US & Multilateral Trade and Policy Developments

Japan External Trade Organization

October 2015

Contents

US General Trade Policy Highlights

United States and Mexico Sign Memorandum of Understanding Formalizing Cargo Pre-Inspection Program

On October 15, 2015, the United States and Mexico signed a Memorandum of Understanding (MoU) formalizing the US-Mexico Cargo Pre-Inspection Program,[1] which is designed to facilitate bilateral trade by streamlining cargo inspection procedures. Under the program, customs officials from both countries will inspect outbound cargo before it departs the exporting country, eliminating the need for redundant inspections upon arrival in the importing country in most circumstances. Customs officials from both countries expect the program to facilitate trade by reducing customs clearance and border crossing wait times and other transaction costs.

Officials from US Customs and Border Protection (CBP) and Mexico's Tax Administration Service (SAT) will now begin to implement the program on a trial basis at three pilot locations in the United States and Mexico. The pilots will be limited to specific types of cargo, as follows: (i) officials at the Laredo, Texas International Airport will pre-inspect air cargo from the automotive, electronics, and aerospace industries destined for eight Mexican airports; (ii) officials at the Mesa de Otay (Tijuana) customs facility in Mexico will pre-inspect US-bound shipments of agricultural products; and (iii) officials at Mexican customs facilities in San Jerónimo, Chihuahua will pre-inspect US-bound shipments of computers and other electronics.

Each of the three pilot programs will last for six months, after which customs officials from both countries will assess whether the program should be extended, made permanent, or expanded to include other industries and locations. Participation in the pilot programs is voluntary, and eligible companies may submit an application to participate in through Mexico's Tax Administration Service or US Customs Border Protection, as applicable.

US International Trade Commission Highlights Changes to India's Trade and Investment Policies under Prime Minister Narendra Modi

On October 22, 2015, the US International Trade Commission (ITC) released the findings of ITC Investigation No. 332-550, which reviewed changes made to India's trade and investment policies by the government of Prime Minister Narendra Modi since he took office in May 2014.[2] The ITC found that the Modi government has made significant changes to certain barriers to US trade and investment, with mixed implications for the bilateral trading relationship. According to the ITC, several of the Modi government's policy changes constitute liberalization of bilateral trade and investment, and are viewed favorably by US industry representatives. However, the ITC also found that the Modi government has expanded the scope of certain trade barriers, such as local content requirements, and has not yet enacted laws to address alleged intellectual property-rights (IPR)-related barriers that are of particular concern to US companies.

The ITC investigation, titled *Trade and Investment Policies in India, 2014–2015*, supplements an earlier ITC investigation concluded in December 2014, titled *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy* (Investigation No. 332-543). Both investigations were requested by the US Senate Committee on Finance and the US House of Representatives Committee on Ways and Means. The first investigation was requested in August 2013, prior to the election of PM Modi, and focused on India's policies from 2003 to mid-2014. Following the election of PM Modi, the committees requested the second investigation to cover any significant policy changes made by the new Modi government.

The new investigation found that the Modi government has proposed or enacted significant policy changes in the following four areas: (i) foreign direct investment; (ii) tariffs and customs procedures; (iii) local content and localization requirements; and (iv) standards and technical regulations. The main findings of the investigation are as follows:

[1] Click **here** for an announcement on the program from US Customs and Border Protection.

[2] Click **here** for a copy of the ITC's report on the investigation.

- **Foreign Direct Investment.** The Modi government (i) raised FDI equity limits in the insurance, defense, and civil aerospace industries; (ii) removed requirements for prior government approval of FDI in medical devices; (iii) permitted FDI in certain segments of the railways industry, in which FDI had previously been wholly prohibited; (iv) removed requirements for pre-investment authorization in several cases; (v) eliminated the need for prior government approval of FDI in certain mergers and acquisitions involving new operations and facilities; and (vi) raised the threshold for certain investment projects requiring cabinet approval from Rs 20 billion (USD 307.4 million) to Rs 30 billion (USD 461.1 million). However, the ITC report also states that India's remaining investment restrictions, notably those pertaining to multibrand retail and electronic commerce, continue to limit US investment opportunities in India.

- **Tariffs and Customs Procedures.** The Modi government reduced tariffs on information and communications technology (ICT)-related products, clean energy goods, textiles, footwear, and medical devices. The government also began deploying additional workers to provide 24/7 customs clearance at major ports, and established a "single window" to handle regulatory matters for agricultural imports. However, the ITC report notes that tariffs were increased on several telecommunications products, including cellphones, tablet computers, and digital video cameras.

- **Local Content and Localization Requirements.** The Modi government postponed implementation of a new rule requiring that imported telecommunications equipment undergo testing in Indian laboratories. However, the Modi government expanded the scope of several localization and local content policies. These changes included (i) the addition of several ICT products to the Preferential Market Access (PMA) list, thereby subjecting them to local content requirements; and (ii) the addition of several electronics products to the Compulsory Registration Order (CRO) list, thereby requiring that they undergo consumer safety testing within India. The Modi government also proposed new localization requirements in its 2015 National Telecom Roadmap, including (i) mandatory data localization (*i.e.*, requirements that certain data be located on servers in India); (ii) restrictions on the use of foreign SIM cards; and (iii) the addition of several Internet-connected devices to the PMA list. In the area of government procurement, the ITC also notes that the Modi government is considering expanding the scope of its offset program, which requires foreign defense contractors to offset 30 percent of the value of their contracts with the Indian government with purchases of Indian goods, by applying the same requirement to certain non-defense contracts.

