US & Multilateral Trade Policy Developments

Japan External Trade Organization

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Contents

US General Trade Policy Highlights

USTR Releases President Trump's National Trade Policy Agenda for 2017

On March 1, 2017, the Office of the US Trade Representative (USTR) released the President's National Trade Policy Agenda for 2017, providing the Trump administration's first formal, written statement of its trade policy priorities and objectives.[1] The agenda describes, in relatively general terms, three main objectives that the Trump administration intends to pursue: (i) combating unfair trade practices through the use of trade remedies (anti-dumping, countervailing duty and safeguards measures) and "Section 301"; (ii) negotiating "new and better" trade agreements; and (iii) using "all possible leverage" to eliminate foreign trade barriers. It also discusses the administration's views on the WTO dispute settlement system, emphasizing two general legal principles: that WTO rulings are not directly binding on the United States, and that they should not modify a Member's rights or obligations under the WTO Agreements.

Although some of the views expressed in the agenda represent a departure from the trade policies and rhetoric of previous administrations, they generally are in line with our prior predictions regarding the Trump administration's approach and do not embrace the most radical aspects of President Trump's past promises on trade. Instead, they represent the fairly mainstream (though certainly more protectionist) policy view of various US industries, unions and their legal counsel – an unsurprising outcome given these groups' influence in the new administration. Moreover, in contrast with previous trade policy agendas, the 2017 agenda generally avoids providing specific details about the Trump administration's plans and policy positions and notes at the outset that the administration will submit a more detailed version of the trade policy agenda after the Senate has confirmed a USTR.

Overview of the agenda

The agenda lists four items that the Trump administration has identified as "major priorities" for its trade policy:

- **Defending US sovereignty over trade policy.** In discussing its view of the WTO dispute settlement system, the administration highlights two legal principles that it considers to be of particular importance: (i) the WTO Dispute Settlement Understanding (DSU) repeatedly states that the rulings of the Dispute Settlement Body (DSB) "cannot add to or diminish the rights or obligations" provided in the WTO Agreements; and (ii) the Uruguay Round Agreements Act confirms that DSB rulings are not self-executing or directly binding on the United States, instead requiring the government's voluntary compliance. Neither of these principles is, in and of itself, controversial.

  However, the agenda then notes that, consistent with these protections, the administration "will aggressively defend American sovereignty over trade policy", and that it will resist efforts to "advance interpretations that would weaken the rights and benefits of, or increase the obligations under, the various trade agreements to which the United States is a party". However, it does not propose any particular course of action or change in policy, and thus does not necessarily indicate that the Trump administration will depart from past US practice by, for example, expressly refusing to comply with adverse WTO rulings.

  Indeed, recent US administrations have to some extent followed the same two legal principles highlighted by the Trump administration. For example, the Obama administration in 2016 blocked the reappointment of an Appellate Body member on the grounds that rulings in which he had been involved had allegedly exceeded the Appellate Body's mandate as stated in the DSU. The United States government also has not fully complied (and has delayed compliance) with several adverse WTO rulings, particularly in the area of subsidies and trade remedies,[2] and has for years showed signs of disenchantment with WTO negotiations, turning increasingly to

[1] A copy of the 2017 agenda is attached for reference. For a copy of USTR's Annual Report on the Trade Agreements Program for 2016, which was released alongside the 2017 agenda, click **here**.

[2] Examples of such cases include *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379), *United States — Subsidies on Upland Cotton* (DS267), *United States — Measures Relating to Zeroing and Sunset Reviews* (DS322), and *United States — Laws, Regulations and Methodology for Calculating Dumping Margins* (DS294).

regional and plurilateral agreements to pursue its trade agenda. The ambiguous language used in the Trump agenda thus leaves open the possibility that the new administration might simply continue these practices, albeit in a more colorful and direct manner. Nevertheless, the tenor of the agenda does warrant caution, as the administration's express refusal to comply with dispute settlement rulings or abandonment of the WTO would likely cripple the institution.

- **Strictly enforcing US trade laws.** The agenda highlights several legal mechanisms that the Trump administration intends to use to combat unfair trading practices. In particular, it notes that the administration intends to enforce the anti-dumping (AD) and countervailing duty (CVD) laws, and that the Department of Commerce may self-initiate AD/CVD investigations if circumstances warrant. Similarly, the agenda states that the imposition of safeguard measures under Section 201 of the Trade Act of 1974 "may be appropriate" in some situations and that Section 301 of the Trade Act, if "properly used", can be a powerful lever to encourage foreign countries to adopt more market-friendly policies. Doing so could be consistent with US law, which arguably permits unilateral Section 301 challenges to certain foreign government actions that fall outside of WTO rules, but would undoubtedly lead to a response (unilateral or at the WTO) from the targeted country.

  On the other hand, the agenda does not mention other, more controversial unilateral mechanisms (*e.g.*, Section 338 of the Tariff Act of 1930, Section 232(b) of the Trade Expansion Act of 1962, and the Trading With the Enemy Act), nor does it indicate that the Trump administration intends to use such mechanisms. This represents a departure from past statements by President Trump and his political staff that such measures were under consideration, though these measures could be implied in the agenda's promise to "use all possible leverage" to open foreign markets to US goods and services (see below).

- **Negotiating "new and better trade deals".** The agenda highlights the administration's view that, while existing US trade agreements have "generated substantial benefits" for some segments of the US economy, they nonetheless have not "lived up to expectations". Consequently, the agenda states that "the time has come for a major review of how we approach trade agreements". However, it does not identify specific features of US trade agreements that the administration views as problematic, nor does it describe the administration's criteria for future agreements or renegotiations of current deals. The agenda also does not rule out the possibility of the Trump administration engaging in plurilateral or even multilateral (WTO) negotiations; rather, it merely states that the administration "will tend to focus on bilateral negotiations" going forward. Moreover, the agenda does not reiterate the Trump campaign's threats to withdraw from US trade agreements, such as NAFTA, or from the WTO.

- **Using leverage to open foreign markets.** The agenda highlights several types of foreign trade barriers that block or impede the competitiveness of US exports, including tariffs, subsidies, restrictions on data flows and services, trade secret theft, currency practices, and technical barriers to trade. The agenda calls for "a more aggressive approach" to eliminating these barriers, and states that the Trump administration "will use all possible leverage to encourage other countries to give U.S. producers fair, reciprocal access to their markets". However, the agenda does not describe the forms of leverage that the administration will use to achieve this objective.

Outlook

Consistent with our expectations, the agenda lays out a more defensive, enforcement-oriented approach to trade policy than that taken by previous administrations but does not represent a radical shift towards US protectionism. Trump administration officials such as Treasury Secretary Stephen Mnuchin also have continued to downplay the likelihood that the Trump administration will impose extreme protectionist measures. Moreover, while avoiding outright criticism of the agenda, Republican Members of Congress such as House Ways and Means Committee Chairman Kevin Brady (R-TX) have responded to it by expressing support for free trade agreements and the WTO's dispute settlement system, suggesting that Congress may push back against radical changes in policy in these areas. Thus, at this stage, we continue to expect that the Trump administration will avoid the more extreme policy proposals discussed during the campaign.

