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Understanding the South Korea-United States FTA

By Kevin Smith (Sandler & Travis Trade Advisory Services)

In order to have any meaningful discussion of KORUS, it must first be viewed within the context of the trade flows between South Korea and the United States (U.S.). Trade statistics show that South Korea is the seventh-largest trading partner of the U.S., and the U.S. is the third largest trading partner of South Korea. The Korea and U.S. Free Trade Agreement (KORUS), like all free trade agreements, provides unique opportunities, requirements and obligations for both U.S. and South Korean exporters and importers.

These opportunities include several elements such as an elimination of customs duties on qualifying goods that are staged over fifteen years, an elimination of over ninety five percent of tariffs on industrial and consumer goods within five years, along with the elimination and prevention of future merchandise processing fees on qualifying goods. By any measure, these are significant opportunities but, like all free trade agreements, duty free treatment must be

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Trade in Audiovisuals between Physical Trade and E-commerce

By Renato Antonini, Eva Monard and Lorenzo Di Masi[1] (Jones Day)

The regulation of trade in audiovisual goods is characterized by a tension between attempts of liberalization carried out by certain countries and protectionist policies, pursued, most notably, by European states. Moreover, the emergence of the Internet as a major means for trade in audiovisuals poses interesting questions on how to interpret the law of the World Trade Organization in the contemporary digital age.

Introduction

As widely reported by the international press during the past few weeks, there has been quite some debate concerning the inclusion of audiovisual services, including those provided online, in the mandate for the negotiations of the Transatlantic Trade and Investment Partnership ("TTIP"), the future free trade agreement between the European Union ("EU") and the United States of America ("U.S.").[2]

As the result of the opposition of France, the negotiating mandate given to the European Commission for the start of the talks with the U.S. does not in-

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The Korea and U.S. Free Trade Agreement (KORUS) provides unique opportunities, requirements and obligations for both U.S. and South Korean exporters and importers. In order to receive duty free treatment, certain requirements must be followed such as direct shipment of goods between the two countries and proper certification of origination. *Page 1*

Trade in Audiovisuals, E-Commerce
The audiovisuals sector has recently emerged at the forefront of transatlantic trade agreement negotiations, which extends to a broader discussion of e-commerce regulation in trade. *PTCS* outlines the legal framework for trade in this sector at the level of the WTO as well as its predecessor General Agreement on Tariffs and Trade. *Page 1*

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understood within the context of the requirements that apply to this treatment. These requirements include the direct shipment of the qualifying goods between South Korea and the U.S., goods must qualify for the treatment according to rules of origin prescribed in the agreement, a written or electronic certification by the importer or exporter that the claimed good is originating, the records supporting a claim must be maintained for five years from the date of certification and both South Korea and the U.S. governments may conduct origin verifications on claimed goods eligibility.

These requirements fall on both the exporter and importer of goods and create very separate and distinct obligations. Exporters in both South Korea and the U.S. must provide a written or electronic certification and shall on request, provide a copy to its government. Any false certification by an exporter or a producer shall be subject to penalties equivalent to those that would apply to an importer that makes a false statement or representation in connection with an importation. Also, when an exporter or a producer has provided a certification and has reason to believe that the certification contains or is based on incorrect information, the exporter or producer shall promptly notify in writing every person to whom the exporter or producer provided the certification of any change that could affect the accuracy or validity of the certification.

Importers in South Korea and the U.S. who claim preferential tariff treatment for goods imported into its territory must declare the goods as an originating good, provide the tariff rate and possess and when required, provide a copy of any certification on which they have based their claim. The importer must also be able to validate that the good is an originating good and satisfy all applicable requirements including the direct shipment requirement. Finally, an importer must make a claim for preferential tariff treatment and apply for a refund of any excess duties paid no later than one year after the date of importation.

Therefore, the questions that both exporters and importers face are: how to best take advantage of the opportunities, fulfill the requirements, and meet all their obligations. Past experiences have shown all this can be accomplished by breaking down and viewing them as best practices that occur in three segments; the first being, activities that must occur prior to export and import, secondly, activities that must take place at the time of export

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The Impact of the U.S. Department of Commerce's Modified Factual Information Regulations on Antidumping and Countervailing Duty Proceedings

By Donald B. Cameron and Mary S. Hodgins (Morris, Manning & Martin)

The Department of Commerce recently modified its regulations addressing the submission of factual information during antidumping and countervailing duty investigations and administrative review proceedings. *See Definition of Factual Information and Time Limits for Submission of Factual Information*, 78 Fed. Reg. 21246 (April 10, 2013) ("Modified Regs"). Parties should be aware of these Modified Regs because, while they are meant to streamline proceedings and enhance the Department's ability to fully address the issues before it, the changes implemented in these revised regulations place yet another obstacle in the path of parties wishing to participate in smooth and efficient administrative proceedings. In fact, these changes may affect the Department's ability to determine antidumping and countervailing duty margins "as accurately as possible". These changes also make early preparation for antidumping and countervailing duty investigations and reviews even more crucial.

