US & Multilateral Trade Policy Developments

Japan External Trade Organization

July 2017

Contents

US General Trade Policy Highlights

USTR Requests Special Session of KORUS Joint Committee to Discuss "Possible Amendments and Modifications"

On July 12, 2017, US Trade Representative Robert Lighthizer requested that the Joint Committee established under Article 22.2 of the US-Korea Free Trade Agreement ("KORUS") convene a special session to consider "matters affecting the operation of the Agreement, including possible amendments and modifications."[1] The request indicates that, in addition to the special session, the United States is seeking "follow-on negotiations" with Korea to "resolve several problems regarding market access in Korea for U.S. exports, and, most importantly, address our significant trade imbalance."

The request appears to have been prompted by President Trump's unexpected statement during the June 30 visit of Korean President Moon Jae-in that "we are renegotiating a trade deal right now with South Korea[.]" This announcement reportedly had not been cleared in advance with USTR, the Korean delegation, or Members of Congress, but rather was an idea advanced by the "economic nationalist" wing of the White House – namely Office of Trade and Manufacturing Policy Director Peter Navarro and White House Chief Strategist Stephen Bannon. The Korean government subsequently addressed President Trump's comment by stating that, although it is willing to discuss the United States' concerns regarding KORUS, "our stance is that we have not agreed on renegotiation of the deal."

President Trump's statement and Ambassador Lighthizer's subsequent request have sown confusion about the nature and extent of the changes being sought by the Trump administration. The administration has not made clear whether it is seeking a comprehensive renegotiation of KORUS (similar to the efforts it is undertaking for the North American Free Trade Agreement), or, alternatively, a narrower negotiation aimed at addressing a only a few specific issues. Ambassador Lighthizer's request does not address this question, stating only that the United States' goals are to reduce the U.S. trade deficit with Korea and to resolve several unspecified market access issues. USTR has not yet held consultations with the congressional trade committees to discuss its plans for the special session or any subsequent negotiations with Korea.

Congressional reactions

Leaders of the congressional trade committees have expressed concern about the Trump administration's plan to seek changes to KORUS and have urged it to adhere to the notification and consultation requirements set forth in Trade Promotion Authority ("TPA"). Following President Trump's announcement, House Ways and Means Committee Chairman Brady (R-TX) questioned whether renegotiation of KORUS should be a priority, stating that "I'm a little surprised by the decision to renegotiate our Korea trade agreement when there is such urgency for us to address America's absence in the larger Asia-Pacific region[.]" Subsequently, on July 17, the Chairmen and Ranking Members of the House Ways and Means and Senate Finance Committees stated in a letter to Ambassador Lighthizer that "we write to urge you to consult closely with Congress before meeting with Korea and throughout your discussions on these matters in accordance with U.S. law and longstanding practice. Furthermore, we emphasize the importance of adhering to the requirements established in [TPA]."

The letter also emphasizes that Congress expects the Trump administration to adhere to the TPA notification and consultation requirements even if the anticipated changes to KORUS do not require congressional approval: "any changes affecting the United States resulting from the work of [the Joint Committee] cannot take effect unless either the President exercises his authorities as delegated to him by Congress or Congress makes changes to U.S. statutes.

[1] Article 22.2 of KORUS establishes a Joint Committee comprising officials of each Party (the USTR for the United States and the Minister of Trade for Korea, or their respective designees). The Joint Committee may, *inter alia*, "consider amendments to [the Agreement] or make modifications to the commitments therein[.]"

And, even where the President exercises authorities that Congress has already delegated, Congress fully expects to be consulted in the exercise of those authorities."[2]

Next steps and implications

As Ambassador Lighthizer's request notes, KORUS Article 22.2.4 provides that the Joint Committee shall convene in special session within 30 days of the request of a Party. It is therefore expected that the special session will be held before August 11. Given this short timeline, it is not possible for the administration to fulfill the TPA "pre-negotiation" requirements (*e.g.*, those requiring notification, consultation, and publication of negotiating objectives prior to the initiation of negotiations) in advance of the special session. Thus, the special session will likely be a general, "high-level" discussion (rather than a formal negotiation) in which the United States aims to identify the issues on which the Korean government might be prepared to engage in formal negotiations. Depending on the outcome of those discussions, the Trump administration might then proceed with the formal notifications and other pre-negotiation obligations required under TPA.

Though it remains to be seen whether the special session will lead to substantive negotiations or trade policy changes, Ambassador Lighthizer's request – prompted by President Trump's unexpected announcement on June 30 – indicates that U.S. trade agreements and other international trade policies may be subject to sudden, unexpected scrutiny while President Trump is in office. Moreover, these actions demonstrate the extent to which gross bilateral trade balances appear to be shaping the rhetoric, if not the actual trade policy priorities, of the Trump administration. Indeed, President Trump and his advisors have repeatedly cited the U.S. trade deficit with Korea (and its growth following the entry into force of KORUS) as their main justification for seeking renegotiation of the Agreement, and Ambassador Lighthizer's July 12 request provides the same rationale. Like other efforts undertaken by the Trump administration (*e.g.*, the "Omnibus Review of Significant Trade Deficits"), the decision to seek changes to KORUS reflects the view of some Trump advisors that reducing bilateral trade deficits is a worthwhile economic objective, and one that should be pursued through trade policy. That view, however, has not yet translated into substantive policy actions.

Ambassador Lighthizer's request and the letter from congressional trade leaders are attached for reference.

