US & Multilateral Trade and Policy Developments

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Contents

US General Trade Policy

US Senate Invokes Cloture on Motion to Proceed to TPA and TAA, Passes Trade Preferences and Customs Bills

On May 14, 2015, the US Senate invoked cloture on Senate Majority Leader Mitch McConnell's (R-KY) motion to proceed to consideration of a bill comprised of (i) the *Bipartisan Congressional Trade Priorities and Accountability Act of 2015* (TPA 2015) and (ii) the *Trade Adjustment Assistance Enhancement Act of 2015* (TAA 2015). The Senate also passed (i) the *AGOA Extension and Enhancement Act of 2015* (AGOA 2015), which is likely to be passed into law; and (ii) the *Trade Facilitation and Trade Enforcement Act of 2015* ("Customs bill"), which contains, inter alia, controversial provisions intended to address alleged currency manipulation and thus is unlikely to be enacted into law.

An agreement to vote on these bills was announced on May 13 by Sen. McConnell and Senate Minority Leader Harry Reid (D-NV), just one day after Senate Democrats blocked Sen. McConnell's motion to proceed to the combined TPA-TAA bill due to unmet demands that Sen. McConnell merge the TPA-TAA bill with the Customs bill. However, after a day of negotiations, Senate Democrats ceased this demand and agreed to consider the TPA-TAA bill separately from AGOA 2015 and the Customs bill, as had been proposed initially by the Senate's Republican leadership. We provide an analysis of these developments and the next steps for TPA 2015 below.

Background: Cloture Votes and Senate Rules

In the US Senate, legislation can be brought to the floor for consideration by "unanimous consent" (i.e., if no Senator objects to consideration of the bill). However, if unanimous consent cannot be reached, then the Senate Majority Leader typically offers a "motion to proceed" to consider the bill in question. A motion to proceed to consider a bill can be approved by a simple majority of the Senators who are present and voting. Sen. McConnell filed a motion to proceed to consider TPA 2015 on May 6.

Because Senate rules do not provide a method for a simple majority of Senators to end debate on a motion to proceed and to move to a final vote, such a motion is vulnerable to a "filibuster" – a process by which Senators can insist on extended debate or use other obstructive tactics to delay or prevent a final vote. Given the controversial nature of TPA 2015, it was expected that certain Senators would filibuster Sen. McConnell's motion to proceed in an effort to delay consideration of the bill.

The May 12 Cloture Vote

In anticipation of a filibuster, Sen. McConnell on May 7 filed for "cloture" on the motion to proceed, which, upon approval by a three-fifths majority of the Senate (usually 60 Senators), limits debate on the motion and forces a final vote. This 60-vote threshold was not reached during the May 12 vote to invoke cloture on Sen. McConnell's motion to proceed, preventing Sen. McConnell from scheduling a final Senate vote on TPA 2015. The vote results were almost entirely along party lines: 45 Senators voted against cloture, including 42 Democrats and two Independents who caucus with the Democratic Party. 52 Senators voted for cloture, including 51 Republicans and one Democrat, Sen. Tom Carper (D-DE). Sens. Cory Booker (D-NJ), Lindsey Graham (R-SC), and Marco Rubio (R-FL) did not vote. After initially voting for cloture, Sen. McConnell changed his vote to "no" for purely procedural reasons, ensuring that he would be able to bring the question up again for a second vote (as was done on May 14).

Debate over Merging TPA 2015 with the Customs Bill and Other Legislation

The Democrats' initial opposition to TPA 2015 cloture stemmed from a procedural dispute concerning how to proceed on each of the four trade bills being considered by the Senate. Prior to the May 12 cloture vote, Sen. Reid warned that Senate Democrats would oppose cloture on the motion to proceed unless TPA 2015 was merged with the three other bills passed by the Senate Finance Committee (SFC): TAA 2015, AGOA 2015, and the Customs bill. Sen. Reid's insistence on combining the four bills reportedly came as a surprise to Senate Republicans and, in particular, to SFC Chairman Orrin Hatch (R-UT), who had reached a different agreement with SFC Ranking Member Ron Wyden (D-OR) in April regarding the manner in which the four bills would proceed.

Pursuant to the April agreement between Sens. Hatch and Wyden, all four bills would proceed separately, albeit within a similar timeframe. Recognizing that a vote on TAA 2015 was a high Democratic priority and necessary to secure Democratic votes for TPA 2015, Sen. Hatch and the Republican leadership in both chambers committed to allowing a vote on TAA 2015 on the same day as TPA 2015. However, no such agreement was reached regarding AGOA 2015 or the Customs bill, nor was there an agreement to combine any of the four bills.

Prior to the May 12 cloture vote, Sen. McConnell partially acceded to Sen. Reid's new demand by agreeing to combine TPA 2015 and TAA 2015 into a single bill. However, Sen. McConnell refused to include AGOA 2015 and the Customs bill in the package. Sen. McConnell's refusal was due largely to the controversial nature of the Customs bill, which includes the following controversial provisions:

- *Currency Undervaluation Investigation Act of 2015* (S.433) ("Currency CVD"), which would direct the Department of Commerce to consider undervalued currency as a prohibited export subsidy for purposes of US countervailing duty (CVD) law;
- *Leveling the Playing Field Act of 2015* (S.891), which would amend US trade remedy laws in a manner favorable to petitioners in US trade remedy investigations, including by modifying the injury standard used in such investigations;
- *ENFORCE Act*, which would require US Customs and Border Protection to adhere to certain investigating procedures and deadlines when responding to allegations of antidumping (AD) or CVD evasion; and
- *American Manufacturing Competitiveness Act of 2015* (S.998), which would reform the Miscellaneous Tariff Bill process by allowing companies to submit proposals for duty suspension directly to the International Trade Commission while reserving final approval for Congress.

