US & Multilateral Trade Policy Developments

Japan External Trade Organization

February 2017

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US Trade Reports

TPP Member Responses to the United States' Withdrawal

The Trump administration's recent decision to withdraw the United States from the Trans-Pacific Partnership (TPP) has elicited a wide range of responses from the remaining TPP signatories. While some governments have argued that the remaining signatories should seek to implement a version of the TPP without the United States, others have indicated that they will instead aim to negotiate bilateral free trade agreements (FTAs), or that they will turn towards other regional initiatives such as the Regional Comprehensive Economic Partnership (RCEP) negotiations. Several governments also have suggested that new entrants – namely China and South Korea – should be invited to join the TPP in place of the United States. This report provides a country-by-country overview of the positions taken by the TPP signatories following the United States' withdrawal in order to illustrate how trade policies in the Asia-Pacific region might progress.

On March 14-15, 2017, trade ministers from several of the TPP signatories as well as China, South Korea, and Colombia will meet in Viña del Mar, Chile for a "High-level Dialogue on Integration Initiatives in the Asia-Pacific Region." According to the Chilean government, which organized the summit, the purpose of the meeting will be to discuss how the remaining TPP signatories should proceed in light of the United States' withdrawal. To date, the governments of all TPP signatories except Vietnam, the United States, and Brunei have confirmed that they will participate in the summit. This meeting, and subsequent meetings such as the APEC Trade Ministerial Summit in Hanoi in May 2017, could shed further light on how the remaining TPP signatories intend to proceed.

Australia

On February 7, 2017, the Senate Foreign Affairs, Defence and Trade References Committee authorized to review the TPP recommended that Parliament defer ratification of the Agreement. In its report, the Committee recommended that TPP ratification should no longer be a legislative priority given that Australia, together with other TPP signatories, is in the process of looking into other alternatives to implement the TPP. Previously, Australian Trade Minister Steve Ciobo had called upon Parliament to continue domestic ratification of the TPP to reflect the importance of the Agreement to Australia. In his view, ratification would represent Australia's rejection of protectionism and support for market liberalization as solutions for long-term job creation and sustainable growth. However, the Committee viewed that Australia should put ratification on hold and instead focus on the possibility of future TPP arrangements.

Subsequently, on February 15, Australian Ambassador to the United States Joe Hockey stated that "we are certainly proceeding after discussions with the other countries to have a 12 minus 1 TPP and go ahead without the United States, and we still certainly encourage others to join[.]" Ambassador Hockey then suggested that countries such as China, South Korea, Indonesia, and others that are "strategically very important" to Australia might be invited to join the TPP, echoing a similar statement issued by Minister Ciobo on January 24. Minister Ciobo has also revealed to the press that Australia has discussed possible ways forward with Canada, Mexico, Japan, New Zealand, Singapore, and Malaysia, and he has stated that the Trump administration's actions on the North American Free Trade Agreement (NAFTA) also will dictate how Australia (and other TPP signatories) might proceed on the TPP moving forward.

Brunei

On January 26, 2017, the Ministry of Foreign Affairs and Trade (MOFAT) issued a formal statement in response to the US executive order to withdraw from the TPP, noting that Brunei "remains committed in pursuing free and open trade within the context of multilateral trade rules" and will actively engage with TPP member countries to determine its next steps. In addition, the statement adds that Brunei will continue to participate in ongoing bilateral and regional initiatives, likely referring to the ongoing realization of the ASEAN Economic Community (AEC) and the RCEP.

Brunei is one of the original four founding member states of the precursor to the TPP, *i.e.*, the Trans-Pacific Strategic Economic Partnership Agreement or P-4 signed in 2005 by Brunei, Chile, New Zealand, and Singapore. At this time, however, it remains unclear whether Brunei will participate in the March 2017 TPP summit in Chile.

Canada

On January 20, 2017, Canadian Trade Minister François-Philippe Champagne indicated that Canada will consider the "TPP-11" approach being proposed by Australia, as well as the negotiation of bilateral FTAs with the TPP parties and with other Asian countries. The Canadian government subsequently confirmed that Minister Champagne will participate in the March summit in Chile to discuss the future of the TPP.

Minister Champagne has stated that while Canada is still evaluating its options in light of the United States' withdrawal from the TPP, the Canadian government has "enormous interest" in negotiating new FTAs with Asian countries, including Japan, India, Indonesia, Malaysia, and China (with which Canada launched exploratory talks in September 2016). However, the Canadian government has not made any formal announcements on its post-TPP negotiating agenda, and Minister Champagne noted that the government's main priority in the near term is to ensure that the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union enters into force.

Chile

On January 23, 2017, Chilean Foreign Minister Heraldo Munoz held a press conference to discuss the Chilean government's position regarding the United States' withdrawal from the TPP. Minister Munoz stated that Chile remains committed to deepening trade integration with the remaining TPP countries and the Asia-Pacific region, despite the fact that "the TPP as we know it is no longer on the table." Minister Munoz also announced that Chile has invited trade ministers from the TPP countries, as well as trade ministers from China, South Korea and Colombia, to meet in Chile from March 14-15 to discuss how to proceed with the TPP.

Chilean Trade Minister Paulina Nazal has indicated that Chile's objective in hosting the March summit is to advance a "TPP-type" agreement that includes the remaining TPP signatories and several new participants – namely China, South Korea, and Colombia. On January 25, Minister Nazal stated that Chile would be "very happy" to have China participate in such an agreement, as well as South Korea and Colombia, and that Chile will seek to discuss these possibilities at the March summit. Chile already has bilateral FTAs in force with all of the TPP parties and with China, South Korea, and Colombia. However, Chile was aiming to upgrade those existing agreements through the TPP, and through bilateral negotiations it launched in 2016 to expand its FTAs with China and South Korea.

Japan

On January 24, 2017, following the United States' withdrawal from the TPP, Deputy Chief Cabinet Secretary Koichi Hagiuda reiterated Prime Minister Shinzo Abe's view that the TPP would be "meaningless" without the United States, stating that "the fundamental balance of benefits" in the Agreement would be lost without US participation. Subsequently, including during Prime Minister Abe's visit to the United States from February 10- 12, Japanese government officials have reiterated their commitment to the TPP and stated that the government intends to continue discussing the strategic and economic benefits of the Agreement with the Trump administration. During the visit, President Trump and Prime Minister Abe agreed to create a new bilateral dialogue to discuss trade, investment and other economic issues, but to date neither government has publicly expressed support for bilateral FTA negotiations.

More recently, on February 28, in a telephone conference between Minister of State for Economic and Fiscal Policy Nobuteru Ishihara and Australian Trade Minister Ciobo, Minister Ishihara commented that the economic and strategic significance of TPP remains the same even without the United States, likely alluding to Japan's flexibility for a potential TPP-11 approach while recognizing the balance between the importance of mega-FTAs and the non-participation of the United States. The Japanese government will participate in the March summit in Chile, although senior officials at the ministerial level are unable to attend in light of the Diet schedule.