Chief Negotiators from TPP-11 Countries Discuss Options for Implementation of TPP without United States; Set November Deadline to Complete Final Assessment

Chief negotiators from the 11 remaining member states of the Trans-Pacific Partnership (TPP) met in Hakone, Japan from July 12-14, 2017 to discuss all possible options for the implementation of the Agreement following the official withdrawal of the United States early in the year. According to Japanese chief negotiator Kazuyoshi Umemoto, the Parties discussed necessary steps to bring the TPP Agreement into force without the United States.

Although Japanese chief negotiator Kazuyoshi Umemoto indicated that the Parties "achieved mutual understanding on a path forward," the Parties were apparently unable to agree on the scope of the new TPP. Similar to the TPP-11 Trade Ministerial meeting in May 2017, Japan, which is the largest economy among TPP-11 member states, is pushing to maintain the existing TPP text, including existing concessions on contentious issues such as pharmaceuticals, investment, state-owned enterprises, and labor provisions. Japan's stance is backed by New Zealand with some support from Australia whereby these three countries would not renegotiate the concluded Agreement and would only omit the United States' annexes, schedules and bilateral side letters. However, at the very least, the Parties must revise the ratification clause, which currently states that the TPP will come into effect only when ratified by six countries representing 85 percent of the combined economic value of the 12 original member states. Without the United States, such threshold cannot be reached.

[2] US law (*i.e.*, the United States-Korea Free Trade Agreement Implementation Act and TPA) is silent as to whether congressional approval would be required for amendments to KORUS, except for modifications of tariff rates and certain rules of origin. Sections 201 and 202 of the KORUS Implementation Act provide that the President, subject only to "consultation and layover" requirements, may proclaim modifications to tariff rates and certain rules of origin established under KORUS. These provisions imply that substantive modifications of KORUS outside of tariffs and rules of origin would require congressional authorization.

Meanwhile, other TPP-11 Parties such as Vietnam, Malaysia, Chile, and Peru are reportedly willing to renegotiate various areas of the Agreement to fine tune negotiating balances without the United States. Specifically, Vietnam and Malaysia are willing to ease certain TPP requirements that they previously accepted in exchange for access to the US market or other US concessions. Meanwhile, Brunei and Singapore have indicated their continued support for the implementation of TPP; however, they have so far not disclosed publicly the extent of their stance on the text of the Agreement. Canada and Mexico remain cautious of TPP implementation without the United States. Their stances are likely be determined by the progress of the North American Free Trade Agreement (NAFTA) renegotiations, which is their first priority. Notably, Mexico's participation in the original TPP was meant to protect its special relationship with the United States, which is its primary trading partner. With the absence of the United States, Mexico views the TPP-11 as much less attractive.

Despite their diverging stances on the content of TPP-11, the Parties agreed to meet again in early September 2017 in Australia to compile their "wish-lists" for the new TPP Agreement. They aim to reach an agreement on the new content of the TPP by November 2017, when their leaders are scheduled to meet in Vietnam on the sidelines of the Asia-Pacific Economic Cooperation (APEC) Summit.

Malaysian and US Trade Officials Establish Five Sectoral Working Groups under TIFA Framework; Discuss Trade Deficit

On July 17, 2017, Assistant US Trade Representative (AUSTR) for Southeast Asia and the Pacific Barbara Weisel and Malaysian Secretary-General of the Ministry of International Trade and Industry J. Jayasiri met in Kuala Lumpur in the context of the US-Malaysia Trade and Investment Framework Agreement (TIFA) to discuss ways to enhance bilateral trade and address outstanding trade and investment issues. The meeting is one of many visits to the region by AUSTR Weisel to strengthen bilateral trade and economic relationships following the withdrawal of the United States from the Trans-Pacific Partnership (TPP) earlier in the year. On April 3 and July 11, respectively, she met with Thai Commerce Minister Apiradi Tantraporn and Philippine Undersecretary of Trade Ceferino Rodolfo to discuss similar themes under their respective TIFAs.

During the US-Malaysia TIFA meeting, AUSTR Weisel briefed her Malaysian counterpart on the Trump administration's trade agenda. To enhance bilateral ties, both sides agreed to establish working groups on five priority sectors, namely: (i) goods; (ii) intellectual property; (iii) financial services; (iv) labor; and (v) environment. Many issues within these sectors have challenged the US-Malaysian economic relationship not only in the context of the recent TPP negotiations, but also during the bilateral US-Malaysia Free Trade Agreement (FTA) negotiations, which stalled in 2008 following eight negotiating rounds.

The two senior trade officials also used the TIFA meeting to discuss the fact that Malaysia is one of the countries with which the United States has a "significant" bilateral trade deficit in goods. According to USTR statistics, the United States had a USD 25 billion trade deficit with Malaysia in 2016 (exports from the United States to Malaysia amounted to just 11.8 billion). Malaysia's main exports to the United States include electrical machinery, machinery, optical and medical equipment, rubber, and furniture. To address the deficit issue, the Office of the United States Trade Representative (USTR) is expected follow the directives contained in the forthcoming *Omnibus Report on Significant Trade Deficits*.

The United States and Malaysia are likely, at least for the near future, to use the TIFA platform as the primary means to address bilateral trade issues rather than reviving bilateral FTA negotiations. In the months ahead, the United States will focus on the renegotiation of the North America Free Trade Agreement (NAFTA), slated to commence on August 16, and the amendment and/or modification of the Korea-US FTA (KORUS), while Malaysia's efforts will concentrate on timely conclusion of the Regional Comprehensive Economic Partnership (RCEP) negotiations and finalizing its policy assessment in the context of the TPP-11 negotiations.

