US & Multilateral Trade and Policy Developments

Japan External Trade Organization

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Contents

US General Trade Policy Highlights

United States Restores GSP Benefits for Burma

On September 14, 2016, President Obama signed a proclamation restoring Burma's eligibility for benefits under the Generalized System of Preferences (GSP) program.[1] Pursuant to the proclamation, Burma's GSP benefits will be reinstated effective on November 13, 2016. Burma's GSP benefits were suspended on July 1, 1989, as a result of a presidential determination that the country was not meeting the statutory GSP eligibility requirements regarding internationally recognized worker rights.

The proclamation also designates Burma as a least-developed beneficiary developing country (LD-BDC) for purposes of the GSP program, effective on November 13. LD-BDCs are eligible to export a wider range of products to the United States duty-free than regular BDCs (approximately 5,000 articles are GSP-eligible for LD-BDCs, versus approximately 3,500 articles for regular BDCs). GSP-eligible articles currently exported by Burma to the United States include wood products, rattan products, travel goods such as handbags and backpacks, and dried peas. Burma's total exports to the United States in 2015 were valued at an estimated USD 142 million.

President Obama announced the restoration of Burma's GSP benefits in a joint statement with State Counsellor Aung San Suu Kyi, who made an official visit to Washington, DC on September 14. In the joint statement, President Obama also announced that the United States will revoke the Executive Order-based framework of its Burma sanctions program, and noted that the United States is interested discussing a potential bilateral investment treaty (BIT) between the United States and Burma. US business groups such as the US Chamber of Commerce have recently advocated the initiation of exploratory talks on a US-Burma BIT, as well as the reinstatement of Burma's GSP benefits and the termination of sanctions.

USTR Recommends Reciprocal Trading Arrangements With African Countries After AGOA Expiration

The Office of the US Trade Representative (USTR) has issued a new report proposing that the United States pursue reciprocal trading arrangements with African countries after the unilateral tariff preferences afforded to them under the African Growth and Opportunity Act (AGOA) expire in 2025.[2] The report argues that the current direction of African trade policies and recent improvements in economic conditions on the continent warrant a shift towards reciprocal trading arrangements with Africa, which could take the form of traditional US free trade agreements (FTAs) or alternative arrangements based on the principle of less-than-full reciprocity. Congress expressed interest in these issues in 2015 when it included provisions in the Trade Preferences Extension Act (TPEA) requiring USTR to assess the prospects for negotiating FTAs with African countries.

USTR argues that several recent trends warrant a shift towards a more reciprocal relationship with Africa, including Africa's recent move towards establishing reciprocal trading arrangements with outside partners. Such partners include the EU, which has concluded Economic Partnership Agreements (EPAs) with several regional blocs in Africa, and China, which has expressed interest in negotiating comprehensive FTAs with African countries. As such agreements are implemented, USTR argues, US companies will be disadvantaged in Africa compared to their European and Chinese competitors. Other trends highlighted in the report include (i) the proliferation of non-tariff barriers such as localization requirements in several African countries; (ii) improving economic conditions in Africa; and (iii) decisions by Canada and the EU to scale back their unilateral tariff preference programs in recent years.

In light of these and other trends, USTR suggests that the US trading relationship with Africa should move towards greater reciprocity, include African policy reforms across a range of policy areas (*e.g.*, sanitary and phytosanitary (SPS) measures, technical barriers to trade (TBT), services, intellectual property (IP), and investment), and promote

[1] Click **here** for the proclamation and **here** for the joint statement.

[2] Click **here** to view USTR's report.

African integration into the global trading system. USTR proposes several approaches that United States might take to achieve these objectives:

- **Traditional US FTAs.** The United States could (i) negotiate bilateral FTAs with individual African countries or regional groups; (ii) negotiate a "mega-regional" FTA building on African initiatives such as the Tripartite FTA or the Continental FTA, which are currently being negotiated; or (iii) allow African countries to "dock on" to existing US FTAs.
- **"Collaborative Arrangements".** The United States could temporarily extend unilateral tariff benefits to African countries that undertake certain market-opening commitments, such as (i) binding a larger share of their tariffs in the WTO; (ii) achieving full compliance with WTO rules and notification requirements; or (iii) joining plurilateral agreements and negotiations such as the Information Technology Agreement, the Environmental Goods Agreement, future WTO sectorals, and the Trade in Services Agreement.
- **EPA-style agreements.** Similar to the European Union's practice of negotiating EPAs, the United States and African countries could negotiate, on the basis of less-than full reciprocity, tariff-only agreements or agreements with a limited set of "tariff-plus" obligations.

As USTR acknowledges, each of these approaches would entail challenges. For example, there is little precedent for an EPA-style agreement in the United States, and it is questionable whether such an agreement would be supported by Congress or other US stakeholders. Negotiating traditional FTAs would also pose challenges, as many African countries might not be ready to take on the full range of commitments involved in a traditional US FTA. Thus, USTR holds out the possibility that the United States might take a diversified approach (*e.g.*, by negotiating FTAs with some African countries and pursuing less reciprocal arrangements with others). Alternatively, AGOA could be extended past 2025 with more stringent eligibility requirements (*e.g.*, minimum standards in the areas of services, investment, SPS, TBT, and/or IP). Though the US Congress and future US Presidents will ultimately determine which, if any, of these avenues are pursued, an eventual shift towards greater reciprocity with at least some African countries appears likely.

Petitions and Investigations Highlights

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.[3] In its investigation, DOC preliminarily determined that imports of the subject merchandise from three Chinese 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.

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

US International Trade Commission Issues Affirmative Final Determinations in AD/CVD Investigations of Cold-Rolled Steel Flat Products from Brazil, India, Korea, and the United Kingdom

On September 2, 2016, the US International Trade Commission (ITC) announced its final determinations in the antidumping (AD) and countervailing duty (CVD) investigations concerning imports of cold-rolled steel flat products from Brazil, India, Korea, Russia, and the United Kingdom that the US Department of Commerce (DOC) has determined are sold in the United States at less than fair value and subsidized by the governments of Brazil, India, Korea, and Russia.[4]

In its investigations, the ITC determined that a US industry is materially injured or threatened with material injury by reason of imports of cold-rolled steel flat products from Brazil, India, Korea, and the United Kingdom. The ITC also determined that imports of the same merchandise from Russia are negligible. As a result of these determinations, DOC will issue CVD orders on imports of the subject merchandise from Brazil, India, and Korea and AD orders on imports of the subject merchandise from Brazil, India, Korea, and the United Kingdom. No orders will be issued on imports of the subject merchandise from Russia.

