US & Multilateral Trade and Policy Developments

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Contents

Free Trade Agreements

Evaluating the Trans-Pacific Partnership

On February 4, 2016, the Parties to the Trans Pacific Partnership (TPP) signed the Agreement in Auckland, New Zealand, marking the formal conclusion of their negotiations. The TPP is one of the largest and most ambitious trade agreements ever negotiated, setting the parameters for liberalized trade among a dozen countries of the Asia-Pacific region: the United States, Japan, Canada, Mexico, Australia, New Zealand, Malaysia, Vietnam, Chile, Peru, Singapore, and Brunei. With the TPP now finalized, the Parties must ratify the Agreement pursuant to their own domestic legal procedures before it can enter into force – a process that will be politically contentious for several of the Parties, and in particular the United States.

The TPP – nearly seven years in the making – is being described by the United States as a so-called "next-generation" trade agreement. As a "next generation" agreement, the United States intends it to serve as a template for future trade negotiations. It builds on the core structure of the World Trade Organization (WTO) Agreements and existing US bilateral free trade agreements (FTAs), but takes WTO and FTA rules further in a number of key areas, particularly on what the United States considers to be priority issues, such as electronic commerce, intellectual property, and state-owned enterprises (SOEs). The completion of the TPP is, therefore, is a critical development in evolution of international trade rules.

With the TPP now pending ratification by the Parties, this report examines the substance and process of the Agreement – how it overlaps with and differs from existing US free trade agreements (FTAs) as well as the WTO Agreements; its broader contextual relevance and implications for future agreements; and the next steps for its ratification and implementation by the Parties.

Overview of Key TPP Chapters

Trade in Goods: The TPP aims to liberalize trade in goods among the Parties, including by eliminating tariffs on nearly 75 percent of nonzero tariff lines immediately upon entry into force and on 99 percent of non-zero tariff lines when the Agreement is fully implemented. The Trade in Goods Chapter consists of four main elements:

- ***Market access*.** A Party commits to eliminate tariffs and quantitative restrictions on goods imports from other TPP parties, and its own exports to those Parties. The primary mechanisms for achieving this objective are (i) a commitment to eliminate customs duties on imports of almost all products originating in other TPP Parties pursuant to each Party's schedule; (ii) a prohibition on import and export restrictions, except for certain products and under certain conditions; (iii) a prohibition on "performance requirements" as a condition for receiving reduced import tariffs; (iv) rules on import and export licensing, ensuring that such systems are clear, transparent, non-discriminatory and not a disguised restriction on trade; (v) limits on administrative fees and formalities (*e.g.*, customs fees) associated with importation or exportation to the approximate cost of services rendered; (vi) a prohibition on export duties, except for certain goods; and (vii) a commitment to publish promptly rules, regulations and procedures on the importation or exportation of goods.
- ***National treatment*.** A Party generally commits to treat the goods of TPP Parties the same as domestic goods. Such "national treatment" is a fundamental principle of all trade agreements.
- ***Agriculture.*** A Party undertakes various commitments specific to agriculture, including (i) a commitment to eliminate export subsidies on agricultural goods destined to other TPP Parties; (ii) a commitment to negotiate

multilateral disciplines on export credits, export credit guarantees and insurance programs; (iii) a commitment to negotiate multilateral disciplines on agricultural state trading enterprises; (iv) disciplines on the imposition of export restrictions for food security reasons; and (v) basic commitments on transparency, cooperation and information-exchange related to the trade of products of modern biotechnology, including GMOs.

- ***Tariff Rate Quotas (TRQs)*.** A party commits to administer all TRQs, as set forth in an Annex, in a transparent and impartial manner and subject to various disciplines.

Trade in Services: The TPP aims to facilitate trade in services among the Parties using three main mechanisms: (i) commitments by the Parties to extend most-favored nation (MFN) and national treatment to one another's services and service suppliers; (ii) a prohibition on market access restrictions, such as limitations on the number of service suppliers or the total value of transactions; and (iii) a prohibition on measures that require service suppliers to maintain a local presence as a condition for supplying a service. These commitments apply to measures affecting the supply of a covered service (i) from the territory of one Party into the territory of another Party; (ii) in the territory of a Party to a person of another Party; or (iii) by the national of a Party in the territory of another Party.

Notably, the TPP services commitments operate on a "**negative list**" basis, meaning that they apply to all service sectors except for those specifically listed in a Party's schedule. However, the chapter does not cover measures relating to financial services, which are addressed separately in the Financial Services Chapter. The negative lists contained in each Party's schedule include two types of "non-conforming measures" (NCMs), which are exempt from the Chapter's MFN, national treatment, market access, and/or local presence commitments: (i) measures subject to a "standstill and ratchet" obligation, whereby measures cannot become more restrictive in the future and any future liberalization cannot be reversed; or (ii) reservations whereby participants maintain complete discretion as to their current and future policy.

The United States has taken notable reservations for NCMs in sectors such as (i) maritime transport (*e.g.*, for US "cabotage" laws such as the *Jones Act*); (ii) land transport (for NCMs prohibiting the supply of trucking or bus services by non-US persons); (iii) services related to air transport (for NCMs with respect to MFN, national treatment, and local presence) and (iv) legal, accounting, and engineering services (which, along with several other sectors, are subject to various state-level NCMs). Most other Parties have taken similar reservations with respect to maritime transport, for NCMs requiring that only their own nationals and flagged vessels may provide such services. Other notable reservations include those taken by (i) Australia, Chile, Malaysia, Japan, Singapore, and Vietnam with respect to broadcasting and/or audio-visual services; (ii) Malaysia, Mexico, Vietnam, and Singapore with respect to health care services; (iii) Canada and Australia, with respect to NCMs designed to support cultural industries such as literature, film, and music; and (iv) Japan, for NCMs affecting accounting, architecture, engineering, real estate, and road transport services. In addition, most Parties have taken reservations in legal services, although Chile, Malaysia, and Vietnam have reserved particularly restrictive NCMs in this sector.

Other features of the services chapter include (i) disciplines on domestic regulations governing the authorization and licensing of service suppliers; (ii) a commitment to permit payments and transfers related to the supply of a service; and (iii) annexes containing specific commitments relating to professional services and express delivery services.

Electronic Commerce: The E-Commerce Chapter seeks to facilitate business-related data transfers as well as trade in digital products. The primary mechanisms for achieving these objectives are: (i) a prohibition on data localization measures (*i.e.*, requirements that an investor or service supplier locate computing facilities within a Party's territory as a condition for conducting business in that Party's territory); (ii) a commitment to allow the cross-border transfer of information by electronic means when such activity is for the conduct of business; (iii) a commitment not to impose customs duties on electronic transmissions; and (iv) a commitment to treat the "digital products" (*e.g.*, media and software) of another TPP Party the same as other like digital products. The Chapter also prohibits a Party from requiring access to the source code of software owned by a person of another Party as a condition for the import, sale, or use of the software. The Chapter does not apply to financial services, however, which are covered by separate rules in the Financial Services Chapter.

Investment: The Investment Chapter includes the core obligations of the US Model BIT and applies them on a negative list basis (*i.e.*, to all sectors and activities except for those listed in a Party's annex to the Chapter). A Party commits to accord to the investments of another Party (i) national treatment; (ii) MFN treatment; (iii) a minimum standard of treatment (*i.e.*, police protection and protection against denial of justice); (iv) protections against expropriation; (v) the ability to transfer funds related to an investment; and (vi) non-discriminatory treatment in the event of armed conflict or civil strife. A Party also commits not to impose performance requirements (*e.g.*, export requirements, local content requirements, or forced technology transfers) in connection with covered investments. The Chapter does not apply to financial services, which are covered separately in the Financial Services Chapter.

The United States has taken notable investment reservations in sectors such as mining (for restrictions on foreign acquisition of land leases and rights-of-way for oil and gas pipelines); telecommunications (for restrictions on foreign ownership of radio licenses); air transport (for restrictions on the provision of domestic air service by foreign carriers); and marine transport (for any measure relating to investments in maritime cabotage services and US-flagged vessels). Other notable reservations include those taken by (i) Japan, for any NCM with respect to investments in broadcasting; (ii) Vietnam, for foreign equity limits in a wide array of sectors including telecommunications, motion picture production and distribution, sound recording, electronic gaming services, and aircraft manufacturing; (iii) Canada, Chile, Malaysia, Mexico, and Vietnam, for various NCMs limiting foreign participation in oil and gas exploration; and (iv) Malaysia, for foreign equity limits in automobile manufacturing, minimum capital investments in hypermarkets, superstores, and department stores, and prohibitions on foreign investment in supermarkets, minimarkets, fuel stations, news agencies, and clothing stores, among others. In addition, several Parties will continue to subject proposed foreign investments to economic needs tests or screening processes, such as Vietnam (for proposed retail outlets), Australia (for proposed investments in agribusiness), and Japan (for proposed investments in the agriculture, oil, telecommunications, and pharmaceutical manufacturing sectors, among others).

The Chapter also includes investor-state dispute settlement (ISDS) procedures that may be invoked when an investor alleges that a Party has breached its obligations under the Chapter. When pursuing a claim under ISDS, investors waive their right to pursue the same claim through other fora such as domestic courts.

Financial Services: The Financial Services Chapter includes MFN and national treatment obligations, which require a Party to accord to another Party's investors, financial institutions, and investments in financial institutions treatment no less favorable than that which it accords to its own (or a third country's) investors, financial institutions, and investments in financial institutions in like circumstances. A Party also commits to allow financial institutions to transfer data across borders for processing. Other key elements of the Chapter include:

- ***Cross-border trade.*** A Party commits to allow, on a national treatment basis, the supply of certain financial services (whether by cross-border supply, consumption abroad, or commercial presence). This commitment is applied on a "positive list" basis to specific financial services listed in a Party's annex to the chapter. A Party must allow payments and transfers that relate to the cross-border supply of services covered by this commitment.