Because the Customs bill includes these controversial provisions – in particular the currency CVD provisions, which the Obama Administration and many congressional Republicans strongly oppose – combining the Customs bill with TPA 2015 would have jeopardized Congressional approval of the entire package, particularly in the House of Representatives. In addition, enactment of the currency CVD provisions would complicate substantially efforts to conclude the TPP negotiations, potentially defeating the purpose of TPA 2015. For these reasons, Sen. McConnell refused to merge the Customs bill with TPA 2015, despite the fact that such refusal likely would result in the failure of the May 12 cloture vote. Sen. Hatch criticized Sen. Wyden for joining other Democrats in opposing cloture on May 12 and suggested that Sen. Wyden had violated their April agreement to hold separate votes on each bill. Indeed, only one day before the May 12 vote, Sen. Wyden indicated publicly that he would vote for cloture on TPA 2015.

Following the failed May 12 cloture vote, the Senate Republican and Democratic leadership quickly began negotiations on a path forward. A focal point of the negotiations was the position of Sen. Wyden and approximately 10 other Senate Democrats who had opposed cloture on May 12, but who generally are considered to support TPA 2015, including Sens. Michael Bennet (D-CO), Maria Cantwell (D-WA), Ben Cardin (D-MD), Dianne Feinstein (D-CA), Heidi Heitkamp (D-ND), Tim Kaine (D-VA), Claire McCaskill (D-MO), Patty Murray (D-WA), Bill Nelson (D-FL) and Mark Warner (D-VA). Explaining the decision to oppose cloture, Sen. Wyden stated that "the group is concerned about the lack of a commitment to trade enforcement, which is specifically the customs bill." However, Sen. Wyden

did not insist that all four bills be combined, as Sen. Reid originally demanded, and merely insisted that Senate Republicans provide a "path forward" for all four bills.

May 14 Votes on Cloture, AGOA 2015, and the Customs Bill

On May 13, the Senate Democratic and Republican leadership announced an agreement to proceed with consideration of the four pending bills. Pursuant to the agreement, separate votes on passage of the Customs bill and AGOA 2015 were scheduled for May 14, followed by a second cloture vote on the motion to proceed to the combined TPA-TAA bill. This agreement does not appear to differ significantly from the proposal initially offered by the Senate Republican leadership, as Senate Democrats' demand to combine the Customs bill with TPA 2015 was not fulfilled. Nonetheless, Sen. Wyden and 12 other Democrats accepted the agreement and voted with 53 Republicans to invoke cloture in a final vote of 65 to 33. The Democrats who voted in favor of cloture were Sens. Michael Bennet (D-CO), Maria Cantwell (D-WA), Tom Carper (D-DE), Chris Coons (D-DE), Dianne Feinstein (D-CA), Heidi Heitkamp (D-ND), Tim Kaine (D-VA), Claire McCaskill (D-MO), Patty Murray (D-WA), Bill Nelson (D-FL), Jeanne Shaheen (D-NH), Mark Warner (D-VA), and Ron Wyden (D-OR). Immediately following the vote, the Senate began to debate the motion to proceed to consider the combined TPA-TAA bill, with debate limited to eight hours. The motion to proceed is expected to be approved, at which point the Senate will begin debating the TPA-TAA bill itself and any proposed amendments to the legislation.

The Senate passed AGOA 2015 by a vote of 97 to 1, with Sen. James Lankford (R-OK) casting the sole vote in opposition. AGOA 2015 is expected to be approved by the House, where it enjoys similarly strong bipartisan support. The Senate passed the Customs bill by a vote of 78 to 20. Republican Senators cast all 20 votes in opposition to the bill, while 32 Republicans joined 44 Democrats and 2 Independents voting in favor of the bill. However, despite its approval by a large Senate majority, the Customs bill as written is unlikely to be enacted into law. House Republicans, including House Speaker John Boehner (R-OH) and House Ways and Means Committee Chairman Paul Ryan (R-WI), strongly oppose the currency CVD provisions included in the Senate Customs bill, and Speaker Boehner has indicated reluctance to considering the Senate-passed bill in the House. The *Leveling the Playing Field Act*, which also is included in the Senate Customs bill, likely will face similar House Republican opposition. Further, House Republicans have long opposed Sen. Wyden's *ENFORCE Act*, and such opposition has been the primary obstacle to enactment of a Customs bill since 2012. As a result of these differences, the House likely will not enact the Senate-passed Customs bill.

Next Steps for TPA 2015 and TPP

After the Senate initially failed to invoke cloture on May 12, observers speculated that a compromise agreement to hold a second cloture vote might not be reached until mid-June, after the Memorial Day Congressional recess. Under such a scenario, enactment of TPA 2015 into law likely would have been delayed until mid-July, consequently delaying the conclusion of the TPP negotiations. Even under the expedited legislative procedures established by TPA 2015, this delay would have pushed the likely timeframe for Congressional approval of TPP-implementing legislation into the Spring of 2016. This timing – which would require Congress to vote on the TPP in the midst of the US Presidential election season – would be politically challenging, jeopardizing prospects for approval of the TPP during President Obama's term.

By swiftly reaching an agreement to consider TPA 2015 after the failed May 12 cloture vote, the Senate temporarily managed to avoid this outcome. Thus, the minor delay caused by the May 12 cloture vote should not significantly impact the timing for enactment of TPA 2015 into law – which, in a best-case scenario is likely in early summer of 2015. Consequently, Congressional approval of TPP-implementing legislation is unlikely to occur before the end of the year; however, such approval during President Obama's term cannot be ruled out.

