US & Multilateral Trade Policy Developments

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Petitions and Investigations Highlights

US Department of Commerce Issues Affirmative Final Determinations in AD/CVD Investigations of Hot-Rolled Steel From Seven Countries

On August 5, 2016, the US Department of Commerce (DOC) announced its affirmative final determinations in the antidumping duty (AD) investigations of certain hot-rolled steel flat products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom.[1] DOC also announced its affirmative final determinations in the countervailing duty (CVD) investigations concerning imports of the same from Brazil, Korea, and Turkey.

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

Country	Dumping Margin	Subsidy Rate
Australia	29.37%	NA
Brazil	33.14 - 34.28%	11.09 - 11.30%
Japan	4.99 - 7.51%	NA
Korea	3.89 - 9.49%	3.89 - 57.04%
Netherlands	3.73%	NA
Turkey	3.66 - 7.15%	6.01%
United Kingdom	33.06%	NA

The US International Trade Commission (ITC) is scheduled to make its final injury determinations in the investigations of hot-rolled steel from Australia, Brazil, Japan, Korea (AD only), the Netherlands, Turkey (AD only) and the United Kingdom by September 19, 2016. Because the preliminary determinations for the Turkey and Korea CVD investigations were negative, and the final determinations are affirmative, the ITC has 75 days to make its final injury determinations (*i.e.*, until October 18, 2016). If the ITC makes affirmative final determinations that imports of the subject merchandise materially injure or threaten material injury to the domestic industry, DOC will issue AD and CVD orders.

US International Trade Commission Issues Affirmative Final Determination in AD/CVD Investigations of Carbon Steel Pipes and Tubes from Korea, Mexico, and Turkey

On August 17, 2016, the US International Trade Commission determined that a US industry is materially injured by reason of imports of heavy walled rectangular welded carbon steel pipes and tubes from Korea, Mexico, and Turkey.[2] The US Department of Commerce (DOC) determined in July 2016 that imports of these products from Korea, Mexico, and Turkey were sold in the United States at less than fair value and received countervailable subsidies from the government of Turkey.

As a result of the ITC's affirmative determination, DOC will issue AD orders on imports of the subject merchandise from Korea, Mexico, and Turkey, and a CVD order on imports of the subject merchandise from Turkey. The final dumping margins calculated by DOC are as follows: (i) 2.34 to 3.82% (for Korea); (ii) 3.83 to 5.21% (for Mexico); and

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

[2] Click **here** for the ITC press release on the investigation.

(iii) 17.83 to 35.66% (for Turkey). DOC calculated subsidy rates ranging from 15.08 to 23.37% for producers of the subject merchandise in Turkey.

The ITC's public report on the investigation will be made available by September 27, 2016. According to the ITC, imports of the subject merchandise from Korea, Mexico, and Turkey totaled USD 103 million in 2015.

US Department of Commerce Issues Affirmative Preliminary Determination in AD Investigation of Biaxial Integral Geogrid Products from China

On August 17, 2016, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the antidumping duty (AD) investigation of certain biaxial integral geogrid products from China.[3] In its investigation, DOC preliminarily determined that imports of the subject merchandise from China were sold in the United States at dumping margins of 38.92 to 66.74%. In June 2016, DOC also preliminarily determined that imports of the subject merchandise received countervailable subsidies ranging from 16.60 to 128.27%.

As a result of DOC's affirmative preliminary determination, DOC will instruct US Customs and Border Protection (CBP) to collect cash deposits based on the preliminary rates listed above. One mandatory respondent, BOSTD Geosynthetics Qingdao Ltd., will not be subject to these cash deposits, as its rate of dumping was preliminarily found to be zero.

DOC is scheduled to announce its final determination on or around December 22, 2016, unless the statutory deadline is extended. If DOC makes an affirmative final determination, and the US International Trade Commission (ITC) makes an affirmative final determination that imports of the subject merchandise materially injure or threaten material injury to the domestic industry, DOC will issue an AD order.

US Department of Commerce Issues Affirmative Preliminary Determination in AD Investigation of Truck and Bus Tires From China

On August 29, 2016, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the antidumping duty (AD) investigation of truck and bus tires from China. In its investigation, DOC preliminarily found that imports of truck and bus tires from China were sold in the United States at the following dumping margins: (i) 20.87% (for Prinx Chengshan Tire Co., Ltd. and the non-selected respondents eligible for a separate rate); and (ii) 22.57% (for all other producers and exporters in China). As a result of the affirmative preliminary determination, DOC will instruct US Customs and Border Protection (CBP) to collect cash deposits based on these preliminary rates. DOC in June issued an affirmative preliminary determination in the countervailing duty (CVD) investigation of imports of the same merchandise from China, assigning preliminary subsidy rates ranging from 17.06 to 23.38%.

DOC is scheduled to announce its final determination in the AD investigation of truck and bus tires from China on or around January 17, 2017. If DOC makes an affirmative final determination, and the US International Trade Commission (ITC) makes an affirmative final determination that imports of truck and bus tires from China materially injure or threaten material injury to the domestic industry, DOC will issue an AD order. According to DOC, imports of the subject merchandise from China were valued at an estimated USD 1.07 billion in 2015.

The DOC fact sheet on the investigation is attached for reference.

US Department of Commerce Issues Affirmative Preliminary Determination in CVD Investigation of HEDP Acid From China

On August 30, 2016, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the countervailing duty (CVD) investigation of imports of 1-hydroxyethylidene-1, 1-diphosphonic acid (HEDP) from China.[4] In its investigation, DOC preliminarily determined that imports of the subject merchandise from three Chinese

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

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

respondents received countervailable subsidies ranging from 1.04 to 36.33 percent. All other producers and exporters in China were assigned a preliminary subsidy rate of 1.71 percent. As a result of the affirmative preliminary determination, DOC will instruct US Customs and Border Protection (CBP) to require cash deposits based on these preliminary rates.