The ITC's report on these investigations will be made public by October 3, 2016.

US Department of Commerce Issues Affirmative Preliminary Determination in CVD Investigation of Carbon and Alloy Steel Cut-To-Length Plate from China

On September 7, 2016, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the countervailing duty (CVD) investigation concerning imports of certain carbon and alloy steel cut-to-length plate (CTL plate) from China.[5] In addition, DOC announced its negative preliminary determination in the CVD investigation concerning imports of CTL plate from Korea.

In the China investigation, DOC assigned a preliminary subsidy rate of 210.50 percent to three mandatory respondents and to all other producers and exporters in China, based on the application of adverse facts available. In the investigation concerning Korea, DOC calculated a *de minimis* preliminary subsidy rate of 0.62 percent for one mandatory respondent and for all other producers and exporters in Korea. As a result of the preliminary affirmative determination for China, DOC will instruct US Customs and Border Protection (CBP) to require cash deposits based on the preliminary rate. For Korea, because its preliminary determination was negative, DOC will not instruct CBP to require cash deposits.

DOC is scheduled to announce its final determinations on or around January 19, 2016, unless the statutory deadline is extended. If DOC makes affirmative final determinations, and the US International Trade Commission (ITC) makes affirmative final determinations that imports of CTL plate from China and/or Korea materially injure or threaten material injury to the domestic industry, DOC will issue CVD orders.

US Department of Commerce Issues Affirmative Preliminary Determination in AD Investigation of Stainless Steel Sheet and Strip from China

On September 12, 2016, the US Department of Commerce announced its affirmative preliminary determination in the antidumping duty (AD) investigation of stainless steel sheet and strip from China.[6] In its investigation, DOC calculated a preliminary dumping margin of 63.86 percent for two Chinese respondents, whereas all other producers and exporters from China were assigned a preliminary dumping margin of 76.64 percent. As a result of the preliminary affirmative determination, DOC will instruct US Customs and Border Protection (CBP) to collect cash deposits based on these preliminary rates.

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

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

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

DOC is scheduled to announce its final determination on or around November 25, 2016. 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 from China materially injure or threaten material injury to the domestic industry, DOC will issue an AD order. DOC's final determination in the countervailing duty (CVD) investigation of the same merchandise from China is expected on or around November 23, 2016.

US International Trade Commission Issues Final Determinations in AD/CVD Investigations of Hot-Rolled Steel from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom

On September 12, 2016, the US International Trade Commission (ITC) announced its final determinations in (i) the antidumping duty (AD) investigations of hot-rolled steel flat products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom; and (ii) the countervailing duty (CVD) investigations of the same merchandise from Brazil, Korea, and Turkey.[7]

In its investigations, the ITC determined that a US industry is materially injured by reason of the subject imports from Australia, Brazil, Japan, Korea, the Netherlands, and the United Kingdom, as well as the subject imports from Turkey that are sold in the United States at less than fair value. The ITC further determined that imports subsidized by the government of Turkey are negligible. Consequently, the ITC will issue AD orders on imports of the subject merchandise from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom, and CVD orders on imports of the subject merchandise from Brazil and Korea. Due to the ITC's negligibility finding, no CVD order will be issued on imports from Turkey.

The ITC also made negative findings with respect to critical circumstances for imports of the subject merchandise from Brazil and Japan. As a result, goods that entered the United States from Brazil prior to January 15, 2016, will not be subject to retroactive countervailing duties, and goods that entered the United States from Brazil and Japan prior to March 22, 2016, will not be subject to retroactive antidumping duties

The ITC's public report on these investigations will be made available by October 18, 2016.

US Department of Commerce Issues Affirmative Preliminary Determinations in AD Investigations of Steel Cut-to-Length Plate From Brazil, South Africa, and Turkey

On September 16, 2016, the US Department of Commerce (DOC) announced its affirmative preliminary determinations in the antidumping duty (AD) investigations of certain carbon and alloy steel cut-to-length plate (CTL plate) from Brazil, South Africa, and Turkey. In its investigations, DOC preliminarily determined that imports of the subject merchandise were sold in the United States at the following dumping margins:

Country	Dumping Margin
Brazil	74.52 percent
South Africa	87.72 – 94.14 percent
Turkey	42.02 – 50.00 percent

As a result of DOC's affirmative preliminary determinations, US Customs and Border Protection (CBP) will collect cash deposits based on the preliminary rates shown above. DOC is scheduled to announce its final determinations on or around November 30, 2016. If DOC makes affirmative final determinations, and the US International Trade Commission (ITC) makes affirmative final determinations that imports of CTL plate from Brazil, South Africa, and/or Turkey materially injure or threaten material injury to the domestic industry, DOC will issue AD orders.

[7] Click **here** for the ITC's press release on the investigations.

The DOC fact sheet on these investigations is attached for reference.

US Department of Commerce Issues Affirmative Final Determinations in AD/CVD Investigations of Welded Stainless Pressure Pipe From India

On September 23, 2016, the US Department of Commerce (DOC) announced its affirmative final determinations in the antidumping (AD) and countervailing duty (CVD) investigations of welded stainless pressure pipe from India.[8] In its investigations, DOC determined that imports of the subject merchandise from India were sold in the United States at a dumping margin of 12.66 percent and received countervailable subsidies ranging from 3.13 to 6.22 percent.

The US International Trade Commission (ITC) is scheduled to make its final injury determination in these investigations on or around November 6, 2016. If the ITC makes an affirmative final determination that imports of the subject merchandise from India materially injure or threaten material injury to the domestic industry, DOC will issue AD and CVD orders.

Free Trade Agreement Highlights

Mexican Officials and Industry Representatives Expect Mexican Senate to Ratify TPP in 2016

On September 12, 2016, the Mexican Council on Foreign Affairs (*Consejo Mexicano de Asuntos Internacionales* – COMEXI) held a High-Level Public-Private Forum to discuss the Trans-Pacific Partnership (TPP). Mexican Senators attending the event expressed confidence that the Senate will ratify the TPP by the end of this year, even if the US Congress does not vote on the agreement during the "lame-duck" session held after the US elections in November. Industry representatives also discussed the TPP's potential implications for the Mexican economy.