USTR Releases Negotiating Objectives for NAFTA, Schedules First Negotiating Round for Mid-August

On July 17, 2017, the Office of the US Trade Representative (USTR) released a summary of the Trump administration's objectives for the renegotiation of the North American Free Trade Agreement (NAFTA).[3] USTR published the objectives in accordance with the Bipartisan Congressional Trade Priorities and Accountability Act ("TPA"), which requires the administration to publish a "comprehensive summary" of its specific negotiating objectives at least 30 days before initiating formal negotiations. USTR's release of the objectives follows several rounds of consultations with the congressional trade committees, as well as a public comment and hearing process during which USTR received input from US companies, industry groups, non-governmental organizations, and other stakeholders.

Overview of the objectives

Consistent with the Trump administration's earlier drafts of the objectives, the finalized objectives are mostly aimed at "modernizing" NAFTA by introducing provisions that were included in the Trans-Pacific Partnership (TPP) and other recent US trade agreements. The objectives, consequently, have been well-received by pro-trade Members of Congress and the US business community, who in recent months have urged the administration to adhere to the negotiating objectives set forth in TPA and to maintain the trade liberalization already achieved under NAFTA. Some of the objectives, however, do appear to reflect the Trump administration's economic nationalist goals or are so ambiguous as to allow for the pursuit of such goals during the negotiations themselves.

Objectives resembling TPA and TPP provisions

Although USTR's summary initially mentions the economic impact of NAFTA and the need to "improve the U.S. trade balance and reduce the trade deficit with the NAFTA countries," the specific negotiating objectives that follow do not appear to envision a major reversal of the trade liberalization achieved under NAFTA or measures tied to bilateral trade balances. Indeed, most of the negotiating objectives reflect the US government's longstanding pro-trade consensus:

- The specific negotiating objectives regarding trade in goods are, among other things, to "maintain existing reciprocal duty-free market access" for industrial and agricultural goods and to pursue further liberalization through regulatory cooperation and the elimination of non-tariff barriers and subsidies.
- In most of the remaining areas that USTR aims to cover in the negotiations – including sanitary and phytosanitary measures, technical barriers to trade, customs and trade facilitation, regulatory practices, services, digital trade, data flows, state-owned enterprises, intellectual property, labor, and the environment – the objectives broadly mirror the outcomes negotiated in the TPP and appear consistent with the TPA negotiating objectives.

Moreover, USTR indicates that it intends to seek some disciplines that go beyond those in the TPP. For example, whereas the TPP disciplines regarding data localization were not applicable to measures in the financial services sector, USTR aims to "ensure that the NAFTA countries refrain from imposing measures in the financial services sector…that require the use or installation of local computing facilities." Regarding SOEs, the United States will seek to define SOEs "on the basis of government ownership or government control through ownership interests, including situations of control through minority shareholding." The TPP's definition of "SOE", by contrast, did not expressly include "situations of control through minority shareholding," so the US position on NAFTA could expand the entities covered by SOE disciplines. Each of these "TPP-plus" objectives is likely to receive support from pro-trade Members of Congress and the US business community.

Objectives not clearly aimed at trade liberalization

[3] Click **here** to view the summary of negotiating objectives.

By contrast, some of the objectives could reflect the Trump administration's economic nationalist views and could prove controversial during the negotiations:

- **Trade remedies.** The objectives on trade remedies reflect the Trump administration's support for stronger trade remedy measures. One such objective seeks to "eliminate the Chapter 19 dispute settlement mechanism", which provides for NAFTA panel review of antidumping and countervailing duty determinations, and which some import-sensitive US industries perceive as undermining the United States' ability to impose trade remedies. Another objective seeks to "eliminate the NAFTA global safeguard exclusion so that it does not restrict the ability of the United States to apply measures in future investigations." This objective refers to NAFTA Article 802.1, which requires the Parties to exclude one another's' goods from global safeguard measures unless such goods account for a substantial share of total imports and contribute importantly to the injury suffered by the domestic industry.

The Trump administration also will seek to "exclude state-owned enterprises as part of the domestic industry in AD/CVD proceedings." This appears to be aimed at making it more difficult for petitioners (particularly those in industries where SOEs are prevalent) to bring successful antidumping and countervailing duty cases against US exporters, or at preventing SOEs from utilizing trade remedies protections.

Another objective seeks to "facilitate the ability to impose measures based on third country dumping," in apparent reference to Article 14 of the WTO Antidumping Agreement (and GATT Article XI:6b), which permits a WTO Member (*i.e.*, a "third country") to request that the investigating authority of another Member impose antidumping measures against imports into the latter's territory (from any country) where the alleged dumping is causing injury to the third country's domestic industry. New disciplines could include a requirement that a NAFTA party initiate an antidumping investigation at the request of a third country that is a NAFTA member, provided certain conditions are met. Trump administration officials have indicated that they view third-country dumping measures as a potentially effective means of combating excess industrial capacity in China and its effect on global steel and aluminum prices.

- **Rules of origin.** One objective seeks to "ensure the rules of origin incentivize the sourcing of goods and materials from the United States and North America", while another seeks to "strengthen the rules of origin." This appears to be a reference to the Trump administration's desire to make the NAFTA rules of origin more restrictive (*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.

- **Currency.** The objective on currency practices is as follows: "Through an appropriate mechanism, ensure that the NAFTA countries avoid manipulating exchange rates in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage." It is not explained, however, what would constitute an "appropriate mechanism", and, in particular, whether such a mechanism would involve currency disciplines that are enforceable through dispute settlement.

- **Investment.** The objective regarding investment protection is vague and does not include an express commitment to retaining the investor-state dispute settlement ("ISDS") mechanism, which some Democratic Members of Congress and various U.S. interest groups have sought to eliminate. The objective states only that the United States will seek to "secure for U.S. investors in the NAFTA countries important rights consistent with U.S. legal principles and practice, while ensuring that NAFTA country investors in the United States are not accorded greater substantive rights than domestic investors."