- ***Market access.*** A Party is prohibited from imposing certain market access restrictions with respect to the financial institutions of another Party, such as limitations on (i) the number of financial institutions or their employees; (ii) the total value of financial service transactions; and (iii) the type of legal entity through which a service is supplied. A Party commits to allow a financial institution to supply a new financial service that it would permit its own financial institutions to supply, in like circumstances, under its existing laws.

- ***Investment disciplines.*** A Party commits to provide certain investor protections, including (i) a minimum standard of treatment; (ii) non-discriminatory treatment in the event of armed conflict or civil strife; (iii) the ability to transfer funds related to an investment; and (iv) protection against expropriation. Investors have recourse to ISDS with respect to violations of these commitments, but not for violations of the MFN or national treatment committments.

Intellectual Property: The Intellectual Property Chapter requires Parties to provide for the protection of trademarks, patents, copyrights, and trade secrets, and to accord national treatment to the nationals of another Party with regard to IPR protection. The key elements of the Chapter are as follows:

- ***Trademarks.*** A Party must maintain a trademark registration system that incorporates certain features (*e.g.*, a process for providing written explanations to an applicant when a trademark application is rejected, and a process for opposing or cancelling registrations). A Party also must protect trademarks through its internet domain name system (*e.g.,* by revoking domains that are identical or confusingly similar to a trademark). The TPP expressly includes sounds and geographical indications within the scope of protectable subject matter, and provides that a mark does not need to be visually perceptible to be registered.

- ***Geographical indications (GIs).*** The Chapter incorporates the TRIPs definition of a GI and imposes certain disciplines on a Party's administrative procedures with respect to protection of GIs. Such procedures must include the publication of, and opportunity for comment on, applications for new GIs, and a process for cancelling an existing GI. A Party that recognizes GIs must allow for applications to be denied (or for existing GIs to be cancelled) if the GI is likely to cause confusion with a trademark or is a common name for the relevant good in the territory of that Party.

- ***Data protection.*** If a Party requires the submission of undisclosed test data as a condition for granting marketing approval of a pharmaceutical, it must provide at least five years of data protection, during which it will not allow a subsequent applicant (*e.g.*, a generic drug manufacturer) to market the same or a similar product on the basis of data provided by an earlier applicant (or on the basis of the earlier applicant's marketing approval). For biologic medicines, Parties must provide eight years of data protection, or deliver a comparable outcome by providing five years of data protection in combination with "other measures". The TPP does not specify what "other measures" are acceptable.

- ***Patents.*** A Party's patent system is subject to various disciplines, including (i) a commitment to only revoke a patent for reasons that would have justified a refusal to grant the patent; (ii) a "first to file" requirement (*i.e.*, to grant patents to the first person who applies, rather than the first person who creates the invention); and (iii) a requirement to provide patent term adjustments to compensate for unreasonable delays in the application process. Parties also confirm that secondary patents will be available for new uses of a known product, new methods of using a known product, or new processes of using a known product. For pharmaceuticals, a Party must notify a patent holder if a person seeks to use that patent holder's data or prior marketing approval to obtain marketing approval for a new product *(e.g.*, a generic), and allow the patent holder to seek remedies against alleged infringement by the new product. This rule is commonly known as patent linkage.

- ***Copyrights.*** A Party commits to ratify or accede to the WIPO Copyright Treaty (WCT) and the Performance and Phonograms Treaty (WPPT), and to uphold certain rights enumerated therein (*e.g.*, rights of distribution and reproduction for authors). Parties must prohibit and penalize (i) the removal or modification of electronics rights management information, and (ii) the circumvention of technological protection measures that copyright holders use to restrict access to their works.

- ***Enforcement.*** A Party commits to provide for (i) criminal procedures and penalties for trade secret theft, commercial-scale counterfeiting and piracy, and importation or exportation of counterfeit or pirated goods; and (ii) civil and administrative procedures and remedies (including monetary compensation) for infringement. A Party's enforcement measures must allow rights holders to request the detention of imports that are suspected of infringement.

- ***Exceptions.*** Like the TRIPs Agreement, the TPP allows a Party to provide limited exceptions to the exclusive rights granted by (i) a copyright or patent (provided that the exceptions do not conflict with normal exploitation of the work or the legitimate interests of the rights holder); or (ii) a trademark (*e.g.*, for fair use of descriptive terms). Regarding medicines, the TPP provides that a Party may take measures to protect public health in

accordance with (i) the Doha Declaration on TRIPS and Public Health ("Doha Declaration"); (ii) any waiver of any TRIPS provision granted by WTO Members to implement the Doha Declaration; or (iii) any amendment of the TRIPS Agreement to implement the Doha Declaration. The TPP also requires Parties to provide a "regulatory review" exception from infringement of pharmaceutical patents, so that generic manufacturers may conduct testing activities before the patent on a related brand-name drug has expired. Furthermore, several TPP Parties (particularly developing countries) are provided a grace period to implement certain obligations. For example, Brunei, Malaysia, Mexico, Peru and Vietnam are given grace periods ranging from four to ten years after the TPP enters into force to fully implement the commitments relating to data protection for biologic medicines.

Sanitary and Phytosanitary Measures: The SPS Chapter establishes disciplines related to import checks, certifications, risk analysis, and transparency, among other issues. The disciplines on import checks require a Party to (i) conduct inspections promptly, (ii) provide a rationale for the nature and frequency of its import checks; (iii) provide information about its analytical methods, and (iii) base any testing procedures on international laboratory standards. If a Party excludes imported merchandise from entry on SPS grounds, it must provide its reasoning to the importer or exporter and allow an opportunity for review of the decision. A Party's certification requirements also must take into account international standards, and may only be applied to the extent necessary to protect life or health.

If an importing Party maintains SPS measures that go beyond international standards or guidelines (and are therefore based on risk assessment), the importing Party must (i) provide interested persons and exporting Parties the opportunity to comment on the risk analysis; (ii) provide the exporting Party with an explantion for the information required for the risk assessment; and (iii) allow trade to commence or resume within a reasonable period of time if justified by the results of the risk analysis.

On transparency, the Chapter requires Parties to (i) notify proposed SPS measures through the WTO notification system; (ii) allow interested parties to provide written comments; and (iii) disclose, in certain circumstances, the scientific information considered in developing a proposed measure. Other transparency and procedural disciplines apply when a Party assesses the equivalency of another Party's SPS measures, determines whether to recognize a region of another Party as pest- or disease-free, or audits a Party's SPS authorities and inspection systems.

Technical Barriers to Trade: The TBT Chapter incorporates essential disciplines of the WTO TBT Agreement into the TPP. The Chapter also requires Parties to accord national treatment to one another's conformity assessment bodies, so that testing, certifications, or inspections performed by one Party's conformity assessment body may be used to certify that a product meets the standards or regulations of another Party. A Party also must allow persons of another Party to participate in the development of technical regulations, standards, and conformity assessment procedures, including by publishing proposed versions of such measures and allowing interested persons to provide comments in writing. Sector-specific annexes to the Chapter encourage (and in some instances, require) that the Parties adopt common approaches to the regulation of certain products, such as medical devices, information and communications technology (ICT) products, cosmetics, and pharmaceuticals.

Telecommunications: The Telecommunications Chapter requires a Party to ensure that access is provided, on a non-discriminatory basis, to any public telecommunications service offered in its territory. To that end, a Party must ensure that suppliers of public telecommunications services in its territory allow interconnection by another Party's suppliers, and provide number access and number portability on a non-discriminatory basis. "Major suppliers" of public telecommunications services are subject to further commitments to provide non-discriminatory treatment with respect to, *inter alia,* rates and quality of service, provision of leased circuits, and co-location of equipment.

The Chapter also includes (i) a commitment that a Party's procedures for allocating scarce resources (*e.g.*, frequencies) will be objective and non-discriminatory; (ii) a commitment that telecommunications regulatory bodies shall be separate from, and not have a financial interest in, public telecommunications suppliers; (iii) a commitment not to accord more favorable treatment to government-owned telecommunications suppliers; (iv) a commitment to

establish notice and comment procedures for proposed regulations; and (v) a commitment to allow suppliers to choose the technologies through which they will supply their services.

State-Owned Enterprises: The SOE chapter imposes four new legal disciplines on Parties: (i) a commitment that their SOEs and designated monopolies, in their purchase or sale of a good or service, not discriminate against the enterprises of other Parties (*i.e.*, they must essentially provide MFN and national treatment) and act in accordance with "commercial considerations"; (ii) a requirement that courts and administrative bodies have jurisdiction over commercial claims against SOEs; (iii) a requirement that Parties not provide SOEs with "non-commercial assistance" that causes adverse effects or material injury to another Party; and (iv) reporting and transparency requirements.

Under the Chapter, many SOEs are exempt from certain legal disciplines, including several of the Parties' national energy companies such as Mexico's Petróleos Mexicanos (Pemex), Malaysia's Petronas, PetroVietnam, and PetroPeru. Other exempted entities include (i) the three US-government sponsored housing finance institutions (the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac) and the Government National Mortgage Association (Ginnie Mae); (ii) the Canadian Broadcasting Corporation; (iii) all of Malaysia's state-owned development financial institutions; and (iv) Vietnam's SOEs in the publishing, broadcasting, shipbuilding, coffee production, air transport, defense, coal, and electricity sectors, among others. The Chapter also generally exempts export credit agencies and state-owned banks from certain legal disciplines.

