

US & Multilateral Trade Policy Developments

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Contents

US General Trade Policy Highlights	1
US Trade Representative Requests Supplemental Report from US International Trade Commission in Safeguard Investigation of Crystalline Silicon Photovoltaic Cells.....	1
President Trump Signs Executive Order on “Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals”	1
Generalized System of Preferences to Expire on December 31, 2017	2
President Trump Restores GSP Beneficiary Status for Argentina, Partially Suspends GSP Benefits for Ukraine	3
United States Removes Thailand from Special 301 “Priority Watch List”	4
Petitions and Investigations Highlights	6
US Department of Commerce Self-Initiates AD and CVD Investigations of Common Alloy Aluminum Sheet from China.....	6
US Department of Commerce Issues Affirmative Preliminary Determinations in Antidumping Investigations of Fine Denier Polyester Staple Fiber from China, India, Korea, and Taiwan	7
US International Trade Commission Issues Affirmative Final Determinations in Antidumping Investigations of Carbon and Certain Alloy Steel Wire Rod from Belarus, Russia, and the United Arab Emirates	8
US Department of Commerce Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of 100- to 150-Seat Large Civil Aircraft from Canada	8
Multilateral Highlights	9
United States “Counter-Notifies” Chinese State Trading Enterprises to WTO	9
WTO Ministerial Conference Ends Without Significant Results; United States Discusses Path Forward	9

US General Trade Policy Highlights

US Trade Representative Requests Supplemental Report from US International Trade Commission in Safeguard Investigation of Crystalline Silicon Photovoltaic Cells

On November 27, 2017, US Trade Representative (USTR) Robert Lighthizer requested a supplemental report from the US International Trade Commission (ITC) to assist the President in making a determination in the global safeguard investigation concerning imports of crystalline silicon photovoltaic cells (CSPV), whether or not partially or fully assembled into other products. The ITC submitted its initial report to the President in this investigation on November 13, 2017.

Ambassador Lighthizer's letter requests additional information from the ITC in the form of a supplemental report that identifies "any unforeseen developments that led to the articles at issue being imported into the United States in such increased quantities as to be a substantial cause of serious injury." In the last WTO dispute involving U.S. safeguard measures (on certain steel products), the WTO Appellate Body found that the U.S. measures were inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards because the United States "failed to provide a reasoned and adequate explanation demonstrating that 'unforeseen developments' had resulted in increased imports causing serious injury to the relevant domestic producers".¹

Pursuant to section 203(a)(5) of the Trade Act of 1974, the ITC must provide the additional information requested by Ambassador Lighthizer within 30 days (*i.e.*, by December 27, 2017) and the President must make a final determination in the investigation within 30 days after receiving the additional information (*i.e.*, by January 26, 2018, at the latest). Absent Ambassador Lighthizer's request, the President's determination would have been due by January 12, 2018. USTR will hold a public hearing on December 6, 2017, at which interested parties will be able to submit views and evidence on the appropriateness of the safeguard measures recommended by the ITC.

A copy of Ambassador Lighthizer's letter is attached for reference.

President Trump Signs Executive Order on "Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals"

On December 20, 2017, President Trump signed an Executive Order calling for the development of a U.S. federal government strategy to ensure "secure and reliable supplies of critical minerals", including by reducing the United States' dependence on imports of critical minerals.² The order requires the Secretary of Commerce, in coordination with the US Trade Representative and other federal officials, to submit a report detailing the strategy to the President no later than August 18, 2018. Although the order draws a link between U.S. dependence on imports of critical minerals and perceived threats to national security, it does not appear likely to lead to significant trade actions.

The order contains the following substantive sections:

- A statement of policy, justifying the order on the grounds that "the United States is heavily reliant on imports of certain mineral commodities that are vital to the Nation's security and economic prosperity. This dependency of the United States on foreign sources creates a strategic vulnerability for both its economy and military to adverse foreign government action, natural disaster, and other events that can disrupt supply of these key minerals."
- A directive that the Department of the Interior, in consultation with the Department of Defense and other agencies, publish a list of "critical minerals" in the Federal Register no later than February 18, 2018. The order defines a "critical mineral" as (i) a non-fuel mineral or mineral material essential to the economic and national security of the United States, (ii) the supply chain of which is vulnerable to disruption, and (iii) that serves an

¹ *United States — Definitive Safeguard Measures on Imports of Certain Steel Products (DS259), Appellate Body Report, para. 513.*

² Click [here](#) to view the Executive Order.

essential function in the manufacturing of a product, the absence of which would have significant consequences for the U.S. economy or national security.