The CVD investigation is aligned with the concurrent antidumping duty (AD) investigation of HEDP from China. Consequently, DOC is scheduled to announce its final determination on or about January 11, 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 HEDP from China materially injure or threaten material injury to the domestic industry, DOC will issue a CVD order.

US and Free Trade Agreement Highlights

European Union Seeks Equivalence and Harmonization of Motor Vehicle Regulations under TTIP

A new proposal tabled by the European Union during the 14th round of the Transatlantic Trade and Investment Partnership (TTIP) negotiations aims to facilitate trade in motor vehicles and motor vehicle parts by improving the compatibility of the Parties' respective regulatory regimes.[5] The proposal includes provisions that would establish "equivalence" (*i.e.*, mutual recognition) of the Parties' technical regulations, and also includes requirements related to the implementation of global technical regulations (GTRs) established under the *1998 Agreement concerning the Establishing of Global Technical Regulations for Wheeled Vehicles, Equipment and Parts* ("1998 Agreement") administered by the World Forum for Harmonization of Vehicle Regulations (WP.29).

The EU proposal for an Annex on Motor Vehicles and Motor Vehicles' Parts would apply to each Party's technical regulations, test procedures and marking requirements related to wheeled vehicles, equipment, and parts for wheeled vehicles as defined under the 1998 Agreement, falling in particular under Chapters 40, 84, 85, 87 and 94 of the HS 2012. The commitments sought by the EU proposal may be summarized as follows.

- **Equivalence of technical regulations.** The proposal would establish a list of US technical regulations and corresponding EU technical regulations that the Parties will recognize as "equivalent" to one another (*i.e.*, as providing at least the same level of protection) upon the entry into force of the Agreement. A Party must consider a covered product to be in compliance with its domestic technical regulation if the product complies with the corresponding "equivalent" technical regulation of the other Party. A Party also would have to ensure that a covered product which satisfies an equivalent technical requirement is treated, in any administrative and judicial proceedings, in a manner no less favorable than a domestic product fulfilling the corresponding domestic technical requirement.

  The EU proposal does not specify whether "covered products" include those originating in countries that are not Parties to TTIP. Thus, it is unclear whether the proposal would require a Party to afford the aforementioned benefits to a product that fulfills the other Party's "equivalent" technical requirements, but originates from a non-TTIP country. Other negotiating texts tabled by the EU to date do not provide any insight into the EU position on this issue, either in the context of motor vehicles or of regulatory equivalence more broadly. In a report requested by the European Parliament to examine TTIP's impact on developing countries, the EU Directorate-General for External Policies recommended that the Parliament could "ask the negotiators to include explicitly in the text the extension of mutual recognition/equivalence of standards for developing countries". However, neither EU nor US negotiators have indicated publicly where they stand on this issue.

  The EU equivalence proposal is similar to proposals put forth by the US and EU auto industries, although US automakers had requested that equivalence be established through a negative list (*i.e.*, equivalence would be

[5] Click **here** for a copy of the EU proposal.

presumed for all regulations unless a Party demonstrated that a particular regulation of another Party is deficient from a safety or environmental perspective). The new EU proposal does not identify specific regulations that the EU wishes to recognize as equivalent; however, the European Commission has published position papers in which certain seatbelt, lighting, and vision standards were identified as candidates for equivalence. A joint proposal by the American Automotive Policy Council (AAPC) and the European Automobile Manufacturers' Association (ACEA) listed these and other standards – including braking, emissions, impact protection, theft prevention, and electrical safety regulations – as priority areas in which equivalence should be established under TTIP.

- **Harmonization under the 1998 Agreement.** The proposal includes disciplines intended to facilitate the Parties' adoption of, and conformity with, GTRs established under the 1998 Agreement. The proposal would prohibit Parties from introducing new domestic technical requirements or conformity assessment procedures that diverge from those of an existing or imminent GTR, unless there are substantiated scientific reasons why a specific technical requirement of a GTR is ineffective at ensuring safety, environmental protection, energy efficiency, or anti-theft performance. In addition, under the EU proposal, a positive vote by a Party in favor of a GTR under the 1998 Agreement would commit the Party to adopt that GTR into its domestic laws or regulations within 24 months. After that period, the GTR would be considered equivalent to any relevant existing domestic technical regulation in the area of the GTR. Similarly, if a Party did not object to an existing GTR at the time of its adoption (either through a negative vote or abstention), the Party would commit to transpose the GTR into its domestic law by the time of TTIP's entry into force, at the latest. After that period, the GTR would be considered equivalent to any relevant domestic technical regulation in the area of the GTR.

- **Cooperation on new regulations.** The Parties would be required to inform one another if they identify the need to regulate in a particular area. If a Party identifies the need to regulate in a particular area where a GTR has already been adopted, or where the adoption of a GTR is imminent, the Party would be prohibited from developing its own regulation. Rather, a Party seeking to regulate in an area covered by an existing or imminent GTR would be required adopt the GTR.

- **Bilateral harmonization**. The Parties would commit to carrying out bilateral harmonization of certain existing technical regulations. US and EU negotiators have discussed the possibility of harmonizing standards on adaptive front lighting, automatic emergency braking systems, and seat-belt interlocks, among others. The European Commission has suggested that harmonized EU-US standards under TTIP could serve as a template for new GTRs under the 1998 Agreement.

US officials have not reacted publicly to the EU proposal, though US and EU regulators have discussed many of the concepts included in the proposal (particularly equivalence and bilateral harmonization) during recent negotiating rounds and are reportedly focused on identifying which technical regulations those disciplines might cover. During the 14th TTIP round, US and EU industry groups such as the AAPC, ACEA, and the Alliance of Automobile Manufacturers (AAM) reiterated that such disciplines are a key priority for the auto industry in TTIP, touting an AAM-funded study by the Center for Automotive Research which found that annual cost savings of USD 2.3 billion could be realized if TTIP were to include "full U.S.-EU auto safety regulatory convergence." Given the recent Brexit vote and upcoming US presidential elections, however, near-term completion, no less implementation, of the TTIP is unlikely, meaning that it could be many years before the potential effects of any regulatory convergence under TTIP are realized.