Senator Teofilo Torres Corzo, who serves as Chairman of the Senate Foreign Affairs Committee on the Asia-Pacific and heads the Senate delegation in charge of reviewing the TPP, stated that the Senate could be ready to vote on the agreement by November 2016. Nine different committees in the Mexican Senate are set to review the TPP in the coming weeks, including by holding hearings and meetings with industry representatives that are set to begin this week. Although some opposition to the TPP is expected, particularly from Senators representing the Revolutionary Democratic Party, Senator Torres expressed confidence that the Senate will approve the TPP by year-end without encountering any major obstacles. Industry representatives and trade experts speaking at the event generally shared this view.

Sen. Torres also indicated that the Mexican Senate will vote on the TPP as soon as its review of the agreement is complete, rather than waiting for the US Congress to hold its own vote on the TPP. As has been suggested by New Zealand Ambassador Tim Groser, who visited with Mexican officials last week to discuss the TPP, this strategy is likely designed to pressure US lawmakers into considering and approving the agreement during the lame duck session.

In discussions regarding the TPP's economic implications, representatives of Mexico's automotive, steel, and electronics industries spoke positively of the agreement, stating that it would provide new export opportunities for their respective industries. Representatives of other sectors, particularly agriculture and textiles, were more cautious about the TPP. These industries expressed concern that Mexican exporters will face increased competition in their main export market (the United States) as a result of the TPP, particularly from developing countries such as Malaysia and Vietnam.

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

Multilateral Policy Highlights

WTO Panel Issues Report in Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union (DS475)

A WTO Panel has ruled that the Russian Federation violated its WTO obligations by imposing an EU-wide ban on live pigs and pork products, in breach of the food safety rules of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement").

The Panel found multiple violations of the SPS Agreement, including the failure of Russia to conduct a risk assessment or to base its measures on international standards, the failure to adapt the ban to regional conditions in the EU, the use of measures that were "more trade-restrictive than required", and "arbitrary or unjustifiable discrimination" against imported products. Russia's invocation of the "precaution" provision of the SPS Agreement was rejected.

Significance of Decision

This dispute arose after African swine fever ("ASF") was detected in the swine herds of four EU countries: Estonia, Latvia, Lithuania and Poland. ASF, according to the EU, is "a lethal, infectious disease of pigs which is harmless to humans or other animals". Following what the EU claimed were "a few infected wild boars at the borders with Belarus", Russia closed its borders to imports of pigs and related products from the entire EU. It did so without conducting a risk assessment. The EU had a very strong case that this did not comply with the science-based rules of the SPS Agreement and the Panel repeatedly ruled against Russia's actions.

One notable feature of this decision is the application of the provisions of the SPS Agreement as they apply to regions. SPS Article 6 sets out rules on adapting SPS measures to regional conditions, including "pest or disease-free areas" and "areas of low pest or disease prevalence". The Agreement provides that in such instances, the exporting country shall provide the necessary evidence to "objectively demonstrate" to the importing Member that areas within its territory are disease-free. This case is the first time that a WTO Panel has interpreted this term. After reviewing the evidence, the Panel concluded that the EU "objectively demonstrated to Russia that there are areas within the European Union territory, outside of Estonia, Latvia, Lithuania, and Poland, which are free of ASF and are likely to remain so". It ruled that Russia, by "imposing an outright ban" and "failing to recognize the existence of ASF-free areas within the European Union's territory", breached its obligations under the SPS Agreement with respect to the regional application of SPS measures.

The idea behind these "regionalization" provisions is to allow the application of SPS measures by importing countries that are targeted to the regions where diseases have occurred, while permitting trade to continue with areas unaffected by an outbreak. Such rules are particularly compelling when trade is with a WTO Member as geographically vast as the EU.

Background: EU-wide ban susceptible to WTO challenge

As noted above, Russia imposed a ban on live pigs and pork products from Estonia, Latvia, Lithuania and Poland, the only countries where ASF had been detected. Russia also refused to accept "imports of the products at issue from the entire EU, amounting to an EU-wide ban".

The Panel first ruled that the EU-wide ban was "a measure susceptible to challenge under the WTO dispute settlement mechanism". It noted that the basis for Russia's refusal was the requirement in the veterinary certificates negotiated with the EU. The Panel noted that under this requirement, "the whole of the European Union's territory, except for Sardinia, has to be ASF free for three years in order for the products at issue to be imported into Russia". Following the ASF outbreaks in Lithuania in early 2014, "the products from the European Union do not meet that requirement". Therefore, the Panel found that "the actions by Russia to apply this general requirement to the current

situation in the European Union results in an EU-wide ban of the products at issue attributable to Russia". The Panel then assessed this Russian measure against the requirements of the SPS Agreement.

EU-wide ban a "fundamental departure" from international standards

Article 3.1 of the SPS Agreement provides in part that Members shall base their SPS measures on "international standards, guidelines or recommendations, where they exist". An Annex to the Agreement lists the relevant standard-setting organizations, including, for animal health, those developed by the Paris-based International Office of Epizootics. (This body has since changed its name to the World Organisation for Animal Health, but it still uses its former French acronym of "OIE".) The Panel noted that the OIE Terrestrial Animal Health Code "sets out standards for the improvement of terrestrial animal health and welfare and veterinary public health worldwide, including through standards for safe international trade in terrestrial animals".

After concluding that the EU-wide ban did not comply with the requirements of the SPS Agreement for regional application (see below), the Panel found that this measure breached Russia's obligations under Article 3.1 because it was not based on the relevant international standard. It ruled that "[g]iven that the relevant provisions of the Terrestrial Code call upon OIE members to allow for the possibility of recognition of ASF-free status… on a country or 'zone' basis, the failure of Russia to even allow for the possibility for imports from the unaffected EU member States… amounts, in our view, to a 'fundamental departure' from the provisions of the Terrestrial Code…." The Panel thus ruled that "the EU-wide ban contradicts the relevant international standards and therefore it cannot be considered to be 'based on' that standard for the purposes of Article 3.1 of the SPS Agreement".

EU-wide ban not "adapted" to regional conditions in the EU

The core obligation of the SPS Agreement with respect to regionalization is set out in Article 6.1, which provides in part that Members shall ensure that their SPS measures are "adapted" to the SPS characteristics of the area, "whether all of a country, part of a country, or all or parts of several countries", from which "the product originated and to which the product is destined". Article 6.2 adds that "Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence". Article 6.3 states that "[e]xporting Members claiming that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively".

The Panel found that Russia's legislative framework "recognizes the concepts of pest- or disease-free areas and areas of low pest or disease prevalence in respect of ASF", and therefore the EU-wide ban was not inconsistent Article 6.2.