Malaysia

On February 16, 2017, Malaysian Trade and Industry Minister Mustapa Mohamed revealed that Malaysia will determine its stance on the future of the TPP on the sidelines of the APEC Trade Ministerial Summit scheduled to take place in Hanoi on May 20-21, 2017. According to Minister Mustapa, trade ministers from eleven TPP member states (excluding the United States) will officially meet in Hanoi to discuss the future fate of the TPP. In his view, Malaysia remains open to any proposals including (i) one on continuing to implement the TPP without the United States (the TPP-11 approach); and (ii) the other on rejecting the TPP and engaging bilaterally with individual TPP member countries. He indicated, however, that engaging in bilateral FTAs would be a more realistic option for Malaysia.

Minister Mustapa's remarks represent the second official position taken by Malaysia following the US announcement to withdraw from TPP. On January 21, 2017, he stated that Malaysia's policy priorities are threefold: (i) deepening economic integration with ASEAN; (ii) pushing for the conclusion of the RCEP negotiations; and (iii) pursuing bilateral FTAs with individual TPP members.

Minister Mustapa has also indicated that Malaysia will continue to engage with the United States to enhance bilateral trade and economic relations as the United States is Malaysia's third largest trading partner and a major source of investment. Still, against the backdrop of rising protectionist sentiments in the United States, Minister Mustapa reaffirmed Malaysia's commitment to remain open for foreign businesses. In particular, he noted that foreign investments have always played a vital role in Malaysia's economic development, and that the Malaysian government would continue to welcome high quality investments.

Mexico

On January 31, 2017, Mexican Minister of Economy Ildefonso Guajardo announced that Mexico will pursue bilateral FTAs with the six TPP signatories that do not already have FTAs with Mexico (*i.e.*, Australia, Brunei, Malaysia, New Zealand, Singapore, and Vietnam). Minister Guajardo also announced that Mexico will aim to accelerate its ongoing negotiations with the European Union (EU) to update the EU-Mexico FTA (including by scheduling two additional negotiating rounds for April and June of 2017) and will seek to resume FTA negotiations with South Korea. Both announcements reflect the Mexican government's interest in strengthening trade ties with new and existing trading partners in light of the United States' withdrawal from the TPP and the uncertainty about the Trump administration's objectives for the renegotiation of the NAFTA.

Prior to making the above announcements, Minister Guajardo had suggested that Mexico would be open to the TPP-11 approach. At the November 2016 APEC Summit in Lima, Peru, Minister Guajardo stated that the remaining TPP signatories would "press ahead with this agreement independently of what Washington decides." He also suggested that the remaining signatories should consider amending the TPP's entry into force provisions so that the agreement could enter into force without the United States' ratification. At this stage, however, it is unclear whether Mexico remains open to the TPP-11 approach given its decision to pursue bilateral FTAs with several of the remaining signatories.

New Zealand

On January 24, 2017, New Zealand's Prime Minister Bill English held a press conference to address the government's position concerning the United States' withdrawal from the TPP. He revealed that the government would join other TPP member states, including Australia, Japan and Singapore, to continue efforts to implement the TPP without the United States. He added that the US decision to reduce influence in the region would create other trade alternatives, including the possibility of China joining the TPP. Meanwhile, bilateral relations with the United States are expected to remain very important to New Zealand for economic, defense and security purposes. Notably, National Trade Council Director Peter Navarro indicated on January 30, 2017 that the United States might seek to engage with New Zealand on a bilateral basis.

The TPP is New Zealand's first FTA with the United States, Japan, Canada, Mexico, and Peru. Without the TPP, New Zealand will likely pursue bilateral FTAs with these trading partners. In the meantime, New Zealand is a negotiating party to the RCEP. PM English indicated that if the TPP fails to materialize, New Zealand may shift its focus towards the RCEP negotiations. Besides RCEP, New Zealand is scheduled to commence bilateral negotiations with the EU, while the negotiating status with India remains unclear as both sides have been working to reach common ground on a path forward to conclusion. New Zealand also commenced a scoping exercise on a potential bilateral FTA with the United Kingdom; however, formal FTA negotiations cannot begin until the United Kingdom officially leaves the EU.

Peru

On January 24, 2017, Peruvian President Pedro Pablo Kuczynski suggested that Peru should work with the other TPP countries, as well as with China and India, to negotiate a new regional trade agreement that would incorporate the "best elements" of the TPP. In addition, Peruvian Trade Minister Eduardo Ferreyros has stated that Peru is interested in negotiating bilateral FTAs with Australia and New Zealand – two TPP parties with which Peru does not yet have an FTA. In this regard, Minister Ferreyos expressed hope that the TPP text could serve as a starting point for these bilateral negotiations, allowing the negotiations to be concluded quickly. However, he also emphasized that his priority in the near term will be the negotiation of a bilateral FTA with India. Those negotiations are expected to begin in the first half of 2017 and will cover trade in goods, services and investment.

Singapore

On January 25, 2017, Singapore's Ministry of Trade and Industry (MTI) issued its statement to acknowledge the United States' decision to withdraw from TPP. According to the statement, while Singapore is committed to pursuing greater regional integration, it acknowledged that without the participation of the United States, the TPP as signed cannot come into effect. Still, Singapore remains open to discuss with other TPP partners on the way forward and possible alternatives to push for ratification of TPP with like-minded signatories even without the United States. Singapore will participate in the March 2017 TPP summit to discuss such options. In the meantime, official word from the government is that Singapore will focus on other regional integration initiatives, including the RCEP and the proposal for a Free Trade Area of the Asia-Pacific (FTAAP) agreement.

Singapore and the United States have shared a robust and long-standing bilateral economic relationship in which the United States has had a significant trade surplus with Singapore. Moving forward, Singapore will likely continue to work with the United States to enhance the bilateral partnership.

Vietnam

On January 24, 2017, the Ministry of Foreign Affairs released a general statement regarding the United States' decision to withdraw from the TPP, stating that despite the demise of TPP, Vietnam will continue its economic reforms in line with TPP commitments, particularly in relation to state-owned enterprise (SOE) equitization, stronger labor and environment protections, higher health standards, and other regulatory reforms to facilitate foreign investment. Deputy Head of the National Assembly Economic Committee, Nguyen Duc Kien, commented in mid-February that the "end of TPP would push [Vietnam] to expand in other markets."