US Senate Passes Trade Promotion Authority Legislation

On May 22, 2015, the US Senate passed the *Trade Act of 2015* (H.R. 1314 or "*Trade Act*"), a bill comprised of the *Bipartisan Congressional Trade Priorities and Accountability Act of 2015* ("TPA 2015") and the *Trade Adjustment Assistance Enhancement Act of 2015* ("TAA 2015"). The Senate passed the *Trade Act* by a vote of 62 to 37, with 14 Democrats and 48 Republicans voting in the affirmative. When it returns from its Memorial Day recess in June, the US House of Representatives is expected to consider the *Trade Act*, the *AGOA Extension and Enhancement Act of 2015* (AGOA 2015), and the *Trade Facilitation and Trade Enforcement Act of 2015* ("Customs bill").

Controversial Amendments on Currency and New TPP Entrants Rejected

Prior to passing the *Trade Act*, the Senate narrowly defeated two controversial amendments: (i) an amendment offered by Sen. Sherrod Brown (D-OH) that would have required Congressional approval of any new entrants to the Trans-Pacific Partnership (TPP) negotiations (rejected by a vote of 47 to 52); and (ii) an amendment offered by Sen. Rob Portman (R-OH) that would modify the existing principal negotiating objectives in TPA 2015 related to currency practices (rejected by a vote of 48 to 51). The amended negotiating objective sought by Sen. Portman would have directed US negotiators to "target protracted large-scale intervention in one direction in the exchange markets…by establishing strong and enforceable rules against exchange rate manipulation." In the days preceding the vote, US Treasury Secretary Jack Lew reiterated the widely-held view that, if adopted, the amendment would have prevented the successful conclusion of the TPP negotiations. President Obama also warned before the vote that he would veto the *Trade Act* if it included Sen. Portman's amendment.

Non-Controversial Amendments on Religious Freedom and Currency Approved

The Senate adopted two amendments to the *Trade Act*, neither of which is expected to have significant implications: (i) an amendment offered by Sen. James Lankford (R-OK) that establishes a negotiating objective "to take into account conditions relating to religious freedom of any party to negotiations for a trade agreement with the United States" (approved by a vote of 92 to 0); and (ii) an amendment offered by Senate Finance Committee Chairman Orrin Hatch (R-UT) and Ranking Member Ron Wyden (D-OR) to establish a new principal negotiating objective pertaining to "foreign currency manipulation" (approved by a vote of 70 to 29). The new objective provides a description of alleged "unfair currency practices" but does not require negotiators to establish enforceable rules to address such practices. The Obama Administration supported the amendment, the primary purpose of which was to steer votes away from the controversial currency amendment offered by Sen. Portman. Because the Hatch-Wyden amendment does not require negotiators to establish enforceable rules related to currency practices, it is not considered to pose any threat to the TPP negotiations.

TPA Provision on Alleged Human Trafficking Remains Unaddressed

Despite the efforts of the Obama Administration and Sens. Hatch and Wyden, the Senate failed to modify a controversial provision in TPA 2015 pertaining to alleged human trafficking. The provision was authored by Sen. Robert Menendez (D-NJ) and adopted by the Senate Finance Committee during its April 22 markup of TPA 2015. Under the provision, which is contained in Section 106(b)(6) of the *Trade Act*, legislation to implement trade agreements between the United States and "Tier 3"[1] countries would be ineligible for the expedited (*i.e.*, "fast-track") legislative procedures established by TPA, thus diminishing (i) the agreement's likelihood of being approved by Congress; and (ii) a Tier 3 country's willingness to sign a trade agreement with the United States. The provision would diminish prospects for Congressional approval of the TPP because Malaysia, one of the parties to the TPP

[1] Pursuant to the *Trafficking Victims Protection Act of 2000*, Tier 3 countries are those whose governments (i) do not comply with certain "minimum standards" that allegedly pertain to the elimination of human trafficking; and (ii) supposedly are not making "significant efforts" to do so. Countries allegedly meeting these criteria are identified in the US State Department's annual Trafficking in Persons Report.

negotiations, currently is classified as a Tier 3 country.

On May 19, Sen. Menendez announced that he would seek to modify the provision to address concerns expressed by the Obama Administration about the provision's potential impact on the TPP. To that end, Sen. Menendez filed an amendment on May 20 which would allow trade agreements with Tier 3 countries to remain eligible for expedited consideration "if the Secretary of State submits to the appropriate congressional committees a letter stating that [the Tier 3 country] has taken concrete actions to implement the principal recommendations in the most recent annual report on trafficking in persons." The Obama Administration and Sen. Wyden endorsed the amendment, which likely would have been approved by the Senate. However, the amendment never received a vote, as Senators were unable to resolve a broader dispute regarding which amendments to the *Trade Act* (out of more than 200 that had been filed) would be considered.

On May 22, Sen. Hatch announced that he and Sen. Wyden will seek to enact the compromise language proposed by Sen. Menendez "in the context of the future conference of [the Customs bill]." Sen. Hatch's statement refers to a "conference committee," which is a temporary panel of members of the House and the Senate formed for the purpose of reconciling differences in legislation. The Senate passed its version of the Customs bill on May 14, and the House is expected to pass a different version of the Customs bill in June. Thus, a conference committee likely will be convened to resolve the differences between the Senate-passed version of the Customs bill and the version that the House is expected to pass.

The strategy suggested by Sen. Hatch likely would involve the House approving the Senate-passed version of the *Trade Act*, as well as the House version of the Customs bill. Subsequently, the House and the Senate would convene a conference committee to resolve the differences between the House- and the Senate-passed versions of the Customs bill. During the conference, representatives from both chambers then would agree to include Sen. Menendez's compromise language in the final "conferenced" Customs bill. This final Customs bill, which would have to be approved by both the House and the Senate, would amend the *Trade Act* retroactively by adding Sen. Menendez's compromise language.

