangements on excess capacity and carbon intensity can be viewed **here** and **here**. DOC's statements regarding Japan and the UK can be viewed **here**, and **here**, respectively.

Outlook

US steel producers have welcomed the new outcomes agreed with the EU, and have urged "proper implementation and enforcement of the TRQ[.]"[11] US labor unions have also welcomed the TRQ arrangement, emphasizing that the initial TRQ volume is set below the level of steel imports supplied by the EU prior to the imposition of the Section 232 duties.[12] Indeed, the initial TRQ volume of 3.3 MMT is significantly lower than the level of imports supplied by the EU in 2015 (4.9 MMT), 2016 (4.1 MMT) and 2017 (4.9 MMT). The EU has emphasized that it continues to consider the Section 232 measures to be incompatible with WTO rules, and that it will continue to seek the complete removal of Section 232 measures on EU goods over the long term.[13] Nevertheless, the TRQ arrangement will provide important tariff relief for EU exporters, and the EU has welcomed it as a "major step forward" in the "renewed" trans-Atlantic relationship under the administration of President Biden.[14] Similarly, US exporters whose goods are currently subject to the EU retaliatory tariffs have expressed relief that an agreement has been reached.[15] This de-escalation of the Section 232 dispute will provide momentum for the proposed initiatives on excess capacity and carbon emissions, but achieving consensus on effective measures in these areas will be difficult in light of political obstacles at the domestic and international levels. In addition, it is not yet clear whether the Biden administration will conclude agreements that ease the Section 232 restrictions for other like-minded countries while the global arrangements are negotiated.

The proposed global arrangement on carbon intensity may signal shifts in the trans-Atlantic relationship and the Biden administration's trade policy, but it is too early to judge. The European Commission has issued a formal proposal for a carbon border adjustment mechanism (CBAM), which will impose a levy on imports of steel, aluminum, and other carbon intensive goods that corresponds to the carbon costs imposed on EU producers by the EU

[11] "AISI Comments On Administration Announcement On U.S.-EU Steel Trade Agreement," American Iron and Steel Institute, October 30, 2021, https://www.steel.org/2021/10/aisi-comments-on-administration-announcement-on-u-s-eu-steel-trade-agreement/

[12] "USW Supports Interim Arrangement with EU on Section 232," United Steelworkers Union, October 30, 2021, https://www.usw.org/news/media-center/releases/2021/usw-supports-interim-arrangement-with-eu-on-section-232

[13] "EU-US Trade Relations on Steel and Aluminium: European Union Announcement," European Commission, October 30, 2021, https://trade.ec.europa.eu/doclib/html/159891.htm

[14] "Remarks by President Biden and European Commission President Ursula von der Leyen on U.S.-EU Agreement on Steel and Aluminum Trade," The White House, October 31, 2021, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/10/31/remarks-by-president-biden-and-european-commission-president-ursula-von-der-leyen-on-u-s-eu-agreement-on-steel-and-aluminum-trade/

[15] "WHAT THEY ARE SAYING: Historic U.S.-EU Steel and Aluminum Trade Arrangement Is a Win for American Workers, Businesses, and the Environment," US Department of Commerce, October 31, 2021, https://www.commerce.gov/news/press-releases/2021/11/what-they-are-saying-historic-us-eu-steel-and-aluminum-trade

Emissions Trading System. The Biden administration, by contrast, has not issued or endorsed a formal proposal for a US carbon border adjustment, and it did not ask Congress to include such a measure in President Biden's signature legislative initiative, the *Build Back Better Act*, which is close to being finalized. The administration's pledge to negotiate a new global arrangement in which participants will "restrict market access" for carbon-intensive goods is an important signal that it intends to implement some form of carbon border adjustment eventually – and that it may be interested in doing so using the President's unilateral authority under Section 232, as some Members of Congress have recently suggested.

US Trade Representative Terminates Section 301 Investigations Concerning Digital Services Taxes

On November 18, 2021, the Office of the US Trade Representative (USTR) issued a Federal Register notice terminating its Section 301 investigations concerning digital services taxes (DSTs) imposed or under consideration by Austria, France, Italy, Spain, and the United Kingdom. USTR terminated the investigations based on a finding that recent political agreements with these countries provide a satisfactory resolution to the matters under investigation. Subsequently, and for the same reasons, USTR on December 1 and 2 terminated its Section 301 investigations of the DSTs imposed by Turkey and India, respectively. As a result, imports from these countries will not be subject to retaliatory action under Section 301.