- **Government procurement.** The objectives do not explicitly call for scaling back US government procurement commitments under NAFTA. However, they do indicate that the administration will be reluctant to expand NAFTA's coverage of US government procurement, given the objectives to (i) "keep in place domestic preferential purchasing programs"; (ii) "exclude sub-federal coverage…from the commitments being negotiated"; and (iii) "maintain broad exceptions for government procurement" regarding national security and other sensitive issues.

- **Dispute Settlement.** The section on dispute settlement includes a vague objective to "have provisions that encourage compliance with the obligations of the Agreement", and does not explain what such provisions might entail.

Implications and next steps

Overall, the objectives do not appear to represent a radical shift in US trade policy, and they appear sufficiently balanced as to allow for the possibility of a successful negotiation. The US Chamber of Commerce has expressed relief that the objectives appear to embrace the principle of "doing no harm" to NAFTA, and the Chairmen of the House Ways and Means and Senate Finance Committees have similarly welcomed the objectives. Chairman Hatch stated that the document "demonstrates that the administration remains committed to following bipartisan Trade Promotion Authority", and Chairman Brady suggested that a new NAFTA based on the Trump administration's objectives would serve as "a model for future trade agreements".

However, as noted above, some of the objectives could lead to more controversial or protectionist demands, thus leading to a difficult and protracted negotiation. For example, several of the objectives on trade remedies (*e.g.*, the elimination of Chapter 19 and the safeguard exclusion) already have encountered public pushback from the NAFTA Parties. Proposals to establish onerous rules of origin also would likely face opposition, both from the NAFTA Parties and from US domestic industries that have organized their supply chains around the existing rules. Given these and other potential points of controversy, as well the wide range of issues to be addressed in the negotiations, concluding the negotiations by end-2017 (or even before the Mexican elections in June 2018) will be challenging.

The negotiations are scheduled to begin in mid-August, with the first formal negotiating round scheduled for August 16-20 in Washington, DC. Ambassador Lighthizer has announced that John Melle, Assistant USTR for the Western Hemisphere, will serve as the US chief negotiator for NAFTA.

President Trump Signs Executive Order on "Manufacturing and Defense Industrial Base and Supply Chain Resiliency"

On July 21, 2017, President Trump signed a new Executive Order on "Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States".[4] The order requires the US Department of Defense ("DOD") to provide a report to the President assessing the ability of the manufacturing and defense industrial base and supply chains of the United States to support US national security needs.

The order and subsequent comments from Trump administration officials indicate that DOD's report will assess whether international trade and import competition, among other factors, threaten the health of US industries that produce goods deemed "essential to national security". The order is distinct from the "Section 232" investigation process and, by itself, does not contemplate or require import restrictions. However, the Trump administration's eventual findings and recommendations could lead to new trade actions such as Section 232 investigations.

The order contains the following substantive sections:

- A statement of policy, justifying the order on the grounds that a "healthy manufacturing and defense industrial base and resilient supply chains are essential to the economic strength and national security of the United States," and that declines in manufacturing jobs and output have created an environment where additional losses "could impair domestic capacity to create, maintain, protect, expand, or restore capabilities essential for national security."
- A directive that DOD, in coordination with other agencies and within 270 days, complete a broad assessment of the US industrial base, supply chains and potential "contingencies" that may harm them. The report will, among other things:

[4] Click **here** to view the Executive Order.

- Identify the military and civilian materiel, raw materials, and other goods that are "essential to national security";
- Assess "the resiliency and capacity of the manufacturing and defense industrial base and supply chains of the United States to support national security needs" upon the occurrence of "defense, intelligence, homeland, economic, natural, geopolitical, or other contingencies that may disrupt, strain, compromise, or eliminate the supply chains" of "essential" goods;
- Assess, among other things, "gaps in national-security-related domestic manufacturing capabilities, including non-existent, extinct, threatened, and single-point-of-failure capabilities"; "exclusive or dominant supply of essential goods by or through nations that are or are likely to become unfriendly or unstable"; and "the availability of substitutes for or alternative sources for" essential goods; and
- Recommend "such legislative, regulatory, and policy changes and other actions by the President or the heads of agencies as they deem appropriate based upon a reasoned assessment that the benefits outweigh the costs (broadly defined to include any economic, strategic, and national security benefits or costs) over the short, medium, and long run" in order to resolve the problems identified.

Implications

The order reportedly was championed by Office of Trade and Manufacturing Policy Director Peter Navarro, who has long advocated protecting the US "defense industrial base" from imports on national security grounds. Mr. Navarro alluded to these goals when announcing the signing of the order, stating that "this executive order recognizes the fact that every element of our national power – from manufacturing capacity…to resilient supply chain and balanced international trade – is needed to ensure national security and prosperity[.]" Mr. Navarro also cited several examples of products and industries in which offshoring allegedly has created gaps in the capabilities of the US defense industrial base, including "certain types of military-grade semiconductors and printed circuit boards"; "flat-panel displays for aircraft"; and "the processing of rare-earth elements."

The Trump administration could use the report's findings to justify new import restrictions or new import investigations under, for example, Section 232. At the same time, however, the order does not require any trade measures, and DOD, which is in charge of this new initiative, has not recently expressed support for security-related import restrictions, including under Section 232. Furthermore, the new order has created some confusion among US companies and analysts, particularly regarding its relationship with other Trump executive orders on similar subjects, the ongoing Section 232 investigations of steel and aluminum, and US laws that already task DOD with ensuring the health of the defense industrial base and supply chain. The order's impact, therefore, is far from certain.

