US & Multilateral Trade and Policy Developments

Japan External Trade Organization

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Contents

US General Trade Policy Highlights

US Trade Representative to Review 34 Petitions for Modification of GSP Product Coverage

On January 11, 2016, the Office of the US Trade Representative (USTR) accepted for the 2015/2016 Generalized System of Preferences (GSP) Annual Review ("Annual Review") certain petitions requesting (i) the addition of certain products to the list of GSP-eligible articles; (ii) the removal of certain products from GSP eligibility for certain GSP beneficiary countries; and (iii) waivers of competitive need limitations (CNLs) for products imported from certain countries under the GSP program. Consequently, the USTR-chaired interagency Trade Policy Staff Committee (TPSC) will conduct a formal review of these petitions and determine by July 1, 2016 whether to make the requested modifications to the list of GSP-eligible articles.[1] July 1, 2016 also will be the effective date for any modifications to the list of GSP-eligible articles resulting from the annual review.

TPSC Hearing and ITC Investigation[2]

As part of its review process, the TPSC will hold a public hearing on all of the petitioned product additions, product removals, and CNL waiver petitions from March 3-4, 2016. The deadline for submitting public statements on the petitions and requests to appear at the hearing is February 19. The TPSC also has requested that the US International Trade Commission (ITC) conduct an investigation regarding the probable economic effect of the modifications requested in the petitions. As part of its investigation, the ITC will hold a public hearing on February 24. The ITC will accept requests to appear at the hearing, as well as public statements on the petitions, until February 1 and 3, respectively. The ITC is scheduled to report its findings to USTR by April 28.

Petitions for the Removal of Products

The TPSC will consider petitions for the removal of the following products from the list of GSP-eligible articles:

HTS Subheading	Description	Action Requested	Petitioner
3204.20.10	Fluorescent brightening agent 32	Remove product for India and Indonesia	Archroma
3204.20.80	Other fluorescent brightening agents	Remove product for India and Indonesia	Archroma
3907.60.00	PET resin (Polyethylene terephthalate in primary forms)	Remove product for India	PET Resin Coalition
3920.62.00	Nonadhesive plates, sheets, film, foil and strip, noncellular, of polyethylene terephthalate	Remove product for Brazil	DuPont Teijin Films, Mitsubishi Polyester Film, Inc., and SKC, Inc.
3921.90.40	Nonadhesive plates, sheets, film, foil and strip, flexible, nesoi, of noncellular plastics	Remove product for Brazil	DuPont Teijin Films, Mitsubishi Polyester Film, Inc., and SKC, Inc

[1] Click **here** for the *Federal Register* notice regarding the TPSC review.

[2] Click **here** for the notice regarding the ITC investigation.

Petitions for CNL Waivers

The TPSC will consider petitions requesting CNL waivers for the products listed below. Imports of these products from the listed beneficiary developing countries (BDCs) have allegedly exceeded the CNLs for 2015 because they (i) accounted for 50 percent or more of the value of total US imports of that product; or (ii) exceeded a specified dollar value (USD 170 million in 2015). The GSP statute provides that a BDC is to lose its GSP eligibility with respect to a product if a CNL is exceeded and no waiver is granted.

HTS Subheading	Description	Petitioner	Country
0804.10.60	Dates, fresh or dried, whole, without pits, packed in units weighing over 4.6 kg	Government of Tunisia	Tunisia
1509.10.40	Virgin olive oil and its fractions, whether or not refined, not chemically modified, weighing with the immediate container 18 kg or over	Government of Tunisia	Tunisia
2102.20.60	Single-cell micro-organisms, dead, excluding yeasts, (but not including vaccines of heading 3002)	Alltech, Inc	Brazil
2202.90.90	Nonalcoholic beverages, nesi, not including fruit or vegetable juices of heading 2009	Royal Thai Government and Sappe Public Co.	Thailand
2804.29.00	Rare gases, other than argon	Government of Ukraine	Ukraine
4202.92.04	Insulated beverage bag w/outer surface textiles, interior only flexible plastic container storing/dispensing beverage thru flexible tubing	Camelbak Product	Philippines
6911.10.37	Porcelain or china (o/than bone china) household table & kitchenware in sets in which aggregate val. of arts./US note 6(b) o/$56 n/o $200	Lenox Corporation	Indonesia
8708.50.95	Parts & accessories of motor vehicle of 8701, nesoi, 8702 and 8704-8705, half-shafts	Liners India Limited	India

Petitions for the Addition of Products

The TPSC will consider petitions requesting the addition of the following products to the list of GSP-eligible articles:

