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CPTPP. Legal Trends

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CPTPP. Legal Trends

Carlos Reyes

Resumen

Las zonas de libre comercio (y las uniones aduaneras) se establecieron a nivel multilateral desde 1947 en el artículo XXIV del GATT, y ese es el mínimo legal a partir del cual se construyen ahora los acuerdos comerciales preferenciales. Algunos dicen que el CPTPP forma parte de una nueva generación de Acuerdos de Libre Comercio, porque profundiza en el proceso de integración. El Acuerdo CPTPP es un tratado de 584 páginas, un instrumento legal muy extenso con 30 capítulos, así que cuando hablamos de tendencias legales se refiere a los 30 capítulos en un principio. Pero no es la idea explicar en este texto todos los capítulos, ni siquiera los mecanismos de disputa, sino los aspectos legales más destacados que hacen del CPTPP un ejemplo de la nueva estructura en el derecho comercial internacional. Los nuevos capítulos del CPTPP constituyen la verdadera agenda comercial y establecen un piso mínimo de protección en temas no especialmente vinculados al comercio, pero indispensables ahora para hablar de una nueva configuración de los acuerdos comerciales como son las inversiones, la propiedad intelectual, el comercio electrónico, entre otros.

Abstract

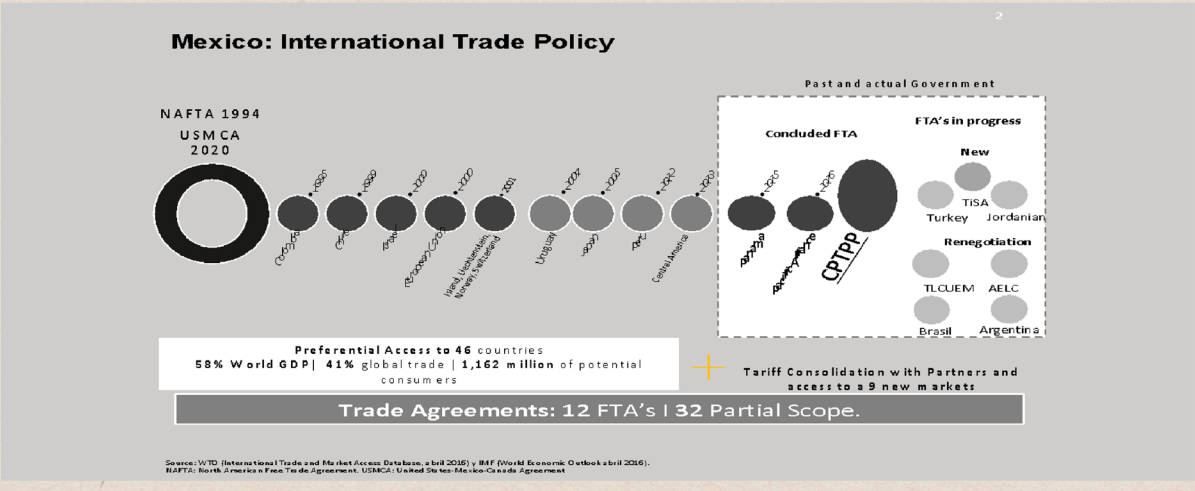
Free trade areas (and customs unions) were established in a multilateral level since in Article XXIV of the GATT, and that is the legal minimum from which preferential trade agreements are now built. Some say CPTPP is part of a new generation of Free Trade Agreements because it goes deeper in the integration process. The CPTPP Agreement is a 584-page treaty, a very extensive legal instrument with 30 chapters, so when we talk about legal trends it refers to all 30 chapters at first. But it's not the idea to explain every chapter in this text, not even just the dispute mechanisms, but the legal highlights that make the CPTPP an example of the new structure in international trade law. The CPTPP's new chapters constitute the actual trade agenda and establish a minimum level of protection on topics not specially linked to trade, but which are now essential to talk about a new configuration of trade agreements, such as investments, intellectual property, e-commerce, among others.

Free Trade Agreements

Mexico started its open trade politic in 1985 by signing GATT's Agreement. But it was until 1994, with the negotiation and the enters into force of NAFTA, along with the membership of the OECD, and the inauguration of the WTO (1995), when the so called neoliberalism got more powerful and globalization took the political and economic agenda of the then recent new multilateralism.

The last decade of the XX Century was vigorous in terms of free trade agreements for Mexico. This country celebrated a free trade zone with many countries, just as it shows next (figure 1).

Figure 1. Mexico: International Trade Policy



Source: WTO (International Trade Market Access Database, April 2016) and IMF (World Economic Outlook April 2016).