USTR has terminated the Section 301 investigations concerning DSTs based on (1) a political agreement reached at the multilateral level under the auspices of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting, and individual agreements; and (2) subsequent "political compromises" reached between the United States and the investigated countries regarding the implementation of the multilateral agreement:

- On October 8, 2021, Austria, France, India, Italy, Spain, Turkey, and the United Kingdom joined the United States and 130 other jurisdictions in reaching political agreement on a Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy ("Statement").[16] Among other things, the Statement provides that "Pillar One" of the solution will be implemented through a new multilateral convention, which will address DSTs as follows:

  "The Multilateral Convention (MLC) will require all parties to remove all Digital Services Taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future. No newly enacted Digital Services Taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the MLC. The modality for the removal of existing Digital Services Taxes and other relevant similar measures will be appropriately coordinated."

- On October 21, 2021, the United States, Austria, France, Italy, Spain, and the United Kingdom issued a joint statement that describes a political compromise reached among these countries on a transitional approach to existing unilateral DST measures while implementing Pillar 1.[17] Under this transitional approach, according to USTR, "DST liability that accrues during the transitional period prior to implementation of Pillar 1 will be creditable in defined circumstances against future income taxes due under Pillar 1. In return, the United States commits to terminating the existing section 301 trade actions on goods of Austria, France, Italy, Spain, and the United Kingdom, and not to impose further trade actions against Austria, France, Italy, Spain, and the United Kingdom with respect to their existing DSTs until the earlier of the date the Pillar 1 multilateral convention comes into force or December 31, 2023." On November 22, the United States and Turkey agreed to the same terms.

---

[16] Available at https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf.

[17] Available at https://home.treasury.gov/news/press-releases/jy0419.

> On November 24, 2021, the United States announced a similar agreement with India on a “transitional approach” to India’s DST while implementing Pillar One. According to USTR, “[u]nder this agreement and in defined circumstances, the liability from India’s DST that U.S. companies accrue in India during the interim period will be creditable against future taxes accrued under Pillar 1 of the OECD agreement. The period during which the credit accrues will be from April 1, 2022, until either the implementation of Pillar 1 or March 31, 2024, whichever is earlier. In return, the United States commits to terminate the existing section 301 trade action on goods of India, and not to impose further trade actions against India with respect to its existing DST until the earlier of the date the Pillar 1 multilateral convention comes into force or March 31, 2024.”

In each of the above-mentioned Section 301 investigations, USTR has determined that the multilateral agreement and subsequent “transitional approaches” agreed with the investigated countries provide a satisfactory resolution of the matters under investigation. Accordingly, imports from these countries will not be subject to retaliatory action under Section 301 as USTR had initially proposed. However, USTR has noted that it will “monitor the implementation of the political agreement on an OECD/G20 Two-Pillar Solution as pertaining to DSTs,” as well as the agreements reach with each investigated country and “associated measures.” USTR has indicated that it will consider further action under Section 301 if it considers that the investigated countries are not satisfactorily implementing the relevant agreements and associated measures.

Trade Remedies

US Court of International Trade Reinstates Safeguard Tariff Exclusion for Bifacial Solar Panels

On November 16, 2021, the U.S. Court of International Trade ("CIT") reinstated the exclusion of bifacial solar panels from the safeguard measure imposed on imported crystalline silicon photovoltaic ("CSPV") products under Section 201 of the Trade Act of 1974 ("Section 201"). Former President Donald Trump previously withdrew these exclusions on October 10, 2020 via Proclamation 10101 in an effort to sustain the effectiveness of the safeguard measure on CPSV products. The CIT, in *Solar Energy Industries Assoc. et al. v. United States*, invalidated Proclamation 10101 after determining that it exceeded the president's delegated authority. The CIT's decision reinstates the exclusion on bifacial solar panels and orders refunds of duties collected under Proclamation 10101.

The following alert provides an overview of the CIT's decision in *Solar Energy Industries Assoc. et al*.

Background

<u>Safeguard Investigation and Exclusion</u>

The International Trade Commission ("ITC") originally instituted a safeguard investigation of CSPV imports pursuant to Section 201 in response to petitions filed by domestic producers Suniva, Inc. ("Suniva") and SolarWorld on May 17, 2017 and May 25, 2017 respectively.[18] The ITC determined that CSPV products were being imported "in such increased quantities as to be a substantial cause of serious injury to the domestic industry" and recommended the imposition of duties.[19] On January 23, 2018, former President Trump issued Proclamation 9693 imposing a safeguard measure on imports of CSPV products for a period of four years.[20] The safeguard measure consisted of (1) a tariff-rate quota on imports of CSPV cells not partially or fully assembled into other products; and (2) an increase in duties on imports of CSPV modules. This measure took effect on February 7, 2018 and was scheduled to terminate on February 6, 2022.