However, the Panel ruled that the EU had "objectively demonstrated" to Russia that there are areas within the EU, outside Estonia, Latvia, Lithuania, and Poland, which are "free of ASF and are likely to remain so" within the meaning of Article 6.3.

The Panel considered that "objectively demonstrate" meant "to prove something in an impartial manner". It added that "the exporting Member cannot merely provide general information in support of its claim, but rather sufficient relevant scientific and technical evidence, as relevant for the circumstances of the particular dispute, to prove in an impartial manner that an area within its territory is free of a disease and is likely to remain so".

After reviewing the evidence, the Panel concluded that the EU "objectively demonstrated to Russia that there are areas within the European Union territory, outside of Estonia, Latvia, Lithuania, and Poland, which are free of ASF and are likely to remain so". Based on this, it ruled that "imposing an outright ban… such as the one imposed by Russia through the EU-wide ban, and failing to recognize the existence of ASF-free areas within the European Union's territory amounts to not adapting the measure to the sanitary and phytosanitary characteristics of the

European Union territory outside Estonia, Latvia, Lithuania, and Poland". It therefore found Russia to be in breach of its obligations under SPS Article 6.1.

Russia's "precaution" arguments rejected

SPS Article 5.1 provides that Members must ensure that their SPS measures are based on a risk assessment. As noted by the Panel, the Appellate Body had previously ruled that if a measure is not based on a risk assessment, "it can be presumed not to be based on scientific principles or to be maintained without sufficient scientific evidence" in breach of SPS Article 2.2.

Russia acknowledged that it had not conducted any risk assessment. However, it argued that it had taken action on the basis of "precaution" under SPS Article 5.7. This provision states that where "relevant scientific evidence is insufficient, a Member may provisionally adopt" SPS measures on the basis of "available pertinent information".

The Panel recalled prior Appellate Body jurisprudence that "Article 5.7 of the SPS Agreement sets out four cumulative requirements that must be met for a Member to justify its measure on the basis of this article: (i) it is imposed in respect of a situation where relevant scientific evidence is insufficient; (ii) it is provisionally adopted on the basis of available pertinent information; (iii) the Member maintaining the measure seeks to obtain the additional information necessary for a more objective assessment of risk; and (iv) the Member reviews the measure within a reasonable period of time". It also noted the Appellate Body's admonition that the four requirements are "cumulative in nature" and that "whenever *one* of these four requirements is not met, the measure at issue is inconsistent with Article 5.7" (original emphasis).

After reviewing the evidence, the Panel ruled that Russia did not satisfy any of the four tests set out under Article 5.7. It found that "there was sufficient scientific evidence for Russia to conduct a risk assessment of the ASF situation in the non-affected EU member States, as appropriate to the circumstances". Moreover, "Russia did not provisionally adopt the measure on the basis of available pertinent information, did not seek to obtain the additional information necessary for a more objective assessment of risk, and did not review the EU-wide ban within a reasonable period of time". Therefore, the EU-wide ban did "not fall within the scope of Article 5.7" and the "qualified exemption" was "not available to Russia".

The EU-wide ban thus violated Russia's obligations under SPS Articles 5.1, 5.2, and 2.2.

"Relevant economic factors" not taken into account

SPS Article 5.3 provides that in assessing "the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk", Members must "take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks".

This was the first WTO Panel to consider a claim under SPS Article 5.3. The Panel stated that "[i]n the context of Article 5.3, we consider that a Member has the obligation to give consideration to the relevant economic factors listed therein when either assessing the risk to animal or plant life or health or determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection, and not to other economic factors". It added that "[t]his obligation does not imply, however, that consideration of the relevant economic factors will require a particular course of action from the Member imposing an SPS measure".

In the context of the EU claims in the present case, the Panel found that "the EU-wide ban is inconsistent with Article 5.3 of the SPS Agreement, because by not basing that measure on a risk assessment in circumstances in which Article 5.7 is not applicable, Russia could have not taken into account the relevant economic factors listed in Article 5.3…."

EU-wide ban "more trade-restrictive than required"

SPS Article 5.6 provides that when establishing or maintaining SPS measures, Members shall ensure that such measures "are not more trade-restrictive than required" to achieve their appropriate level of SPS protection, taking into account technical and economic feasibility. A footnote to this provision adds that "a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade".

The Panel found that measures based on the OIE Terrestrial Code were "a reasonably available alternative to the EU-wide ban". It considered that this alternative was "technically and economically feasible", would achieve Russia's required level of protection, and was "significantly less restrictive to trade than the EU-wide ban". Therefore, the Panel ruled that the EU-wide ban breached SPS Article 5.6 and 2.2.

"Arbitrary or unjustifiable discrimination" against imported products

SPS Article 2.3 provides that Members must ensure that their SPS measures do not "arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members" and cannot be "applied in a manner which would constitute a disguised restriction on international trade".

The EU argued that Russia was in breach of this provision because "Russia bans imports of the products at issue from the entire territory of the European Union, while it allows for trade in the products at issue from non-affected areas within Russia…." The Panel agreed.

The Panel considered that there was "a clear distinction in the treatment of the products under the same conditions, i.e. imports of products from areas not affected by ASF". It noted that it was an "undisputed fact" that ASF has been present in Russia since 2007. It observed that the "imported products coming from non- ASF affected areas within the European Union are not allowed to enter into Russia's market, while intra-Russian trade is possible for those products coming from non-ASF affected areas". The Panel concluded that "the EU-wide ban discriminates against products originating in the non-ASF affected areas of the European Union compared to the treatment granted to trade in domestic products", in breach of Article 2.3.

National bans also breach SPS Agreement

The EU won most of its claims against the national bans on imports from Estonia, Latvia, Lithuania and Poland. It also established certain procedural violations.

The Report of the WTO Panel in *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union* (DS475) was released on August 19, 2016.

Update on the Environmental Goods Agreement Negotiations

The G20 Summit in China last week took a significant step towards the conclusion of the Environmental Goods Agreement (EGA) by confirming the final list of 304 products that will be covered. The target to conclude the EGA is the end of this year, before the Obama Administration leaves office in January. Conclusion of the EGA could open the door to negotiations on other sectoral agreements which the United States and others are keen to advance in the WTO, such as tariff elimination in chemicals.

The detailed list of EGA products that was agreed by the G20 is not yet publicly available. It reportedly was drafted in July and confirmed at an Ambassador-level meeting in the WTO just days before the G20 Summit meeting. To date there is no indication that the parties have reached agreement on the schedule for phasing in tariff reductions on these products.