In the Modified Regs, Commerce has amended its regulations regarding the definition of, and the deadlines for submission of, factual information in the course of antidumping (AD) and countervailing duty (CVD) investigations and reviews. Prior to the change, the Department defined factual information as "(i) initial and supplemental questionnaire responses; (ii) data or statements of fact in support of allegations; (iii) other data or statements of facts; and (iv) documentary evidence." The new regulation creates five distinct, more specific categories of factual information: (i) Evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR § 351.408(c) (factors of production) or to measure the adequacy of remuneration under 19 CFR § 351.511(a)(2); (iv) evidence placed on the record by the Department; and (v) evidence other than factual information described in (i) – (iv). The Department notes that these new definitional categories do not change the types of information that can be submitted but rather "allow for more accurate classification" of the information submitted in a proceeding. The Department's new regulations also set specific time limits for submissions based on the type of factual information submitted. Previously, the regulations provided a general time limit for submission of factual information (seven days prior to verification in an investigation or 140 days after the request for a review in an administrative review). Finally, the new regulations require that any person submitting factual information must specify precisely which of the five categories a submission falls under or whether it is being submitted to rebut, clarify or correct information already on the record (and must specify what that information is).

In the Modified Regs, Commerce has amended its regulations regarding the definition of, and the deadlines for submission of, factual information in the course of antidumping (AD) and countervailing duty (CVD) investigations and reviews.

Parties appearing before the Department should be aware that the new regulations impose some additional administrative burdens. Parties will have to ensure that they are correctly identifying the subsection of factual information that their submission falls under and add an explanation to the submission of why that subsection is the appropriate one. In addition, when submitting information to rebut, clarify or correct information on the record, parties will have to identify the specific information they are rebutting and add an additional reference to that information. While this may seem like a simple task, submissions often cover and refer to multiple points of an argument, and preparing precise references to various previously submitted statements can take some time. This additional procedural hurdle disrupts the parties' attention from the business of preparing the substantive information required in investigations and reviews. Parties should keep these additional procedural requirements in mind particularly as the deadlines to submit information to rebut, clarify or correct information submitted in questionnaire responses has

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now been shortened to 14 days after an initial questionnaire response and ten days after a supplemental response. Previously, parties had until the general factual information deadline to submit any relevant factual information in response to the information submitted by other parties. In tandem with the Department's fairly onerous new certification requirements, requiring certifications from clients (who often reside in different time zones) to accompany virtually *every* submission to the Department, parties will now be spending a significant amount of time on purely procedural matters as they will on the substance of submissions, and they will have significantly less time in which to analyze submitted information and arguments and gather factual information in response.

These new regulations raise more serious substantive issues, which have the potential to affect the accuracy of the Department's determinations in trade remedy proceedings.

These new regulations also raise more serious substantive issues, which have the potential to affect the accuracy of the Department's determinations in trade remedy proceedings. Many of these issues were addressed during the notice and comment period preceding the adoption of the Modified Regs by parties that appear regularly before the Department. Most of these potential substantive issues can be seen in the context of non-market economy ("NME") antidumping cases. In an NME case, in very basic terms, a foreign producer's costs are determined by valuing its factors of production ("FOP") (the various components that go into producing the subject merchandise, such as raw materials, energy and labor) through the use of surrogate values from production of similar merchandise in a surrogate market economy country. The process of determining which market economy country to use as the surrogate country and which surrogate values are most accurate is a time-consuming process that always carries the potential for totally arbitrary results. The process of examining and presenting the most accurate surrogate country and surrogate values requires extensive market research and analysis by all parties. The selection of one particular surrogate value over another can have an enormous effect on a party's antidumping duty margin.

The Department's old regulations provided parties with multiple deadlines by which to submit publicly available information to value these factors of production: one deadline set by the Department for each particular case toward the beginning of the review or investigation; one at the general deadline for the filing of factual information; and one after the preliminary determination (40 days after publication of the determination in an investigation and 20 days after publication in a review).

The Department's new regulations eliminate the ability of parties to submit information to value factors of production after the Department's preliminary determination and provide only one deadline – 30 days prior to the preliminary determination – to submit this information. This is problematic in that the Department often does not select the surrogate country until the preliminary determination. In addition, it may not be clear which factors of production will require a surrogate value until the preliminary determination, as the Department has different methods of valuing a respondent's factors of production in different circumstances. For instance, when a producer uses intermediate inputs in the production process or sources its inputs from market economy countries the input will be valued differently. Therefore, in order to ensure that all of the necessary information regarding potential surrogate values for the factors of production in a given case is on the record by the new deadline, parties will have to submit surrogate value information for every potential factor from every available source, or they will risk being stuck with unfavorable surrogate values. Having to anticipate every possible outcome prior to the preliminary determination will lead to a flood of factual information submitted to the record, which, in turn, will greatly add to the cost of preparing submissions for the proceeding and undermines the Department's goals of increased efficiency. Further complicating matters, the Department often delays its selection of mandatory respondents until well after initiation of the proceedings. As parties do not want to expend resources in preparation of factual information prior to confirmation that they will in fact be required to respond to the Department's questionnaire as mandatory respondents, they will have even less time, once selected, for the time-consuming process of gathering and preparing information related to the critically important selection of surrogate values in the case.

In addition, the regulatory changes limit parties' opportunities to effectively rebut the sur-

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rogate value information provided by opposing parties. Under the Department's new regulations, parties are only afforded one opportunity to submit arguments or publicly available information to rebut, clarify or correct the factual information submitted by the opposing party. The new regulations specifically prohibit the submission of previously absent from the record alternative surrogate value information as part of this rebuttal. This appears to limit a party's ability to rebut surrogate value information by providing a more specific or accurate surrogate from other publicly available information.

