US & Multilateral Trade Policy Developments

Japan External Trade Organization

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Contents

US General Trade Policy Highlights

US Trade Representative to Consider Increase in Proposed Section 301 Tariff Rate on USD 200 Billion in Chinese Imports; China Responds with New Proposed Tariffs on USD 60 Billion in US Exports

On August 1, 2018, the Office of the US Trade Representative (USTR) announced that, at the direction of the President and pursuant to Section 301 of the Trade Act of 1974, USTR will consider modifying its proposed tariff action covering USD 200 billion worth of Chinese imports by increasing the proposed level of the additional tariff from 10 percent to 25 percent. In light of this potential change, USTR extended certain deadlines for submitting public comments on the proposed action, which USTR first announced on July 10, 2018.

USTR on August 3 issued a draft Federal Register notice officially implementing these changes and stating that the potential tariff rate increase is intended to provide the Trump Administration with "additional options" to obtain the elimination of the alleged Chinese government practices covered by the Section 301 investigation.[1] However, that same day China's Ministry of Commerce (MOFCOM) announced in response to USTR's proposed action a new list of additional tariffs ranging from 5 to 25 percent on US products worth a combined annual import value of USD 60 billion. MOFCOM did not provide the implementation date of these tariffs. These actions portend further escalation of the ongoing US-China trade dispute and are summarized in greater detail below.

Proposed Modification of Section 301 Action

In its draft Federal Register notice of August 3, USTR notes that the President this week "directed [USTR] to consider raising the level of the additional duty…from 10 percent to 25 percent", and that "[i]n light of this possible increase…[USTR] is extending certain comment periods" for the proposed USD 200 billion tariff action. The revised comment deadlines set forth in the notice are as follows:

- **August 13, 2018:** The due date for filing requests to appear and a summary of expected testimony at the public hearing and for filing pre-hearing submissions is extended from July 27 to August 13, 2018.
- **September 5, 2018:** The due date for submission of written comments is extended from August 17 to September 5, 2018.
- **August 20-23, 2018:** The scheduled start date of the Section 301 hearing (August 20) has not changed. The Section 301 Committee may extend the length of the hearing depending on the number of additional interested persons who request to appear at the hearing.
- **September 5, 2018:** The due date for submission of post-hearing rebuttal comments is extended from August 30 to September 5, 2018 (*i.e.*, the same day as the extended written comments deadline).

USTR has advised that "[i]nterested persons are invited to include comments in their written submissions and oral testimony on the possible imposition of a 25 percent additional duty." In the event that an interested person already has provided written comments and wishes to provide further comments in light of the possible increase in the rate of additional duty, the submitter may do so by filing a "supplemental comment".

The Federal Register notice provides little insight into the reasons for the President's directive that USTR consider increasing the proposed rate of duty, stating only that the possible increase "is intended to provide the Administration with additional options to obtain the elimination of the acts, policies, and practices covered in the investigation." However, sources close to the administration have suggested that President Trump directed USTR to consider the increased tariff rate in order to offset the recent depreciation of the Chinese yuan against the US dollar. Though USTR's August 1 announcement was unexpected, other Federal Register notices in the Section 301 tariff proceedings have indicated that modification of the proposed tariff rates was a possibility. For example, the original

[1] USTR's Federal Register notice is available **here** and MOFCOM's announcement is available **here** (in Chinese).

Federal Register notice announcing the proposed USD 200 billion tariff action expressly invited interested parties to comment on "[t]he level of the increase, if any, in the rate of duty" to be imposed.

China's Response

MOFCOM on August 3 announced that, in response to USTR's proposed action against USD 200 billion in Chinese imports, MOFCOM intends to impose additional tariffs ranging from 5 to 25 percent on certain US goods with a combined annual import value of USD 60 billion. MOFCOM published four separate lists of US products to be subject to these additional tariffs, which are attached for reference:

- **List 1** contains 2,493 tariff lines to be subject to an additional duty of **25 percent** and includes liquefied natural gas (falling under tariff subheading 27111100); various beers, wines, and liquors (HS 22); various solar goods (HS 8541); various chemicals (HS 28 and 29); and certain oil and gas pipelines (HS 7304).
- **List 2** contains 1,078 tariff lines to be subject to an additional duty of **20 percent** and includes certain plastic products (HS 39); wood and paper products (HS 44 and 48); air conditioners (HS 8415); cranes (HS 8426); and agricultural equipment (HS 8432-33).
- **List 3** contains 974 tariff lines to be subject to an additional duty of **10 percent** and includes various textile goods (HS 57-63); glass products (HS 70); chicken breast (HS 1602); turkey and offal (HS 1602); and frozen potatoes (HS 0710).
- **List 4** contains 662 tariff lines to be subject to an additional duty of **5 percent** and includes various vehicles and automotive parts (HS 8705, 8706, and 8708); automobile and aircraft tires (HS 4012); wood and paper products (HS 44 and 48); and chemicals (HS 28 and 29).

MOFCOM's notice does not specify an effective date for these tariffs, stating only that "the final form of the measure and the effective date will be announced separately." However, it is expected that the tariffs proposed by MOFCOM would take effect at or around the same time as any action taken by USTR on the USD 200 billion tariff list.

Implications

Given the revised USTR notice and comment schedule and recent practice, the earliest practicable date for publication of a final USD 200 billion tariff list would be late-September, with implementation of those tariffs approximately two weeks thereafter. As noted above, the retaliatory tariffs announced by MOFCOM would likely take effect at or around the same time as the US tariffs. Such actions would presumably follow two other rounds of tariffs: (1) the United States' imposition of a 25 percent tariff on approximately USD 34 billion in imports from China on July 6, 2018, and China's imposition of an equivalent tariff on approximately USD 34 billion in imports from the United States on the same date; and (2) the United States' likely imposition of a 25 percent tariff on approximately USD 16 billion in imports from China in late-August or thereafter, and China's likely imposition of an equivalent tariff on approximately USD 16 billion in imports from the United States on or around the same date. As such, the third round of tariffs would represent a major escalation of the ongoing US-China trade dispute, and would have serious ramifications for US and Chinese businesses, their suppliers and customers, and the global trading system.

Members of Congress and the US business community in recent days have reiterated their opposition to the Section 301 tariff actions, including the latest tariff increase proposed by USTR, and have again called on the Trump Administration to engage in negotiations with China and avoid escalating the situation further. Though some members of the Administration, such as Treasury Secretary Steven Mnuchin, reportedly favor this approach, no such negotiations are currently taking place. Moreover, bilateral negotiations attempted earlier this year made little progress, raising serious doubts as to whether further negotiations, if they occur, can succeed in averting the new tariffs proposed by USTR and MOFCOM.

