US & Multilateral Trade and Policy Developments

Japan External Trade Organization

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Contents

US General Trade Policy Highlights

USTR Announces Results of 2015-2016 GSP Annual Review

On June 30, 2016, the Office of the United States Trade Representative (USTR) announced the outcome of the 2015/2016 Annual Product Review[1] under the Generalized System of Preferences (GSP) program. Based on its annual review of various issues and petitions, USTR is making several modifications to the list of articles eligible for duty-free treatment under GSP. These modifications include (i) adding certain products to the list of GSP-eligible articles; (ii) removing certain products from the list of GSP-eligible articles; (iii) announcing that certain articles are subject to competitive need limitations (CNLs); and (iv) granting CNL waivers for certain articles. The effective date for these modifications is July 1, 2016.

Products added to the GSP program

USTR has added 28 tariff lines covering certain travel and luggage products to the list of GSP-eligible articles, provided that such products originate from a least-developed beneficiary developing country (LD-BDC) or an African Growth and Opportunity Act (AGOA) country. In 2015, various travel and luggage goods companies filed petitions requesting that USTR add these products to the GSP program for all GSP-eligible countries; however, USTR has postponed indefinitely its decision to grant such benefits to GSP countries that are not LD-BDCs. USTR also postponed its decision to grant GSP benefits to ferromanganese from the Ukraine, among other items.

Products removed for certain beneficiary developing countries

In response to petitions filed by interested parties, USTR decided to remove the following products from the list of GSP-eligible articles: (i) polyethylene terephthalate (PET) resin from India; and (ii) various fluorescent brightening agents from India. In addition, USTR removed several products that were found to exceed CNLs in 2015. CNLs are exceeded when US imports of a GSP-eligible product from a BDC during a calendar year account for 50 percent or more of the value of total US imports of that product ("percentage-based CNL"), or exceed a specified dollar value (USD 170 million in 2015). Consequently, the following products will be removed from the list of GSP-eligible articles: (i) iron or steel cast grinding balls from India; (ii) certain motor vehicle parts and accessories from India; and (iii) single fruit or vegetable juices from the Philippines. USTR also issued waivers for 114 products that exceeded CNLs in 2015, thereby ensuring continued GSP benefits for those products.

President Obama Issues Proclamation to Implement Expanded Information Technology Agreement

On June 30, 2016, President Obama issued a Presidential Proclamation to implement the World Trade Organization (WTO) Declaration on the Expansion of Trade in Information Technology Products (ITA-II). The first round of US tariff reductions under the ITA-II is scheduled to take effect on July 1, 2016. Of the covered tariff lines on which the United States currently imposes duties, 62 percent are scheduled for full duty elimination as of July 1, 2016, whereas 38 percent will be subject to a three year phase-out ending on July 1, 2019. Among the products scheduled for full duty elimination as of July 1, 2016 are certain sound recording and playback devices, monitors, and optical equipment.

President Obama implemented the ITA-II by Presidential Proclamation pursuant to the Uruguay Round Agreements Act (URAA) – as was done by President Bill Clinton with the original ITA – rather than by submitting implementing legislation to Congress for approval. Section 111(b) of the URAA authorizes the President to modify duty rates for certain tariff categories (provided that those tariff categories had been the subject of negotiations during the Uruguay Round) in order to implement agreements such as the ITA whose negotiation had begun but not concluded during the Uruguay Round.

[1] Click **here** for the full results of the 2015/2016 GSP Annual Review.

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

Petitions and Investigations Highlights

Administrative Law Judge Suspends Section 337 Investigation on Chinese Carbon and Alloy Steel Products

On July 6, 2016, US International Trade Commission (ITC) Administrative Law Judge (ALJ) Dee Lord suspended the recently instituted, high profile section 337 investigation regarding Chinese carbon and alloy steel products pending notification of the investigation to the US Department of Commerce. In light of the suspension, all discovery and motion practice has been stayed.

Background

The ITC instituted *Certain Carbon and Alloy Steel Products*, Inv. No. 337-TA-1002, on May 26, 2016 based on a Complaint filed by United States Steel Corporation ("US Steel"). Unlike most section 337 investigations, which involve alleged infringement of intellectual property rights, here the ITC ordered that the investigation be instituted to determine whether a violation of Section 337 occurred in the importation into the United States, sale for importation, or sale within the United States after importation of certain carbon and alloy steel products by reason of: (i) conspiracy to fix prices and control output and export volumes; (ii) the misappropriation and use of US Steel's trade secrets; and (iii) false designation of origin or manufacturer for the purpose of evading duties. Under due course, the Notice of Investigation was served upon the Antitrust Division of the Department of Justice, US Customs and Border Protection, the Federal Trade Commission, and the National Institutes of Health. The investigation was thereafter referred to Administrative Law Judge Dee Lord.

According to US Steel's Complaint, there are four ongoing investigations at the Department of Commerce and two Title VII investigations pending before the ITC related to the same steel products at issue in the section 337 investigation.

Initial Determination Suspending Investigation

After receipt of several of the Chinese Respondents responses to the Complaint and various letter briefs in which they argued that the conspiracy and false designation claims are outside of the scope of section 337, ALJ Lord found that the Chinese carbon and alloy steel products investigation comes at least "in part" within the purview of the antidumping and countervailing duty laws, and accordingly, pursuant to section 337(b)(3), the ITC is required to notify the Secretary of Commerce of the pending ITC investigation. ALJ Lord therefore suspended the investigation in order to allow the ITC to provide the statutorily required notice to the Secretary of Commerce, and also noted that any response from the Commerce Department or other relevant agencies may aid in developing a complete record in the investigation.