The relevant part of the G20 Summit Communique reads as follows:

> "G20 Environmental Goods Agreement (EGA) participants welcome the landing zone achieved in the WTO EGA negotiations, and reaffirm their aim to redouble efforts to bridge remaining gaps and conclude an ambitious, future-oriented EGA that seeks to eliminate tariffs on a broad range of environmental goods by the end of 2016, after finding effective ways to address the core concerns of participants."

The "core concerns of participants", referenced in the Communique, alludes principally to China's longstanding concern about "free riders", which might not join the EGA but which could benefit from it through the application of the MFN principle. China continues to insist on trying to limit the extent to which other countries could free-ride on tariff elimination by EGA participants. China has dropped its "snap-back" proposal to deal with free riders, *i.e.*, that EGA participants should be allowed to withdraw EGA concessions and to reinstate tariffs if the percentage of world trade in products covered by EGA participants were to fall below 70 percent, and any non-participating country were to account for at least 3 percent of world trade in covered products.

China has suggested instead that emphasis be placed on attracting other WTO Members to join the EGA so that a "critical mass" of about 90 percent of world trade in covered products is reached and maintained. China likely has in mind the need to attract India and Brazil in particular, which are not participating in the negotiations. China is seeking, in addition, flexibility to keep tariffs in place on some of the products that are to be covered by the EGA rather than total tariff elimination. It also wants relatively long phase-out periods to eliminate tariffs for itself and other developing countries. Some EGA participants are confident that a compromise will be found over both of these issues, in part because China will be able to exercise leverage with the United States, which is particularly keen to meet the end-of-year target to conclude the agreement.

Thirteen WTO Members Launch Plurilateral Negotiations on Fisheries Subsidies

The United States has agreed with 12 other WTO Members to launch plurilateral negotiations aimed at disciplining certain fisheries subsidies and at strengthening the reporting and transparency of fisheries subsidies.[9] This move is likely to remove fisheries subsidies from attention in the Rules Group in the WTO, and could prevent fisheries subsidies from being used again as an opening or a lever for much broader WTO negotiations on industrial subsidies which the European Union has been seeking.

The United States has said that the aim of the new negotiations is to build on the Trans-Pacific Partnership (TPP) rules on fisheries subsidies. The TPP prohibits its participants from using specific subsidies (within the meaning of the WTO Agreement on Subsidies and Countervailing Measures) for fishing that negatively affect fish stocks which are in an overfished condition and for illegal, unreported and unregulated fishing. It also set up reporting requirements for prohibited and other fisheries subsidies. Broadly speaking, those were the disciplines that had been proposed by the "Friends of Fish" group under the Doha Development Agenda (DDA). They were put forward for agreement at the WTO's 10th Ministerial Conference in Nairobi (MC10) but they failed to achieve consensus.

Participants in the new negotiations include seven TPP members (Australia, Canada, Chile, New Zealand, Peru, Singapore, and the United States) as well as Argentina, Colombia, Norway, Papua New Guinea, Switzerland and Uruguay, who are not members of the TPP but who have been core members of the Friends of Fish group in the WTO. However, four of the main TPP participants have not signed on to the new negotiations (Japan, Malaysia, Mexico and Vietnam).

A September 14 communique from the thirteen participating countries appears to envisage the possibility of moving the agreement back into the multilateral system at some point. It states:

> "Our objective is to work with each other and with like-minded participants to conclude an ambitious, high standard agreement, while at the same time working with all WTO Members to make progress toward a multilateral agreement in the WTO."

[9] Click **here** to view the joint statement announcing the launch of plurilateral negotiations on fisheries subsidies.

The announcement of the new negotiations holds out the possibility, therefore, of attracting other WTO Members to join, though this appears unlikely to happen to any great extent. As noted above, four of the largest TPP members have not signed on to the plurilateral negotiations, and other key WTO Members such as China, Korea, India, and Brazil are unlikely to do so given their history of resistance to reducing their fisheries subsidies through the DDA or out of general opposition to expanding the WTO rule-book.

Removing the element of fisheries subsidies from the mandate for the Rules negotiations in the DDA might also increase the likelihood that other elements of the Rules mandate, particularly stronger disciplines on "horizontal" industrial subsidies and new anti-dumping rules, will remain moribund. The EU has been the main proponent of negotiating stronger industrial subsidy disciplines in the DDA. It has been reluctant to consider disciplining fisheries subsidies because of divisions among its member states on that issue, and during discussions in the WTO in June it made its support for fisheries subsidies contingent on progress being made on other Rules issues, particularly industrial subsidies. Taking fisheries subsidies out of the equation in the Rules negotiations will remove the ability of the EU to try to use that type of leverage in the future.

Appellate Body Report in US-Korea Washers Dispute Addresses Zeroing and Regional Specificity

On September 7, 2016, the Appellate Body released its report in DS464 (*United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*). The Appellate Body's report may have important implications for WTO Members in two regards: (i) the findings on "zeroing" could potentially reduce final anti-dumping duties on exporters that may be subject to anti-dumping investigations in the United States; and (ii) the findings on regional specificity could affect subsidy programs designed to provide economic support in many developing countries. We review each of these issues below.

Zeroing in Targeted Dumping Cases

The Appellate Body report restricts the ability of investigating authorities, in particular the United States Department of Commerce (USDOC), to use the "zeroing" methodology or others like it that can inflate dumping margins (and thus final duties). Zeroing distorts the determination of the "margin of dumping", *i.e.*, the magnitude or amount of the dumping. When zeroing is used, investigating authorities do not give any credit for so-called "negative dumping margins", *i.e.*, when the export price of the product is higher than the price in the exporting country. Under zeroing, the investigating authority will not average positive and negative dumping margins together - instead, it considers all negative dumping margins to be zero. This has the effect of inflating the overall average dumping margin, and can lead to the imposition or maintenance of anti-dumping duties which may not otherwise apply at all.

Zeroing has been condemned by successive Panel and Appellate Body decisions in most contexts, but the Appellate Body had not previously ruled in earlier cases on whether zeroing may be used in cases of "targeted" dumping (*i.e.*, dumping that is targeted to certain purchasers regions, or time periods) under the Anti-Dumping Agreement. The USDOC therefore still uses zeroing methodologies in targeted dumping investigations, which have increased in recent years.

In the present case, the majority of the Appellate Body members concluded that the use of zeroing in targeted dumping cases is inconsistent with the Anti-Dumping Agreement. One Appellate Body member wrote a dissenting opinion. The Appellate Body member, who is not named in the opinion, stated that he believed that none of the majority's findings on zeroing were founded on "convincing authority". While the majority, and binding decision, of the tribunal found zeroing in targeted dumping cases inconsistent with WTO law, the obvious disagreement within the Appellate Body may buoy US efforts to preserve zeroing as a policy tool in anti-dumping cases, and may make implementation of this decision more difficult.

