

# US & Multilateral Trade and Policy Developments

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**Japan External Trade Organization**

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## US General Trade Policy Highlights

### US Trade Representative Releases Annual Review of Notorious Markets

On December 21, 2016, the Office of the US Trade Representative (USTR) released the 2016 Out-of-Cycle Review of Notorious Markets (“Review”),<sup>1</sup> which highlights select physical and online markets around the world that allegedly engage in and facilitate substantial copyright piracy and trademark counterfeiting. Similar to last year’s Review, the 2016 Review emphasizes USTR’s increasing focus on online rather than physical markets, reflecting the evolving enforcement priorities of US copyright owners and trademark holders. Thus, while the Review reiterates longstanding US concerns such as the alleged sale of counterfeit goods at physical markets in China and elsewhere, it places considerable focus on new developments such as the proliferation of online “stream ripping” services and piracy applications for digital media.

#### Online Markets

USTR has listed a total of 21 online markets in this year’s Review. The listed markets allegedly are based in China, Ukraine, Russia, Poland, Vietnam, France, Germany, the Netherlands, the British Virgin Islands, Switzerland, Sweden, Bosnia and Herzegovina, and Panama. The most recognizable of these markets is Taobao.com (a subsidiary of the Alibaba Group), which is China’s largest online shopping destination by gross merchandise volume. USTR chose to list Taobao “due to the large volume of allegedly counterfeit and pirated goods available and the challenges right holders experience in removing and preventing illicit sales and offers of such goods.” Most of the other online markets listed are file-sharing or streaming websites that allegedly facilitate the unauthorized distribution of digital media, such as movies, music, video games, audio books, and software.

In addition to listing specific online markets, USTR has dedicated a special section of this year’s Review to an “emerging trend” in digital copyright enforcement known as “stream ripping”. USTR defines stream ripping as “the unauthorized act of converting a file from a licensed streaming site into an unauthorized copy for distribution via download to the requester.” According to USTR, 2016 was the first year in which US copyright holders nominated stream ripping websites for inclusion in the Review. USTR chose to list one such website, which allegedly is based in Germany, in recognition of this reportedly growing trend. The Review states that both copyright holders and the operators of legitimate streaming websites can be negatively impacted by the growth of stream ripping services.

#### Physical Markets

USTR has listed a total of 20 physical markets in this year’s Review. Of these, 6 are located in China, while the remaining markets are located in Nigeria, Paraguay, Brazil, Indonesia, Vietnam, Argentina, India, Mexico, and Thailand. Most of the listed markets are alleged to facilitate the sale of counterfeit goods, such as apparel and footwear, computer products, automotive parts, electronics, or luxury goods. The Review notes that, as in past years, US IPR holders continue to identify China as the “primary source” of counterfeit products. However, the Review also acknowledges that the Chinese authorities have recently taken enforcement actions and other measures to limit the availability of such products.

USTR has included in this year’s Review a series of policy recommendations for foreign governments to reduce the flow of counterfeit products. Such policies include: (i) enhanced criminal penalties for serious cases of counterfeiting that threaten health and safety; (ii) robust border enforcement authority to interdict small consignment shipments; (iii) criminal procedures and penalties for trafficking in counterfeit labels and packaging; (iv) customs authority to detain and seize counterfeit and pirated goods entering into and exiting from Free Trade Zones; and (v) effective border enforcement measures to prevent the importation, exportation, and transshipment of infringing merchandise.

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<sup>1</sup> Click [here](#) to view USTR’s 2016 Out-of-Cycle Review of Notorious Markets.