- **Standards and Technical Regulations.** The Modi government's 2015-20 Foreign Trade Policy statement included a plan to promote greater harmonization of Indian standards with international standards. According to the ITC, the Modi government also "set out a roadmap to achieve this goal through proposed legislative and institutional reforms and a proposal to make conformity assessment for low-risk imports less burdensome." However, the ITC also notes that the Modi government has implemented certain standards-related policies pertaining to food, agricultural products, and cosmetics that allegedly increase costs, delay time to market, and exclude certain US products, according to US companies.

- **Intellectual Property Rights.** The Modi government enacted no new IPR laws to address alleged barriers to the protection of trade secrets, regulatory test data, patents, trademarks, and copyrights. The ITC report states that the Modi government has shown an increased willingness to engage on IPR issues with US government and industry representatives, but notes that these stakeholders remain concerned about India's lack of concrete action on IPR issues.

Following the ITC's release of its report on the investigation, Senate Finance Committee Chairman Orrin Hatch (R-UT), Ranking Member Ron Wyden (D-OR), House Ways and Means Committee Chairman Paul Ryan (R-WI), and Ranking Member Sander Levin (D-MI) issued a joint statement welcoming PM Modi's stated commitment to implementing economic reforms in India. However, the lawmakers noted that "while there have been some positive developments since the Modi Administration began, significant concerns remain, and it is not yet clear whether policies that negatively affect foreign trade and investment are in fact headed towards much-needed reform." Several of the issues raised in the ITC's report are likely to be addressed during the October 29 ministerial-level meeting of

the US-India Trade Policy forum, to be co-chaired by US Trade Representative Michael Froman and Indian Minister of Commerce Nirmala Sitharaman.

Free Trade Agreement Highlights

TPP Ministers Reach Agreement in Atlanta; Release of Final Text Expected in Approximately 30 Days

On October 4, 2015, trade ministers for the Trans-Pacific Partnership (TPP) countries announced the successful conclusion of the TPP negotiations after a five-day ministerial meeting in Atlanta.[3] To formalize the outcomes of the agreement, negotiators are now continuing technical work, including drafting, legal review and translation, in order to prepare a final text for public release. According to various US government sources, the final text will be published within approximately 30 days. Canadian Trade Minister Ed Fast stated on October 8 that Canada has proposed releasing a "provisional text" in the coming days while negotiators continue to work on the official, final text, but he acknowledged that the other Parties have not yet agreed to this proposal.

The key issues that remained outstanding after the previous ministerial held in Maui in July reportedly were resolved as follows:

- **Market Access for Dairy Products.** At the Maui ministerial, New Zealand, and to a lesser extent, the United States, expressed dissatisfaction with the level of market access being offered by Canada in its "supply managed" dairy and poultry sectors. Subsequently, Canada agreed in Atlanta to grant a limited amount of additional market access in these sectors. According to the Canadian government, the market access it has granted under the TPP is equivalent to roughly 3.25 percent of Canada's annual dairy production, 2.3 percent of annual egg production, and 2.1 percent of annual chicken production.

- **Market Access for Sugar.** In Maui, Australia expressed dissatisfaction with the US offer to increase Australia's tariff-rate quota (TRQ) allotment for sugar by 65,000 tons (a 74 percent increase). However, Australia accepted this offer in Atlanta when the United States added to it a guarantee that Australia would receive a 23 percent share of future additional WTO quota allocations for sugar. The Australian sugar industry expressed disappointment with the outcome, but nonetheless described the agreement as a "net positive" for its exporters.

- **Rules of Origin for Automobiles and Auto Parts.** The parties have reportedly agreed on a 45 percent regional value content (RVC) threshold for finished automobiles, to be calculated using the net cost method. The agreement will also allow use of the "build down" method favored by many Japanese automakers, but would require 55 percent RVC if this method is used. The auto parts and components rules of origin will create three separate RVC thresholds of 45, 40, and 35 percent. It is expected that more complex components such as gear boxes and transmissions will be among those subject to the higher 45 percent requirement. The Mexican and Canadian auto parts industries, which had strongly criticized an earlier side agreement by the United States and Japan on the automobile and auto parts rules of origin, both expressed satisfaction with this outcome.

- **Data Exclusivity for Biologic Drugs.** The Parties agreed on a five-year data exclusivity period for biologic drugs (*i.e.*, the period of time during which generic versions of a drug cannot be approved using the data generated by the company that originally created the drug). This issue was controversial for all Parties - including developing countries concerned about the availability and affordability of generics - but particularly for Australia and the United States. Australia faced intense political pressure not to offer more than its current five years of data protection, due in part to concerns that additional protection would result in higher costs for the country's national healthcare system. The United States, however, faced intense pressure from Congress and the US pharmaceutical industry to secure 12 years of data protection, reflecting current US law. Thus, the five-

[3] Click **here** for a summary of the TPP agreement by the United States Trade Representative; **here** for a summary by the government of New Zealand, **here** for a summary by the government of Canada; and **here** for a summary by the Government of Australia.

year outcome is controversial for the United States. Indeed, just three days after ministers concluded the negotiations, President Obama held a meeting with US pharmaceutical executives to defend the five-year compromise on biologics, and urged them to support the final agreement.