The four tariff lists published by MOFCOM, along with unofficial English translations of the listed product descriptions, are attached.

USTR Finalizes Second List of Tariffs on Products of China Under Section 301

On August 7, 2018, the Office of the US Trade Representative (USTR) announced that it has finalized the second list of China-origin products that will be subject to a 25 percent additional tariff based on USTR's investigation of China's intellectual property rights practices under Section 301 of the Trade Act of 1974.[2] The final list contains 279 of the original 284 tariff lines that were on the proposed list announced by USTR on June 15, 2018, and has an annual import value of approximately USD 16 billion. US Customs and Border Protection (CBP) will begin to collect the additional duties on the Chinese imports covered by the list on August 23, 2018.

USTR's announcement comes just one week after the conclusion of the public comment period on the proposed USD 16 billion action, during which more than 700 comments were filed. The announcement notes that "[c]hanges to the proposed list were made after USTR and the interagency Section 301 Committee sought and received written comments and testimony during a two-day public hearing last month." Following the public comment period, USTR removed the following five products from the list, based on a determination that tariffs on such products "could cause severe economic harm":

HTSUS Subheading	Product Description
3913.10.00	Alginic acid, and its salts and esters, in primary forms
8465.96.00	Splitting, slicing or paring machines for working wood, cork, bone, hard rubber, hard plastics or similar hard materials
8609.00.00	Containers (including containers for transport of fluids) specially designed and equipped for carriage by one or more modes of transport
8905.90.10	Floating docks
9027.90.20	Microtomes

USTR has stated that it will soon publish a formal notice of the USD 16 billion tariff action in the Federal Register, and that the notice will announce a process by which interested persons may request the exclusion of particular products covered by a tariff line subject to the additional duties. USTR already has established a product exclusion process for the first tranche of Section 301 tariffs covering approximately USD 34 billion in Chinese imports, which took effect on July 6, 2018. The exclusion process for the second tariff list will likely be similar if not identical to the process for the first list.

China is expected to retaliate quickly against the new Section 301 action announced by USTR by imposing an equivalent tariff on USD 16 billion worth of imports from the United States. On June 15, 2018 (the same day that USTR announced its proposed action against USD 16 billion in Chinese imports), China's Ministry of Finance announced its intention to impose an additional 25 percent tariff on USD 16 billion worth of US goods, including chemicals, medical equipment and energy products, at an unspecified future date. It is expected that those tariffs will take effect shortly after the second tranche of US Section 301 tariffs enters into force (*i.e.*, August 23, 2018).

A copy of the final tariff list announced by USTR is attached.

President Trump Signs Proclamation Doubling Section 232 Tariff on Steel Imports from Turkey

On August 10, 2018, President Trump issued a Proclamation increasing from 25 to 50 percent the *ad valorem* tariff applicable to imports of steel articles from Turkey under Section 232 of the Trade Expansion Act of 1962.[3] The Proclamation states that President Trump took this action "[t]o further reduce imports of steel articles and increase

[2] USTR's announcement on the final tariff list can be viewed **here**. The list of corresponding retaliatory tariffs proposed by China's Ministry of Finance on June 15, 2018 may be viewed **here**, beginning on page 25.

[3] Click **here** to view the Proclamation and **here** to view CBP's statement.

domestic capacity utilization" and "in light of [U.S.] national security interests." The increased rate of duty took effect at 12:01 a.m. eastern daylight time on August 13, 2018.

In announcing the Trump administration's decision to double the Section 232 tariffs applicable to steel imports from Turkey, President Trump on August 10 suggested that the action was taken in response to the recent depreciation of the Turkish Lira against the U.S. dollar. The Proclamation does not mention this directly and instead seeks to justify the action on the grounds that the Section 232 measures imposed to date have not reduced U.S. steel imports or increased domestic capacity utilization to the levels that the Trump administration has deemed necessary to eliminate the threat to national security allegedly posed by steel imports.

The U.S. Department of Commerce (USDOC) concluded in its January 2018 report on the Section 232 investigation of steel imports that "the only effective means of removing the threat of impairment [of U.S. national security] is to reduce imports to a level that should, in combination with good management, enable U.S. steel mills to operate at 80 percent or more of their rated production capacity". USDOC further determined that a 37 percent reduction in steel imports from 2017 levels would be necessary to enable the domestic industry to reach the targeted level of 80 percent capacity utilization. However, President Trump's August 10 Proclamation states that these targets have not yet been met:

> "The Secretary has informed me that while capacity utilization in the domestic steel industry has improved, it is still below the target capacity utilization level the Secretary recommended in his report. Although imports of steel articles have declined since the imposition of the tariff, I am advised that they are still several percentage points greater than the level of imports that would allow domestic capacity utilization to reach the target level…In light of the fact that imports have not declined as much as anticipated and capacity utilization has not increased to that target level, I have concluded that it is necessary and appropriate in light of our national security interests to adjust the tariff imposed by previous proclamations."

The Proclamation then states that "[t]o further reduce imports of steel articles and increase domestic capacity utilization, I have determined that it is necessary and appropriate to impose a 50 percent ad valorem tariff on steel articles imported from Turkey, beginning on August 13, 2018." The Proclamation notes that (1) USDOC's January 2018 report "recommended that [the President] consider applying a higher tariff to a list of specific countries should [the President] determine that all countries should not be subject to the same tariff"; (2) "[o]ne of the countries on that list was the Republic of Turkey"; and (3) "Turkey is among the major exporters of steel to the United States[.]" However, it provides no further justification for the President's determination to increase the rate of duty only on imported steel articles from Turkey, as opposed to other (or all) countries. Imports of all steel mill products from Turkey were valued at an estimated USD 1.18 billion in 2017, accounting for approximately 4 percent of total US imports of steel mill products, according to USDOC.

US Customs and Border Protection (CBP) on August 12 issued a CSMS message confirming that the 50 percent duty on steel articles that are the product of Turkey is effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on August 13, 2018. CBP has advised that, in addition to reporting the regular Chapters 72 & 73 of the Harmonized Tariff Schedule of the United States (HTSUS) classification for the imported merchandise, importers must report the following HTSUS classification for imported merchandise subject to the additional duty: 9903.80.02.

Outlook

Though the President's August 10 statement indicated that the Trump administration also plans to double the Section 232 tariff applicable to aluminum imports from Turkey (from 10 to 20 percent), the President has not yet issued a proclamation modifying the Section 232 tariff on aluminum imports. Turkey is a relatively small exporter of aluminum products to the United States, with total exports of aluminum to the United States valued at approximately USD 59 million in 2017.