Regional Specificity of Subsidy Programs

The Appellate Body report will likely support an investigating authority's decision to treat broadly-available subsidies targeting less-developed areas within a country as regionally-specific and thus countervailable. WTO disciplines on subsidies, provided for under the Agreement on Subsidies and Countervailing Measures Agreement ("SCM Agreement"), apply only if the subsidy is "specific" to "certain enterprises," or is limited to enterprises located within a designated geographical region within the jurisdiction of the granting authority ("regional specificity"). In this case, the USDOC found that a subsidy that was available throughout 98 percent of Korea – everywhere but Seoul – was regionally "specific." The Appellate Body dismissed Korea's challenge to that USDOC determination, ruling that "*any* identified tract of land within the jurisdiction of a granting authority" may qualify as a geographic region (original emphasis).

The Appellate Body's ruling may have been driven by the specific facts of this case, given the dominant role of Seoul in Korea. The Appellate Body stressed that "although the Seoul overcrowding area only occupies 2% of Korea's landmass, such area accounts for a large proportion of the country's population and concentrates a substantial portion of its economy."

The Appellate Body ruling could restrict the ability of governments to provide economic support to less–developed areas to foster economic diversification, even when these programs are extensive and are available throughout many regions across the country. The Appellate Body stressed that the "function" of the regional specificity rule is to "address subsidy schemes by which Members direct resources to certain geographical regions within their jurisdictions, thereby interfering with the market's allocation of resources". The Appellate Body has thus provided additional support to investigating authorities such as the USDOC when they make findings of regional specificity.

The Appellate Body report is attached for reference.

United States Requests Consultations with China Over Domestic Support for Agricultural Producers

On September 13, 2016, the United States filed a new request for consultations with China concerning China's domestic support in favor of agricultural producers. The request alleges that China has provided domestic support in favor of its wheat, rice, and corn producers in excess of the commitment levels specified in its schedule. It follows months of disagreement between China and the United States in the Doha agricultural negotiations where China's refusal to accept any reduction in its domestic support policies has frustrated the United States and left the negotiations deadlocked. The timing of the request for consultations might have been strategically chosen by the Obama Administration in an effort to build US congressional support for the Trans-Pacific Partnership (TPP).

The US request released on September 20 alleges that China's domestic support for agricultural producers is inconsistent with China's obligations pursuant to Articles 3.2, 6.3, and 7.2(b) of the Agriculture Agreement, because the level of domestic support provided exceeds the commitment level of "nil" specified in Section I of Part IV of China's schedule. In particular, the United States alleges that China's domestic support, expressed in terms of its Total Aggregate Measurement of Support, exceeded China's final bound commitment level in 2012, 2013, 2014, and 2015 because of product-specific domestic support given to producers of wheat, Indica rice, Japonica rice, and corn.

In Section I of Part IV of China's schedule, it committed not to provide product-specific support for wheat, Indica rice, Japonica rice, and corn in excess of a *de minimus* level (equal to 8.5 percent of the total value of China's annual production of each product). The US request alleges that, during each year from 2012 to 2015, China provided product-specific support in excess of the *de minimus* level for each product, citing 33 legal instruments through which China allegedly provided such support. In a September 13 press release announcing the US request for consultations, the Office of the US Trade Representative (USTR) claimed that "in 2015, the level of support provided through these programs in excess of China's commitment was nearly $100 billion."

The timing of the dispute suggests that the Obama Administration could be using the request for consultations to build congressional support for consideration and approval of the TPP during the "lame-duck" session to be held after the US elections in November. Such a highly publicized dispute against China could help undecided members of

Congress to justify votes in favor of the TPP by providing a current example of US efforts to combat prohibited trade practices. Indeed, USTR's press release and a separate statement from President Obama aim to connect the new dispute to the TPP by claiming that the request for consultations "reflects the Administration's commitment to trade enforcement and indicates the resolve that the United States would bring to enforce the high standards won in the Trans-Pacific Partnership (TPP)". Several members of Congress were also quoted as expressing support for the request for consultations in USTR's press release.

The Obama Administration has pursued a similar strategy in the past; for example: (i) filing a request for consultations over Chinese wind power subsidies (DS419) in late 2010 as congressional debate over free trade agreements with Korea, Colombia and Panama intensified; and (ii) filing a request for consultations over China's provision of export-contingent subsidies in various sectors (DS489) in early 2015 as Congress began to debate Trade Promotion Authority (TPA) legislation. Given this pattern, as well as the importance placed by the Obama Administration on having the TPP ratified by Congress this year, the United States' new request for consultations with China might presage it taking similar actions against other trading partners in the coming months.

The US request for consultations in DS511 (*China – Domestic Support for Agriculture Producers*) is attached for reference.

UK Secretary of State for International Trade Discusses UK Plans for Transitioning to Independent Membership in WTO

The UK's Secretary of State for International Trade, Dr. Liam Fox, spoke publicly yesterday at the World Trade Organization (WTO) on the UK's plans for transitioning to independent membership in the WTO once the UK withdraws from the European Union (EU). Dr. Fox aimed to strike a reassuring note for other WTO Members that "Brexit" would not disrupt their trade with the UK and he presented a bullish preview of the role that the UK would play in pushing aggressively for further multilateral trade liberalization.

Re-establishing the UK's independent membership in the WTO is one of the three trade components of Brexit; the other two are (i) establishing a new preferential trading relationship with the EU and (ii) negotiating free trade agreements with other WTO Members. Both of these are awaiting further political guidance from London.

WTO membership, independent of the EU, is crucial for the UK since it allows the UK to trade in goods and services on Most Favored Nation (MFN) terms with other WTO Members. These are the terms on which the UK, as an EU member, already trades with its major partners such as the United States and Japan and emerging markets such as China and India.

In his speech at the WTO, Dr. Fox made clear that the UK intended to ensure there would be no change after Brexit to the MFN terms on which the UK currently trades, and by implication therefore no disruption to the UK's trade relations with other countries. He said:

> "The UK is a full and founding member of the WTO. We have our own schedules that we currently share with the rest of the EU. These set out our national commitments in the international trading system. The UK will continue to uphold these commitments when we leave the European Union. There will be no legal vacuum."

