US & Multilateral Trade Policy Developments

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Contents

US Trade Reports

Overview of Section 301 of the Trade Act of 1974

Section 301 of the Trade Act of 1974 ("Section 301") provides the U.S. executive branch with the authority and procedures to enforce U.S. rights under international trade agreements and to respond to certain foreign "unfair" practices not covered by trade agreements. Section 301 is the principal statutory mechanism under which the President may impose trade sanctions on foreign countries that violate existing trade agreements or engage in acts that are "unjustifiable" or "unreasonable" and burden U.S. commerce. The United States Trade Representative (USTR) makes determinations, initiates and conducts investigations, and implements action under Section 301.

When a Section 301 investigation involves an alleged violation of a trade agreement, U.S. law requires that USTR follow the consultation and dispute settlement procedures set forth in the applicable agreement.[1] For example, if the investigation involves a violation of the World Trade Organization (WTO) Agreements, USTR must follow WTO dispute settlement procedures.[2] However, when USTR determines that a Section 301 investigation does not involve an alleged trade agreement violation, the agency may investigate the foreign practices and retaliate unilaterally in the case of affirmative findings.

The procedural requirements for Section 301 investigations, whether for trade agreement or non-trade agreement situations, are described herein, as are those for "Special 301" proceedings involving the identification of intellectual property rights (IPR) "Priority Foreign Countries." A procedural timeline of the four different situations contemplated by Section 301 is provided in Annex I.

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[1] The Statement of Administrative Action ("SAA") for the Uruguay Round Agreements Act states:

> Although it will enhance the effectiveness of section 301, the DSU does not require any significant change in section 301 for investigations that involve an alleged violation of a Uruguay Round agreement or the impairment of U.S. benefits under such an agreement. In such cases, the Trade Representative will:
>
> - invoke DSU dispute settlement procedures, as required under current law;
> - base any section 301 determination that there has been a violation or denial of U.S. rights under the relevant agreement on the panel or Appellate Body adopted by the DSB;
> - following adoption of a favorable panel or Appellate Body report, allow the defending party a reasonable period of time to implement the report's recommendations; and
> - if the matter cannot be resolved during that period, seek authority from the DSB to retaliate.

SAA at 1034-35 (emphasis added).

A WTO Dispute Settlement Panel found that unilateral action taken by the United States pursuant to Section 304 of the Trade Act of 1974 would constitute a prima facie violation of the WTO Agreement; however, the SAA and representations by the U.S. government during the dispute settlement process removed the threat of a violation and thus the inconsistency with the WTO Agreements. If the U.S. were to depart from the representations made to the Panel, this finding of consistency may no longer be warranted. United States – Section 301-310 of the Trade Act of 1974, Panel Report, para. 7.97, 7.134.

[2] For example, in October 2010, USTR initiated an investigation under Section 301 to investigate acts, policies, and practices of the Government of the People's Republic of China affecting trade and investment in the green technology sector. The investigation was initiated following a petition filed by the United Steelworker's Union under Section 302(a). As a result of the investigation initiated by USTR, the United States challenged some of the alleged subsidies at the WTO. After consultations between the United States and China, took action formally revoking the legal measure at issue. In theory, however, nothing would prevent USTR from pursuing a dual track Section 301 investigation, simultaneously pursuing a case at the WTO and initiating its own investigation seeking unilateral action to combat the foreign country conduct in question.

Section 301 Investigations and Procedures

Scope of Investigations (Section 301)

Section 301 (19 U.S.C. § 2411) delegates to USTR broad authority to "take action," at the direction of the President, in response to "unfair" trade practices by foreign governments.[3] Three types of foreign government conduct are expressly subject to Section 301, but nothing in the law limits the scope of foreign acts, policies or practices to only those defined therein:

- A trade agreement violation[4];
- An "unjustifiable" action (*i.e.*, acts, policies or practices that violate or are inconsistent with U.S. international legal rights[5]) that "burdens or restricts United States commerce"[6]; and
- An "unreasonable" action (acts, policies or practices that are not necessarily in violation of or inconsistent with U.S. international rights, but are otherwise unfair and inequitable[7]) or "discriminatory" action (acts, policies, and practices which deny national or most-favored-nation treatment to United States goods, services, or investment[8]) that "burdens or restricts United States commerce."[9]

The statute expressly defines "commerce" to include services and investment.[10]

Whether an issue involves a U.S. trade agreement will affect the procedures and outcomes of a Section 301 investigation. That determination rests at the discretion of USTR: for example, although the binding Statement of Administrative Action (SAA) for the Uruguay Round Agreements Act, which implemented the WTO Agreements into U.S. law, states that USTR "will" invoke the dispute settlement procedures of the WTO Dispute Settlement

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[3] 19 U.S.C. §§ 2411-2420.

[4] 19 U.S.C. § 2411(a)(1)(A) and (B)(i).

[5] 19 U.S.C. § 2411(d)(4).

[6] 19 U.S.C. §2411(a)(B)(ii).

[7] 19 U.S.C. §2411(d)(3). Section 301 defines "unreasonable" acts to include but not be limited to:

(1) the denial of equitable or fair opportunities for:

a. the establishment of an enterprise;

b. the provision of effective intellectual property rights ("IPR");

c. non-discriminatory market access opportunities for U.S. persons relying on IPR; or

d. market opportunities, including government tolerance of systematic anticompetitive activities by foreign enterprises in the foreign country, that would prevent access goods or services into the foreign market;

(2) Export targeting (i.e., any government plan or scheme consisting of a combination of coordinated actions that are bestowed on a specific enterprise, industry, or group, which allows the enterprises, industry or group to become more competitive in exporting a class or kind of merchandise); or

(3) A persistent pattern of conduct that:

a. denies workers the right of association;

b. denies workers organization and collective bargaining rights;

c. permits forced labor;

d. fails to provide a minimum age requirement for children workers; or

e. fails to provide minimum wage standards, hours of work, or occupational and safety and health of workers.

[8] 19 U.S.C. §2411(d)(5). Almost all actions under this definition would today implicate the WTO Agreements.

[9] 19 U.S.C. §2411(b)(1).

[10] 19 U.S.C. §2411(d)(1).

Understanding (DSU), it subsequently makes clear that "[n]either section 301 nor the DSU will require the Trade Representative to invoke DSU dispute settlement procedures **if the Trade Representative does not consider that a matter involves a Uruguay Round agreement**."[11] USTR's decision, however, may be subject to challenge at the WTO or in U.S. courts.

- **Procedures for Section 301 Action**

Sections 302-309 of the Trade Act of 1974 (19 U.S.C. §§ 2412-19) describe the procedural requirements and limitations for Section 301 actions. The law also establishes special procedural rules for IPR cases begun through "Special 301." These sections, as well as USTR's corresponding regulations[12], do not impose specific substantive requirements on USTR's investigations or determinations.

- **Administration: The Section 301 Committee**

  Section 301 investigations are conducted by a "Section 301 Committee," which is a subordinate, staff-level body of the interagency Trade Policy Staff Committee (TPSC). The Section 301 Committee is comprised of (1) a Chairman appointed by the USTR; and (2) with respect to each investigation, and subject to the invitation of the Chairman, members designated by other U.S. government agencies that have an interest in the issues raised by the investigation.[13] The Section 301 Committee reviews Section 301 petitions, conducts public hearings, and, based on these activities, makes recommendations to the TPSC regarding potential actions under Section 301. The TPSC then provides its own recommendations to USTR.[14] USTR then takes final action based on these recommendations.