The Trump administration's decision to double the Section 232 tariff on steel (and possibly aluminum) imports from Turkey is another example of the administration's willingness to use novel interpretations of U.S. trade law to achieve its policy objectives. In addition, it highlights the volatility of U.S. trade policy under the Trump administration, as importers and other interested parties were notified of the decision only three days before the increased duties were to take effect. The decision also comes amid escalating trade tensions between the United States and Turkey. Just one week prior to the release of the Proclamation, the Office of the US Trade Representative (USTR) announced that it is reviewing Turkey's eligibility to participate in the U.S. Generalized System of Preferences (GSP) program due to Turkey's recent imposition of tariffs on USD 1.78 billion of U.S. exports in response to the initial U.S. Section 232 tariffs on steel and aluminum. USTR's review could lead to the revocation of preferential duty rates currently afforded to approximately USD 1.66 billion in annual imports from Turkey under GSP.

CFIUS Reform Becomes Law: What FIRRMA Means for Industry

On August 13, 2018, the Foreign Investment Risk Review Modernization Act (FIRRMA) was signed into law by President Trump. FIRRMA reforms and modernizes the Committee on Foreign Investment in the United States (CFIUS) review process and represents the first update to the CFIUS statute in more than a decade. We reported on FIRRMA's key provisions in July. In an updated Client Alert available here, we discuss FIRRMA's practical implications as well as provide useful context relevant to clients and industry.

Free Trade Agreement Highlights

United States and European Union Establish Executive Working Group to Explore Bilateral Trade Negotiations

On July 25, 2018, President Trump and European Commission President Jean-Claude Juncker agreed to begin preliminary discussions on a "joint agenda" of potential bilateral trade initiatives, including a potential negotiation to liberalize US-EU trade in non-automotive industrial goods and services.[4] In a joint statement issued on July 25, the two leaders announced that an Executive Working Group will convene immediately to discuss the new agenda. EU officials have stated that the United States will refrain from imposing additional tariffs on automotive imports from the European Union under Section 232 of the Trade Expansion Act while the bilateral discussions are underway, though this is not confirmed by the joint statement and the Trump administration has said that its Section 232 investigation of automotive imports will continue. We provide an overview of the joint statement and its potential implications below.

Joint Statement on US-EU Trade Initiatives

The document states that President Trump and President Juncker have agreed to undertake the following initiatives:

- **Trade liberalization.** The leaders agreed "to work together toward zero tariffs, zero non-tariff barriers, and zero subsidies on non-auto industrial goods"; and to "work to reduce barriers and increase trade in services, chemicals, pharmaceuticals, medical products, as well as soybeans."
- **Standards dialogue.** The leaders agreed "to launch a close dialogue on standards in order to ease trade, reduce bureaucratic obstacles, and slash costs."
- **Energy cooperation.** The leaders agreed "to strengthen our strategic cooperation with respect to energy", noting that "[t]he European Union wants to import more liquefied natural gas (LNG) from the United States to diversify its energy supply."
- **Addressing unfair trade practices.** The leaders agreed **"**to join forces to protect American and European companies better from unfair global trade practices", and "will therefore work closely together with like-minded partners to reform the WTO and to address unfair trading practices, including intellectual property theft, forced technology transfer, industrial subsidies, distortions created by state owned enterprises, and overcapacity."

President Trump and President Juncker "decided to set up immediately an Executive Working Group of our closest advisors to carry [the above] joint agenda forward." In addition, the Executive Working Group "will identify short-term measures to facilitate commercial exchanges and assess existing tariff measures." A White House fact sheet issued alongside the joint statement claims that "[t]his is just the start of the conversation. Many other products and issues will be addressed."

The joint statement also notes that both leaders "want to resolve the [Section 232] steel and aluminum tariff issues and retaliatory tariffs", and the White House fact sheet states that the bilateral discussions "will include topics such as the United States steel and aluminum tariffs and EU retaliatory tariffs." Though the joint statement does not expressly reference the United States' ongoing Section 232 investigation of automotive imports, it contains a general commitment that "[w]hile we are working on [the joint agenda], we will not go against the spirit of this agreement, unless either party terminates the negotiations." EU officials have stated that they now expect that the United States will not impose additional tariffs on EU automotive goods under Section 232, and that each party's tariffs on one another's automotive goods will remain at their current levels.

[4] Click **here** to view the joint statement.

Next steps

Though the joint statement discusses the scope of a potential US-EU trade negotiation covering tariffs, non-tariff barriers, and services, it does so only in general terms and does not constitute a formal launch of negotiations. Before formal negotiations can begin, both sides will need to agree on the precise scope of the negotiation, which will likely be discussed by the Executive Working Group in the coming months and, if agreement is reached, detailed in a formal working group report. The Executive Working Group is expected to be led by US Trade Representative Robert Lighthizer and EU Trade Commissioner Cecilia Malmstrom. The two sides reportedly are aiming to reach agreement on the scope of the negotiation within the next three months, but these discussions could prove contentious. For example, following the issuance of the joint statement, Trump administration officials repeatedly have stated that they expect agricultural issues to be included in the scope of the negotiations, whereas EU officials have stated that agriculture must be excluded. This and other disagreements over the scope could impede the launch of formal negotiations.

In addition, both sides must complete their respective domestic legal procedures before negotiations formally begin. For the United States, in order to benefit from the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA 2015) (which commits Congress to vote on bills implementing trade agreements within a fixed period, with limited debate, without amendment, and subject to an up-or-down vote, once the president submits an implementing bill), the President is required to adhere to statutory requirements before formal negotiations can begin. These procedures are set forth in TPA 2015, and require the Trump administration to (1) consult with the relevant congressional committees and advisory groups before initiating negotiations; (2) provide, at least 90 days before initiating negotiations, a written notice to Congress of its intent to enter into the negotiations and the specific US objectives for the negotiations; and (3) publish, at least 30 days before initiating negotiations, a detailed summary of the specific negotiating objectives. For the European Union, the European Commission cannot formally initiate negotiations until the European Council approves a negotiating mandate authorizing it do so and setting forth negotiating directives, including the objectives, scope and possible time limits of the negotiations. Neither party has indicated when it will begin taking the necessary actions to satisfy its domestic legal requirements for the launch of negotiations.

The Trump administration has confirmed that its Section 232 investigation of automotive imports will continue while bilateral discussions with the European Union are underway. Secretary of Commerce Wilbur Ross stated on July 25 that "[w]e've been directed by the president to continue the investigation, get our material together, but not actually implement anything pending the outcome of the negotiation[.]" Secretary Ross further stated that the US Department of Commerce may issue its report on the investigation in August. He also alluded to a possible exemption for the European Union, stating that “[d]epending on where we are with the EU, it might have an impact” on the Department’s findings in the investigation.