Update on the Status of Executive Branch Nominations in the Trump Administration

On March 7, 2017, Senate Finance Committee Chairman Orrin Hatch (R-UT) announced that the Finance Committee will hold a hearing on March 14 to consider the nomination of Robert Lighthizer for US Trade Representative (USTR). This announcement follows the Senate's recent votes to confirm two other Cabinet-level officials responsible for US trade and international economic policy: Secretary of Commerce Wilbur Ross, whom the Senate confirmed on February 27, and Treasury Secretary Steven Mnuchin, whom the Senate confirmed on February 10. Despite these recent actions, many important, sub-Cabinet-level positions with direct responsibility for the formulation and implementation of US trade policy remain vacant, and President Trump has yet to submit nominations for most of these positions.

The chart below shows the current status of 24 senior-level, trade-related positions at USTR, the Department of Commerce, and the Department of the Treasury, noting for each: (i) whether the position is currently vacant, filled, or being filled by a temporary "acting" official; (ii) whether President Trump has announced a nominee for the position; and (iii) the names of any individuals who reportedly are under consideration for the position. As the chart shows, many of these roles, including all three Deputy USTR positions, are currently vacant and lacking a nominee awaiting Senate confirmation. Because these and other sub-Cabinet-level officials often play an important role in developing and executing US trade policy, the current vacancies and the slow pace of nominations indicate that, at least in the near term, the Trump administration will face difficulties implementing a trade policy agenda. These vacancies also indicate that confirmed Trump administration officials (*e.g.*, Treasury Secretary Steven Mnuchin and Commerce Secretary Wilbur Ross) and White House staff who do not require Senate confirmation (*e.g.*, Senior Policy Adviser Stephen Miller and National Trade Council Director Peter Navarro) could have outsized influence on the shape and direction of US trade policy in the near term.

Office of the US Trade Representative	Current Official	Nominee	Rumored Nominee/Appointee
US Trade Representative	Stephen Vaughn (Acting)	Robert Lighthizer	
Deputy US Trade Representative (Rank of Ambassador)	Vacant	No Nominee	Kevin Dempsey Jeffrey Gerrish
Deputy US Trade Representative (Geneva)	Vacant	No Nominee	
Deputy US Trade Representative	Vacant	No Nominee	
Chief Agricultural Negotiator	Vacant	No Nominee	
General Counsel	Stephen Vaughn	N/A*	
Chief of Staff	Vacant	N/A*	Jameison Greer
Deputy Chief of Staff	Vacant	N/A*	Payne Griffin
Counselor to the US Trade Representative	Vacant	N/A*	
Senior Advisor	Timothy Reif	N/A*	

* Position not subject to Senate confirmation

Department of Commerce	Current Official	Nominee	Rumored Nominee/Appointee
Secretary of Commerce	Wilbur Ross	N/A	
Deputy Secretary of Commerce	Vacant	Todd Ricketts	
Under Secretary for International Trade	Kenneth E. Hyatt (Acting)	No Nominee	Gilbert Kaplan
Under Secretary for Oceans and Atmosphere	Vacant	No Nominee	
Under Secretary for Industry and Security	Vacant	No Nominee	
Assistant Secretary for Enforcement and Compliance	Ronald Lorentzen (Acting)	No Nominee	
Assistant Secretary for Oceans and Atmosphere	Vacant	No Nominee	

Department of Commerce	Current Official	Nominee	Rumored Nominee/Appointee
Assistant Secretary for Export Administration	Alexander Lopes (Acting)	No Nominee	
Assistant Secretary for Export Enforcement	Richard Majauskas (Acting)	No Nominee	

Department of Treasury	Current Official	Nominee	Rumored Nominee/Appointee
Secretary of the Treasury	Steven Mnuchin	N/A	
Deputy Secretary of the Treasury	Vacant	No Nominee	
Under Secretary for International Affairs	Vacant	No Nominee	David Malpass
Assistant Secretary for International Finance	Vacant	No Nominee	
Assistant Secretary for International Markets and Development	Vacant	No Nominee	

Senate Finance Committee Holds Confirmation Hearing for USTR Nominee Robert Lighthizer

On March 14, 2017, the Senate Finance Committee held a confirmation hearing for Robert Lighthizer, President Trump's nominee for United States Trade Representative (USTR).[3] At the hearing, Mr. Lighthizer discussed his views on a wide range of trade policy issues including new and existing free trade agreements (FTAs); the World Trade Organization (WTO); trade enforcement; industrial overcapacity; and US trade relations with China. Consistent with his previous public statements on trade policy, Mr. Lighthizer advocated an aggressive approach to trade enforcement and called for intensified efforts to address industrial overcapacity in China. However, Mr. Lighthizer did not advocate the most aggressive trade policies proposed by President Trump during the 2016 campaign, such as the imposition of across-the-board import tariffs or withdrawal from US trade agreements or the WTO, and generally espoused support for lawful unilateral trade measures that are within the mainstream (albeit more aggressive than recent US administrations). Moreover, Mr. Lighthizer expressed a desire to pursue trade liberalization through the negotiation of new trade agreements, and spoke positively of several aspects of the Trans-Pacific Partnership (TPP).

Mr. Lighthizer's comments during the hearing may be summarized as follows:

- **New FTAs.** Mr. Lighthizer stated that he and the Trump administration believe that the United States should pursue new bilateral trade agreements, particularly with the countries that participated in the TPP. He noted that, of the TPP countries, Japan would be the "primary target" for new bilateral FTA negotiations due in part to its attractiveness as an export destination for US agricultural products. Moreover, Mr. Lighthizer stated that several elements of the TPP would have been beneficial to the United States, including its provisions on digital trade and the commitments the United States obtained on agricultural market access. He indicated that he would seek to duplicate or improve upon these outcomes in future agreements.

  During the hearing, Sen. Pat Roberts (R-KS) noted that White House National Trade Council Director Peter Navarro had presented Senate Finance Committee members with a list of the Trump administration's "policy objectives" for trade agreements during a recent briefing on Capitol Hill. A copy of the list, titled "Key Elements of a Model Trade Agreement", was circulated by the press on March 20. The document lists 24 general subjects that the administration is aiming to cover in trade agreements (*e.g.*, "Currency Manipulation", "Trade Deficit Reduction", "Rules of Origin Percentages & Loopholes", and "Non-Tariff Barriers"), but provides no details about the administration's specific objectives or policy positions. USTR Deputy Chief of Staff Payne Griffin stated that the document is a "non-exhaustive list of things that may be addressed" in future bilateral trade agreements,

[3] Mr. Lighthizer's testimony may be viewed **here**.

though he noted that Mr. Lighthizer played no role in preparing the list since he has not been confirmed. A copy of the list is attached for reference.

- **Renegotiation of NAFTA.** Mr. Lighthizer did not provide specifics regarding the administration's objectives for the renegotiation of NAFTA; however, he expressed a desire to renegotiate the agreement in a way that would benefit both the United States and Mexico. Mr. Lighthizer also indicated that, while he would seek changes to NAFTA that would benefit the US manufacturing sector, he would avoid taking positions in the negotiation that would jeopardize the market access that the United States currently enjoys under the agreement, particularly in the area of agriculture. Moreover, Mr. Lighthizer expressed "total agreement" with Sen. Tom Carper's (D-DE) suggestion that the TPP should be used as a template for the renegotiation of NAFTA, and Mr. Lighthizer stated his view that former USTR Michael Froman had done a "remarkable job" negotiating various elements of the TPP.