Petitions and Investigations Highlights

Department of Commerce Issues Affirmative Final Determination in Antidumping Investigation of Steel Concrete Reinforcing Bar from Taiwan

On July 21, 2017, the US Department of Commerce (DOC) announced its affirmative final determination in the antidumping (AD) investigation concerning imports of steel concrete reinforcing bar from Taiwan.[5] In its investigation, DOC determined that imports of the subject merchandise from Taiwan were sold in the United States at the following dumping margins:

Producer/Exporter	Dumping Margin
Power Steel Co., Ltd.	3.50 percent
Lo-Toun Steel and Iron Works Co. Ltd.	32.01 percent
All others	3.50 percent

The merchandise subject to the investigation is steel concrete reinforcing bar imported in either straight length or coil form (rebar) regardless of metallurgy, length, diameter, or grade or lack thereof. Subject merchandise includes deformed steel wire with bar markings (*e.g.*, mill mark, size, or grade) and which has been subjected to an elongation test. The subject merchandise includes rebar that has been further processed in the subject country or a third country, including but not limited to cutting, grinding, galvanizing, painting, coating, or any other processing that would not otherwise remove the merchandise from the scope of the investigations if performed in the country of manufacture of the rebar.

The subject merchandise is classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) primarily under item numbers 7213.10.0000, 7214.20.0000, and 7228.30.8010. The subject merchandise may also enter under other HTSUS numbers including 7215.90.1000, 7215.90.5000, 7221.00.0017, 7221.00.0018, 7221.00.0030, 7221.00.0045, 7222.11.0001, 7222.11.0057, 7222.11.0059, 7222.30.0001, 7227.20.0080, 7227.90.6030, 7227.90.6035, 7227.90.6040, 7228.20.1000, and 7228.60.6000.

The US International Trade Commission (ITC) is scheduled to announce its final determination in this investigation on or around September 5, 2017. If the ITC makes an affirmative final determination that imports of steel concrete reinforcing bar from Taiwan materially injure or threaten material injury to the domestic industry, DOC will issue an AD order.

According to DOC, imports of steel concrete reinforcing bar from Taiwan in 2016 were valued at an estimated USD 53 million.

International Trade Commission Issues Affirmative Final Determination in Antidumping Investigation of DOTP from Korea

On July 20, 2017, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of dioctyl terephthalate (DOTP) from Korea.[6] The US Department of Commerce (DOC) determined in June 2017 that imports of DOTP from Korea were sold in the United States at dumping margins ranging from 2.71 to 4.08 percent.

As a result of the ITC's affirmative final determination, DOC will issue an antidumping duty order on imports of DOTP from Korea. The ITC did not disclose the import value of the product in 2016 due to the need to avoid disclosure of business proprietary information. The ITC's public report on the investigation will be available by August 23, 2017.

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

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

International Trade Commission Issues Affirmative Final Determinations in AD and CVD Investigations of Finished Carbon Steel Flanges from India and Italy

On July 28, 2017, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of finished carbon steel flanges from India and Italy.[7] The US Department of Commerce (DOC) determined in June 2017 that imports of finished carbon steel flanges from India and Italy were sold in the United States at dumping margins ranging from 11.32 to 12.58 percent (for India) and 79.17 to 204.53 percent (for Italy), and were subsidized by the government of India at rates ranging from 5.66 to 9.11 percent.

As a result of the ITC's affirmative final determinations, DOC will issue antidumping and countervailing duty orders on imports of the subject merchandise from India, and an antidumping duty order on imports of the subject merchandise from Italy. The ITC's public report on this investigation will be available by September 5, 2017.

Multilateral Policy Highlights

WTO Releases Report on G20 Trade Measures Ahead of Summit in Hamburg

Trade is shaping up to be a contentious issue at the G20 Summit in Hamburg on 7-8 July. Tensions have developed this year, particularly in the trade relationships of the United States, China and the European Union. The United States has caused widespread concern by its proposals to impose various new import restrictions and to reform its corporate tax system to favor the consumption of domestic production. China is under pressure to correct its subsidization of overcapacity in several global industries, notably steel, and to take steps more generally to free up its trade and economic policies. The EU is completing the strengthening of its trade remedy legislation and reportedly examining the possible introduction of carbon taxes on imports and border measures to protect its labor and environmental standards. The United States and the EU are facing legal challenges in the WTO for failing to recognize China as a market economy in their trade remedy actions. Against that background, the G20 host, Germany, has been struggling to inject political support for trade liberalization into the Summit and to condemn protectionism.

The latest WTO report monitoring new trade restrictions imposed by G20 economies has sought to strike a reassuring note ahead of the Summit.[8] Its finding is that G20 trade restrictions have risen over the past eight months (mid-October 2016 to mid-May 2017) at a moderate rate, similar to that of previous years, and these have been matched in number by new trade liberalizing measures. On that basis, WTO Director-General, Roberto Azevêdo, has stated that "The moderation and restraint that we have seen in trade policies shows that the trading system is doing its job in keeping global commerce flowing and resisting protectionism." As a result of the tariff reductions made by parties to the WTO Information Technology Agreement, and additional tariff reductions by some G20 members such as Brazil and Canada, the WTO has calculated that 42 trade facilitating measures taken in the past eight months have covered $163 billion of world merchandise trade. The WTO draws a favorable comparison between that figure and $47 billon, which it estimates to be the trade coverage of the 42 new trade restrictions that it records for the same period, comprising tariff increases, new customs barriers, technical regulations and rules of origin.