In addition to the exemptions in the SOE Chapter itself, Chapter 29 of the TPP notes that the general exceptions outlined therein shall apply to the SOE Chapter "only with respect to measures of a Party" that affect either "the purchase, production or sale of goods, or affecting activities the end result of which is the production of goods" or "the purchase or supply of services, or affecting activities the end result of which is the supply of services[.]" The exceptions in Chapter 29 encompass, by way of express incorporation, GATT Article XX and GATS Article XIV, which provide exceptions for measures necessary to protect, *inter alia*, human, animal, or plant life or health, public morals, or privacy of individuals.

The Agreement also calls for further negotiations within five years after entry into force on expanding the disciplines of the chapter, including to cover SOEs owned or controlled by sub-central governments.

Government Procurement: The TPP's Chapter on Government Procurement is closely modelled on the WTO's Government Procurement Agreement (GPA), which Australia, Brunei, Chile, Malaysia, Mexico, Peru, and Vietnam have not yet joined. As in the GPA, each TPP participant has appended to this Chapter a schedule of the central government, sub-central government and other covered entities whose procurements will be subject to agreed disciplines, and the threshold values below which procurements are not covered by the Agreement. All participants have also excluded from coverage certain procurements regarded as particularly sensitive, such as military and communications equipment and specialty metals. Furthermore, the Chapter does not define SOEs as covered entities, thus exempting those entities' procurements from TPP disciplines. Coverage for each participant is defined by the content of its schedule, and this is the result of negotiations.

Rules of Origin and Origin Procedures: The Agreement supports the development of TPP-wide supply chains by generally allowing for "accumulation" within the TPP region. This confirms that the ability to further process or add materials of one trade agreement country to products in another trade agreement country (which will then be treated as originating in the latter country) has become a standard feature in modern trade agreements.

A number of specific origin principles also apply, including the "Chemical Reaction Rule," under which a product will be considered originating if a chemical reaction (*i.e.*, a process resulting in a molecule with a new structure) occurred within the TPP territory. The TPP contains other product-specific rules of origin that impose more onerous requirements for certain sensitive goods to qualify as originating. These include the rules of origin for automobiles, which require that, to qualify as originating, a finished vehicle must contain (i) 45 percent regional value content (if calculated using the "net-cost" method used in prior US FTAs such as NAFTA); or (ii) 55 percent regional value content (if calculated using the "build down" method used by Japan in its prior FTAs). For textiles, the TPP uses the

"yarn-forward" rule of origin, pursuant to which an apparel item is considered originating if it is made in a TPP country using yarns or fabrics that were produced in a TPP country. Like most US FTAs, which have included the yarn forward rule, the TPP includes a "short supply" list of certain yarns and fabrics that will be considered originating even if they are sourced from a non-TPP country, because they are not produced by TPP Parties in sufficient quantities to meet production needs.

Regulatory Coherence: The Regulatory Coherence Chapter contains mostly non-binding disciplines that encourage the Parties to implement certain regulatory practices, such as (i) conducting impact assessments of proposed regulatory measures; (ii) providing annual public notice of regulatory measures expected to be issued in the upcoming year, and (iii) periodically reviewing the appropriateness of existing regulations.

Trade Remedies: With respect to anti-dumping (AD) and countervailing duty (CVD) measures, the TPP leaves untouched the rights and obligations of the Parties under the WTO Agreements. The dispute settlement mechanism of the TPP does not apply to AD and CVD measures adopted by the TPP Parties.

Competition: The Competition Chapter provides that each Party shall adopt or maintain national competition laws that proscribe anticompetitive business conduct, and shall take appropriate action with respect to that conduct. The concept of "anticompetitive business conduct" is not defined. Competition laws shall apply to all commercial activities but may provide for exemptions that are transparent and are based on public policy or public interest grounds.

Environment and Labor: The Environment Chapter includes both binding and non-binding commitments relating to environmental protection. The binding obligations prohibit a Party from (i) failing to effectively enforce its environmental laws in a manner affecting trade or investment between the Parties; (ii) waiving or otherwise derogating from its environmental laws in order to encourage trade or investment between the Parties; or (iii) providing certain types of fisheries subsidies that negatively impact overfished stocks. The Chapter includes several related, non-binding commitments (*e.g.*, to "strive to" provide for high levels of environmental protection; to "seek to" prevent overfishing; and to "promote and encourage" conservation and sustainable use of biodiversity.)

The Chapter also includes provisions relating to multilateral environmental agreements (MEAs), including a non-binding provision that affirms each Party's commitment to implement the MEAs to which it is a party. However, the Chapter generally does not make MEAs enforceable through the TPP, as has been suggested by some press reports. The TPP makes only one MEA enforceable for the Parties that have joined it (the *Convention on International Trade in Endangered Species of Wild Flora and Fauna* (CITES), to which all TPP Parties have acceded) by requiring that each Party "shall adopt, maintain, and implement laws, regulations, and any other meaures to fulfil its obligations" under the CITES. However, other MEAs are subject to weaker commitments. For example, a Party must (i) "take measures to control" the production, consumption, and trade of ozone-depleting substances controlled by the *Montreal Protocol*; and (ii) "take measures to prevent" marine pollution of the kind covered by the *International Convention for the Prevention of Pollution from Ships*. These and the CITES commitments are subject to dispute settlement, but in order to establish a violation, the complaining Party must demonstrate that the other Party has failed to meet the committments "in a manner affecting trade or investment between the Parties".

The Labor Chapter includes binding commitments that require a Party to uphold through its domestic laws the following rights as set forth in the International Labour Organization (ILO) Declaration: (i) freedom of association and collective bargaining; (ii) elimination of forced labor; (iii) abolition of child labor; and (iv) elimination of employment discrimination. Other binding obligations include (i) a commitment to "adopt and maintain" statutes and relations governing minimum wages, hours of work, and occupational health and safety (though the TPP does not establish minimum standards in these areas); (ii) a committment not to waive or derogate from these obligations in a manner affecting trade or investment between the Parties; and (iii) a commitment that Parties shall not fail to effectively enforce their labor laws in a manner affecting trade or investment between the Parties.

Although both the Environment and Labor chapters are subject to dispute settlement, the Parties must first exhaust a multi-step consultations process before bringing claims related to either chapter under the TPP's dispute settlement mechanism.

Dispute Settlement: The TPP's dispute settlement procedures are similar to those available under the WTO Dispute Settlement Understanding, and include a consultations phase, a request for establishment of a panel, issuance and adoption of a panel report, and detailed panel procedures. There is however no appeal stage. The TPP also provides detailed new procedures for the selection of panellists. These include several new contingencies designed to prevent a responding Party from obstructing the appointment of panellists and panel chairs, even if the TPP Parties fail to establish a roster of potential panel chairs and panellists as required by Article 28.11 of the Agreement.

Parties remain free to choose either the WTO or the TPP procedures to settle their disputes, but once a forum has been elected, it must be used to the exclusion of other fora. Given the number of new and WTO-plus provisions, as well as the number of parties in the TPP, the TPP dispute settlement provisions could be utilized far more frequently than those of other US FTAs.

Transparency and Anti-Corruption: With respect to transparency, the TPP countries must ensure that all TPP-related laws, regulations, procedures and administrative rulings of general application are publicly available – including in certain cases at the draft stage – to allow public comment. This is in line with general US efforts to ensure that its exporters and investors have easy access to foreign national regulations and measures that could impact their trade and business. With respect to anti-corruption, all Parties commit to criminalize the intentional offering of an undue advantage to a public official (and acceptance thereof) in relation to his or her official duties. Certain bookkeeping and accounting principles are established to prevent corruption. The Parties also agree to ratify the United Nations Convention on Corruption (which Japan and New Zealand have not yet ratified).

Exceptions: The TPP Chapter on exceptions and general provisions directly integrates the exceptions provisions of the relevant WTO Agreements to the respective applicable chapters in the TPP. In other words, GATT Article XX is incorporated with respect to specific applicable chapters, as is GATS Article XIV, thereby incorporating exceptions for measures necessary to protect, *inter alia*, human, animal, or plant life or health, public morals, privacy of individuals, and conservation of exhaustible natural resources. The Agreement also contains broad exceptions for national security.

Comparing the TPP to prior US FTAs and WTO Agreements

In many areas, the TPP incorporates existing WTO rules and replicates provisions contained in prior US FTAs – especially the recent South Korea-United States FTA (KORUS), the US-Colombia FTA, and the US-Panama FTA, all of which entered into force in 2012. However, the TPP builds upon these prior agreements and, in some cases, breaks new ground by addressing subjects that have not yet been covered in trade agreements. We discuss below the key similarities and differences between prior agreements and the TPP.

Electronic Commerce: The TPP takes a similar approach to recent US FTAs, such as KORUS, by requiring non-discriminatory treatment of digital products. In addition, like KORUS, the TPP incorporates and makes permanent for the Parties the WTO's current moratorium against customs duties on electronic transmissions. However, the TPP goes beyond prior agreements by requiring the Parties to allow cross-border transfers of data by electronic means – a policy that was encouraged, but not required, under KORUS – and by prohibiting data localization measures. The TPP's prohibition on measures that require involuntary disclosure of software source code is also a new feature.

Investment: The core provisions of the Investment Chapter (*e.g.*, those relating to national treatment, MFN treatment, minimum standards of treatment, and performance requirements) are generally consistent with those of recent US FTAs such as KORUS. The TPP goes beyond these agreements, however, by (i) explicitly stating that SOEs are subject to the investment obligations when they exercise governmental authority, (ii) prohibiting additional types of performance requirements, such as measures requiring the use of domestic technology; and (iii) clarifying that

government actions or inactions do not violate the minimum standard of treatment obligation merely because they are inconsistent with an investor's expectations (*e.g.*, expectations of future profits).