Another potential problem with the Department's new regulations as they are applied to NME proceedings is that while the Department favors contemporaneous data to value the factors of production, these data are often not available until much later in the proceeding as they are often sourced from public governmental websites with a significant lag in publication. Due to the earlier time limits for submission of FOP data under the Modified Regs., parties will be forced to submit less contemporaneous data, potentially leading to a less-accurate dumping margin.

Rather than providing a more streamlined way to develop the record, with these new regulations the Department has insured that the record of NME cases will become clogged with voluminous submissions encompassing every possible surrogate value and providing little in the way of clarity for the Department or interested parties. Due to the significantly condensed time frame for submitting information (particularly information to value factors of production) it is essential for parties to work with counsel early in a proceeding to begin to develop the arguments in the case and to gather the factual information necessary. Under the Department's new regulations, parties who wait until the investigation or review is underway to begin to develop this critical information will face a significant disadvantage and may end up with high AD and/or CVD margins, an outcome that may be preventable through early preparation. ❑

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Round Up

Trade & Customs Round Up

By Linda Zhang (Thomson Reuters)

U.S. Advances Trade Relations with ASEAN Countries

In June, high-ranking U.S. trade officials and members of the Association of Southeast Asian Nations discussed opportunities to build economic ties that would benefit businesses and workers, including trade, according to the Office of U.S. Trade Representative press release.

Among the topics of interest were an assessment of the progress of the U.S.-ASEAN Enhanced Economic Engagement Initiative and how the trading partners can align interests to set up a successful World Trade Organization meeting in Bali at the end of 2013.

In addition, U.S. and Indonesian representatives met in a bilateral meeting under the U.S.-Indonesia Trade and Investment Framework Agreement. The two countries discussed a range of issues, including their cooperation within the Asia-Pacific Economic Cooperation forum. The U.S. also raised concerns regarding restricted market access to Indonesia's agriculture, manufacturing, energy and telecommunications sectors.

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U.S., Vietnam Still Far Apart on Clothing in TPP Talks

Unsettled contentions between the U.S. and Vietnam over textile trade policy may stall Trans-Pacific Partnership (TPP) talks, which the U.S. hopes conclude by the end of the year, according to Reuters.

As the U.S. pressures Vietnam to eliminate tariffs on agricultural and manufactured goods, among other regulations of trade activities, Vietnam wants the U.S. to phase out textile tariffs. However, the U.S. fears that such a drastic change would hurt its textile trade with members under the 1992 North American Free Trade Agreement. In particular, the tariff reduction would threaten the "yard forward" rule which grants duty-free treatment of yarn and manufactured fabric in a NAFTA country and limits the rule of origin to ensure that third countries, like China, do not benefit.

In attempts at reconciliation, the U.S. has offered a "short supply" list of 170 items that would not be subject to the "yard forward" rule, but Vietnam says the list, which only includes 5 percent of the country's clothing exports, is too short.

Textiles from Vietnam face an 11.1 percent tariff average, which is much higher than the average tariff of all imports of less than 2 percent. Tariffs on some clothing even face levels at near 30 percent.

Any China Solar Pact Would Help Defuse Wine Spat, said EU Official

In an ongoing trade spat with China over Chinese solar panels and a subsequent EU wine probe, EU Trade Commissioner Karel De Gucht and EU officials met with their Beijing counterparts, urging a resolution before August when full duties will be effective, according to Reuters.

According to a joint statement between Gucht and China's Commerce Minister Gao, both parties are interested in agreeing on a floor price for the Chinese solar products; however, neither top trade official shared pricing details.

EU Files WTO Complaint over Chinese Stainless Steel Duty

In mid-June, the European Union filed a complaint at the World Trade Organization regarding anti-dumping duties China imposed on stainless steel tube imports, following a similar filing submitted by Japan six months earlier, according to Reuters. The complaint targets high-quality steel products that China requires to build power plants.

In its defense, China reasoned that it could not maintain a competitive cost of production compared to its Japanese and European counterparts, and suspected that the imports were priced unfairly, thus necessitating the anti-dumping duties. The duties on the European products range from 9.7 to 11 percent.

China to Scrap Iron Ore Import Licensing System to Open up Trade

China plans to eliminate a decade-old iron ore import licensing system, which will open an import market that makes up two-thirds of the world's international trade in this area, according to Reuters. This elimination may also cut costs for domestic steel mills due to a reduced need for licensed middlemen in the import licensing process.

The new move will require iron ore traders to follow the same streamlined routine licenses issued to other importers without having to receive additional approval from government-backed industry giants such as the China Iron and Steel Association (CISA).

The former system faced many challenges and sometimes resulted in counterproductive results. For example, though the system tried to prevent unlicensed traders from driving prices up through speculative buying, it ultimately opened up a grey market for middlemen to make large profits instead.

Lawmakers, Businesses Demand Indian Trade Reforms

Over 170 U.S. lawmakers and a group of U.S. business groups jointly pushed for the U.S. to increase pressure on India to change policies that hurt American exports and jobs, according to Reuters. They point to how the Indian government has forced local production of various manufactured goods, thereby strategically blocking foreign suppliers.