House Ways and Means Committee Chairman Paul Ryan (R-WI) has agreed to follow the strategy proposed by Sen. Hatch; however, the viability of the strategy is uncertain. The Senate-passed Customs bill contains several controversial provisions not included in the House version of the Customs bill, including provisions that would direct the Department of Commerce to consider undervalued currency as a prohibited export subsidy for purposes of US countervailing duty investigations. If the conferees are unable resolve these differences, or if the final conferenced bill is rejected by either Chamber, Section 106(b)(6) of the *Trade Act* would remain unamended. An alternative to the above strategy would involve the House passing its own version of TPA 2015 to be conferenced with the *Trade Act*. However, proponents of TPA are reluctant to take these two bills to conference, as doing so would require the House to take a second controversial vote on TPA.

Next Steps

The House of Representatives returns from the Memorial Day recess on June 1. The House Republican leadership has indicated that it intends to hold floor votes on the *Trade Act* during the week of June 8, although it will likely use a parliamentary procedure known as "dividing the question" to hold separate votes on Titles I and II of the bill (which contain TPA 2015 and TAA 2015, respectively). Chairman Ryan has pledged, in consultation with the House Republican leadership, that the House will consider the Customs Bill and AGOA 2015 on the same day as the *Trade Act*.

House Speaker John Boehner (R-OH) repeatedly has sought assurances that TPA 2015 will receive substantial Democratic support before it is brought to the House floor for a vote; however, fewer than 20 House Democrats have expressed public support for the bill. The White House reportedly has been lobbying aggressively to secure additional Democratic votes, but whether these efforts will enable the House to advance the bill by the week of June 8 remains uncertain. In a realistic best-case scenario, the House would approve TPA 2015 (and, potentially, the other aforementioned bills) by mid-June.

Given this timeline, Congressional approval of TPP-implementing legislation is increasingly unlikely to occur before the end of the year. If TPA 2015 is approved in June and TPP is concluded shortly thereafter, a final vote on TPP-implementing legislation would not be required under the TPA timelines until the spring of 2016, at the earliest. This vote could be further delayed due to the US presidential elections, which tend to heighten political tensions and discourage major legislative initiatives. To avoid this outcome, the administration would have to rapidly conclude TPA and submit implementing legislation, and Congress would have to advance that legislation far more quickly than is required under TPA 2015. Doing so would likely be politically challenging. Thus, while TPA is expected to be approved this summer, there is a real chance that US implementation of a final TPP agreement would not occur until 2017, under a new US President.

US General Trade Policy Highlights

US Lawmakers Introduce Legislation to Repeal Crude Oil Export Ban

On May 12, 2015, Senate Energy and Natural Resources Committee Chair Lisa Murkowski (R-AK) and Sen. Heidi Heitkamp (D-ND) introduced the *Energy Supply Distribution Act of 2015* (S. 1312), which would repeal the longstanding ban on exports of crude oil from the United States. A June 4 Senate Energy and Natural Resources Committee hearing on "Energy Accountability and Reform Legislation" is expected to address S. 1312 and several other bills being considered for inclusion in a broad package of energy legislation to be finalized later this year. Sens. Murkowski and Heitkamp also plan to merge S. 1312 with the *American Crude Oil Export Equality Act*, which they introduced on May 19. The latter bill has been referred to the Senate Banking Committee.

The US federal government regulates the export of crude oil primarily pursuant to Section 103 of the *Energy Policy and Conservation Act of 1975* (*EPCA*), which requires the President to "promulgate a rule prohibiting the export of crude oil and natural gas produced in the United States." Although the *EPCA* authorizes the President to exempt certain exports from the ban for national interest purposes, the United States maintains an effective ban on exports of almost all crude oil. According to a December 2014 Congressional Budget Office report, only one percent of crude oil produced in the United States in 2013 was exported, and nearly all of those exports were shipped to Canada. Section 13 of S. 1312 would repeal the ban by providing that "any domestic crude oil or condensate (other than crude oil stored in the Strategic Petroleum Reserve) may be exported without a Federal license to countries not subject to sanctions by the United States," notwithstanding any other provision of law.

The American Crude Oil Export Equality Act, which reportedly is intended to complement S. 1312, seeks to "reinforce the need to lift the oil export ban by going line-by-line through federal laws already on the books to strike any mention of or reference to the prohibitions on crude oil exports," according to a statement issued by Sen. Heitkamp's office. However, the American Crude Oil Export Equality Act reportedly also would authorize the President to impose certain restrictions on crude oil exports under special circumstances, such as "when supply shortages or price increases are likely to negatively impact employment." The legal and policy implications of any such provisions are uncertain at this time because the bill's text has not yet been released publicly. The bill has been referred to the Senate Banking Committee "with the intent of merging it with [S.1312]," according to the statement issued by Sen. Heitkamp's office. Sens. Robert Corker (R-TN) and Joe Manchin (D-WV) co-sponsored the American Crude Oil Export Equality Act. Sens. Lamar Alexander (R-TN), John Barrasso (R-WY), Shelley Moore Capito (R-WV), Robert Corker (R-TN), Jeff Flake (R-AZ), John Hoeven (R-ND), James Inhofe (R-OK), James Lankford (R-OK), John McCain (R-AZ), James Risch (R-ID), and Marco Rubio (R-FL) co-sponsored S.1312.