The TPP's ISDS procedures also differ from those of recent FTAs in some respects. For example, if requested by one of the disputing parties, an ISDS tribunal must share a proposed version of its decision or award with the disputing parties, allow 60 days for the parties to submit written comments on the proposal, and issue the decision or award within 45 days after the comment period. If invoked, these procedures would extend the timeframe for resolution of an ISDS case under the TPP. The TPP also permits, for the first time in an FTA, a Party to deny the benefits of ISDS with respect to claims challenging a tobacco control measure.

Services: The TPP's provisions on trade in services are based on those of the GATS, but differ in ways that will have a profound effect on the foreign investment regimes of TPP Parties and of parties to future regional agreements based on the TPP. First, the TPP treats services as an *investment* discipline. The GATS provisions on supply of services through investment in the export market are subsumed and expanded in the TPP Chapter on Investment, which covers all investments, whether in services or goods. By importing into all trade these obligations derived from the GATS, the TPP marks a major advance on the WTO Agreements.

In addition, the TPP services commitments operate from a negative list, whereas GATS commitments, by contrast, operate from a "positive list," *i.e.*, they apply only to those sectors listed in the WTO Member's services schedule. However, in most cases, the national schedules of the TPP Parties do not represent substantial advances in market access over their commitments under the GATS and other FTAs.

Financial Services: Like most recent US FTAs, the TPP's Financial Services Chapter includes obligations on MFN and national treatment, market access, cross-border trade, and investment. On investment, the TPP expands on prior FTAs by making ISDS available for alleged violations of the commitments on minimum standards of treatment and armed conflict and civil strife; however, ISDS remains unavailable for violations of MFN and national treatment.

The TPP also adds new procedural requirements for ISDS cases in which the responding Party invokes a defense under Article 11.11, which exempts prudential measures from the obligations of the Chapter. In such a scenario, if the respondent and claimant Parties cannot agree on whether the Article 11.11 exception applies, a state-to-state dispute settlement panel will determine whether the exception applies, and the resulting determination will be binding on the ISDS tribunal. Prior FTAs did not refer this issue to state-to-state dispute settlement, and instead required the ISDS tribunal or the FTA's Financial Services Committee to decide whether the exception applied. This change could increase the length of time required to resolve ISDS cases involving financial services.

Technical Barriers to Trade: Similar to KORUS, the TPP goes beyond WTO rules by imposing transparency requirements and requiring the Parties to accord national treatment to one another's conformity assessment bodies. The TPP also includes some KORUS-plus obligations in the area of conformity assessment, such as (i) a commitment that another Party's conformity assessment bodies will not be required to establish a local presence; and (ii) limitations on the reasons for which a Party may reject conformity assessment results. The TPP also breaks new ground with its sector-specific annexes on wine and spirits, ICT products, pharmaceuticals, cosmetics, medical devices, prepackaged foods, and organic produts. These annexes encourage, and in some areas require, that the Parties adopt common approaches in their technical reguations relating to these products.

Sanitary and Phytosanitary (SPS) Measures: Prior US FTAs such as KORUS have included brief SPS chapters that largely reaffirmed the Parties' current WTO commitments. However, the TPP provisions on risk analysis, transparency, equivalency assessments, and assessments of regional conditions expand on the relevant provisions of the SPS Agreement, namely by requiring importing Parties to disclose the scientific basis for their SPS-related decisions and measures, consider comments from exporting Parties, and make SPS-related decisions and approvals in a timely manner. These principles also are reflected in the new TPP provisions on audits, certification requirements, and import checks, which are not addressed directly by the SPS Agreement.

Intellectual Property: The TPP incorporates many of the TRIPs-plus obligations that were included in recent US FTAs such as KORUS. These include committments to provide (i) a ten-year term of protection for trademarks (vs. seven years in TRIPS); (ii) a copyright term lasting 70 years after the author's death or the date of first publication (vs. 50 years under TRIPS); and (iii) five years of data protection for pharmaceutical products and ten years for agricultural chemicals (vs. no minimum duration in TRIPs). Other TRIPs-plus obligations common to the TPP and the KORUS are the requirements to provide patent term adjustments, a one-year grace period for self-defeating patent disclosures, penalties for circumventing technological prevention measures and tampering with rights management information, and criminal penalties for importation and exportation of infringing goods.

The TPP also includes new TRIPs-plus provisions. In the area of enforcement, these include (i) a commitment to provide criminal penalties for trade secret theft; (ii) a clarification that civil and criminal enforcement procedures and remedies apply to IPR violations that occur in the digital environment; (iii) a clarification that such remedies may be applied to SOEs, subject to certain TRIPs agreement disciplines; and (iv) a requirement to maintain appropriate remedies against internet domain names that are confusingly similar to a trademark. On GIs, the TPP contains detailed new guidelines for determining whether a proposed or existing GI should be rejected or cancelled because it is similar to a "common name" for the relevant good. The TPP is also the first FTA to include data exclusivity requirements that are specific to biologic medicines.

SOEs: Prior agreements such as KORUS and the US-Singapore FTA included limited disciplines on SOEs, such as transparency requirements, obligations to accord non-discriminatory treatment in the sale of goods or services to covered investments, and, in the case of the Singapore FTA, obligations to act in accordance with commercial considerations in the purchase or sale of goods or services. However, the TPP's comprehensive SOE disciplines go far beyond these agreements and WTO rules, including by (i) requiring that courts and administrative bodies have jurisdiction over commercial claims against SOEs; and (ii) prohibiting the provision of non-commercial assistance to SOEs. Like the other disciplines in the SOE chapter, the commitment that a Party will not – and will ensure that its SOEs do not – cause "adverse effects" to the interests of another Party or cause "material injury" to another Party's domestic industry through the provision of non-commercial assistance is subject to dispute settlement. However, the process for settling disputes that arise under this commitment includes additional "information-gathering" procedures. For example, a disputing Party may provide written questions to another disputing Party at the outset of such a dispute, and is entitled to receive responses (which must be shared with the panel) within 30 days. The panel is instructed to draw adverse inferences from a Party's failure to cooperate with this information-gathering process, and may also make its own requests for information from a disputing Party.

Telecommunications: Similar to KORUS and other recent FTAs, the TPP incorporates core obligations of the GATS Annex on Telecommunications, which ensure that service suppliers are accorded access to public telecommunications services on reasonable and non-discriminatory terms. The TPP also includes WTO-plus provisions that are similar to KORUS, such as (i) requirements to provide access to telephone numbers and number portability; (ii) requirements that "major suppliers" accord non-discriminatory access to interconnection, leased circuits, physical co-location of equipment, poles, and submarine landing cables; and (iii) requirements to allocate scare resources, such as frequencies, on a non-discriminatory basis. The TPP makes a minor advance on prior agreements by requiring any Party that regulates international mobile roaming rates to ensure that a supplier of another Party has access to the regulated rates.

Regulatory Coherence: The TPP is the first FTA to include a chapter on regulatory coherence; however, most of the provisions in the Chapter are hortatory. The inclusion of the Chapter could presage future efforts by the United States to include similar provisions on a binding basis in subsequent agreements.

Government Procurement: While the FTAs with Colombia, Korea, Panama and Peru already include rules for a tender in procurement, TPP extends these provisions to all TPP countries. Specifically, TPP establishes obligations for seven countries (Australia, Brunei, Chile, Malaysia, Mexico, Peru and Vietnam) that are not parties to the WTO Government Procurement Agreement.

Trade Remedies: The Trade Remedies chapter is identical in most respects to the corresponding chapters in the KORUS, US-Colombia, and US-Peru FTAs. However, the TPP contains new provisions allowing an industry in a TPP country to request that transitional safeguard measures be imposed against one, some, or all of the other TPP countries where imports are believed to be a cause or threat of serious injury. The TPP also contains new disciplines relating to notification requirements for safeguard investigations and the implementation of safeguard measures.

Dispute Settlement: Similar to the KORUS, the TPP's Dispute Settlement Chapter applies to a broad range of issues covered by the Agreement, including national treatment and market access, rule of origin, textiles, customs administration, technical barriers to trade, services, telecommunications, e-commerce, government procurement, SOEs, competition policy, intellectual property, labor, and environment. The TPP, however, extends coverage of the dispute settlement mechanism to obligations in the SPS chapter and the transparency and anti-corruption chapter, which were not subject to dispute settlement in the KORUS.

The TPP's dispute settlement procedures are based on those of the WTO, but differ from WTO procedures in several important respects. For example, unlike the WTO, the TPP dispute settlement procedures do not include an appellate process. As a result, the time required to settle disputes under TPP rules should be shorter (350 days from the initial request for consultations to the issuance of a final panel report, versus 16 to 20 months at the WTO). With respect to transparency, the TPP differs from the WTO by (i) requiring that panel hearings are open to the public unless the disputing Parties agree otherwise; (ii) requiring panels to consider *amicus curiae* submissions by outside groups; and (iii) requiring Parties to release their written submissions to the public. In addition, regarding retaliation, the TPP unlike the WTO specifically allows for monetary compensation as a remedy. The TPP also seeks to improve on prior FTAs such as NAFTA by providing a series of contingencies to prevent a responding Party from blocking the appointment of panellists.

Labor: The TPP Labor Chapter includes the same core obligations as the four most recently-concluded US FTAs (KORUS, US-Colombia, US-Panama, and US-Peru), which require the Parties to adopt the five principles of the ILO Declaration. The TPP includes some additional obligations, such as (i) a commitment to "discourage" trade in goods produced by forced labor; (ii) a commitment to maintain laws and working conditions with respect to minimum wages and hours of work; and (iii) commitments not to weaken labor protections in export processing zones.

Environment: The core provisions of the TPP Environment Chapter are broadly similar to those of the four most recent US FTAs, which require the Parties to effectively enforce their environmental laws and take measures similar to those required by certain multilateral environmental agreements (MEAs). The TPP includes some new environmental obligations, such as a prohibition on certain fisheries subsidies and a commitment to impose sanctions, penalties, or other measures to deter the illegal trade and transshipment of wildlife.