Similar to the other ASEAN TPP members, Vietnam is likely to shift its focus in the coming months towards the RCEP negotiations and ASEAN integration as a means to expand trade and investment opportunities for Vietnamese manufacturing sectors. With respect to non-ASEAN markets, Vietnam implemented an FTA with Russia under the Eurasian Economic Union (EAEU) in October 2016 and has signed an FTA with the EU, although ratification of the EU agreeement remains pending. On February 16, the European Chamber of Commerce in Vietnam in collaboration with the EU-Vietnam Business Network jointly organized a seminar in Ho Chi Minh City on *"European Union-Vietnam FTA (EVFTA): a Game Changer for Vietnam in ASEAN?"* The seminar, which was attended by EU and local business operators, discussed ways for EU business to capitalize on the demise of the TPP and to enhance EU-Vietnam bilateral relations through the FTA.

US General Trade Policy Highlights

SEC Considers Changes to Conflict Minerals Rule and 2014 Guidance; Seeks Public Comments by March 17, 2017

On January 31, 2017, the US Securities and Exchange Commission's (SEC) Acting Chairman Michael Piwowar announced that the SEC is considering changes[1] to its conflict minerals disclosure rule and to its April 2014 guidance regarding the implementation of the rule.[2] In 2014, the SEC stayed the effective date of certain portions of the rule (and issued guidance to that effect) after elements of the rule were invalidated by the US Court of Appeals for the District of Columbia Circuit (DC Circuit) on First Amendment grounds.[3] The DC Circuit remanded the case to the district court for further consideration, and the SEC's guidance has remained in effect while the litigation is pending.

Notably, when the SEC issued its guidance in April 2014, then-SEC Commissioner Piwowar expressed opposition to the rule and to the SEC's decision to stay only certain portions thereof. At the time, Commissioner Piwowar argued that the rule had been "profoundly counterproductive" and that "the entirety of the rule should be stayed, and no further regulatory obligations should be imposed, pending the outcome of this litigation."[4] Now, following his designation as Acting SEC Chairman by President Trump on January 23, Mr. Piwowar has reiterated his prior criticism of the rule and of the SEC's guidance, and he has directed the SEC staff to "consider whether the 2014 guidance is still appropriate and whether any additional relief is appropriate in the interim." Consequently, the SEC has requested comments from interested persons on all aspects of the rule and the guidance, with a deadline of March 17, 2017.

Background

On April 14, 2014, the DC Circuit partially invalidated on free speech grounds the portion of the rule that requires companies to describe certain products in their SEC filings (and on their websites) as "not DRC conflict free."[5] Specifically, the DC Circuit held that the government could not compel companies to label their products with what might be viewed as a negative and morally charged designation. The DC Circuit remanded the case to the district court for further consideration.

Subsequently, on April 28, 2014, then-SEC Commissioners Michael Piwowar and Daniel Gallagher urged the SEC to stay the rule in its entirety pending final resolution of the litigation. The Commissioners argued that the First Amendment violations noted by the DC Circuit "permeate all the required disclosures" in the rule, and that "a full stay is essential because the district court could (and, in our view, should) determine that the entire rule is invalid." They further argued that the rule "has been profoundly counterproductive, resulting in a de facto embargo on Congolese tin, tantalum, tungsten, and gold, thereby impoverishing approximately a million legitimate miners[.]" They also argued that Congress should consider revising the underlying statute (Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act)[6] to address this issue and to "save investors billions of dollars in compliance costs[.]"

On April 29, 2014, Keith F. Higgins (then-Director of the SEC Division of Corporation Finance) rejected these arguments stating that, subject to any further action that may be taken either by the SEC or a court, the SEC would continue to expect all reports (including the "Form SD") required under the rule to be submitted. In light of the DC

[1] Acting Chairman Piwowar's statements regarding the SEC's reconsideration of the rule can be viewed **here** and **here**.

[2] 17 C.F.R. § 240 and 249b

[3] SEC.gov | *Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule*. US Securities and Exchange Commission, 29 Apr. 2014. Web. 08 Feb. 2017. <**https://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541681994**>

[4] SEC.gov | *Joint Statement on the Conflict Minerals Decision.* US Securities and Exchange Commission, 28 Apr. 2014. Web. 08 Feb. 2017. <**https://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541665582**>

[5] *National Association of Manufacturers, et al. v. SEC, et al.*, No. 13-5252 (D.C. Cir. April 14, 2014). The acronym "DRC" refers to the Democratic Republic of the Congo.

[6] 15 U.S.C. § 78m(p)

Circuit's decision however, Director Higgins released a statement amending, but not entirely staying, the requirements of the rule. The statement provided the following guidance to industry:

- The Form SD, and any related Conflict Minerals Report, should comply with and address those portions of the rule and Form SD that the DC Circuit upheld. Thus, companies that do not need to file a Conflict Minerals Report should disclose their reasonable country of origin inquiry and briefly describe the inquiry they undertook.

- For those companies that are required to file a Conflict Minerals Report, the report should include a description of the due diligence that the company undertook. If the company has products that fall within the scope of Items 1.01(c)(2) or 1.01(c)(2)(i) of Form SD, it would not have to identify the products as “DRC conflict undeterminable” or “not found to be ‘DRC conflict free,’” but should disclose, for those products, the facilities used to produce the conflict minerals, the country of origin of the minerals and the efforts to determine the mine or location of origin.

- No company is required to describe its products as “DRC conflict free,” having “not been found to be ‘DRC conflict free,’” or “DRC conflict undeterminable.” If a company voluntarily elects to describe any of its products as “DRC conflict free” in its Conflict Minerals Report, it would be permitted to do so provided it had obtained an independent private sector audit (IPSA) as required by the rule. Pending further action, an IPSA will not be required unless a company voluntarily elects to describe a product as “DRC conflict free” in its Conflict Minerals Report.

Subsequently, on May 2, 2014, the SEC stayed the effective date for compliance with those portions of the rule that were subject to the DC Circuit’s constitutional holding, pending the completion of judicial review.[7] The order instructed companies to refer to the above guidance for compliance purposes.

Reconsideration of the rule and guidance in 2017

President Trump designated Commissioner Piwowar as Acting Chairman of the SEC on January 23, 2017. Subsequently, on January 31, Acting Chairman Piwowar issued two separate statements concerning the conflict minerals rule. The first, shorter statement notes that “the temporary transition period provided for in the Rule has expired” and explains that “[i]n light of this, as well as the unexpected duration of the litigation, I am directing the staff to consider whether the 2014 guidance is still appropriate and whether any additional relief is appropriate in the interim.”

The second, lengthier statement provides a more detailed rationale for Acting Chairman Piwowar’s decision, and reiterates his earlier criticisms of the rule and the SEC’s partial stay thereof. It argues that the disclosure requirements “have caused a de facto boycott of minerals from portions of Africa” and that “legitimate mining operators are facing such onerous costs to comply with the rule that they are being put out of business.” Moreover, the statement argues that “the withdrawal from the region may undermine U.S. national security interests by creating a vacuum filled by those with less benign interests.”