HTS Subheading	Description	Petitioners
4202.11.00; 4202.11.00.30; 4202.11.00.90; 4202.12.40; 4202.21.60; 4202.21.90; 4202.22.15; 4202.22.45; 4202.31.60; 4202.32.40; 4202.32.80; 4202.92.15; 4202.92.20; 4202.92.45; 4202.99.90; 4202.12.20.20; 4202.12.20.50; 4202.12.80.30; 4202.12.80.70; 4202.22.80.50; 4202.32.95.50; 4202.32.95.60; 4202.91.00.30; 4202.91.00.90; 4202.92.30.20; 4202.92.30.31; 4202.92.30.91; 4202.92.90.26; 4202.92.90.60	Certain handbags and travel goods products	Backpack Sport Travel Bag Coalition Callaway Golf Council for Leather Exports Garment Manufacturers Association in Cambodia Global Mamas (Ghana) Government of Philippines Handbag Coalition Jaclyn Inc. Luggage Coalition Michael Kors (Indonesia) Michael Kors (Philippines) Michael Kors (Thailand) Performance Sports Pocket Goods Coalition Royal Thai Government Tory Burch Tumi Holdings TWT Manufacturers Unison Pan (Asia) Co. LTD. Victorinox Swiss Army Inc.
2204.21.20	Effervescent wine	Government of Bolivia
3301.13.00	Essential oils of lemon	Government of Bolivia
7202.11.50	Ferromanganese containing by weight more than 4 percent of carbon	Government of Ukraine

US Department of Agriculture Adopts Final Rule Defining Lacey Act Exemptions

On January 25, 2015, the US Department of Agriculture, Animal and Plant Health Inspection Service (APHIS) adopted a final rule[3] defining two categories of agricultural products that are exempt from the Lacey Act ("the Act").[4] The Lacey Act (i) prohibits the importation and exportation of plants and plant products that are taken, possessed, transported or sold in violation of Federal, State, or foreign environmental conservation laws; and (ii) subjects certain plants and plant products to an import declaration requirement. The 2008 US Farm Bill amended the Act to provide exemptions for two categories of plants – those classified as "common cultivars" and "common food crops" – but did not define these terms, and instead authorized APHIS to define them by regulation.[5]

APHIS in its final rule has adopted without changes the definitions it initially proposed in its interim final rule of July 9, 2013, which are as follows:

[3] Click **here** for the Federal Register notice.

[4] 16 U.S.C. 3371 et seq.

[5] Click **here** for the APHIS list of exempt products.

- **Common cultivars.** A plant (except a tree) that: (1) has been developed through artificial selection for specific morphological or physiological characteristics; and (2) is a species or hybrid, or a selection thereof, that is produced on a commercial scale; and (3) is not listed: (i) in an appendix to the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES);[6] (ii) as an endangered or threatened species under the *Endangered Species Act of 1973*;[7] or (iii) pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction.

- **Common food crop.** A plant that: (1) is raised, grown, or cultivated for human or animal consumption; and (2) is a species or hybrid, or a selection thereof, that is produced on a commercial scale; and (3) is not listed: (i) in an appendix to the CITES; (ii) is an endangered or threatened species under the *Endangered Species Act of 1973*; or (iii) pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction.

Plants that meet the above definitions are not subject to the restrictions and requirements set forth in the Lacey Act, including the import declaration requirement established by the 2008 Farm Bill. The exemption also applies to the roots, seeds, parts, or products of plants that meet the above definitions.

APHIS currently maintains a list of plants and plant products that are considered common food crops and/or common cultivars, and are therefore exempt from the Lacey Act. APHIS is now accepting written requests from the public to add specific products to this list (or to remove them from the list). Such requests should include: (i) the scientific name of the plant (genus, species); (ii) common or trade names; (iii) the annual trade volume of the commodity; and (iv) any other information that will help APHIS to make a determination, such as the countries or regions where the plant is grown and the estimated number of acres or hectares in commercial production. However, the APHIS list is intended to be illustrative of the types of products that are exempt, rather than an exhaustive list of all such products.

[6] 27 UST 1087; TIAS 8249

[7] 16 U.S.C. 1531 et seq.