- **Initiation (Section 302)**

  USTR may initiate a Section 301 investigation in one of two ways:

  (a) **Initiation by petition.** Any interested person may file a petition with USTR requesting that action be taken under Section 301.[15] The petition must set forth the allegations in support of the request.[16] Within 45 days of the receipt of the petition, USTR must review the allegations and determine whether to initiate an investigation. If USTR determines to initiate an investigation based on the filing of a petition, it must publish a summary of the petition in the Federal Register, and, as soon as practicable, provide an

[11] SAA at 1035 (emphasis added).

[12] 15C.F.R. §§ 2006.0 – 2006.15.

[13] 15 C.F.R. §2002.3.

[14] The TPSC reviews reports of hearings and reviews conducted by the Section 301 Committee and the recommendations resulting therefrom. Based on this information, the TPSC makes recommendations to the USTR regarding potential determinations and actions under Section 301. 15 C.F.R. §2002.2(b)(8).

[15] 19 U.S.C. § 2412(a)(1). The term "interested person" includes, but is not limited to, domestic firms and workers, representatives of consumer interests, U.S. exporters, and any industrial user of goods or services that might be affected by action taken pursuant to Section 301. 19 U.S.C. § 2411(d)(9).

[16] Petitions must, among other things (i) describe the economic interest of the petitioner which is directly affected by the acts, policies, or practices that are the subject of the petition; (ii) describe the rights of the United States being violated or denied under the trade agreement which petitioner seeks to enforce or the other act, policy or practice which is the subject of the petition; (iii) identify the product, service, intellectual property right, or foreign direct investment matter for which the rights of the United States under the agreement claimed to be violated or denied are sought, or which is subject to the act, policy or practice; (iv) demonstrate that rights of the United States under a trade agreement are not being provided; or that the act, policy or practice violates or is inconsistent with the provisions of a trade agreement or otherwise denies benefits accruing to the United States under a trade agreement, or is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce; and (v) provide information concerning the degree to which U.S. commerce is burdened or restricted. 15 C.F.R. § 2006.1(a)

Depending on the subject matter, petitioners must provide certain additional information. For example, if the petition alleges that protection of IPR in a foreign country is denied, petitioner must (i) Identify the intellectual property right for which protection has been sought; (ii) indicate how persons who are not citizens or nationals of such foreign country are denied the opportunity to secure, exercise, and enforce IPR; and (iii) provide information regarding the foreign country's laws or policies. 15 C.F.R. § 2006.1(b)

opportunity for interested parties to present views and hold a public hearing.[17] If USTR determines not to initiate an investigation based on a petition, it must inform the petitioner of the reasons for not initiating and publish the determination not to initiate in the Federal Register.[18]

(b) **"Self-initiation."** Section 301 also provides two means by which USTR may initiate an investigation in the absence of a petition:

(i) USTR may self-initiate an investigation into "any matter,"[19] but only after consulting with the appropriate private and public sector bodies (*e.g.,* the Advisory Committee for Trade Policy and Negotiations).[20] Any such determination must be published in the Federal Register.

(ii) USTR must initiate a Section 301 investigation of any foreign country identified as a Special 301 "Priority Foreign Country" within 30 days after the identification of that country.[21] Priority Foreign Countries are those found by USTR to have the most onerous or egregious IPR acts, policies, or practices with the greatest adverse impact on U.S. products, and that are not entering into good faith negotiations or making significant progress in affording adequate IPR protection.[22] USTR has authority to make or revoke an identification of a Priority Foreign Country at any time, subject to various reporting requirements.[23]

As discussed in Section 4 below, IPR investigations initiated as a result of a Priority Foreign Country designation are conducted under Special 301 procedures, which differ in some respects from those that govern regular Section 301 investigations (*e.g.*, Special 301 investigations must be expedited in certain circumstances). However, nothing in the law prevents USTR from investigating IPR-related acts, policies, or practices of a foreign country that is not designated as a Priority Foreign Country under Special 301. Such investigations, whether self-initiated or resulting from a petition, may be conducted under regular Section 301 procedures. USTR is not required to initiate a Section 301 investigation of a Priority Foreign Country if it determines initiating an investigation would be detrimental to U.S. economic interests,[24] in which case USTR shall submit to the Congress a written report setting forth the reasons and the U.S. economic interests that would be adversely affected.[25]

In deciding whether to initiate an investigation, USTR has discretion to determine whether the initiation would ultimately be effective in addressing the act, policy or practice at issue.[26]

- **Consultations (Section 303)**

Upon initiating a Section 301 investigation, USTR must immediately request consultations with the targeted foreign country regarding the issues involved in the investigation.[27] The consultation procedures will depend on whether the investigation "involves a trade agreement":

[17] 19 U.S.C. § 2412(a)(2).

[18] 19 U.S.C. § 2412(a)(3).

[19] 19 U.S.C. § 2412(b)(1). This includes, in certain circumstances, acts, policies, or practices of a foreign government identified as a "trade enforcement priority" under "Super 301." 19 U.S.C. §2420(c)(2).

[20] The U.S. trade policy bodies are authorized by 19 U.S.C. §2155.

[21] 19 U.S.C. § 2412(b)(2)(A)

[22] 19 U.S.C. § 2242(b)(1).

[23] 19 U.S.C. § 2242(c)-(e).

[24] 19 U.S.C. § 2412(b)(2)(B)

[25] 19 U.S.C. § 2412(b)(2)(C)

[26] 19 U.S.C. § 2412(c).

[27] 19 U.S.C. § 2413(a).

- **Trade agreement investigation.** If a "mutually acceptable resolution" is not reached before the earlier of (1) the close of the consultation period, if any, specified in the trade agreement, or (2) the 150th day after the day on which consultation was commenced, USTR will promptly request formal dispute settlement proceedings under the governing trade agreement.

- **Non-trade agreement investigation.** There are no statutory guidelines for non-trade agreement consultations. In the 2013 Section 301 investigation of Ukraine – initiated due to a Priority Foreign Country designation under Special 301 – USTR simply sent a letter on the day of initiation requesting consultations with the Government of Ukraine regarding the issues under investigation. USTR also sought information and advice from the appropriate trade advisory committees in preparing the U.S. presentations for such consultations.[28]

An investigation could involve both trade agreement issues and non-trade agreement issues. In such a case, the SAA states that USTR would pursue consultations on a parallel track – both within and outside of the trade agreement framework.[29]

USTR may, after meeting with the petitioner (if any), delay any request for consultations by up to 90 days "for the purpose of verifying or improving the petition to ensure an adequate basis for consultation."[30] Any such delay would need to be notified in the Federal Register and reported to Congress, and would extend the statutory deadlines for an investigation following the completion of consultations.

- **Investigation and Determinations (Section 304)**

Following consultations, USTR will begin its investigation to determine whether the unfair trade practices described in Section 301 (see above) do in fact exist. If USTR's determination is affirmative, it will then determine what action, if any, it should take to remedy the unfair trade practice.[31] Section 301 divides foreign country trade practices into two groups: those for which USTR must take action and those for which USTR may, at its discretion, take action.

- **Mandatory actions**. USTR must take action, subject to the President's discretion, where it makes an affirmative determination of a trade agreement violation or an act, policy, or practice of a foreign country that is "unjustifiable and burdens or restricts United States commerce" (see definitions in Section A above). Any mandatory USTR action taken under Section 301 must affect goods or services of the foreign country in an amount equivalent in value to the burden or restriction being imposed by that country on U.S. commerce.[32]

  However, USTR is not required to act in "mandatory action" cases where (1) the WTO Dispute Settlement Body has adopted a dispute settlement report finding that the trade practice at issue does not violate WTO rules[33]; or (2) USTR finds that (a) the foreign country in question is taking satisfactory measures to grant the rights of the United States under a trade agreement; (b) the foreign country has

[28] 78 FR 33887 (June 5, 2013).