Next Steps

Under ITC Rules, ALJ Lord's Initial Determination will become the determination of the ITC in thirty days, unless one of the parties filed a petition for review or the Commission decides to review on its own motion. If a petition for review is filed, the Commission will decide whether to grant or deny the petition within thirty days.

Department of Commerce Issues Affirmative Preliminary Determination in CVD Investigation of Amorphous Silica Fabric from China

On June 28, 2016, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the countervailing duty (CVD) investigation of certain amorphous silica fabric from China.[2] In its investigation, DOC preliminarily determined that imports of the subject merchandise from China received countervailable subsidies

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

ranging from 4.36 to 28.25 percent. As a result of the affirmative preliminary determination, DOC will instruct US Customs and Border Protection to require cash deposits based on these preliminary rates.

The product covered by this investigation is woven (whether from yarns or rovings) industrial grade amorphous silica fabric, which contains a minimum of 90 percent silica by nominal weight, and a nominal width in excess of 8 inches. The investigation covers industrial grade amorphous silica fabric regardless of other materials contained in the fabric, regardless of whether in roll form or cut-to-length, regardless of weight, width (except as noted above), or length. The subject imports are normally classified in subheadings 7019.59.4021, 7019.59.4096, 7019.59.9021, and 7019.59.9096 of the Harmonized Tariff Schedule of the United States (HTSUS), but may also enter under subheadings 7019.40.4030, 7019.40.4060, 7019.40.9030, 7019.40.9060, 7019.51.9010, 7019.51.9090, 7019.52.9010, 7019.52.9021, 7019.52.9096 and 7019.90.1000.

DOC is scheduled to announce its final determination on or around November 8, 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 from China 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 Stainless Steel Sheet and Strip from China

On July 12, 2016, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the countervailing duty (CVD) investigation of imports of stainless steel sheet and strip from China.[3] DOC initiated this CVD investigation in March 2016 in response to a petition filed by AK Steel Corporation, ATI Flat Rolled Products, North American Stainless, and Outokumpu Stainless USA, LLC.

In its investigation, DOC preliminarily determined that imports of the subject merchandise from China received countervailable subsides ranging from 57.30 to 193.12 percent. DOC calculated a preliminary subsidy rate of 57.30 percent for mandatory respondent Shanxi Taigang Stainless Steel Co. Ltd, whereas two other Chinese exporters and their affiliated companies received a preliminary rate of 193.12 percent based on adverse facts available. All other producers and exporters in China were assigned a preliminary rate of 57.30 percent. As a result of the preliminary affirmative determination, DOC will instruct US Customs and Border Protection to require cash deposits based on these preliminary rates.

The products under investigation are currently classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings 7219.13.0031, 7219.13.0051, 7219.13.0071, 7219.13.0081, 7219.14.0030, 7219.14.0065, 7219.14.0090, 7219.23.0030, 7219.23.0060, 7219.24.0030, 7219.24.0060, 7219.32.0005, 7219.32.0020, 7219.32.0025, 7219.32.0035, 7219.32.0036, 7219.32.0038, 7219.32.0042, 7219.32.0044, 7219.32.0045, 7219.32.0060, 7219.33.0005, 7219.33.0020, 7219.33.0025, 7219.33.0035, 7219.33.0036, 7219.33.0038, 7219.33.0042, 7219.33.0044, 7219.33.0045, 7219.33.0070, 7219.33.0080, 7219.34.0005, 7219.34.0020, 7219.34.0025, 7219.34.0030, 7219.34.0035, 7219.34.0050, 7219.35.0005, 7219.35.0015, 7219.35.0030, 7219.35.0035, 7219.35.0050, 7219.90.0010, 7219.90.0020, 7219.90.0025, 7219.90.0060, 7219.90.0080, 7220.12.1000, 7220.12.5000, 7220.20.1010, 7220.20.1015, 7220.20.1060, 7220.20.1080, 7220.20.6005, 7220.20.6010, 7220.20.6015, 7220.20.6060, 7220.20.6080, 7220.20.7005, 7220.20.7010, 7220.20.7015, 7220.20.7060, 7220.20.7080, 7220.90.0010, 7220.90.0015, 7220.90.0060, and 7220.90.0080.

DOC is scheduled to announce its final determination on or around November 23, 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 stainless steel sheet and strip from China materially injure or threaten material injury to the domestic industry, DOC will issue a CVD order.

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

US Department of Commerce Issues Affirmative Final Determinations in AD/CVD Investigations of Carbon Steel Pipe and Tube from Korea, Mexico, and Turkey

On July 15, 2016, the US Department of Commerce (DOC) announced its affirmative final determinations in (i) the antidumping duty (AD) investigations of heavy walled rectangular welded carbon steel pipes and tubes from Korea, Mexico, and Turkey; and (ii) the countervailing duty (CVD) investigation of imports of the same from Turkey.[4]

In its investigations, DOC determined that imports of the subject merchandise were sold in the United States at the following dumping margins: (i) 2.34 to 3.82 percent (for Korea); (ii) 3.83 to 5.21 percent (for Mexico); and (iii) 17.83 to 35.66 percent (for Turkey). DOC also determined that imports of the subject merchandise from Turkey received countervailable subsidies ranging from 15.08 to 23.37 percent. The subject merchandise is currently provided for in item 7306.61.1000 of the Harmonized Tariff Schedule of the United States (HTSUS), and may also enter under 7306.61.3000.