Implications

Members of Congress and the US business community have welcomed the Trump administration’s decision to explore possible trade negotiations with the European Union to eliminate tariffs and other trade barriers. They also have praised the administration’s apparent decision to refrain from imposing Section 232 tariffs on EU automotive goods. However, these outcomes are far from guaranteed. The bilateral discussions could collapse in their early stages due to disagreements over the scope of the negotiation, or the Trump administration could at any point reverse course and seek to apply Section 232 tariffs to EU automotive goods as a means of gaining “leverage” in the negotiation. Such policy reversals would not be unprecedented. For example, although the Trump administration initially excluded Canada and Mexico from the Section 232 tariffs on steel and aluminum imports due to the ongoing renegotiation of NAFTA, it ultimately reversed course and imposed the Section 232 tariffs on both countries’ steel and aluminum exports as of June 1, 2018. Similarly, the Trump administration in May announced that its plan to impose tariffs on certain products of China pursuant Section 301 of the Trade Act of 1974 had been placed “on hold” because it had reached agreement with China on a new framework to increase US exports and address intellectual property rights issues. However, the Trump administration subsequently reversed course and implemented the Section 301

tariffs on July 6, 2018. Given the volatility of the Trump administration's trade policies and negotiating tactics, it is difficult to predict how the new dialogue announced by Presidents Trump and Juncker will ultimately affect US-EU trade relations or the outcome of the Section 232 investigation of automotive imports.

Mexico and the United States Reach Preliminary Agreement in Principle in NAFTA Negotiations

On August 27, 2018, Mexican and US officials announced a breakthrough in the renegotiation of the North American Free Trade Agreement (NAFTA).[5] Mexican Minister of Economy Ildefonso Guajardo and United Sates Trade Representative (USTR) Robert Lighthizer announced a preliminary "agreement in principle" between the two countries, subject to finalization and implementation, on sensitive and non-sensitive NAFTA chapters, including new rules of origin for the automotive sector, the so-called "sunset clause", seasonal agricultural exports, labor, and dispute settlement provisions. Canadian negotiators arrived in Washington, DC on August 28 to discuss the details of the new agreement with their US counterparts. Though the United States and Mexico have expressed their desire for Canada to join the agreement, the Trump administration (and the President himself) has indicated that the US Administration will begin the process of finalizing a bilateral agreement with Mexico if Canada does not agree to join the agreement by the end of this week.

We provide below an overview of the most sensitive issues covered by the new agreement in principle, and the next steps in the negotiations and implementation process.

Preliminary Agreement in Principle

Stricter Rules of Origin for Automotive Trade

- Regional value content (RVC) requirements will increase from 62.5 percent to 75 percent during a short transition period, i.e., automobiles must contain at least 75 percent originating content in order to qualify for preferential tariff treatment.
- A new "labor value content" rule will require that at least 40 percent of auto content and 45 percent of heavy truck content be made by workers earning at least $16 per hour in order to qualify for preferential tariff treatment.
- According to the Mexican Secretariat of Economy, 68 to 70 percent of Mexican automotive exports to the United States comply with the new rule of origin, which will allow at least part of the automotive trade to continue to flow without disruption.
- Mexico and the United States will continue discussions regarding the United States' ongoing investigation of automotive imports pursuant to Section 232 of the Trade Expansion Act.

Dispute Settlement

- Two separate investor-state dispute settlement (ISDS) systems will be implemented. Under the first system, investors that have contracts in the telecommunications, energy generation, oil and gas, and infrastructure sectors will continue to enjoy the full protection of the existing ISDS system. However, investors in other sectors will have access to a limited ISDS system that only covers claims involving expropriation or failure to grant national treatment or most-favored nation (MFN) treatment.
- The United States and Mexico have agreed to eliminate Chapter 19, which provides for binational panel reviews of anti-dumping and countervailing duty determinations made by the governments of the NAFTA parties. However, Mexico will become eligible for exclusions from certain global safeguard remedies imposed

[5] Click **here** for the full press USTR press release on the agreement in principle with Mexico.

by the United States pursuant to Section 201 of the Trade Act of 1974. Canada has previously insisted that Chapter 19 dispute resolution remain a part of any modified agreement.

- The United States and Mexico have agreed not to modify Chapter 20, which governs state-to-state dispute settlement between the NAFTA parties for controversies arising from the application of the agreement.

Sunset Clause

- The initial term of the agreement would be 16 years, with a review after year six. In the sixth year, the parties can decide to extend the agreement for another 16 years. Alternatively, if the parties do not decide to extend the agreement, they will hold reviews in subsequent years with a view to resolving any trade irritants.

Labor

- The agreement will include new, enforceable labor provisions requiring, among other things, that the parties (i) adopt and maintain in law and practice labor rights as recognized by the International Labor Organization, (ii) effectively enforce their labor laws, and (iii) not waive or derogate from their labor laws. USTR also has stated that the Labor chapter will include an Annex on Worker Representation in Collective Bargaining in Mexico, under which Mexico commits to specific legislative actions to provide for the effective recognition of the right to collective bargaining. The parties are expected to review the details of the new labor provisions in the coming days.

Agricultural Trade

- The agreement will maintain existing duty-free treatment of agricultural products.
- A proposal by the United States to establish specialized procedures for trade remedy investigations involving seasonal and perishable goods was withdrawn and will not be included in the agreement.
- Specific provisions on biotechnology and other innovations in agriculture will be included in the agreement.
- The agreement confirms the recognition of “geographical indications” (GIs) for certain products. At the same time, USTR’s fact sheet indicates that the agreement will not restrict market access in Mexico for US cheeses labeled with certain names. It is not clear how this would work in practice, or how it would be reconciled with Mexico’s commitments under other trade agreements.

Other provisions

Mexican and US negotiators also agreed to make numerous updates to non-sensitive NAFTA chapters, including (i) sanitary and phytosanitary (SPS) measures; (ii) transparency; (iii) good regulatory practices; (iv) technical barriers to trade (TBTs); (v) e-commerce; (vi) government enterprises; (vii) financial services; (viii) intellectual property; (ix) environment; and (x) energy cooperation.

Pending Issues: Steel and Aluminum Tariffs, Canadian Participation, and US Congressional Approval

US Steel and Aluminum Tariffs

Mexico and the United States will continue discussions in the coming weeks regarding the sensitive issue of US tariffs on steel and aluminum imports from Mexico. Currently, Mexican steel and aluminum is subject to a 25 percent duty imposed after the Section 232 national security investigation, and Mexico has retaliated against certain exports from the United States. Mexico also has challenged the US Section 232 duties in the WTO. The status quo apparently will continue until the governments come to some other agreement, which reportedly could include volume restrictions like those applied to other suppliers, such as Argentina and Korea.