Broader Context and Implications

The completion of the TPP comes after more than a decade of unsuccessful efforts by WTO Members to reach agreement on the main issues of the Doha Round. Longstanding disagreements, particularly between developed and advanced developing countries, on the core Doha issues resulted in the Round effectively being brought to an end at the WTO's 10th Ministerial Conference in Nairobi in December 2015. The Doha impasse, combined with developments such as the rapid growth of digital trade and electronic commerce, led major WTO Members such as the United States, Japan, and the EU to pursue further liberalization outside of the WTO, primarily through so-called "mega-regional" trade agreements such as the TPP which cover a large share of global trade and include comprehensive disciplines in new areas not yet covered by WTO rules.

As the first mega-regional agreement to be successfully negotiated, the TPP's completion is a critical development in the evolution of international trade rules, particularly because the United States intends for the Agreement to serve as a model for future regional, plurilateral, or multilateral agreements. In addition, the TPP's dispute settlement system is likely to be used more often than that of prior FTAs, given the Agreement's many WTO-plus provisions. For these reasons, it is likely that the TPP will influence future trade agreements – including mega-regional initiatives such as

the Transatlantic Trade and Investment Partnership (TTIP) and the Regional Comprehensive Economic Partnership (RCEP) – as well as the WTO's negotiating arm and dispute settlement system.

Implications for Future FTAs

Many of the TPP's new provisions will likely be replicated to some extent in future FTAs in which the United States is involved, including the TTIP and the Trade in Services Agreement (TiSA), which are currently under negotiation. For example, US Trade Representative Michael Froman has stated that certain TPP issues such as SOEs and digital trade are likely to be addressed similarly in the TTIP and the TiSA. Certain structural elements of the TPP, such as the scheduling of services commitments based on "negative lists", will also likely be mirrored in future FTAs involving the United States. Furthermore, the TPP will likely render obsolete the US practice of negotiating individual FTAs with countries in the Asia-Pacific region. Countries in the region will be expected to join the TPP rather than negotiate bilateral FTAs with the United States.

The completion of the TPP might also inject momentum into other trade initiatives in the Asia-Pacific region, such as the RCEP and China-Japan-Korea (CJK) FTA negotiations. Indeed, following the completion of the TPP negotiations, RCEP participants such as India have expressed concern about possible trade and investment diversion to TPP Parties such as Vietnam and Malaysia, and have sought to accelerate the RCEP negotiations in response. The TPP might also influence the substance of these other agreements, as certain parties to the RCEP, for example, may wish to adopt more ambitious rules and commitments in order to match the scope and level of ambition of the TPP.

Implications for WTO negotiations and dispute settlement

The completion of the TPP also will impact negotiations at the WTO. Since the Nairobi Ministerial, the United States has argued in favor of pursuing new plurilateral negotiations in the WTO, and US trade officials have stated that the United States intends to use certain TPP provisions as the basis for potential plurilateral negotiations on issues such as electronic commerce, SOEs, technical barriers to trade, and sanitary and phytosanitary measures. Given that other major Members including the EU, China, Brazil, and Russia have expressed openness to exploring new issues in the plurilateral format, there is a strong chance that a subset of WTO Members will launch new plurilateral negotiations in areas covered by the TPP. Other TPP Parties would likely join the United States in insisting that TPP rules be used as the starting point for any such negotiations.

In addition, given that the TPP has more Parties and WTO-plus provisions than most FTAs, its dispute settlement system is likely to be used more frequently than those of other FTAs, which could cause utilization of the WTO's dispute settlement system to decline. Longstanding concerns over persistent delays at the DSB might also cause TPP parties to favor the TPP's dispute settlement system as a more expeditious means of resolving disputes. Such a trend has the potential to marginalize the WTO by undermining its centrality as a venue for dispute settlement, particularly if additional WTO members eventually join the TPP. A shift towards the TPP's dispute settlement system could also complicate trade governance by giving rise to conflicting interpretations of key terms and principles included in both the TPP and the WTO Agreements. The TPP Parties likely anticipated and sought to minimize such conflicts through Article 28.12.3, which provides that, with respect to any obligation of the WTO Agreement that has been incorporated into the TPP, the TPP dispute settlement panel must consider relevant interpretations in reports of WTO panels and the WTO Appellate Body.

Next Steps and Implementation

With the TPP now signed, the Parties must ratify the Agreement pursuant to their own domestic legal procedures before it can enter into force. Article 30.5 of the Agreement ensures that its entry into force cannot occur until six Parties representing at least 85 percent of the 2013 GDP of the twelve original Parties have completed their domestic procedures. These limitations ensure that the TPP will not enter into force without both the United States' and Japan's formal ratification. The Japanese Diet is presently debating the TPP and might vote on the Agreement in the coming months. The Vietnamese government also plans to submit the TPP to the National Assembly for ratification during its July 2016 session, and Brunei and Malaysia are aiming to ratify the TPP in during the spring of 2017.

In the United States, President Obama intends to submit TPP-implementing legislation to Congress in the coming months so that Congress will be able to vote on the Agreement in 2016. However, there is a strong chance that a required vote in the US Congress will not occur until 2017 at the earliest, given political issues in the United States and legal timelines under the US Trade Promotion Authority (TPA) Law.

Election-year obstacles

The congressional Republican leadership has stated that it does not intend to hold a vote on the TPP before the November 8 presidential and congressional elections. This timing decision is not unusual, as Congress historically has been reluctant to consider major, controversial initiatives such as trade agreements during election years. Moreover, with four of the five remaining Presidential candidates opposed to the TPP, securing enough votes to approve the Agreement prior to the election would be extremely difficult – particularly given that many potential TPP supporters in Congress are engaged in competitive re-election campaigns. The Republican leadership in the House and the Senate is unlikely to put its existing majorities at risk by requiring vulnerable lawmakers to cast a controversial vote on the TPP just months prior to the election. Indeed, Senate Majority Leader Mitch McConnell (R-KY) has acknowledged this difficulty, stating that "with both the Democratic candidates for president opposed to the deal and a number of presidential candidates in our party opposed to the deal, it is my advice that we not pursue [TPP legislation], certainly before the election."

In addition to electoral concerns, substantive objections raised by influential Republican lawmakers could also delay the timeframe for a potential TPP vote. Congressional Republicans have expressed opposition in particular to the following aspects of the TPP: (i) the IP chapter provides a shorter period of data protection for biologic medicines than the twelve years provided for under US law; (ii) financial services are not covered by the electronic commerce chapter's prohibition on data localization measures; and (iii) Parties are allowed to deny the benefits of ISDS with respect to claims challenging tobacco control measures. Many leading Republican lawmakers, including Senate Finance Committee Chairman Orrin Hatch (R-UT), have demanded that the Obama Administration secure additional commitments and clarifications from the TPP Parties on the data protection and financial services issues before Congress will consider the TPP. Although the Obama Administration has expressed openness to addressing these concerns through side agreements or implementation plans with certain TPP parties, doing so could take several months, leaving little time, if any, for Congress to debate and vote on the TPP before the elections.

TPA timelines and possible "lame duck" consideration

It is also increasingly unlikely that the TPP will be considered between the presidential elections and the start of 2017. If President Obama can build sufficient support for the TPP by the fall of 2016, Congress could vote on the agreement during the "lame duck" session between the November elections and the start of 2017, before the newly-elected Congress and President take office. To date, however, Senator McConnell and other Republican leaders have downplayed this possibility, stating that it might be unfair to vote on a contentious matter such as the TPP after constituents have elected new representatives to serve them in Congress. Furthermore, it is likely that the new US President-elect, regardless of his or her views on TPP, will want to have a say on the deal before Congress votes for political or substantive reasons. Finally, there is the actual timing of any such vote: under the TPA law, once the President submits the TPP implementing legislation Congress will have 90 in-session days to consider the legislation before a final vote is required. Given that Congress is scheduled to hold fewer than 60 in-session days during the remainder of 2016, the Republican leadership would need to hold committee and floor votes on the TPP much faster than is required under the TPA timelines in order to approve the Agreement during the lame duck session. Such an approach would be controversial, particularly given the significance of the TPP.

How the next President and Congress will handle the TPP if it is not ratified in 2016 is highly uncertain. In a best-case scenario, under a supportive President and Congress, the Agreement could be ratified and signed into law in 2017. However, there is a strong chance that the new President will delay the TPP in order to renegotiate certain provisions or simply to distance the deal from President Obama, who did much the same thing with the Colombia, Panama and Korea agreements negotiated by President George W. Bush. As a result, it could be many years before the TPP is signed into law in the United States.

Furthermore, once the TPP becomes law, it is uncertain when it will actually be implemented by the United States. The President will not be legally bound to issue a proclamation implementing the TPP by any specific date. Rather, the timeline for US implementation of the TPP will be subject to the discretion of the executive branch. In the past, Presidential proclamations to implement FTAs have not been issued until USTR has assured the President that partner countries have made the necessary legislative and regulatory changes to meet their obligations under the FTA. This will not occur until a "critical mass" of at least six Parties representing at least 85 percent of the 2013 GDP of the twelve original TPP Parties complete their domestic procedures, meaning that the United States, Japan, and at least four other Parties must ratify the Agreement before it can enter into force. Thus, the actual realization of the TPP's market access and other benefits could occur long after Congressional approval of the Agreement's implementing legislation. Given these issues, the recent finalization and signing of the TPP are only the first small steps in the Agreement's increasingly-long journey to becoming a US trade reality.

Petitions and Investigations Highlights

US Department of Commerce Issues Affirmative Preliminary Determination in CVD Investigation of Iron Mechanical Transfer Drive Components from China

On April 4, 2016, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the countervailing duty (CVD) investigation concerning imports of certain iron mechanical transfer drive components from China. DOC initiated the investigation in November 2015 in response to a petition filed by TB Woods, Inc.