- **Other Issues.** The ministers agreed to exclude tobacco control regulations from the scope of Investor-State Dispute Settlement (ISDS), thereby allowing any Party to deny the benefits ISDS with respect to a claim challenging a "tobacco control measure." Although it was proposed by the United States, several members of Congress are opposed to this exception and have threatened to oppose the TPP due to its inclusion. In addition, negotiators are reportedly continuing discussions towards a non-binding "side agreement" on currency manipulation. The potential side agreement, however, is not expected to satisfy US lawmakers who have demanded that the TPP include enforceable currency disciplines.

President Obama is expected to notify the US Congress in the coming days of his intention to sign the TPP. Subsequently, President Obama must wait at least 90 days, and publish the full text of the agreement online for at least 60 days, before he can sign the agreement, pursuant to the Trade Promotion Authority (TPA) law enacted in June 2015. Under these timelines, President Obama could sign the TPP in January 2016 at the earliest. However, it remains uncertain how soon after signing he will submit TPP-implementing legislation to Congress.

If implementing legislation is submitted in early 2016, a vote on the legislation could still technically occur before the 2016 Presidential elections in November. However, there is a strong chance that the vote will be delayed until at least the "lame duck" session of Congress in late 2016, particularly in light of the fact that key Republican leaders, such as Senate Finance Committee Chairman Orrin Hatch (R-UT), have already expressed reservations about certain aspects of the final agreement.

A vote during the 2016 lame duck session could be controversial, however, particularly if a TPP opponent or Republican were to win the presidency. Thus, there is an increasing possibility that the US Congress will not vote on the TPP until 2017, under a new President, or later, if the new President seeks to renegotiate certain terms of the agreement. US ratification is essential because the TPP cannot enter into force until six Parties, which collectively must account for at least 85 percent of the combined GDP of TPP countries, have ratified the agreement. Based on 2014 GDP figures, both the United States and Japan would have to ratify the agreement in order to meet the 85 percent threshold.

Preview of TPP Disciplines on State-Owned Enterprises

Government summaries of the recently-concluded Trans-Pacific Partnership (TPP) provide a first glimpse at the types of disciplines that the agreement will impose on state-owned enterprises (SOEs), as well as the exceptions to these new rules.[4] The summaries indicate that some of the SOE provisions expand on World Trade Organization (WTO) anti-subsidy disciplines and place limitations on foreign sovereign immunities in domestic courts. Other provisions, however, appear to recite current WTO rules. In addition to their impact on the TPP Parties, the new disciplines could have broader implications because they will likely be applied in other international trade contexts (for example, in other US free trade agreements or at the WTO).

The TPP legal texts are expected to be published within the next several weeks. In the meantime, the factsheets provided by the governments of New Zealand, the United States, Canada and Singapore provide an overview of what to expect from the SOE chapter:

- **Scope.** The agreement applies to:

  - **SOEs**, which are large companies principally engaged in commercial activities that are more than 50 percent owned or controlled by the government. The agreement does not apply to state entities primarily engaged in public services (*e.g.*, health care or postal services), even if those entities engage in some commercial

[4] Click **here** for the factsheet provided by New Zealand, **here** for the United States, **here** for Canada, and **here** for Singapore.

activities or charge for some of their services. Smaller SOEs – *i.e.*, those with an annual revenue of under SDR 200 million (currently about USD 267 million), to be adjusted every three years – also are exempt. "Control" of an SOE is not defined in the factsheets.

- **Monopolies**, which are state-owned or private entities that are designated as the sole provider or purchaser of a good or service in a market. These disciplines would only cover private entities designated after TPP enters into force.

- **Obligations.** The agreement sets forth the following disciplines, many of which appear to follow current WTO rules:

  - **Commercial considerations.** The agreement requires that SOEs, when engaging in commercial activities, act in accordance with "commercial considerations" including factors such as price, quality and availability, except when making a public service available pursuant to a government mandate and in a non-discriminatory manner. In this context, "commercial activities" excludes activities undertaken on a cost-recovery or not-for-profit basis. The agreement also requires that monopolies act in accordance with commercial considerations when buying or selling goods or services, except when fulfilling the terms of their monopoly designation. According to New Zealand, these obligations reflect the country's existing WTO obligations.

  - **Non-discriminatory treatment.** When engaging in a commercial activity and thereby purchasing a good or service or selling a good or service, SOEs may not discriminate against the goods or services supplied by an enterprise from a TPP party in favor of those provided by a domestic enterprise or an enterprise from a non-TPP party. Similar obligations apply to monopolies. According to New Zealand, this obligation reflects current WTO rules.

  - **Anti-competitive practices by monopolies.** Monopolies may not use their monopoly position to engage in anti-competitive practices (*i.e.*, practices which restrict or distort competition) in markets where the monopoly has not been granted monopoly rights, and which negatively affect trade and investment. According to New Zealand, this obligation is consistent with an existing WTO obligation on monopoly service suppliers.

  - **"Non-commercial" government assistance.** The agreement prevents TPP parties from causing "adverse effects" or injury to the interests of another TPP Party through the provision of "non-commercial assistance" (*e.g.*, loan guarantees, non-market financing by the government or through another entity, or selective regulation) to an SOE. Services supplied by an SOE in its own territory are exempt from these rules, which appear to discipline a wider range of policies than those covered by WTO anti-subsidy rules (although the United States calls them "subsidies"). The United States also adds that these disciplines will "for the first time in a U.S. trade agreement" permit the United States (or any other TPP party) to "initiate dispute settlement and impose trade sanctions."