- A directive that the Secretary of Commerce, in coordination with the Secretaries of Defense, the Interior, Agriculture, and Energy, and the United States Trade Representative, produce a report including:
 - a strategy to reduce the United States' reliance on critical minerals;
 - options for accessing and developing critical minerals through investment and trade with our allies and partners;
 - an assessment of progress toward developing critical minerals recycling and reprocessing technologies, and technological alternatives to critical minerals;
 - a plan to improve the topographic, geologic, and geophysical mapping of the United States and make the resulting data available to support private sector mineral exploration of critical minerals; and
 - recommendations to streamline permitting and review processes related to developing leases; enhancing access to critical mineral resources; and increasing discovery, production, and domestic refining of critical minerals.

The order directs the Secretary of Commerce to submit the report to the President within 180 days after the list of critical minerals is published in the Federal Register (i.e., by August 18, 2018).

USGS report on critical minerals

The order appears to be related to the US Department of the Interior, US Geological Survey's (USGS) December 19 report on "Critical Mineral Resources of the United States" – the first such report produced by USGS since 1973. The USGS report identifies "23 mineral commodities currently among those viewed as important to the national economy and national security of the United States[.]"³ The report emphasizes that the United States "is largely dependent on imports to meet its needs" for many of the critical minerals and identifies China as a major supplier of many of those minerals. In a briefing on the new report, Interior Secretary Ryan Zinke and USGS officials expressed confidence that the United States possesses sufficient deposits of many of the critical minerals to satisfy U.S. demand.

Implications

Although the order draws a link between imports and perceived threats to national security – a familiar theme in the Trump administration – it does not appear likely to lead to significant trade actions. Rather, the language of the order and subsequent statements by Trump administration officials suggest that the administration is primarily considering domestic policy changes that are aimed at encouraging U.S. domestic exploration, production, recycling, and reprocessing of critical minerals. Moreover, the trade-related provision of the order (requiring that the report discuss "options for accessing and developing critical minerals through investment and trade with our allies and partners") appears to suggest the opposite of protectionism. Thus, although the policy objective stated in the order is reduction of the United States' dependence on imports of critical minerals, the order does not indicate that import restrictions are likely to be part of the forthcoming federal strategy.

Generalized System of Preferences to Expire on December 31, 2017

On December 21, 2017, the US Congress concluded its legislative business for the 2017 calendar year after enacting a short-term spending measure to fund the federal government through January 19, 2018.⁴ Prior to its adjournment,

³ The 23 minerals identified in the USGS report are antimony (Sb), barite (barium, Ba), beryllium (Be), cobalt (Co), fluorite or fluorspar (fluorine, F), gallium (Ga), germanium (Ge), graphite (carbon, C), hafnium (Hf), indium (In), lithium (Li), manganese (Mn), niobium (Nb), platinum-group elements (PGE), rare-earth elements (REE), rhenium (Re), selenium (Se), tantalum (Ta), tellurium (Te), tin (Sn), titanium (Ti), vanadium (V), and zirconium (Zr). The report is available at <https://pubs.er.usgs.gov/publication/pp1802>

⁴ CBP's administrative message on the expiration of GSP can be viewed [here](#).

Congress did not take action to reauthorize the Generalized System of Preferences (GSP) program, and as a result, duty-free treatment of GSP-eligible articles will expire for goods entered or withdrawn from warehouses after midnight on December 31, 2017.

US Customs and Border Protection (CBP) on December 19 issued an administrative message stating that importers are “strongly encouraged” to continue to flag otherwise GSP-eligible importations with the special program indicator (SPI) “A” after the program expires. In the event that Congress renews GSP with retroactivity, CBP is developing programming to provide for the batch processing of refunds on all importations made with SPI “A” and duties paid. Congress has allowed GSP to lapse numerous times during the program’s 40-year history, but has always reauthorized the program retroactively so that duties paid during the program’s lapse are refunded.