The US International Trade Commission (ITC) is scheduled to make its final injury determinations on August 29, 2016. If the ITC makes affirmative final determinations that imports of the subject merchandise from Korea, Mexico, and/or Turkey materially injure or threaten material injury to the domestic industry, DOC will issue AD and CVD orders.

US Department of Commerce Issues Affirmative Preliminary Determination in AD Investigation of Large Residential Washers from China

On July 20, 2016, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the antidumping duty (AD) investigation of certain large residential washers from China.[5] DOC initiated the investigation in January of 2016 in response to a petition filed by Whirlpool Corporation.

In its investigation, DOC preliminarily determined that imports of the subject merchandise from China were sold in the United States at dumping margins of 49.88 percent (for LG Electronics, Inc. and its affiliates) and 111.09 percent (for Samsung Electronics Co., Ltd. and its affiliates). DOC calculated a preliminary dumping margin of 80.49 percent for all other producers and exporters in China. As a result of the affirmative preliminary determination, DOC will instruct US Customs and Border Protection (CBP) to collect cash deposits based on these preliminary rates.

DOC is scheduled to announce its final determination on or around December 9, 2016. 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 an AD order.

US Department of Commerce Initiates AD Investigation of Dioctyl Terephthalate from Korea

On July 21, 2016, the US Department of Commerce (DOC) announced the initiation of an antidumping duty (AD) investigation of dioctyl terephthalate (DOTP) from Korea.[6] DOC initiated the investigation in response to a petition filed by Eastman Chemical Company. DOTP is commonly used to soften polyvinyl chloride (PVC) plastics.

The merchandise covered by the investigation is dioctyl terephthalate (DOTP), regardless of form. DOTP has the general chemical formulation $C_6H_4(C_8H_{17}COO)_2$ and a chemical name of “bis (2-ethylhexyl) terephthalate” and has a Chemical Abstract Service (CAS) registry number of 6422-86-2. DOTP that has been blended with other products is covered by the investigation when such blends include constituent parts that have not been chemically reacted with each other to produce a different product. The subject merchandise is classified under subheading 2917.39.2000 of the Harmonized Tariff Schedule of the United States (HTSUS), and may also enter under subheadings 2917.39.7000 or 3812.20.1000.

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

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

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

The US International Trade Commission (ITC) is scheduled to make its preliminary injury determination on or before August 15, 2016. If the ITC determines that there is a reasonable indication that imports of the subject merchandise materially injure or threaten material injury to the domestic industry, the investigation will continue. DOC will then be scheduled to make its preliminary determination in December 2016, unless the statutory deadline is extended.

According to DOC, imports of the subject merchandise from Korea were valued at an estimated USD 31.2 million in 2015. The dumping margins alleged in the petition range from 23.70 to 47.86 percent.

US Department of Commerce Initiates AD/CVD Investigations of Carbon Steel Flanges from India, Italy, and Spain

On July 21, 2016, the US Department of Commerce (DOC) announced the initiation of antidumping duty (AD) investigations of finished carbon steel flanges from India, Italy, and Spain, and a countervailing duty (CVD) investigation of imports of the same from India.[7] DOC initiated these investigations in response to a petition filed by Boltex Manufacturing Co., L.P. and Weldbend Corporation.

The scope of these investigations covers finished carbon steel flanges. Finished carbon steel flanges differ from unfinished carbon steel flanges (also known as carbon steel flange forgings) in that they have undergone further processing after forging, including, but not limited to, beveling, bore threading, center or step boring, face machining, taper boring, machining ends or surfaces, drilling bolt holes, and/or de-burring or shot blasting. Any one of these post-forging processes suffices to render the forging into a finished carbon steel flange for purposes of the investigations. The subject merchandise is currently classified under subheadings 7307.91.5010 and 7307.91.5050 of the Harmonized Tariff Schedule of the United States (HTSUS), and may also enter under HTSUS subheadings 7307.91.5030 and 7307.91.5070.

The US International Trade Commission (ITC) is scheduled to make its preliminary injury determinations on or before August 15, 2016. If the ITC determines that there is a reasonable indication that imports of the subject merchandise 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 September 2016 and its preliminary AD determinations in December 2016, unless the statutory deadlines are extended.

According to DOC, imports of the subject merchandise from India, Italy, and Spain in 2015 were valued at an estimated USD 90.6 million, 31 million, and 26.8 million, respectively. The dumping margins alleged in the petition are as follows: (i) 17.80 – 37.84 percent (for India); (ii) 15.76 – 204.53 percent (for Italy); and (iii) 13.19 – 24.43 percent (for Spain).

US Department of Commerce Issues Affirmative Final Determinations in AD/CVD Investigations of Cold-Rolled Steel from Brazil, India, Korea, Russia, and the United Kingdom

On July 21, 2016, the US Department of Commerce (DOC) announced its affirmative final determinations in (i) the antidumping duty (AD) investigations of certain cold-rolled steel flat products from Brazil, India, Korea, Russia, and the United Kingdom; and (ii) the countervailing duty (CVD) investigations of imports of the same from Brazil, India, Korea, and Russia.[8]

In its investigations, DOC determined that imports of the subject merchandise were dumped in the United States and received countervailable subsidies in the following amounts:

Country	Dumping Margin	Subsidy Rate
Brazil	14.43 – 35.43 percent	11.20 – 11.31 percent

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

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

India	7.60 percent	10.00 percent
Korea	6.32 – 34.33 percent	3.91 – 58.36 percent
Russia	13.36 percent	6.95 percent
United Kingdom	5.40 – 25.56 percent	NA

The US International Trade Commission (ITC) is scheduled to make its final injury determinations in these investigations on September 3, 2016. If the ITC makes affirmative final determinations that imports of the subject merchandise materially injure or threaten material injury to the domestic industry, DOC will issue AD and CVD orders.