President Obama Submits Draft Statement of Administrative Action for TPP

On August 12, 2016, the Office of the US Trade Representative (USTR) submitted to Congress the draft Statement of Administrative Action (SAA) for the Trans-Pacific Partnership (TPP). The submission of the draft SAA is one of several procedural requirements which, pursuant to the Trade Promotion Authority (TPA) law, the Executive Branch must satisfy before it submits FTA-implementing legislation to Congress. USTR's submission of the draft SAA indicates that President Obama wants to maintain the option of presenting TPP-implementing legislation to Congress

during the “lame duck” session following the presidential election, should the unlikely scenario arise in which there is sufficient congressional support to approve the bill.

The draft SAA contains the Administration’s views regarding the interpretation and application of the TPP, both for purposes of US international obligations and domestic law. It contains three main components, each of which is required under TPA: (i) a list of significant administrative actions proposed to implement US obligations under the TPP; (ii) an explanation of how the implementing bill and proposed administrative action will change or affect existing law; and (iii) a statement setting forth the reasons why the implementing bill and proposed administrative action are “strictly necessary or appropriate” to implement the TPP.

Under the TPA timelines, the President is required to submit the draft SAA and the legal text of the TPP at least 30 days before presenting the final SAA and the implementing bill to Congress for approval. Consequently, President Obama could submit the implementing bill to Congress as early as September 12, 2016, though it is highly unlikely that he would do so until after the presidential election in November. After the election, the earliest day on which President Obama could submit the implementing bill is November 14, based on the current congressional calendar. Given that the TPA law allows Congress to consider the implementing bill for up to 90 legislative days before a final vote must be held, the final vote on a TPP-implementing bill introduced on November 14 would not be required until at least the spring of 2017 – well after President Obama leaves office.

USTR’s submission of the draft SAA indicates that the Administration is preparing for a scenario in which it receives assurances from the Republican congressional leadership that there is sufficient support to pass the TPP during the lame duck session. This is likely the only scenario in which President Obama would submit the implementing legislation to Congress; however, House Speaker Paul Ryan (R-WI) and Senate Majority Leader Mitch McConnell (R-KY) have stated that this scenario is unlikely given both presidential candidates’ opposition to the deal and the substantive objections that some Members of Congress have raised regarding the TPP.

Moreover, to hold a vote on the TPP during the short timeframe of the lame duck session, Congress would have to disregard the TPA timelines described above, and would likely have to forego the normal practice of holding “mock markups” of the implementing bill. Indeed, USTR officials have suggested that the implementing bill could be approved in as little as ten days during the lame duck session, which would leave little time for hearings to occur. Many Members of Congress would object to voting on the TPP on such short notice (though USTR’s decision to submit the draft SAA in August, much earlier than would be strictly necessary for a lame duck vote, might be aimed at blunting such criticisms). Given these obstacles, US ratification of the TPP during the lame duck session continues to appear unlikely, and as a result, the next US president will likely determine the fate of the unratified agreement.

A copy of the draft Statement of Administrative Action is attached for reference.

US Government Accountability Office Releases Report on Unpaid Antidumping and Countervailing Duties

On August 15, 2016, the US Government Accountability Office (GAO) released a report analyzing US Customs and Border Protection’s (CBP) efforts to improve the collection of antidumping (AD) and countervailing (CV) duties.[6] In its report, GAO estimated that USD 2.3 billion in AD/CV duties owed to the US government were uncollected as of May 2015. GAO also identified characteristics of the US duty collection system that it considers to be contributing to the nonpayment of duties, and offered recommendations for CBP to improve its duty collection efforts. The GAO analysis was requested by Senate Finance Committee Chairman Orrin Hatch (R-UT), and will likely be cited by certain US industries and Members of Congress as evidence that the US government needs to strengthen its trade enforcement efforts.

GAO’s findings and recommendations

[6] Click **here** for a copy of the GAO report.

GAO found that the total amount of unpaid AD/CVD bills issued for goods that entered the United States during fiscal years 2001 to 2014 was about USD 2.3 billion as of May 2015. According to GAO's analysis, the AD/CVD bills with unpaid amounts were concentrated among a small number of importers, with just 20 importers accounting for about 50% of the 2.3 billion owed. AD duties accounted for nearly the entire amount owed, with only about USD 584,000 related to unpaid CV duties. During the 2001 to 2014 timeframe, CBP collected duties owed for about 90% of the total number of AD/CVD bills issued, though its collection rate – measured by the total dollar amount paid as a portion of the total amount owed – averaged about 31%. According to GAO, products from 21 countries were associated with unpaid duties. These countries, in order of the amount of uncollected duties, are as follows: China, Thailand, India, Vietnam, Argentina, Germany, Canada, Malaysia, United Arab Emirates, Cambodia, Taiwan, Turkey, Mexico, Italy, Japan, South Korea, Brazil, Belgium, France, Great Britain, and Hong Kong.

In its analysis, GAO considered that the large amount of uncollected duties is due in part to the "long lag time between entry and billing" in the US retrospective AD/CV duty collection system. Under this system, GAO found, there is an average of about 2-and-a half years between the time goods enter the United States and the date a bill may be issued. Moreover, GAO reasoned that "large differences between the initial estimated duty rate and the final duty rate assessed" can contribute to unpaid bills, because importers who receive a large bill long after an entry is made may be unwilling or unable to pay. GAO also noted that CBP has not developed a risk assessment process that enables it to adequately identify entries that pose a heightened risk of nonpayment, although CBP possesses the data necessary to do so.

To address these issues, GAO recommended that: (i) CBP should regularly conduct a risk analysis that assesses both the likelihood and the significance of risk factors related to AD/CV duty collection; (ii) CBP should, consistent with US law and international obligations, use data and risk assessments to mitigate AD/CV duty nonpayment, including by identifying entries that pose heightened risk and taking "appropriate action" to mitigate the risk; and (iii) CBP should identify and address the causes of liquidations that occur outside of the 6-month time frame set forth in the *Tariff Act of 1930*.