- **Industrial overcapacity.** Mr. Lighthizer outlined three steps that he believes are necessary to encourage China to reduce excess production capacity in sectors such as steel and aluminum: (i) discussing the issue with China in settings such as the Global Steel Forum (though he acknowledged that this approach would likely be insufficient to resolve the issue); (ii) enforcing US trade laws (*e.g.*, trade remedies) and working with other countries to address "third-country" dumping (*i.e.*, the alleged dumping of goods in non-US markets, to the disadvantage of US exporters to those markets); and (iii) working with Congress to develop "new remedies" with which to penalize countries whose governments encourage "non-economic expansion" of production capacity.

  Mr. Lighthizer's comments suggest that he plans to take actions under Section 1317 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. § 1677k) in order to address "third-country dumping" (*e.g.*, alleged dumping of Chinese steel or aluminum products in countries other than the United States). Under Section 1317, USTR can, upon receiving a petition from the US industry, request that a third country impose anti-dumping duties on a product on behalf of the United States, if USTR has a "reasonable basis" to believe that allegedly dumped sales of the product in the third country market are causing "material injury" to a US industry. Mr. Lighthizer repeatedly stated his intention to request that other countries "enforce their trade laws", indicating that Trump administration may use this authority to address alleged dumping of Chinese products that do not actually enter the US market but arguably injure US producers by depressing global prices or impeding US exports. Mr. Lighthizer also expressed interest in taking actions to address "upstream dumping" (*i.e.*, the incorporation of dumped inputs into another product that is then exported to the United States).

  When asked whether existing US trade law and WTO rules provide adequate mechanisms to address industrial overcapacity in China, Mr. Lighthizer stated that "I don't believe the WTO is set up to deal effectively with a country like China and their industrial policy," thus potentially indicating his desire to utilize unilateral measures such as Section 301 to combat Chinese trade and economic policies. Mr. Lighthizer also indicated that he has several ideas for "new remedies" that could be helpful in addressing this issue, and he stated that he would like to discuss these proposals with Members of Congress.

- **Other US-China trade issues.** Mr. Lighthizer indicated that he believes the Department of Commerce (DOC) should continue to treat China as a non-market economy for purposes of antidumping investigations, and that DOC should "self-initiate" trade remedy investigations of imports from China (including imports of products other than steel). Self-initiation is permitted under Sections 702(a) and 732(a) of the Tariff Act of 1930 (19 U.S.C. §§ 1671a and 1673a), but is rare and resource-intensive – trade remedy cases have almost always been initiated based on a petition from the domestic industry.

  Mr. Lighthizer also was hesitant to label China a "currency manipulator", stating that "in the past, it is my judgement that China was a substantial currency manipulator…whether China is manipulating the currency right now to weaken it is another question[.]"

While Mr. Lighthizer's comments during the hearing represent a more defensive and enforcement-oriented approach to trade policy than that espoused by recent USTRs, his stated views do not represent a radical shift towards US protectionism. Rather, they are consistent with the relatively mainstream (albeit more aggressive) views that Mr. Lighthizer and other members of the US trade bar have expressed over the past several decades while serving as legal counsel to import-sensitive US industries, such as the US steel industry. Moreover, Mr. Lighthizer did not embrace the most radical aspects of President Trump's past promises on trade, and he emphasized during his testimony that efforts to reduce the US trade deficit should focus on increasing US exports.Thus, at this stage, Mr. Lighthizer's likely confirmation as USTR does not alter our expectation that the Trump administration will avoid the more extreme policy proposals discussed during the campaign.

Trump Administration Sends Draft of NAFTA Negotiating Objectives to Congress

On March 28, 2017, Acting United States Trade Representative (USTR) Stephen Vaughn sent Members of Congress a draft notification announcing President Trump's intention to "initiate negotiations related to the North American Free Trade Agreement (NAFTA) and its architecture". The draft notification includes a list of the administration's "specific objectives" for the negotiation, and therefore provides important insights into how the Trump administration intends to modify NAFTA and how it might approach future free trade agreement (FTA) negotiations. Pursuant to the trade promotion authority (TPA) law enacted by Congress in 2015, the Trump administration must submit a final version of the notification and the objectives to Congress 90 days before initiating negotiations with the other NAFTA parties.

Overall, the Trump administration's draft negotiating objectives for NAFTA do not represent a radical departure from those that recent administrations have pursued in FTA negotiations, or from the negotiating objectives that Congress approved in the TPA legislation enacted in 2015. Indeed, many of the objectives appear similar to the outcomes negotiated by the Obama administration in the Trans-Pacific Partnership (TPP). However, a few of the objectives do appear to reflect the Trump administration's economic nationalist objectives or are so ambiguous as to permit the pursuit of such objectives during the negotiations themselves. Furthermore, it is possible that, following congressional review of the draft document, the listed objectives are clarified, amended or supplemented.

The draft negotiating objectives that might differ from past US FTAs include the following:

- **Trade in goods.** The administration will "seek to maintain and expand current market access on trade between each NAFTA country and the United States on the broadest possible basis…*while addressing U.S. import sensitivities*" (emphasis added). This objective might not represent a departure from recent US policy, as there are a small number of import-sensitive products that the United States has routinely shielded from tariff elimination or other forms of liberalization in trade agreements. On the other hand, given President Trump's rhetoric regarding import restrictions, this objective might presage efforts to negotiate the reinstatement of tariffs or other import restrictions on products that were subject to liberalization under NAFTA.

- **Tax treatment.** The administration will "seek to level the playing field on tax treatment," but the document does not specify how US negotiators will seek to achieve this objective. The reference could therefore be benign – for example merely ensuring "national treatment" for internal taxation equivalent to that under the WTO's General Agreement on Tariffs and Trade. On the other hand, it could refer to some Trump administration officials' belief that the "border adjusted" value-added tax (VAT) systems of Mexico and Canada (*i.e.*, which tax import sales but exempt export sales) disadvantage US goods, and that the United States should seek to address this supposed imbalance through trade agreement measures such as offsetting border taxes. Pursuing this objective could therefore be controversial.

- **Rules of origin.** The administration will "seek rules of origin that ensure that the Agreement supports production and jobs in the United States…without creating unnecessary obstacles to trade". This appears to be a reference to the Trump administration's desire to tighten the NAFTA rules of origin (*i.e.*, to require a higher level of regional value content) for products such as automobiles and electronics, though this is not explicitly stated in the objective. Many critics have warned that, while Canada and Mexico may welcome certain revisions to the current

NAFTA rules of origin, onerous rules (*e.g.*, those requiring high levels of originating content or a certain proportion of content for each NAFTA party) might be impossible for domestic manufacturers of sophisticated goods and thus might discourage companies from using NAFTA or investing in North America.

- **Government procurement.** The administration will seek rules that require government procurement to be conducted in a manner that is consistent with US law and "the Administration's policy on domestic procurement preferences." Given that the Trump administration has emphasized its support for "Buy American" policies in government procurement, this objective likely indicates a desire to reduce the scope of the US procurement market that is available under the NAFTA. On the other hand, the United States also will seek to open the procurement markets of Canada and Mexico to US companies. It is unclear how both of these objectives will be achieved in the negotiations.