[29] SAA at 1035 ("In section 301 investigations involving mixed actions of this kind, the Administration intends to continue the-current practice of initiating dispute settlement proceedings against actions falling under a trade agreement and addressing other actions through bilateral negotiations.").

[30] 19 U.S.C. § 2413(b).

[31] 19 U.S.C. § 2414(a)(1)(B).

[32] 19 U.S.C. § 2411(a)(3).

[33] 19 U.S.C. § 2411(a).

agreed to eliminate or phase out the act, policy, or practice or has agreed to an imminent solution to the burden or restriction on U.S. commerce; (c) the foreign country has agreed to provide satisfactory compensatory trade benefits to the United States; (d) in extraordinary cases, action would have an adverse impact on the U.S. economy substantially out of proportion to the benefits of any action taken; or (e) such action would cause serious harm to U.S. national security.[34]

- **Discretionary actions.** USTR may take action where it determines that an act, policy, or practice is "unreasonable or discriminatory and burdens or restricts United States commerce," and that action by the United States is "appropriate." Any such action is subject to the specific direction, if any, of the President.[35]

The possible forms of any retaliatory action are described in Section (C) below.

Before making a determination, USTR must (1) provide interested persons with an opportunity (after giving no less than 30 days' notice) to present their views and conduct a public hearing if requested by an interested person;[36] and (2) obtain advice from relevant advisory committees.[37] In cases requiring "expeditious action," USTR may postpone these actions until after making its determinations.[38] USTR may also request the views of the U.S. International Trade Commission on the probable impact of any potential U.S. retaliatory action on the domestic economy.[39] The regulations set forth the various requirements for interested person participation in Section 301 investigations.[40]

The timelines for making any final determinations vary depending on (1) whether the case was initiated as the result of a Priority Foreign Country designation under Special 301 procedures; (2) whether the investigation involves a trade agreement; and (3) the particular trade agreement (if any) that is involved.

Regular Section 301 Investigations

- When a **Section 301 investigation involves an alleged violation of a trade agreement**, U.S. law requires USTR to follow the dispute settlement procedures set forth in the applicable agreement.[41] For example, if the investigation involves a violation of the WTO Agreements, USTR must follow WTO dispute settlement procedures.[42] For all trade agreement cases (except for certain Special 301 cases described below) USTR must

[34] 19 U.S.C. § 2411(a)(2)(B)(i)-(v).

[35] 19 U.S.C. § 2411(b).

[36] 19 U.S.C. § 2414(b)(1)(A).

[37] 19 U.S.C. § 2414(b)(1)(B).

[38] 19 U.S.C. § 2414(b)(2).

[39] 19 U.S.C. § 2414(b)(1)(C).

[40] *See* 15 C.F.R. §§ 2006.8 and 2006.9. In order to participate in the presentation of views (either at a public hearing or otherwise) an interested person may submit a written brief to USTR describing their position and the supporting rationale. Written briefs may be, but need not be, supplemented by the presentation of oral testimony at any public hearing scheduled in the investigation. USTR also must allow interested persons to submit rebuttal briefs within a time limit specified in the public notice. An interested person may also request in writing to present oral testimony at any public hearing scheduled in the investigation, and USTR must grant such request if the person has submitted a written brief that conforms with the applicable regulations and deadlines.

[41] A WTO Dispute Settlement Panel found that unilateral action taken by the United States pursuant to Section 304 of the Trade Act of 1974 would constitute a *prima facie* violation of the WTO Agreement; however, the Statement of Administrative Action ("SAA") for the Trade Act of 1974 and representations by the U.S. government during the dispute settlement process removed the threat of a violation and thus the inconsistency with the WTO Agreements. If the U.S. were to depart from the representations made to the Panel, this finding of consistency may no longer be warranted. *United States – Section 301-310 of the Trade Act of 1974*, Panel Report, para. 7.97, 7.134.

[42] For example, in October 2010, USTR initiated an investigation under Section 301 to investigate acts, policies, and practices of the Government of the People's Republic of China affecting trade and investment in the green technology sector. The investigation was initiated following a petition filed by the United Steelworker's Union under Section 302(a). As a result of the investigation initiated by USTR, the United States challenged some of the alleged subsidies at the WTO. After consultations between the United States and China, took action formally revoking the legal

make its final Section 301 determinations the earlier of (1) 30 days after the date on which the dispute settlement procedure is concluded; or (2) the date that is 18 months after the date on which the investigation is initiated.[43]

- In **cases not involving trade agreements**, USTR must make its determinations within twelve months after the date the investigation is initiated.[44]

Special 301 Investigations

As noted above, USTR must initiate a Section 301 investigation of any foreign country identified as a Special 301 "Priority Foreign Country." In such investigations, USTR must issue its final determination by the following deadlines:

- For Special 301 investigations involving **rights under the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) or the GATT 1994 relating to products subject to intellectual property protection**, USTR is required to make the determination within 30 days after the date on which the dispute settlement procedure is concluded.[45]
- For Special 301 investigations **not covered by a U.S. trade agreement**, USTR must make a determination within 6 months after the date of initiation of the investigation.[46] If the case involves either complex or complicated issues or requires additional time, or if the foreign country is undertaking enforcement measures to provide adequate and effective protection of IPR, USTR may make the determination within 9 months after the date of initiation of the investigation.[47]
- For Special 301 investigations involving **trade agreements other than TRIPS or the GATT 1994**, USTR must follow the same procedures regarding its final determinations as it would in a regular Section 301 investigation involving a trade agreement.[48] That is, USTR must make its final determinations the earlier of (1) 30 days after the date on which the dispute settlement procedure is concluded; or (2) the date that is 18 months after the date on which the investigation is initiated.

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measure at issue. In theory, however, nothing would prevent USTR from pursuing a dual track Section 301 investigation, simultaneously pursuing a case at the WTO and initiating its own investigation seeking unilateral action to combat the foreign country conduct in question.

[43] 19 U.S.C. § 2414(a)(2)(A)

[44] 19 U.S.C. § 2414 (a)(2)(B).

[45] 19 U.S.C. § 2414(a)(3)(A)(i)

[46] 19 U.S.C. § 2414(a)(3)(A)(ii).

[47] 19 U.S.C. § 2414(a)(3)(B).

[48] These deadlines are set forth in 19 U.S.C. § 2414(a)(2)(A), which applies to any investigation involving a trade agreement except for "an investigation initiated pursuant to [Special 301] involving rights under the Agreement on Trade-Related Aspects of Intellectual Property Rights…or the GATT 1994[.]"

In any trade agreement case (Special 301 or otherwise) in which a dispute is not resolved before the close of the minimum dispute settlement period[49] provided for in a trade agreement, USTR must, within 15 days after the close of the period, submit a report to Congress setting forth (1) the reasons why the dispute was not resolved within the minimum period; (2) the status of the case at the close of the period; (3) and the prospects for resolution.[50] USTR is required to publish any determination, together with a description of the facts on which such determination is based, in the Federal Register.[51]

- **Implementation (Section 305)**

  Upon making an affirmative determination to take retaliatory action against a foreign country trade practice, USTR must implement any such actions within 30 days after the date of the affirmative determination.[52] USTR may delay implementation by no more than 180 days if (1) in cases brought by petition, a delay is requested by the petitioner; (2) in the case of a self-initiated investigation, a delay is requested by a majority of the "domestic industry that would benefit from the action"; or (3) USTR determines that substantial progress is being made in remedying the targeted foreign country actions, or that a delay is necessary to obtain U.S. rights or a satisfactory solution.[53]

  However, in Special 301 investigations that do not involve trade agreements, the following limitations apply:

  – In investigations in which USTR's **final determination was not delayed** (because USTR did not determine that "complicated" issues were involved or that the foreign country was taking certain cooperative actions), USTR may not delay the implementation of retaliatory action.[54]

  – In cases in which USTR's **final determination was delayed** to 9 months (for one of the reasons described above), USTR may delay implementation of retaliatory action by no more than 90 days.[55]

  The law also provides special rules for cases in which USTR makes an affirmative determination of "export targeting" but determines that no action should be taken.[56]

- **Form of Retaliatory Action**

  In order to remedy a foreign country trade practice, Section 301 authorizes USTR to (1) impose duties or other import restrictions on the goods of, and, notwithstanding any other provision of law, fees or restrictions on the services of, the foreign country for such time as USTR deems appropriate; (2) withdraw or suspend preferential duty treatment under the Generalized System of Preferences; the Caribbean Basin Initiative, or the Andean

[49] The "minimum dispute settlement period" is the total period of time that results if all stages of the formal dispute settlement procedures are carried out within the time limitations specified in the agreement, but computed without regard to any extension authorized under the agreement at any stage.