In particular, the Indian government used "compulsory licenses" and other ways to nullify patents of U.S. drug manufacturers, putting U.S. innovation and intellectual property at risk. Adding local content requirements has also threatened the ability of U.S. music, movies and software to enter the market. Some U.S. lawmakers have suggested revoking India's participation in the U.S. Generalized System of Preferences which eliminates duties on billions of dollars of exports from India to the U.S.

The business groups include Pharmaceutical Research and Manufacturers of America, Motion Picture Association of America, Biotechnology In-

dustry Association, National Foreign Trade Council and Solar Energy Industries Association.

U.S. Puts Russia on Notice in First Report on WTO Compliance

The Office of United States Trade Representative (USTR) released its first report on Russia's compliance with World Trade Organization commitments as part an agreement with Congress to pressure Moscow to abide by WTO rules, according to Reuters.

Among concerns of U.S. lawmakers are market access for U.S. goods and services as well as the protection of U.S. intellectual property rights. For instance, the report lists what the U.S. has done to address Russian limitations on U.S. meat imports which contain the feed additive ractopamine. Russia joined the world trade body about a year ago. Since then, the U.S. has passed legislation to establish "permanent normal trade relations" with the country.

Mexico Considering Tariff Hikes on U.S. Goods in Meat Origin Labeling Dispute

Joining Canada, Mexico has threatened to increase tariffs on U.S. goods to raise concern over U.S. noncompliance with a WTO ruling regarding meat of origin labeling requirements, according to the Sandler, Travis & Rosenberg Trade Report. The two partners want the WTO to evaluate whether the U.S. is abiding by recently revised rules, and if not, to take action to ensure it does. ❏

Trade Partnerships

EU, U.S. Leaders Launch Trade Talks, France Digs in on Culture

By William Schomberg and Roberta Rampton (Reuters)

The United States and the European Union launched talks in June to create one of the world's most ambitious free-trade zones, as France again underscored its determination to protect its movies and culture.

A trans-Atlantic free trade agreement was first considered three decades ago but was knocked down by France in the 1990s. Europe has now managed to get Paris onside, opening the way to a deal that could boost the EU and U.S. economies by more than $100 billion a year each.

"This is a once-in-a-generation prize and we are determined to seize it," said British Prime Minister David Cameron, flanked by U.S. President Barack Obama and leaders of European Union institutions before a Group of Eight summit in Northern Ireland.

The United States and Europe account for almost half of the world's total output and a third of its trade.

France had threatened to block the start of talks until the EU's other 26 governments accepted its demand to shield movies and online entertainment from competition from Hollywood and Silicon Valley. Paris eventually won at least a temporary exclusion for such industries.

Tensions came to a head again in June after European Commission President Jose Manuel Barroso told a newspaper that opposition to opening Europe's culture industry to competition was "reactionary" and part of an anti-globalization agenda.

French President Francois Hollande said the comments had been a "bit of a shock, a bit of a surprise" and France would not allow the issue back on the negotiating table.

Barroso, aware of the upset in Paris, stressed he believed help was needed for some forms of culture which "are not exactly like other sorts of goods." But, with an eye on Washington, he said audiovisual services could yet be put on the table.

"I hope this is understood by our American partners," he said.

Obama warned against narrowing the scope of the talks. "It is important that we get it right and that means resisting the temptation to downsize our ambitions or avoid tough issues just for the sake of getting a deal," he said.

Those tough issues are likely to include agriculture.

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The American Farm Bureau Federation, representing big U.S agricultural interests, urged Washington to do away with the "endless array of non-tariff barriers" in Europe to its exports, including for genetically modified crops.

While U.S. and EU negotiators are aware that a final deal will be tough to clinch, they are also conscious of the rising power and influence of China and the need to deepen Western economic integration in order to compete with Asia.

'Political Will'

The United States and the European Commission, the executive arm of the 27-country European Union, hope for a free-trade deal by the end of 2014 - a tight deadline in complex international trade talks that usually take many years.

"We must maintain that political will in the months ahead," Cameron said.

The London-based Centre for Economic Policy Research estimates a pact - to be known as the Transatlantic Trade and Investment Partnership - could boost the EU economy by 119 billion euros ($159 billion) a year, and the U.S. economy by 95 billion euros.

However, a report commissioned by Germany's non-profit Bertelsmann Foundation said the United States may benefit more than Europe. A deal could increase GDP per capita in the United States by 13 percent over the long term but by only 5 percent on average for the European Union, the study found.

Businesses on both sides would like an agreement in which a car tested for safety in the United States would not have to be tested again in Europe, and a drug deemed safe by Brussels would not have to be approved as well by the U.S. government.

Following the collapse of global trade talks in 2008, both the United States and Europe have sought to strike as many free-trade agreements as possible, and Brussels alone is negotiating with more than 80 countries.

The first round of EU-U.S. negotiations will take place in Washington on July 8, the White House said in a statement. ❏

Trade Partnerships

New U.S. Trade Chief Focused on India, Striking Deals

By Doug Palmer (Reuters)

New U.S. Trade Representative Michael Froman in late June said he expected growing trade problems with India to be a major early focus of his tenure, but stopped short of saying the United States should cut off benefits for that country.

"We have a number of concerns about the investment and innovation environment in India," Froman said in a wide-ranging interview shortly after being sworn into office. "It's something that we're very focused on."

Other top priorities are completing trade deals with 11 countries in the fast-growing Asia-Pacific region and with the European Union, and ensuring that countries live up to their existing trade obligations, he said.