According to DOC, imports of the subject merchandise from Brazil, India, Korea, Russia, and the United Kingdom were valued at an estimated USD 65 million, 57 million, 206 million, 54 million, and 132 million, respectively, in 2014.

Free Trade Agreement Highlights

TiSA Parties Complete 19th Round of Negotiations

The twenty-three Parties that are negotiating the Trade in Services Agreement (TiSA) completed their 19th round of negotiations last week. Off-the-record briefings from senior negotiators pointed to the negotiations being broadly on schedule to deliver a high quality agreement for political approval by the end of this year. One important obstacle was removed on 12 July with the finalization of the "EU-US Privacy Shield", which will clear the way for data transfers that are key to effective trade in many services sectors, such as telecommunications and digital commerce. However, negotiators also struck a note of caution that there remains a great deal of technical work to conclude in a short time and there are several difficult issues that need to be resolved, in particular between the United States and the EU over market access. There is concern that if the TiSA cannot be concluded before the end of this year, it may be a long time before another opportunity to do so arises because of the possibility of waning political and public support in some Parties for trade liberalization.

Market access will be key to achieving a high standard agreement and it was a focus of the latest TiSA round. Negotiators acknowledged that advances are being made, but the Parties, in particular the United States and the EU, still consider that significant gaps exist over the adequacy of their respective offers as a basis for concluding the negotiations.

In broad terms, the United States wants the EU to offer to TiSA Parties the full market access package that it has granted to Canada in the EU-Canada Comprehensive Economic and Trade Agreement (CETA), which is the EU's "best" market access commitment in services to date but which the EU has not so far agreed to match in the TiSA. The United States also wants the EU to agree to remove a large proportion of the national treatment exemptions that individual EU member states apply in various services sectors, not only to improve the quality of the EU's market access offer but also to remove any likelihood of future TiSA parties, such as China, claiming similar exemptions for themselves. For its part, the EU wants the United States to go beyond the market access package in services that it has agreed to under the Trans-Pacific Partnership (TPP) and to offer to open its market more widely in several of the 17 sectors under negotiation where to date the United States has sought significant exemptions because of their domestic political sensitivity, such as the exclusion of maritime services, foreign equity caps in telecommunications, and limitations in financial services. An important area of disagreement is the treatment in the TiSA of so-called "new services", which the EU wishes to carve-out from TiSA rules on non-discrimination and retain the right to regulate freely but which the United States believes cannot be identified separately from "old" services and must therefore be subject to all TiSA rules.

Detailed negotiations on market access are setting the scene for the next revision of market access offers by the Parties, which are due to be tabled in October. That has to be the final stage of the market access negotiation if the TiSA is to be completed this year, although some major political issues might not be resolved until November. It will be important for the revised market access offers to provide the basis for a result that all Parties can regard as

ambitious and balanced. Senior negotiators in briefings last week were relatively optimistic that this can be done, one noting that "there is more good news than bad news" in the current prospects.

Negotiations continued last week also on the sectoral annexes and the rules and institutional provisions of the core TiSA text that will guarantee the value of the market access concessions that are to be exchanged. Some areas, such as transparency and domestic regulation, appear to be relatively well advanced. Some others, such as state-owned enterprises, which is of particular interest to the United States, have not so far received enough attention to clarify the likelihood of their being included in the final agreement or not. Some new texts were still being tabled at the time of last week's meeting, including US proposals to prohibit policies that would require forced data localization for financial companies and on intermediary liability protection for TiSA's E-Commerce chapter, as well as new EU proposals on dispute settlement and institutional issues. As the end-game draws closer, there will be pressure on Parties to drop their proposals or make them less ambitious where it is clear that they are not widely supported. This has already led to the withdrawal by Canada of its proposal for a dedicated chapter on Environmental services, and there are indications that a proposal for a dedicated chapter on Mining and Energy-Related services might also be dropped.

The TiSA will be a plurilateral agreement, with no commitment by the Parties to apply the results on the Most-Favored-Nation (MFN) basis to other WTO Members. Instead, other countries will be able to apply to accede to the TiSA once it has been completed. With that in mind, the TiSA Parties are aiming to produce an agreement that delivers high and predictable levels of market access that are backed up by comprehensive policy disciplines that go significantly further than the WTO's General Agreement on Trade in Services (GATS). Such a high standard agreement may not be accessible for all, but the Parties, in particular the United States, want to ensure that those that do wish to accede, for example China, are fully committed to the high standard of market access and are bound to meet it by the TiSA rules. At some point after the conclusion of the TiSA, thought may be given to how the agreement might be "multilateralized" and brought into the WTO framework; although some Parties, such as the EU, favor that outcome, there is no commitment from others for the time being.

Multilateral Policy Highlights

China Re-Engages in Environmental Goods Agreement Negotiations

China re-engaged positively in the Environmental Goods Agreement (EGA) negotiations during the most recent EGA negotiating round held in late June. During the round, China submitted a much watered-down proposal on how to deal with its free-rider concerns in a future EGA, and it participated constructively in the review by EGA participants of the product coverage of the agreement and the timetable for eliminating tariffs. Progress towards the conclusion of the EGA opens the door to negotiations on other sectoral agreements, such as tariff elimination in chemicals.