In its investigation, DOC assigned preliminary subsidy rates of 2.68 and 33.94 percent for mandatory respondents NOK Vibration Control China Co. Ltd and Powermach Import and Export Co. Ltd., respectively. In addition, thirty companies received a preliminary subsidy rate of 166.7 percent based on adverse facts available. DOC assigned all other producers/exporters in China a preliminary subsidy rate of15.51 percent.

The merchandise covered by this investigation is currently classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings 8483.30.8090, 8483.50.6000, 8483.50.9040, 8483.50.9080, 8483.90.3000, and 8483.90.8080. Covered merchandise may also enter under subheadings 7325.10.0080, 7325.99.1000, 7326.19.0010, 7326.19.0080, 8431.31.0040, 8431.31.0060, 8431.39.0010, 8431.39.0050, 8431.39.0070, 8431.39.0080, and 8483.50.4000.

DOC has aligned the CVD investigation with the concurrent antidumping duty investigations, and is scheduled to announce its final determinations on or around August 22, 2016, unless the statutory deadline is extended. If DOC makes an affirmative final determination, and the US International Trade Commission makes an affirmative final determination that imports of the subject merchandise materially injure or threaten material injury to the domestic industry, DOC will issue a CVD order.

US Department of Commerce Issues Affirmative Preliminary Determination in CVD Investigation of Circular Welded Steel Pipe from Pakistan

On April 4, 2016, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the countervailing duty (CVD) investigation concerning imports of circular welded carbon-quality steel pipe from Pakistan.[1] DOC initiated the investigation in November 2015 in response to a petition filed by Bull Moose Tube Company, EXLTUBE, Wheatland Tube, and Western Tube & Conduit.

In its investigation, DOC preliminarily determined that imports of the subject merchandise from Pakistan received countervailable subsidies of 64.81 percent. The subject merchandise is classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 7306.19.1010, 7306.19.1050, 7306.19.5110, 7306.19.5150, 7306.30.1000, 7306.30.5015, 7306.30.5020, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085, 7306.30.5090, 7306.50.1000, 7306.50.5030, 7306.50.5050, and 7306.50.5070.

[1] Click **here** for the DOC fact sheet on the investigation.

DOC is scheduled to announce its final determination on August 16, 2016, unless the statutory deadline is extended. If DOC makes an affirmative final determination, and the US International Trade Commission (ITC) makes an affirmative final determination that imports of the subject merchandise materially injure or threaten material injury to the domestic industry, DOC will issue a CVD order.

United Steelworkers Union Files Safeguard Petition on Primary Unwrought Aluminum

On April 18, 2016, the United Steelworkers Union (USW) filed a safeguard petition on imports of primary unwrought aluminum. The petition, filed under Section 201 of the *Trade Act of 1974*, seeks (i) the imposition of tariffs ranging from 35 to 50 percent on all US imports of primary unwrought aluminum for a period of four years; and (ii) bilateral and multilateral negotiations by the US government to reduce global excess capacity in the primary aluminum sector. The resulting investigation by the US International Trade Commission (ITC) will be the first safeguard investigation initiated under Section 201 since the ITC's investigation of steel products in 2001. Under the timelines in the Section 201 statute, the President's final determination in the aluminum investigation will likely not occur until early 2017, and will be required before the end of March 2017.

Scope of the petition

The USW petition covers primary unwrought aluminum, whether alloyed or unalloyed, regardless of the alloying element or alloy source, and regardless of shape. The petition does not cover imports of secondary or recycled unwrought aluminum (which are created by melting scrap), but does cover imports of primary unwrought aluminum that may have had some amount of scrap added in the liquid state to create an alloy. Primary unwrought aluminum is classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 7601.20.90.60, 7601.20.90.75, 7601.10.30.00, 7601.10.60.00, 7601.20.30.00, 7601.20.60.00, 7601.20.90.30, 7601.20.90.45, and 7601.20.90.90. Imports of the merchandise classified under these tariff headings are currently subject to import duties ranging from 0 to 2.6 percent.

Main differences from AD/CVD investigations

Unlike antidumping (AD) and countervailing duty (CVD) investigations, which target imports of the covered merchandise from select countries, safeguard investigations such as that requested by the USW are global, targeting imports of the covered merchandise from all countries. The USW petition identifies Canada, the United Arab Emirates, Russia, Qatar, Argentina, Saudi Arabia, Bahrain, Venezuela, India, and Mexico, respectively, as the top ten exporters of primary unwrought aluminum to the United States, accounting for more than 95 percent of US imports. Pursuant to the *NAFTA Implementation Act*, the ITC may recommend that the President exclude imports from a NAFTA country from a safeguard measure, provided that the imports do not account for a substantial share of total imports or do not contribute significantly to the injury of the domestic industry. The USW petition argues that imports from Canada should not be eligible for this exclusion; however, the petition does not make a similar argument for Mexico.

Safeguard investigations also differ from AD/CVD investigations in that (i) they do not require findings of dumping or subsidization; and (ii) they require a finding of "serious injury" to the domestic industry (as opposed to the lower "material injury" standard in AD/CVD cases). The USW petition alleges that increasing low-priced imports are the cause of the domestic industry's "serious injury", and claims that such imports are the result of a global imbalance in supply and demand driven principally by "large and growing overcapacity in China". Given that US steel producers recently have made similar arguments with respect to the global steel market, the ITC's investigation of aluminum could serve as a test case for future US safeguard petitions against steel products.

Next steps

The USW petition alleges that critical circumstances exist, and therefore requests the imposition of a provisional 50 percent tariff during the ITC's investigation and the subsequent period of review by the President. Under the Section 201 statute, the ITC will have 60 days (*i.e.*, until June 17) to determine whether critical circumstances exist and whether provisional relief is appropriate. If the ITC's determination with respect to critical circumstances is affirmative, the President will then have 30 days (*i.e.*, until July 18) to determine whether provisional relief is warranted.

The ITC must make its injury determination within 180 days of receiving the petition (*i.e.*, by October 14) unless it chooses to postpone the statutory deadline by 30 days to November 14. In any event, the ITC will have until December 14 to submit a report to the President including the determination and, if the determination is affirmative, the recommended form of relief. The relief requested by the petitioner includes a 50 percent tariff in the first year after the final determination, followed by 45 percent in the second year, 40 percent in the third year, and 35 percent in the fourth and final year. However, the petition proposes a system for capping the tariff on an entry-by-entry basis if market prices return to "sustainable" levels during the four-year period.

If the ITC makes an affirmative injury determination, the President will have 60 days after receiving the ITC's report (or 50 days, if provisional relief was granted) to determine whether to take the actions recommended by the ITC, or whether to take a different action. Under these timelines, the President's decision would be required during the first half of February 2017, unless the President requests supplemental information from the ITC. Such a request could delay the President's decision until late March 2017.

A copy of the Section 201 petition is attached for reference.

US Department of Commerce Initiates Antidumping Investigation of Ferrovanadium from Korea

On April 19, 2016, the US Department of Commerce announced the initiation of an antidumping duty (AD) investigation concerning imports of ferrovanadium from Korea. DOC initiated the investigation in response to a petition filed by the Vanadium Producers and Reclaimers Association and its members AMG Vanadium LLC, Bear Metallurgical Company, Gulf Chemical & Metallurgical Corporation, and Evraz Stratcor, Inc. The dumping margins alleged in the petition range from 20.25 to 54.69 percent.

The merchandise subject to the investigation is all ferrovanadium regardless of grade (*i.e.*, percentage of contained vanadium), chemistry, form, shape, or size. Ferrovanadium is an alloy of iron and vanadium. Ferrovanadium is classified under the Harmonized Tariff Schedule of the United States (HTSUS) under subheading 7202.92.0000.

The US International Trade Commission (ITC) is scheduled to make its preliminary injury determination on or before May 12, 2016. If the ITC determines that there is a reasonable indication that imports of ferrovanadium from Korea materially injure or threaten material injury to the domestic industry, the AD investigation will continue. DOC will then be scheduled to make its preliminary AD determination in September 2016, unless the statutory deadline is extended.

A copy of the DOC fact sheet on the investigation is attached for reference.

US Department of Commerce Initiates AD/CVD Investigations of HEDP Acid from China

On April 21, 2016, the US Department of Commerce (DOC) announced the initiation of antidumping (AD) and countervailing duty (CVD) investigations concerning imports of 1-Hydroxyethylidene-1, 1-Diphosphonic Acid (HEDP) from China.[2] DOC initiated the investigations in response to petitions filed by Compass Chemical International, LLC, a producer of the domestic like product. The dumping margin alleged in the petition is 96 percent.

The merchandise subject to the investigations includes all grades of aqueous acidic (nonneutralized) concentrations of 1-hydroxyethylidene-1, 1-diphosphonic acid (HEDP), also referred to as etidronic acid,

[2] Click **here** for the DOC fact sheet on the investigations.

hydroxyethylidenendiphosphonic acid, hydroxyethanediphosphonic acid, and acetodiphosphonic acid. HEDP is commonly used in industrial water treatment (such as cooling and boiler water treatment), in swimming pool applications (for stain and scale control), in industrial and institutional detergents and cleansers, and in personal care products. HEDP is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 2931.90.9043, and may also enter under subheadings 2811.19.6090 and 2931.90.9041.

The US International Trade Commission (ITC) is scheduled to make its preliminary injury determination on or before May 16, 2016. If the ITC determines that there is a reasonable indication that imports of HEDP from China materially injure or threaten material injury to the domestic industry, the investigations will continue. DOC will then be scheduled to make its preliminary CVD determination in June 2016 and its preliminary AD determination in September 2016, unless the statutory deadlines are extended.