Canadian Participation in the Agreement

Canadian negotiators returned to Washington on August 28 to begin discussions with the United States regarding Canada's potential participation in the agreement. The Trump administration has indicated that, while it would prefer for Canada to join the agreement, it will begin the process of finalizing a bilateral agreement with Mexico if Canada does not agree to join the agreement by the end of this week. Specifically, USTR stated that by this Friday, August 31, the Trump administration will notify Congress of its intention to sign either (1) a trilateral agreement with the NAFTA parties, or, if Canada refuses to participate (2) a bilateral agreement with Mexico. According to Ambassador Lighthizer, "ideally Canada will be in and we'll be able to notify that. If Canada's not in then we'll notify that we have an agreement with Mexico and that we're open to Canada joining it." Ambassador Lighthizer indicated that President Trump would sign an agreement (whether with Mexico only or with both parties) at the end of the 90-day notification period required under the Trade Promotion Authority (TPA) law (i.e., on November 29, 2018, if the notification is submitted on August 31).

Mexican officials have repeatedly expressed their "strong preference" for a trilateral agreement, but have declined to rule out the possibility of a bilateral agreement with the United States if Canada declines to join. Mexican President-elect Andrés Manuel López Obrador's representative in the NAFTA negotiations, Jesús Seade, stated that "The entire time it's remained clear that [talks] were for a trilateral. It could be a bilateral if [the U.S. and Canada] don't agree, but our strong preference is different[.]" Mexican Foreign Minister Luis Videgaray similarly stated that "[w]e want Canada to be a part of this negotiation, part of this deal. However, we recognize there are variables we don't control, that depend on third parties, that could yield a different result." He further stated that "[w]e will either have a new trilateral deal or a bilateral deal with the U.S...Mexico will have a free trade deal independent of factors that we can't control."

US Congressional Approval

The prospects for US congressional approval of a renegotiated NAFTA are uncertain, and the discussions are only beginning. Congressional votes on free trade agreements historically have been contentious, but NAFTA (or whatever name a new agreement may take) faces additional uncertainties, given that the November mid-term elections in the United States may significantly alter the composition of the US Congress. A bilateral agreement with Mexico faces additional uncertainties due potential controversies over its eligibility for consideration under TPA legislative procedures. Indeed, some have argued that a bilateral agreement with Mexico is not eligible for consideration under TPA procedures because the Trump administration notified and consulted Congress regarding its intention to negotiate a revised NAFTA with Canada and Mexico, not a bilateral agreement with only Mexico. Others, including USTR Lighthizer, have argued that a bilateral agreement can proceed under TPA legislative procedures. This particular controversy may become moot depending on the outcome of ongoing discussions with Canada. However, as noted above, Congressional approval of even a trilateral agreement between the United States, Canada, and Mexico is far from guaranteed.

In the meantime, the business community will have to accept a period of uncertainty while these and other issues progress. An optimistic scenario is a new, trilateral agreement that could enter into force in 2019, with the current agreement remaining in place until then. There are many less optimistic scenarios.

Petitions and Investigations Highlights

US Department of Commerce Issues Affirmative Final Determinations in AD/CVD Investigations of Uncoated Groundwood Paper from Canada

On August 2, 2018, the US Department of Commerce (DOC) announced its affirmative final determinations in the antidumping and countervailing duty investigations of imports of uncoated groundwood paper from Canada.[6] In its investigations, DOC determined that imports of uncoated groundwood paper from Canada were sold in the United States at the following dumping margins and subsidy rates:

Exporter/Producer	Dumping Margin
Catalyst	16.88%
Resolute	0.00%
White Birch Paper	0.00%
All Others	0.00%

Exporter/Producer	Subsidy Rate
Catalyst	3.38%
Kruger	9.53%
Resolute	9.81%
White Birch Paper	0.82% (*de minimis*)
All Others	8.54%

The merchandise covered by the investigations is certain paper that has not been coated on either side and with 50 percent or more of the cellulose fiber content consisting of groundwood pulp, including groundwood pulp made from recycled paper, weighing not more than 90 grams per square meter. Certain uncoated groundwood paper is classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) in several subheadings, including 4801.00.0120, 4801.00.0140, 4802.61.1000, 4802.61.2000, 4802.61.3110, 4802.61.3191, 4802.61.6040, 4802.62.1000, 4802.62.2000, 4802.62.3000, 4802.62.6140, 4802.69.1000, 4802.69.2000, and 4802.69.3000. Subject merchandise may also be imported under several additional subheadings including 4805.91.5000, 4805.91.7000, and 4805.91.9000.

The US International Trade Commission (ITC) is scheduled to make its final determinations in these investigations on or around September 17, 2018. If the ITC makes affirmative final determinations that imports of uncoated groundwood paper from Canada materially injure, or threaten material injury to, the domestic industry, DOC will issue antidumping and countervailing duty orders. If the ITC makes negative determinations of injury, the investigations will be terminated.

According to DOC, imports of uncoated groundwood paper from Canada in 2017 were valued at an estimated USD 1.21 billion.

US Department of Commerce Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Stainless Steel Flanges from India

On August 13, 2018, the US Department of Commerce (DOC) announced its affirmative final determinations in the antidumping and countervailing duty investigations concerning imports of stainless steel flanges from India.[7] In its

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

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

investigations, DOC determined that imports of the subject merchandise from India were sold in the United States at the following dumping margins and subsidy rates:

Exporter/Producer	Dumping Rate
Bebitz/Viraj Single Entity	145.25%
Echjay Single Entity	145.25%
Chandan Steel Limited	19.16%
All Others	19.16%

Exporter/Producer	Subsidy Rate
Bebitz Flanges Works Pvt. Ltd.	256.16%
Echjay Forgings Private Limited	4.92%
All Others	4.92%

The products covered by these investigations are certain forged stainless steel flanges, whether unfinished, semi-finished, or finished (certain forged stainless steel flanges). Certain forged stainless steel flanges are generally manufactured to, but not limited to, the material specification of ASTM/ASME A/SA182 or comparable domestic or foreign specifications. Certain forged stainless steel flanges are made in various grades such as, but not limited to, 304, 304L, 316, and 316L (or combinations thereof). Merchandise subject to the investigations is typically imported under headings 7307.21.1000 and 7307.21.5000 of the Harmonized Tariff Schedule of the United States (HTSUS).

The US International Trade Commission (ITC) is scheduled to make its final determinations on or around September 24, 2018. If the ITC makes affirmative final determinations that imports of stainless steel flanges from India materially injure, or threaten material injury to, the domestic industry, DOC will issue antidumping and countervailing duty orders. If the ITC makes negative determinations of injury, the investigations will be terminated.

According to DOC, imports of stainless steel flanges from India in 2017 were valued at an estimated USD 44 million.