China has dropped its earlier "snap-back" proposal to deal with free riders, to which other EGA participants were very firmly opposed. It has suggested instead that emphasis be placed on attracting other WTO Members to join the EGA so that a "critical mass" of 90 percent of world trade in covered products is reached and maintained. China reportedly has in mind the need to attract India and Brazil in particular, which are not participating in the EGA negotiations. Other G20 countries might also come under pressure from China to join the EGA later this year.

According to the Chinese proposal, the EGA would not enter into force until the 90 percent target is achieved. If coverage slipped back subsequently below 90 percent, based on a three year moving average, to less than a threshold level to be agreed upon by the EGA parties, then "… participants shall review the shifts in trade with a view to finding appropriate solutions… ". If coverage slipped back further still, falling below a second agreed-upon threshold level, China makes more radical suggestions that a Member could be "required" to join the EGA or that "… the waiver of MFN obligation shall be sought". Those suggestions are not likely to advance because they could be seen as coercive and unfitting for inclusion in a WTO agreement.

China reportedly contributed constructively to the discussion and negotiation of the list of products that have been proposed for coverage in the EGA, which currently stands at about 350 but which is likely to have to be pared back to 250-300 before agreement can be reached. China also engaged constructively in the discussion of the timetable for tariff elimination. The United States is pressing for a maximum number of products to be liberalized as soon as the EGA enters into force, while China is seeking more flexibility and longer phase-out periods for itself and other developing countries.

United States Requests Consultations with China over Export Duties on Raw Materials

The WTO has released the United States' request for consultations in DS508 (China – Export Duties on Certain Raw Materials), which addresses the use of duties to restrict the exportation of raw materials. This dispute is essentially a continuation of the dispute between the United States and China regarding export restrictions of raw materials in DS394/DS395/DS398 (*China – Raw Materials*). DS508 also raises issues similar to those considered by the DSB in DS433 (*China – Rare Earths*). However, unlike these previous disputes, DS508 only alleges violations of China's Accession Protocol, and does not raise any issues under the GATT.

In DS394 and DS433, the DSB considered whether China's export restrictions on raw materials and rare earths, respectively, were consistent with Article 11.3 of China's Accession Protocol and GATT Article XI (quantitative restrictions). In both disputes, the DSB also considered whether the Chinese measures at issue were justified pursuant to GATT Article XX(g) (environmental exception).

In DS508 the United States alleges that the various laws and regulations that impose export duties on raw materials are inconsistent with China's Accession Protocol because the commodities at issue are not among those specifically listed therein (and thus may be subject to export duties). The request for consultations does not allege that the export duties are inconsistent with GATT Article XI. Thus, the allegations raised by the United States in DS508 appear to be narrower than those raised in DS394 and DS433.

Nevertheless, DS508 might raise systemic issues under the WTO agreements. For example, China might attempt to justify the targeted laws and regulations under GATT Article XX or to claim that the laws and regulations at issue do not in fact achieve their restrictive effect through export duties but instead through other measures that are permitted under GATT Article XI. In addition, the Panel or the Appellate Body might discuss generally the scope of the right of WTO Members to use export duties, unless they have specifically agreed not to do so as a term of accession.

Update on WTO Negotiations on Fish Subsidies, Trade and Environment, and Services

In recent weeks, there have been signs of renewed activity in several WTO negotiating groups as Members start to focus on preparations for potential outcomes from the next Ministerial Conference in December 2017 (MC11). These signs are generally favorable for Members which prioritize the multilateral system over alternative plurilateral or regional initiatives. For the time being the progress has been most apparent in areas such as subsidies and potential environmental disciplines. However, there has not been any noticeable movement in core areas, particularly negotiations on Non-Agricultural Market Access (NAMA), suggesting that the views of the United States and other Members who oppose further work under the umbrella of the Doha Round Single Undertaking are holding sway.

Developing countries have continued to attach importance since the Nairobi Ministerial Conference to making progress broadly on the Doha agenda, not just on selected parts of it that appeal to the United States and others. One reason is that unbundling the Doha package tends to force Members to negotiate with a much narrower set of trade-offs than was envisaged in the Single Undertaking. It weakens their ability to resist being pressured into agreement on issues that appeal least to them, and their ability to ensure that issues of most importance to them are moved along in parallel.

The most significant developments in the past several weeks have been as follows:

- **Fisheries Subsidies.** There has been a new attempt to promote disciplines on fisheries subsidies as a deliverable for MC11. At the end of June, discussions focused on a paper presented by New Zealand and other

members of the "Friends of Fish" group proposing the sharing of information on Members' fisheries subsidies policies as background for further discussions on achieving the UN Sustainable Development goal to prohibit and eliminate fisheries subsidies that contribute to overfishing, overcapacity and illegal fishing by 2020. Many WTO Members said that they supported the UN goal, and some stated that, given the tight deadline, it was important that a multilateral agreement be reached by MC11. Their negotiating proposal on this issue had relatively strong support in Nairobi. Since Nairobi, the United States has signaled that it considers this issue a priority for MC11 and the EU has taken a more pro-active position in favor of an agreement. The EU and others during the end-June discussions linked their readiness to make progress on fisheries subsidies to progress being made on other Rules issues, particularly industrial subsidies.