Sen. Murkowski seeks to include S. 1312 (and, by extension, the *American Crude Oil Export Equality Act*) in the broader package of energy legislation being drafted by members of the Senate Energy and Natural Resources Committee. However, any legislation that would repeal the ban will face obstacles in Congress. While prospects for Congressional passage of legislation to reform or repeal the ban are improved in the 114th Congress – largely as a result of the Republican Party assuming majority control of the Senate – Congress is unlikely to pass legislation liberalizing crude oil exports this year (*please refer to the W&C US Trade Report dated March 16, 2015*). Congressional Republicans generally support reforming or eliminating the ban, but key House Republicans have

taken a cautious approach towards any potential changes to the ban, indicating that short-term repeal is unlikely. The ban also continues to enjoy strong support among many Members of Congress, particularly within the Democratic Party. As a result, potential Congressional action to reform or repeal the ban might be delayed until after the 2016 US elections.

Click **here** for a copy of S. 1312. The text of the *American Crude Oil Export Equality Act* has not been made public.

Free Trade Agreement Highlights

European Commission to Table New ISDS Proposal for TTIP in Autumn of 2015

On May 7, 2015, EU Trade Commissioner Cecilia Malmstrom stated that the European Commission (EC) plans to table revised language on investor-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP) negotiations during the autumn of 2015. The EC suspended negotiations on the TTIP investment chapter in January 2014 in response to pressure from European non-governmental organizations and other interested parties, and simultaneously announced that it would hold public consultations to seek feedback on its draft ISDS proposal.

The EC released the results of its public consultations in January 2015 and has since been revising its draft ISDS proposal. On May 5, the EC published a concept paper on ISDS, which describes in general terms the reforms that it plans to pursue in the TTIP and future trade and investment agreements. The proposed reforms are intended to address concerns raised during the EC's public consultations, which generally pertained to one of the following issues: (i) the right of governments to regulate in the public interest; (ii) the establishment and functioning of ISDS tribunals; (iii) the appellate process for ISDS decisions; and (iv) the relationship between ISDS and domestic courts.

The May 5 concept paper indicates that the EU might seek the following, inter alia, in its revised proposal: (i) a requirement that all ISDS arbitrators must be chosen from a roster that has been pre-established by the parties; (ii) a bilateral appellate mechanism for ISDS, which would be modeled after the WTO Appellate body; (iii) a requirement that investors make a definitive choice between ISDS and domestic courts at the outset of any legal proceedings (known as the "fork in the road" approach); and (iv) an operational provision (i.e., an Article) in the TTIP which will refer to the right of governments to take measures to achieve legitimate public policy objectives, "on the basis of the level of protection that they deem appropriate".

The United States has not yet reacted publicly to the concepts discussed in the EC paper. However, US negotiators likely are concerned by the EC's proposed operational provision that would assert the right of governments to regulate "on the basis of the level of protection that they deem appropriate." Observers have expressed concerns that such a provision could be used to justify arbitrary restrictions on commercial activity without requiring scientific or other evidence to support such actions.

In addition, certain of the proposed reforms in the concept paper stand in contrast to the 2012 US model bilateral investment treaty (model BIT). For example, the model BIT does not require parties to select from a pre-established roster of arbitrators. Rather, under the model BIT, each party may appoint one arbitrator to an ISDS panel, while the third arbitrator must be mutually agreed upon by the parties (or selected by the Secretary-General of the International Center for the Settlement of Investment Disputes, if the parties cannot reach an agreement). The United States typically has sought to adhere closely to the model BIT when negotiating free trade agreements, including the Trans-Pacific Partnership. Thus, while the EC concept paper has not yet been elaborated into a formal proposal, its contents indicate that ISDS will continue to be one of the most challenging and politically sensitive components of the TTIP negotiations.

Click **here** for a copy of the concept paper.

US Trade Representative Publishes Summary of Digital Trade Rules Being Pursued in TPP

On May 1, 2015, the Office of the US Trade Representative (USTR) published a twelve-point summary of the rules that the United States has pursued in the Trans-Pacific Partnership (TPP) negotiations with respect to digital trade. Deputy USTR Robert Holleyman also presented an overview of the rules during a recent speech to the New Democrat Network in Washington, DC.

In the speech, Ambassador Holleyman stated that existing multilateral trade rules, such as those established by the General Agreement on Trade in Services (GATS), provided a framework that has enabled digital trade to grow substantially in recent years. In particular, Ambassador Holleyman credited (i) the agreement by the GATS parties that commitments under the GATS were to be "technologically neutral" and (ii) the commitments made by the GATS parties to ensure that services suppliers could utilize public telecommunications systems to move data across borders and access data stored in the territories of other parties.

However, Ambassador Holleyman also argued that these existing rules have been inadequate to combat the rise of "digital protectionism," whereby countries allegedly have imposed measures that impede digital trade and the free flow of data. Ambassador Holleyman cited the following policies as examples of this trend: (i) localization requirements, (ii) market access limitations, (iii) intellectual property rights infringement, (iv) inflexible data privacy and protection requirements, and (v) uncertain legal liability rules. According to Ambassador Holleyman, the United States has sought to address these and other related policies through the TPP by seeking disciplines in twelve general areas, as follows:

- **Authentication Methods.** The United States has proposed a provision designed to ensure that companies and consumers "can develop and use technologically-neutral electronic signatures and authentication methods of their own choice."
- **Forced Technology Transfers.** The United States has proposed rules designed to prohibit countries from requiring that companies transfer their technology, production processes, or other proprietary information to persons in their respective territories.
- **Customs Duties for Digital Products.** The United States has proposed a complete prohibition on customs duties for digital products, such as music, videos, software, and e-books.
- **Technology Choice.** The United States has proposed binding commitments designed to prevent countries from requiring that companies purchase and/or utilize local technologies.
- **Encryption Products.** The United States has introduced a provision designed to "protect innovation in encryption products" and has sought to prevent countries from restricting the types of encryption technologies that can be used within their territories.
- **Cross-Border Data Flows.** The United States has negotiated specific provisions designed to protect the movement of data, subject to "reasonable safeguards" (such as those which a country might maintain to protect exported consumer data).
- **Localization Barriers.** The United States has proposed rules designed to prevent countries from requiring that companies localize their computing services (for example, by requiring that companies build data centers within the country to serve that country's consumers).
- **Application to New Services.** The proposed structure of services and investment commitments in the TPP would ensure that such commitments are extended to new technologies and services invented after the agreement is concluded (unless a specific, negotiated exception applies).