WTO Highlights

WTO Appellate Body Issues Report in Indonesia — Safeguard on Certain Iron or Steel Products (DS490 and DS496)

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The WTO Appellate Body has affirmed that claims against Indonesia under the WTO Agreement on Safeguards should be dismissed on the grounds that the challenged duty was not actually a "safeguard measure". All disputing parties had agreed that Indonesia's duty on iron or steel was a safeguard measure, but the Appellate Body rejected this consensus position.

The Appellate Body upheld a separate challenge against the duty as a violation of 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 principle that WTO Panels must make their own, independent assessment of whether a WTO Agreement applies, and they are not bound by the positions of the disputing parties on this issue.

The current dispute was unusual in that the Appellate Body rejected the concurring views of the complaining parties (Chinese Taipei and Viet Nam) and the defending party (Indonesia) on the 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 Agreement on Safeguards applied, although they differed on whether Indonesia's duty was consistent with that Agreement.

The Appellate Body ruled that the Agreement on Safeguards did not apply. Indonesia had no binding tariff obligations under GATT Article II with respect to the products subject to the duty. The Panel had noted that the Agreement on Safeguards 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 challenged in this case "did not suspend, withdraw, or modify Indonesia's obligations under Article II of the GATT 1994". Therefore, the Safeguards Agreement did not apply, and the Panel dismissed all claims under that Agreement. The Appellate Body upheld the Panel's ruling, stressing that "the imposition of the specific duty does not suspend any of Indonesia's GATT obligations, nor does it withdraw or modify any of Indonesia's GATT concessions" and was therefore not a safeguard measure.

This ruling is directly relevant to the current challenge by a number of WTO Members to the US Section 232 duties on aluminum and steel. These complaining parties argue, among other things, that the Section 232 duties violate US obligations under the Agreement on Safeguards. The United States has strongly rejected the notion that the Safeguards Agreement applies. In a June 2018 statement, the United States Trade Representative argued that "the United States has not taken a safeguard measure. The President's actions here were taken under a US national security statute – not under the separate US statute for safeguard measures". He added that "[t]he United States is not invoking Article XIX of the GATT, permitting emergency safeguard actions, to justify its duties. So any assertion that others' retaliatory duties are a justified response to a US "safeguard action" is, on its face, ridiculous".

Yet the August 15 ruling of the Appellate Body in the Indonesia case reinforces the pre-existing case law that WTO Panels will have the final say on whether or not a measure is subject to a covered WTO Agreement, including the Agreement on Safeguards. The Indonesian duties were imposed under Indonesia's safeguard law, and yet were found by both the Panel and the Appellate Body not to be a safeguard measure. Similarly, while the Section 232 duties were indeed not enacted under the US safeguards law, it would still be up to a Panel to determine whether the Agreement on Safeguards applies to these US measures. Ultimately, the substantive content of the measure, not the legislation used to adopt it, will be determinative.

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.

The complaining parties in this dispute, Chinese Taipei and Viet Nam, argued that the specific duty was a safeguard measure within the meaning of the WTO Agreement on Safeguards, 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.

The Panel noted that Indonesia had no binding tariff obligations under GATT Article II with respect to the products subject to the duty. Therefore, the Safeguards Agreement did not apply, and the Panel dismissed all claims under that Agreement.

Panel's obligation to determine applicability of the covered Agreements

On appeal, Indonesia argued that the Panel exceeded its terms of reference by determining, on its own motion, "whether the measure at issue constitutes a safeguard measure despite the parties' "concurring positions" on that issue".

The Appellate Body rejected this argument, reasoning that "a panel is not only entitled, but indeed required, under Article 11 of the DSU to carry out an independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its claims, regardless of whether such applicability has been disputed by the parties to the dispute". The Appellate Body also reaffirmed its earlier ruling that "the description of a measure proffered by a party" and the label given to it under domestic law are "not dispositive" of the "proper legal characterization of that measure under the covered agreements".

Indonesian duty "does not constitute a safeguard measure"

The Appellate Body then turned to the substantive issue of whether the Panel erred in determining that the Indonesian duty was not a safeguard measure under the Agreement. It recalled that "all parties have consistently argued that the duty at issue *is* a safeguard measure" [original emphasis].

The Appellate Body examined Article 1 of the Agreement on Safeguards, which specifies that "safeguard measures" are "measures provided for in Article XIX of GATT 1994". It then stated that "the action contemplated under Article XIX:1(a) consists of the suspension, in whole or in part, of a GATT obligation or the withdrawal from or modification of a GATT concession. Absent such a suspension, withdrawal, or modification, we fail to see how a measure could be characterized as a safeguard measure". It added that "the suspension of a GATT obligation or the withdrawal or modification of a GATT concession must be designed to pursue a specific *objective*, namely preventing or remedying serious injury to the Member's domestic industry" [original emphasis].

The Appellate Body considered that the reasoning deployed by the Panel to be "problematic" in that it "conflated the constituent features of a safeguard measure with the conditions for the conformity of a safeguard measure with the Agreement on Safeguards". The Appellate Body nevertheless upheld the Panel's ruling, as "the imposition of the specific duty does not suspend any of Indonesia's GATT obligations, nor does it withdraw or modify any of Indonesia's GATT concessions". It affirmed the Panel's finding that Indonesia "has no binding tariff obligation with respect to galvalume in its WTO Schedule of Concessions" and was therefore "free to impose any amount of duty it deems appropriate" on that product.

Indonesia also pointed to the fact that it had exempted a large number of developing countries from the measure, as required by Article 9.1 of the Agreement on Safeguards. In the view of the Appellate Body, this did not support the argument that the Indonesian duty was a safeguard measure. It found that "that exemption appears to constitute an ancillary aspect of the measure", aimed at according "special and differential treatment" to developing countries. It added that "[t]he disciplines of Article 9.1 set out conditions for the WTO-*consistent* application of safeguard measures, and do not speak to the question of whether a measure constitutes a safeguard measure for purposes of the *applicability* of the WTO safeguard disciplines" [emphasis added].

Thus, the Appellate Body affirmed that "the measure at issue does not constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards".

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

The Panel had concluded that "the application of the specific duty on imports of galvalume originating in all but the…[exempt developing] countries… is inconsistent with Indonesia's obligation to afford MFN treatment under Article I:1 of the GATT 1994". On appeal, Indonesia argued that the MFN claim was not within the Panel's terms of reference, a position rejected by the Appellate Body. Indonesia did "not otherwise challenge the Panel's substantive analysis or findings under Article I:1 of the GATT 1994", and so the Appellate Body upheld this finding of violation.

The Report of the WTO Appellate Body in *Indonesia – Safeguard on Certain Iron or Steel Products*, (DS490, DS496) was circulated on 15 August 2018.