According to DOC, imports of HEDP from China were valued at USD 290 million in 2015.

United Steelworkers Union Suspends Safeguard Petition on Primary Unwrought Aluminum

On April 22, 2016, the United Steelworkers Union (USW) suspended its recent safeguard petition on primary unwrought aluminum. The USW requested that the petition be withdrawn from consideration by the US International Trade Commission (ITC), and stated in a subsequent press release that "many in the industry refused to support the case[.]" The press release claimed that "this opposition could have resulted in no relief for the remaining domestic industry" and argued that "many parties are placing short-term interests over the long-term viability of the sector."

Press reports indicate that US aluminum producers, as well as Canadian producers and the Canadian government, had expressed opposition to the USW petition. Although the petition argued that imports from Canada (the largest exporter of primary aluminum to the United States) contributed importantly to the "serious injury" of the domestic industry, the petition's central claim was that large and growing overcapacity in China is the principal cause of the declining global prices that have allegedly resulted in serious injury. Following its decision to suspend the petition, the USW has reportedly stated that the US and Canadian governments should jointly address the overcapacity issue with China.

US Steel Corporation Files Section 337 Complaint on Chinese Carbon and Alloy Steel Products

On April 26, 2016, the United States Steel Corporation ("US Steel") filed a complaint under Section 337 of the Tariff Act of 1930 , 19 U.S.C. § 1337, seeking the exclusion of Chinese carbon and alloy steel products from entry into the United States. The complaint alleges that more than forty Chinese companies have exported steel products into the United States using the following "unfair" practices, in violation of Section 337: (i) a conspiracy to fix prices and control output and export volumes; (ii) the misappropriation and use of US Steel's trade secrets; and (iii) the false designation of origin or manufacturer for the purpose of evading duties.

The complaint is unusual in that it seeks the exclusion of all Chinese carbon and alloy steel products from the US market, regardless of their source, rather than targeting a narrower subset of products and companies. Moreover, while most complaints arising under Section 337 involve alleged infringement of intellectual property rights (IPR), the US steel complaint alleges antitrust violations and duty evasion – issues not typically of focus in the US International Trade Commission's (ITC) investigations under Section 337. Given the breadth and unique aspects of the complaint, an investigation resulting in a determination of violation of Section 337 by the ITC could have wide-ranging implications, and may be challenged in US courts.

Background

Section 337 makes it unlawful to (i) import articles that infringe on US intellectual property rights; or (ii) engage in "unfair methods of competition and unfair acts" in the importation of articles, the threat or effect of which is to (a) destroy, substantially injure, or prevent the establishment of an industry in the United States or (b) restrain or monopolize trade and commerce in the United States. Complaints arising under Section 337 are investigated by the

ITC through a process that involves an initial determination by an Administrative Law Judge and a final determination by the Commission.

If the ITC finds a violation of Section 337, three potential remedies are available – general exclusion orders, limited exclusion orders, and cease and desist orders. A general exclusion order directs US Customs and Border Protection (CBP) to exclude all of the infringing or unfairly traded articles from entry into the United States, regardless of their source, whereas a limited exclusion order directs CBP to exclude such articles only when they originate from a company that was a respondent in the Commission investigation. A cease and desist order directs a respondent in the investigation to cease certain actions, such as selling infringing or unfairly traded articles. Remedial actions proposed by the ITC are subject to review by the President, who may disapprove them for policy reasons, but such disapprovals are rare.

Details of the US Steel complaint

The complaint proposes more than forty Chinese steel producers and distributors –including many of the largest producers in China – as respondents to the investigation. The complaint alleges that the proposed respondents have engaged in unfair trade practices "across their entire range of carbon and alloy steel products", and therefore seeks the inclusion of all Chinese carbon and alloy steel products within the scope of the complaint.

US Steel asserts the following causes of action against the proposed respondents: (i) an alleged conspiracy to control production, output, and export volumes in order to injure US competitors (in violation of Section 1 of the *Sherman Act*); (ii) misappropriation and use of US Steel's trade secrets, including those relating to the manufacture of Advanced High-Strength Steel (AHSS) used by the automotive industry; and (iii) circumvention of US antidumping and countervailing duty orders against Chinese steel products through actions such as transshipment and submission of false documents to CBP (in violation of the *Lanham Act*).

The complaint requests relief in the form of a permanent general exclusion order prohibiting the entry into the United States of the allegedly unfairly traded Chinese steel products, regardless of their source. Instead of a limited exclusion order, which would only apply to steel products originating from the proposed respondents, US Steel argues that a general exclusion order is necessary because (i) Chinese steel manufacturers allegedly evade US duties, and therefore would likely evade a limited exclusion order; (ii) the alleged coordination of prices and output decisions is imposed on the entire Chinese steel industry; and (iii) US Steel's trade secrets were allegedly stolen for the benefit of the entire Chinese steel industry. The complaint also requests permanent cease and desist orders prohibiting the proposed respondents from conducting various activities in the United States such as importing, selling, marketing, or distributing the allegedly unfairly traded Chinese steel products.

Implications

Given the broad range of issues and products covered by the complaint, the ITC's findings in the resulting investigation could have a substantial impact on US-China trade relations, and might also encourage similar complaints from other US industries. However, an affirmative finding is far from certain, and any remedy proposed by the ITC following such a finding would be subject to Presidential review and thus could be reversed. Indeed, the last time a 337 complaint involving steel products alleged an antitrust violation based on pricing behavior, then-President Jimmy Carter issued a presidential determination disallowing the ITC's proposed remedy (a cease and desist order), citing national interest reasons and the need to avoid duplication and conflicts with trade remedy proceedings. The next President might take similar actions, particularly given that many of the products covered by the US Steel complaint are covered by existing AD/CVD orders and investigations against Chinese steel products. Moreover, if the ITC were to find a violation in this case, the resulting determination would likely be appealed to the US Court of Appeals for the Federal Circuit. An exclusion order issued by the ITC in this case also would likely be challenged by China at the WTO as a potential violation of GATT Article XI:1.

A copy of the complaint is attached for reference.

Multilateral Policy

WTO Appellate Body Issues Report in Panama-Argentina Dispute Over Argentine "Tax Transparency" Regulations

The WTO Appellate Body has dismissed claims by Panama against Argentina's "tax transparency" regulations. The Appellate Body reversed an earlier ruling by a WTO Panel that these measures violated Argentina's obligations under the General Agreement on Trade in Services (GATS).

This much-anticipated decision was expected to provide guidance on whether, and to what extent, WTO Members may take measures to address tax transparency issues. International attention to this appeal was heighted by the events of recent weeks, including the "Panama Papers". However, the Appellate Body rendered an extremely narrow decision that sheds relatively little light on the substantive issues in dispute.

Argentina argued, among other things, that its regulations were "defensive tax measures" that were designed to "protect Argentina's tax base by preventing tax evasion, tax avoidance, and fraud". Argentina's asserted that its measures "serve to prevent concealment and laundering of money of criminal origin" and were meant to "protect investors and the soundness of the Argentine financial system". Argentina's law distinguished between "countries cooperating for tax transparency purposes" and "countries not cooperating for tax transparency purposes". It adopted four separate tax measures, as well as measures relating to access to the reinsurance sector, the capital market, and the foreign exchange market. It also imposed requirements with respect to the registration of branches of foreign companies.

The September 2015 Panel decision found, among other things, that the Argentine measures violated the MFN obligation of GATS Article II because they did "not accord, immediately and unconditionally, to services and service suppliers of non-cooperative countries treatment no less favourable than that which they accord to like services and service suppliers of cooperative countries". The Appellate Body overturned that ruling on the grounds that the Panel had used an erroneous "likeness" test. But it did not go on to determine for itself whether the services at issue were "like". Indeed, having reversed the Panel on this threshold issue (and the consequent substantive findings that flowed from it), the Appellate Body took pains to emphasize that "we have taken no view on whether the services and service suppliers of cooperative countries are 'like' the services and service suppliers of non-cooperative countries, or 'like' Argentine services and service suppliers".

Following the Appellate Body's ruling it thus remains unclear whether WTO Members may take measures against countries that are considered to be "not cooperating for tax transparency purposes". This presumably will have to be resolved in a future dispute, perhaps with other litigating parties.

Another notable feature of this decision is that this is the first case since the advent of the WTO to interpret the so-called "prudential carve-out". This exception – set out in the GATS Annex on Financial Services – provides in part that "[n]otwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system".

The scope of the prudential carve-out is important, and has generally been interpreted broadly by national regulators, particularly during and after the 2008 financial crisis. In the current dispute, the United States as a third party argued that "the prudential exception preserves the broad discretion of

national authorities to protect the financial system, and includes measures directed at individual financial institutions or cross-border financial services suppliers and measures to promote systemic stability". The United States also argued that "the term 'prudential measures' includes 'precautionary measures'".

The Appellate Body found that the prudential carve-out could in principle be invoked "to justify inconsistencies with all of a Member's obligations under the GATS". However, a more critical issue – the meaning of the term "prudential reasons" – was not appealed. This, too, will need to await a future dispute.

Background

To be designated as "cooperative", a country had either (i) to sign with Argentina an agreement on the exchange of tax information, or a double taxation treaty "with a broad information exchange clause, provided that there is an effective exchange of information"; or (ii) initiate with Argentina the negotiations necessary for concluding such an agreement or convention (Panama was "for many years" classified as a "non-cooperative country".) After the Panel was established in this dispute, Argentina added Panama to the list of "cooperative" countries, even though, as the Appellate Body noted, "it did not have in place a double taxation convention or an information exchange agreement with Argentina, and was not negotiating such a convention or agreement with Argentina".