- **Network Competition.** The United States has proposed provisions that are designed to promote network competition within TPP countries. Such provisions relate to the ability of suppliers to build networks and infrastructure, such as submarine cables, in the territories of other parties.
- **Consumer Protections.** The United States has proposed that TPP countries adopt enforceable consumer protections in their markets, with the goal of ensuring that "baseline consumer trust" is enhanced.
- **Basic Non-Discrimination Principles.** The United States has sought to ensure in the TPP that basic non-discrimination principles, such as those contained in existing multilateral agreements governing trade in goods and services, also apply to digital products.
- **"Free and Open" Internet.** With a focus on commercial suppliers, the United States has sought to "affirm the bedrock principle" that consumers in TPP countries "should be able to access online content and applications of their choice for all legitimate commercial purposes."

In addition to the above measures, Ambassador Holleyman noted that the TPP would also contain "dozens and dozens" of related disciplines in the intellectual property, services, financial services, investment, telecommunications, and small and medium enterprise chapters.

Click **here** for a copy of Ambassador Holleyman's speech and a summary of the proposed rules.

Multilateral Highlights

WTO Director-General Initiates Consultation Process on Doha Negotiations

WTO Director-General Roberto Azevêdo recently launched his own consultation process on the Doha Round negotiations with the objective of achieving a political deal on the core market access issues of Agriculture, Non-Agricultural Market Access (NAMA), and Services by July to meet the deadline that WTO Members set for finishing this part of the Bali Work Programme. Other negotiating issues, such as Rules and Environment, are being set aside temporarily because their prospects for producing an outcome depend largely on the results on market access.

Until now, the individual Chairmen of the Negotiating Groups have been responsible for the negotiations on each of the core market access issues: (i) Ambassador Adank (New Zealand) for Agriculture, (ii) Ambassador Winzap (Switzerland) for NAMA, and (iii) Ambassador Duque (Colombia) for Services. These Negotiating Groups have made only limited progress by dealing with these issues separately, and Director-General Azevêdo believes that a combined approach is needed to unblock the negotiations by allowing Members to explore trade-offs between the three issues. The separate Negotiating Groups will continue working as a backup to Director-General Azevêdo's process and are prepared to conduct more technical and detailed negotiations as circumstances permit. The Agriculture Negotiating Group will need to select a new Chairman shortly because highly-experienced and well-respected Ambassador Adank is leaving his post in Geneva, but finding a suitable replacement should be less difficult now that Director-General Azevêdo has assumed control of the negotiations.

The traditional WTO approach to brokering a deal during such a late stage of a negotiation is to work with a small number of major players first and, as progress is made, to broaden the process to include other Members, and eventually all Members, in the drive towards reaching consensus. This approach has been criticized in the past for being too exclusive, especially of developing countries, and for presenting the majority of the membership towards the end with a fait accompli when it is too late for them to exert much influence on the result. As an ex-Ambassador of Brazil to the WTO, Director-General Azevêdo is sympathetic to that criticism; he demonstrated his preference for a more inclusive approach during the process he chaired to conclude the Trade Facilitation Agreement in 2014. While placing the major players at the core of his process is unavoidable, particularly early on, he likely will broaden participation relatively quickly to include all interested delegations. This approach, although time-consuming, has greater legitimacy because it is open to all Members and is more necessary now than it was in the past when the

United States and the European Union were the predominant WTO players. Today, approximately twenty-five WTO Members, including the major developing countries, must be included from an early stage if progress is to be made, and even a handful of relatively small developing countries can block proceedings if they feel excluded. This was demonstrated last year in the final stages of the Trade Facilitation negotiations when members of the "Alba" group, led by Cuba, were able to stall the process until they were satisfied with the result.

Director-General Azevêdo likely will conduct his consultations in a variety of formats, including the following:

- **Private, one-on-one consultations with individual Members.** After many years of negotiations, the main contours of each Member's positions on the various negotiating issues are well known. By meeting with them individually in private, in a process that is sometimes referred to as "confessionals," Director-General Azevêdo will hope to (i) find out exactly what their priorities are, from both an offensive and a defensive perspective; (ii) discuss what flexibilities they might have but have not yet admitted to other Members; and (iii) explore possible trade-offs that could increase their willingness to compromise.

- **Small group consultations with key interested delegations on specific issues.** These consultations typically will bring together the main proponents and opponents on a particular issue in the negotiations to explore whether the Members are willing to negotiate a compromise. For example, in Agriculture, the United States and the EU on the one hand, and China and India on the other hand, are in a stand-off regarding reductions in agricultural subsidy levels by large emerging market economies. The public debate is well known, but only the chief negotiators of each of the Members involved knows where exactly the political "red lines" have been drawn by their governments and whether they have the authority to return to their capitals with a request that the red line be moved to facilitate a compromise. Director-General Azevêdo is experienced and skilled in chairing this kind of negotiation, and he might have inside information gained from his "confessionals" that will allow him to steer the consultations in the right direction. He will need to begin with the big issues (such as farm subsidy cuts) that are creating blockages, but as these issues are unwound, several other issues that require attention will arise (such issues might be less high-profile, but they might not necessarily be any easier to resolve). This consultation process will need to be maintained throughout the negotiating process.