- **Trade and Environment.** Under the heading of trade and environment, there have been three developments:
    - A proposal to reform fossil fuel subsidies received a mixed reception at a recent meeting of the Committee on Trade and Environment (CTE). Some saw merit in discussions on this issue in the WTO, while others stated that it did not belong in the WTO and instead should be confined to the G20, where energy Ministers failed to agree early this month on a deadline to phase out fossil fuel subsidies in spite of Chinese and US pressure to do so. For the time being, the possibility of this proposal advancing in the WTO seems remote.
    - Discussions in the CTE on the follow-up to the Paris Agreement on Climate Change focused on a proposal from Korea, Canada and Costa Rica to increase coherence between trade and climate change policies and for further discussions in the CTE and other WTO bodies. Some Members supported this proposal, but others felt it premature given that work on implementation of the Paris Agreement is still at an early stage. While this initiative is not expected to produce any technical result in time for MC11, the proposal could possibly form the basis for a political statement by WTO Ministers on the trade and climate change nexus at MC11.
    - The most recent round of negotiations on the Environmental Goods Agreement (EGA) saw the re-engagement of China, which had held up these negotiations for several months over its concerns about "free riders". Progress was made in narrowing down differences over the list of products that the EGA will cover. China engaged constructively in the negotiations on product coverage and renewed the hopes of other EGA participants that agreement on coverage may be possible in time for the G20 Leaders' Summit in China in September.
- **Services.** In the Services Council, an unexpectedly large number of WTO Members recently expressed strong interest in reviving Services negotiations on market access, domestic regulations and electronic-commerce, with some saying that there may be potential outcomes for MC11 in one or more of these areas. Movement in Services, if it materializes, comes after a long hiatus during which attention had shifted to the negotiations on the Trade in Services Agreement (TiSA). With the United States and others now confident that the TiSA could be concluded before the end of this year, it is sensible that attention should shift back to the WTO – some Members, including China, wish to evaluate if, how and when the TiSA results might be "multilateralized" into the WTO. Several delegations announced that they would be tabling new proposals on market access and domestic regulations. In parallel, the United States tabled a new and very thorough paper on digital trade, setting out the main barriers facing international business in this area.

United States and China Discuss China's Market Economy Status at WTO Council for Trade in Goods

At meetings last week in the WTO, China acknowledged that other WTO Members will not be obliged to grant it automatic market economy (ME) status in their anti-dumping investigations from the end of this year – a significant public reversal from previous Chinese demands that its WTO Accession Protocol required Members to "graduate" China to ME status by December 2016. China went on to say, however, that the 11 December 2016 expiration date

in paragraph 15 of its Accession Protocol would "eliminate the legal basis" for other Members to discriminate against Chinese imports in anti-dumping investigations and would require national investigating authorities to apply in these investigations the methodologies permitted under GATT Article VI and the WTO Anti-Dumping Agreement.

The pertinent language of paragraph 15 reads:

Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:

> (a) In determining price comparability under Article VI of the GATT 1994 and the Anti Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
>
> > (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
> >
> > (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

During a meeting of the WTO Council for Trade in Goods on July 14, China reminded other Members that paragraph 15(a)(ii) expires on 11 December. It urged those Members that have been applying non-market economy (NME) methodologies to China in their anti-dumping investigations to stop doing so in a timely manner "so as to safeguard the authority and seriousness of the multilateral trading system." However, China also acknowledged that the text of paragraph 15 does not require other WTO Members automatically to grant China market economy status at the end of this year. Instead, China said that Members will have to start using prices and costs reported by Chinese companies to calculate anti-dumping duties, in line with GATT Article VI and the WTO Anti-Dumping Agreement, rather than relying, as they do now, on prices and costs in third countries. China said that the expiry of paragraph 15(a)(ii) will eliminate the legal basis for Members to use discriminatory methodologies against China in their anti-dumping investigations and warned that those who continue to do so would be violating their WTO obligations.

The United States agreed with China that its Accession Protocol does not require Members automatically to recognize China as a market economy after 11 December. However, the United States went on to say that the Accession Protocol states that granting market-economy status is based solely on an assessment of the "facts on the ground" and in light of each Member's domestic rules. In that regard, the United States said that there is "little doubt that China's market reforms have fallen below expectations" especially with respect to its steel and aluminum industries. According to the United States, paragraph 15(a)(i) of China's Accession Protocol, which does not expire on 11 December, provides that only when China establishes that it is a market economy under a Member's domestic law will paragraph 15(a) expire entirely. The United States has not publicly explained what market economy standard it will apply under paragraph 15(a)(i) or what methodologies it will apply if that standard is not met. In our view paragraph 15 will still permit alternative methodologies that are not based on actual prices and costs in China, but the burden will shift from Chinese exporters to national investigating authorities to demonstrate the need for such methodologies.

Sources have told us that China is confident that other Members will be obliged after 11 December to apply strictly the methodologies required by GATT Article VI and the WTO Anti-Dumping Agreement in their anti-dumping investigations against Chinese exports. China believes that it will be difficult for other Members to find a legal basis in the WTO Anti-Dumping Agreement to deny it de facto market economy status even if they are not prepared to

acknowledge that status de jure. However, there is a question whether China's stance will preclude alternative calculation methodologies that are not based entirely on "a strict comparison with domestic prices or costs in China." According to our sources, several WTO Members consider that the text of GATT Article VI and the WTO Anti-dumping Agreement are ambiguous enough to permit methodologies that depart from such comparisons.

Other WTO Members are also deliberating the appropriate antidumping methodology to apply to China after December 11. During a July 13 speech in Beijing, EU President Jean-Claude Juncker said that it has "not made up its mind" about whether or not to grant China ME status before December 11 and noted that the European Commission will debate the issue on July 20. European Trade Commissioner Cecilia Malmstroem has previously said categorically that China is not a market economy, but the Commission is still reviewing the results of its public consultation process to determine what steps it should take.