Froman, who won Senate approval in June by a vote of 93-4, said he agreed with Senator Elizabeth Warren that the public should have a better understanding of the issues that countries negotiate in trade agreements.

"We'll take a look at a number of ideas and proposals that people have about how to improve transparency. But we also want to make sure that we can negotiate a deal that is in the best interests of American workers, farmers and ranchers," he said.

Warren's concern that trade talks are overly secretive prompted the Massachusetts Democrat to vote against Froman, even though she is an ally of President Barack Obama on many other issues.

Angst over India

Members of Congress and business groups have urged the Obama administration to take a tougher line on India's trade policies, including its use of compulsory licenses to suspend patents on U.S. drugs, barriers to U.S. agricultural exports, restrictions on foreign investment and local content policies that discriminate against foreign goods.

Froman, who until recently was Obama's chief international economic affairs adviser, said he expected to raise the issues in July in Washington at a U.S.-India CEO Summit, and potentially in a future meeting of the U.S.-India Trade Policy Forum, which has not met since 2010.

Some lawmakers have suggested removing India from Washington's Generalized System of Preferences program, which helps developing countries export goods to the United States.

Froman treaded carefully on that question, noting that many U.S. companies also benefited from the program, since it lowered their production costs by waiving duties on imports.

"We need to take a careful look at that ... This is something we want to work with Congress on," he said.

Busy Negotiating Agenda

Froman, whose friendship with Obama goes back to their days together at Harvard Law School, takes over the top trade post at one of its busiest times in recent years.

The United States hopes to wrap up trade talks with Japan and 10 other countries in the Asia-Pacific region by the end of the year, and will hold the first round of talks on a proposed U.S.-EU agreement the week of July 8.

"It's a very full agenda that all revolves around creating jobs in the United States," Froman said.

Finishing talks on the proposed Trans-Pacific Partnership, or TPP, by December 31 is "an ambitious timetable, but that is the objective we have set out," he said.

One of the TPP countries, Vietnam, complained in June that the United States was continuing to shield the U.S. textile industry from substantial market openings while making tough demands on other participants in the talks.

"All I would say is this is intended to be a comprehensive, high-standard agreement, which means there will be hard steps for every country to take," Froman said.

"With regard to textiles in particular, we want to make sure we balance the interests of our domestic producers, importers and consumers appropriately," he said.

In its separate talks with the EU, the United States is pushing for "the broadest, most comprehensive agreement we can get," despite France's insistence on excluding cultural industries from the negotiations, Froman said.

"There are sensitivities on both sides that will have to be addressed in the agreement."

When asked if the pact would make it easier for U.S. farmers to sell genetically modified crops in Europe, Froman said, "We think the prospect of a broad and comprehensive agreement gives us our best opportunity for achieving something that has eluded us before."

He repeated his intention to work with lawmakers to pass a "trade promotion authority" bill, which would allow the White House to submit trade agreements to Congress for an up-or-down vote without amendments.

Many lawmakers want the bill to include a provision requiring the administration to negotiate rules against currency manipulation in trade pacts. Asked about that, Froman said that was an issue that needed to be worked out during discussions.

Finishing talks on the proposed Trans-Pacific Partnership, or TPP, by December 31 is "an ambitious timetable, but that is the objective we have set out," he said.

Chinese Investment

Froman declined to comment on concerns raised by several senators about Shuanghui International's proposed $4.1 billion purchase of Smithfield Foods, which would be the biggest Chinese takeover of a U.S. company to date.

Those lawmakers have argued that the tie-up poses a potential threat to both U.S. food security and food safety, and they want the administration to consider those issues before deciding whether to sign off on the deal.

"I would only say as a general matter the U.S. is open to foreign investment provided it meets our overall statutory standard," he said.

On another matter, Froman said he expected a decision on whether to suspend Bangladesh from the U.S. Generalized System of Preferences by the end of June, following recent tragedies, including a factory fire that killed more than 100 people, that have raised concerns about working conditions in the Asian nation's garment sector.

Most of Bangladesh's garment exports to the United States do not receive duty-free treatment under GSP, so suspending it from the program would be a mostly symbolic move. ❑

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and import and finally, activities that take place after export and import.

Some of these best practices in each of the three segments include:

Prior to Export

- Review and Modify Supplier Contracts and Obtain commitments to provide FTA required data
- Understand the Rules of Origin and Identify Documents and Data sources
- Develop Systems and Process Flow Documentation
- Indentify and Acquire Resources: People, Systems, Processes, Service Providers
- Train Staff: People, Suppliers, Service Providers
- Classify Goods, Materials and Request Origin Certifications

Can a claim for KORUS be made after goods are imported? Yes, the importer can make a claim for a refund of duty and fees up to one year after importation.

- Obtain Bills of Materials, Add Classification and Regional Value Content data
- Conduct Audit Certifications and Supplier Follow-up
- Complete the Bill of Material Processing

At Export and Import

- Completion of Certifications
- Communicate Certification Status to Necessary Parties
- Make Declarations

After Export and Import

- Keep and Maintain Electronic and Paper Records
- Respond to Information Request from Appropriate Authorities
- Respond to Government Audits

As mentioned, KORUS is very much like any other free trade agreement, it may provide tremendous benefits however, not without a fair amount of work and preparation. In all cases, properly preparing a KORUS claim for duty and fee benefits before export involves much less work and risk than playing catch up after the fact. All exporters and importers are advised to prepare ahead of time, to successfully participate in KORUS.