Free Trade Agreement Highlights

USTR Says TiSA Participants Reaffirm Commitment to Conclude Negotiations in 2016

On January 23, 2016, trade ministers representing the Trade in Services Agreement (TiSA) participants met informally in Davos, Switzerland to discuss the status of the TiSA negotiations and the timeline for their potential completion. According to the Office of the US Trade Representative (USTR), ministers present at the meeting reaffirmed their commitment to concluding the TiSA negotiations this year – an ambitious target considering that several issues in the core text and the issue-specific annexes remain unsettled, as do the negotiations on market access.[8] These obstacles combined with the political headwinds emanating from the November 2016 US elections will make a successful conclusion of the TiSA negotiations in 2016 difficult, though such an outcome cannot be ruled out.

MFN-forward and market access

A key outstanding issue in the core text is the proposed "MFN-forward" provision, which would require each TiSA participant to automatically extend to all other TiSA participants any future liberalization that they may negotiate in bilateral or regional agreements with non-TiSA countries. Insofar as their TiSA partners are concerned, therefore, TISA participants in effect would be renouncing the right to further preferential liberalization under Article V of the General Agreement on Trade in Services (GATS). The United States has supported the MFN-forward approach, while other participants such as the European Union have opposed it. Opponents such as the EU fear that the provision would complicate the eventual integration of the TiSA into the WTO and make it more difficult for future participants to accede to the agreement. In addition, some participants likely wish to retain their ability to negotiate bilateral liberalization with other countries who may not be participants in TiSA.

Disagreement over the MFN-forward provision is considered to be an obstacle to further progress in the market access negotiations. All TiSA participants have submitted their initial market access offers and are reportedly discussing an April 30, 2016 target date for submitting revised offers. However, continued disagreement over the MFN-forward issue could complicate these efforts, because participants are hoping to clarify the overall structure of the agreement before submitting their revised offers. Thus, a timely solution to the MFN-forward issue will likely be essential to conclude the negotiations on market access expeditiously.

Issue-specific annexes

Substantial work also remains on the issue-specific annexes, which cover a wide range of service sectors and rules issues. In recent months, negotiators have focused on four "priority" annexes, which will continue be prioritized in early 2016: (i) financial services; (ii) domestic regulation and transparency; (iii) telecommunications and electronic commerce; and (iv) movement of natural persons (Mode 4). Each of these annexes, and in particular domestic regulation and telecommunications, are well-advanced, though sensitive issues remain particularly in financial services. Participants are aiming to resolve all but the most sensitive issues in the priority annexes before a stocktaking meeting planned for July, at which TiSA ministers may attempt to provide the political direction needed to resolve them fully.

Participants also have proposed annexes on maritime transport, air transport, road transport, delivery services, distribution/direct selling, professional services, energy services, and environmental services. Some of these annexes involve regulatory disciplines, while others, such as environmental services, seek to impose binding market access scheduling disciplines (*i.e.*, requirements that each participant permit the supply of certain types of services by particular modes of supply). The final agreement is unlikely to include all of these proposed annexes, since some proposals have not received support from other negotiating parties. However, if the proponents of certain annexes insist on their inclusion, the negotiations could be prolonged beyond 2016.

Other obstacles

[8] Click **here** for the USTR statement on the TiSA ministers' meeting.

Despite making steady progress in 2015, TiSA negotiators will face several obstacles as they seek to conclude the negotiations this year (in addition to the unresolved issues described above). First, the United States will likely be unwilling make controversial concessions before the November 2016 US elections, which could inhibit progress on key issues. Second, several TiSA participants reportedly do not support the goal of concluding the negotiations in 2016, for fear that this timetable will not allow enough of their priority issues to be addressed. These participants may be unwilling to make the concessions required for a 2016 conclusion if they believe that more protracted negotiations could result in an agreement that better addresses their priorities. Finally, the large number of TiSA participants and the broad scope of issues being considered increase the likelihood that complications or impasses will arise during the "endgame" of the negotiations. Thus, while a successful conclusion of the negotiations in 2016 cannot be ruled out, such an outcome would only be possible in a best-case scenario.

United States to Eliminate Tariffs on Most ITA-II Products Immediately Upon Implementation

On January 28, 2016, the World Trade Organization (WTO) published the tariff schedules agreed to by the 23 WTO Members participating in the expanded Information Technology Agreement (ITA-II), revealing the dates by which participants will eliminate their tariffs on each of the covered products. The schedules show that the United States will eliminate tariffs on all of the covered products within three years, with full tariff elimination taking place immediately upon implementation for most products. By contrast, China has secured phase-out periods of five to seven years for the majority of the covered products, and other participants have secured similarly lengthy phase-outs on a small number of sensitive goods. ITA-II participants approved the schedules at the WTO's 10th Ministerial Conference held in Nairobi last December, and chose July 1, 2016 as the date on which the first round of tariff reductions will take effect (please refer to the W&C WTO Alert dated December 23, 2015.)