  - **Impartial regulation.** According to Singapore and the United States, the agreement requires parties to ensure that administrative bodies regulating both SOEs and private companies do so in an impartial manner. This requirement may be related to the disciplines on "non-commercial" government assistance.

  - **Transparency.** SOEs and monopolies are subject to new transparency requirements, with protections for confidential or commercially-sensitive information. For example, each party will share a list of its SOEs with the other TPP parties and will provide, upon request, additional information about the extent of government ownership or "control" of the SOEs, as well as, the "non-commercial assistance" that the government provides to its SOEs.

  - **Jurisdiction and sovereign immunity.** According to Singapore, the TPP Parties have agreed "to provide their courts with jurisdiction over the commercial activities of foreign SOEs in their territory." The United States adds that the TPP's SOE chapter will "[e]nsure that national courts have full jurisdiction over foreign

SOEs located within their territory, so that they cannot avoid national laws through claims of sovereign immunity."

- **Dispute settlement.** According to the United States, all SOE provisions are "fully enforceable" through state-to-state dispute settlement.

- **Flexibilities.** The agreement contains several exceptions and exemptions, some of which apply to all TPP parties and others which are party-specific:

  - **Agreement-wide.** The SOE chapter establishes that the agreement's general exceptions for, *e.g.*, national security and public health or safety, will apply to the SOE disciplines.

  - **Chapter-wide.** The chapter exempts (i) services supplied by an SOE or monopoly in the exercise of "governmental authority" (*i.e.*, "services supplied neither on a commercial basis nor in competition with another supplier"); (ii) government procurement; (iii) temporary government measures taken in response to global or national economic emergency; (iv) sovereign wealth funds, independent pension funds, export credit agencies and entities related to failed or failing financial institutions; and (v) entities at the sub-central level of government (though TPP parties have agreed to negotiate further on this issue).

  - **Country-specific.** The summaries do not list all of the country-specific exceptions, but several of the parties have announced specific exemptions applicable to their SOEs (*e.g.*, (i) Canadian Broadcasting Corporation (CBC), Telefilm Canada and future Canadian SOEs involved in cultural industries; and (ii) government non-commercial assistance to SOEs providing transport services to and from New Zealand or providing services related to communications infrastructure).

TTIP Negotiators Exchange Revised Tariff Offers During 11th Negotiating Round in Miami

From October 19-23, 2015, negotiators from the United States and the European Union held their 11th round of negotiations towards the Transatlantic Trade and Investment Partnership (TTIP).[5] During the round, the parties exchanged their second market access offers for goods and agreed to exchange initial market access offers for government procurement by February 2016. Negotiators also discussed regulatory cooperation in specific sectors and tabled initial proposals on labor, environmental protection, rules of origin, and trade facilitation. Although both parties expressed satisfaction with the progress made during the round, US and EU business groups and certain EU Member States have expressed increasing frustration in recent weeks with the overall slow pace of the TTIP negotiations. We summarize these developments below.

- **Tariffs.** EU Chief Negotiator Ignacio Garcia Bercero confirmed that both the US and EU tariff offers exchanged during the 11th round cover 97 percent of tariff lines, which are being proposed for full tariff elimination. The US offer reportedly does not cover sensitive products such as automobiles, textiles, and certain agricultural products, while the EU offer excludes certain industrial products and agricultural products such as dairy, beef, pork, and chicken. Although overall US and EU tariff levels are already low by global standards, both parties retain some double-digit tariffs on these sensitive products. Bercero indicated that substantive negotiations on the sensitive products are unlikely to occur until the TTIP negotiations are in their "end game," as is commonplace in trade negotiations. Regarding staging, both parties reiterated after the round that they are seeking to eliminate tariffs on the vast majority of goods immediately upon TTIP's entry into force.

- **Government procurement.** Negotiators discussed the "benchmark" level of ambition for potential market access offers on government procurement, and agreed to exchange their initial offers by February of 2016. To date, negotiators have not exchanged offers in this area due to disagreements concerning the overall level of ambition, including coverage of sensitive areas such as US sub-federal procurement. The EU is seeking access to the procurement markets of the 13 US states that are not currently covered by the WTO's

[5] Click **here** for a statement on the 11th round by EU Chief Negotiator Ignacio Garcia Bercero.

Government Procurement Agreement (GPA) and other sub-federal entities such as counties and cities, with a particular focus on the transportation and environmental services sectors. Although the EU continued to push for coverage of sub-federal entities during the 11th round, negotiators reportedly agreed that the initial offers to be exchanged in February will cover only federal procurement. This temporary scaling back of ambition will leave the sensitive matter of sub-federal procurement to be handled in a later stage of the negotiations.

- **Regulatory cooperation.** Negotiators continued to discuss potential regulatory cooperation in nine sectors: chemicals, cosmetics, engineering, information and communications technology, medical devices, motor vehicles, pesticides, pharmaceuticals, and textiles. These negotiations are in their early stages. In most sectors, negotiators are still attempting reach agreement on the potential scope of cooperation (*i.e.*, what specific regulatory standards or processes should be harmonized) before proceeding to discussions on how harmonization will be achieved. Bercero stated that negotiations in this area during the 11th round were "particularly constructive and intensive," but he did not disclose any specific outcomes.