Acting Chairman Piwowar’s reference to national security concerns is potentially significant because Section 1502 provides that the SEC may revise or temporarily waive the requirements of the rule for up to two years if the President determines that such revision or waiver is in the national security interest of the United States. Several recent press reports have stated that President Trump is planning to issue an executive order scaling back or waiving the rule pursuant to this authority, though this has yet to be confirmed by the White House. Congressional Republicans have also criticized the rule, and the House of Representatives in July 2016 approved legislation that would have withheld federal funding for the SEC’s efforts to enforce the rule. Thus, while it is unclear at this stage what form of relief (if any) the SEC might provide from the requirements of the rule, the current US political climate appears amenable to such changes.

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[7] See *In the Matter of Exchange Act Rule 13p-1 and Form SD, Order Issuing Stay* (May 2, 2014), available at **http://www.sec.gov/rules/other/2014/34-72079.pdf**

Trump Administration Considers Use of Countervailing Duty Law to Address Currency Manipulation

According to recent press reports, the Trump administration is considering using the US countervailing duty law to address alleged currency "manipulation" by China and other countries. Specifically, the administration is considering measures that would require the Department of Commerce (DOC) to treat a country's currency undervaluation as a countervailable subsidy, thus potentially subjecting imports from that country to remedial duties based thereupon. This policy would be a departure from DOC's long-standing practice of not using a country's currency practices as grounds to apply countervailing duties.

An effort by the Trump administration to applying countervailing duties to currency undervaluation, particularly to target China, would likely encounter legal and practical obstacles. Whether implemented unilaterally at the administrative level or as a result of new congressional legislation, such a measure very likely would be challenged by US trading partners as a violation of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). Moreover, a unilateral policy change by the administration might also be challenged in US courts on the grounds that the measure is based on an impermissible construction of the statute.

Finally, given current economic conditions, it is not clear that a measure targeting currency undervaluation would result in increased countervailing duties on US imports from China, which reportedly is the intended target of these changes. Instead, the measure might actually benefit Chinese exporters by implicating imports from competitor countries such as Japan and Korea, given that (unlike China) IMF's most recent assessments have found their currencies to be undervalued. We discuss these legal and practical challenges in greater detail below.

Implementation of the measure

The Trump administration has not indicated whether it intends to implement the change unilaterally at the administrative level or, alternatively, by seeking congressional enactment of legislation authorizing the change. DOC arguably has the authority under the Tariff Act of 1930 to treat currency undervaluation as a countervailable subsidy,[8] and could therefore promulgate a rule to implement this change without any action being taken by Congress. For example, DOC could find that (i) foreign exporters' exchange of US Dollars earned from export sales in the United States for their home market currency is a "financial contribution" by the domestic government; (ii) this financial contribution confers a "benefit" equal to the difference between the amount of currency provided to the exporter and the amount that would have been given if the currency had been set by market forces; and (iii) the resulting "subsidy" is contingent upon exportation (and thus prohibited) because foreign exporters disproportionately benefit from the currency policy.

However, companies adversely affected by the measure might challenge DOC's unilateral action in US courts, arguing that the measure is based on an impermissible construction of the statute and that legislative amendments are needed to authorize such a change. This challenge could be supported by both the current text of the US CVD law, which does not clarify whether a nation's currency policy can actually be a financial contribution or a prohibited export subsidy, and the fact that Congress multiple times has considered legislation specifically amending US CVD law to address currency undervaluation. In particular (i) the House of Representatives (but not the Senate) approved currency CVD legislation during the 111th Congress; (ii) the Senate (but not the House) approved currency CVD legislation during the 112th Congress; (iii) currency CVD legislation was introduced in both chambers (but was not approved by either) during the 113th Congress; and (iv) currency CVD legislation was included in the Customs reauthorization bill approved by the Senate during the 114th Congress, but subsequently was removed from the final bill by a conference committee. These actions might permit US plaintiffs to argue that Congress is of the view that DOC currently lacks the legal authority to countervail currency undervaluation.

[8] Under both US law and WTO rules, a subsidy is defined as (i) a financial contribution (e.g., a direct transfer of funds, government provision of goods or services, or government revenue foregone) or an "income or price support" (ii) by a government authority; (iii) that confers a benefit on the recipient. A subsidy is countervailable where it is specific (i.e., where it is limited to an enterprise or industry or groups thereof or to a region; or where it is a prohibited export subsidy or import substitution subsidy).

Alternatively, the Trump administration could urge Congress to approve legislation authorizing or requiring DOC to treat currency undervaluation as a countervailable subsidy. Whether Congress would approve such legislation, however, is far from certain, given that Congress has frequently debated and failed to approve such legislation in recent years. Indeed, as noted above, similar currency legislation was introduced in the 111th, 112th, 113th, and 114th Congresses but failed to become law, and House Speaker Paul Ryan (R-WI) ensured that such legislation was removed from the final version of the Trade Facilitation and Trade Enforcement Act approved by Congress in February 2016. Given the uncertain prospects for congressional approval of any new currency legislation, the Trump administration might be left with little choice but to implement the change by regulation, despite the potential US legal challenges.

WTO challenges

Regardless of the manner in which the measure is implemented, the application of countervailing duties to currency undervaluation would very likely be challenged at the WTO. Such a challenge could include allegations that: (i) currency undervaluation cannot qualify as a “financial contribution” by a government as defined in Article 1.1 of the SCM Agreement (because it meets none of the types of financial contribution specifically listed therein, and there is nothing actually provided by the government to its exporters in most cases); and (ii) currency undervaluation is not a specific subsidy as defined in Article 2 of the SCM Agreement or a prohibited export subsidy under Article 3 (because domestic currency is available to all enterprises and industries, including those that do not export). Moreover, depending on the details of the measure, WTO Members might also dispute DOC’s methodology for calculating the benefit conferred by the alleged currency undervaluation, particularly where it contradicts current IMF views on countries’ currency values.