When thinking about KORUS it is important to keep these Ten Critical Factors in mind

1. Are there any special requirements for an importer making a KORUS claim?

Answer – Yes, the importer at the time of importation must claim KORUS treatment using a free form declaration that may be provided electronically or in writing.

2. Are there any waivers at the time of import for this declaration?

Answer – Yes, the declaration is waived on shipments valued at $1,000 US dollars or less.

3. Are there any special shipping requirements related to originating goods?

Answer – Yes, goods must be shipped directly between the U.S. and South Korea[1]. There are limited acceptations to this rule and logistics arrangements should be reviewed[3] carefully before making a claim for KORUS treatment.

4. What are the basic rules of origin?

Answer – There are five basic rules[2]

- Goods that are Wholly Obtained or Produced in one or both of the parties
- Goods Produced in one of both the parties exclusively of Originating Materials
- Goods that meet the Tariff Shift Rules
- Goods that meet the Regional Value Content Requirement
- Goods that meet a Combination of the Tariff Shift Rules and the Regional Value Content

5. Are there any exceptions in the rules for small amounts of non-originating material?

Answer – Yes, there is a general de minimis rule for non-originating material of 10 percent[3]. This amount may vary for certain goods and the rules of origin should be carefully checked.

6. Can a claim for KORUS be made after goods are imported?

Answer – Yes, the importer can make a claim for a refund of duty and fees up to one year after importation.

7. Will an exporter or producer be subject to penalties if they make a mistake when they certify a good for KORUS?

Answer – Generally no. Pprovided the exporter or producer notifies in writing all persons who they have provided the certification, neither the U.S. nor South Korea may impose penalties on them. It is recommended that an exporter and producer who finds they have made a mistake seek advice from an appropriate representative if this situation occurs.

8. How does the government verify the correctness of KORUS claims?

Answer – The governments may send written questions or a questionnaire, or they may also conduct an on-site visit to the exporter or importer.

9. Can a written determination of origin from the government be obtained?

Answer – Yes, if requested by the importer or exporter, a written determination can be obtained.

10. Must the importer and exporter retain records and for how long?

Answer – Yes, records that support the claim and the determination of origin must be maintained for a period of five years.

Free trade agreements play a critical role in the success for all globally operating companies, whether they are trading between two countries or many. The U.S. currently has free trade agreements with twenty countries and while they all have much in common, none of them are simple to understand or to execute. This article is not intended to address or answer all questions related to KORUS, but to give the reader a sense of what it is and knowledge that when approached properly, KORUS provides real opportunities. ❑

1 One exception to the direct shipment rule is that merchandise can be unloaded and reloaded in the Customs control of a third country.
2 Depending on the goods, Special Processing Rules may also apply
3 For textiles and apparel the deminimis is 7 percent.

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clude trade in audiovisuals services. However, the mandate also states that "*the* Commission, according to the Treaties, may make recommendations to the Council on possible additional negotiating directives on any issue, with the same procedures for adoption, including voting rules, as for this mandate".[3] Thus, the Commission reserves its right to come back to the Council with additional negotiating directives that might arise from the talks with the U.S. counterpart at a later stage, including the possibility to re-include audiovisual services in the scope of the negotiations.

The non-inclusion in the mandate of trade in audiovisual services does not come as a surprise. In general terms, trade in audiovisuals has always been one of the sectors least liberalized since the end of the Second World War, especially in Europe. The so-called "cultural exception" represents the basis for the non-liberalization of trade in audiovisuals.[4] According to this concept, given their importance in the creation and conservation of the national and cultural identity of a country, audiovisuals should be excluded from the rules of free trade.

In the following section, we will describe the legal framework for trade in audiovisuals at the level of the World Trade Organization ("WTO") and its predecessor, the General Agreement on Tariffs and Trade (the "GATT"). Moreover, we will discuss the relevant WTO disputes related to trade in audiovisuals.

Trade in Audiovisuals in the Framework of the GATT and the WTO

Trade in Audiovisuals under the GATT

The first attempt to regulate global trade in audiovisuals took place in 1947 in the context of the GATT. Article IV of the GATT – "Special Provisions Relating to Cinematograph Films" – establishes a system of quotas for "the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time".

As explained by Burri, Article IV of the GATT "is symptomatic of the sought-after […] cultural exception as well as of its narrow focus on audiovisual media"[5] in a post World War II scenario characterized by the attempt of European states to protect their domestic films industry from the rising power of the U.S. films industry.

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Trade in Audiovisuals in the Context of the WTO: the GATS

The issue of trade in audiovisuals was tackled again in the context of the General Agreement on Trade in Services (the "GATS") negotiated during the Uruguay Round, the multilateral negotiations that led to the establishment of the World Trade Organization on January 1, 1995.

In order to understand how audiovisual services are regulated under the GATS, it is necessary to describe briefly the functioning of the Agreement itself.

In extreme synthesis, the definition of services trade under the GATS is four-pronged, depending on the territorial presence of the supplier and the consumer at the time of the transaction. Pursuant to Article I:2, the GATS covers services supplied:

a. from the territory of one Member into the territory of any other Member (Mode 1 — Cross border trade);

b. in the territory of one Member to the service consumer of any other Member (Mode 2 — Consumption abroad);

c. by a service supplier of one Member, through commercial presence, in the territory of any other Member (Mode 3 — Commercial presence); and

d. by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member (Mode 4 — Presence of natural persons).