The EU appears to have scaled back its ambitions on the sensitive issue of regulatory cooperation in the financial services sector. The EU wishes to establish a bilateral mechanism for regulatory cooperation on financial services, and has insisted at previous rounds that this mechanism be "anchored" within the TTIP. However, the US has resisted this approach, citing a reluctance to alter US financial regulations implemented in the wake of the 2008 financial crisis and insisting that regulatory cooperation in this sector be discussed in multilateral fora (*i.e.*, outside of TTIP). After the 11th round, Bercero conceded that the EU is willing to hold separate discussions on financial services regulation and will wait until a later stage "to determine the relationship between this exercise and TTIP." However, Bercero also indicated that the EU will continue to withhold its market access offer for financial services until the United States shows more flexibility on regulatory cooperation.

- **Other proposals.** The European Union tabled its initial proposed text for the labor and environment chapters during the round, while the United States tabled its first proposed texts on trade facilitation, customs procedures, and the institutional framework of the agreement. The parties also exchanged their initial proposals for product-specific rules of origin for industrial products. Negotiators have not yet reacted publicly to these proposals.

In a press conference held on October 23, Bercero and US Chief Negotiator Daniel Mullaney expressed satisfaction with the progress made during the 11th round and reiterated their goal of concluding the TTIP negotiations during President Obama's term. However, given the multitude of sensitive, unresolved issues in the negotiations, such an outcome appears highly unlikely. In addition to the unresolved issues noted above, negotiators have made little progress in the following sensitive areas: (i) protection of geographical indications (GIs) for food products (a US defensive interest); (ii) US market access restrictions on maritime and air transportation services (a US defensive interest); (iii) EU sanitary and phytosanitary restrictions (an EU defensive interest); (iv) the scope and structure of the investor-state dispute settlement (ISDS) mechanism (an EU defensive interest); and (v) US export restrictions on energy products (an EU offensive interest).

The Business Coalition for Transatlantic Trade, which is comprised of US and EU companies who support the TTIP negotiations, expressed frustration with the lack of progress in these sensitive areas in a recent letter to US Trade Representative Michael Froman and EU Trade Commissioner Cecilia Malmstrom, stating that "[t]wo years on, repeated expressions of political support for an ambitious outcome are not translating into progress at the negotiating table...[t]oo many red lines are being drawn[.]" Similarly, recently-leaked European Commission documents indicate that EU Member States are frustrated with the lack of progress in key areas of the negotiations. However, a significant acceleration of the TTIP negotiations appears unlikely in the short term, given that (i) 2016 will be an election year in the United States; and (ii) the Trans-Pacific Partnership will continue to be a major focus of US trade policy in the coming year as the US Congress debates its potential ratification.

Multilateral Policy Highlights

Update on the Expanded Information Technology Agreement

New information on the enhanced Information Technology Agreement (ITA II) casts doubt on whether the deal will be completed this year. The 54 ITA II participants have already agreed on the 201 products that the new agreement will cover. The current negotiations concern the "staging", or phase-in periods, to which each participant will agree in order to bring its tariffs on these products down to zero, beginning from the proposed date of entry-into-force of ITA II in July 2016.

Current negotiations on "staging" for ITA II are based on the blueprint of the original ITA, which provided for tariffs to be eliminated immediately upon entry into force of the ITA or over three- or five-year periods in a limited number of cases for products that participants individually wanted to phase-out more gradually. In exceptional circumstances, the original ITA provided a seven-year phase-out period for particularly sensitive products. In the ITA II, staging commitment proposals vary:

- The United States is pressing hard for the elimination of tariffs under ITA II as quickly as possible, and it has offered immediate elimination of its own tariffs on the large majority of products and a three-year phase-out period for the rest.
- By contrast, China proposed last week to use five- or seven-year phase-out periods for almost half of the products on the ITA II list (90 out of 201), which the United States and the EU view as being far too long. US industry representatives have criticized the Chinese proposal, saying that the innovation life-cycle of many of the products on the list, particularly consumer electronics, is less than seven or even five years, so that delaying tariff elimination for that long would undermine the commercial benefits of the Agreement.
- The United States and EU also have criticized some of the other Asian developing countries participating in these negotiations for proposing phase-out periods to eliminate their tariffs that are longer than they had indicated were necessary earlier in the negotiations. In some cases, the proposed periods are even longer than the upper limit of seven years.

Further negotiations are therefore needed on staging, and they will take place during the week of November 9. Originally, it had been hoped that by then, ITA II participants would have agreed on their individual schedules and ITA II could be sent forward as a significant deliverable to the WTO Ministerial Conference in Nairobi on December 15-18. That objective now seems in doubt.

Update on WTO Negotiations for the Nairobi Ministerial Conference

On October 5, 2015, senior trade officials from the United States, the European Union, Japan, Australia, Brazil, China, and India met in Istanbul on the margins of the G-20 Trade Ministers meeting and made some progress towards converging on the objective of a small, "Doha-minus" package of results for the WTO Ministerial Conference (MC10) in Nairobi on December 15-18. The officials representing these seven countries did not, however, agree on what should happen to the rest of the Doha Round after Nairobi.

G-20 members subsequently were briefed on the October 5 meeting by WTO Director-General Roberto Azevedo, who asked the broader group of G-20 Trade Ministers to consider: (i) what should be included in the small Nairobi package; and (ii) how WTO Members should define their negotiations after the Nairobi Conference. DG Azevedo asked G-20 Members to clarify their positions on these two questions before the end of October.