Impact of the report

Senate Finance Committee Chairman Orrin Hatch (R-UT) and House Ways and Means Committee Chairman Kevin Brady (R-TX) reacted to the report by calling on CBP to enhance its trade enforcement efforts, including by implementing the GAO's recommendations. Rep. Brady also suggested that the report demonstrates the need for CBP to issue regulations implementing Title IV of the *Trade Facilitation and Trade Enforcement Act* ("Customs Bill") by the August 22 deadline set forth in that legislation. Title IV of the Customs Bill established new procedures that CBP must follow when it investigates claims of AD/CVD "evasion" (*i.e.*, entry of merchandise subject to an AD/CVD order by means of false statements or material omissions that result in a lowering or elimination of an AD/CVD payment or cash deposit). These provisions are intended to prevent the use of methods such as transshipment to conceal the origin of merchandise subject to an AD/CVD order. CBP will likely face congressional scrutiny as it implements these new procedures, and on the issue of trade enforcement more broadly, in light of the GAO's findings and the current political climate in the United States.

US Customs and Border Protection Issues Interim Final Rule on AD/CVD Evasion

On August 22, 2016, US Customs and Border Protection (CBP) issued groundbreaking new regulations that establish procedures for interested parties, the Department of Commerce (DOC), or the International Trade Commission (ITC) formally to ask that CBP investigate reasonably supported claims of evasion of antidumping (AD) and countervailing duty (CVD) orders.[7] The regulations implement Section 421 of the *Trade Facilitation and Trade Enforcement Act of 2015* by creating an entire new set of procedures for investigating evasion of AD/CVD orders. These regulations generally define "evasion" as entering covered merchandise into the US customs territory by means of material and

[7] Click **here** for the interim final rule.

false statements, acts, or omissions that reduce or eliminate any otherwise required AD or CVD cash deposits or duties.

The new regulations transform CBP's old, opaque system for addressing allegations of AD/CVD evasion into a systematic and relatively transparent process. Noteworthy provisions include the following:

- Before now, CBP could take enforcement measures against evasion of AD/CVD orders, but the new rule allows private parties actively to participate and requires CBP to notify parties that submit evasion allegations as to the investigation's outcome. Under the previous rules, parties filing allegations would often not know if CBP took any enforcement measures to combat the alleged evasion.

- When CBP receives a properly filed allegation of AD/CVD evasion, the statute now requires CBP to take certain actions with certain timeframes. Specifically, within 15 days of receiving an allegation, CBP must decide whether to initiate an investigation, based on whether the information submitted "reasonably suggests" that an importer has entered covered merchandise through evasion. Thereafter, if CBP initiates an investigation, it must within 300 days of the date of initiation (or 360 days in "extraordinarily complicated" cases) initially determine whether the covered merchandise was entered into the U.S. through evasion.

- Interestingly, if CBP decides not to initiate an investigation, the agency must within five days thereafter notify the person who alleged evasion. If, however, CBP decides to initiate an investigation, the agency need not until 95 days thereafter tell other interested parties (including the investigation's target), unless CBP before then implements "interim measures" described below. As before the new regulations, therefore, a target might be under investigation without immediately knowing it.

- Eventually, though, CBP must take certain "interim measures" after initiating an investigation. These measures will have serious commercial consequences. Where CBP finds a reasonable suspicion that the importer entered the merchandise through evasion, no later than 90 days after the date of initiation CBP must suspend the liquidation of each unliquidated entry of covered merchandise entered on or after the date of initiation of the investigation.

- During an investigation, CBP may gather and verify information through questionnaires and other means, and interested parties may respond, within certain specified time limits, by adding information and arguments to the administrative record.

- Within 30 days of CBP's initial determination, an interested party wanting to reverse it may submit a request for an administrative review. Reviewing the matter *de novo*, a separate unit in CBP will then within 60 business days make a final determination as to evasion. An interested party may then within 30 days appeal CBP's final determination to the US Court of International Trade.

- Imports formally investigated need to have been entered within one year before CBP receives an allegation, but eventual enforcement measures could apply to earlier entries, so long as the five-year statute of limitations has not expired.

- Unlike in investigations by the DOC and ITC, no Federal Register notices or administrative protective orders cover CBP's investigations, but the agency still permits interested parties to identify and bracket their own confidential information, when contained in formal submissions. As a result, interested parties and their lawyers will see only public versions of adverse parties' submissions.

- Importantly, the enforcement mechanism that the new regulations provide is not exclusive. That is, CBP may still investigate and penalize possible violations separately, even if a private party or other agency does not make a formal allegation.

- The definition of "interested parties" (1) is inclusive and allows for a wide range of entities to file allegations of evasion; and (2) specifically allows for competitors of the targeted importers to allege AD/CVD evasion.

The regulations were released as an "interim rule," meaning that the regulations went into effect immediately, but that CBP will solicit and consider comments on the interim rule before issuing a final rule. Comments must be received by October 21, 2016.

USTR Initiates 2016/2017 Annual Review for GSP, Supplemental Review for Travel and Luggage Goods

On August 25, 2016, the Office of the US Trade Representative (USTR) announced the initiation of the 2016/2017 Annual Review for the Generalized System of Preferences (GSP). Accordingly, USTR has begun to accept petitions to (i) modify the list of articles that are eligible for duty-free treatment under GSP; (ii) modify the GSP status of certain GSP beneficiary developing countries (BDCs) because of country practices; and (iii) waive competitive need limitations (CNLs). USTR also initiated a separate review concerning the possible addition of travel and luggage goods items as GSP-eligible articles. Modifications made as a result of USTR's annual review will likely take effect on July 1 of 2017, whereas changes made pursuant to the separate review of travel goods may take effect as early as January of 2017. Congressional action will be required to extend the GSP program beyond December 31, 2017 – the date on which the program is set to expire pursuant to the *Trade Preferences Extension Act of 2015*.