In two respects, however, the WTO report may be open to criticism for painting too sanguine a picture of the world trading environment.

First, under pressure from some G20 members, notably the United States, the WTO has not classified trade remedy measures as "trade restrictions" in its latest report, yet trade remedies are often seen as the leading indicator of a shift to more defensive trade policymaking because of the greater legislative ease and speed with which they can be imposed. The United States had criticized the WTO for classifying trade remedies as trade restrictions in its past

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

[8] Click **here** to view the WTO Report on G20 Trade Measures.

reports, suggesting that trade remedies did not introduce new trade restrictions but rather corrected for existing trade distortions caused by dumping or export subsidization. This year, the WTO has responded to the United States' criticism and has treated trade remedy measures in a separate category. It reported that 146 new trade remedy investigations were initiated in the past eight months, covering an additional $25 billon of world trade, and that new investigations were running at about the same level as in previous years. The number of investigations initiated by Brazil, China, Mexico and the United States decreased in 2016, but there were significant increases in investigations initiated by Argentina, Canada and India. China was by far the most frequent target of the investigations, accounting for one-third of the initiations, followed by Korea with 7% of initiations.

Second, Azevêdo's message does not address concerns about the steady accumulation of new trade restrictions that G20 members have imposed since the financial crisis in 2008. Of almost 1,700 trade-restrictive measures (including trade remedies) that the WTO recorded had been imposed by the end of 2016, about 1,300 were still in place and were affecting 6.5% of total G20 merchandise trade. Previous WTO monitoring reports pointed to this as evidence that the G20 was failing to meet its commitment, made originally in 2009 and repeated in successive communiques up to 2016, not to impose new trade restrictions and to rollback those that had already been put in place. The United States has resisted pressure from other G20 members this year to repeat that commitment.

The WTO monitoring reports have been requested by the G20 since 2009 to provide an objective basis for maintaining political pressure on G20 members to avoid protectionist policies. That objectivity is needed more than ever at the present time, because of the politically charged atmosphere that is likely to hang over the discussion of trade issues at the forthcoming G20 Summit. However, the WTO's latest report risks being criticized by some G20 members for appearing to downplay the potential trade restrictive effects of trade remedy measures. Also, by focusing solely on developments over the past eight months it may be less valuable than previous reports for renewing the G20 pledge to avoid trade restrictions and rollback measures imposed since 2009.

WTO National Security Exception Under Scrutiny

There are fears that a number of WTO Members may be turning to the national security exceptions in Article XXI of the GATT and Article XIV *bis* of the GATS to justify their imposition of new trade restrictions that could otherwise be considered inconsistent with their WTO obligations. This threatens to widen the channel through which trade restrictions can evade WTO rules and escape enforcement through dispute settlement, and if it proliferates it could weaken seriously the extent to which WTO disciplines can be relied on to maintain open markets for goods and services. In recent months, Russia, China, and Saudi Arabia (along with Bahrain, the UAE and Egypt) have each referred to security concerns to justify actions that restrict trade in one way or another. Moreover, the United States is considering using its security interests as a justification for imposing higher tariffs on steel and aluminum imports. The WTO national security exceptions, particularly GATT Article XXI, have been used sparingly in the past. Each time, they have been subject to intense scrutiny by other WTO Members and warnings of the systemic damage that they could do to the integrity of the rules-based trading system, in the hope of dissuading others from pursuing this approach under anything other than the narrowest interpretation of those circumstances when trade restrictions might provide a legitimate response to the protection of national security.

On several occasions at recent WTO meetings, national security in one form or another has been cited as a justification for imposing measures that restrict trade:

- In January 2016, Ukraine complained in the WTO about Russia's prohibition on agricultural imports from Ukraine and its transit ban on Ukrainian goods under Russian legislation whose stated intent was to ensure the safety of the Russian Federation and to protect Russia's economic security and national interests. The issue is now in dispute settlement in the WTO, where the panel may need to offer its interpretation of the GATT national security exceptions if Russia chooses to invoke them.

- This year China has defended, on the grounds of public interest and security, provisions in its new electronic commerce law that impose localization requirements to store and safeguard data in China and share data

with the Government. The provisions have been criticized by other Members, notably the United States, as restricting E-commerce by adding unnecessarily to the costs of data processing for foreign companies.

- In June 2017, Qatar complained about the trade boycott imposed on it by Saudi Arabia, Bahrain, the UAE and Egypt saying that it was exploring all possible legal avenues, including dispute settlement, to have the boycott lifted. In response, Saudi Arabia, Bahrain, the UAE and Egypt said that the measures they were taking conformed with their WTO obligations and with their right to impose trade restrictions under the national security exceptions of the GATT and the GATS.

- Also in June, the United States faced heavy criticism from other WTO Members for considering restricting imports of steel and aluminum for national security reasons through the imposition of "Section 232" tariffs, quotas or both. Section 232 of the Trade Expansion Act of 1962 authorizes trade restrictions if imports are found to "threaten to impair the national security" of the United States, which the United States has said could result from undermining its industrial base. In the WTO, several Members doubted that the WTO national security exception could apply to such action, they said that trying to use it for that purpose would pose an unacceptable systemic risk to the WTO, and they cautioned about provoking tit-for-tat reactions if import restrictions were imposed.