The small group of seven WTO Members who met on October 5 have accepted that the only realistic aim now for the Nairobi Conference is a small package of results. They have agreed that it should contain results in favor of the WTO's 34 Least-Developed Countries (LDCs) on: (i) preferential rules of origin; (ii) duty-free, quota-free market access; (iii) a reduction in trade-distorting domestic support and export subsidies for trade in cotton; (iv) preferential access through a Services waiver; and (v) a TRIPs agreement on public health to provide LDCs with better access to

patent-protected medicines. The seven Members have agreed also that the package could contain new disciplines on agricultural export subsidies. They are converging on providing a special agricultural safeguard mechanism for developing countries and on improving transparency in various WTO Agreements.

However, aside from a package of results for the LDCs, the level of agreement in each of these areas is fragile and for the time being many of the details are lacking. For example:

- The EU is pressing for an agreement on agricultural export subsidies to be comprehensive, but the United States is resisting the inclusion of export credits (which it maintains through the "GSM-102" program) and food aid.
- The EU wants broad improvements in transparency, covering all areas of the Rules negotiations (anti-dumping procedures, regional trade agreements, horizontal subsidies and fisheries subsidies), as well as non-tariff barriers for industrial products and Services, while China and India are seeking a far narrower result on transparency, limited for example to anti-dumping procedures.
- India is seeking to have its food security exemption included in the package, whereas the United States is resisting that outcome.
- The United States repeated its position that it will consider withholding Special and Differential Treatment (S&D) from advanced developing countries in any package of results, which Brazil and India have flatly rejected.

Moreover, there is no agreement at all on what will happen to the rest of the Doha negotiations after Nairobi. The United States, the European Union, Japan, and Australia want to end the Doha Round in Nairobi; they accept that some WTO negotiations, such as market access, can continue after Nairobi, but only if they are no longer governed by the Doha mandate. Brazil, China and India insist that all unresolved issues from the Doha agenda must remain part of the post-Nairobi work programme. This disagreement is mirrored in the wider WTO membership, with most developing countries supporting the continuation of the Doha Round. This disagreement will have to be resolved in order to draft language for the Nairobi Declaration, but at present there is no basis on which to begin that task.

Update on WTO Rules Negotiations for the 10th Ministerial Conference in Nairobi

In preparation for the WTO's 10th Ministerial Conference in Nairobi this December, Members are consulting now in the WTO Negotiating Group on Rules to find common ground on improved transparency provisions for some or all of the areas covered by the negotiations: (i) anti-dumping; (ii) horizontal subsidies; (iii) fisheries subsidies; and (iv) regional trade agreements (RTAs). Transparency is viewed by some as a potential component of a small, "Doha-minus" package of results for Nairobi, along with agricultural export subsidies and greater flexibility for least-developed countries, but there is no sign of consensus yet on the details of specific new transparency provisions. Some Members, notably India, are opposing any result in this area unless they achieve agreement on their separate proposal on food security for developing countries.

At the meeting of the Rules Negotiating Group on October 23, four proposals were tabled and discussed. Japan put forward a watered-down version of an earlier proposal on improvements to the transparency and due process provisions of the Anti-Dumping Agreement that it had submitted on behalf of the Friends of Anti-Dumping Negotiations (FANs). Some influential FANs, such as Brazil, failed to support these proposals in the past thus weakening Japan's hand in negotiating them, and Japan put forward this latest proposal (W/265) in its own name only. Japan appears to be trying now to align itself more closely to the EU, in particular by raising the profile of its proposal that the anti-dumping procedures of the 20 Members with the most AD measures in force should be reviewed periodically (every five years or so) through a specialized document prepared by the Secretariat based on the pattern of Trade Policy Review (TPR) reports. Among other things, Japan wants also to strengthen the requirement on investigating authorities to make all non-confidential information available to all interested parties and,

on due process, to require that "all" domestic producers support the initiation of an anti-dumping case before it is launched whereas at present it is sufficient if "a major portion" of them do so.

The main reaction from developing countries seems to have been that Japan's proposal is too complicated at this late stage, just weeks before the Nairobi Conference, and that in any case (and this applied to all of the proposals tabled) new transparency obligations would place a heavy burden on developing countries and would produce negligible benefit for them. In that discussion, the United States rejected the idea of applying Special and Differential (S&D) Treatment to any improved transparency obligations, including anti-dumping provisions. China supported the idea in principle of improving the transparency of anti-dumping procedures, although it did not provide detailed comments on Japan's proposal.

The European Union proposed (W/263), with regard to horizontal subsidies, that Members, when notifying semi-annually their countervailing duty actions under Article 25.11 of the SCM Agreement, should supplement their notification with information about the subsidies of those Members that they are countervailing against – in effect, introducing a reverse notification process for subsidies and placing Members who were cited as having those subsidies in the awkward position of having to defend them in the SCM Committee. China spoke out in strong opposition to this proposal, unsurprisingly given that it has been heavily criticized by the United States and the European Union for failing to notify its subsidies. On fisheries subsidies, the European Union put forward some additional ideas on what might be notified, but in a particularly tentative way saying it was simply making a contribution to the discussion and that "it is up to the proponents of disciplines on fisheries subsidies to further develop possible approaches". This suggests that the European Union will not press forward its position in this area. On anti-dumping, the European Union repeated its earlier proposal of conducting "mini-TPRs" on each member's anti-dumping procedures, which as noted above was supported by Japan but which many developing countries opposed because of the administrative burden it would impose on them. On RTAs, the European Union proposed adoption on a permanent basis of the Transparency Mechanism, which provides the basis for a "mini-TPR" of each RTA and which is already being applied on a provisional basis. India opposed this on the grounds that the Transparency Mechanism should not apply to Enabling Clause RTAs among developing countries.