Though GSP will expire after December 31, the program continues to enjoy bipartisan support in Congress. The Chairmen of the House Ways and Means and Senate Finance Committees, as well as Senate Finance Committee Ranking Member Ron Wyden (D-OR), have issued statements in recent days reiterating their support for reauthorization of GSP, with Chairman Brady (R-TX) expressing optimism that Congress may reauthorize the program in early 2018. Given Congress’s busy legislative schedule, it is unlikely that GSP legislation will be considered on its own, meaning that another, more pressing piece of legislation will likely need to serve as a “vehicle” for GSP renewal. When Members return to Congress in January, they are likely to focus on negotiating a long-term government spending bill covering the remainder of Fiscal Year 2018, and it is expected that GSP supporters in Congress will seek to use the long-term spending measure as a vehicle for renewal of GSP.

President Trump Restores GSP Beneficiary Status for Argentina, Partially Suspends GSP Benefits for Ukraine

On December 22, 2017, President Trump issued a proclamation restoring Argentina’s designation as a beneficiary developing country under the Generalized System of Preferences program (GSP).⁵ The proclamation also suspends certain GSP benefits for Ukraine and restores trade preferences for The Gambia and Swaziland under the African Growth and Opportunity Act (AGOA) program. These developments are summarized below.

Reinstatement of GSP beneficiary status for Argentina

In March 2012, the Obama administration suspended Argentina’s designation as a GSP beneficiary developing country after determining that Argentina had not acted in good faith in enforcing arbitral awards in favor of U.S. entities. Argentina filed a petition in October 2016 seeking reinstatement as a GSP beneficiary developing country, and USTR considered the petition during its 2016/2017 GSP Annual Review.

President Trump’s proclamation provides that Argentina will be reinstated as a GSP beneficiary, effective January 1, 2018. According to the Office of the US Trade Representative (USTR), President Trump has determined to reinstate Argentina as a GSP beneficiary “following resolution of certain arbitral disputes with U.S. companies, new commitments by the Argentine government to improve market access for U.S. agricultural products, and improved protection and enforcement of IPR.” However, USTR noted that the reinstatement of GSP beneficiary status for Argentina will not apply to all eligible products “due to certain remaining IPR issues”.

The list of products of Argentina that will be considered GSP-eligible as of January 1, 2018 is provided in Annex IV of the attached proclamation. However, this change will not have an immediate effect on duty rates because duty-free treatment of all GSP-eligible articles will expire on December 31, 2017.

Partial suspension of GSP benefits for Ukraine

President Trump’s proclamation provides that Ukraine will no longer be treated as a beneficiary developing country with respect to certain eligible articles for purposes of the GSP, effective in 120 days (*i.e.*, on April 26, 2018). According to USTR, Ukraine’s partial suspension from GSP “stems from its failure to provide adequate and effective

⁵ The proclamation is attached for reference. USTR’s statement on the proclamation is available [here](#).

protection of intellectual property rights (IPR) despite years of encouragement and assistance from the U.S. Government.” However, USTR noted that the President has decided to provide 120 days’ notice in this case because the Government of Ukraine has a viable path to remedy the situation, including improving the current legal regime governing royalty reimbursement to right holders’ organizations.

The list of products of Ukraine that will no longer be considered GSP-eligible as of April 26, 2018 is provided in Annex III of the attached proclamation.

Ambassador Lighthizer touted this action as evidence of the Trump administration’s commitment to enforcing the statutory eligibility criteria for U.S. trade preference programs, stating that "President Trump has sent a clear message that the United States will vigorously enforce eligibility criteria for preferential access to the U.S. market...Beneficiary countries choose to either work with USTR to meet trade preference eligibility criteria or face enforcement actions.”

Reinstatement of AGOA benefits for The Gambia and Swaziland

President Trump’s proclamation designates The Gambia and Swaziland as beneficiary sub-Saharan African countries under the AGOA trade preference program. The Obama administration suspended AGOA benefits for these countries in 2014, citing concerns over human rights abuses and deterioration of the rule of law in Gambia and restrictions on the freedoms of peaceful assembly, association, and expression in Swaziland. According to USTR, President Trump is restoring AGOA benefits for these countries after determining that (i) the Gambia has made progress in strengthening the rule of law, improving human rights, and supporting political pluralism; and (ii) Swaziland has met a series of benchmarks set by the United States related to lifting restrictions on freedoms of assembly, association, and expression.