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## US Trade Representative Releases Annual Report on Implementation and Enforcement of Russia's WTO Commitments

On December 23, 2016, the Office of the US Trade Representative (USTR) released its 2016 Annual Report on the Implementation and Enforcement of Russia's WTO Commitments.<sup>2</sup> The central theme of the report is USTR's contention that Russia "continued to depart from the core tenets of the WTO" in 2016 in favor of "inward-looking, import-substitution economic policies" that USTR claims have diminished the benefits of Russia's WTO membership. The report discusses a wide range of alleged Russian policies and practices – including import and export restrictions, sanitary and phytosanitary (SPS) measures, local content requirements, subsidies, and policies relating to state-owned enterprises (SOEs) – that USTR considers to be indicative of this trend. The main issues raised in the report may be summarized as follows:

- **Import and export restrictions.** USTR acknowledges in the report that Russia implemented various tariff reductions in 2016 in accordance with its WTO commitments. However, USTR contends that Russia's application of various non-tariff measures "has often undermined benefits expected from the application of lower tariffs." According to USTR, such measures include burdensome import licensing requirements and "opaque" customs valuation procedures. Regarding export restrictions, USTR questions whether Russia's export licensing requirements are consistent with WTO disciplines and expresses concern in particular about Russia's export duties on certain chemicals and anodes of the platinum group of metals.
- **Trade-related investment measures (TRIMS).** The report highlights alleged local content measures and other TRIMS that USTR is currently reviewing for consistency with the TRIMS Agreement. Such policies include: (i) possible local content requirements in a preferential leasing program implemented by a Russian state-owned agricultural equipment leasing company; (ii) a program that allegedly supports automotive leases of "only Russian-made automobiles"; (iii) efforts by Russia's Government Import Substitution Commission to limit the goods and services that may be sourced outside of Russia by government entities and SOEs; and (iv) a proposal to establish a minimum target for procurement by SOEs of "hi-tech and innovative products".
- **Agriculture.** USTR states that Russia has put in place the legal framework to allow it to comply with its WTO commitments regarding SPS measures. However, USTR contends that Russia's implementation of these commitments remains problematic, including in the areas of risk assessment and conformity with international standards. For example, USTR states that "Russia has adopted a zero tolerance for both ractopamine and trenbolone acetate, standards more stringent than Codex's maximum residue levels (MRL) for pork and beef, but does not appear to have provided risk assessments that conform to Codex guidelines." Other US concerns in the agriculture sector include Russia's ban on certain agricultural imports from the United States (including certain beef, pork, poultry, fish, and prepared foods), and a measure that allegedly exempts certain agricultural entities from Russia's VAT.
- **Subsidies.** USTR alleges that Russia maintains several subsidy programs that might raise WTO concerns. These include: (i) a program announced in July 2015 that allegedly provides financial support to lessors of Russian-made aircraft; (ii) a similar program under which producers of agricultural equipment allegedly receive financial support that may be contingent on a certain level of local production; and (iii) certain benefits allegedly being provided to manufacturers in the "Titanium Valley" Special Economic Zone.
- **SOEs.** USTR claims that Russia imposes various import substitution requirements on SOEs. According to USTR, such policies include (i) a measure adopted in 2014 that prohibits certain SOEs from purchasing imported automobiles, metal products and heavy machinery; (ii) policies authorizing the Russian government to establish "procurement plans" for SOEs and to approve SOEs' procurement of machinery and equipment for large investment projects; (iii) a 2016 measure encouraging Russian SOEs to switch to domestically-produced software; and (iv) a 2015 measure restricting the procurement of certain types of equipment used by SOEs

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<sup>2</sup> Click [here](#) to view the report.

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(including gas and steam turbines, generators, and passenger boats) to complete projects co-funded or guaranteed by government funds.

- **Services.** USTR alleges that Russia's Law on Personal Data, which took effect in September 2015, appears to impose data localization requirements and may implicate WTO commitments that Russia made to allow cross-border services. Another services issue raised by USTR is a Russian measure that allegedly requires Russian insurance companies to place ten percent of their reinsurance business with a new, state-owned reinsurance company established by the Russian government in 2016. According to USTR, this policy might raise WTO issues because Russia did not take any reservations or limitations to its insurance services commitments.