- **Safeguard mechanism.** The administration will seek "a safeguard mechanism to allow a temporary revocation of tariff preferences, if increased imports from NAFTA countries are a substantial cause of serious injury or threat of serious injury to the domestic industry." A similar safeguard mechanism was included in Chapter 8 (Emergency Action) of the NAFTA, but was available to the NAFTA parties only during specified "transition periods" (*i.e.*, during the period in which duties on NAFTA-origin goods were being phased out). Chapter 8 also required that the party taking the safeguard action provide to the party against whose good the action was taken "mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the action". While a proposal to reinstate the original safeguard mechanism might not be regarded as controversial, an effort by the Trump administration to modify the mechanism (*e.g.*, by removing the requirement to provide trade liberalizing compensation or lowering the injury threshold) might encounter resistance from the other NAFTA parties.

- **Dispute settlement.** The document includes an objective to "eliminate Chapter 19 dispute settlement of antidumping and countervailing duty determinations, in light of US experiences where panels have ignored the appropriate standard of review and applicable law[.]" More recent US FTAs, such as those negotiated by the Obama administration, have not included a review mechanism for AD/CVD determinations such as that included in Chapter 19 of the NAFTA.

Notably absent from the document are objectives regarding currency manipulation, or the investor-state dispute settlement (ISDS) mechanism, which permits private investor suits against government decisions affecting their investments.

Most of the remaining negotiating objectives – including on trade in goods, services, and investment – are similar to those set forth in TPA and the outcomes negotiated in recent US FTAs. Notably, the negotiating objectives on state-owned enterprises, digital trade, intellectual property, labor and environment, technical barriers to trade, and sanitary and phytosanitary measures appear similar to the rules included in the TPP. These similarities were not unexpected, given that USTR nominee Robert Lighthizer, Treasury Secretary Steven Mnuchin, and Commerce Secretary Wilbur Ross have each suggested that various elements of the TPP should be used as a starting point for the renegotiation of NAFTA.

Outlook

Most of the Trump administration's draft negotiating objectives appear to be aimed at updating NAFTA to incorporate provisions that have been included in more recent US trade agreements, and thus do not represent a major shift in policy. Many of these objectives also appear to be consistent with the goals set forth by Congress in TPA. While some of the objectives do not fall into this category and suggest the possibility of tariffs or other protectionist measures, they are described only in general terms and do not necessarily indicate that the administration will seek a substantial reversal of the trade liberalization achieved under NAFTA. However, caution is still warranted with respect to these and other objectives due to their current ambiguity.

Furthermore, the objectives described above are in draft form, and USTR officials have noted that the final objectives will be the result of negotiations between the administration and Congress. It is possible, therefore, that the objectives will be changed or clarified to reflect congressional priorities.

Petitions and Investigations Highlights

International Trade Commission Issues Affirmative Final Determinations in AD/CVD Investigations of Stainless Steel Sheet and Strip from China

On March 3, 2017, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of stainless steel sheet and strip from China.[4] The US Department of Commerce (DOC) determined in February 2017 that imports of these products from China were sold in the United States at dumping margins ranging from 63.86 to 76.64 percent and received countervailable subsidies ranging from 75.60 to 190.71 percent.

As a result of the ITC's affirmative final determinations, DOC will issue anti-dumping and countervailing duty orders on imports of the subject merchandise from China. According to the ITC, imports of the subject merchandise from China were valued at an estimated USD 312 million in 2015.

The ITC also made negative findings with respect to critical circumstances with regard to imports of the subject merchandise from China. As a result, subsidized goods that entered the United States from China prior to July 18, 2016 will not be subject to retroactive countervailing duties, and goods sold at less than fair value that entered the United States prior to September 19, 2016 will not be subject to retroactive anti-dumping duties.

The ITC's public report on these investigations will be available by April 14, 2017.

International Trade Commission Issues Affirmative Final Determinations in AD/CVD Investigations of Carbon and Alloy Steel Cut-to-Length Plate from China

On March 3, 2017, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of carbon and alloy steel cut-to-length plate from China.[5] The US Department of Commerce (DOC) determined in January 2017 that imports of these products from China were sold in the United States at a dumping margin of 68.27 percent and received countervailable subsidies of 251 percent.

As a result of the ITC's affirmative final determinations, DOC will issue anti-dumping and countervailing duty orders on imports of the subject merchandise from China. According to the ITC, imports of the subject merchandise from China were valued at an estimated USD 74.6 million in 2015.

The ITC's public report on these investigations will be available by April 3, 2017.

Department of Commerce Issues Affirmative Final Determination in AD Investigation of Ferrovanadium from Korea

On March 17, 2017, the US Department of Commerce (DOC) announced its affirmative final determination in the anti-dumping duty (AD) investigation concerning imports of ferrovanadium from the Republic of Korea (Korea).[6] In its investigation, DOC determined that imports of the subject merchandise from Korea were sold in the United States at the following dumping margins:

Country	Producer/Exporter	Dumping Margin
Korea	Korvan Ind. Co., Ltd	3.22 percent
	Fortune Metallurgical Group Co., Ltd	54.69 percent
	Woojin Ind. Co., Ltd	54.69 percent
	All others	3.22 percent

[4] Click **here** to view the ITC's press release on the investigations.

[5] Click **here** to view the ITC's press release on the investigations.

[6] Click **here** to view the DOC fact sheet on these investigations

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 HTSUS item number 7202.92.0000.

The US International Trade Commission (ITC) is scheduled to announce its final determination in this investigation on or around May 1, 2017. If the ITC makes an affirmative final determination that imports of ferrovanadium from Korea materially injure or threaten material injury to the domestic industry, DOC will issue an AD order.

According to DOC, imports of ferrovanadium from Korea in 2015 were valued at an estimated USD 16 million.

International Trade Commission Issues Affirmative Final Determination in AD Investigation of R-134a from China

On March 23, 2017, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of 1,1,1,2-tetrafluoroethane (R-134a) from China.[7] The US Department of Commerce (DOC) determined in February 2017 that imports of R-134a from China were sold in the United States at dumping margins ranging from 148.79 to 167.02 percent.

As a result of the ITC's affirmative final determination, DOC will issue an antidumping duty order on imports of R-134a from China. According to the ITC, imports of these products from China were valued at an estimated USD 50.8 million in 2015.

The ITC made negative findings with respect to critical circumstances with regard to imports of R-134a from China. As a result, goods sold at less than fair value that entered the United States from China prior to October 7, 2016 will not be subject to retroactive antidumping duties.

The ITC's public report on this investigation will be available by April 26, 2017.

Department of Commerce Issues Affirmative Final Determinations in AD and CVD Investigations of HEDP from China

On March 21, 2017, the US Department of Commerce (DOC) announced its affirmative final determinations in the anti-dumping (AD) and countervailing duty (CVD) investigations concerning imports of 1-hydroxyethylidene-1, 1-diphosphonic acid (HEDP) from China.[8] In its investigations, DOC determined that imports of the subject merchandise from China were sold in the United States at the following dumping margins and subsidy rates:

Exporter/Producer	Dumping Margin
Shandong Taihe Chemical Co., Ltd	167.58 percent
WW Group	184.01 percent
Separate Rate Companies	179.76 percent
China-Wide Rate	184.01 percent

Exporter/Producer	Subsidy Rate
Shandong Taihe Chemical Co., Ltd	2.40 percent
Wujin Water	0.75 percent (*de minimis*)
Adverse Facts Available Companies	54.11 percent
All others	2.40 percent

[7] Click **here** to view the ITC's press release on the investigation.