European Union Announces New Proposals to Reform WTO

New proposals to reform the WTO were announced by the European Union (EU) at the WTO Heads of Delegation meeting on 24 July. They have been welcomed by WTO Director-General, Roberto Azevedo. Azevedo welcomed in particular the EU's objective of finding multilateral solutions to current trade tensions through the WTO instead of the United States' approach of unilateral trade restrictions, which the EU opposes and which it, along with other WTO Members, is challenging through WTO dispute settlement. Azevedo told WTO Members, "There is renewed engagement from many Members on systemic issues, bringing more focus on the WTO and how it can be improved. I think that this could be positive – and could potentially help us to find a path out of the current crisis." Japan has indicated its support for the EU proposals, and China has agreed with the EU to set up a joint working group on the issue of WTO reform. President Trump also agreed to work with the EU on WTO reform when he met with EU Commission President Juncker on 25 July. The EU is now gathering support from other Members.

Privately, however, informed sources are sceptical of the potential of the EU proposals to produce results, particularly not in the short-term. In their view:

- Other WTO Members, notably China, are unlikely to engage in the kinds of reform efforts the EU is proposing unless the United States acts first to remove the Section 232 and Section 301 trade restrictions it has imposed and withdraws its threat of imposing more restrictions; they see no evidence that the United States is willing to do that.

- The consensus of all WTO Members would be needed to introduce the reforms that the EU is proposing, particularly amending WTO Agreements; 15 years of inconclusive Doha Round negotiations showed how difficult that can be to achieve.

- Some of the proposals are likely to be rejected outright by other Members; already, for example, China called the EU proposal to reform WTO rules that provide flexibilities for developing countries "explosive in nature" and "politically unacceptable", and said "there is no possibility to reach consensus on this".

- China, India, South Africa and other influential developing countries may be willing to negotiate on some of the EU's proposals, but they would demand in exchange reforms to the WTO of their own choosing, such as the

elimination of all agricultural subsidies by developed countries; in current circumstances, sources consider it extremely unlikely that developed countries would accept to negotiate on such a basis, least of all the United States.

The EU reform proposals

EU Commission officials introduced their reform proposals in the WTO stating that WTO Members "… face a simple choice. Either we take a significant step forward in the organisation, or we accept the demise of the rules-based trading system. It is a dangerous illusion to believe that the status quo is an option". A copy of the EU document on "WTO modernisation" can be found **here**.

The EU reform proposals cover three areas: (i) dispute settlement; (ii) rule-making and development; (iii) regular WTO work and transparency.

Dispute settlement

The EU proposal is targeted at ending the United States' blockage on Appellate Body appointments by amending parts of the WTO Dispute Settlement Understanding (DSU) to address criticisms made by the United States of the Appellate Body's activities. That would involve:

(i) strengthening the Appellate Body's obligation to conclude its proceedings in each case within 90 days, unless parties to the dispute agree otherwise (DSU Article 17.5);

(ii) creating a rule allowing an outgoing Appellate Body member to complete the disposition of a pending appeal even where that involved the member continuing to serve beyond his/her formal term of office;

(iii) modifying DSU Article 17.12 to direct the Appellate Body to focus exclusively on issues necessary for the resolution of a dispute and to avoid making unnecessary "advisory opinions" or "obiter dicta";

(iv) clarifying in DSU Article 17.6 that the Appellate Body does not have the authority to challenge the meaning of Members' municipal laws; and

(v) providing regular opportunities for WTO Members to express their concerns directly to the Appellate Body on systemic issues or trends in jurisprudence with which they disagree.

In addition, the EU proposes increasing the number of Appellate Body members from 7 to 9, making the position of Appellate Body member a full-time job, and providing for one single but longer (6-8 years) term for each Appellate Body member to serve, with the aim of strengthening the independence and efficiency of the Appellate Body.

These EU proposals respond directly to each of the criticisms that the United States has made recently about the functioning of the Appellate Body. In principle, securing the support of other WTO Members for these changes to the DSU rules and procedures should not be difficult since none of them alters substantively the role or mandate of the Appellate Body from that which key WTO Members would agree was intended when the DSU was negotiated; it was never intended, for example, that the Appellate Body should include unnecessary advisory opinions in its findings, nor that it should have the authority to challenge the meaning of WTO Members' municipal laws, although the Appellate Body has drifted into doing so in recent years. The question many WTO Members have in mind, however, is whether these changes would be enough to persuade the United States to lift its veto on the appointment on new Appellate Body members. Some consider that the United States' main target is to change the Appellate Body's interpretation of certain WTO provisions, particularly its interpretation of the treatment of "zeroing" under the Anti-Dumping Agreement. In that case, they doubt that procedural changes will be enough for the United States to lift its veto.

The EU seems to acknowledge this in its document. It proposes a second stage of the reform programme in which Members would discuss substantive issues of interpretation of WTO rules by the Appellate Body to which Members

have objected, particularly the United States on trade remedies, and consider modifying the substantive rules or providing authoritative interpretations of them, as necessary. This is an ambitious objective. For example, some observers who were delegates at the time of the Uruguay Round negotiations recall that a negotiating proposal then by Hong Kong, China to prohibit the practice of "zeroing" when calculating anti-dumping margins was not accepted; the fact that such a proposal was considered and explicitly rejected demonstrates, in their view, that the Uruguay Round Agreement on Anti-Dumping did not prohibit "zeroing" and the United States has reason to complain about Appellate Body findings that it does. They acknowledge, however, that it would be very difficult to achieve a consensus among WTO Members today to confirm that "zeroing" is permitted. More generally, they note that proposals to clarify, amend or expand many aspects of the WTO rules on trade remedies were under consideration in the Doha Round for 15 years without making any headway; they see no evidence to suggest that this EU proposal would be more successful in producing results.

Rule-making and development

The EU proposes the negotiation of new WTO rules to combat "uncompetitive and unfair behaviour", particularly caused by industrial subsidies, state-owned enterprises and forced technology transfer. To overcome what the EU calls "the effective paralysis" of the WTO's negotiating function, it proposes a new approach to incorporating flexibilities for developing countries in negotiations and support for plurilateral agreements as long as these are applied to all WTO Members on the Most-Favoured-Nation (MFN) basis.

In the area of rulemaking, the EU focuses on changes to the Agreement on Subsidies and Countervailing Measures (SCM) and proposes:

(i) creating incentives for Members to meet their SCM Agreement notification requirements; the EU recalls its earlier proposal to create "… a general rebuttable presumption according to which if a subsidy is not notified or is counter-notified, it would be presumed to be a subsidy or even presumed to be a subsidy causing serious prejudice".