European Commission Proposal on China's Market Economy Status

The European Commission today signaled that it will propose a new methodology to address China's "market economy" status in anti-dumping (AD) investigations.[9] The methodology will not isolate China but instead will be applied to all WTO members' imports, and will be designed to account for "market distortions linked to state intervention." The precise terms of the proposal will be issued later this year (perhaps in September), but the Commission is considering a new methodology that would examine whether investigated exporters' production costs are in line with international market prices.

The Commission made the announcement today during a discussion on "political, economic and legal implications resulting from the expiry on 11 December 2016 of some provisions in China's Protocol of Accession to the World Trade Organisation (WTO) and what consequences to draw from this." The expiration of the Accession Protocol provision on the "non-market economy" (NME) treatment of Chinese imports in AD investigations has generated intense debate among many WTO Members, and the EU has been examining the issue for several months. The Commission's announcement today comes after a public consultation period that resulted in over 5,000 sets of public comments on how the Commission's AD investigations should treat Chinese imports after 11 December. China has lobbied heavily for the application of standard AD methodologies to its exports, while EU manufacturing industries have opposed any change out of fear that it would lead to lower AD duties (and thus less protection from Chinese competition).

The Commission press release first explains the three options under consideration: (i) no changes; (ii) removing China from the list of NMEs and applying the standard methodology for dumping calculations; and (iii) changing the AD methodology "with a new approach which would maintain a strong trade defence system, while giving effect to the EU's international obligations." The announcement then includes statements from EU Trade Commissioner Cecilia Malmström and EU Commission Vice-President Jyrki Katainen that contain no details on the actual Commission proposal or the methodology therein. Today's announcement concludes by calling on EU Member States to adopt the Commission's 2013 proposal on trade defence instruments; explaining the Commission's efforts to address steel overcapacity; and promising to table a formal proposal on the new AD methodology "before the end of this year."

Despite the official statement's ambiguity, press reports provide additional details based on Commissioner Malmström's oral statements:

The college [of commissioners] has agreed to propose changes to the EU anti-dumping and anti-subsidy legislation with the introduction of a new anti-dumping methodology, to capture market distortions linked to state intervention…. So this is a new method, it will be country-neutral and will be applied equally to all WTO countries. We are eliminating the existing list of non-market economy countries…. This new methodology would lead to approximately the same level of anti-dumping duties as we have today…. [It] is a way to both safeguard our economic interest and protect European jobs.

[9] Click **here** for the Commission's press release.

– Politico, July 20, 2016

According to sources familiar with the Commission proposal, "one of the favored ways to overhaul the EU's anti-dumping rules would be to switch to a 'factors of production' model," under which "Chinese prices would be judged not by direct comparison with another country but by studying the international cost for all of the inputs feeding into a Chinese product's price."

The EU is currently involved in several WTO disputes related to the Commission's treatment of investigated exporters' record costs. The Panel in DS473 (*EU – Biodiesel (Argentina)*), which is on appeal, ruled against the Commission's wholesale replacement of Argentinian biodiesel exporters' input costs (as a violation of Article 2.2.1.1 of the AD Agreement), but did leave the door open to the possible adjustment of such costs to reflect international prices for the same input product. The new Commission proposal could incorporate these findings.

Press reports indicate that the formal proposal could be released as soon as September 2016, and will require approval from both the EU Member States and the European Parliament. This approval is far from certain, given the intense political debate surrounding China's ME status both in the Parliament and among member countries. For example, Britain and Sweden are supportive of China's view, while Italy and others oppose any change because of the impact of "unfairly cheap" Chinese imports on their manufacturing sectors and jobs. A similar rift emerged with respect to the 2013 trade defense instruments, which remain in limbo. Brexit, however, might clear the logjam and make implementation of the new proposal more likely.

China Threatens WTO Action on Application of Adverse Facts Available

The Chinese government has threatened to file a WTO challenge against the United States' use of "adverse facts available" (AFA) in trade remedy proceedings.[10] Such a challenge could have widespread implications because the US Department of Commerce (DOC) has used AFA against exporters from many countries, and has done so in a manner that might be inconsistent with the WTO Agreements on Anti-Dumping (AD) and Subsidies and Countervailing Measures (SCM).

On July 13, 2016, DOC issued an affirmative preliminary determination in the countervailing duty investigation of stainless steel sheet and strip from China. DOC applied AFA to calculate a preliminary subsidy rate of 193.12 percent and an all others rate of 57.30 percent. According to a press release from the Chinese Ministry of Commerce (MOFCOM), the United States "deliberately misinterpreted" WTO rules and used "unreasonable methods" to apply facts available to Chinese respondents, resulting in improper higher duty rates. The press release also warns that China will utilize WTO dispute resolution mechanisms to defend its rights.

The United States has often relied upon adverse facts available in trade remedy investigations against China and other countries to find dumping margins or countervailable subsidies that, without AFA, would likely not be found to exist. DOC's AFA approach appears to be deliberate: the agency frequently issues onerous questionnaires requesting information that is very difficult or nearly impossible to provide (often because they are not kept in the ordinary course of business). The practice is especially disadvantageous to respondents in countervailing duty investigations in which the government of the exporting country must participate. When the responding government does not provide what DOC alone deems to be a sufficient response, the agency resorts to AFA, and deems the relevant legal or evidentiary standards (*e.g.*, "governmental authority") to be found. Thus, DOC's approach often results in affirmative determinations on various subsidy elements (*e.g.*, public body) and ultimately higher duties on subject imports. DOC will then rely on these determinations in future investigations of similar products from the same country. This approach means that DOC's questionable interpretations of its legal and evidentiary responsibilities under the WTO Agreements are applied in both the current case and future investigations.