Practical Implications

As noted above, the Trump administration reportedly is considering the new countervailing duty measure as a means of combating alleged currency “manipulation” by China. However, it is not clear that a measure targeting currency undervaluation would lead to increased countervailing duties on imports from China (at least in the near term), given that IMF assessments have concluded since mid-2015 that the renminbi is no longer undervalued.[9]

Previous legislative proposals that would have treated currency undervaluation as a countervailable subsidy would have directed DOC to calculate the benefit conferred on producers using IMF data and methodologies (specifically, the methodologies described in the guidelines of the IMF’s Consultative Group on Exchange Rate Issues (CGER)).[10] However, the IMF in its July 2016 External Sector Report (which uses a revised version of the CGER methodologies) calculated a small, *positive* real effective exchange rate gap for the renminbi (which corresponds to an overvalued, rather than undervalued exchange rate). Similarly, the IMF in its 2015 country report on China concluded that “the real effective appreciation over the past year has brought the exchange rate to a level that is no longer undervalued”, and the IMF did not find the renminbi to be undervalued in 2016.[11]

These assessments suggest that, under current conditions, it would be difficult for DOC to make a finding that China’s currency policies confer a benefit through undervaluation. However, the currency policies of other US trading partners such as Japan, Korea, Sweden, and Malaysia (among others) might be found to confer a benefit under a new US currency/CVD policy, as the IMF’s most recent assessments have found their currencies to be undervalued

[9] International Monetary Fund. *IMF Executive Board Concludes 2015 Article IV Consultation with the People’s Republic of China*. 14 Aug. 2015. Web. <**https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr15380**>.

[10] *Methodology for CGER Exchange Rate Assessments*. Research Department, International Monetary Fund, 8 Nov. 2006. Web. <**https://www.imf.org/external/np/pp/eng/2006/110806.pdf**>.

[11] *2015 Article IV Consultation— Press Release; Staff Report; and Statement by the Executive Director for the People’s Republic of China*. IMF Country Report No. 15/234. International Monetary Fund, Aug. 2015. Web. <**https://www.imf.org/external/pubs/ft/scr/2015/cr15234.pdf**>.

(see Annex I below). Thus, it is possible that the application of countervailing duties to currency undervaluation would have little effect on China, while leading to increased countervailing duties on other major US trading partners and some of Chinese exporters' main competitors for US market share (though this would depend on the details of the measure). As such, the new policy might have the opposite effect of that reportedly intended by the Trump administration: enhancing Chinese imports' competitiveness in the US market.

Annex I: **Countries Estimated to Have Undervalued Currencies Using the IMF's External Balance Approach (EBA) Methodology, 2015***
Brazil
Canada
Euro Area
Indonesia
Japan
Korea
Malaysia
Mexico
Poland
Russia
South Africa
Sweden
Thailand
Source: *2016 External Sector Report.* Figure 15. International Monetary Fund, 27 July 2016. Web. <https://www.imf.org/external/np/pp/eng/2016/072716.pdf>. *Note: The IMF's EBA methodology is a revised version of the CGER methodology, and thus, the EBA methodology most closely resembles the approaches proposed in recent US currency CVD legislation. However, it should be noted that the IMF staff prepares its own estimates of the level of undervaluation, and these staff estimates often differ substantially from the EBA-assessed levels.

Petitions and Investigations Highlights

US Department of Commerce Issues Affirmative Preliminary Determination in AD Investigation of Dioctyl Terephthalate from Korea

On January 27, 2017, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the anti-dumping duty (AD) investigation of dioctyl terephthalate (DOTP) from Korea.[12] In its investigations, DOC preliminarily determined that imports of the subject merchandise from Korea were sold in the United States at dumping margins ranging from 3.96 to 5.75 percent.

The merchandise covered by this investigation is DOTP, regardless of form. DOTP that has been blended with other products is included within the scope when such blends include constituent parts that have not been chemically reacted with each other to produce a different product. For such blends, only the DOTP component of the mixture is covered by the scope of the investigation. The subject merchandise is currently classified under subheading 2917.39.2000 of the Harmonized Tariff Schedule of the United States (HTSUS), and may also enter under subheadings 2917.39.7000 or 3812.20.1000.

DOC is scheduled to announce its final determination in this investigation on or around June 13, 2017. If DOC makes an affirmative final determination, and the US International Trade Commission makes an affirmative final determination that imports of DOTP from Korea materially injure or threaten material injury to the domestic industry, DOC will issue an AD order.

According to DOC, imports of DOTP from Korea were valued at an estimated USD 31.2 million in 2015.

US Department of Commerce Issues Affirmative Preliminary Determinations in AD Investigations of Finished Carbon Steel Flanges from India, Italy, and Spain

On January 27, 2017, the US Department of Commerce (DOC) announced its affirmative preliminary determinations in the anti-dumping duty (AD) investigations of finished carbon steel flanges from India, Italy, and Spain.[13] 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
India	8.58 to 12.56 percent
Italy	79.17 to 204.53 percent
Spain	18.81 to 24.42 percent

The products covered by these investigations are carbon steel flanges that have undergone further processing after forging, including, but not limited to, beveling, bore threading, center or step boring, face machining, taper boring, machining ends or surfaces, drilling bolt holes, and/or de-burring or shot blasting. The subject products are currently classified under subheadings 7307.91.5010 and 7307.91.5050 of the Harmonized Tariff Schedule of the United States (HTSUS), and may also enter under subheadings 7307.91.5030 and 7307.91.5070.

DOC is scheduled to announce its final determinations in these investigations on or around April 12, 2017, unless the statutory deadline is extended. If DOC makes affirmative final determinations, and the US International Trade Commission makes affirmative final determinations that imports of finished carbon steel flanges from India, Italy, and/or Spain materially injure or threaten material injury to the domestic industry, DOC will issue AD orders.

According to DOC, imports of finished carbon steel flanges from India, Italy, and Spain in 2015 were valued at an estimated USD 90.6 million, 31 million, and 26.8 million, respectively.

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

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

International Trade Commission Issues Affirmative Final Determinations in AD/CVD Investigations of Biaxial Integral Geogrid Products from China

On February 7, 2017, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of certain biaxial integral geogrid products ("geogrid products") from China that the US Department of Commerce (DOC) has determined are subsidized and sold in the United States at less than fair value.[14] DOC determined in January 2017 that imports of geogrid products from China received countervailable subsidies ranging from 15.61 to 152.50 percent and were sold in the United States at a dumping margin of 372.81 percent.

As a result of the ITC's affirmative determinations, DOC will issue anti-dumping and countervailing duty orders on imports of geogrid products from China. According to DOC, imports of geogrid products from China were valued at an estimated USD 9.2 million in 2014.

The ITC's public report on these investigations will be available by March 14, 2017.

International Trade Commission Issues Affirmative Final Determinations in AD/CVD Investigations of Ammonium Sulfate from China

On February 8, 2017, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of ammonium sulfate from China that the US Department of Commerce (DOC) has determined are subsidized and sold in the United States at less than fair value.[15] DOC determined in January 2017 that imports of ammonium sulfate from China received countervailable subsidies of 206.72 percent and were sold in the United States at dumping margins of 493.46 percent.

As a result of the ITC's affirmative determinations, DOC will issue anti-dumping and countervailing duty orders on imports of ammonium sulfate from China. According to the ITC, imports of ammonium sulfate from China were valued at an estimated USD 68.3 million in 2015.

The ITC's public report on these investigations will made be available by March 23, 2017.