Annual Review Process

As part of its normal annual review process, USTR will be accepting the following petitions until October 4, 2016:

- **Product Review Petitions.** Any interested party, including foreign governments, may submit petitions to (i) designate additional articles as eligible for GSP benefits; or (ii) withdraw, suspend or limit the application of GSP benefits with respect to any article.
- **Country Practices Review Petitions.** Any interested party may submit a petition to review the GSP eligibility of any BDC with respect to any of the designation criteria listed in 19 U.S.C. § 2462, which include labor and intellectual property rights (IPR) practices, among others.
- **CNL Petitions.** Any interested party may submit a petition seeking a waiver of the 2016 CNL for individual beneficiary developing countries with respect to specific GSP-eligible articles. Articles that exceed CNLs during the 2016 calendar year will lose their eligibility for GSP benefits unless a waiver is granted. CNLs are exceeded when US imports of a GSP-eligible product from a BDC during a calendar year account for 50 percent or more of the value of total US imports of that product, or exceed a specified dollar value.

Travel Goods Review

On June 30, 2016, USTR added 28 tariff lines covering certain travel and luggage products to the list of GSP-eligible articles, but limited this benefit to articles originating from "least-developed beneficiary developing countries" (LDBDCs) or African Growth and Opportunity Act (AGOA) countries (*please refer to the W&C US Trade Alert dated June 30, 2016*). USTR postponed indefinitely its decision to grant GSP benefits to travel and luggage products from more advanced GSP countries (*i.e.*, countries that are not LDBDCs or AGOA countries). The US travel goods industry criticized USTR's deferral, arguing that most of the travel goods at issue will not be made in AGOA or LDBDC countries in the near future, and that USTR's decision would leave them little choice but to continue sourcing from China rather than diversifying towards countries such as the Philippines, Thailand, Pakistan, Indonesia, and Sri Lanka. According to a letter sent by the travel goods industry to USTR Michael Froman, 85 percent of US imports of the products at issue originated from China in 2015, whereas just 1.3 percent originated from least-developed and AGOA countries.

In response to the concerns raised by the travel goods industry and certain Members of Congress, USTR has initiated a supplemental review to "give stakeholders the opportunity to submit further information with respect to the possible addition of travel and luggage goods items" for more advanced BDCs. USTR will accept such information

until October 4, 2016 and will hold a public hearing on the issue on October 18, 2016. USTR is aiming to conclude its review of luggage and travel goods by January 2017.

Click **here** for USTR's Federal Register notice initiating the 2016/2017 Annual Review.

Multilateral Highlights

China Notifies Sub-Central Government Subsidy Programs to WTO SCM Committee

On July 29, 2016, China provided to the WTO Committee on Subsidies and Countervailing Measures (SCM) a notification of its sub-central government subsidy programs for the period 2001-2014. The new notification supplements China's previous subsidy notification of October 2015, which was criticized by the United States and other WTO Members for its failure to include any subsidy programs provided at the sub-central government level, among other alleged deficiencies.

China's new notification may satisfy in part criticism by the United States, the EU and Japan of gaps in the notification that China submitted in October 2015, particularly China's failure then to include any sub-central government measures. However, the majority of the new programs that China has notified now appear to be small-scale and, in many cases, unlikely to be related to trade in a significant way – for example, programs that target the training of rural migrant workforces or sales of consumer durables in rural areas. The United States claimed that China had inflated its last notification by including a large number of programs that were unrelated to the SCM Agreement. The new notification leaves largely unanswered other claims by the United States that China's previous notification was "grossly incomplete" in its coverage of trade-distorting subsidies, in particular its subsidies to its steel and fisheries sectors. Regarding steel, the United States said that China had failed to notify a single subsidy granted to its steel industry, despite evidence from public sources that extensive subsidies to China's large steel producers were being granted at central and sub-central government levels. This new notification does not address that point.

China's new notification will be examined in the SCM Committee in the autumn. In the meantime, it is unlikely to quieten the political opposition in Washington and Brussels to granting China "market economy status" at the end of this year when Article 15(a)(ii) of its Accession Protocol expires. Although "market economy status" relates to China's treatment in anti-dumping proceedings, the perception by the United States and the EU that China is continuing to conceal the full extent of its subsidy programs will harden their attitude and make it politically more difficult for them to show the kind of flexibility that China is hoping for.

The United States, supported by the EU, has taken a far more active stance this year in scrutinizing subsidy notifications and criticizing those that fell short. Although China and Russia have been the main targets of this attention so far, several Members have complained that compliance with obligations to notify specific subsidy programs is low and declining and is threatening the operation of the SCM Agreement. These concerns might presage more wide-ranging efforts to review and improve transparency by all Members.

A copy of China's new subsidy notification is attached for reference.

WTO Members Discuss Potential Outcomes for 11th Ministerial Conference

Last week, WTO Director-General Roberto Azevêdo convened a meeting of all WTO Members to discuss potential deliverables for the WTO's 11th Ministerial Conference (MC11) in December 2017. Overall, the meeting painted a mixed picture of progress and produced little clarity about possible results for MC11. Azevêdo pointed to increased engagement in general in the negotiations but went on to stress the need "… to change the pace of our engagement – if we want to make progress – and dive into a real proposal driven process immediately after our summer break". The scene appears to be set for an attempt to negotiate results on a small number of selected issues for MC11, similar to what was achieved at the last two Ministerial Conferences in Nairobi (2015) and Bali (2013). The bigger goal of the Doha Round no longer figures in most Members' calculations of what the multilateral system can realistically deliver.