The issue of trade in digital audiovisual goods and services falls under the broader problem of the regulation of electronic commerce ("e-commerce") within the WTO.

In addition to establishing the four abovementioned modes of supply, the GATS identifies 12 sectors of services. For each one of these 12 sectors, the GATS Members are left free to determine to which extent they want to liberalize trade *vis à vis* all the other parties. This is done in practice through a "positive list approach": Members undertake to provide market access to services' suppliers from other countries only with respect to sectors that are explicitly included in lists defined as "schedules of commitments".

Another basic obligation of the GATS is contained in Article II, which states that "each member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country". However, such principle, known as "Most Favored Nation treatment" ("MFN treatment"), can be waived at the conditions set in Annex on Article II Exceptions of the GATS.[6]

Audiovisual services fall under point D of Sector 2 "Communication Services" and include motion picture and video tape production and distribution services, motion picture projection services, radio and television services, radio and television transmission services and sound recording.[7]

The concept of "cultural exception" plays an important role in the regulation of trade in audiovisuals services under the GATS.[8] Indeed, audiovisual services are the least liberalized service sector under the GATS. According to the data made available by the WTO, as of January 2009, only 30 WTO Members had made commitments in the sector[9] and all the 27 EU Member states had not made any commitment at all. Moreover, the sector is characterized by a high number of exemptions to the MFN treatment which have been tabled, *inter alia*, by the EU.

WTO Case-law

Audiovisual goods and services were the object of a WTO dispute between the U.S. and China, the *China – Publications and Audiovisual Products* case.[10]

In *China – Publications and Audiovisual Products*, the U.S. challenged the compatibility with WTO law of certain Chinese measures restricting the importation and distribution of cinematographic films, sound recordings, DVDs and publications. In particular, China had established a system allowing only state-owned enterprises to import publications and audiovisuals, therefore preventing foreign-invested companies from engaging in import activities.

According to the U.S., such system violated several GATT and GATS provisions as well as Article 5.1 of China's Protocol of Accession to the WTO. Such provision requires China to grant to all enterprises in China, including foreign-invested ones, the right to trade in all goods within three years from its accession to the WTO.

China rebutted that its measures were justified under Article XX (a) of the GATT, which allows WTO Members to adopt measures necessary to protect public morals provided that their applica-

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tion does not lead to an arbitrary or unjustifiable discrimination or a disguised restriction of international trade. According to China, the system for the selection of import entities was justified since audiovisual were "cultural goods", whose content could have had a negative impact on public morals in China.[11]

The Appellate Body dismissed China's defense based on Article XX (a) as "China failed to establish a causal connection between the exclusive ownership of the state in the equity of a publication import entity or the exclusion of foreign invested enterprises from importation of the relevant products, on the one side, and the protection of public morals in China, on the other side"[12]. Moreover, both the panel and the Appellate Body agreed with the U.S. that the measures were not "necessary" as China could have employed alternative and less trade-restrictive measures to pursue its goal of protecting public moral.[13]

Trade in Digital Audiovisual Goods and Services and E-commerce

Even if audiovisual services are included in the new services negotiations, which will have to re-define the WTO rules applicable to trade in services and lead to a new wave of liberalization, very insignificant progresses have been made since their opening in 2000.

In parallel to the deadlock of multilateral talks, there have been new developments in the field of trade in audiovisuals. In particular, it happens increasingly often that audiovisual goods and services are traded in a digital form via the Internet. Common examples are the possibility to purchase and download music from the Internet or the possibility to listen to online radios.

From a classificatory point of view, the issue of trade in digital audiovisual goods and services falls under the broader problem of the regulation of electronic commerce ("e-commerce") within the WTO.

While WTO Members have become aware of the necessity to regulate e-commerce since 1998, the year of the establishment of the Work Programme on E-Commerce,[14] no binding legal instrument has been adopted yet. Despite this fact, some steps forward in the definition of trade rules applicable to e-commerce have been made, especially through the contribution of WTO dispute settlement bodies.[15]

First, since the establishment of the Work Program on E-Commerce in 1998, WTO Members have agreed not to impose customs duties on electronic transmissions.[16] The moratorium has been confirmed at the Geneva Ministerial Conference in 2011[17] and it will be in force until the next Ministerial Conference taking place in Bali in December 2013.

Second, WTO case-law has affirmed the applicability of the rules of the GATS to e-commerce and to electronically supplied services.[18] Moreover, WTO case-law has confirmed that the electronic cross-border deliverance of a service is a service supplied under GATS mode 1 (cross-border supply) and not mode 2 (consumption abroad).[19]

Third, according to WTO case-law, specific commitments for GATS mode 1 encompass the delivery of services through electronic means.[20] In particular, in the case *US-Gambling*, the panel stated that "a market access commitment…implies the right of other Members' service suppliers to supply a service through all means of delivery, whether by mail, telephone, Internet etc., unless specified in the Member's Schedule."[21]

The future of the regulation of trade in audiovisuals remains uncertain. No further liberalization of the sector is likely to be achieved in the near future at a WTO level.