Despite raising many concerns about Russia's compliance with its WTO commitments, USTR notes in the report that "the United States continues to believe that having Russia in the rules-based system of the WTO benefits the United States, Russia, and the global trading system." USTR also states that it will use all appropriate means, including formal dispute settlement proceedings, to ensure that Russia's measures conform to its WTO obligations. However, it is important to note that the report reflects the views of the Obama administration, and that it remains uncertain how the Trump administration might seek to address the issues raised in the report or trade and economic relations with Russia generally.

## Petitions and Investigations Highlights

### **US Department of Commerce Issues Affirmative Final Determination in AD Investigation of Large Residential Washers From China**

On December 9, 2016, the US Department of Commerce (DOC) announced its affirmative final determination in the anti-dumping duty (AD) investigation of certain large residential washers from the China.<sup>3</sup> In its investigation, DOC determined that imports of the subject merchandise from China were sold in the United States at the following dumping margins: (i) 32.12 percent (for imports from Nanjing LG-Panda Appliances Co.); (ii) 52.51 percent (for imports from Suzhou Samsung Electronics Co.); and (iii) 44.28 percent (for the China-wide entity). Though DOC preliminarily found that critical circumstances exist with respect to Samsung and the China-wide entity, for the final determination DOC did not find critical circumstances.

The products subject to this investigation are classifiable under subheadings 8450.20.0040 and 8450.20.0080 of the Harmonized Tariff Schedule of the United States (HTSUS). Products subject to the investigation may also enter under HTSUS subheadings 8450.11.0040, 8450.11.0080, 8450.90.2000, and 8450.90.6000. According to DOC, imports of washing machines from China in 2015 were valued at an estimated USD 1.1 billion.

The US International Trade Commission (ITC) is scheduled to make its final injury determination in this investigation on or around January 23, 2017. If the 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.

### **Department of Commerce Issues Affirmative Final Determinations in Anti-Dumping Investigations of Certain Carbon and Alloy Steel Cut-To-Length Plate from Brazil, South Africa, and Turkey**

On November 30, 2016, the US Department of Commerce (DOC) announced its affirmative final determinations in the anti-dumping duty (AD) investigations of certain carbon and alloy steel cut-to-length plate (CTL plate) from Brazil, South Africa, and Turkey.<sup>4</sup> In its investigations, DOC determined based on adverse facts available that imports of the

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<sup>3</sup> Click [here](#) for the DOC fact sheet on the investigation.

<sup>4</sup> Click [here](#) for the DOC fact sheet on the investigation.

subject merchandise from Brazil, South Africa, and Turkey were sold in the United States at the following dumping margins:

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

Critical circumstances were alleged with respect to imports of CTL plate from Brazil and Turkey. On September 7, 2016, DOC preliminarily found that critical circumstances exist with respect to all exporters from Brazil and Turkey, and DOC continues to do so for the final determinations. Consequently, US Customs and Border Protection will be instructed to impose provisional measures retroactively on entries of CTL plate from Brazil and Turkey effective 90 days prior to publication of the preliminary determinations in the *Federal Register*.

The US International Trade Commission (ITC) is scheduled to make its final injury determinations on or around January 13, 2017. If the ITC makes affirmative final determinations that imports of the subject merchandise from Brazil, South Africa, and Turkey materially injure or threaten material injury to the domestic industry, DOC will issue AD orders.

## Multilateral Policy Highlights

### Suspension of the Environmental Goods Agreement Negotiations

A Ministerial meeting of participants in the negotiations on an Environmental Goods Agreement (EGA) held from December 3-4 failed to make progress, and the negotiations have now been suspended until 2017. The negotiations had struggled in the past four months because of China's concerns about product coverage and about creating "free rider" benefits for countries that would not be parties to the EGA, especially large developing countries. Uncertainty about the future course of US trade policy under President-elect Donald Trump made it difficult to engage in a final round of exchanging concessions that might have addressed China's concerns. WTO Director-General Roberto Azevedo, concluded that "... the knowledge and understanding gained in these discussions will help us to move forward in the near future".