Key messages from last week's stock-taking relating to possible candidates for results at MC11 were as follows:

- Negotiations on new disciplines on Fisheries Subsidies for MC11 are more advanced than on other issues at this stage, having been proposed already for results at the last Ministerial Conference in Nairobi and having since then attracted stronger support from the United States and the EU and a seemingly lower level of opposition from China. The most notable recent development in this area was a statement by the EU in June that it would drop the linkage it had previously maintained in the Rules negotiations between progress on Fisheries Subsidies and progress on tightening disciplines on industrial subsidies more generally (referred to as "horizontal subsidies" in the Rules negotiating mandate). Not only did this give a boost to the Fisheries Subsidies negotiations, it also was taken by other delegations as a signal that the EU was no longer seeking results in the near term on industrial subsidies for which it had been the main proponent. The United States supported results on Fisheries Subsidies and has proposed that this should be achieved through plurilateral negotiations if the multilateral effort becomes too difficult. That, it seems, is directed at China, India and Russia, who have maintained that they could agree to a result on Fisheries Subsidies only in conjunction with results on other elements of the Rules mandate, in particular on stronger anti-dumping disciplines, which the United States has ruled out categorically. A plurilateral approach on Fisheries Subsidies may become more likely also because many Members have resisted it as an objective for MC11 unless they are first assured that the core of any results at MC11 will be on Agriculture. Azevêdo also reported during the meeting that there has been no serious engagement in the Non-Agricultural Market Access (NAMA) negotiations.

- Agriculture negotiations have been active in the past six months, with the Chairman, Ambassador Vitalis of New Zealand, suggesting that Members are now "… more engaged on the substance than ever before". For many, the focus is on lowering domestic subsidies and, for some, also on finding a permanent solution to allow developing countries to subsidize public food stocks and to apply a special safeguard mechanism to control imports. However, Vitalis also said that the positions of delegations "have not fundamentally changed" and there appear to be significant gaps still over every aspect of the mandate. Neither the United States nor China have given any indication that they are willing to modify their farm subsidy policies and they disagree fundamentally over whether China (and other emerging economies) should be eligible to receive Special and Differential Treatment flexibilities if serious negotiations were to begin. Efforts by India and other food-importing developing countries to reach a permanent solution on public food stocks are blocked by other Members (including developing countries) over concerns that this could fuel increased exports of subsidized food. Many Members are opposed to considering a special safeguard mechanism to control food imports outside the context of a new attempt to negotiate increased agricultural market access, which practically no-one supports for the time being.

- One issue that has been raised recently as a possibility in some form for MC11 is electronic commerce (e-commerce), on which Azevêdo noted that a number of new submissions have been tabled this year by delegations and that the private sector has become significantly more engaged in seeking a WTO result. Azevêdo himself seems to be very interested in taking this issue forward. It is supported strongly by the United States and the EU and is being included on a regular basis as a separate chapter in new regional and bilateral agreements (such as the Trans-Pacific Partnership and the Trade in Services Agreement). E-commerce already has a WTO pedigree through the General Agreement on Trade in Services (GATS) and its e-commerce work program, which was started in 1998 but which has not progressed far to date. E-commerce today is viewed as being part of the universe of Digital Trade, which covers the production, distribution, marketing, sale and delivery of goods and services by electronic means and which depends on telecommunications services as well as specific e-commerce and data localization policies. In WTO terms, it covers goods and services as well as intellectual property issues. As such, it is far too large and complex an issue and far too immature in the WTO to be considered for serious treatment before MC11, but there have been proposals from some Members to select one or two of its trade-related elements, such as transparency, to work on as a precursor to a far larger negotiation that could be launched at MC11.

When WTO Members return in September, Azevêdo will likely convene meetings to try to agree quickly on the handful of issues that are to be negotiated for MC11. The meeting last week suggested that this will not be an easy task.

ICSID Tribunal Rejects Luxembourg Investor's GATS-Based Claim to Arbitration

A recent ruling by an ICSID tribunal illustrates the complex issues involving investor rights and the WTO agreements.[8] The ICSID tribunal rejected a Luxembourg-based investor's claim that WTO Members who have consented to investor-state dispute settlement (ISDS) in bilateral investment treaties (BITs) have also, by virtue of the most-favored-nation (MFN) clause of the General Agreement on Trade in Services (GATS), "consented" to ISDS with the nationals of all WTO Members. The investor relied on this claim to argue that the government of Senegal – which has BITs with the UK and the Netherlands, but not with Luxembourg – had nonetheless "consented" to ISDS with Luxembourg nationals by agreeing to be bound by the MFN clause of the GATS. Had this argument been accepted by the tribunal, it would have had considerable consequences, as it would have implied that service suppliers of a WTO Member may invoke the provisions of BITs to which that Member is not a party to establish that ISCID has jurisdiction over an arbitration claim.

Arguments based on GATS Article II

In April 2015, the Luxembourg-based airport services company Menzies Middle East and Africa SA ("Menzies") requested arbitration proceedings against the Republic of Senegal, alleging that Senegal had expropriated Menzies' assets. Because Senegal does not have a BIT with Luxembourg, Menzies' arguments on jurisdiction centered on GATS Article II:1, which reads in part as follows:

> *1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.*

Menzies argued that it was a "service supplier" within the meaning of the GATS, and that the measures covered by the GATS (*i.e.*, "measures by Members affecting trade in services") include the ISDS commitments contained in the BITs of WTO Members. To support the latter claim, Menzies noted that some WTO Members such as Canada, Chile, and Poland had specifically included the ISDS commitments contained in their BITs in their list of exemptions from GATS Article II. Senegal, by contrast, had not expressly exempted from GATS Article II its ISDS commitments under the Senegal-Netherlands and Senegal-UK BITs – commitments which, Menzies asserted, were "measures" covered by the GATS. According to Menzies, Senegal's decision to accede to the GATS without exempting its ISDS commitments from Article II meant that Senegal had offered the same treatment (*i.e.*, ISDS) to the nationals of all WTO Members on the MFN basis. Menzies thus asserted that it was entitled to invoke the ISDS provisions of the Senegal-UK and Senegal-Netherlands BITs to demonstrate that Senegal had consented to ISDS with Luxembourg nationals.