Of the covered tariff lines on which the United States currently imposes duties, 62 percent will be subject to full duty elimination as of July 1, 2016, and 38 percent will be subject to a three year phase-out ending on July 1, 2019. By contrast, of the covered tariff lines on which China currently imposes duties (i) none will be phased-out in 2016; (ii) 42 percent will be phased-out by July 1, 2019; (iii) 39 percent will be phased out by July 1, 2021; and (iv) 19 percent will be phased out by July 1, 2023. Products that China has subjected to the five- and seven-year phase-outs include certain semiconductors, printers and printer ink, optical fibers, measuring instruments, and medical devices such as magnetic resonance imaging (MRI) machines. Other ITA-II participants, namely Korea, the Philippines, and Malaysia, have secured five- and seven-year phase-outs for a smaller number of sensitive products. The United States initially resisted efforts by China and other participants to "backload" their tariff schedules in this manner, but ultimately relented in the interest of concluding the ITA-II in Nairobi.

Unlike most FTAs, US implementation of the ITA-II may not depend upon congressional approval of implementing legislation. President Obama may seek to implement the ITA-II by Presidential proclamation – as was done by President Bill Clinton with the original ITA – rather than by submitting implementing legislation to Congress for approval. The original ITA was implemented by Presidential proclamation pursuant to Section 111(b) of the Uruguay Round Agreements Act. Section 111(b) authorized the President to modify duty rates for certain tariff categories (provided that those tariff categories had been the subject of negotiations during the Uruguay Round) in order to implement agreements such as the ITA whose negotiation had begun but not concluded during the Uruguay Round. President Obama might rely on the same authority to implement the ITA-II by proclamation. Though this approach could be met with resistance by members of Congress or trade skeptics in the United States who oppose the proclamation on political, procedural or protectionist grounds, such opposition is unlikely to prevent the United States from implementing the ITA-II.

A copy of the US tariff schedule for the ITA-II is attached for reference.

Multilateral Policy Highlights

Trade Ministers to Discuss Swiss Proposal for Additional Sectoral Tariff-Elimination Agreements

Switzerland will propose that WTO Members start to negotiate this year more sectoral tariff-elimination agreements, modeled on the enhanced Information Technology Agreement (ITA-II), when it chairs the meeting of selected Trade Ministers at Davos, Switzerland on January 22. The conclusion of the ITA-II last December offers a model that some WTO Members, including the United States and the European Union, believe can be applied more broadly to reinvigorate the WTO's negotiating functions and to liberalize trade in selected products. Some sectors that have been proposed in the past in the context of the Doha negotiations on Non-Agricultural Market Access (NAMA) could be revived. This approach has advantages while the broader Doha agenda remains stuck in neutral:

- Sectoral negotiations can often be concluded quickly. Negotiations on the Environmental Goods Agreement, for example, are close to finalization and will have taken little more than two years to complete.
- Sectoral negotiations take place on the basis of a "critical mass" of participants, generally covering around 90 percent of world trade in the products concerned. They are, therefore, less vulnerable to being knocked off track by individuals or small groups of WTO Members who do not share the same liberalization objectives. India, for example, did not participate in the ITA-II and therefore could not block its completion or its entry into force. The "critical mass" principle also helps to minimize the so-called "free rider" problem. GATT Article I would require the participants to grant preferential tariff treatment to all WTO Members, even non-parties. However, with the participation of 90 percent of trade in the products concerned, the "free rider" problem would be essentially eliminated in practice.
- Sectoral negotiations are not bound by negotiating principles such as the "Single Undertaking" or "Special and Differential Treatment" which have frustrated attempts to conclude the Doha Round. In the ITA-II, for example, additional flexibility is provided to developing country participants through longer periods to phase-out their tariffs but this flexibility has been negotiated case-by-case. It is not provided automatically and it is not applied as a formula equally to all developing countries; some (such as China) are asked to contribute more in the negotiations than others.
- Members would be obliged to undertake obligations only in those negotiations in which they elect to participate. All members would, nonetheless, benefit from Most Favored Nation (MFN) treatment in all the sectors that are successfully negotiated, as is the case in the ITA-II where participants are eliminating their import tariffs to the advantage of all WTO Members. Members also could withdraw from the negotiations at any time, and would not be obliged at the end to sign on to the result if they felt it was not to their advantage to do so. In the case of the ITA-II, for example, Turkey participated in the negotiations throughout but it decided at the end not to sign the agreement since its offer of tariff cuts was not accepted by the United States. This means that Turkey will not cut its tariffs on any ITA-II product, but it will benefit from the tariff cuts that other ITA-II participants will make since these will apply to all WTO Members on the MFN basis.