On January 14, 2018, the Office of the U.S. Trade Representative ("USTR") published a notice describing the procedures for requesting an exclusion from the measures imposed under Proclamation 9693.[21] On June 13, 2018, USTR granted a number of product exclusions from the safeguard measures imposed under Proclamation 9693, including an exclusion for bifacial solar panels.[22]

<u>Proclamation 10101</u>

USTR attempted to withdraw the product exclusion for bifacial solar panels on two prior occasions: first on October 9, 2019 and again on April 17, 2020. As justification for the withdrawal of the product exclusion, the October 9 notice explained that "[s]ince publication of [the Exclusion] notice, the U.S. Trade Representative has evaluated this exclusion further and, after consultation with the Secretaries of Commerce and Energy, determined it will undermine the objectives of the safeguard measure."[23] In *Invenergy Renewables LLC v. United States*, 422 F. Supp.3d 1255 (CIT 2019), the Court of International Trade ("CIT") enjoined USTR from implementing its October 9, 2019 withdrawal of the product exclusion on bifacial solar panels. The CIT likewise enjoined USTR from implementing its April 17,

---

[18] *See* Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products), Inv. No. TA-201-75, USITC Pub. 4739 (Nov. 2017).

[19] Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products), Inv. No. TA-201-75, USITC Pub. 4739 (Nov. 2017).

[20] Proclamation 9693 (Jan. 23, 2018).

[21] Procedures to Consider Additional Requests for Exclusion of Particular Products from the Solar Products Safeguard Measure, 83 *Fed. Reg.* 6,670 (USTR Feb. 14, 2018).

[22] Exclusion of Particular Products from the Solar Products Safeguard Measure, 84 *Fed. Reg.* 27,684 (USTR Jun. 13, 2019).

[23] Withdrawal of Bifacial Solar Panels Exclusion to the Solar Products Safeguard Measure, 84 *Fed Reg.* 54,244 (USTR Oct. 9, 2019).

2020 withdrawal of the product exclusion on bifacial solar panels in *Invenergy Renewables LLC v. United States*, 476 F. Supp. 3d 1323 (CIT 2020).

Former President Trump issued Proclamation 10101 on October 16, 2020, which again withdrew the exclusion on bifacial solar panels. The stated justification for withdrawing the exclusion was that it "has impaired and is likely to continue to impair the effectiveness of the action [the President] proclaimed in Proclamation 9693." Proclamation 10101 thus re-imposed the safeguard duties on bifacial solar panels implemented under Proclamation 9693. In addition, Proclamation 10101 increased the safeguard duties on CSPV modules imposed under Proclamation 9693 from 15% to 18%.

Solar Energy Industries Assoc. et al. v. United States

Plaintiffs in *Solar Energy Industries Assoc. et al. v. United States* raised four claims in opposition of Proclamation 10101, only one of which the CIT found persuasive. Plaintiffs argued – and the CIT agreed – that Proclamation 10101 substantively violated Section 204(b)(1)(B) of the Trade Act of 1930 (19 U.S.C. § 2254(b)(1)) because the Proclamation restricted rather than liberalized trade.

Section 204(b)(1)(B) specifically provides for the "reduction, modification, and termination of a safeguard action." Proclamation 10101 justified its withdrawal of the exclusion on bifacial solar panels based on Section 204(b)(1)(B)'s authorization that the President may modify an existing safeguard action "when the President determines that the domestic industry has made a positive adjustment to import competition." Plaintiffs argued that it "[r]uns counter to logic and congressional intent to increase trade restrictions when 'the domestic industry has made a positive adjustment to import competition.'"[24] The CIT agreed – noting that the imposition of safeguard measures requires "an intricate framework of investigations, consultations, and reports."[25] The President is additionally required to "comply with a variety of interpretive and substantive requirements, as well as specific deadlines for both further investigation and the proclamation of relief," to authorize any safeguard measures. The CIT found that the use of Proclamation 10101 to withdraw the product exclusion for bifacial solar panels – thereby increasing duties for importers of these products – would permit the president to skirt the substantial requirements in place for imposing safeguard duties. The Court specifically found "[t]here is no indication in the statute that Congress intended Section 204 to provide a loophole for the institution of harsher safeguards without the standard procedural restrictions. Conversely, there is every indication that the section was intended to provide and escape hatch from those safeguards where domestic industry has adequately adapted to import completion."[26] The Court therefore found that Proclamation 10101 constituted an action outside of the President's delegated authority and enjoined the government from enforcing the terms of the Proclamation.