[50] 19 U.S.C. § 2414(a)(4).

[51] 19 U.S.C. § 2414(c).

[52] 19 U.S.C. § 2415(a)(1).

[53] 19 U.S.C. § 2415(a)(2)(A).

[54] 19 U.S.C. § 2415(a)(2)(B).

[55] 19 U.S.C. § 2415(a)(2)(C).

[56] In particular, USTR must take alternative action in the form of establishing an advisory panel to recommend measures to promote the overall competitiveness of the affected domestic industry. The panel is required to submit reports on its recommendations to USTR and Congress within six months. On the basis of these reports, and subject to the direction of the President, USTR is allowed to take administrative actions authorized under any other law and propose legislation to implement any other actions that would restore or improve the competitiveness of the domestic industry. USTR must submit a report to Congress after the USTR panel report is submitted on the actions taken and proposals made. 19 U.S.C. § 2415(b).

Trade Preferences Act, or (3) enter into binding agreements with the foreign country to commit the foreign country to either eliminate the conduct in question or the burden to U.S. commerce, or compensate the United States with satisfactory trade benefits.[57] If USTR determines that action is to be taken in the form of import restrictions, it "shall" give preference to tariffs and consider substituting on an incremental basis an equivalent duty for any other form of import restriction imposed.[58]

In actions involving services instead of goods, USTR may also restrict the terms and conditions or deny the issuance of any access authorization (such as a licenses or permits) to the U.S. market issued under U.S. federal law.[59] Such action must be applied prospectively to authorizations granted on or after the date of the filing of a Section 301 petition or, if USTR self-initiates an investigation, the date of initiation. Before imposing fees or restrictions, USTR must consult the federal or state agency affected.[60]

- **Subsequent Actions**

Section 306 and 307 respectively provide the requirements for monitoring and modification or termination of any retaliatory action taken under Section 301. Importantly, foreign non-compliance with a measure or agreement undertaken as a result of a Section 301 investigation is considered a violation of a trade agreement under Section 301 and subject to **mandatory** retaliatory action.[61] The same time limits and procedures set forth in Sections 304 and 305 would apply to any further action taken by USTR. Any Section 301 action will terminate automatically if it has been in effect for four years, unless the petitioner or any representative of the domestic industry that benefits from the action has submitted to USTR in the final 60 days of the four-year period a written request for continuation.[62] If a request for continuation is submitted, USTR is required to conduct a review of the effectiveness of Section 301 or other actions undertaken in achieving the objectives and the effects on the U.S. economy, including domestic consumers.[63]

The Trade Facilitation and Trade Enforcement Act of 2015 amended certain provisions of the Trade Act of 1974 to confirm that USTR may reinstate a previously terminated Section 301 action in order to exercise a WTO authorization to suspend trade concessions. In particular, USTR may reinstate a Section 301 action following (1) a request from the petitioner or any representative of the domestic industry that would benefit from reinstatement of the action; (2) consultations; and (3) a review of the effectiveness of the action or any other actions that could be taken to achieve the objectives of Section 301, as well as of the effects of such actions on the U.S. economy.[64]

[57] 19 U.S.C. § 2411(c).

[58] 19 U.S.C. § 2411(c)(5).

[59] 19 U.S.C. § 2411(c)(2)(A).

[60] 19 U.S.C. § 2411(c)(2)(B)-(C).

[61] *Id.*

[62] 19 U.S.C. § 2417(c).

[63] 19 U.S.C. § 2417(c)(3).

[64] 19 U.S.C. § 2416(c).

US General Trade Policy Highlights

President Trump Directs USTR to Consider Section 301 Investigation of China's IPR Practices

On August 14, 2017, President Trump signed a memorandum directing US Trade Representative (USTR) Robert Lighthizer to determine whether to initiate an investigation under Section 301 of the Trade Act of 1974 concerning China's intellectual property rights policies.[65] The memorandum indicates that the Trump administration might be willing to use Section 301 to investigate and respond unilaterally to certain Chinese government practices that allegedly harm US intellectual property rights holders, where it can be argued that such practices are not covered by the WTO Agreements. However, it is unclear whether the Trump administration ultimately will take this approach because the memorandum does not rule out other, less controversial approaches contemplated under Section 301 such as the use of WTO dispute settlement procedures.

Background

Section 301 delegates to USTR broad authority to "take action," at the direction of the President, in response to "unfair" trade practices by foreign governments. Three types of foreign government conduct are expressly subject to Section 301:

1. A trade agreement violation;
2. An "unjustifiable" action (*i.e.*, acts, policies or practices that violate or are inconsistent with U.S. international legal rights) that "burdens or restricts United States commerce" ; and

[65] Click **here** to view the Presidential Memorandum.

3. An "unreasonable" action (acts, policies or practices that are not necessarily in violation of or inconsistent with U.S. international rights, but are otherwise unfair and inequitable) or "discriminatory" action (acts, policies, and practices which deny national or most-favored-nation treatment to United States goods, services, or investment) that "burdens or restricts United States commerce."

When a Section 301 investigation involves an alleged violation of a trade agreement, U.S. law requires that USTR follow the consultation and dispute settlement procedures set forth in the applicable agreement. However, when USTR determines that a Section 301 investigation does not involve an alleged trade agreement violation, the agency may investigate the foreign practices and retaliate unilaterally in the case of affirmative findings. USTR may retaliate by (1) imposing duties or other import restrictions on the goods of, and fees or restrictions on the services of, the foreign country; (2) withdrawing or suspending preferential duty treatment under trade preference programs; or (3) entering into binding agreements with the foreign country to either eliminate the conduct in question or to compensate the United States with satisfactory trade benefits.

Substance of the memorandum

President Trump's memorandum contains the following substantive sections:

A statement of policy claiming that "China has implemented laws, policies, and practices and has taken actions related to intellectual property, innovation, and technology that may encourage or require the transfer of American technology and intellectual property to enterprises in China or that may otherwise negatively affect American economic interests."

A directive that USTR "shall determine, consistent with section 302(b) of the Trade Act of 1974 (19 U.S.C. 2412(b)), whether to investigate any of China's laws, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development." Section 302(b) provides that USTR may self-initiate an investigation into "any matter" to determine whether it is actionable under Section 301, and that USTR must initiate an investigation of any foreign country identified as a Special 301 "Priority Foreign Country" within 30 days after the identification of that country.[1] The latter type of investigation is conducted under expedited procedures unless it involves a trade agreement (*i.e.*, USTR must complete its investigation in 6 to 9 months, compared to 12 months in other investigations.)