Argentina Implements New Import Licensing Regime to Replace DJAI Procedure

On January 8, 2016, the Argentine Secretary of Commerce (*Secretaría de Comercio* – SC) published Resolution No. 2/2016 in the *Official Gazette*, finalizing a new import licensing regime to replace the country's Advance Sworn Import Statement (*Declaración Jurada Anticipada de Importación* – DJAI) procedure.[9] The Argentine government eliminated the DJAI procedure in December 2015 in order to comply with the World Trade Organization (WTO) Appellate Body ruling in *Argentina – Measures Affecting the Importation of Goods* (DS438/444/445) (*please refer to the W&C WTO Trade Alert dated December 17, 2015*).

[9] Click **here** for a copy of Resolution No. 5/2015 as amended by Resolution No. 2/2016 (in Spanish).

Pursuant to the new import licensing measure, approximately 95 percent of tariff lines will be subject to "automatic" licensing, while the remaining tariff lines, which cover import-sensitive products, will be subject to "non-automatic" licensing. Prospective importers of products subject to automatic licensing will be required to provide Argentina's Federal Tax Administration (*Administración Federal de Ingresos Publicos* – AFIP) with basic information concerning the product to be imported, such as the Mercosur Common Nomenclature (NCM) tariff heading, FOB value, model, and country of origin. However, for products subject to non-automatic licensing, prospective importers must also submit information regarding the exporter (including the company name and address) and a certification that the imported product complies with technical requirements and standards set forth in Argentine law. According to the Argentine authorities, the system of non-automatic licensing has been adopted in order to verify, prior to importation, that the product fulfills Argentina's domestic technical requirements.

AFIP published an initial list of the products subject to the non-automatic licensing regime in the *Official Gazette* under Resolution No. 5/2015, and further amended the list on January 8 via Resolution No. 2/2016. The list includes certain products classified under NCM Chapters 28 (inorganic chemicals); 29 (organic chemicals); 72 (iron and steel); 73 (articles of iron and steel); 82 (tools and implements); 84 (machinery and mechanical appliances); 85 (electrical machinery); and 87 (vehicles and vehicle parts), among others.

Prospective importers seeking to obtain both automatic and non-automatic import licenses must submit the required information through AFIP's Integrated System of Import Monitoring (*Sistema Integrado de Monitoreo de Importaciones* – SIMI), which can be accessed on the AFIP website. Both the automatic and non-automatic import licenses will be valid for a period of 90 days.

USTR Publishes Annual Report to Congress on China's WTO Compliance

On December 29, 2015, the Office of the United States Trade Representative (USTR) released its 14th Annual Report to Congress on China's WTO Compliance, pursuant to Section 421 of the *U.S.-China Relations Act of 2000* (P.L. 106-286). The report examines nine categories of WTO commitments undertaken by China, and China's compliance therewith: (i) trading rights; (ii) import regulation; (iii) export regulation; (iv) internal policies affecting trade; (v) investment; (vi) agriculture; (vii) intellectual property rights (IPR); (viii) services; and (ix) legal framework. Within these nine categories, USTR identifies the following six "priority" areas in which China's trade policies and practices cause "particular concern" for the United States and U.S. stakeholders:

- **Intellectual Property.** In addition to perennial concerns regarding trade secrets protection, counterfeiting, and piracy, USTR cites the Chinese government's provision of regulatory preferences in the pharmaceuticals sector as a "serious and emerging concern that arose in 2015." In particular, the report alleges that China has sought to promote government-directed indigenous innovation and technology transfer through the provision of such preferences, citing a 2015 State Council measure that calls for expedited regulatory approval to be granted to new drugs if the applicant's manufacturing capacity has been shifted to China. The report also reiterates U.S. concerns regarding market access for pharmaceuticals, citing China's allegedly "backlogged" regulatory approval system.

- **Industrial Policies.** As in previous years, the report highlights US concerns with China's alleged use of export restraints and subsidies, value-added tax (VAT) rebates, import substitution policies, excess capacity in manufacturing, and government support for "strategic emerging industries." In addition, a new concern identified by USTR in 2015 relates to China's proposed requirements for the use of "secure and controllable" information and communications technology (ICT) in various sectors. In this regard, the report cites China's proposed *Guidelines on Promoting the Application of Secure and Controllable Information Technology in the Banking Industry* and similar proposed measures in the insurance and e-commerce sectors. Such measures would, according to USTR, impose local content requirements on ICT used by these sectors, impeding market access for foreign ICT suppliers. Similarly, the report states that China's 2015 draft laws on counterterrorism and cybersecurity would impose "far-reaching and onerous trade restrictions on imported ICT products and services in China" if approved in their current draft form.