This principle has been re-affirmed in the case *China – Publications and Audiovisual Products*. In this case, the WTO judiciary bodies had to decide whether the insertion by China in its schedule of commitments of "sound recording distribution services" only covered the supply of such services in a physical form or also in an electronic form. China argued that its schedule of commitments had to be interpreted taking into account the technical feasibility and commercial reality of a service at the time such commitments were made. According to China, digital music services had emerged in China only after its accession to the WTO and therefore after schedule commitments were made.[22] While the panel somehow uphold the arguments raised by China,[23] the Appellate Body ruled that schedule of commitments have to be interpreted in an evolutionary way:

"[W]e consider that the terms used in China's GATS Schedule ("sound recording" and "distribution") are sufficiently generic that what they apply to may change over time. In this respect, we note that GATS Schedules, like the GATS itself and all WTO agreements, constitute multilateral treaties with continuing obligations that WTO Members entered into

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for an indefinite period of time, regardless of whether they were original Members or acceded after 1995[…]. We further note that interpreting the terms of GATS specific commitments based on the notion that the ordinary meaning to be attributed to those terms can only be the meaning that they had at the time the Schedule was concluded would mean that very similar or identically worded commitments could be given different meanings, content, and coverage depending on the date of their adoption or the date of a Member's accession to the treaty. Such interpretation would undermine the predictability, security, and clarity of GATS specific commitments, which are undertaken through successive rounds of negotiations, and which must be interpreted in accordance with customary rules of interpretation of public international law."[24]

Final Remarks

The future of the regulation of trade in audiovisuals remains uncertain. No further liberalization of the sector is likely to be achieved in the near future at a WTO level. Similarly, the adoption of a binding legal text on e-commerce, as such potentially applicable to audiovisuals, is unlikely due to the deadlock of the multilateral talks.

In this scenario, possible developments could come from free trade agreements, such as for instance the TTIP. In this framework, the U.S. is likely to exert pressure to re-include audiovisuals in the negotiating mandate of the TTIP. The effect of such possible re-inclusion should not be underestimated. Free trade agreements can be "stepping stones" to multilateral trade negotiations. If the U.S. and the EU, the two major trading blocks in the world, agree to liberalize trade in audiovisuals between them, they might be willing to do it also at the multilateral level and their example could be followed by other WTO Members. ❑

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1 The views adopted in the present article represent the personal opinions of the author and not the position of Jones Day.

2 For general information concerning the TTIP, see R. Antonini, E. Monard and L. Di Masi, "*Transatlantic Trade and Investment Partnership*" in Practical Trade & Customs Strategies 28 February 2013, Vol. 2, No. 4 and Practical International Corporate Finance Strategies, Vol 39, No. 4, Thomson Reuters; www.wtexecutive.com.

3 See European Union, *Member States endorse EU-U.S. trade and investment negotiations* (available at http://europa.eu/rapid/press-release_MEMO-13-564_en.htm).

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4 For a general introduction to the concept of "cultural exception" see M. Burri, *"Cultural Diversity as a Concept of Global Law: Origins, Evolution and Prospects"* (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1585139).
5 See M. Burri, *"Trade versus culture: The policy of the Cultural Exception and the World Trade Organization"*, pag, 2 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2125805).
6 For a description of the conditions for waiving to Article II of the GATS, see World Trade Organization, *Guide to reading the GATS schedules of specific commitments and the list of article II (MFN) exemptions* (available at http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm).
7 See World Trade Organization, *Audiovisual Services* (available at http://www.wto.org/english/tratop_e/serv_e/audiovisual_e/audiovisual_e.htm).
8 For an overview of the negotiations on audiovisual services in the context of the GATS see M. Burri, *supra* note 4, pag. 2-6.
9 See *supra* note 6.
10 DS363 — China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products
11 Panel Report, *China – Publications and Audiovisual Products*, para. 7.898 and Appellate Body Report, paras. 312-335.
12 P. Delimatsis, *Protecting Public Morals in a Digital Age: Revisiting the WTO Rulings on U.S. – Gambling and China – Publications and Audiovisual* Products, in Journal of International Economic Law, Vol. 14, pag. 285, 2011.
13 Panel Report, *China – Publications and Audiovisual Products*, paras. 7.712 – 7.714
14 WTO, Ministerial Declaration on Global E-Commerce, WY/MIN/(98)/DEC/2, 20 May 1998.
15 For a complete list of all the issues surrounding trade in e-commerce at a WTO level see S. Wunsch-Vincent and A. Hold, *Towards coherent rules for digital trade: Building on efforts in multilateral versus preferential trade negotiations* (available at http://www.wti.org/fileadmin/user_upload/nccr-trade.ch/wp3/3.2/wunsch_hold_final.pdf), pag. 4-6.

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16 See *supra* note 14.
17 WTO, Work Programme on Electronic Commerce, WT/L/843, 19 December 2011.
18 Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 363-365.
19 Panel Report, *United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services (US – Gambling)*, WT/DS285/R, para. 3.29 and Appellate Body Report, *US – Gambling*, WT/DS285/AB/R, para. 215
20 See S. Wunsch-Vincent and A. Hold, *supra* note 15.
21 Panel Report, *US – Gambling*, *supra* note 19, para. 6.355.
22 See Shin-yi Peng, *Renegotiate the WTO "Schedules of Commitments"?: Technological Development and Treaty Interpretation*, in Cornell International Law Journal, Vol. 45, pag. 416, 2012.
23 See Panel Report, *China Audiovisuals*, para. 7.1237.
24 Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 396-397.

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