Next steps and implications

The presidential memorandum does not set a deadline for USTR to determine whether to initiate an investigation, and the timing of any such action is unclear. The Trump administration might initially seek to use the memorandum and the threat of unilateral action under Section 301 as leverage in negotiations with China regarding IPR issues or other matters. Longer term, however, USTR could indeed initiate a Section 301 investigation into the IPR practices described in the memorandum because there is generally bipartisan and industry support for a more aggressive US position on China IPR issues.

The implications of a formal Section 301 investigation would depend on whether USTR determines upon initiation that the Chinese government practices at issue do not implicate the WTO Agreements, and therefore seeks to investigate and respond to the alleged practices unilaterally. To do so would be a departure from the trade policies of recent administrations (which, since the creation of the WTO, have been reluctant to use Section 301 in this manner), and could invite challenges in the WTO and U.S. courts as well as retaliatory action by China. Alternatively, if USTR determines that the matters under investigation involve China's WTO commitments, USTR would be required to proceed in accordance with WTO dispute settlement procedures, and the invocation of Section 301 to trigger this process would not, in and of itself, have significant implications. The memorandum does not establish which of these

approaches, if any, USTR will take: the memorandum's reference to "unreasonable or discriminatory" actions is defined in Section 301(d) of the law, and these definitions would permit either unilateral actions or trade agreement actions.

USTR Initiates Section 301 Investigation of China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation

On August 18, 2017, the United States Trade Representative (USTR) initiated an investigation under Section 301 of the Trade Act of 1974 to determine whether acts, policies, and practices of the Government of China related to technology transfer, intellectual property, and innovation are "unreasonable or discriminatory and burden or restrict U.S. commerce."[66] The notice indicates, but does not expressly state, that the Trump administration intends to investigate at least some of the alleged Chinese government practices unilaterally under Section 301, rather than attempting to challenge them under WTO dispute settlement procedures.

Scope of the investigation

USTR's notice of initiation describes four types of conduct that will be examined in the investigation, but holds open the possibility that additional types of conduct will be added to the scope at a later stage. The notice states that the investigation "initially" will consider the following specific types of conduct:

- The Chinese government reportedly uses a variety of tools, including opaque and discretionary administrative approval processes, joint venture requirements, foreign equity limitations, procurements, and other mechanisms to regulate or intervene in U.S. companies' operations in China, in order to require or pressure the transfer of technologies and intellectual property to Chinese companies;
- The Chinese government's acts, policies and practices reportedly deprive U.S. companies of the ability to set market-based terms in licensing and other technology-related negotiations with Chinese companies and undermine U.S. companies' control over their technology in China;
- The Chinese government reportedly directs and/or unfairly facilitates the systematic investment in, and/or acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and generate large-scale technology transfer in strategic industries; and
- The investigation will consider whether the Chinese government is conducting or supporting unauthorized intrusions into U.S. commercial computer networks or cyber-enabled theft of intellectual property, trade secrets, or confidential business information.

The notice also states that interested parties "may submit for consideration information on other acts, policies and practices of China relating to technology transfer, intellectual property, and innovation described in the President's Memorandum that might be included in this investigation, and/or might be addressed through other applicable mechanisms." USTR is requesting public comments on these "other" types of conduct, and on the four specific types of conduct described in the notice, by 11:59 pm on September 28, 2017. USTR also will hold a public hearing on October 10, 2017 at which interested parties will have the opportunity to testify on these issues.

Investigation process

[66] Click **here** to view the notice of initiation.

The notice does not state that USTR plans to unilaterally investigate the aforementioned actions (rather than using the WTO), as is permitted under Section 301 if USTR determines that the investigation does not involve a U.S. trade agreement. That determination is solely at USTR's discretion. However, several aspects of the initiation notice indicate that USTR plans to investigate unilaterally at least some of the actions identified therein:

- **Twelve-month deadline.** In describing the deadline by which USTR must issue its final determination in the investigation, the notice references only the deadline applicable to non-trade agreement investigations. Citing Section 304(a)(2)(B), the notice states that USTR "must determine within 12 months from the date of initiation of the investigation whether any act, policy, or practice described in [Section 301] exists and, if that determination is affirmative, what action, if any, to take." This provision applies to non-trade agreement investigations, whereas investigations involving trade agreements are subject to different deadlines set forth in Section 304 (tied to the completion of dispute settlement proceedings).

- **No mention of the WTO.** USTR's August 18 notice does not allege that the aforementioned Chinese government practices violate WTO rules, and does not otherwise mention the WTO, trade agreements, or formal dispute settlement proceedings. By contrast, in prior self-initiated investigations under Section 301 that involved the WTO Agreements, USTR has described the alleged or suspected WTO violations in its notice of initiation.[67]

- **No request for WTO dispute settlement consultations.** The United States has not requested formal dispute settlement consultations with China at the WTO concerning the issues under investigation. However, the notice states that "on the date of initiation, [USTR] requested consultations with the Government of China concerning the issues under investigation[.]" This indicates that USTR has requested informal (*i.e.*, not WTO) consultations with China, as it has done in past Section 301 investigations that did not involve trade agreements, such as the 2013 Special 301 investigation of Ukraine.

- **"Unreasonable" actions targeted.** Like President Trump's August 14 memorandum, the initiation notice references "unreasonable or discriminatory" actions, which are defined in Section 301(d) of the law, and these definitions would permit either unilateral actions or trade agreement actions. "Unreasonable" actions are defined in Section 301(d) to include actions that do not necessarily violate a trade agreement, but are "otherwise unfair and inequitable". By contrast, foreign government actions targeted by Section 301(a) expressly involve trade agreements.

Next steps and implications

Though the notice indicates that USTR plans to investigate some or all of the alleged Chinese government actions unilaterally, it remains possible that USTR ultimately will seek to address some of them through WTO dispute

[67] Since 1995, there have been two Section 301 investigations (both initiated by petition) that resulted in WTO disputes even though USTR's notice of initiation under Section 301 did not mention alleged WTO violations:

- On October 23, 2000, USTR initiated a Section 301 investigation concerning the wheat trading practices of the Canadian Wheat Board (65 FR 69362). USTR's notice of initiation did not mention possible WTO violations, and such violations were not alleged in the petition. On February 15, 2002, USTR determined that the Canadian government policies under investigation "are unreasonable and burden or restrict U.S. commerce", and stated that, in addition to taking other actions, "USTR will examine taking a possible dispute settlement case against the Canadian Wheat Board in the WTO[.]" On December 17, 2002, USTR requested consultations with Canada in the WTO regarding some of the Canadian policies examined in the Section 301 investigation (see *Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain* – DS276).

- On July 2, 1995, USTR initiated a Section 301 investigation concerning barriers to access to the Japanese market for consumer photographic film and paper (60 FR 35447). USTR's notice of initiation did not mention possible WTO violations. On June 13, 1996, USTR determined that certain of the Japanese government policies under investigation "are unreasonable and burden or restrict U.S. commerce" (61 FR 30929). USTR further concluded that "there is reason to believe based on strong evidence" that some of the Japanese measures "contravene Japan's obligations under the Multilateral Trade Agreements annexed to the Marrakesh Agreement Establishing the World Trade Organization (WTO), and nullify or impair benefits accruing to the United States under the WTO agreements." Consequently, USTR stated that "the United States will invoke the dispute settlement procedures of the WTO with respect to these measures and their application". On the same day as the final determination, the United States requested consultations with Japan in the WTO regarding some of the measures examined in the Section 301 investigation (see *Japan - Measures Affecting Consumer Photographic Film and Paper* – DS44).

settlement. Indeed, Section 301 does not expressly prohibit USTR from determining, after initiating an investigation and receiving public input, that some of the matters under investigation involve a trade agreement and requesting formal dispute settlement proceedings. Moreover, and as noted above, USTR is seeking public comments on "other acts, policies and practices of China…that might be included in this investigation, and/or might be addressed through other applicable mechanisms." Some of the acts identified in the public comments might include alleged WTO violations, which USTR might then seek to address through WTO dispute settlement.