- **Services.** Although the report does not identify any major new concerns related to services, it does reiterate longstanding U.S. concerns, in particular with respect to electronic payment services, telecommunications, banking, and insurance. Regarding electronic payments, USTR implies that China has yet to bring its policies into compliance with the WTO's rulings in DS413 (*China – Certain Measures Affecting Electronic Payment Services*), and suggests that the United States is considering whether to initiate compliance proceedings at the WTO. Other longstanding concerns highlighted in the report include (i) foreign equity limits in the insurance sector; (ii) working capital requirements in the banking sector; (iii) regulations limiting the provision of currency services by foreign banks; and (iv) restrictions on basic telecommunications services, such as informal bans on new entry, "exceedingly high" capital requirements, and a requirement that foreign suppliers can only enter into joint ventures with state-owned enterprises (SOEs).

- **Agriculture.** As in previous years, USTR highlights three main concerns in the agricultural sector: (i) "questionable" sanitary and phytosanitary (SPS) measures that restrict market access for US exports of beef, poultry, and pork; (ii) delays in China's approvals of agricultural products derived from biotechnology; and (iii) "significantly increasing" domestic subsidies and other support measures provided to the agricultural sector. Regarding support programs, USTR also expresses concern with the notifications provided by China to the WTO, stating that "the methodologies used by China to calculate support levels, particularly with regard to its price support policies and direct payments, result in underestimates."

- **Transparency.** USTR acknowledges that China issued a measure in March 2015 requiring trade-related departmental rules to be translated into English. This measure also provides that the translation of a departmental rule normally must be published before implementation. However, USTR notes that the United States is pressing China to ensure that it similarly publishes translations of trade-related laws and administrative regulations before implementation, as required by China's WTO accession agreement. USTR also reiterates concerns that not all of China's central government entities publish their trade-related measures in a single official journal administered by the Ministry of Commerce, as required in China's WTO accession agreement.

- **Legal Framework.** As in previous years, USTR highlights ongoing concerns regarding the implementation of China's *Anti-Monopoly Law* (AML), including uncertainties regarding the law's application to Chinese state-owned enterprises, and concerns about the procedural fairness of AML investigations against foreign companies.

Despite these and other issues identified in the report, USTR notes that China's current leadership "has highlighted the need for and has begun to pursue further economic reform in China". In this regard, USTR notes that the United States in the coming year will focus on China's implementation of the Third Plenum Decision, whose goals include reform of China's SOEs, reduced government intervention in the economy, and an acceleration of China's opening up to foreign goods and services. According to USTR, the United States will continue to urge China to "speedily implement these promising reforms". However, the report notes that the United States will not hesitate to invoke the dispute settlement mechanism at the WTO if bilateral dialogue is ineffective in resolving U.S. concerns.

WTO Ministers Meet in Davos to Discuss 2016 Agenda

The meeting of 22 Trade Ministers that took place in Davos, Switzerland on January 23 produced surprisingly wide-based interest in taking up "new issues" in the WTO work programme this year. The meeting also reviewed the outcome from the Nairobi Ministerial Conference, the basis on which unfinished Doha Round issues might be brought back to multilateral negotiations, and the potential for opening plurilateral negotiations on specific topics in the style of the enhanced Information Technology Agreement (ITA-II). This represents the start of what will probably be a long period of reflection among Members on the WTO's negotiating functions; no quick decisions are likely to be taken, but key Members such as the United States, the EU and China are clearly ready to engage.

Outcome of the Nairobi Conference

Many of the Ministers present in Davos said that priority should be given to implementing the decisions taken in Nairobi and at the earlier Bali Ministerial Conference in 2013. Of most importance is securing the entry into force of

the Trade Facilitation Agreement (TFA) which has now been ratified by 68 Members; 108 ratifications are needed for the TFA to enter into force. In addition, some Ministers in Davos recalled the need to work expeditiously on the issues of public stockholding of food in developing countries and a special agricultural safeguard mechanism for developing countries, but these remain highly contentious issues and it is unlikely that any progress will be made on them outside the broader Doha Round negotiations on Agriculture which have themselves been placed "on hold" for the time being by the United States and the EU.