GATT Article XXI has been invoked rarely, but on each occasion its highly disruptive potential has been plain. The main reason is that key Members, including the United States and the EU at various times, have maintained that each Member has the sole authority to determine what it considers necessary to protect its security interests and that this judgment cannot be challenged by others. The view of the EU in 1982, when the trade embargo imposed against Argentina over the Falklands/Malvinas war was discussed, was that the exercise by a Member of its rights under Article XXI required neither notification, justification nor approval by other Members. The dispute panel established in 1985 to examine the trade embargo imposed by the United States against Nicaragua was excluded by its terms of reference from examining or judging the validity or motivation of the United States for its invocation of Article XXI and it concluded that it was therefore unable to find that the United States was complying with or failing to comply with its GATT obligations. Other examples of trade measures imposed to protect national security, including the US trade embargo against Cuba and the Arab League trade boycott of Israel, have never been adjudicated.

GATT Article XXI(b)(iii) allows a WTO Member to take any action "… which it considers necessary for the protection of its essential security interests … taken in time of war or other emergency in international relations". In the absence of an accepted objective standard for national security interests, and the inability of any Member to challenge the unilateral declaration by another Member that its security interests are threatened, the systemic threat that can be posed to the integrity of other WTO rules is plain. Because of its precedent-setting power, the decision of the United States over the next few weeks on whether to pursue Section 232 trade restrictions will be crucial in nailing down tightly the limits of the "exception" in GATT Article XXI or "releasing the genie" from the Article XXI bottle. The damage to the WTO, if it chooses to do the latter, could be immeasurable.

G20 Leaders' Declaration Emphasizes Reciprocity and Trade Defense over Trade Liberalization

The latest G20 Summit (July 7-8 in Hamburg) has produced an ambivalent statement on trade policy that emphasizes reciprocity and trade defense over the anti-protectionism and trade liberalization themes that marked its predecessors.[9] In part, this reflects the influence of the change in the trade priorities of the United States this year under the Administration of President Trump. It also reflects longer-term difficulties for G20 members in finding a coordinated position on trade policies and on the role of the multilateral system and the WTO, particularly over the contested issue of development flexibilities.

Since the first G20 Summits in 2008/9 at the time of the global financial crisis, the G20 has regularly declared its determination to resist trade protectionism and to focus its efforts on multilateral initiatives to coordinate trade policies

[9] Click **here** to view the G20 Leaders' Declaration.

and liberalize trade and investment. Those commitments were repeated in every Summit Declaration, including the Hangzhou Summit in 2016 when G20 Leaders stated:

- "We reiterate our opposition to protectionism on trade and investment in all its forms. We extend our commitments to standstill and rollback of protectionist measures till the end of 2018, reaffirm our determination to deliver on them and support the work of the WTO, UNCTAD and OECD in monitoring protectionism."
- "We reaffirm our determination to ensure a rules-based, transparent, non-discriminatory, open and inclusive multilateral trading system with the World Trade Organization playing the central role in today's global trade. We … commit to advancing negotiations on the remaining [Doha Development Agenda] issues as a matter of priority …" (Excerpts from the G20 Hangzhou Summit Declaration, September 2016).

In practice, the G20 countries found it increasingly difficult to live up to those commitments. With regard to the first, although the outbreak of protectionism that was feared after the global financial crisis did not materialize, monitoring reports prepared annually by the WTO have recorded the steady accumulation of new trade restrictions by every G20 member at one time or another, outnumbering instances of rollback by a factor of 4 to 1 and affecting 6.5% of G20 trade by the end of 2016. With regard to the second commitment, the central role assigned by the G20 to the multilateral trading system has not translated into progress at the WTO. The Doha Round negotiations have been set aside by the United States, the EU and Japan in favor of regional or issue-specific trade liberalization initiatives among more limited numbers of participants, such as the Trans-Pacific Partnership (TPP) and the Trade in Services Agreement (TiSA). Incremental gains have been made in the WTO in the past few years, through the Trade Facilitation Agreement and the elimination of some forms of agricultural export subsidies, but larger goals have not been achieved, such as broad-based liberalization of trade in goods and services and bringing E-commerce under WTO rules.

In Hamburg, the G20 Leaders backed away from these earlier commitments. They replaced them with language that targets "unfair" trade practices and promotes "reciprocal and mutually advantageous" trade liberalization initiatives. The influence of the United States is evident in both cases.

On protectionism, the new commitment is:

- "We will … continue to fight protectionism including all unfair trade practices and recognise the role of legitimate trade defence instruments in this regard. We will strive to ensure a level playing field, in particular by promoting a favourable environment for trade and investment in this regard."

This statement represents an important shift in position. The commitment to the standstill and rollback of protectionist measures has been abandoned, and the G20 no longer considers that trade remedy measures, such anti-dumping duties and countervailing measures, are trade restrictions. Instead, dumping and trade-distorting subsidies are viewed as a core element of protectionism. The WTO is invited to continue monitoring protectionism, but the message is that it should no longer include trade remedies in the exercise.

There is a danger in removing trade remedy actions from political oversight by the G20. It is semantic whether they are classified as trade restrictions or not. They are a leading indicator of a shift to more defensive trade policymaking because of the relative speed and legislative ease with which they can be imposed and the high penalties that can be levied on imports. Though trade remedies are widely considered to have a legitimate role to play in counteracting unfair trade, the large number of trade disputes that have challenged the consistency of trade remedy actions with WTO rules is an indication that case-by-case their legitimacy can be controversial. The latest WTO monitoring report recorded 146 new trade remedy investigations that were initiated by G20 countries since October 2016, covering $25 billon of world trade. New investigations were running at about the same level as in previous years. Initiating trade remedy investigations can have a chilling effect on trade flows even if they do not lead to the definitive application of duties. To lose sight of that, and of the fact that not all trade remedy actions are necessarily legitimate, would place a serious limitation on the G20's ability to monitor trade policies and to use its authority to keep global markets open.