Outlook

The CIT's decision to enjoin enforcement of Proclamation 10101 will immediately ease the tariff burden for importers of bifacial solar panels by reinstating the exclusion of these products from the safeguard measure. In addition to enjoining enforcement of Proclamation 10101, the Court also ordered the government to refund all safeguard duties collected under Proclamation 10101, with interest. The government can still appeal the Court's ruling in *Solar Energy Industries Assoc. et al.* to the United States Court of Appeals for the Federal Circuit, but has not indicated whether it will do so.

The U.S. government is currently considering whether to extend the safeguard measure on CSPV products beyond its currently-scheduled expiration date of February 6, 2022, in response to a petition filed by domestic producers of CSPV products. On November 24, 2021, the ITC issued an affirmative determination in the extension proceeding, finding that safeguard relief continues to be necessary to prevent or remedy serious injury to the U.S. industry, and that there is evidence that the domestic industry is making a positive adjustment to import competition. The ITC will

[24] *Solar Energy Industries Assoc. et al. v. United States*, Court No. 20-03491, Slip Op. 21-154 (CIT Nov. 16, 2021) at 27.

[25] Slip Op. 21-154 at 27.

[26] Slip Op. 21-154 at 30.

forward its report on its investigation and determination to the President by December 8, and will issue a public version of its report by December 29. The President will make the final determination on whether to extend the safeguard measure.

The CIT's opinion in *Solar Energy Industries Assoc. et al.* can be found here.

US International Trade Commission Determines Imports of Polyester Textured Yarn from Indonesia, Malaysia, Thailand, and Vietnam Injure US Industry

On November 16, 2021, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of polyester textured yarn from Indonesia, Malaysia, Thailand, and Vietnam that the US Department of Commerce (DOC) has determined are sold in the United States at less than fair value. As a result of the ITC's affirmative determinations, DOC will issue antidumping duty orders on imports of this product from Indonesia, Malaysia, Thailand, and Vietnam. Chair Jason E. Kearns, Vice Chair Randolph J. Stayin, and Commissioners David S. Johanson, Rhonda K. Schmidtlein, and Amy A. Karpel voted in the affirmative.

The merchandise covered by these investigations, polyester textured yarn, is synthetic multifilament yarn that is manufactured from polyester (polyethylene terephthalate). Polyester textured yarn is produced through a texturing process, which imparts special properties to the filaments of the yarn, including stretch, bulk, strength, moisture absorption, insulation, and the appearance of a natural fiber. The scope includes all forms of polyester textured yarn, regardless of surface texture or appearance, yarn density and thickness (as measured in denier), number of filaments, number of plies, finish (luster), cross section, color, dye method, texturing method, or packaging method (such as spindles, tubes, or beams). The merchandise subject to these investigations is classified under subheadings 5402.33.3000 and 5402.33.6000 of the Harmonized Tariff Schedule of the United States (HTSUS).

In its antidumping investigations, DOC determined that imports of the subject merchandise were sold in the United States at the following dumping margins:

Country	Dumping Margin
Indonesia	7.47-26.07
Malaysia	8.50
Thailand	14.47-56.80
Vietnam	2.58-22.36

The ITC's public report on this investigation will be made available by December 28, 2021.

US International Trade Commission Determines Imports of Utility Scale Wind Towers from India and Malaysia Injure US Industry

On November 16, 2021, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of utility scale wind towers from India and Malaysia that the US Department of Commerce (DOC) has determined are sold in the United States at less than fair value and subsidized by the government of India. As a result of the ITC's affirmative determinations, DOC will issue a countervailing duty order on imports of this product from India and antidumping duty orders on imports of this product from India and Malaysia. Chair Jason E. Kearns, Vice Chair Randolph J. Stayin, and Commissioners David S. Johanson, Rhonda K. Schmidtlein, and Amy A. Karpel voted in the affirmative.