- **Consultations with the group of the largest WTO Members, typically 25 to 30 in number.** Often referred to as "Green Room" consultations, these consultations provide the opportunity for key Members to exchange candid views regarding the main problems and potential solutions. The consultations bring greater transparency to the proceedings for the key players and can be an opportunity for one Member to signal a conditional change in its position (or to hear from other Members before returning to its capital to ask for new negotiating instructions if, for example, it becomes clear that it is effectively isolated within its peer group). Director-General Azevêdo can use these meetings to focus on particular problems that are holding-up negotiations and try to mobilize peer pressure to resolve them. He also can use them to send key messages to Members for transmittal back to capitals, for example, if a problem that has the potential to derail the entire negotiation appears intractable without additional flexibility. Green Room consultations rarely produce an immediate solution but can stimulate a process of more intensive bilateral negotiations at senior political levels to try to create a breakthrough.

- **Consultations open to all Members in "Room W," one of the WTO's largest conference rooms**. Director-General Azevêdo used these consultations to great effect when crafting the Bali Package, including Trade Facilitation, in 2014. They provide for full transparency and ensure that all Members have the opportunity to be heard and informed so that they cannot complain of having been excluded from the process. The consultations typically are not used until the negotiations have acquired momentum through one or several of the smaller consultation processes, but when that is the case, Room W consultations can help to lock-in progress and expose Members who are in a small minority to pressure from the rest of the membership to change their positions. Late in the process, these consultations are used to draft texts of agreements.

- **Trade Negotiations Committee (TNC).** Azevêdo chairs the TNC, which oversees all elements of the Doha negotiations. The TNC has been used mainly for Members to read prepared speeches, which rarely advances negotiations. However, as the negotiations progress, the TNC will help to manage the structure and outcome of the negotiations; for example, if, as seems to be the case, the negotiations initially emphasize market access, then the TNC will need to decide how and when the other negotiating issues will be addressed to ensure that the overall result can be accepted by all Members. Members with predominantly defensive interests in market access will need to understand how their offensive interests, for example in the Rules negotiations, will be addressed in order for those Members to accept the final package. The TNC provides the Members with that clarification and ensures that the whole package of results fits together and attracts consensus.

Managing this array of consultation processes effectively is difficult, but Director-General Azevêdo has the experience to accomplish this task. He will attempt to target the opportune moments to seek compromise among a small group (or even just two delegations) or to mobilize a larger group to exert peer pressure. He will aim to tackle problems that appear ripe for a breakthrough, and he will leave other problems aside temporarily until they become more easily solvable. He will require awareness of changes in political thinking in capitals and must be able to capitalize rapidly on those changes. He will need to judge when to lean harder on delegations, including the largest delegations, to change their positions. And, if all else fails, he will need to judge when to put forward his own compromise proposal to try to salvage a result. An "Azevêdo Draft" of the conclusion of the Doha Round is a high risk strategy for Director-General Azevêdo and for the WTO, but at present nothing can be ruled out.

Environmental Goods Agreement Participants Begin Review of Initial Product List

The nineteen participants in the negotiations on a new Environmental Goods Agreement (EGA) are now reviewing the 650 products that have been proposed for tariff elimination. The participants conducted a line-by-line review of the initial product list at their most recent meeting from May 4 to 8, reportedly in a constructive spirit of seeking to include as many of those products as possible. The participants will work towards agreement on a consensus list at further meetings in June and July.

The United States is pressing for as many products to be included as possible, but some other participants, particularly in Europe, are under pressure from environmental groups to apply strict environmental credentials before allowing products to be included. As a result, it is expected that the coverage will be narrowed down somewhat over the next several months.

There are still only a relatively small number of participants in the EGA negotiations, despite the recent additions of Israel, Turkey and Iceland. Out of the G-20 group of major global economies, non-participants in the EGA include Argentina, Brazil, India, Indonesia, Mexico, Saudi Arabia, and South Africa, and there is no sign for the time being of any interest by most of these countries in joining the negotiations. This suggests that it may be difficult for the EGA members to attain the "critical mass" that they have said they need if they are to extend the EGA results to all WTO Members on the Most Favoured Nation basis once the deal is concluded (i.e., to "multilateralize" the result). In that case, the EGA might end up as a plurilateral agreement only.

The objective is still to complete the EGA in time for the UN Climate Change Conference in Paris in December and the next WTO Ministerial Conference in Nairobi, Kenya, also in December. Some participants continue to press for the EGA to tackle non-tariff barriers and to include environmental services, but this is now unlikely to occur before the December deadline. Nonetheless, the agreement could be expanded later in those directions.

TiSA Negotiations Continue to Make Steady Progress

Plurilateral negotiations towards an international Trade in Services Agreement (TiSA) are continuing to make steady progress. The TiSA initiative was launched in direct reaction to the failure of the Doha Round to liberalize services trade, and now includes 27 participants (with the EU counted as one). Uruguay was recently accepted as a participant, and Mauritius is about to become the first African country to join. The agreed intention is that each participant should offer to all other parties, at a minimum, the best commitments that it has made in preferential free

trade agreements. It also is the stated intention that the eventual agreement should be capable of multilateralization and open for accession by all WTO Members. With these intentions in mind, the architecture and principles of TiSA are closely modelled on those of the General Agreement on Trade in Services (GATS).

The general view of TiSA participants is that the negotiations are progressing steadily and on the whole satisfactorily, but need to be accelerated to obviate the risk of "drift." It is hoped that real progress, including the submission of final offers of commitments, will be made by the time of the Nairobi Ministerial in December, to create the possibility of completion in 2016 (notwithstanding the US presidential election). Initial offers in the form of schedules of commitments have been tabled by all participants except for Pakistan, Paraguay, and Uruguay. Meaningful negotiations on market access, which have not yet begun, will seek to improve on these initial offers.