The issue of which products were to be covered by the EGA became a major area of disagreement in the past four months of this negotiation. The list of products was steadily whittled down to accommodate the concerns of the participants, from over 400 products at the beginning of the year to a final list of 261 products that was tabled last weekend for Ministerial consideration. At the meeting, China rejected the list without comment, signaling to other participants that it was not prepared to continue negotiations on this basis.

China also remained intransigent at the meeting over two other aspects of the EGA. One aspect was the length of time to be given to China to complete its elimination of tariffs on covered products. China sought relatively long phase-out periods, of up to 15 years, for certain products, claiming that its developing country status necessitated that the removal of protection for its domestic industry should take place only gradually. Other participants, including the United States, were not willing to countenance such long phase-out periods.

The second aspect was building provisions into the EGA that would prevent "free riding" by non-parties. Free riding could have occurred if the benefits of tariff elimination by EGA parties were applied on the Most-Favored-Nation basis to all other WTO Members who would not be obliged to open their own markets for EGA products in return. Reportedly, the potential for certain large developing countries to benefit from such an arrangement was a particular concern for China. In the past year China proposed various solutions to prevent the problem of free riders from occurring, including a forward-looking "snap-back" provision that would have negated the obligations of the EGA parties to eliminate their tariffs if the "critical mass" of trade covered by the EGA were to fall below a certain

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proportion, which China suggested at one stage should be 70 percent. None of the proposals put forward by China were accepted by the other EGA participants, and at the Ministerial meeting last weekend China reverted to stating simply that it could not accept the EGA unless it included a “critical mass” provision to take care of its concerns about free riders. China did not state what proportion of global trade it would consider to amount to a “critical mass”. The 18 participants in the EGA negotiations (including the 28 EU member states) account for around 80 percent of global trade in products that were likely to be covered by the EGA, suggesting that China now views this proportion as being too low.

## China Requests Consultations with United States and European Union over Non-Market Economy Methodologies

On December 12, 2016, China filed requests for consultations with the United States and the European Union regarding their continued application of non-market economy (NME) methodologies to Chinese exporters.<sup>5</sup> China’s requests were filed just one day after the expiry of the provision in China’s WTO accession protocol that has allowed other Members for 15 years to use anti-dumping methodologies that are “not based on a strict comparison with domestic prices or costs in China” because of their designation of China as a “non-market economy”. These disputes may have important commercial and legal implications.

China argues that under paragraph 15 of its WTO Accession Protocol, WTO Members were required to terminate the use of the NME methodologies no later than December 11, 2016. China argues that the provisions of the Anti-Dumping Agreement and the GATT which provide the standard method for the calculation of normal value should now apply to imports from China. Both the European Union and the United States have thus far refused to extend market economy status to China.

### Recent WTO Discussions

China acknowledged in the WTO Council for Trade in Goods last July that other WTO Members would not be obliged to grant it automatic market economy status in their anti-dumping investigations once Article 15(a)(ii) of its Accession Protocol expired on December 11, 2016. However, China stated that the expiration of that provision would “eliminate the legal basis” for other Members to discriminate against Chinese imports in anti-dumping investigations and would require national investigating authorities to apply the methodologies permitted under GATT Article VI and the WTO Anti-Dumping Agreement, specifically to start using prices and costs reported by Chinese companies to calculate anti-dumping duties rather than relying on prices and costs in third countries.

In response at that time, the United States said that there was “little doubt that China’s market reforms have fallen below expectations”, especially with respect to its steel and aluminium industries, and that paragraph 15(a)(i) of China’s Accession Protocol, which did not expire on December 11, stated that only when China established that it was a market economy under a Member’s domestic law would paragraph 15(a) expire entirely. This, the United States said, would allow it to continue using for anti-dumping purposes “... a methodology that is not based on a strict comparison with domestic prices or costs in China ...”. The United States has not stated publicly what market economy standard it would apply under paragraph 15(a)(i) nor what anti-dumping methodologies it would apply if that standard were not met.