The merchandise covered by these investigations consists of certain wind towers, whether or not tapered, and sections thereof. Certain wind towers support the nacelle and rotor blades in a wind turbine with a minimum rated electrical power generation capacity in excess of 100 kilowatts and with a minimum height of 50 meters measured from the base of the tower to the bottom of the nacelle (i.e., where the top of the tower and nacelle are joined) when fully assembled. Merchandise covered by these investigations is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheading 7308.20.0020 or 8502.31.0000. Wind towers of iron or steel are classified under HTSUS 7308.20.0020 when imported separately as a tower or tower section(s). Wind towers may be classified under HTSUS 8502.31.0000 when imported as combination goods with a wind turbine (*i.e.,* accompanying nacelles and/or rotor blades).

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
India	54.03	2.25-397.70
Malaysia	3.20	NA

The ITC's public report on this investigation will be made available by December 20, 2021.

US International Trade Commission Determines Imports of Certain Mobile Access Equipment and Subassemblies Thereof from China Threaten to Injure US Industry

On November 10, 2021, the US International Trade Commission (ITC) determined that a US industry is threatened with material injury by reason of imports of certain mobile access equipment and subassemblies thereof from China that the US Department of Commerce (DOC) has determined are subsidized by the government of China. As a result of the ITC's affirmative threat determination, DOC will issue a countervailing duty order on imports of this product from China. Chair Jason E. Kearns, Vice Chair Randolph J. Stayin, and Commissioners David S. Johanson, Rhonda K. Schmidtlein, and Amy A. Karpel made affirmative threat determinations.

In its investigation, DOC determined that imports of the subject merchandise from China received countervailable subsidies valued at 11.95 to 448.70 percent.

The subject merchandise consists of certain mobile access equipment, which consists primarily of boom lifts, scissor lifts, and material telehandlers, and subassemblies thereof. Mobile access equipment combines a mobile (self-propelled or towed) chassis, with a lifting device (e.g., scissor arms, boom assemblies) for mechanically lifting persons, tools and/or materials capable of reaching a working height of ten feet or more, and a coupler that provides an attachment point for the lifting device, in addition to other components. Certain mobile access equipment subject to these investigations is typically classifiable under subheadings 8427.10.8020, 8427.10.8030, 8427.10.8070, 8427.10.8095, 8427.20.8020, 8427.20.8090, 8427.90.0020 and 8427.90.0090 of the Harmonized Tariff Schedule of the United States (HTSUS). Parts of certain mobile access equipment are typically classifiable under subheading 8431.20.0000 of the HTSUS.

In its countervailing duty investigation, DOC determined that imports of the subject merchandise from China received countervailable subsidies valued at 11.95 to 448.70 percent.

The ITC's public report on this investigation will be made available by December 20, 2021.

US Department of Commerce Initiates Antidumping Investigation of Certain Superabsorbent Polymers from South Korea

On November 23, 2021, the US Department of Commerce (DOC) announced the initiation of an antidumping duty (AD) investigation of certain superabsorbent polymers from South Korea. DOC initiated the investigation in response to a petition filed by the Ad Hoc Coalition of American SAP Producers, whose members are BASF Corporation (Florham Park, NJ), Evonik Superabsorber LLC (Greensboro, NC), and Nippon Shokubai America Industries, Inc. (Pasadena, TX).

The merchandise covered by this investigation is superabsorbent polymers (SAP), which is cross-linked sodium polyacrylate most commonly conforming to Chemical Abstracts Service (CAS) registry number 9003-04-7, where at least 90 percent of the dry matter, by weight on a nominal basis, corrected for moisture content, is comprised of a polymer with a chemical formula of $(C_3\,H_3\,O_2\,Na_x\,H_{1-x})_n$, where x is within a range of 0.00-1.00 and there is no limit to *n*. The subject merchandise also includes merchandise with a chemical formula of $\{(C_2H_3)COONa_y H_{(1-y)}\}_n$, where *y* is within a range of 0.00-1.00 and there is no limit to *n*. The subject merchandise includes SAP which is fully neutralized as well as SAP that is not fully neutralized. SAP is classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheading 3906.90.5000. SAP may also enter the United States under HTSUS 3906.90.9000 or 3906.10.0000.

The petition alleges that imports of the subject merchandise from Korea were sold in the United States at dumping margins ranging from 27.20 to 48.20 percent.

The US International Trade Commission (ITC) is scheduled to issue its preliminary injury determination on or before December 17, 2021. If the ITC issues an affirmative preliminary determination of injury, the investigation will continue and DOC will be scheduled to issue its preliminary determination by April 11, 2022. If the ITC makes a negative preliminary determination of injury, the investigation will be terminated.

According to DOC, imports from South Korea under HTSUS subheading 3906.90.5000 were valued at approximately $76.4 million in 2020.