Consequently, it is possible that USTR will (i) unilaterally investigate certain Chinese government actions under Section 301; (ii) initiate WTO consultations regarding certain Chinese government actions; or (iii) pursue both types of action simultaneously (*i.e.*, investigating some of the actions unilaterally while seeking to address others through the WTO). A decision to investigate at least some of the actions unilaterally, which now appears likely, would reflect a more aggressive U.S. government stance on China IPR issues, though it appears to have both industry and congressional support. Unilateral action also would reflect the view of some Trump administration officials that WTO rules and dispute settlement are insufficient to address alleged Chinese industrial policies that are viewed as harmful to U.S. trade and investment.

The use of Section 301 to investigate China and retaliate unilaterally is permitted under U.S. law but could raise serious legal and practical concerns. China might bring a WTO challenge to the investigation and any final measures resulting therefrom, claiming, for example, a violation of GATT Article XXIII by arguing that the US measures nullify or impair the benefits and objectives of the GATT outside of the WTO Agreements. Instead of or concurrent with a WTO dispute, China might also retaliate unilaterally against U.S. exporters or investors – perhaps even using the same justifications regarding WTO applicability that the Trump administration applied in its Section 301 actions. State-run media in China have already denounced the initiation.

USTR Holds Debriefings on TIFA Meetings with Malaysia and the Philippines

On August 23, 2017, the Office of the United States Trade Representative (USTR) held debriefings on its recent meetings with the Malaysian and Philippine governments pursuant to the US-Malaysia and US-Philippines Trade and Investment Framework Agreements (TIFAs). Mr. Karl Ehlers, Deputy Assistant USTR for Southeast Asia and the Pacific, and Ms. Christine Brown, Director for Southeast Asia and Pacific Affairs, provided an overview of the main issues discussed during the TIFA meetings, which are summarized below.

Malaysia

Mr. Ehlers indicated that the goal of the meeting was to reinvigorate the US-Malaysia TIFA discussion, and that the Malaysian government has appeared cautious towards the United States following recent developments such as the US withdrawal from the TPP, the Trump administration's "Omnibus Report on Significant Trade Deficits", and the Section 201 global safeguard investigation on solar products. USTR established five working groups with Malaysia to advance certain issues (trade in goods, opening up new sectors for services, IP, labor rights, and environment), but Mr. Ehlers indicated that USTR has fewer outstanding issues to address with Malaysia than with other countries in the region. Those outstanding issues include foreign equity limits in the insurance sector, pharmaceutical IP issues (e.g., data exclusivity and compulsory licensing), import restrictions in the auto sector, and agriculture, where USTR believes the United States should be able to export more to Malaysia than it does presently.

Philippines

Ms. Brown indicated that the parties discussed a wide range of issues during the US-Philippines TIFA meeting, including investment (the definition of public utility, opening up new sectors to foreign investment, and constitutional reform), taxes on sugary beverages, tariff-rate quotas on rice, government procurement reform, customs reform in accordance with the WTO Trade Facilitation Agreement, implementation of the expanded Information Technology

Agreement, continued efforts on intellectual property rights (IPR), and labor rights. Ms. Brown noted that progress was made in each of these areas, and in particular on agriculture issues. The parties agreed on certain follow-up actions, and USTR intends to monitor the Philippines' progress and address any follow-up issues by the end of this year or early next year.

Petitions and Investigations Highlights

Department of Commerce Issues Affirmative Preliminary Determination in CVD Investigation of Aluminum Foil from China

On August 8, 2017, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the countervailing duty (CVD) investigation concerning imports of aluminum foil from China.[68] In its investigation, DOC determined that imports of the subject merchandise from China received countervailable subsidies at the following rates:

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

Exporter/Producer	Subsidy Rate
Dingsheng Aluminum Industries (Hong Kong) Trading Co., Ltd.	28.33 percent
Jiangsu Zhongji Lamination Materials Co., Ltd.	16.56 percent
Loften Aluminum (Hong Kong) Limited	80.97 percent
Manakin Industries LLC and Suzhou Manakin Aluminum Processing Technology Co., Ltd.	80.97 percent
All others	22.45 percent

The merchandise subject to the investigation is aluminum foil having a thickness of 0.2 mm or less, in reels exceeding 25 pounds, regardless of width. The products under investigation are currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7607.11.3000, 7607.11.6000, 7607.11.9030, 7607.11.9060, 7607.11.9090, and 7607.19.6000. Further, merchandise that falls within the scope of the proceeding may also be entered into the United States 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.

DOC is scheduled to announce its final determination on or around October 23, 2017, unless the statutory deadline is extended. If DOC makes an affirmative final determination, and the US International Trade Commission (ITC) makes an affirmative final determination that imports of the subject merchandise materially injure or threaten material injury to the domestic industry, DOC will issue a CVD order.

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

Department of Commerce Issues Affirmative Preliminary Determinations in Countervailing Duty Investigations of Silicon Metal from Australia, Brazil and Kazakhstan

On August 8, 2017, the US Department of Commerce (DOC) announced its affirmative preliminary determinations in the countervailing duty (CVD) investigations concerning imports of silicon metal from Australia, Brazil and Kazakhstan.[69] In the investigations, DOC determined that imports of the subject merchandise from Australia, Brazil and Kazakhstan received countervailable subsidies at the following rates:

Country	Exporter/Producer	Subsidy Rates
Australia	Simcoa Operations Pty Ltd.	16.23 percent
	All others	16.23 percent
Brazil	Dow Corning Silicio do Brasil Industria e Comercio Ltda.	3.69 percent
	Ligas de Aluminio S.A. - LIASA	52.07 percent
	All others	3.69 percent
Kazakhstan	Tau-Ken Temir LLP	120.00 percent
	All others	120.00 percent

The scope of these investigations covers all forms and sizes of silicon metal, including silicon metal powder. Silicon metal contains at least 85.00 percent but less than 99.99 percent silicon, and less than 4.00 percent iron, by actual weight. Semiconductor grade silicon (merchandise containing at least 99.99 percent silicon by actual weight and classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheading 2804.61.0000) is excluded from the scope of the investigations. Silicon metal is currently classifiable under subheadings 2804.69.1000 and 2804.69.5000 of the HTSUS.

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

DOC is scheduled to announce its final determinations on or around December 19, 2017, unless the statutory deadline is extended. According to DOC, imports of silicon metal from Australia, Brazil, and Kazakhstan in 2016 were valued at an estimated USD 33.9 million, 60.0 million, and 17.5 million, respectively.

US Department of Commerce Issues Affirmative Preliminary Determinations in Countervailing Duty Investigations of Carbon and Alloy Steel Wire Rod From Italy and Turkey

On August 28, 2017, the US Department of Commerce (DOC) announced its affirmative preliminary determinations in the countervailing duty (CVD) investigations concerning imports of carbon and alloy steel wire rod from Italy and Turkey.[70] In its investigations, DOC preliminarily determined that imports of the subject merchandise received countervailable subsidies at the following rates:

Country	Subsidy Rates
Italy	1.70 to 44.18 percent
Turkey	2.27 percent

The merchandise covered by these investigations is certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, less than 19.00 mm in actual solid cross-sectional diameter. The products under investigation are currently classifiable under subheadings 7213.91.3011, 7213.91.3015, 7213.91.3020, 7213.91.3093, 7213.91.4500, 7213.91.6000, 7213.99.0030, 7227.20.0030, 7227.20.0080, 7227.90.6010, 7227.90.6020, 7227.90.6030, and 7227.90.6035 of the Harmonized Tariff Schedule of the United States (HTSUS). Products entered under subheadings 7213.99.0090 and 7227.90.6090 of the HTSUS also may be included in the scope if they meet the physical description of subject merchandise.