Unfinished Doha Round issues

The gulf that exists between developed and developing country Members over how to revitalize the Doha Round negotiations remained very much in evidence in Davos:

- The United States, the EU, Japan, Canada and others reiterated their unwillingness to begin negotiating again on the basis of the Doha mandate; for them, above all, there has to be acceptance by advanced developing countries (notably China) that they will forgo their access (at least in part) to "Special and Differential Treatment" (SDT) in the negotiations.

- South Africa and Turkey were outspoken in Davos in rejecting that condition for restarting the Doha negotiations, and many other developing countries (notably India) are known to share that view even though they did not take the floor in Davos.

- China supported continuation of the Doha negotiations on agriculture, industrial goods and services "based on the Doha framework". It did not insist on the full Doha mandate and is willing to discuss limiting its access to full SDT on a case-by-case basis if this means that the negotiations can start up again, but there is no indication that India and others are willing to fall into line with China's thinking on this point, for the time being at least. It seems probable, therefore, that the Doha negotiations will remain blocked.

Plurilateral negotiations

Several Members, notably the United States, pressed the case for negotiating on a plurilateral basis where no consensus could be found to negotiate multilaterally, citing the ITA-II, the Environmental Goods Agreement (EGA) and the Trade in Services Agreement (TiSA) as examples of where this approach is working. There was no concrete discussion of new initiatives of this kind, but the United States, the EU and others are known to be interested in focusing on specific industry agreements such as chemicals. WTO Director-General Roberto Azevedo gave his implicit support for this approach when he spoke of "the need for open-minded suggestions from Ministers to begin conversations on issues that fall outside Doha", and there are indications that the United States intends to begin convening groups of Members in Geneva to discuss what additional plurilateral negotiations might be of interest. The United States is also pressing for increased membership in the plurilateral Government Procurement Agreement (GPA).

New issues

Some Ministers in Davos, particularly South Africa, ruled out taking up new issues until the Doha negotiations have been brought to a conclusion, but there is a strong interest from others in looking at new issues. China said that it wanted to take up "very relevant new issues such as e-commerce and investment" in parallel with the continuation of negotiations on unfinished business from the Doha Round, and that as host of the G20 this year it would encourage the G20 to provide the leadership to move these issues forward and to focus on trade and investment as a working goal for 2016. The investment issue received a good deal of support, and could be a particularly important and interesting issue to bring into the WTO. A WTO Investment Agreement could hold out considerable advantages for the protection of investors and investments, and it would be a far more efficient and reliable way of dealing with international investment than through bilateral investment agreements which have proliferated for many years. However, the architecture of a multilateral investment agreement would need to be worked out carefully to be consistent with the investment provisions of the GATS.

Other suggestions were for work on digital trade (EU, Mexico), global value chains and small and medium scale enterprises (Korea and Thailand), and competition policy (Thailand), while Brazil said it was prepared to examine any new issue as long as it would be negotiated multilaterally.

United States Criticizes China Over Subsidy Notifications at WTO

On January 25, 2016, the United States tabled a new WTO document criticizing several aspects of China's recent notification of its subsidy programs to the WTO. The submission highlights three US concerns with China's notification of October 30, 2015, which covers programs granted or maintained by China during the period of 2009 to 2014: (i) the notification does not include several of China's central and sub-central government programs that, according to the US, appear to provide specific subsidies; (ii) the notification does not include any subsidy programs provided at the sub-central government level; and (iii) China has, according to the US, artificially inflated the number of programs it has notified by including in its notification several programs that do not appear to constitute specific subsidies. Similar to a previous US submission of October 19, 2015, which criticized China for having failed at the time to make any subsidy notification since 2011, the new US submission indicates increasing frustrations over China's alleged lack of transparency regarding its subsidy programs.

The latest US submission identifies 30 central and sub-central government programs that China has not notified and that appear to provide support to the following industries or sectors: (i) steel; (ii) non-ferrous metals; (iii) semiconductors; (iv) wild capture fisheries; (v) textiles; (vi) renewable energy; and (vii) "high and new technology zones". For each sector, the United States has asked China to explain why the listed programs have not been notified pursuant to Article 25 of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). Regarding steel, the submission also notes that China "has never notified a steel subsidy program at either the central or sub-central level" and asks China to clarify whether it is "China's position that it has never provided a specific subsidy to the steel industry since becoming a WTO Member[.]" The submission makes identical requests regarding non-ferrous metals and wild capture fisheries, noting that China has never notified subsidy programs for these industries.