United States Removes Thailand from Special 301 “Priority Watch List”

On December 15, 2017, US Trade Representative (USTR) Robert Lighthizer announced the outcome of USTR’s Special 301 Out-of-Cycle Review (OCR) of Thailand.⁶ Ambassador Lighthizer welcomed the “corrective actions” that Thailand has recently taken to improve intellectual property rights protection and enforcement and announced that USTR is upgrading Thailand from the Special 301 “Priority Watch List” to the Watch List. USTR has placed Thailand on the Priority Watch List for the past ten years.

In its announcement, USTR acknowledged the Thai government’s establishment of an interagency National Committee on Intellectual Property Policy (“the Committee”) and a Subcommittee on Enforcement against Intellectual Property Infringement (“the Subcommittee”). Chaired by the Prime Minister and Deputy Prime Minister respectively, USTR noted that the Committee and Subcommittee led to improved coordination among government entities, as well as enhanced and sustained enforcement efforts to combat counterfeit and pirated goods throughout the country.

USTR also stated that Thailand “has been taking steps to address backlogs for patent and trademark applications, including significantly increasing the number of examiners and streamlining regulations.” On August 7, 2017, Thailand also deposited its instrument of accession to the Madrid Protocol for the International Registration of Marks at the World Intellectual Property Organization (WIPO) becoming the 99th member of the Madrid Protocol and the 7th ASEAN Member State to implement the Protocol following Brunei, Cambodia, Laos, the Philippines, Singapore, and Vietnam. The Protocol took effect with respect to Thailand from November 7, 2017.

USTR highlighted other recent developments including increasing Thai government efforts to address online piracy affecting the US content industry and commitments by the Thai government to improve transparency concerning pharmaceutical issues. In particular, the Thai Ministry of Public Health has agreed to take into account stakeholder inputs for future amendments to Thailand’s Drug Act and will conduct regular consultations between interested stakeholders and the Thai Food and Drug Administration.

⁶ Click [here](#) for Ambassador Lighthizer’s statement on the OCR of Thailand.

In light of these developments in Thailand, USTR determined to conclude the OCR, which it initiated in September 2017, by upgrading Thailand to the Special 301 Watch List. The Thai authorities have welcomed USTR's decision to change Thailand's ranking.

Petitions and Investigations Highlights

US Department of Commerce Self-Initiates AD and CVD Investigations of Common Alloy Aluminum Sheet from China

On November 28, 2017, the US Department of Commerce (DOC) self-initiated antidumping (AD) and countervailing duty (CVD) investigations of imports of common alloy aluminum sheet from China.⁷ DOC took this action “based on information indicating that the United States price of common alloy sheet from China may be less than the normal value of such or similar merchandise and that imports of common alloy sheet from China may be benefitting from countervailable subsidies.” The U.S. antidumping and countervailing duty laws authorize DOC to self-initiate investigations, but such actions are rare: DOC last self-initiated a countervailing duty investigation in 1991 (on softwood lumber from Canada) and an antidumping duty investigation in 1985 (on semiconductors from Japan).

The merchandise subject to the investigations is common alloy aluminum sheet, which is a flatrolled aluminum product having a thickness of 6.3 mm or less, but greater than 0.2 mm, in coils or cut-to-length, regardless of width. Common alloy aluminum sheet within the scope of the investigations includes both not clad aluminum sheet, as well as multi-alloy, clad aluminum sheet.

With respect to not clad aluminum sheet, common alloy sheet is manufactured from a 1XXX-, 3XXX-, or 5XXX-series alloy as designated by the Aluminum Association. With respect to multialloy, clad aluminum sheet, common alloy sheet is produced from a 3XXX-series core, to which cladding layers are applied to either one or both sides of the core.