Peru submitted a draft decision on fisheries subsidies (W/264), proposing not only increased notification obligations but also the prohibition of certain fisheries subsidies. Some developing countries supported the proposal, but only on condition that there would be extensive S&D flexibilities built into it which, as noted above, the United States rejected.

Russia proposed detailed language with which to clarify the content and format of the non-confidential presentation of information by interested parties to investigating authorities in both anti-dumping and countervailing duty investigations (W/262). There was little substantive reaction to Russia's proposal, and it is likely that it has been produced too late to provide Russia with a real opportunity to try to garner support for it.

There will be further consultations in the Rules Group in the coming weeks in an attempt to narrow the scope of what might be presented as agreed language to Ministers in Nairobi. At present, it is difficult to see where consensus might be found on this issue.

Copies of the four proposals are attached for reference.

United States Criticizes China Over Lack of Subsidy Notifications

The United States has tabled a new WTO document (CHN53) highlighting 64 alleged Chinese subsidy programs that have not been notified to the WTO and that "appear to provide specific subsidies within the meaning of Article 1.1 and 2 of the [WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement)]". The United States has requested that China make a comprehensive notification of its subsidy programs promptly, and has reserved its right to raise the alleged subsidies for discussion at the SCM Committee. This move by the United States indicates a ratcheting up of its frustration over China's alleged lack of transparency over its subsidy programs and may presage a more aggressive stance against China under the SCM Agreement through dispute settlement in the coming year.

The strongly worded US submission complains about China's failure to make any subsidy notification since 2011, when it notified its subsidies for the period of 2005-2008. China has been criticized repeatedly in the Trade Policy Review Body (TPRB) for allegedly failing to provide comprehensive information on its subsidy programs, which the United States characterized at China's last TPR in 2014 as "widespread and massive" and its notifications as "seriously deficient".

According to the United States, the 64 central and sub-central government measures listed in the submission were designed to provide support for China's "strategic emerging industries", or SEIs, following China's 2010 *State Council Decision on Accelerating the Cultivation and Development of Strategic Emerging Industries*. The US submission alleges that "this support policy is perhaps China's primary industrial support policy for the 12th Five-Year planning period (2011-2015)". The industry-specific measures listed in the submission pertain to renewable energy, semiconductors, cloud computing, telecommunications, software, biotechnology, medical technology, electric vehicles, high-quality and specialized steel, and pharmaceuticals, among others. At this time last year, the United States made a similar submission (CHN51) citing 110 alleged subsidy programs in place in China, which were not related to the SEI policy.

The latest notification by China of its subsidy programs, made in 2011, covered the period 2005-2008 and listed 93 subsidy programs. China has not made any notification of the subsidy programs it has in place after 2008, and according to the latest United States submission China has "refused repeated requests to meet bilaterally to discuss the issue and the issue of subsidy notification more generally".

Copies of the US submissions are attached for reference.

US International Trade Commission Begins Examination of EGA Product List

The US International Trade Commission (ITC) has begun its examination of the products proposed for tariff elimination in the WTO Environmental Goods Agreement (EGA), and has received submissions from US business, labor and environmental groups containing their views on which products they support for coverage by the EGA. Most US business groups, such as the Chamber of Commerce and the National Association of Manufacturers, have reported to the ITC that they support all of the products proposed for coverage by the EGA. Their support is based on the trade-liberalizing effects of the EGA, which they believe will benefit the growth of GDP and employment in the United States. A few individual manufacturers have registered their opposition to specific products on the list, for example, polyethylene terephthalate (PET), electric fans, and synthetic textiles and yarns.

However, labor and environmental groups have been highly critical of the proposed inclusion of many of the products, including automobile parts and primary commodity products such as cement, glass, plastics, steel, and silicon metal. The United Steelworkers Union in its comments to the ITC opposed the inclusion of these products partially on protectionist grounds, stating that "these products, jobs, and industries are critical to America's economic well-being and must not be included [.]" In addition, the BlueGreen Alliance, one of the largest associations of US labor unions and environmental organizations, reported to the ITC its view that "… while some of the goods identified to date are arguably beneficial to the environment, the list has grown to increasingly include a host of goods for which the connection to environmental benefit is at best tangential and, at worst, actively detrimental to the environment." It opposes the inclusion of many of the products on the list on the grounds either that they have no evident environmental qualities or that foreign producers of those products have lower labor and environmental standards than the United States and liberalizing trade in them would, in their view, lead to a race to the bottom globally of those standards.

The ITC exercise will result in an advisory report to the United States Trade Representative (USTR) who will then have to take decisions on which of the products from the proposed list they support for coverage in the EGA when they meet again with their negotiating partners in November to try to finalize the list. We understand that the European Union is going through a similar consultative process with its own industry, labor and environmental organizations, and that so far the results of its consultations match closely those of the ITC; that is to say, support for broad coverage by its industry organizations, and reticence from labor and environmental groups. It seems likely that

the proposed list of products will have to be narrowed down from the 650 that have been proposed for EGA coverage, but there is no indication yet by how much.