### Requests for Consultations

Now that Paragraph 15(a)(ii) of China’s Accession Protocol has expired, China has filed two requests for consultations challenging the relevant laws or regulations at issue:

- **Section 773 of the US Tariff Act of 1930** allows the US Department of Commerce (DOC) to use third country “market economy” prices for the calculation of normal value for exports from a country that the United States designates as a non-market economy. DOC designated China a “non-market economy” under Section

<sup>5</sup> Click [here](#) to view the request for the EU and [here](#) to view the request for the United States.



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771(18)(c) of the 1930 Tariff Act in 2006 and the Act states that a determination “... shall remain in effect until revoked ...”, which it has not been to date. China contends that those provisions are inconsistent with US obligations under the WTO Anti-Dumping Agreement and the GATT 1994.

- **Articles 2(1) to 2(7) of the EU’s “Basic Regulation” of 2016** cites China as a “non-market economy” and states that normal value shall be determined on the basis of prices or constructed value in a surrogate “market economy” third country in the event that an exporter is unable to substantiate that “market economy” conditions prevail in the manufacture and sale of its products. China contends that those provisions are inconsistent with EU obligations under the WTO Anti-Dumping Agreement and the GATT 1994. China notes that legislative processes that could lead to changes to these provisions of the Basic Regulation are underway in the EU and its request for consultations with the EU covers also the outcome of these processes. China’s reference is to modifications to the EU’s trade defense instruments that the EU Commission proposed in 2013 but that only now, in somewhat modified form, have been approved by the EU member states.

Each challenge implicitly reiterates China’s statements to the WTO earlier this year, *i.e.*, while formal “graduation” is not required, WTO Members may no longer apply the standard NME methodology to Chinese imports.

## Implications

As noted above, China’s challenges at the WTO could have important commercial and legal implications. First, the refusal of important WTO Members to grant China market economy treatment and China’s consequent challenge will aggravate the existing uncertainty surrounding anti-dumping methodologies applied to China. Second, removal of the NME designation would make Chinese exporters more competitive in key export markets like the United States and the European Union. Finally, the WTO rulings themselves could affect how large markets like the United States and the European Union treat NME factors like state ownership, subsidies and price regulations outside of the NME context (*i.e.*, to calculate normal value and dumping margins in anti-dumping investigations of market economy exporters). A successful challenge to the US and EU NME methodologies also might affect methodologies applied by other major economies.

## Results of the 13th Trade Policy Review of the United States

The Trade Policy Review (TPR) of the United States held on December 19 and 21 was, in the main, a very positive exercise that highlighted the longstanding commitment of the United States to open trade and investment policies and to the core principles of the multilateral trading system. However, it was also the first opportunity that Members have had in the WTO to comment on the future trade policy of President-elect Trump. In that regard, the general tone was one of concern about “persistent anti-trade rhetoric” and the possibility of this leading the United States to disengage from the WTO and to take a more protectionist path that could damage global trade and place the multilateral trading system under great stress.

In most respects, the Secretariat documentation for this TPR and the comments of Members at the meeting paid tribute to the openness of the US economy to trade in goods and services and the key role that this plays in helping to spread growth and development around the globe.

Nonetheless, some areas of trade policy came in for criticism, most particularly increased use by the United States of trade remedy measures in the past few years which several Members referred to as having a de-stabilizing effect on trade flows. China was particularly vocal on this point noting that it was currently the target of 102 measures and criticizing the United States for continuing to use the “surrogate country” methodology against China even after the expiry of the “non-market economy” provision in China’s Protocol of WTO Accession. Other Members, including Japan, Taiwan, Norway, Korea and Vietnam, also criticized various aspects of the US trade remedy policy, including continued use of zeroing.