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

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 hydroxyethylidenendiphosphonic acid, hydroxyethanediphosphonic acid, acetodiphosphonic acid, and etidronic acid. The Chemical Abstract Service (CAS) registry number for HEDP is 2809-21-4. The subject merchandise is currently classified in HTSUS at subheading 2931.90.9043. It may also enter under HTSUS subheadings 2811.19.6090 and 2931.90.9041.

The US International Trade Commission (ITC) is scheduled to announce its final determinations in these investigations on or around May 4, 2017. If the ITC makes affirmative final determinations that imports of HEDP from China materially injure or threaten material injury to the domestic industry, DOC will issue AD and CVD orders.

According to DOC, imports of HEDP from China in 2015 were valued at an estimated USD 290.1 million.

Department of Commerce Initiates AD and CVD Investigations of Silicon Metal from Australia, Brazil, Kazakhstan and Norway

On March 29, 2017, the US Department of Commerce (DOC) announced the initiation of antidumping duty (AD) investigations concerning imports of silicon metal from Australia, Brazil, and Norway, and the initiation of countervailing duty (CVD) investigations concerning imports of the same from Australia, Brazil, and Kazakhstan.[9]

The petitioner for these investigations is Globe Specialty Metals, Inc. The petitioner has alleged that imports of silicon metal were sold in the United States at dumping margins of 28.58 – 52.81 percent (for Australia); 15.41 – 134.92 percent (for Brazil); and 32.25 – 45.66 percent (for Norway). The petitioner also has alleged that imports of silicon metal from Australia, Brazil, and Kazakhstan received countervailable subsidies.

The merchandise subject to the investigation is silicon metal of all forms and sizes, including silicon metal powder. Silicon metal contains at least 85 percent but less than 99.99 percent silicon, and less than 4 percent iron, by actual weight. The subject merchandise is currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 2804.69.1000 and 2804.69.5000. Semiconductor grade silicon (merchandise containing at least 99.99 percent silicon by actual weight and classifiable under HTSUS subheading 2804.61.0000) is excluded from the scope of the investigation.

The US International Trade Commission (ITC) is scheduled to make its preliminary injury determinations on or before April 24, 2017. If the ITC determines that there is a reasonable indication that imports of silicon metal from the subject countries materially injure, or threaten material injury to, the domestic industry, the investigations will continue. DOC will be scheduled to announce its preliminary CVD determinations in June 2017 and its preliminary AD determinations in August 2017, unless the statutory deadlines are extended.

According to DOC, imports of silicon metal from Australia, Brazil, Kazakhstan, and Norway in 2016 were valued at an estimated USD 33.9 million, USD 60 million, USD 17.5 million, and USD 26.1 million, respectively.

Department of Commerce Initiates AD and CVD Investigations of Aluminum Foil from China

On March 28, 2017, the US Department of Commerce (DOC) announced the initiation of antidumping (AD) and countervailing duty (CVD) investigations concerning imports of aluminum foil from China.[10] The petitioner, the Aluminum Association Trade Enforcement Working Group, has alleged that imports of aluminum foil from China were sold in the United States at dumping margins of 38.40 – 140.21 percent and received countervailable subsidies.

[9] Click **here** to view the DOC fact sheet on this investigation.

[10] Click **here** to view the DOC fact sheet on this investigation.

The merchandise subject to the investigations is aluminum foil having a thickness of 0.2 mm or less, in reels exceeding 25 pounds, regardless of width. Aluminum foil is made from an aluminum alloy that contains more than 92 percent aluminum. The products under investigation are currently classifiable under Harmonized Tariff Schedule of the U.S. (HTSUS) subheadings 7607.11.3000, 7607.11.6000, 7607.11.9030, 7607.11.9060, 7607.11.9090, and 7607.19.6000, and may also be entered under HTSUS subheadings 7606.11.3060, 7606.11.6000, 7606.12.3045, 7606.12.3055, 7606.12.3090, 7606.12.6000, 7606.91.3090, 7606.91.6080, 7606.92.3090, and 7606.92.6080.

The US International Trade Commission (ITC) is scheduled to make its preliminary injury determinations on or before April 24, 2017. If the ITC determines that there is a reasonable indication that imports of aluminum foil from China materially injure or threaten material injury to the domestic industry, the investigations will continue. DOC will then be scheduled to announce its preliminary CVD determination in June 2017 and its preliminary AD determination in August 2017, unless the statutory deadlines are extended.

According to DOC, imports of aluminum foil from China in 2016 were valued at an estimated USD 389 million.

Free Trade Agreement

Renegotiating the North American Free Trade Agreement

On February 2, 2017, President Trump confirmed that he intends to initiate the renegotiation of the North American Free Trade Agreement ("NAFTA") in the near future. However, aside from tariff and rules of origin modifications, substantive renegotiation of an existing US free trade agreement is unprecedented, and the US laws that govern NAFTA and presidential trade negotiation authority do not expressly establish the process for renegotiation and legislative approval of any renegotiated agreement. These legal ambiguities and the Trump Administration's comments on the matter have raised questions regarding the extent to which Congress will be involved in the renegotiation process – questions that this report seeks to answer.

Our conclusions may be summarized as follows:

- The three different US laws expressly governing NAFTA—the Trade Act of 1974 ("1974 Act"), the version of trade promotion authority ("TPA") in effect at the time of NAFTA's negotiation and implementation (TPA 1988), and the act implementing NAFTA into US law – are silent on substantial renegotiation of the agreement.
- The current version of TPA ("TPA 2015") governs the President's efforts to negotiate or renegotiate certain trade agreements (and congressional consideration thereof), but *does not definitively resolve* whether NAFTA is one of those agreements. The text of TPA 2015 permits three different interpretations with respect to NAFTA renegotiation: (1) TPA 2015 and *all* of its requirements apply; (2) only certain provisions (chiefly, a requirement that the President notify Congress 90 days prior to entering into FTA negotiations) of TPA 2015 apply; or (3) TPA 2015 does not apply at all.
- Even though legal arguments could be advanced that the President can unilaterally renegotiate NAFTA, any attempt by President Trump to do so would almost certainly provoke congressional opposition and could face legal challenges. Perhaps for these reasons, it appears that the President intends to adhere to TPA 2015's procedural requirements.

General Principles Governing US Trade Agreements (Including NAFTA)

The negotiation, entry into, and implementation of trade agreements implicates Congress's express power to impose duties and tariffs to regulate foreign commerce under Article I of the US Constitution,[11] and the President's authority under Article II of the US Constitution to negotiate treaties and international agreements, and to conduct foreign affairs.[12] Because of Congress's express power in this area, the President may not impose, reduce, or effect any other change in existing tariff rates or other barriers to trade unless Congress has delegated to him the authority to do so.

Under US Law, FTAs are not treaties (which are typically "self-executing," require two-thirds approval by the Senate, and have the force of law upon ratification). They are "congressional-executive agreements" that, even after being signed by the President, have limited legal force in the United States until they are converted into implementing legislation (which would amend current law), passed by Congress, and signed into law by the President.[13]

Each US trade agreement is governed by three different US laws:

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11 U.S. CONST. Art. I, Section 8, Cls. 1, 3.