In order to confirm its independent WTO membership the UK will have to present its market access schedules for goods and services to other WTO Members for their approval so that the schedules can be formally certified. The procedures for doing this are set out in WTO documents on the Rectification and Modification of Schedules which date from 1980 in the case of the goods schedule and 2000 in the case of the services schedule. In the absence of any objection from other WTO Members, the schedules would be certified after 90 days in the case of goods and after 45 days in the case of services.

Dr. Fox said that the UK intends to carry over its market access schedules unchanged from the EU schedules that it currently applies: "The UK will continue to uphold these commitments when we leave the European Union". That should facilitate considerably the process of receiving the approval of other WTO Members for the schedules.

Nevertheless, some WTO Members might challenge details of the UK's schedules before being willing to approve them, and some might seek new trade concessions from the UK in exchange for doing so. The UK will need, therefore, to consult with other WTO Members and be willing to listen to their concerns and to take account of them if it sees merit in their case. Elements of the schedules that could give rise to such concerns are, for example, quantitative restrictions such as tariff rate quotas that apply currently to a number of agricultural imports.

Consultations with other WTO Members on the schedules to iron out these concerns could delay the certification of the schedules beyond the time that the UK formally withdraws from the EU. Dr. Fox stated that it would be the UK's intention that this would not be the case: "There will be no legal vacuum". Even if there were to be a delay, however, this need not affect the UK's day-to-day trade with its trading partners. It has not been uncommon for WTO Members, including the EU, to trade on the basis of an uncertified schedule, in some cases for years, while the process of Rectification and Modification of the schedule is carried out to completion. Day-to-day trade has not been disrupted in the meantime.

Second Update on the Environmental Goods Agreement Negotiations

Negotiations on an Environmental Goods Agreement (EGA) appear to have stumbled again after having won the support of G20 Leaders in China earlier this month. Last week's discussions in Geneva revealed that there are still several important gaps remaining between participants on all three of the pillars of the draft agreement. The target to complete the EGA is early December, but there are now doubts about whether that is achievable.

At last week's EGA meeting, participants reviewed all three pillars of the draft EGA but made practically no progress in drawing any closer to each other's respective positions.

- **Product coverage.** A list of 304 products to be covered by the EGA was endorsed at the G20 meeting. It became clear at last week's negotiating session, however, that the list is not yet stabilized. Part of this session was taken up by a high profile disagreement between the EU and China over the inclusion of bicycles on the list. We understand that many other disagreements among participants over product coverage are still to be resolved, and that the final list may have to be reduced to around only 200 products if agreement is to be reached.

- **"Critical mass".** It had been hoped after the G20 Summit that China's longstanding concern about "free riders" (countries which may not join the EGA but which could benefit from it through the application of the MFN principle) had diminished and that it was prepared to move ahead on the basis of assurances that other WTO Members would be encouraged to join the EGA so as to make up a critical mass of participants (understood informally to be around 90 percent of world trade in covered products). However, China raised this concern again last week and said that an assurance of that kind was insufficient. It did not make a new proposal on how its concern could be addressed. Some accommodation might be possible by giving China greater flexibility on the third pillar of the EGA, the scheduling of tariff elimination.

- **Scheduling of tariff elimination.** It had been understood before the G20 meeting that China had given up its original proposal to maintain a positive level of tariffs on at least some of the products covered by the EGA rather than eliminate all of them. However, at last week's meeting China raised again the difficulties that it would have in agreeing to full tariff elimination as long as the list of products remained large and the "free rider" problem was not resolved. While China's position points towards how a final compromise on the whole agreement might be found, the United States and several other participants expressed reluctance to move in that direction because they feel that it would diminish the commercial value of the EGA and weaken its claim to make a positive environmental impact. Nonetheless, a compromise might be possible through trade-offs across all of the three

pillars and some believe that China will be able to exercise leverage in that way with the United States which is particularly keen to meet the end-of-year target to conclude the agreement under the Obama Administration.

Further negotiations will take place this month, focusing to begin with on product coverage.

WTO Appellate Body Issues Report in India – Certain Measures Relating to Solar Cells and Solar Modules (DS456)

The WTO Appellate Body has affirmed that local content requirements maintained by India for solar cells and modules violate India's obligations under the General Agreement on Tariffs and Trade (GATT) 1994 and the WTO Agreement on Trade-Related Investment Measures (TRIMs).

Significance of Decision

This decision is consistent with a long line of prior cases that have ruled that local content requirements are inconsistent with the national treatment obligations of the GATT and the TRIMs Agreement. The United States was widely expected to win on all points in this appeal, and it did.

One notable aspect of this case was India's attempt to invoke principles of international environmental law, including the United Nations Conventions on Climate Change (UNFCCC), to seek to justify its measures.

GATT Article XX(d) allows WTO Members to adopt or enforce measures "necessary to secure compliance" with GATT-consistent "laws or regulations". India had argued before the Panel that its local content requirements for solar cells and modules were justified under Article XX(d) because they were "integral to its compliance with both domestic and international law obligations to ensure ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its obligations relating to climate change". India pointed to its international legal obligations, including under the UNFCCC. India argued that it had "an obligation to take steps to achieve energy security, mitigate climate change, and achieve sustainable development, and that this includes steps to ensure the adequate supply of clean electricity, generated from solar power, at reasonable prices". Both the Panel and the Appellate Body rejected this defence.

India's argument faltered over the threshold issue of whether the domestic environmental policies and international environmental agreements it cited could be considered as "laws or regulations" for the purposes of Article XX(d). The Appellate Body provided guidance on when measures could meet the definition of "laws or regulations", based on factors such as specificity, enforceability, and sanctions.

The Appellate Body rejected the notion that the domestic environmental policies cited by India could constitute "a 'rule' to ensure ecologically sustainable growth". It agreed with the Panel that such provisions were "hortatory, aspirational, declaratory, and at times solely descriptive". It similarly dismissed the argument that the UNFCCC and the other international instruments cited by India were "laws or regulations", as they were neither incorporated into domestic law nor given direct effect in India.

It would be wrong to conclude that this decision shows an unwillingness of the WTO to address environmental issues. Rather, the Appellate Body's mandate in this appeal was much narrower, as it needed to decide when policies or treaties could be considered as "laws or regulations" that could qualify under the exception. The Appellate Body's decision is consistent with the strict interpretation of Article XX(d) that has been established in the jurisprudence.