Ruling of the tribunal

The tribunal rejected Menzies' argument that Senegal had consented to ISDS with nationals of Luxembourg. Consequently, the tribunal determined that it did not have jurisdiction to hear Menzies' claims regarding Senegal's alleged expropriation of assets. The tribunal's reasoning was as follows:

- First, the tribunal noted that a sovereign state cannot be subjected to international arbitration unless it has clearly and unequivocally expressed its consent to arbitration. Menzies' argument, however, would have required the tribunal to assume Senegal's consent based on GATS Article II (which is silent on the issue of international arbitration) and BITs signed by Senegal with third countries. Given the complexity of Menzies' argument and the generality of the wording in GATS Article II, the tribunal considered that Senegal's GATS

[8] Click **here** for a copy of the tribunal's award (in French).

commitments could not be construed as “clear and unequivocal” consent to arbitration with Luxembourg nationals.

- Second, the tribunal considered that Menzies had not shown convincingly that GATS Article II applies to investment arbitration. Referencing the negotiating history of the GATS, the tribunal noted the arguments made by some WTO Members that the treatment they had offered to countries under BITs should not be extended to all Members of the GATS. Other Members, however, did not agree that BITs (and ISDS commitments in particular) should be excluded from the GATS, because they believed that such measures could have effects on trade in services. According to the tribunal, these discussions ended without any conclusive result, and therefore Senegal’s GATS commitments could not be said to reflect clear and unequivocal consent.
- Third, the tribunal noted that the GATS signatories are sovereign states who retain the right to refuse to comply with their GATS obligations. Thus, the tribunal explained that even if it had accepted Menzies’ argument that the GATS covers investment arbitration, GATS Article II would have merely created an *obligation* for Senegal to offer investment arbitration to service providers on the MFN basis. According to the tribunal, the creation of such an obligation would be a completely separate act from its execution (*i.e.*, an actual offer of investment arbitration), and thus would not in and of itself constitute clear and unequivocal consent to arbitration by Senegal.

In its award, the tribunal noted that Menzies’ arguments were novel and would have had considerable consequences if accepted. Importantly, they would imply that GATS Article II permits a WTO Member’s service suppliers to avail themselves of arbitration offers in BITs to which that Member is not a Party. The tribunal considered that a ruling of this significance would require a high degree of certainty, which it did not find to be warranted based on Menzies’ arguments.

Russia Initiates Negotiations to Join WTO Government Procurement Agreement

Russia has submitted a formal notification of its intention to initiate negotiations to join the WTO Government Procurement Agreement (GPA). Russia’s notification was made one day before the end of the four-year deadline set forth in paragraph 1143 of the Working Party Report on Russia’s WTO Accession. The first step in the negotiations will be Russia’s submission of its Annex 1 offer in the coming months, which will set out the list of central government entities that Russia is proposing should be covered.

The negotiations with Russia are likely to be difficult. The United States and the European Union have been critical of the “buy Russia” policy that Russia applies to its government procurement and to the operations of its state-owned enterprises (SOEs). To eliminate this policy, they can be expected to aim for wide coverage by Russia of its central and local government entities, and in particular its “other entities”, within which they will want to capture as many of Russia’s SOEs as possible. Failure to reach agreement on China’s coverage of its SOEs is the major factor that has been holding up its own GPA accession negotiations for over a year.

In light of Russia’s commitment to begin negotiations to join the GPA, the United States has raised concerns about the following Russian policies in particular:

- According to the US Trade Representative (USTR), the Russian government: (i) maintains a 15% price preference for goods (including pharmaceuticals) of Eurasian Economic Union (EAEU) origin in purchases for government use; (ii) prohibits states and municipalities from purchasing a wide range of foreign-made machinery (particularly those used in construction and in raw materials extraction) and vehicles for government and municipal needs; and (iii) prohibits the purchase of many imported light industrial goods unless such goods are not made in Russia or the other EAEU member States.
- USTR alleges that Russia requires local content in many areas of government procurement, including by: limiting state and municipal government purchases of medical devices to those products on a list of devices produced in the EAEU if there are two EAEU-based manufacturers; (ii) prohibiting pharmaceutical

manufacturers from submitting foreign-made drugs for government drug tenders if two equivalent drugs are produced in Russia or the EAEU; (iii) limiting public procurement of imported construction and building materials; and (iv) establishing a preference for domestic software and hardware in government procurement.

Given the concerns expressed by the US and the EU, negotiations on Russia's accession to the GPA could take several years – much like the negotiations on China's GPA accession, which began in December 2007 and are still ongoing.

Copies of Russia's recent notification and the Working Party Report on its WTO Accession are attached.

WTO Panel Issues Ruling in Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products (DS485)

A WTO Panel has ruled that the Russian Federation has violated its WTO obligations by imposing duties on certain EU goods in excess of its committed ("bound") rates, in breach of Article II of the General Agreement on Tariffs and Trade (GATT) 1994.

This is the first time that a WTO Panel has ruled against Russia. Russia acceded to the WTO in August 2012, and since then there have been persistent complaints, particularly by the EU and the United States, that Russia has not been complying with its WTO obligations. This is the first of three WTO panels against Russia established at the request of the EU.

One EU objective in this litigation strategy was to begin with strong cases where the violations were clear. In the present dispute, the Panel had little difficulty concluding that Russia had breached its tariff commitments. Indeed, Russia did not contest the violations for half of the challenged measures.

Under GATT Article II, each WTO Member maintains a "Schedule of Concessions", which specifies the maximum customs duties that may lawfully be imposed on imported products. In its June 2016 ruling in *Colombia – Textiles*, the WTO Appellate Body recalled that "Article II:1 of the GATT 1994 serves the important function of preventing Members from applying duties that exceed the bound rates agreed to in tariff negotiations and incorporated into their Schedules of Concessions".

In the present case, the Panel found that virtually all of the challenged measures violated GATT Article II:1(b), first sentence, which provides in part that imported products are "exempt from ordinary customs duties in excess of those set forth" in the importing country's Schedule of Concessions. Russia's imposition of duties above its bound rates breached this provision.