12 U.S. CONST. Art. II, Section 1. *See United States v. Curtiss-Wright Export Corp*, 299 U.S. 319 (1936)

13 This process is currently codified in the United States Trade Promotion Authority Law (Public Law No. 114-26): **https://www.congress.gov/114/plaws/publ26/PLAW-114publ26.pdf**

- *The 1974 Act.* The basic legal authority for US FTAs rests in the 1974 Act, in which Congress authorized the president to negotiate trade agreements dealing with tariff and non-tariff barriers[14];
- *The version of TPA in effect at the time of the agreement's implementation.* In exchange for providing a commitment that Congress will consider FTAs negotiated by the President under "fast-track" legislative procedures,[15] each version of TPA has also imposed certain congressional notification and consultation requirements on the President. These requirements, along with the TPA negotiating objectives, are designed to ensure that FTAs negotiated by the President reflect congressional priorities.
- *The FTA's implementing act.* Implementing acts are passed by Congress and signed by the President. These acts implement FTA commitments into US law, and typically contain varying rules on modification and withdrawal from the underlying FTA.

NAFTA, US Law and TPA 2015

Because none of the three laws governing NAFTA discuss renegotiation of an existing trade agreement, one could argue that President Trump is free to unilaterally renegotiate NAFTA without congressional input. On the other hand, TPA 2015 covers any trade agreements reached by President Trump between now and July 2021 and contains language that contemplates changes to an existing trade agreement. TPA 2015 could therefore provide for congressional involvement in the NAFTA renegotiation, but its ambiguity with respect to trade agreements implemented *before* the law entered into force precludes a definitive conclusion in this regard.

NAFTA Does Not Address the Process for Renegotiation

The text of NAFTA provides for amendments to the agreement, but does not specifically address the process for conducting or completing renegotiations. Section 2202 of NAFTA allows for "amendments" between two or more parties and requires fulfillment of their respective domestic legal procedures:

> *Article 2202: Amendments*
>
> 1. *The Parties may agree on any modification of or addition to this Agreement.*
> 2. *When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement.*

Beyond this text, there is no formal guidance in NAFTA on the process for undertaking or completing substantial renegotiations of the agreement.

Renegotiation and substantial changes to NAFTA, outside of changes to the agreement's rules of origin and tariffs, is unprecedented. In particular, Article 513 of NAFTA establishes a working group on the agreement's rules of origin, and this group is tasked with implementing the NAFTA rules of origin. The group has met regularly, reviewed the NAFTA rules of origin, and proposed technical changes to the rules and modifications to specific rules of origin contained in Annex 401 of NAFTA. For example, in 2009, the United States and Canada implemented measures to liberalize the NAFTA rules of origin for certain textile goods.[16]

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[14] Section 151 of the 1974 Act authorized the president to submit FTAs to Congress for approval under so-called "fast track" or TPA procedures. 19 U.S.C. § 2191, P.L. 93-617. Subsequent extensions of TPA occurred in 1988, 2002, and most recently, in 2015, each extending the fast track procedures and incorporating the key provisions of the 1974 Act.

[15] Under TPA or "fast track," Congress agreed to suspend its ordinary legislative procedures and give trade agreements expedited treatment when considering an FTA negotiated by the President (for example, under fast track, Congress may not amend a trade agreement and must issue a final vote on the agreement within 90 days). The expedited procedures of the 1974 Act came to be referred to as "fast track," and this term has been used to highlight the restriction of congressional discretion in reviewing trade agreements. When Congress renewed the availability of these procedures under the Bipartisan Trade Promotion Authority Act of 2002, the act re-designated these "fast track" procedures as "trade promotion authority."

[16] *See* Amendments to Appendix 6, Annex 300-B, Rules of Origin Short Supply Goods (June 30, 2009), available at http://www.sice.oas.org/TPD/NAFTA/ROO/App6_Anx300B_e.pdf.

The Trade Act of 1974 and the Omnibus Trade and Competitiveness Act of 1988 ("TPA 1988") Are Silent Regarding Renegotiation

Neither TPA 1988 nor the Trade Act of 1974 contains provisions expressly governing the renegotiation of a US trade agreement. NAFTA was negotiated and submitted to Congress under the terms of the 1974 Act and the TPA 1988. The latter law provided the President the explicit legal authority to negotiate and enter into tariff and nontariff barrier agreements until June 1, 1993, and that authority was later extended to April 15, 1994, in order to complete the General Agreement on Tariffs and Trade Uruguay Round.[17]

NAFTA and Its Implementation Act Are Likewise Silent Regarding Renegotiation

The NAFTA Implementation Act, which implemented the agreement into US law, does not address whether congressional approval would be required for new or amended provisions resulting from renegotiations, *except* for tariff modifications and changes to certain rules of origin. The President is authorized to implement these latter changes by proclamation (*i.e.*, without congressional approval) under Sections 201 and 202 of NAFTA.[18] In addition, the implementation act does not specify or describe the "applicable legal procedures" set forth in NAFTA Article 2202 (see above).

Limited changes to NAFTA not involving formal amendments to the Implementation Act have been negotiated—and ultimately implemented into US law—without congressional legislation, but the White House has nevertheless consulted with Congress. All such changes, however, have related to the aforementioned issues expressly discussed in the NAFTA Implementation Act. For example, changes to NAFTA's rules of origin were implemented by President George W. Bush through a presidential proclamation, and pursuant to existing presidential authority in the NAFTA Implementation Act.[19] Congressional consultation and layover requirements were followed, but subsequent congressional approval was not sought for these changes.[20]

Because Congress approved NAFTA through the NAFTA Implementation Act and given the Act's express exceptions for rules of origin and tariff modifications, there is a strong argument that major changes to the agreement would require legislative approval. Furthermore, the aforementioned history of congressional consultations for minor changes to the agreement indicates that more substantial renegotiations would follow a similar course. However, as noted above, the Act provides no guidance on the process for such changes.

TPA 2015 Contains Express Language Regarding Modifications to Existing Trade Agreements, and Arguably Imposes Congressional Consultation and Approval Requirements on the Renegotiation Process

The text of TPA 2015 contains two provisions that could apply to the renegotiation of NAFTA[21]:

- Section 105(a)(1) of TPA 2015 provides that the President, with respect to *any agreement that is subject to the provisions of Section 103(b)*, must notify Congress at least 90 days before initiating negotiations with another country and specify in that notification whether "the President intends to seek an agreement, or *changes to an existing agreement*"(emphasis added).[22] This language suggests that, regardless of whether the President enters a negotiation anew, or seeks to renegotiate an existing agreement, the 90-day notification rule applies.

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[17] 19 U.S.C. § 2902, P.L. 100-418, as amended by P.L. 103-49.

[18] The North American Free Trade Agreement Implementation Act, Statement of Administration Action, 19 U.S.C. § 3301, *et seq*., P.L. 114-38.

[19] *Id*. at Section 202(q), 19 U.S.C. § 3332(q).

[20] *See* Presidential Proclamation 7870—To Modify Rules of Origin Under the North American Free Trade Agreement (February 9, 2005).

[21] Historically, TPA statutes have required consultation with Congress, including specific House and Senate committees, prior to and during trade negotiations. The Trade Act of 2002 ("TPA 2002") required the president to notify Congress 90 calendar days prior to initiating negotiations on any reciprocal trade agreement with a foreign country. 19 U.S.C. § 3804(a), P.L. 107-210. TPA 2015 maintains these requirements. TPA 2015 covers agreements reached before July 1, 2018, with a possible extension to July 1, 2021. 19 USC § 4202(a)(1)(A)(i)—(ii), P.L. 114-26. TPA 2015 arguably covers any trade negotiations initiated by President Trump until at least July 1, 2018, and also covers any trade renegotiations.

[22] 19 U.S.C. § 4204(a)(1)(A).