Threshold issue: Panel's "likeness analysis" considered flawed

Argentina appealed the Panel's findings that the services and service suppliers at issue are "like" under GATS Article II and Article XVII. This was an important threshold issue in the dispute.

GATS Article II set out the MFN obligation. It provides in part that "each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country". GATS Article XVII, which provides for national treatment, states that in sectors for which services commitments have been scheduled, "each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers".

The Appellate Body found that the Panel in this dispute erred in its "likeness" analysis. The Appellate Body began by noting that "the concept of 'likeness' of services and service suppliers under Articles II:1 and XVII:1 of the GATS is concerned with the competitive relationship of services and service suppliers". It added that this approach was "consonant with the Appellate Body's understanding of 'likeness' in the ambit of trade in goods". The Appellate Body stressed that "the fundamental purpose of the comparison" was "to assess whether and to what extent the services and service suppliers at issue are in a competitive relationship". It noted that "[t]he existence of a competitive relationship is a precondition for the subsequent analysis under the requirement of 'treatment no less favourable' of whether the conditions of competition have been modified".

The Appellate Body then examined the so-called "presumption of likeness". It found that "where a measure provides for a distinction based exclusively on origin, there will or can be services and service suppliers that are the same in all respects except for origin and, accordingly, 'likeness' can be presumed[.]" Thus, "if a complainant succeeds in making a *prima facie* case that a measure draws a distinction between services and service suppliers based exclusively on origin, and this is not rebutted by the respondent, the services and service suppliers at issue may be presumed to be 'like', and a panel may proceed with the analysis of less favourable treatment without the need to assess the competitive relationship of the services and service suppliers at issue based on the relevant criteria as adapted to trade in services".

Turning to the facts of the present dispute, the Appellate Body found that the Panel did not make a finding that the difference in treatment was based "exclusively" on origin. The Appellate Body pointed to statements by the Panel that "the classification of a country as cooperative or non-cooperative is not based on 'origin *per se*', but on 'the regulatory framework inextricably linked to such origin'". This, according to the Appellate Body, was an error of law.

The Appellate Body therefore reversed the Panel's finding that the services and service suppliers of cooperative countries were "like" the services and service suppliers of non-cooperative countries. It similarly overturned the Panel's findings that Argentina's eight measures violated the MFN obligation of GATS Article II, and that certain of the measures were not inconsistent with GATS Article XVII.

Although the Appellate Body found that the Panel had erred in its analysis, it declined to rule on whether the services at issue in this dispute were indeed "like" or not. Although Argentina had asked the Appellate Body to "complete the analysis" on this issue, the Appellate Body found that the condition for that request had not been met.

The Appellate Body's reversal of the Panel's "likeness" finding meant that "there remains no finding of inconsistency with the GATS", and this "render[ed] moot" the issues of less favourable treatment, or whether Argentina's measures could be justified under the exception provided for in GATS Article XIV(c) or the Prudential carve-out. However, given their "implications for the interpretation of provisions of the GATS", the Appellate Body provided views on these issues, as discussed below.

Treatment no less favorable: no "additional step analysis" on regulatory aspects

The Appellate Body found that "[t]he concept of 'treatment no less favourable' under both the most-favoured-nation and national treatment provisions of the GATS is focused on a measure's modification of the conditions of competition". The Appellate Body faulted the Panel for stating that in assessing less favourable treatment, it needed to "take into account regulatory aspects relating to services and service suppliers that may affect the conditions of competition". The Appellate Body concluded that "under the Panel's legal standard for 'treatment no less favourable', consideration of the regulatory aspects forms part of the examination of whether the measure modifies the conditions of competition". It added that "the Panel effectively employed an erroneous standard whereby certain regulatory aspects can 'convert' 'less favourable treatment' into 'treatment no less favourable'. However, neither the text and context of Articles II:1 and XVII of the GATS, nor the object and purpose of the GATS, provide a basis for such a legal standard".

The Appellate Body overturned the Panel's ruling on less favourable treatment for conducting what it called an "additional step analysis":

> [T]he Panel came to the 'preliminary' conclusions that all of the relevant measures modify the conditions of competition to the detriment of like service suppliers of non-cooperative countries and that, consequently, they fail to accord 'treatment no less favourable' to such service suppliers. Nonetheless, the Panel did not stop its analysis here. Rather, under both Article II:1 and Article XVII, the Panel went on to conduct an additional step of analysis regarding the 'regulatory aspects' in this dispute, that is, 'the possibility for Argentina to have access to tax information on foreign suppliers providing services in Argentina'. As our review… indicates, in this additional step of analysis, the Panel did not actually examine the regulatory aspects for purposes of assessing how the measures modify the conditions of competition, but effectively employed an erroneous legal standard under which the regulatory aspects could justify the detrimental impact….

The Appellate Body found that "[t]he Panel's interpretive errors are manifested in both its articulation of the legal standard and its application of Articles II:1 and XVII to the facts of the case". It concluded that the Panel's findings on 'treatment no less favourable' "lack a proper basis and cannot stand" and it reversed the Panel's conclusion that the eight measures were inconsistent with Article II:1 of the GATS, as well as the conclusion that three measures were not inconsistent with GATS Article XVII.

Prudential carve-out: wide scope of application

The Appellate Body began by noting that this was the first dispute in which a WTO Member had invoked the prudential carve-out.

The prudential carve-out is provided for in paragraph 2(a) of the Annex on Financial Services (entitled "Domestic Regulation"). The Appellate Body agreed with the Panel that:

[P]aragraph 2(a) contains three requirements that must be fulfilled for a measure to be justified under this provision. First, there is the threshold, or preliminary, question of what types of measures may potentially fall within the scope of paragraph 2(a). Second, a measure must have been taken "for prudential reasons". Finally, under the second sentence of paragraph 2(a), the measure "shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement". Only when a measure falls within the scope of paragraph 2(a) will there be a need to evaluate whether it was taken "for prudential reasons" and whether it fulfils the requirement in the second sentence of paragraph 2(a).

Panama's appeal was "limited to the threshold question" and so the Appellate Body did not opine on the second or third factors. Panama pointed to the title of this provision ("Domestic Regulation"), and argued that this "delimits the scope of the provision", or defined the type of measures that could be covered by it. Under Panama's interpretation, market access restrictions could not fall under the prudential carve-out.

The Appellate Body disagreed. It reasoned that "[t]he fact that paragraph 2(a) covers violations of obligations under "*any other provisions* of the Agreement" means that it could be invoked to justify inconsistencies with all of a Member's obligations under the GATS. These include, for example, a Member's most-favoured-nation treatment obligation under Article II, market access commitments under Article XVI, or national treatment obligation under Article XVII [original emphasis]".

The Appellate Body therefore concluded that "an interpretation of paragraph 2(a) of the Annex on Financial Services on the basis of its text, read in the light of its context and the object and purpose of the GATS, supports the view that paragraph 2(a) does not impose specific restrictions on the types of 'measures affecting the supply of financial services' that fall within its scope, provided that such measures fulfil all of the requirements of paragraph 2(a)".

Exception under GATS Article XIV(c): compliance measures

GATS Article XIV(c) provides an exception – similar to GATT Article XX(d) – for measures "necessary to secure compliance" with GATS-consistent laws or regulations.

The Appellate Body noted that a measure "can be said 'to secure compliance' with laws or regulations when its design reveals that it secures compliance with specific rules, obligations, or requirements under such laws or regulations, even if the measure cannot be guaranteed to achieve such result with absolute certainty". It cautioned that "there is no justification under Article XIV(c) for a measure that is not designed to 'secure compliance' with a Member's laws or regulations". The second element requires an analysis of whether "this relationship is sufficiently proximate, such that the measure can be deemed to be 'necessary' to secure compliance with such laws or regulations".

The Panel had found that Argentina's measures were "provisionally" justified under GATS Article XIV(c), but that their application constituted "arbitrary and unjustifiable discrimination" within the meaning of the chapeau of GATS Article XIV. Panama appealed the Panel's findings on provisional justification. The Appellate Body found, among other things, that Panama failed to demonstrate that the Panel erred in finding that the measures were designed to secure compliance with Argentine laws, and were relevant. Neither party appealed the Panel's findings on the chapeau.

The Report of the WTO Appellate Body in *Argentina – Measures Relating to Trade in Goods and Services* (DS453) was released on April 14, 2016.

Multilateral Policy Highlights

United States and China Sign Agreement Terminating Chinese Export Subsidy Measures

The United States and China have signed an agreement terminating the alleged export subsidies that were at issue in DS489 (*China – Measures Related to Demonstration Bases and Common Service Platforms Programmes*). The agreement effectively ends the WTO dispute, which the United States initiated last year based on allegations that several Chinese measures were export-contingent subsidies (and thus prohibited under Articles 3.1(a) and 3.2 of the SCM Agreement).

Under the agreement, China will take the following actions:

- Defund Common Service Platform (CSP) programs;
- Terminate preferential service agreements between the government and CSP providers;
- Prohibit CSP providers from continuing to provide free or discounted services to enterprises in export-contingent Demonstration Bases;
- Terminate sub-central government export-contingent cash grant measures;
- Eliminate export-contingent criteria from the Demonstration Base designation process; and
- Re-evaluate national and provincial level bases without the use of export-contingent criteria.

The United States Trade Representative (USTR) is touting this agreement as a victory for US trade interests: "This is a win for Americans employed in seven diverse sectors that run the gamut from agriculture to textiles to medical products, who will benefit from a more level playing field on which to compete." According to USTR, each of the "demonstration bases" at issue in the dispute is comprised of enterprises from one of seven sectors: (i) textiles, apparel and footwear; (ii) advanced materials and metals (including specialty steel, titanium and aluminum products); (iii) light industry; (iv) specialty chemicals; (v) medical products; (vi) hardware and building materials; and (vii) agriculture.

A copy of the agreement is attached for reference.

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