As a minor but curious side note, the Panel repeatedly exercised "judicial economy" (i.e., declined to rule) on the EU's claims that the breach of Russia's bound rates, contrary to GATT Article II:1(b), triggered a consequential violation of GATT Article II:1(a), which requires WTO Members not to impose on imported products treatment "less favourable" than that set out in its Schedule. As far back as 1998, in *Argentina – Textiles*, the Appellate Body ruled that a violation of GATT Article II:1(b) triggers a consequential violation of GATT Article II:1(a): "It is evident to us that the application of customs duties in *excess of* those provided for in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), constitutes 'less favourable' treatment under the provisions of Article II:1(a)" (original emphasis). In light of this clear decision by the Appellate Body, the Panel's refusal – on five separate occasions – to rule on this settled legal point is puzzling. Such restraint is vulnerable to being reversed on appeal as "false judicial economy".

Russia successfully rebutted an EU claim against an alleged overarching system of "systematic duty variations". The Panel found that there was insufficient evidence to sustain this allegation.

Background: three categories of EU claims

The EU challenged Russia's tariff treatment for certain agricultural and manufacturing products. The EU argued that all of the challenged measures imposed duties above Russia's bound rates. The Panel divided the EU claims into three broad categories:

- The first six claims related to the applied ad valorem rates (*i.e.*, the duty as a percentage of the value of the goods), which were ultimately not contested by Russia;
- The seventh through eleventh claims, which challenged combined duty rates (a mixture of ad valorem and specific duties); and
- The twelfth and final claim against what the EU called the "systematic duty variations".

GATT tariff disciplines: protecting conditions of competition

Before turning to the impugned measures, the Panel first set out its interpretive approach to GATT Article II. It began by recalling the dictum of the Appellate Body that the disciplines of the GATT and the WTO "are intended to protect not only existing trade but also the security and predictability needed to conduct future trade". The Panel stressed that "Article II:1(b), first sentence, protects conditions of competition, and not trade volumes". For this reason, the Panel concluded that "a finding of inconsistency under Article II:1(b), first sentence, does not require a complaining party to demonstrate adverse trade effects concerning products falling within the relevant tariff lines". It also rejected any notion of a "*de minimis* exception", reasoning that "an importing Member in our view must not exceed a tariff binding, even if the extent of the excess is only minimal".

Duties in excess of Russia's ad valorem bound rates: violation uncontested by Russia

Russia initially argued that the relevant bound duty rates in its Schedule reflected an error, but later dropped that defence and did not contest that the duties exceeded the bound rate.

The Panel noted that the rates "were not adopted by Russia, but by the Eurasian Economic Union (EAEU), an international organization of which Russia is a member state". The Panel found that the Common Customs Tariff ("CCT") of the Eurasian Economic Union was attributable to Russia, as "it can be presumed that the CCT requirements will lead to the relevant duty rates being applied by Russia". It added that that "Russia has not sought to rebut that presumption".

Russia's bound duty rate for these products was five per cent, while its applied rates ranged from 10 to 15 per cent. The Panel therefore concluded that "Russia is required to apply duties in excess of those set forth in its Schedule, contrary to Article II:1(b), first sentence".

Temporary tariff reduction: the measure "mandates WTO-inconsistent action…in the future"

One of the EU's claims related to a tariff measure that provided for a temporary reduction of the *ad valorem* duty rate. At the time of the establishment of the Panel, Russia applied a rate of 5 per cent, which was equal to the bound rate. However, the measure also mandated a future increase to 15 per cent.

The Panel rejected Russia's argument that the measure "did not exist" at the time of the establishment of the Panel, reasoning that "the rule requiring the future applied duty rate (15%) was in force on the date of the Panel's establishment, even though that rate had not yet been applied". It found that "a panel can in principle find an existing measure to be inconsistent as such with a provision such as Article II:1(b), first sentence, even if that measure mandates WTO-inconsistent action that will take place only in the future".

The Panel ruled that the measure mandated the future imposition of "an *ad valorem* duty rate higher than the bound *ad valorem* duty rate contained in Russia's Schedule" and therefore "Russia was required to apply duties in excess of those set forth in its Schedule, contrary to Article II:1(b), first sentence".

However, the Panel rejected an independent EU claim that this measure violated GATT Article II:1(a) because it “created deleterious effects on competition due to either a lack of foreseeability or insufficient guarantees of compliance with Article II:1”. The Panel found that “the temporary duty reduction at issue in this case did not reduce foreseeability for traders in the marketplace regarding the applicable tariff treatment”.

Combined duties result in breaches of Russia’s bound rate

The second set of claims related to Russian measures that imposed a combined duty rate. The EU argued that Russia was “required to apply a combined duty (pursuant to which the customs authority… calculates and chooses the higher of either an *ad valorem* duty or a specific duty), whereas its Schedule provides for a straightforward *ad valorem* bound duty rate”. The EU argued that this “necessarily results in the application of duties in excess of bound duty rates for some categories of transactions”. Russia argued that the EU claims were “essentially about the structure and design of the applied duties, rather than the duties themselves”, and that “Article II:1 does not prohibit it from applying a type or structure of duty other than that provided for in its Schedule”.

The Panel rejected Russia’s arguments on this issue. It began by acknowledging that “the mere use by a Member of a duty type or structure that differs from the duty type or structure used in that Member's Schedule is not, in itself, inconsistent with Article II:1”. However, it found that “the duties required to be applied by Russia were higher than bound levels for imports at or below specified break-even prices (customs values)” and that “there is no evidence that Russia applied a ceiling or cap that would prevent such duties from being applied”. The Panel therefore concluded that “Russia was required in some instances to apply duties in excess of those set forth in its Schedule, contrary to Article II:1(b), first sentence”.

EU’s claims against “Systematic Duty Variation” rejected

The EU argued that “the CCT systematically provides, in relation to a significant number of tariff lines, for a type or structure of duty that varies from the type or structure of duty recorded in Russia's Schedule, in a way that results in the application of duties in excess of those provided for in the Schedule”. However, the Panel found that “the evidence fails to establish that the relevant tariff treatment is accorded in a ‘systematic’ fashion and that it has been accorded in such a way as to constitute a ‘general’ practice reflected in the CCT”. The Panel therefore dismissed this claim.

The Report of the WTO Panel in *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products* (DS485) was released on August 12, 2016.

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