Common alloy sheet may be made to ASTM specification B209-14, but can also be made to other specifications. Regardless of specification, however, all common alloy sheet meeting the scope description is included in the scope. Subject merchandise includes common alloy sheet that has been further processed in a third country, including but not limited to annealing, tempering, painting, varnishing, trimming, cutting, punching, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the investigations if performed in the country of manufacture of the common alloy sheet. Excluded from the scope of the investigations is aluminum can stock, which is suitable for use in the manufacture of aluminum beverage cans, lids of such cans, or tabs used to open such cans.

Common alloy sheet is currently classifiable under HTSUS subheadings 7606.11.3060, 7606.11.6000, 7606.12.3090, 7606.12.6000, 7606.91.3090, 7606.91.6080, 7606.92.3090, and 7606.92.6080. Merchandise that falls within the scope of the investigations may also be entered into the United States under HTSUS subheadings 7606.11.3030, 7606.12.3030, 7606.91.3060, 7606.91.6040, 7606.92.3060, 7606.92.6040, and 7607.11.9090.

In its fact sheet on the investigation, DOC states that “we have information warranting an investigation into whether 1) the United States price of common alloy sheet from China may be less than the normal value of such or similar merchandise, 2) imports of common alloy sheet from China may be benefitting from countervailable subsidies, and 3) imports of common alloy sheet from China may be materially injuring, or threatening material injury to, the domestic industry producing common alloy sheet in the United States.”

The US International Trade Commission (ITC) is scheduled to make its preliminary injury determinations within 45 days after the date on which the ITC receives notice from the DOC that investigations have been self-initiated, i.e., on or before January 12, 2018. If the ITC determines that there is a reasonable indication that imports of common alloy aluminum sheet from China materially injure or threaten material injury to the domestic industry, the investigations will continue. DOC will then be scheduled to announce its preliminary CVD determination in February 2018 and its preliminary AD determinations in April 2018, unless the statutory deadlines are extended.

⁷ DOC's fact sheet on the investigations is available [here](#).

According to DOC, imports of common alloy aluminum sheet from China were valued at an estimated USD 603.6 million in 2016.

US Department of Commerce Issues Affirmative Preliminary Determinations in Antidumping Investigations of Fine Denier Polyester Staple Fiber from China, India, Korea, and Taiwan

On December 19, 2017, the US Department of Commerce (DOC) announced its affirmative preliminary determinations in the antidumping duty (AD) investigations concerning imports of fine denier polyester staple fiber from China, India, Korea, and Taiwan.⁸ In its investigations, DOC preliminarily determined that imports of the subject merchandise were sold in the United States at the following dumping margins:

Country	Exporter/Producer	Dumping Margin	Cash Deposit
China	Jiangyin Hailun Chemical Fiber Co., Ltd.	181.46%	170.92%
	Jiangyin Huahong Chemical Fiber Co., Ltd.	63.26%	52.66%
	China-wide rate	181.46%	170.92%
India	Reliance Industries Limited	2.66%	0.66%
	Bombay Dyeing & Manufacturing Company Limited	21.43%	15.66%
	All others	2.66%	0.00%

Country	Exporter/Producer	Dumping Margin
Korea	Toray Chemical Korea Inc.	0.00%
	Down Nara Co., Ltd.	45.23%
	Huvis Corporation	45.23%
	All others	30.15%
Taiwan	Tainan Spinning Co., Ltd.	0.00%
	Far Eastern Textile Ltd.	48.86%
	All others	24.43%

As a result of the preliminary affirmative determinations, DOC will instruct US Customs and Border Protection (CBP) to require cash deposits based on these preliminary rates.

The products covered by the investigations are fine denier polyester staple fiber, not carded combed, or pre-opened, measuring less than 3.3 decitex (3 denier) in diameter. The scope covers all fine denier PSF, whether coated or uncoated. The following products are excluded from the scope:

- PSF equal to or greater than 3.3 decitex (more than 3 denier, inclusive) currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 5503.20.0045 and 5503.20.0065.
- Low-melt PSF defined as a bi-component polyester fiber having a polyester fiber component that melts at a lower temperature than the other polyester fiber component which is currently classified under HTSUS subheading 5503.20.0015.

The subject merchandise is currently classifiable under subheading 5503.20.0025 of the Harmonized Tariff Schedule of the United States.

⁸ Click [here](#) to view the DOC fact sheet on these investigations.