Department of Commerce Issues Affirmative Final Determinations in AD/CVD Investigations of Stainless Steel Sheet and Strip from China

On February 2, 2017, the US Department of Commerce (DOC) announced its affirmative final determinations in the anti-dumping (AD) and countervailing duty (CVD) investigations of stainless steel sheet and strip from China.[16] In its investigations, DOC determined that imports of stainless steel sheet and strip from China were sold in the United States at the following dumping margins and subsidy rates:

Producer/Exporter	Dumping Margin
Non-Selected Separate Rate Respondents	63.86 percent
China-Wide Rate	76.64 percent

Producer/Exporter	Subsidy Rate
Shanxi Taigang Stainless Steel Co. Ltd. (and various cross-owned companies)	75.60 percent

[14] Click **here** to view the ITC's press release on the investigations.

[15] Click **here** to view the ITC's press release on the investigations.

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

Producer/Exporter	Subsidy Rate
Ningbo Baoxin Stainless Steel Co., Ltd. (and various cross-owned companies)	190.71 percent
Daming International Import Export Co. Ltd (and various cross-owned companies)	190.71 percent
All others	75.60 percent

The US International Trade Commission (ITC) is scheduled to make its final injury determination in these investigations on or around March 20, 2017. If the ITC makes affirmative final determinations that imports of stainless steel sheet and strip from China materially injure or threaten material injury to the domestic industry, DOC will issue AD and CVD orders. According to DOC, imports of stainless steel sheet and strip from China were valued at an estimated USD 302 million in 2015.

International Trade Commission Issues Negative Final Determination in AD/CVD Investigation of Truck and Bus Tires From China

On February 22, 2017, the US International Trade Commission (ITC) determined that a US industry is not materially injured or threatened with material injury by reason of imports of truck and bus tires from China.[17] The US Department of Commerce (DOC) determined in January 2017 that imports of truck and bus tires from China were sold in the United States at dumping margins ranging from 9 to 22.57 percent and received countervailable subsidies ranging from 38.61 to 52.04 percent.

As a result of the ITC's negative final determination, DOC will not issue anti-dumping or countervailing duty orders on imports of truck and bus tires from China. According to the ITC, imports of truck and bus tires from China were valued at an estimated USD 1.2 billion in 2015.

The ITC's public report on these investigations will be available by March 15, 2017.

Department of Commerce Issues Affirmative Preliminary Determination in CVD Investigation of Steel Concrete Reinforcing Bar from Turkey

On February 22, 2017, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the countervailing duty (CVD) investigation concerning imports of steel concrete reinforcing bar from Turkey.[18] In its investigation, DOC preliminarily determined that imports of the subject merchandise from Turkey received countervailable subsidies of 3.47 percent.

The merchandise subject to the investigation is steel concrete reinforcing bar imported in either straight length or coil form (rebar) regardless of metallurgy, length, diameter, or grade or lack thereof. Subject merchandise includes deformed steel wire with bar markings (*e.g.*, mill mark, size, or grade) and which has been subjected to an elongation test. The subject merchandise is classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers 7213.10.0000, 7214.20.0000, and 7228.30.8010, and may also enter under other HTSUS numbers including 7215.90.1000, 7215.90.5000, 7221.00.0017, 7221.00.0018, 7221.00.0030, 7221.00.0045, 7222.11.0001, 7222.11.0057, 7222.11.0059, 7222.30.0001, 7227.20.0080, 7227.90.6030, 7227.90.6035, 7227.90.6040, 7228.20.1000, and 7228.60.6000.

DOC is scheduled to announce its final determination on or around May 16, 2017, unless the statutory deadline is extended. If DOC makes an affirmative final determination, and the US International Trade Commission (ITC) makes

[17] Click **here** to view the ITC's press release on the investigations.

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

an affirmative final determination that imports of steel concrete reinforcing bar from Turkey materially injure or threaten material injury to the domestic industry, DOC will issue a CVD order.

According to DOC, imports of steel concrete reinforcing bar from Turkey in 2015 were valued at an estimated USD 674.40 million.

Department of Commerce Issues Affirmative Final Determination in AD Investigation of Tetrafluoroethane From China

On February 22, 2017, the US Department of Commerce (DOC) announced its affirmative final determination in the anti-dumping duty (AD) investigation concerning imports of 1,1,1,2-tetrafluoroethane (also known as R-134a) from China.[19] In its investigation, DOC determined that imports of the subject merchandise from China were sold in the United States at dumping margins ranging from 148.79 to 167.02 percent.

The product subject to this investigation is 1,1,1,2-tetrafluoroethane, R-134a, or its chemical equivalent, regardless of form, type, or purity level. The chemical formula for 1,1,1,2-Tetrafluoroethane is CF_3-CH_2F, and the Chemical Abstracts Service registry number is CAS 811-97-2. The subject merchandise is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 2903.39.2020.

The US International Trade Commission (ITC) is scheduled to announce its final determination in this investigation on or around April 7, 2017. If the ITC makes an affirmative final determination that imports of 1,1,1,2-tetrafluoroethane from China materially injure or threaten material injury to the domestic industry, DOC will issue an AD order.

According to DOC, imports of 1,1,1,2-tetrafluoroethane from China in 2015 were valued at an estimated USD 46.2 million.

Department of Commerce Issues Affirmative Final Determination in AD Investigation of Phosphor Copper From Korea

On February 28, 2017, the US Department of Commerce (DOC) announced its affirmative final determination in the anti-dumping duty (AD) investigation concerning imports of phosphor copper from Korea.[20] In its investigation, DOC determined that imports of the subject merchandise from Korea were sold in the United States at dumping margins of 8.43 percent.

The products subject to this investigation are master alloys of copper containing between five percent and 17 percent phosphorus by nominal weight, regardless of form (including but not limited to shot, pellet, waffle, ingot, or nugget), and regardless of size or weight. Merchandise covered by this investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheading 7405.00.1000.

The US International Trade Commission (ITC) is scheduled to announce its final determination in this investigation on or around April 13, 2017. If the ITC makes an affirmative final determination that imports of phosphor copper from Korea materially injure or threaten material injury to the domestic industry, DOC will issue an AD order.

According to DOC, imports of phosphor copper from Korea in 2015 were valued at an estimated USD 4.3 million.

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

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

WTO Reports

WTO Appellate Body Issues Report in *Russia – Pigs* (EU)

Executive Summary

The WTO Appellate Body has affirmed that the Russian Federation violated its WTO obligations by imposing an EU-wide ban on live pigs and pork products, in breach of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement").

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. The Panel's rulings were largely upheld on appeal.