Although any future WTO dispute would target US investigations of Chinese goods, it would likely have implications for other countries whose exports have been subject to US antidumping and/or countervailing duties based on AFA.

[10] The MOFCOM press release is available in Chinese **here**.

WTO Members Hold Contentious Trade Policy Review of China

China's Trade Policy Review (TPR) last week was notable for the heavy criticism that was made by many WTO Members of practically all aspects of China's trade policies, including its export quotas and export duties on raw materials, its domestic content requirements and what the United States termed its "widespread and massive" subsidy programs. The TPR was notable also in documenting a basis for decisions to be made later this year on China's non-market economy (NME) status in the WTO, which has taken on great political significance in the United States and the EU; they each stated in the TPR that China had failed to adhere to the terms of its 2001 Accession Protocol and that it was backtracking on its commitment to reduce the role of the state in its economy, leaving no doubt about their intention to refuse to recognize China in the near future as a functioning market economy.

Sources report that this was an unusually hard-hitting and bad-tempered TPR, that ended with the inclusion in the Chairman's Concluding Remarks of the following, very pointed statement:[11] "Members call upon China to assume the increased responsibility linked with being a major player in the multilateral trading system". China reacted strongly to the negative comments against it in general and this sentence in particular which, China said, it found particularly offensive. China said that it would not hesitate to challenge any trade remedy measure that is imposed on China's exports after the expiry of its NME status on 11 December nor to launch its own challenges against U.S. and EU policies in their steel and other industries which, although China did not specify what these policies were, it said lacked any legal basis in the WTO.

The United States was heavily and comprehensively critical of China's trade policies, but we were told that its statement did not seem excessive in light of the many other Members that spoke critically too about the difficulties they were experiencing in accessing the Chinese market or dealing with large increases in import volumes from China. The United States said that at the time of China's last TPR in 2013, the United States and other WTO Members had remarked positively on serious efforts that China was making to reform its economy, not least of which was to make the market decisive in allocating resources. Since then, however, China appeared to be increasingly reluctant to pursue reforms and its efforts to reduce state intervention had stalled, not least state intervention in the steel and aluminium industries which had contributed heavily to severe global excess capacity. The United States listed many examples of China's policies that favored domestic enterprises, particularly ones dominated by state-owned enterprises (SOEs), including export quotas and export duties on raw materials, foreign investment restrictions, "widespread and massive subsidization", and trade remedy abuses. The problems these caused, the United States said, were compounded by China's failure to implement the transparency commitments it made when it acceded to the WTO, including its poor record of notifying its subsidies. The USTR statement was used extensively by the Chairman of the meeting to draft his Concluding Remarks.

United States Expands WTO Challenge of China's Export Restrictions on Raw Materials

The United States has expanded its WTO challenge to China's export restrictions on raw materials, and the EU has now filed its own dispute on the same measures. Unlike the original US request for consultations in this dispute, the amended US and new EU requests address more systemic issues on raw material export restrictions and the scope of GATT Article XI that are similar to those raised in DS394 (*China – Raw Materials*) and DS431 (*China – Rare Earths*).

The United States last week filed an addendum to its request for consultations in DS508 (*China – Export Duties on Certain Raw Materials*), which expanded its challenge to China's export restraints on raw materials. On the same day, the European Union filed a request for consultations in DS509 (*China - Duties and Other Measures Concerning the Exportation of Certain Raw Materials*), which mirrored the revised claims in DS508. According to news reports, the EU did not originally join the US complaint in DS508 because it was filed right before the EU-China summit, and European officials had hoped they could persuade China to drop the restrictions.

The US addendum and matching EU complaint broaden the scope of the original US complaint in three ways:

[11] Click **here** for the Chairman's Concluding Remarks and **here** for the US statement.

- **New products.** The original US request covered antimony, cobalt, copper, graphite, lead, magnesia, talc, tantalum, and tin; the new requests add chromium and indium.
- **New measures**. The original US request covered only export duties. The new requests add (i) "quantitative restrictions, such as quotas"; and (ii) "additional requirements and procedures with respect to the administration and the allocation of the export quantitative restrictions," including restrictions on trading rights and "licensing requirements."
- **New legal claims.** The requests now include allegations that China's export restraints are inconsistent not only with China's Accession Protocol (as in the original US request), but also with the GATT. In particular, the new allegations state that the quantitative restrictions and related procedures violate GATT Articles XI:1 (the general prohibition on quantitative restrictions) and X:3(a) (on impartial administration of measures).

Given the expanded scope of these disputes, they might raise systemic issues under the WTO Agreements because they will likely address (i) the permissibility of export duties and licensing systems, as well as their administration, under GATT Articles X and XI; (ii) the types of "restrictions" that are prohibited by Article XI; and (iii) the general exceptions of GATT Article XX, such as those for public health or conservation of natural resources. The Panel or Appellate Body also might discuss the unconditional right of WTO Members to use export duties unless they specifically agreed not to do so as a term of accession.

The US request for consultations addendum for DS508 and the EU's request for consultations for DS509 are attached for reference.

Contact us

Washington

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

Scott Lincicome, Esq
Counsel

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

Singapore

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

Samuel Scoles
Regional Director Asia, International Trade Advisory Services

T +65 6347 1527
E sscoles@whitecase.com

WHITE & CASE

whitecase.com