The US submission also highlights what the United States considers to be "over-reporting" by China of subsidy programs that do not need to be notified under Article 25 because, inter alia, such programs "do not appear to be specific to an enterprise, industry or groups thereof; do not benefit industrial enterprises; are provided to individuals; or constitute support for general infrastructure or disaster relief." According to the United States, up to one-quarter of the programs contained in China's latest subsidy notification fall into this category. The submission alleges that China "artificially inflates the number of programs it has notified" by including such programs in its notification.

Regarding sub-central measures, the US submission notes that subsidies provided at the sub-central government level were not included in China's latest notification, and re-iterates the longstanding US concern, expressed in the US statement at China's 2014 Trade Policy Review, that China has never notified a sub-central program "even though hundreds of them have been the subject of WTO disputes." Consequently, the United States has asked China to indicate when it will comprehensively notify subsidy programs provided at the sub-central level. These comments and the general tone of the US submission suggest that the United States intends to continue applying pressure on China to more comprehensively notify its subsidy programs.

World Economic Forum Releases Study on Maximizing Opportunities of the Internet for International Trade

A joint study by the World Economic Forum (WEF) and the International Centre for Trade and Sustainable Development has proposed that the World Trade Organization should develop a new Agreement devoted to digital trade, with the objective of harmonizing regulations, reducing barriers to internet access and unleashing the huge potential for growth of trade over the internet.[10] This is the most striking of 18 "policy options" or recommendations

[10] Click **here** for a copy of the WEF study, titled "Maximizing the Opportunities of the Internet for International Trade".

addressed to governments and the private sector by a group of senior trade policy analysts and experts on the digital economy. Their report forms part of a comprehensive review of the evolution of the global trade and investment system known as the E15 Initiative.

The study's starting point is the phenomenal worldwide growth in internet access and its implications for international trade, productivity, economic growth and employment. Its message is the need to create an enabling environment for digital trade, to ensure that the opportunities created by the internet are fully exploited and not frustrated by conflicting regulations, inadequate infrastructure or protectionism. A key concern is the free flow of data across borders, which is currently threatened by the spread of data localization requirements in the name of privacy protection.

Most of the policy recommendations are addressed to WTO Members, with a view to updating and expanding the body of WTO rules that relate to digital trade, which is substantial. WTO Members already have obligations on e-commerce, telecommunications services and data flows, notably through the General Agreement on Trade in Services, but these are not systematized and they pre-date the technological revolution of the past 20 years. Thus, for example, the study recommends updating the seminal Reference Paper on basic telecommunications, to reflect technological changes and ensure fair competition over the internet as well as over traditional telephone networks. It also recommends clarifying the scope of existing GATS commitments and their consistency with current policies affecting digital trade, and a "firm commitment" to allow cross-border data flows. It is also proposed that the Trade Facilitation Agreement should be updated, notably by addressing the cost and disruption caused by *de minimis* customs duties on low-value goods.

Most notably, the study proposes the negotiation of an Agreement on digital trade in the WTO. This would be a "plurilateral" agreement, negotiated among a critical mass of willing participants, but whose benefits might be extended to all WTO Members on the Most-Favored Nation (MFN) basis. It is envisaged that such an agreement might cover, *inter alia*, commitments to allow cross-border data flows, to observe a set of digital trade principles, not to impose customs duties on trade in digital products, and not to discriminate in favor of national suppliers or products. Such rules have been negotiated in various Free Trade Agreements to which the US is a party and in the Trans-Pacific Partnership (TPP), and are under negotiation in the Transatlantic Trade and Investment Partnership (TTIP) and the International Agreement on Trade in Services (TiSA). An important objective of such an agreement in the WTO would be to prevent the entrenchment and growth of the "digital divide" between advanced and developing countries.

Some of the study's recommendations are concerned with improved cooperation between governments and the private sector, the most interesting of these being that a dispute settlement system should be developed, outside the WTO, to handle cross-border disputes between businesses and consumers, as previously recommended by the OECD and already operated by eBay.

It is not expected that these recommendations to the WTO will be addressed, still less implemented, in the short term. The introduction of new subjects into the WTO agenda is still contentious, with some developing countries likely to insist that outstanding issues from the Doha Round must be resolved before new issues are entertained. This may delay progress, but it is an outdated debate. It was agreed at the Nairobi Ministerial Conference in December that major issues such as agriculture and tariffs will remain on the negotiating agenda, but the Doha Round itself, as a legal framework and a closed agenda for negotiations, is dead. In order to remain relevant, the WTO must and will address the new issues that preoccupy business and are being negotiated in preferential trade agreements all over the world. The digital economy is certainly one of the most important of these, and for this reason the publication of this study is well timed.

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