Other trade policies that were singled out for commentary were as follows:



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- The 2014 Farm Bill was considered by some agricultural-exporting Members to have increased trade-distortion and the protection of farmers by moving from direct income payments to insurance and risk management programs whose contribution to domestic agricultural support was difficult to calculate. More transparency was demanded of the United States in this area.
  - “Buy American” provisions were criticized for restricting access to federal and sub-federal government procurement programs.
  - China took issue with the Committee on Foreign Investment in the United States (CFIUS) review process that it said used a poorly-defined principle of “national security” and un-transparent process to unfairly block mergers and acquisitions of US companies.
  - Lack of information about standards and technical regulations at federal and sub-federal levels was considered by some to create a significant market access barrier.
  - Some felt that some of the new generation of Sanitary and Phytosanitary (SPS) measures on food safety were unnecessarily burdensome and created barriers to trade.

Some Members, including China, were outspoken in their concerns about the future of US trade policy under President-elect Trump and in particular the effect that this might have on the multilateral trading system. In a parting commentary, Deputy USTR Michael Punke noted that since World War II twelve consecutive US presidents had remained committed to “open markets and to the rules-based multilateral trading system”.

## **United States Requests Consultations With China Over Administration of Tariff-Rate Quotas for Wheat, Rice and Corn**

On December 15, 2016, the United States requested consultations with China regarding China’s administration of tariff-rate quotas (TRQs) for wheat, rice, and corn.<sup>6</sup> The United States filed the request one week after requesting the establishment of a panel in a separate dispute over China’s alleged provision of domestic support for the same products. The new request for consultations alleges that China administers its TRQs for wheat, rice, and corn in a non-transparent manner that inhibits the filling of each TRQ, thereby violating provisions of China’s Accession Protocol and the GATT. Though the United States has raised concerns about the transparency of China’s TRQ system for agricultural products for more than a decade, this is the first time that the United States has sought to address the issue through formal dispute settlement proceedings at the WTO.

### **Details of the request**

The United States alleges that China appears to administer TRQs for wheat, short- and medium-grain rice, long-grain rice, and corn inconsistently with paragraph 1.2 of Part I of China’s Accession Protocol because: (i) China has failed to administer its TRQs on a transparent, fair, and predictable basis; (ii) China has failed to ensure that it administers its TRQs using clearly specified administrative procedures and requirements; and (iii) China has failed to ensure that it administers its TRQs using administrative procedures and requirements that would not inhibit the filling of each TRQ.

In addition, the United States alleges that China’s administration of the above TRQs is inconsistent with the following provisions of the GATT: Article X:3(a), because China has failed to administer its TRQs in a reasonable manner; Article XI:1, because China institutes or maintains prohibitions or restrictions on its importation of each product other than “duties, taxes, or other charges”; and Article XIII:3(b), because China has failed to provide public notice of quantities permitted to be imported under each TRQ and of changes to quantities permitted to be imported under each TRQ.

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<sup>6</sup> Click [here](#) to view the request.

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The request lists several Chinese legal instruments that govern the administration of the relevant TRQs, but it does not provide further details regarding the alleged violations. Similarly, a press release from the Office of the US Trade Representative (USTR) claims that “China’s application criteria and procedures are unclear, and China does not provide meaningful information on how it actually administers the tariff-rate quotas”, but does not provide further details. The press release does allege, however, that the aforementioned TRQs “persistently do not fill” despite lower global prices that favor the importation of grains into China. According to the US Department of Agriculture, the value of the unused portion of the TRQs in 2015 was approximately USD 3.5 billion.

## Next steps

If the United States and China fail to resolve this issue through consultations, the United States may request the establishment of a panel to adjudicate the issue. The United States may file its first panel request 60 days after filing the request for consultations (*i.e.*, on February 13, 2017 or thereafter). Consequently, unless the issue is resolved through consultations, the incoming Trump administration will be responsible for determining whether to request a panel in this dispute. Though President-elect Trump’s transition team has not commented publicly on the dispute, his campaign platform included a written promise to bring additional WTO disputes against China. Moreover, several influential Members of Congress have expressed support for USTR’s decision to initiate the dispute. Thus, there is a strong chance that the Trump administration will eventually request a panel to adjudicate the issue if it is not resolved through consultations.

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