With regard to the role of the multilateral trading system, the Hamburg Summit Declaration stated:

- "We underline the crucial role of the rules-based international trading system. We note the importance of bilateral, regional and plurilateral agreements being open, transparent, inclusive and WTO-consistent, and commit to working to ensure they complement the multilateral trade agreements. …. To further improve the functioning of the WTO, we will cooperate to ensure the effective and timely enforcement of trade rules and commitments as well as improve its negotiating, monitoring and dispute settlement functions."

The importance of the WTO is acknowledged, but there is no longer mention of negotiating objectives for the WTO that the G20 would support and that could strengthen the multilateral trading system. Instead, the emphasis is on the need to improve the functioning of the WTO. This echoes criticisms that the United States and the EU have been making for some time at the WTO: that WTO rules are not being adequately respected (on the notification of subsidies, for example, or the elimination of Trade-Related Investment Measures); that the negotiating arm of the WTO is no longer able to deliver results; that efforts to administer the WTO Agreements through specialized Councils and Committees are not effective; and of particular concern to the United States, that the role of the Appellate Body in WTO dispute settlement proceedings needs reforming. These criticisms are well known in the WTO, but so are the views of other WTO Members who do not necessarily share the criticisms or assign to them a higher priority than their own objectives, such as restarting the Doha Round negotiations.

The key issue standing in the way of delivering results from WTO negotiations is that developed countries, in particular the United States and the EU, are not willing to uphold the WTO's standard formula for providing non-reciprocal flexibilities to developing countries ("Special and Differential Treatment") when it is applied to emerging economies such as China and India. There is an allusion to that in the G20 Declaration:

- "We will keep markets open noting the importance of reciprocal and mutually advantageous trade and investment frameworks and the principle of non-discrimination."

For the United States, full reciprocity is now expected from its major trading partners, including the emerging economies in the G20, in negotiations on market access and trade rules. That position is not new, but it has been reinforced this year under the Administration of President Trump and the reference to reciprocity in the G20 Declaration seems to be a reflection of this. However, China, India and other emerging economies have given no sign in the WTO that they are prepared to give up their access to development flexibilities and accept the principle of full reciprocity. Until a compromise can be found on this issue, it seems unlikely that constructive negotiations to strengthen the multilateral trading system will be able to proceed. The G20 is the main forum to take on the challenge of working out that compromise, but there is no indication that a start on it was made at the Hamburg Summit.

Amendment of the WTO Trade Policy Review Mechanism

The first amendment of the WTO Trade Policy Review Mechanism (TPRM) has been approved by the WTO General Council. The amendment alters the periodicity of Trade Policy Reviews (TPRs) for all WTO Members, moving from a cycle of 2-4-6 years today (depending on the importance in world trade of the Member under review) to a cycle of 3-5-7 years. The new cycle will be introduced in 2019. As a result, from 2019 the TPRs of the four largest Members – China, the EU, Japan and the United States – will take place every three years instead of every two years as has been the case since the WTO was established, and other Members will move onto longer cycles as well.

In taking this decision, WTO Members had to weigh several factors.

The main factor favoring the amendment was to reduce the pressure of TPR work and meetings on the WTO Members, the Trade Policy Review Body (TPRB) and the WTO Secretariat. The expansion of the WTO membership to 164 Members today has meant that, on average, 25 TPRs need to be completed each year in order to ensure that all Members are reviewed under the statutory cycle of reviews that was established by the TPRM at the end of the Uruguay Round – that cycle required a TPR every two years for the four largest Members, every four years for the

next 16 largest, and every six years for all other Members. Some Members felt that this had become an excessive burden on WTO and Members' resources, with, for example, the TPRB formally in session for 50 days a year – far more frequently than any other WTO Council or Committee – and with capital-based officials dealing with WTO matters in the largest Members having to devote a considerable proportion of their limited resources to the preparation of TPR reports and TPRB meetings and to providing written answers to the increasingly large number of questions posed by other Members during the TPR process.

The concern raised by this heavy workload was that the quantity of TPRs that had to be managed was undermining their quality, and interfering with the ability of the TPRM to respect its mandate and deliver a high level of transparency over, and understanding of, the trade policies and practices of each WTO Member, in particular the largest Members with the greatest impact on world trade and on the functioning of the multilateral trading system. Added to that was the view of some Members that experience of the last fifteen years had shown that the trade policies and practices of the four largest Members did not, in general, change sufficiently over any two-year period to warrant the investment of resources needed to conduct new TPRs on such a short cycle.

That was not the view of all Members. Some felt that although there could be long periods during which trade policies and practices changed little, when major changes did take place, particularly in the largest Members, it was important that the TPRM could react in a timely way to maintain a high level of transparency and allow other Members to review the changes in a multilateral setting. To try to accommodate this concern, greater importance will be attached in future to the requirement in the TPRM that "… Members shall [between their regular TPR reviews] provide brief reports when there are significant changes in their trade policies ….". In addition, the TPRB will be able to review "… significant policy issues affecting the trading system …" under its mandate to conduct an annual overview of developments in the international trading environment, based on a report by the WTO Director-General highlighting those policy issues. This could place more responsibility on the WTO Director-General to tailor the WTO's regular trade policy monitoring efforts to cover systemically important trade policy changes by the WTO's largest Members.

At its origin, this amendment of the TPRM reflects concern about the resource-intensity of the TPR exercise now that the WTO has almost 40 more Members than it had when the TPRM was established. Changing the cycle of reviews will relieve some of that pressure. It will be important, however, that this does not weaken the ability of the WTO to exercise a high level of transparency over the trade policies and practices of its Members.

The text of the amendment is attached.

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