Most of the work so far has been on drafting various regulatory "disciplines" – some on specific sectors such as financial services, others on horizontal issues such as Mode 4 (movement of persons). There currently are 17 such texts at different levels of completion. Due to a sense among participants that earlier sessions were insufficiently focused, the most recent session, in mid-April, focused on financial services, telecommunications, maritime transport, domestic regulation, and the movement of persons. Good progress was reported on financial services, where one aim is to agree to a common discipline based on, but going beyond, the GATS Understanding on Commitments in Financial Services.

The eventual aim of multilateralizing TiSA is closely linked to the issue of enlarging participation in the negotiations. There is clearly a tension, if not a contradiction, between seeking the agreement's quick conclusion and multilateralizing it at the WTO.

It is well known that China has indicated a wish to participate, but that the United States, with support from Canada and Japan, has so far resisted this, fearing that China will not be able to match the required level of ambition and might slow the process. Other TiSA participants that have supported Chinese entry and still do so in principle, such as the European Union, also have become concerned about the danger of China, and other important developing countries which may follow its lead in joining TiSA, delaying the process. It is generally felt that although wider participation is desirable, new participants must be ready to accept the existing level of ambition and the results achieved so far.

On the other hand, multilateralizing TiSA (i.e., converting it into a WTO agreement) must entail the political decision to extend its benefits to all WTO Members on the Most Favoured Nation basis. To do this would be politically difficult if important trading countries remained outside as "free riders". It is therefore widely accepted that there must be a "critical mass" of TiSA participants, including large developing countries such as China, before the agreement could be multilateralized.

Legally, multilateralization of TiSA should present no major difficulty. The integration into the GATS of TiSA commitments on market access and on rules would require no consensus decision because it would involve no amendment of the GATS. To multilateralize TiSA commitments, including those on rules, would require only that they be added to national schedules of GATS commitments under Articles XVI, XVII, and XVIII. Tariff and services schedules can be improved unilaterally at any time. This is the way that commitments on financial services and telecommunications were incorporated into the GATS following the negotiations in 1997. They came into force when the participants, satisfied that a "critical mass" of participation had been achieved, decided to ratify them. (By contrast, the Trade Facilitation Agreement, whose entry into force was unilaterally blocked by India in 2014, was adopted as an amendment to the GATT, and therefore required ratification by two-thirds of the membership.)

ITA Participants Fail to Make Breakthrough on Product Coverage

Recent meetings of participants in the negotiations to expand the product coverage of the Information Technology Agreement (ITA) have failed to make a breakthrough. The negotiations have been blocked since the end of last year because of China's reluctance to accede to demands from South Korea and Taiwan to include flat screen monitors in the list of products for which tariffs would be eliminated. This impasse has persisted despite the fact that the United

States and China reached a bilateral deal on product coverage in November 2014 which, it was hoped, could be followed quickly by agreement among all participants to conclude the negotiations.

Recent negotiations have taken place among a very limited number of participants (namely the United States, the European Union, Japan, China, South Korea, and Taiwan) to try to overcome the difficulty of including flat screen monitors in the product list for tariff elimination – either (i) by persuading China to accept their inclusion or (ii) by persuading South Korea and Taiwan to accept their exclusion and their replacement by other consumer electronic products of particular export interest to those countries.

An expanded ITA aims to eliminate tariffs on more than 200 additional high-technology products, including certain medical equipment, GPS devices, video game consoles, computer software, and next-generation semiconductors. According to the Office of the US Trade Representative (USTR), examples of the levels of tariffs in participating countries that would be eliminated under the ITA are:

- Next generation semiconductors: tariffs of up to 25%
- Magnetic resonance imaging (MRI) machines: tariffs of up to 8%
- Computed tomography (CT) scanners: tariffs of up to 8%
- Global positioning system (GPS) devices: tariffs of up to 8%
- Printed matter/cards to download software and games: tariffs of up to 10%
- Printer ink cartridges: tariffs of up to 25%
- Static converters and inductors: tariffs of up to 10%
- Loudspeakers: tariffs of up to 30%
- Software media, such as solid state drives: tariffs of up to 30%
- Video game consoles: tariffs of up to 30%

At a meeting of participants in New York on May 13, China renewed its opposition to including monitor screens in a final deal. China said that other participants are making “unrealistic requests” by (i) singling out individual products that are of particular sensitivity to China’s own efforts to support its domestic industry; and (ii) refusing to accept China’s offer to substitute other products in place of liquid crystal display screens on the ITA list. The United States said that its industries were becoming impatient with the lack of progress. The ITA negotiations were raised again on the side-lines of the recent APEC summit, but progress did not occur. The next opportunity to address the ITA will be the OECD Ministerial meeting on June 4, but it is expected that this meeting will focus solely on the Doha negotiations; as such, expectations of progress on ITA are low.

The United States has reached out to WTO Director-General (DG) Roberto Azevêdo to address the ITA negotiations in the context of his broader consultations in Geneva on the Doha market access issues. DG Azevêdo has accepted this challenge and has consulted with the key participants since January, but some WTO Members feel that inclusion of the ITA negotiations could complicate the Doha negotiations. India, for example, vocally opposes expansion of tariff elimination on information technology and electronics products because the country seeks to develop these industries domestically. Although it is not a participant in the ITA negotiations, India will gain leverage to oppose such a deal if ITA products are highlighted for attention in the Doha negotiations on Non-Agricultural Market Access (NAMA).

In sum, it is very hard to see what options are now available to salvage a meaningful result from the Doha Round. The OECD Ministerial meeting might provide guidance on the way forward, although without the full involvement of the United States, the provision of such guidance appears less likely.

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