DOC is scheduled to announce its final determinations on or around May 11, 2018. If DOC makes affirmative final determinations, and the US International Trade Commission (ITC) makes affirmative final determinations that that imports of fine denier polyester staple fiber from China, India, Korea, or Taiwan materially injure, or threaten material injury to, the domestic industry, DOC will issue AD orders.

In 2016, imports of fine denier polyester staple fiber from China, India, Korea, and Taiwan were valued at an estimated USD 79.4 million, 14.7 million, 10.6 million, and 9.6 million, respectively.

US International Trade Commission Issues Affirmative Final Determinations in Antidumping Investigations of Carbon and Certain Alloy Steel Wire Rod from Belarus, Russia, and the United Arab Emirates

On December 19, 2017, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of carbon and certain alloy steel wire rod from Belarus, Russia, and the United Arab Emirates (UAE).⁹ The US Department of Commerce (DOC) determined in November 2017 that imports of carbon and certain alloy steel wire rod from Belarus, Russia, and the UAE were sold in the United States at dumping margins of 280.02 percent, 436.80 to 756.93 percent, and 84.10 percent, respectively.

As a result of the ITC's affirmative final determinations, DOC will issue antidumping duty orders on imports of the subject merchandise from Belarus, Russia, and the UAE, which are classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) primarily under item numbers 7213.91.3011, 7213.91.3015, 7213.91.3020, 7213.91.3093, 7213.91.4500, 7213.91.6000, 7213.99.0030, 7227.20.0030, 7227.20.0080, 7227.90.6010, 7227.90.6020, 7227.90.6030, and 7227.90.6035. Products entered under subheadings 7213.99.0090 and 7227.90.6090 also may be included in the scope of the order if they meet the physical description of the subject merchandise.

According to the ITC, in 2016, imports of carbon and alloy steel wire rod from Belarus, Russia and the UAE were valued at an estimated USD 10.4 million, 32.3 million, and 7 million, respectively.

The ITC's public report on the investigation will be available by January 24, 2018.

US Department of Commerce Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of 100- to 150-Seat Large Civil Aircraft from Canada

On December 20, 2017, the US Department of Commerce (DOC) announced its affirmative final determinations in the antidumping (AD) and countervailing duty (CVD) investigations concerning imports of 100- to 150-seat large civil aircraft from Canada.¹⁰ DOC assigned a dumping margin of 79.82 percent and a countervailable subsidy rate of 212.39 percent to Bombardier, Inc., the Canadian producer of the subject merchandise. DOC noted in its announcement that "although Canadian aircraft subject to these investigations has not yet been imported into the United States, an April 2016 press release announcing the sale of Canadian aircraft to a U.S. airline valued the order to be in excess of \$5 billion."

The products subject to the investigation are aircraft, regardless of seating configuration, that have a standard 100- to 150-seat two-class seating capacity and a minimum 2,900 nautical mile range. A full description of the scope is provided in the DOC fact sheet on the investigation. The subject merchandise is currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheading 8802.40.0040 and may alternatively be classifiable under HTSUS heading 8802.40.0090.

The US International Trade Commission (ITC) is scheduled to announce its final injury determination in this investigation on or around February 1, 2018. If the ITC makes an affirmative final determination that imports of 100- to 150-seat large civil aircraft from Canada materially injure or threaten material injury to the domestic industry, DOC will issue AD and CVD orders.

⁹ Click [here](#) to view the ITC's press release on the investigation.

¹⁰ Click [here](#) to view the DOC fact sheet on these investigations.

Multilateral Highlights

United States “Counter-Notifies” Chinese State Trading Enterprises to WTO

The United States has issued a new counter-notification of the activities of several of China’s most important State Trading Enterprises (STEs) and repeated its complaint that China is failing to meet its notification commitments under the WTO agreement on STEs (Article XVII of the GATT 1994 and the Uruguay Round Understanding on the Interpretation of Article XVII of GATT 1994). This move reflects increased frustration in Washington that China is, in the view of the United States, avoiding its WTO notification and transparency obligations and deliberately concealing its trade policies that are inconsistent with WTO rules or are causing unfair trade that is distorting global markets.