Even if international agreements did have direct effect in India, this defence would still have likely failed, as it would be very difficult to establish that local content requirements are "necessary to secure compliance" with the UNFCCC. The UNFCCC imposes relatively few hard commitments, particularly on developing countries. Indeed, the UNFCCC provisions cited by India in its Article XX(d) defence include commitments by all Parties to formulate "national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing …emissions" of greenhouse gases, and to "[t]ake climate change considerations into account, to the extent feasible, in their

relevant social, economic and environmental policies and actions…." It would be virtually impossible to establish that local content requirements are necessary to "secure compliance" with such general provisions.

Factual Background: India's National Solar Mission and the local content requirements

This dispute arose from certain local content requirements imposed by India under the Jawaharlal Nehru National Solar Mission, which was established by the Indian government in 2010. The objective of the National Solar Mission is to "establish India as a global leader in solar energy, by creating the policy conditions for its diffusion across the country as quickly as possible". It also seeks to make a "major contribution by India to the global effort to meet the challenges of climate change".

In order to promote solar power capacity, the Indian government enters into long-term power purchase agreements with solar power developers, providing a guaranteed rate for a 25-year term. The power developers are in turn subject to mandatory domestic content requirements, obligating them to use certain Indian-manufactured cells and modules.

National treatment: violations of the GATT and the TRIMs Agreement

GATT Article III:4 provides in part that imported products must be accorded "treatment no less favourable" than that accorded to "like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

Article 2 of the TRIMs Agreement provides that "no Member shall apply any TRIM that is inconsistent with the provisions of Article III… of GATT 1994". The TRIMs Agreement includes an "illustrative list" of measures that are inconsistent with GATT Article III:4, including "those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require…the purchase or use by an enterprise of products of domestic origin or from any domestic source…".

GATT Article III:8(a) provides an exception to the national treatment disciplines that would otherwise apply. It states that "[t]he provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale".

In the current case, the U.S. argued strongly that this exception did not apply. Relying on the 2013 decision of the Appellate Body in *Canada – Renewable Energy/Feed-In Tariff Program*, the U.S. argued that "the product procured (electricity) is not in a competitive relationship with the product being discriminated against (solar cells and modules), and… such discrimination is therefore not covered by the derogation of Article III:8(a)". The Panel agreed.

The Appellate Body upheld this finding, ruling that "a competitive relationship between the product discriminated against and the product purchased must be established in all cases". It reasoned that "under Article III:8(a), the product purchased by way of procurement must necessarily be 'like', or 'directly competitive' with or 'substitutable' for – in other words, in a 'competitive relationship' with – the foreign product subject to discrimination". It recognized that "a consideration of inputs and processes of production may inform the question of whether the product purchased is in a competitive relationship with the product being discriminated against", but that "it does not displace the competitive relationship standard".

The Appellate Body thus affirmed that the local content requirements violated India's obligations under both the GATT Article III:4 and the TRIMs Agreement.

GATT Article XX(j): "short supply" not limited to products manufactured domestically

India sought to invoke the exception of GATT Article XX(j), which provides in part that WTO Members may maintain measures "essential to the acquisition or distribution of products in general or local short supply". India had argued before the Panel that "solar cells and modules are 'products in general or local short supply' in India on account of its lack of domestic manufacturing capacity". The Panel rejected this defence.

This was the first time that the Appellate Body has interpreted GATT Article XX(j). The Appellate Body disagreed with India's position that "'short supply' can be determined without regard to whether supply from both domestic and international sources is sufficient to meet demand in the relevant market". It noted that "[b]y its terms, Article XX(j) does not limit the scope of potential sources of supply to 'domestic' products manufactured in a particular country that may be 'available' for purchase in a given market".

The Appellate Body found that "an assessment of whether a Member has identified 'products in general or local short supply' requires a case-by-case analysis of the relationship between supply and demand based on a holistic consideration of all relevant factors". It rejected India's argument that "a lack of 'sufficient' domestic manufacturing 'capacity' will necessarily constitute a product 'shortage' in a particular market…"

The Appellate Body therefore dismissed India's defence under Article XX(j).

GATT Article XX(d): no "rule" to ensure "ecologically sustainable growth"

The Appellate Body noted that in determining whether a responding party had identified a rule that falls within the scope of 'laws or regulations' under GATT Article XX(d), a panel should consider factors such as "(i) the degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member; (ii) the degree of specificity of the relevant rule; (iii) whether the rule is legally enforceable, including, e.g. before a court of law; (iv) whether the rule has been adopted or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member; (v) the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and (vi) the penalties or sanctions that may accompany the relevant rule".

The Appellate Body examined the provisions of India's domestic National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change. It concluded that "we fail to see how these instruments, taken together, could be read to set out a 'rule' to ensure ecologically sustainable growth that India alleges". It reasoned that "the relevant texts of these instruments, whether seen in isolation or read together, do not set out, with a sufficient degree of normativity and specificity, a 'rule' to ensure ecologically sustainable growth", as argued by India. The Appellate Body agreed with the Panel that these provisions were "hortatory, aspirational, declaratory, and at times solely descriptive".

It similarly ruled that the international instruments cited by India could not be considered as "laws or regulations" for the purposes of Article XX(d). Relying in its earlier ruling in Mexico – Taxes on Soft Drinks, the Appellate Body noted that rules deriving from international agreements may become part of the domestic legal system of a WTO Member in at least two ways: "Members may incorporate such rules, including through domestic legislative or executive acts intended to implement an international agreement", and "certain international rules may have direct effect within the domestic legal systems of some Members without specific domestic action to implement such rules" [original emphasis].

India argued that "the very fact that the executive branch can take action to 'execute' the international instruments at issue, e.g. by enacting the [domestic content] measures, shows that these international instruments and rules are already a part of its domestic legal system and therefore may be acted upon by the executive branch". More specifically, India argued that that the "direct effect" of the international instruments under its domestic legal system was established by the fact that "the principles of sustainable development under international environmental law have been recognized by the Supreme Court of India to be part of the environmental and developmental governance in India".

The Appellate Body found that while the decisions of the Indian Supreme Court "may serve to highlight the relevance of the international instruments and rules identified by India for purposes of interpreting provisions of India's domestic law, as well as for guiding the exercise of the decision-making power of the executive branch of the Central Government, we do not consider that this is sufficient to demonstrate that the international instruments India identified are rules that form part of its domestic legal system and fall within the scope of 'laws or regulations' under Article

XX(d)". The Appellate Body therefore dismissed India's position that the domestic content requirements for solar were justified under this exception.

The Report of the WTO Appellate Body in India – Certain Measures Relating to Solar Cells and Solar Modules (DS456) was released on September 16, 2016.

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