This Appellate Body decision focused on the principle of "regionalization" in the application of SPS measures. The "regionalization" disciplines of the Agreement provide for targeted SPS measures, *i.e.*, the importing Member can apply necessary restrictions to products from the regions affected by pests or disease, while permitting trade to continue with areas unaffected by such problems. These rules are particularly compelling when trade is with a WTO Member as geographically vast as the EU.

One important aspect of this decision relates to the relatively limited role of WTO Panels when making certain findings under the SPS Agreement. Under SPS Article 6.3, exporting Members claiming that regions within their territories are "pest- or disease-free areas or areas of low pest or disease prevalence" must provide "necessary evidence" to "objectively demonstrate" this to the importing Member. The Appellate Body found that "a panel's review of compliance by the exporting Member with Article 6.3 must be limited to assessing whether the evidence provided by the exporting Member to the importing Member is of a nature, quantity, and quality sufficient to enable the importing Member's authorities ultimately to make a determination as to the pest or disease status of the relevant areas within the exporting Member's territory". It stressed that "a panel is not called upon to determine *for itself*, based on the evidence provided by the exporting Member, whether the relevant areas are, and are likely to remain, pest- or disease free or of low pest or disease prevalence [original emphasis]".

The Appellate Body's position on this issue is similar to the approach it took in earlier disputes on the restricted role of panels reviewing SPS measures. In its 2008 ruling in *US/Canada – Continued Suspension*, the Appellate Body chided the Panel because it "reviewed the scientific experts' opinions and somewhat peremptorily decided what it considered to be the best science, rather than following the more limited exercise that its mandate required". Similarly, in its 2010 decision in *Australia – Apples*, the Appellate Body admonished that "a panel's task is to review a WTO Member's risk assessment and not to substitute its own scientific judgement for that of the risk assessor".

Yet while a WTO panel is not permitted to choose what it "considers to be the best science", this should not be mistaken for a standard of deference to national regulators on SPS issues. Indeed, as far back as its 1998 ruling in *EC – Hormones*, the Appellate Body stressed that the applicable standard is "neither *de novo* review as such, nor 'total deference', but rather the 'objective assessment of facts'". Ultimately, the WTO-consistency of an SPS measure will hinge on whether it has a valid scientific basis. In the present case, both the Panel and the Appellate Body concluded that the Russian Federation's ban fell short of this standard.

Analysis

Key disciplines: adapting SPS measures to regional conditions

Article 6 of the SPS Agreement sets out specific rules for the adoption and application of SPS measures in the light of regional conditions of the exporting WTO Member.

Article 6.1 obligates importing WTO Members to ensure that their SPS measures are “adapted to the sanitary or phytosanitary 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”. In assessing the SPS characteristics of a region, Members must take into account factors such as “the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations”.

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”. Determination of such areas are to be based on factors such as “geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls”.

Article 6.3 provides in part that exporting Members claiming that areas within their territories are “pest- or disease-free areas or areas of low pest or disease prevalence” must “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 Appellate Body stressed the close connection between these three provisions of SPS Article 6. It recalled its 2015 ruling in *India – Agricultural Products*, which found that the “main and overarching obligation” is set forth in the first sentence of Article 6.1. Under this provision, as noted above, Members must ensure that their measures are “adapted” to “the SPS characteristics of the areas from which the products at issue originate and to which they are destined”. The Appellate Body indicated that the “[t]he remainder of Article 6 ‘elaborates’ on aspects of that obligation and sets forth ‘the respective duties that apply to importing and exporting Members in this connection’”.

The Appellate Body reiterated that the requirement of importing Members to ensure that their SPS measures are adapted to regional SPS characteristics is “an ongoing obligation that applies *upon* adoption of an SPS measure as well as thereafter [original emphasis]”. In other words, “Members are required to ensure adaptation both when adopting SPS measures and as they maintain them, and may be required to adjust such measures over time as the SPS characteristics of the relevant areas change”. The “main and overarching obligation” of Article 6.1 is “further informed” by the factors set out in Article 6.2.

Obligation on exporting Member and the role of WTO Panels

The Appellate Body noted that Article 6.3 “addresses the situation where an *exporting* Member claims that areas within its territory are pest- or disease free or of low pest or disease prevalence” [original emphasis]”. It highlighted that “an exporting Member is expected to provide particularized evidence with respect to the pest or disease and the area concerned, and cannot merely adduce generic information or unsubstantiated assertions”. It recalled that Article 6.3 refers to “necessary information” to “objectively demonstrate” the existence of low or no pest/disease areas, and stressed that “the term ‘necessary’ qualifies the nature, quantity, and quality of the evidence to be provided by the exporting Member, which must be sufficient to enable the importing Member ultimately to make an objective ‘determination’ as to the pest or disease status of the area concerned”.

The Appellate Body ruled that “while the Panel could have been clearer in articulating its task under Article 6.3”, the Panel “did not err in its interpretation of Article 6.3 of the SPS Agreement by not finding that this provision requires consideration of the evidence relied upon by the importing Member”. It therefore dismissed Russia’s appeal on this point.

The Appellate Body thus concluded that "the process of adaptation to regional SPS characteristics pursuant to Article 6 requires that the importing Member evaluate all the relevant evidence concerning the areas that an exporting Member claims are pest- or disease-free or of low pest or disease prevalence". However, a "panel's review under Article 6.3 is limited to assessing whether the evidence provided by the exporting Member to the importing Member is of a nature, quantity, and quality sufficient to enable the importing Member's authorities ultimately to make a determination as to the pest or disease status of the areas that the exporting Member claims to be pest- or disease-free or of low pest or disease prevalence".

The Appellate Body upheld the Panel's findings that the EU had provided the necessary evidence "to objectively demonstrate to Russia that: (i) areas within Estonia, Latvia, Lithuania, and Poland, as well as areas within the European Union outside of the four affected member States, were ASF free; and (ii) the ASF-free areas within Estonia, Lithuania, and Poland, as well as the ASF-free areas within the European Union outside of the four affected member States, were likely to remain so".

Regional adaptation obligations can apply even if exporter Member fails to provide the necessary evidence

Russia argued that the Panel erred in finding that an importing Member "can be found to have failed to adapt its measures to the SPS characteristics of areas within an exporting Member's territory even in a situation where the exporting Member has failed to provide the necessary evidence, pursuant to Article 6.3, in order to objectively demonstrate that such areas are, and are likely to remain, pest- or disease free or of low pest or disease prevalence". The Appellate Body rejected Russia's argument.

The Appellate Body recalled its ruling in *India – Agricultural Products* that "on the one hand, the exporting Member's compliance or non-compliance with Article 6.3 will, in many cases, have implications for the importing Member's ability to assess the SPS characteristics of areas located within the exporting Member's territory and to adapt its measures accordingly, as required by Article 6.1"[.] This is because "the exporting Member is usually best placed to gather and provide information about the level of pest or disease prevalence in areas located within its territory, such that, without its cooperation, an importing Member's ability to determine the pest or disease status of such areas and to adapt its measures to their SPS characteristics may, in certain cases, be impaired". On the other hand, the Appellate Body "rejected the notion that an importing Member's violation of Article 6.1 would necessarily be contingent on the exporting Member's compliance with Article 6.3".