- Under Section 106(a), one of the notification and submission requirements imposed on the President for implementing *any agreement entered into under Section 103(b)* is to explain "whether and how the agreement changes provisions of an agreement *previously negotiated*" (emphasis added).[23]

However, TPA 2015 does not clarify whether NAFTA is an agreement that is "subject to the provisions of Section 103(b),"[24] which pertains to "Agreements regarding tariff and non-tariff barriers" that the President "may enter into" before July 1, 2018 (or 2021 if the law is extended).[25] All of TPA's various notification/consultation and implementation requirements (*e.g.*, Sections 105 and 106) apply to "any agreement entered into under section 103(b)."

TPA 2015 does not clarify, however, whether agreements that were negotiated pursuant to an earlier TPA (*e.g.*, the NAFTA) and implemented prior to TPA 2015's entry into force (*i.e.*, June 29, 2015) are "subject to the provisions" of, or considered an "agreement entered into under," Section 103(b). Consequently, the relationship between TPA 2015 and the NAFTA could be interpreted in the following ways:

1. NAFTA is governed by Section 103(b); thus, TPA 2015 and all of its requirements (including requirements related to congressional notification and consultations) apply to the renegotiation of NAFTA.

2. NAFTA is subject to the provisions of Section 103(b) but is subject only to the express TPA 2015 provisions that govern existing agreements. This would include the 90-day notification requirement set forth in Section 105(a)(1) of TPA 2015, but not the other notification, consultation and implementation requirements set forth in TPA 2015.

3. NAFTA is not subject to the provisions of Section 103(b); thus, TPA 2015 does not apply to the renegotiation of NAFTA.

Though ambiguous, the use of the present tense in Section 103(b) – *i.e.*, stating that the President "may enter into" a trade agreement during the specified time period – indicates that the provision applies to only those agreements negotiated pursuant to TPA 2015 but entered into prior to July 1, 2018. The most straightforward interpretation of TPA 2015, therefore, is that NAFTA is not subject to the provisions of Section 103(b) because it was negotiated and submitted to Congress under TPA 1988—not TPA 2015, and therefore, TPA 2015 does not apply to NAFTA renegotiation. However, because TPA 2015 offers fast track benefits and failure to adhere to TPA's procedures would undoubtedly anger Congress, the Trump administration may still decide to follow to the requirements of TPA 2015.

President Trump and Congress Are Indicating Adherence to TPA 2015

Despite the ambiguity in US law, it appears that the Trump Administration intends to proceed as though interpretation (1) above is correct, and that TPA 2015 in its entirety applies to the renegotiation of NAFTA. President Trump may have made this decision in response to congressional pressure. Members of Congress expect to be notified and consulted (as provided for in TPA) on trade negotiations initiated by the President, and they may have already insisted that President Trump follow the TPA 2015 requirements when renegotiating the NAFTA (President Trump announced his intention to follow the 90-day notification requirement after meeting with the Chairmen and Ranking Members of the congressional trade committees).

More recently, Commerce Secretary Wilbur Ross has indicated in meetings with Members of Congress that the Trump administration plans to follow the TPA notification requirements with respect to the renegotiation of NAFTA, and some congressional sources have indicated that they expect to receive the first required notification in late March. However, Democratic and Republican Members of Congress have stated publicly that the Trump administration has yet to provide details regarding its objectives for the renegotiation. The timing of the first 90-day notification will

[23] *Id*. at § 4206(a)(2)(A)(bb).

[24] *See id*.

[25] *Id*. at § 4202(b).

depend in part on when the Trump administration is ready to provide such details, because TPA requires that this notification include "the specific United States objectives for the negotiations."

The Trump administration's apparent plan to follow the TPA 2015 requirements would be consistent with the practice of previous Presidents when negotiating trade agreements under circumstances not specifically governed by US law. For example, when President Obama initiated negotiations on the Trans-Pacific Partnership in 2009, his administration followed the notification and consultation requirements set forth in TPA 2002, which had expired two years earlier, in order to avoid congressional pushback. In addition, President Obama pursued negotiations on the Transatlantic Trade and Investment Partnership according to TPA 2002 requirements. Furthermore, leaders in other countries may be less likely to participate or engage openly in negotiations if they fear Congress will introduce amendments to any negotiated agreement.

If President Trump were to ignore the TPA 2015 requirements, Congress would be under no obligation to consider any subsequent NAFTA deal, particularly under "fast track" legislative procedures, and might even go so far as to challenge the President's actions in US courts (though this is unlikely).[26]

Specific Requirements Imposed by TPA 2015

In addition to the 90-day notification rule for negotiating trade agreements, TPA 2015 imposes several additional requirements on the President. Most of these requirements occur during the negotiation process and up to the submission of an implementing bill to Congress. Most of the required actions take the form of notifications, reports, or submissions by the President to Congress or designated committees.[27] Some of the key requirements are as follows:

- Report to revenue committees, at least 180 days before entering into a covered trade agreement, on proposals being considered that might require changes to U.S. trade remedy laws;[28]
- Notify Congress at least 90 days before entering into a covered trade agreement;[29]
- Submit to Congress within 60 days after entering into a covered trade agreement a description of changes in existing US law that would be required;[30]
- Provide to Congress at least 30 days before submitting a draft of the implementing bill "a copy of the final legal text of the agreement" and a "draft statement of any administrative action proposed to implement" it;[31] and
- Submit to Congress "on a day in which both Houses of Congress are in session" the draft implementing bill, along with another copy of the final legal text of the agreement, the statement of administrative action (SAA), an explanation of how the SAA will affect existing law; and a statement explaining how the implementing bill meets the substantive requirements (*e.g.*, "serves the interest of United States Commerce").[32]

Assuming that the Trump Administration adheres to the above requirements, Congress would be directly and substantially involved in any renegotiation of NAFTA. Moreover, any renegotiated agreement could not be implemented into US law without congressional approval. In this vein, Congress will take into account whether a

[26] It is worth nothing that the NAFTA Implementation Act does permit certain items – rules of origin and tariff rates – to be unilaterally modified without congressional input or approval. This might arguably permit the President to ignore TPA when negotiating on, and subsequently modifying, these items. However, limiting the negotiations to just these two issues would probably not be sufficient for President Trump or the other NAFTA parties, and Congress might still insist on TPA's negotiating directives and notification/consultation procedures applying to any such negotiations.

[27] These requirements are set forth primarily in 19 U.S.C. § 4204 ("Notices, Consultations, and Reports") and 19 U.S.C. § 4205 ("Implementation of Trade Agreements").

[28] 19 U.S.C. § 4204(b)(3).

[29] *Id*. at § 4205(a)(1)(A).

[30] *Id*. at § 4205(a)(1)(C).

[31] *Id*. at § 4205(a)(1)(D).

[32] *Id*. at § 4205(a)(1)(E) and § 4205(a)(2).

renegotiated NAFTA adheres to the TPA negotiating objectives in deciding whether to approve any such agreement. Indeed, Senate Finance Committee Chairman Orrin Hatch (R-UT) recently stated that "as the Chairman of the Finance Committee, I intend to make sure new agreements meet the high standards we established in our TPA statute. If they fall short of those standards, I won't support them. Many of my colleagues feel the same way."[33]

Conclusion

Renegotiation of an existing US trade agreement is unprecedented, and the ambiguity of the relevant statutes has created uncertainty as to how the renegotiation process will proceed. Given that the TPA 2015 notice and consultation requirements arguably apply to the renegotiation of NAFTA, and the Trump Administration's apparent acknowledgement of this point, Congress will likely be involved in any renegotiation of NAFTA. Moreover, at this stage it appears unlikely that President Trump will seek to renegotiate NAFTA without congressional involvement or approval, thereby risking a high-profile political and legal battle with Congress.