(ii) expanding the scope of what constitutes a "public body" under the SCM Agreement, and determining case-by-case whether a state-owned or state-controlled enterprise performs a government function or furthers a government policy.

(iii) rules to discipline other market-distorting support provided by state-owned enterprises.

(iv) stricter rules on the most trade-distorting subsidies by expanding the list of prohibited subsidies or creating a rebuttable presumption of serious prejudice to cover, for example, unlimited guarantees, subsidies given to an insolvent or ailing enterprise, and dual pricing.

(v) rules on barriers to services, investment and digital trade, such as forced technology transfer, limitations on foreign ownership, administrative review and licensing practices, and other trade-related investment measures (TRIMs) that are not covered already by the TRIMs Agreement.

These proposals to amend the SCM Agreement are very ambitious. Their primary target is China, but many other developing countries would be placed on the defensive in a negotiation on them. For example, it seems unlikely that WTO Members with large state-owned sectors of their economies, including both China and Russia, would be willing to expand the definition of "public body" in the SCM Agreement or to accept targeted WTO rules on the operations of their state-owned enterprises in ways that would surely make their policies more vulnerable to challenge. Numerous proposals to strengthen the SCM Agreement were tabled during the Doha Round, yet no substantive progress towards consensus was made during 15 years of negotiation and there is no evident reason to believe that WTO Members would be more willing to compromise today.

With regard to development flexibilities, the EU proposes abandoning the WTO approach of "Special and Differential Treatment" (SDT) that has applied since 1979. Currently, SDT is available to all developing countries regardless of

their level of development or importance in global trade. The EU proposes that developing countries should be encouraged to graduate and opt-out of SDT, and that future SDT should be offered only on the basis of demonstrated need and should be targeted, time-limited and evidence-based. Similar proposals made by the United States, the EU, Japan and other developed countries during the Doha Round to curtail access to the WTO's SDT provisions were universally rejected by developing countries. They are very likely to continue to be rejected today. China's reaction to this new EU proposal as "politically explosive" is predictable and likely to be echoed by other developing countries, such as India, Indonesia, the Philippines and South Africa. India, for example, resorted to dispute settlement with the EU in 2005, and won the dispute and subsequent appeal, over EU attempts to differentiate between developing countries and deny some of them special benefits under its Generalised System of Preferences (GSP) (DS246). Currently, India is challenging the United States in its domestic review of whether to exclude India, along with three other developing countries, from benefits under its GSP programme on the grounds that India does not provide the United States equitable and reasonable access to its market. In India's view, that "… would be inconsistent with the non-discrimination and non-reciprocal obligations under the Enabling Clause [of the GATT]". Solidarity among developing countries to defend their right to SDT remains very strong.

Regarding the WTO model of negotiation, the EU proposes "flexible multilateralism" that would allow like-minded countries to reach agreement without having to seek consensus among all Members. The EU stipulates that the results must be made available to all other Members under the MFN obligation. This EU proposal is unlikely to encounter strong resistance in principle, but it may prove very difficult to achieve in practice. "Plurilateral" negotiations have already produced the WTO's Information Technology Agreement and Environmental Goods Agreement, and they are being pursued now on an E-commerce agreement. However, the obligation among participants to offer the results of their negotiation to all WTO Members on the MFN basis can create a serious obstacle if an insufficient number of WTO Members (measured in terms of their collective share of world trade – their "critical mass") sign on to the result of the negotiation; that creates the problem of "free riders" – countries that do not sign on to an agreement and consequently have no obligations under it, but who are able to take full advantage its benefits under the MFN-clause. It is highly improbable that the EU, Japan or the United States would accept major trading countries, such as China or India, becoming "free riders" to a new "plurilateral" WTO agreement. In practice, that gives China and India the means of vetoing any "plurilateral" agreement that might emerge from the EU proposal of "flexible multilateralism", and makes it little different from the standard WTO approach of seeking consensus from all Members.

Regular WTO work and transparency

The EU proposes reshaping the WTO's monitoring, surveillance and deliberative functions to make the administration of WTO Agreements more effective. A particular target would be improving the notification record of Members and more general transparency of their trade policies, where necessary through sanctions for failure to comply with obligations. WTO Councils and Committees should hold Members accountable to a much greater extent than they do today, make better use of their consultation function in order to help avoid problems developing into issues for dispute settlement, and use their authority to incrementally adjust and clarify WTO rules. The WTO Secretariat could also be given a stronger and more independent role to monitor Members' compliance with the rules, for example through the Trade Policy Review mechanism.

This proposal is likely to be controversial for many developing countries, including China and India, who consider that their failure to meet WTO notification and transparency obligations is due to lack of administrative capacity – in their view, they should not be penalized in ways that the EU is suggesting, but rather helped to meet their obligations through foreign aid programmes of technical assistance and support for capacity-building. Also, they have stated in the past that they do not have the manpower in their Geneva delegations to cover all WTO Councils and Committees and that they would therefore be marginalised if work were to intensify under the WTO's regular work programme in ways that the EU is proposing. Part of these EU proposals could encounter opposition also from the United States, which is a strong exponent of the view that the WTO must be a "Member-driven organisation" and which rejects any increased role for the WTO Secretariat in compliance issues.

Conclusion

Most of the EU proposals are not new. They have been made before in WTO meetings, although this is the first time that they have been packaged together in this way. In the past, some other Members, such as the United States, Japan, Canada and Australia, have offered their support for both the EU's diagnosis of the problems and some, at least, of the solutions proposed.

However, informed sources consider that it will be very difficult to sell the EU's reform agenda to most developing countries, not only those that might feel themselves targeted directly by changes that the EU is proposing.

- Many developing countries will find little in the EU proposal to interest them directly – most, for example, make no use of the Appellate Body. On the other hand, many developing countries have made proposals of their own for the reform of the WTO, for example in the Doha Round, but these reforms are not included in the EU's proposed reform agenda.
- Developing countries' solidarity in defence of the maintenance of existing WTO development flexibilities that the EU challenges, as well as their view that fragmenting the multilateral system – through plurilateral agreements, for example – would marginalize most developing countries in the WTO.
- The view of most developing countries, as expounded at the recent Summit meeting of the BRICS (Brazil, Russia, India, China and South Africa), is that the greatest current threat to the rules-based WTO system is the unilateral actions of the United States and that unless those can be disciplined by WTO rules there seems little point in negotiating new ones.

Senior WTO officials view the EU reform initiative, therefore, as the possible start of a long process with an uncertain outcome. They do not consider that it offers a likely basis for ending the current crisis in the multilateral trading system which is centred on China's trade policies and practices. In their view, that can only come about through an urgent negotiation on a political solution between the WTO's key Members, notably the United States, the EU, Japan and China, which Azevedo continues to insist is needed.