Earlier this year, the United States followed a similar approach in the WTO with the aim of exposing China’s subsidy programmes in its steel, aluminum and fisheries industries that the United States claimed had not been notified as required – the United States termed China’s notification of its subsidy programmes “grossly incomplete” and claimed also that some of the subsidy programmes were contingent on export performance and therefore were inconsistent with China’s obligations under the WTO Agreement on Subsidies and Countervailing Measures.

In its new counter-notification (attached), the United States focuses on seven of China’s largest STEs – China National Tobacco Import & Export Co. (later renamed China Tobacco International Inc.); China National Offshore Oil Corporation; Sinochem Group; China International Petroleum and Chemicals Co., Ltd.; China National Agricultural Means of Production Group Co.; Chinatex Corporation; and Xinjiang Yin Long International Agriculture Cooperation Co., Ltd. The United States notes that in 2016 it had queried the lack of information provided by China on these STEs and that China had replied in 2017 that much of the information could not be provided because it was confidential to the companies concerned (“business secret”). The counter-notification challenges this claim by China and provides annual trading statistics on these STEs which the United States says it has collected from publicly available information. In the counter-notification, the United States requests China to verify the information it has provided and to provide whatever updates are necessary to bring itself into compliance with its notification obligations on STEs.

The counter-notification is designed to increase the pressure on China to meet its notification obligations in the WTO and to make its trade policies more transparent. It will be discussed at the next meeting of the WTO Committee on STEs (in May 2018), where other Members such as Japan and the EU, can be expected to support the United States and express their concern too about China’s notification record. On the previous occasions that the United States has used this approach, on STEs and Subsidies, China has responded by providing additional information on its trade policies, although never enough, in the view of the United States and others, to constitute a complete and up-to-date notification.

Although China is the target of these actions, they reflect a broader concern of the United States that the compliance of many WTO Members’ with their notification and transparency obligations is poor and deteriorating, and that this is creating a systemic impediment to the WTO’s ability to monitor compliance with its existing rules and to negotiate new ones. The United States made that point firmly at the recent WTO Ministerial Conference and used it as one of the main reasons why the United States is unwilling to engage fully in WTO negotiations in areas such as disciplining agricultural subsidies and Fisheries Subsidies. As long as China and others continue to appear unwilling to meet their existing transparency obligations, the United States is unlikely to be persuaded to pick up again its leadership role in the WTO and move the multilateral trade agenda forward.

WTO Ministerial Conference Ends Without Significant Results; United States Discusses Path Forward

The WTO Ministerial Conference (MC11) has ended without significant results and with deep-seated differences more visible than ever over key issues such as the status of the Doha Round, the role that development flexibilities should play in the WTO, and the future programme of work and negotiation in which Members are willing to

engage. Expectations had already been greatly reduced before the Conference began because of the lack of progress over the past year in Geneva, but even so there was widespread disappointment over the outcome. WTO Director-General, Roberto Azevedo, concluded that “real soul searching” was needed now and that “mindsets will need to change” if governments were to succeed in reinvigorating and advancing the multilateral trade agenda. Azevedo lamented the lack of flexibility demonstrated by key Members, which he said was “a recipe for failure”, and even raised the specter of a collapse of the system: “I stress the system is not perfect but it is the best we have. And we would all, all, deeply regret if we lost it”.

Overshadowing MC11 were major tensions in some key bilateral trade relationships, most importantly that of China and the United States, as well as concerns about systemic weaknesses in the WTO machinery, notably the dissatisfaction of the United States with the functioning of the Appellate Body. None of these tensions were resolved or even lessened at MC11; they will continue to provide a troubling backdrop to work in the WTO in 2018.

Hopes of a concrete result at MC11 had been highest for an agreement to discipline Fisheries Subsidies. However, the draft agreement that was sent from Geneva to MC11 contained too many areas of disagreement for Ministers to resolve, and the major sticking points that needed political input remained deeply contentious, notably the refusal of the United States and the EU to countenance the inclusion of development flexibilities that could be used by advanced developing countries such as India and China. Instead, a decision was taken to continue negotiations on Fisheries Subsidies with the aim of concluding by 2019 (attached as W5). The United States failed to achieve its aim of a commitment to improved notification of Fisheries Subsidies, particularly by advanced developing countries, and poor transparency of current subsidy practices is likely to continue to pose a problem in the continuation of negotiations next year. Part of the difficulty of dealing with Fisheries Subsidies in the WTO is that many Members consider it to be primarily an environmental issue that belongs in the UN and are reluctant to see it brought into the scope of WTO dispute settlement, and this difficulty is expected to persist.