In other words, in certain specific situations, "an importing Member may be required to adapt its measures to regional SPS characteristics irrespective of whether or not an exporting Member has complied with Article 6.3". Such situations included where a Member's regulatory regime precluded the recognition of the concept of pest- and disease free areas.

The Appellate Body faulted the Panel for failing to provide reasoning to explain "why the circumstances of the dispute fall within one or more of those specific situations, or why they otherwise warrant a finding that the importing Member acted inconsistently with Article 6.1". However, "given the Panel's finding that Russia failed to adapt the ban on imports of the products at issue from Latvia to the SPS characteristics of areas within Russia, the Panel's conclusion that this measure is inconsistent with Article 6.1 of the SPS Agreement stands".

"Rendering operational" the concept of recognizing pest or disease free areas

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 with Article 6.2. The EU appealed this finding, with partial success.

The Appellate Body stated that "we see Article 6.2 not as an obligation to acknowledge the concept of regionalization as an abstract idea; rather, we see it as an obligation to render operational the concepts of pest- or disease-free areas and areas of low pest or disease prevalence". It found that "the importing Member must provide an effective opportunity for the exporting Member to make such a claim and thus render operational the concepts of pest- or

disease-free areas and areas of low pest or disease prevalence". It added that "[t]his may be achieved through, individually or jointly: a provision in the regulatory framework; the very SPS measure at issue; and a practice of recognizing pest- or disease-free areas or areas of low pest or disease prevalence. All these elements may be relevant in an assessment of a Member's compliance with the obligation under Article 6.2 of the SPS Agreement". The Panel in this case "erred in finding that it could not take into account in its analysis under Article 6.2 specific instances of recognition or non recognition of the concept of regionalization".

The Appellate Body reversed the Panel's finding that "Russia recognizes the concepts of pest- or disease-free areas and areas of low pest or disease prevalence in respect of ASF, and that, therefore, the EU-wide ban and the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, are not inconsistent with Russia's obligations under Article 6.2 of the SPS Agreement". However, having reversed the Panel on this point, the Appellate Body concluded that it did not have sufficient information to "complete the analysis" and make a determination on "whether or not Russia recognizes the concepts of pest- or disease-free areas and areas of low pest or disease prevalence in respect of ASF".

A number of rulings of the Panel were not appealed by Russia. These included the Panel's finding that the EU-wide ban was inconsistent with Russia's obligation to base its SPS measures on international standards, pursuant to Article 3.1; and that Russia did not base the EU-wide ban on a risk assessment, in breach of SPS Articles 5.1, 5.2 and 2.2.

The Report of the WTO Appellate Body in *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union* (DS475) was released on February 23, 2017.

WTO Highlights

WTO Director-General Begins Consultations on Potential Deliverables for MC11

WTO Director-General Roberto Azevedo has begun a series of high-level consultations with key delegations to try to identify deliverables for the next WTO Ministerial Conference (MC11) in December in Buenos Aires, Argentina. The only viable candidate at present appears to be a possible agreement to discipline fisheries subsidies, although even there the prospects for progress remain highly uncertain. If they were to gather momentum, negotiations on a fisheries subsidies agreement would likely proceed on a stand-alone basis, without linkages to other issues covered in the Rules Negotiations such as industrial subsidies.

The latest round of consultations on Fisheries Subsidies on January 24 in the Rules Group produced quite broad-based support for moving to text-based negotiations on an agreement as quickly as possible given that there are now only eight working months left before MC11. Some participants consider that this step is necessary since having a draft negotiating text available as soon as possible, even one that is full of flagged-up areas of disagreement, could provide impetus to the process. They remain deeply concerned, however, about the likelihood subsequently of being able to narrow down those areas of disagreement.

One unknown for the time being is the position of the United States on the desirability of having any agreement at all on the issue of fisheries subsidies. Much of the momentum that had been generated last year, with the support of the United States, to address problems of the depletion of global fish stocks came from environmental groups and ministries. If negotiations are to succeed, that momentum will need to be maintained in the negotiations in order to help overcome opposition from commercial sources to limiting the capacity of national fishing industries and prohibiting certain types of fishing. The commitment of the new United States Administration to the environmental argument is unclear for the time being, but some delegations doubt that the United States is likely to throw its weight behind this issue.

A major disagreement is expected to arise over the issue of special flexibilities for developing countries in any new WTO disciplines on fisheries subsidies. These flexibilities have been proposed in three of the written proposals that have been tabled. Developing countries with large fishing industries, notably China and India, have been vocal in demanding that large sections of their industries should be exempt from any new WTO disciplines because of the role that fishing plays in providing employment and in supplementing the food supply. Developed countries, including the United States, have responded that developing countries contribute significantly to the problem of depleted fish stocks and that the problem will not be solved if they do not also contribute to the solution. The United States and the European Union, in particular, are firm in refusing to agree that development flexibilities should be granted to advanced developing countries even if they might be prepared to provide those flexibilities on a limited scale to low-income and least-developed countries.

A further difficulty foreseen is that progress on fisheries subsidies could be blocked by some WTO Members if they do not receive support for solutions on other issues that they have proposed for MC11, notably agriculture (reducing agricultural support, guaranteeing food security, and a special agricultural safeguards provision), trade facilitation in services, and some cross-cutting development issues. These proved to be controversial last year and the prospects to advance on any of them have not improved. On the contrary, a recent dispute settlement challenge by the United States to the agricultural support policies of China would seem to have killed off the chances of any serious negotiation taking place on that issue for the time being, and Indian proposals to facilitate trade in services by *inter alia* relaxing visa requirements for services suppliers seems likely to be unacceptable to Washington.

Some WTO delegations are hoping that it might be possible to revive the negotiations on an Environmental Goods Agreement (EGA) and conclude them before MC11. The United States had been a strong supporter of the EGA but its current position is unknown. However, the fact that the EGA would open access to the United States market to other participants, including China, has created doubt that this could be counted on for MC11.

Contact us

Washington

White & Case LLP
701 Thirteenth Street NW
Washington
DC 20005-3807

Scott Lincicome, Esq
Counsel

T +1 202 626 3592
E slincicome@whitecase.com

Singapore

White & Case Pte. Ltd.
8 Marina View #27-01
Asia Square Tower 1
Singapore 018960

Samuel Scoles
Regional Director Asia, International Trade Advisory Services

T +65 6347 1527
E sscoles@whitecase.com

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