DOC is scheduled to announce its final determinations on or around November 9, 2017, unless the statutory deadline is extended. If DOC makes affirmative final determinations, and the US International Trade Commission (ITC) makes affirmative final determinations that imports of the subject merchandise from Italy and/or Turkey materially injure or threaten material injury to the domestic industry, DOC will issue CVD orders.

According to DOC, imports of carbon and alloy steel wire rod from Italy and Turkey in 2016 were valued at an estimated USD 12.2 million and 41.4 million, respectively.

US International Trade Commission Issues Affirmative Final Determination in Antidumping Investigation of Steel Concrete Reinforcing Bar from Taiwan

On August 30, 2017, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of steel concrete reinforcing bar from Taiwan.[71] The US Department of Commerce (DOC) determined in July 2017 that imports of steel concrete reinforcing bar from Taiwan were sold in the United States at dumping margins ranging from 3.50 to 32.01 percent (please refer to the W&C US Trade Alert dated July 25, 2017.)

As a result of the ITC's affirmative final determination, DOC will issue an antidumping duty order on imports of the subject merchandise from Taiwan, which 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. According to the ITC, imports of the subject merchandise in 2016 were valued at an estimated USD 700.7 million.

The ITC's public report on the investigation will be available by October 3, 2017.

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

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

WTO & Multilateral Highlights

WTO Panel Issues Report in Indonesia – Safeguard on Certain Iron or Steel Products

A WTO Panel has dismissed claims against Indonesia under the WTO Agreement on Safeguards on the grounds that the challenged duty was not actually a “safeguard measure”. All disputing parties had agreed that the specific duty on iron or steel was a safeguard measure, but the Panel rejected this consensus position.

The Panel upheld a “stand-alone” challenge against the duty under the Most-Favoured-Nation (MFN) obligation of Article I of the General Agreement on Tariffs and Trade (GATT) 1994.

Significance of Decision

This decision reinforces the important principle that WTO Panels are not bound by the positions or arguments of the disputing parties, but must make their own, independent assessment of the issues.

The current dispute is somewhat unusual in that the Panel rejected the concurring views of the complaining parties (Chinese Taipei and Viet Nam) and the defending party (Indonesia) on a critical threshold issue of whether the measure was a safeguard. Indonesia had conducted an investigation under its safeguards legislation, and had notified the resulting duty to the WTO Committee on Safeguards. All disputing parties agreed that the Safeguards Agreement applied, although they differed on whether Indonesia’s duty was consistent with that Agreement.

The Panel took a different approach. It noted that Indonesia had no binding tariff obligations under GATT Article II with respect to the products subject to the duty. It stated that the Safeguards Agreement and GATT 1994 define “safeguard measures” in part as those which “suspend a GATT obligation” or “withdraw or modify a GATT concession”. The Panel found that as Indonesia was “free to impose any amount of duty it deems appropriate” on these unbound products, the specific duty at issue in this case “did not suspend, withdraw, or modify Indonesia's obligations under Article II of the GATT 1994”. The Panel concluded that “[i]n the absence of an obligation preventing a Member's remedial action, there would be obviously no need for that Member to be released from a WTO commitment”. Therefore, the Safeguards Agreement did not apply, and the Panel dismissed all claims under that Agreement.

WTO panels and the Appellate Body often accept agreed positions advanced by the disputing parties, and proceed on that basis. However, the current Panel was well within its rights to choose not to do so. Indeed, given the Panel’s obligation under Article 11 of the Dispute Settlement Understanding to make an “objective assessment” of the matter before it, including “the applicability of and conformity with the relevant covered agreements”, it was required to make its own independent assessment on the applicability of the Safeguards Agreement, despite the “concurring positions” of the disputing parties on this issue.

The Panel’s decision in this case hinged primarily on the form of the measure imposed by Indonesia. Indonesia elected to impose a specific duty on products that were unbound in Indonesia’s tariff schedule, leading the Panel to conclude that there were no GATT obligations to suspend. The result could have been different if the purported safeguard measure were an import quota rather than a duty, in which case the GATT Article XI rules on quantitative restrictions would apply regardless of whether the product was subject to a tariff binding. Under such a scenario, the Safeguards Agreement would apply. The Panel raised this issue briefly, noting only that “such a measure would have to be based on a WTO-consistent investigation and conclusions”.

Both sides may seek to appeal this ruling.

Background: Safeguards investigation leads to a specific duty

In 2014, Indonesia imposed a specific duty on galvalume, a type of flat-rolled iron or steel. The duty was imposed following an investigation under Indonesia’s safeguards legislation. This three-year duty was also notified by Indonesia to the WTO Committee on Safeguards. Indonesia applied the duty on imports of galvalume from all sources, although developing countries were exempt.

Importantly, as noted above, Indonesia has no tariff binding obligations with respect to galvalume.

Disputing parties agree that the duty is a safeguard measure

The complaining parties in this dispute, Chinese Taipei and Viet Nam, argued that the specific duty was a safeguard within the meaning of the WTO Safeguards Agreement, and violated that Agreement. In the alternative, they argued that if the duty were not a safeguards measure, it was in any event inconsistent with Indonesia's MFN obligation under GATT Article I.

Indonesia agreed that its measure was a safeguard within the meaning of the Safeguards Agreement, but argued that the duty was consistent with that Agreement.

"Fundamental question" for Panel: whether the duty was a safeguard measure

The Panel began by noting that a "fundamental question" in this dispute was whether the specific duty applied by Indonesia on imports of galvalume was a "safeguard measure" within the meaning of Article 1 of the Safeguards Agreement. The Panel stated that "[a]lthough both sides maintain, albeit for somewhat different reasons, that the challenged measure is a safeguard measure within the scope of the Agreement on Safeguards, their arguments have led us to conclude, in discharging our duty to undertake 'an objective assessment of the matter', that we must examine this issue for ourselves, rather than simply proceeding on the basis of the parties' concurring positions". Having done so, the Panel concluded that "the specific duty at issue in this dispute is *not* a 'safeguard measure' within the meaning of Article 1 of the Agreement on Safeguards". [original emphasis; all italicized quotes below are also original emphasis.]

Definition of a "safeguards measure"

Article 1 of the Safeguards Agreement states in part that "safeguard measures" are "those measures provided for in Article XIX of GATT 1994". The Panel found that "the 'measures provided for' in Article XIX:1(a) are measures that *suspend a GATT obligation* and/or *withdraw or modify a GATT concession*, in situations where… a product 'is being imported' into a Member's territory in 'such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products'."

In the view of the Panel, "not *any* measure suspending, withdrawing or modifying a GATT obligation or concession will fall within the scope of Article XIX:1(a)". Instead, "it is only measures suspending, withdrawing, or modifying a GATT obligation or concession that a Member finds it must be temporarily released from in order to pursue a course of action necessary to prevent or remedy serious injury" that will constitute "safeguard measures". It added that "[i]n the absence of an obligation preventing a Member's remedial action, there would be obviously no need for that Member to be released from a WTO commitment and, therefore, nothing to "re-adjust temporarily'."

It followed, in the Panel's view, that "one of the defining features of the 'measures provided for' in Article XIX:1(a) (i.e. safeguard measures) is the suspension, withdrawal, or modification of a GATT obligation or concession that *precludes a Member from imposing a measure to the extent necessary to prevent or remedy serious injury*, in a situation where all of the conditions for the imposition of a safeguard measure are satisfied".