[33] United States Senate, Committee on Finance, "Hatch Unveils Finance Committee Agenda for 115th Congress," February 1, 2017, speech available at **https://www.finance.senate.gov/chairmans-news/hatch-unveils-finance-committee-agenda-for-115th-congress-**.

Multilateral Policy Highlights

WTO Concludes 13th Trade Policy Review of Japan

The latest WTO Trade Policy Review (TPR) of Japan took place on March 8 and 10.[34] WTO Members encouraged Japan to continue, in particular, with structural reforms that would allow it to further liberalize trade and remove non-tariff barriers. The United States was outspoken on this point, expressing serious concern about the USD 69 billion trade deficit that it has with Japan and urging the Japanese Government to address the trade imbalance by implementing "meaningful structural reforms". In the view of the United States, the same structural problems that have hampered Japan's economic growth for a generation are still evident, including import restrictions that substantially reduce the competitiveness of the economy and access to the domestic market.

As was the case in Japan's previous TPRs, an important focus of this review was Japan's agricultural policies which several Members stated were highly trade-restricting. The United States criticized both Japan's agricultural import tariffs, that it said are among the highest of any WTO Member, and Japan's state trading enterprises that control imports of certain key agricultural products. This, the United States said, left Japanese agriculture heavily protected and the domestic market for food products very difficult to penetrate. Other Members welcomed the reforms that Japan has introduced in its farm sector in the past five years, but several added that nothing had been done that could lead to the expectation that agricultural trade restrictions are likely to be relaxed significantly.

The United States also targeted Japan's non-tariff barriers for criticism, urging Japan to remove them and allow US manufacturers "to compete on a level playing field" with Japanese competitors. The United States focused in particular on non-tariff barriers that it said were preventing US automobile manufacturers from entering the Japanese market, listing as areas of concern certification requirements, standards and testing protocols, and hindrances to the development of distribution and service networks within Japan.

Other Members noted Japan's low reliance on foreign direct investment, with several claiming that factors such as the stringent regulatory framework and poor corporate governance have continued to make it unattractive or difficult for foreign investors to enter the Japanese market. Difficulties for foreign firms to compete in Japan's government procurement market were raised. Some Members said that their companies continued to suffer significant economic loss due to infringement of their intellectual property rights in Japan, particularly from counterfeit trade. Some Members also commented on Japan's SPS and TBT measures which they said created high compliance costs for imported goods.

Many Members commented favorably on Japan's commitment to the multilateral trading system and the prominent role that it had played in the Doha Round negotiations and more recent plurilateral initiatives such as the Information Technology Agreement. Japan's participation in negotiations on new regional agreements, such as the Trans-Pacific Partnership and the Regional Comprehensive Economic Partnership, was welcomed. Also, many developing countries, including least-developed countries, expressed great appreciation for Japan's development assistance and preferential schemes, including its duty-free, quota-free initiative.

Increased Scrutiny of State Trading Enterprises in the WTO

In a long running disagreement with the United States and the European Union over the notification of its State Trading Enterprises (STEs), China has brushed aside criticism that its notifications have been inadequate and restated its position that it is complying fully with its WTO transparency obligations. China's latest response to questions posed about its STEs in 2015 and 2016 by the United States and the European Union is likely to inflame the disagreement further, particularly when China's industrial policies and export performance are under intense criticism in Washington. This matter has the effect of raising scrutiny more generally over WTO Members' compliance with their transparency obligations on STEs.

[34] The summing up by the Chairperson of the Trade Policy Review Body, Ms. Irene Young of Hong Kong China, can be found **here**.

In the view of the United States, China has been delinquent for several years in meeting its notification obligations on STEs. This is of concern because the United States believes that China is trading extensively through state-backed firms that do not operate on market-based, commercial terms. In 2014, following China's failure to make any STE notification since its WTO accession, the United States "counter-notified" 153 Chinese enterprises that it considered to be STEs. China responded by rejecting most of the United States' list and by notifying that it had only 25 STEs in operation. That prompted further questions from the United States and the European Union, including written questions from the United States that it tabled in June 2016. China's replies to those questions were submitted last week in the WTO.

In its replies, China rebuts the claims by the United States that it has failed to fully notify its STEs. It states that China has not exercised state trading for many years in many of the sectors counter-notified by the United States and that where it does have STEs, these STEs "conduct market-based operations without government intervention." China goes on to say that: "When a STE acts as an import agency for other enterprises, the resale prices of the imports are their CIF [price] plus a certain proportion of agency commission, without any mark-up. When a STE imports goods for itself, it decides the selling prices according to domestic market wholesale prices, and is responsible for its own profits or losses." However, China fails to provide statistics to back up its statements, saying that internal operating information of its STEs are regarded as business secrets.

China's latest submission on STEs is unlikely to satisfy other Members, notably the United States. China and other WTO Members, namely Russia, are likely to come under further critical scrutiny at the next meeting of the WTO Working Group on STEs in June.

A copy of China's submission is attached for reference.

G20 Finance Ministers Communique on Trade

The latest G20 Finance Ministers meeting has omitted any mention of resisting protectionism from its communique. The United States, with limited support from some other G20 countries, blocked any mention of protectionism in the Communique as well as mention of the rules-based multilateral trading system which Germany, as host of the meeting, had proposed in an earlier draft.[35]

The G20 pledged to reject protectionism and keep markets open after the 2008 global financial crisis when there were fears that countries could resort heavily to trade restrictions to try to protect their economies from recession. That pledge has been repeated at all G20 summits since then and the WTO has monitored how well it was being honored. In fact, resort to trade restrictions was limited and much was made of the importance of the rules-based WTO system as an effective barrier to prevent a more damaging impact of the economic recession on trade. Recently, however, WTO monitoring has registered an increase in new trade restrictions by G20 countries, mainly anti-dumping measures, which WTO Director-General Roberto Azevedo has called a "worrying sign". Another conclusion was that G20 countries have failed to eliminate restrictions which they have imposed in this period; in its latest monitoring report the WTO stated that 5 percent of world imports are now affected by import-restrictive measures implemented since October 2008 that are still in place. According to Azevedo, this state of affairs needs to be met with increased vigilance and greater political pressure on G20 countries to avoid protectionism and rollback their trade restrictions.

The latest G20 Finance Ministers Communique has broken the mold of rejecting protectionism and calling for a rollback of existing restrictions, and it omits reference to the rules-based WTO system which has appeared in all previous Communiques. The only mention of trade is: "We are working to strengthen the contribution of trade to our economies". The United States blocked attempts by Germany, as host of the meeting, to include stronger language. For the time being, the WTO does not know whether this means that it will have to stop monitoring G20 trade restrictions which it has been invited in G20 Communiques to do on a regular basis since 2008. Some G20 countries have reacted to the Finance Ministers Communique by saying that they believe the United States may be able to sign

[35] The G20 Finance Ministers Communique can be found **here**.

on again to the pledge to avoid protectionism by the time of the G20 Summit in July when they hope there will be more clarity on the United States' long-term trade policy.

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