Copies of the submissions provided by US business, labor, and environmental groups are attached for reference.

Update on Preparations for the 10th Ministerial Conference in Nairobi

Negotiations and consultations are now taking place at several levels and across a range of issues as WTO Members try to prepare a successful outcome for the 10th Ministerial Conference in Nairobi on December 15-18. We provide below a broad overview of what is currently on the table for Nairobi.

WTO Members are aiming for two results from Nairobi: (i) a small package ("Doha-minus") of agreements on specific issues from the Doha Round agenda; and (ii) a Conference declaration of some kind setting out how negotiations will continue after Nairobi.

"Doha-minus" package of agreements

Negotiations are taking place to try to find agreements in three areas:

- **New WTO rules to prohibit the use of agricultural export subsidies**. Switzerland and Norway have opposed this but are isolated, all other Members accept it. The United States opposes the inclusion of its export credit and food aid schemes in the prohibition, and is negotiating for flexibilities on these two points. It is also, along with the European Union, demanding an end to Special and Differential (S&D) flexibilities for developing countries on agricultural export subsidies.
- **Benefits for least-developed countries (LDCs).** There is still some uncertainty about what exactly the LDCs want, but the core objective is to agree to implement the results achieved at the Bali Ministerial in 2013 on preferential rules of origin, duty-free quota-free market access, cotton, a waiver from the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement on pharmaceuticals, and a GATS waiver in favor of LDC exports of services. All Members agree that there must be results for the LDCs, but there are still difficult bridges to build in each of these areas. Developed countries want emerging economies to make significant contributions to the LDC package, but India rejects that and insists that only developed countries must contribute. The United States is offering "best endeavour" commitments but not binding obligations and it is resisting cuts to domestic support for its cotton farmers. The European Union, Australia, Japan and others oppose binding rules on preferential rules of origin and want the LDC waivers to be time-bound rather than permanent.
- **New transparency provisions in various WTO Agreements.** Anti-dumping procedures and fisheries subsidies appear to be the most promising candidates, although little progress has been made on fleshing out the details. Proposals have been made also to cover horizontal subsidies, regional trade agreements (RTAs), and domestic regulations in Services, but there is deep opposition in each of those areas and it seems unlikely that anything can be negotiated on them in time for the Nairobi Conference.

There are still major challenges involved in finding consensus in each of these three areas, but WTO Director-General Roberto Azevêdo is now working alongside the Chairmen responsible for the detailed negotiations of texts and has staked his own credibility on getting results, even if they can be found only at the lowest level of ambition. Failure to do that would condemn the Nairobi Conference to irrelevance and the WTO to a very uncertain future.

Outside the focus of DG Azevêdo's process, there are proposals to add to the package an agricultural special safeguard mechanism for developing countries and selected results from the Dispute Settlement negotiations. Both of those proposals face significant opposition and it is improbable that they will progress in the short time now remaining before the Nairobi Conference, particularly without DG Azevêdo's support.

Finally, India, with support from the developing country farm lobby (G33), wants developing countries' food security programs to be counted in the "Green Box" of the Agriculture Agreement where they cannot be challenged. This is opposed by developed countries and developing country food exporters such as Brazil and Argentina. India has already received an open-ended guarantee that its food security programmes will not be challenged until a permanent solution is found, after its blockage of the Trade Facilitation Agreement last year. As a result, the stakes involved this time do not seem to be high enough for India to turn this into a pivotal issue for Nairobi, but with India that can never be completely discounted.

There is hope that the enhanced Information Technology Agreement (ITA II) might be agreed in time to be presented as part of the package of results in Nairobi. This would be a very significant achievement for the WTO, albeit one that has been produced through plurilateral negotiations and outside the scope of the Doha Round.

Conference Declaration

The Nairobi Conference will conclude with some form of declaration on what happens next. This could be a Ministerial Declaration if there is consensus on its contents, a Chairman's summing up if there is no consensus, or some hybrid of the two.

The key issue will be how negotiations will take place in the WTO after Nairobi. Members are deeply divided on that issue. The United States and the European Union oppose any continuation of the Doha Round after Nairobi; they are both open to further negotiations in the WTO, including on the unfinished topics covered by the Doha Round, but they reject absolutely engaging in those negotiations on the basis of the Doha mandate or any of the provisional agreements reached since 2001. Most developing countries, including the main emerging economies, want the opposite; the Doha Round should continue after Nairobi on the same basis that negotiations have taken place until now.

It may be possible to square this circle and have Ministers commit through a Declaration to further negotiations after Nairobi, finessing somehow the basis on which those negotiations will take place. If not, the Conference may have to end with only a Chairman's summing up, which commits no Member to anything. All Members know, however, that the real problem is not what form of words can be found in Nairobi, but how to recreate in the WTO a cooperative atmosphere, especially between developed countries and emerging economies, in which negotiations can take place constructively and have a good chance of producing meaningful commercial agreements.

Contact us

Washington

White & Case LLP
701 Thirteenth Street NW
Washington
DC 20005-3807

Scott Lincicome, Esq
Counsel

T +1 202 626 3592
E slincicome@whitecase.com

Singapore

White & Case Pte. Ltd.
8 Marina View #27-01
Asia Square Tower 1
Singapore 018960

Samuel Scoles
Regional Director Asia, International Trade Advisory Services

T +65 6347 1527
E sscoles@whitecase.com

WHITE & CASE

whitecase.com