No Indonesian tariff commitments for the product at issue

The Panel recalled that "Indonesia has no binding tariff obligation with respect to galvalume in its WTO Schedule of Concessions", which meant that "Indonesia is free to impose any amount of duty it deems appropriate on imports of galvalume", including the specific duty at issue in this dispute. It added that "Indonesia's obligations under Article II of the GATT 1994 did not preclude the application of the specific duty on imports of galvalume, implying that the specific duty did not suspend, withdraw, or modify Indonesia's obligations under Article II of the GATT 1994".

Indonesia also argued in part that the imposition of the specific duty on imports of galvalume originating in its Regional Trade Agreement (RTA) partners (Korea, ASEAN) meant that the GATT obligation being suspended was the exception for RTAs under GATT Article XXIV. The Panel rejected this argument, finding that "Article XXIV of the GATT 1994 does not impose an obligation on Indonesia to apply a particular duty rate on imports of galvalume from its RTA partners" since Article XXIV is "a *permissive* provision, allowing Members to depart from their obligations under the GATT to establish a customs union and/or free trade area…" It concluded that "[t]here is, therefore, no basis for Indonesia's assertion that Article XXIV of the GATT 1994 precluded its authorities from raising tariffs on imports of galvalume and that the specific duty, thereby, 'suspended' 'the GATT exception under Article XXIV' for the purpose of Article XIX:1(a)".

Developing country exemption does not suspend MFN obligation for non-safeguard measures

Article 9.1 of the Safeguards Agreement provides in part that "[s]afeguard measures shall not be applied against a product originating in a developing country Member" as long as such imports remain below certain specified *de minimis* levels. Indonesia asserted that the specific duty suspended its MFN obligation under GATT Article I in order to comply with the special and differential treatment requirements of Article 9.1.

The Panel rejected this argument. It stated that "by its express terms, Article 9.1 is legally premised on an importing Member's intention to apply a *safeguard* measure". It added that "the fundamental prerequisite for the application of Article 9.1 does not exist, and there is, therefore, no basis for Indonesia's assertion that it was *legally required* to apply the specific duty in the manner required by Article 9.1". It added that "[i]n any case, even where a Member is proposing to apply a safeguard measure, it does not, in our view, follow from the fact that Article 9.1 imposes an *obligation* to apply a safeguard measure in a discriminatory manner in favour of qualifying imports from developing country Members, that the very same safeguard measure, *because of that discrimination*, suspends the obligation in Article I:1 to provide MFN-treatment for the purpose of Article XIX:1(a)".

The Panel offered two reasons for this conclusion. First, it stated "the discrimination that is called for by Article 9.1 (which would otherwise be inconsistent with Article I:1 of the GATT 1994) is not intended to prevent or remedy serious injury". Rather, "that discrimination is intended to leave producers from qualifying developing country Members with essentially the same access to the importing country market as existed prior to the imposition of a safeguard measure".

Second, it noted that that the General Interpretative Note to Annex 1A of the WTO Agreement states that in the event of a conflict between a provision of the GATT 1994 and a provision of another covered agreement, the provision of the covered agreement prevails to the extent of the conflict. In the Panel's view, "the effect of this rule is that the discriminatory application of a safeguard measure that is required by Article 9.1, to the extent it is inconsistent with the principle of MFN treatment, is permissible *without having to suspend the operation of Article I:1 of the GATT 1994*". It added that "the question of suspension simply does not arise in this context, because the obligation in Article 9.1 to exclude the qualifying imports of developing country Members from the scope of a safeguard measure prevails *as a matter of law* over the MFN obligation in Article I:1".

The Panel acknowledged that its conclusions on this issue were different from the ruling of the 2012 panel in *Dominican Republic – Safeguard Measures*, which found that "the discriminatory application of a safeguard measure in accordance with Article 9.1 of the Agreement on Safeguards resulted in the suspension of the importing Member's MFN obligations under Article I:1 of the GATT 1994". The current panel stated that it "respectfully disagree[d]" with that earlier ruling and affirmed that "the discriminatory application of a safeguard measure for the purpose of affording S&D pursuant to Article 9.1 *does not* result in a suspension of a Member's obligations under Article I:1, within the meaning of Article XIX:1(a) of the GATT 1994".

Safeguards investigation not determinative

The Panel next considered the fact that Indonesia's specific duty was imposed at the conclusion of a safeguards investigation, and was notified to the WTO Safeguards Committee. It found that "the fact that a Member initiated and conducted an investigation under its domestic safeguards legislation does not necessarily mean that the measures imposed on the investigated product at the end of that process are 'safeguard measures' within the meaning of Article XIX of the GATT 1994 and the Agreement on Safeguards". It stressed that "while a WTO-consistent investigation is a necessary prerequisite for the application of a WTO-consistent safeguard measure, the fact that an importing Member may have conducted an investigation in accordance with the Agreement on Safeguards does not mean that any measures adopted as a result of the conclusions in that investigation suspend, modify, or withdraw any GATT obligation or concession and, therefore, constitute 'safeguard measures' within the meaning of Article 1 of the Agreement on Safeguards".

The Panel stressed at the conclusion of its analysis that "our finding that the specific duty is not a 'safeguard measure' does not mean that Members are precluded from applying 'safeguard measures' on imports for which their tariffs are 'unbound'." Rather, "[a]ny WTO Member faced with such a situation would be entitled to exercise its rights under the Agreement on Safeguards to prevent or remedy serious injury to its domestic industry, provided that the chosen remedial course of action suspends, withdraws, or modifies a relevant GATT obligation or concession for that purpose".

"Stand alone" MFN challenge – Indonesia violated GATT Article I

The Panel then considered the claim that the exemption of 120 developing countries from the application of the specific duty violated Indonesia's MFN obligations under GATT Article I. The Panel noted that "[a]lthough the complainants pursue this claim primarily as part of their complaint against the specific duty as a *safeguard measure*, they also make the same claim on the basis of the same arguments against the specific duty *as a stand-alone measure*".

Indonesia did not contest the claim against the duty as a stand-alone measure. It noted that the exemption for developing countries was premised on the view that "the specific duty is a measure which, *by definition*, would be inconsistent with Article I:1 of the GATT, *were it not considered to be a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards*". The Panel recalled that "[w]e have previously concluded that the specific duty does not constitute a safeguard measure".

GATT Article I provides in part that "any advantage, favour, privilege or immunity" granted by a Member in relation to "customs duties and charges" on the importation of "any product originating in … any other country shall be accorded immediately and unconditionally" to the like product originating in all Members. The Panel agreed with the complainants both that the specific duty was a "customs duty" and that the exclusion of imports of galvalume from the 120 developing countries "constitutes an 'advantage' granted to 'like products' that is not 'immediately and unconditionally accorded' to imports of galvalume from all WTO Members". The Panel therefore concluded that "the application of the specific duty on imports of galvalume originating in all but the 120 countries… is inconsistent with Indonesia's obligation to afford MFN treatment under Article I:1 of the GATT 1994".

Claims under Safeguards Agreement dismissed

In the final section of its report, the Panel considered the claims of the complainants under the Safeguards Agreement and GATT Article XIX. It stated that "[h]aving concluded that the specific duty is *not* a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, it is evident to us that there is no legal basis for the complainants' claims under the Agreement on Safeguards" and GATT Article XIX, and that "we dismiss the entirety of

those claims". Given what the Panel called "the unique circumstances of this case", it "decided to proceed to address the complainants' claims, but only to the extent of identifying facts relevant to an evaluation of the allegations…, the conduct of its investigation, and Indonesia's decision to impose the specific duty". Although it examined those issues, the Panel expressly declined to "consider the legal merits of the complainants' claims" under these provisions.

The Report of the WTO Panel in *Indonesia – Safeguard on Certain Iron or Steel Products*, (WT/DS490/R, WT/DS496/R) was circulated on 18 August 2017.