Attempts to launch work programmes in new areas failed to attract consensus; India and South Africa, supported by many other African countries, opposed the introduction of new issues until the Doha Round had been satisfactorily completed. Agreements were reached among groups of Members to begin work in the WTO on E-commerce, investment facilitation, and micro, small and medium-sized enterprises (MSMEs). The United States welcomed this development, in particular the decisions on a work programme on E-commerce and the continuation of the moratorium on customs duties on electronic transmissions (attached), with a tweet from USTR: “The new direction of the WTO is set: improving trade through sectoral agreements by like-minded countries”. However, if other Members decline to participate, these initiatives create the possibility of WTO rule-making taking place in future at a plurilateral level (as it did after the Tokyo Round in the 1970s), which raises difficult questions about the future agenda and cohesiveness of the multilateral system.

Members were unable to reach any agreement on a work programme for agriculture, or within that on public stockholding for food security which had been India’s principal objective for MC11. The temporary protection from a challenge to subsidies that developing countries use for food security purposes remains in place, but India and others had hoped to make that protection permanent and to loosen the conditions attached to it. Negotiations to improve agricultural market access and reduce domestic agricultural support remain unfinished from the Doha Round, but there seems little chance of them re-starting as long as the United States, Japan, the EU and others refuse to contemplate extending development flexibilities to advanced developing countries, particularly China.

MC11 ended without sending any new political instructions to delegations in Geneva on what the WTO work programme for 2018 should be. No agreement could be reached on a consensus Ministerial Declaration because of deep divisions separating key Members over issues such as development and the primacy of the multilateral system. As a result, some observers believe that the same divisions between delegations, the same blockages in negotiations, and the same systemic problems in the functioning of the WTO machinery risk continuing when work picks up again in Geneva in 2018. In their view, securing the re-engagement of the United States in a leadership role will be critical to the WTO’s ability to make progress in 2018. MC11 sent mixed messages about that.

On the one hand, USTR Robert Lighthizer seemed to send a positive message at the end of the Conference when he said:

“MC11 will be remembered as the moment when the impasse at the WTO was broken. Many members recognized that the WTO must pursue a fresh start in key areas so that like-minded WTO Members and their constituents are not held back by the few Members that are not ready to act. In this regard, the United States is pleased to work with willing Members on e-commerce, scientific standards for agricultural products, and the challenges of unfair trade practices that distort world markets. Further, the United States intends to continue pushing meaningful disciplines on harmful fisheries subsidies based on guidance agreed to by Ministers at Buenos Aires. ... We welcome the opportunity in 2018 to continue to discuss how we can improve the functioning of the WTO and to ensure that it achieves its objectives for the benefit of all Members.”

On the other hand, Ambassador Lighthizer also reiterated the complaints about the functioning of the WTO that the United States had made throughout much of 2017:

- Litigation must stop taking over the role of negotiation in setting the rules;
- Self-proclaimed “developing country status” can no longer be accepted as a basis for exemption from the rules;
- Respect for existing rules – such as notification and transparency – must be greatly improved before new rules can be negotiated; and
- WTO committees must be revitalized and focus on making markets more efficient, in areas such as chronic overcapacity and the influence of state-owned enterprises as well as sanitary and phytosanitary trade barriers.

Some observers are hopeful that progress can be made on the “fresh start” that Lighthizer referred to once work starts up again in Geneva. However, in their view the reforms that Lighthizer called for will take far longer to resolve, particularly the re-definition of access to development flexibilities for which they can see no solution for the time being, and they doubt the patience of the United States to engage in such a drawn-out process. On balance, they remain deeply concerned that the multilateral system could be plunged into crisis in 2018, most evidently through further deterioration in the trade relationship between the United States and China, and that respect for the rule of WTO law coupled with effective dispute settlement may no longer be enough to prevent that.

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