Free trade areas (and customs unions) were established in a multilateral level since 1947 in GATT article XXIV, and that is the legal minimum from where is now built the preferential trade agreements. That means free trade areas can establish more but not less than what it states in GATT.

A free trade area is a group of two or more countries or economies, customs territories in technical language, that have eliminated tariff and all or most non-tariff measures affecting trade among themselves. Participating countries usually continue to apply their existing tariffs on external goods. Free-trade areas are called reciprocal when all partners eliminate their tariffs and other barriers towards each other (Goode, 2004, p. 146).

Even when actual FTA's are different from each other, the base line of all of them is free trade of goods and services, according to the exceptions of non-discrimination principles, such as national treatment (NT) and most favorable nation treatment (MFN), and their general main goal is to promote international trade (Johns and Peritz, 2005), as well as suppression of trade barriers (tariff and non-tariff), just like Article XXIV.8 b establish.

GATT Article XXIV is actually known as the MFN exception, because it allows WTO Members to apply preferential rights with no obligation to extend them to all the other members. The reason for that is stated in paragraph four of the same article, and mainly it says that "4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the country's parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories".

Since GATT's entry into force in 1948, the number of Preferential Trade Agreements (PTA) has been increasingly growing, especially since the 1990's, just as shown below. As for today, there are actually 473 PTA's registered in the WTO transparency platform. 243 of them are Free Trade Areas, 21 Custom Unions, 50 Enabling Clause Agreements, and 159 Services Agreements (GATS Article V) (World Trade Organization).

Most of the actual FTA's include trade in goods and in services agreements, just like CPTPP, which include other trade topics, such as investments, intellectual property, e-commerce, among others that will be explained further.

Even when those PTA's have no implications with the WTO in terms of hierarchy, compliance with multilateral agreements is absolutely required for those FTA's cannot rule against them. There are some harmonization duties that Members should pay attention to in order to comply with both bilateral and multilateral commitments.

CPTPP Agreement recognizes itself as a free-trade zone,[1] which coexists with other trade agreements,[2] not only the WTO but many others that Parties have agreed-upon in the past decades. This coexisting clause prevents Members from uncertainties about rules of origin and preferential tariffs applied on bilateral bases.

In cases of incompatibility of treaties rules, which means unfair more favorable treatment for one partner above all others on, for example, trade of goods, services, investments, consultations are available and, if necessary, dispute mechanisms as well.

A Transpacific Commission is created for that matter (Art. 27.1), a plurilateral minister or senior officials commission in charge of supervising the interpretation and operational matters of the treaty by adopting decisions on consensus.

The disputes against measures inconsistent with those commitments are proven efficient, but let's recognize that the major efforts to comply with multilateral and preferential agreements have not been in the law, but in the politics field. We can say that we've been relatively living in a "pacta sunt servanda" era, where countries have been willing to make serious commitments in favor of free trade, although recent times have proven the cracking of that will, proportionally with the increasing of nationalism, leaded mainly by the actual United States' Administration.

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1 Section A: Initial Provisions Article 1.1: Establishment of a Free Trade Area. "The Parties, consistent with Article XXIV of GATT 1994 and Article V of GATS, hereby establish a free trade area in accordance with the provisions of this Agreement."

2 Article 1.2. Relation to Other Agreements.

New Generation of FTA's

Some say CPTPP is part of a new generation (Corr *et al*, 2019) of FTA's, because it goes deeper in the integration process. I don't know about that, but what is clear is that agreements like USMCA, TTIP, CETA, CPTPP and others contain non-typical XX Century FTA rules and chapters. Those agreements were based on free trade of goods and services, investment, IP rules, rules of origin, dumping and subsidies, dispute mechanisms, labor, environment (former NAFTA included labor and environmental protection duties since 1994), and some more.

New agreements such as CPTPP now include chapters about regulatory coherence, e-commerce, State-owned enterprises, transparency and corruption, among other topics not directly related with trade, but absolutely important for the international trade agenda, because those matters indirectly influence the success of operational trade activities.

The CPTPP Agreement is a 584 pages treaty, a very extensive legal instrument with 30 chapters, so when we talk about legal trends it means all 30 chapters at first. But it's not the idea to explain every chapter here, not even just the dispute mechanisms, but the legal highlights that make the CPTPP an example of the new structure in international trade law.

Regulatory Coherence

This Chapter is based on implementation of good regulatory practices for which countries establish their public policies. It is important to remark that Parties' intentions were not in the sense to avoid their national institutional competence to create and reform their public policies, but to harmonize them on a minimum standard of coherence, that make all of them reasonable.

This chapter mainly focuses on sharing good regulatory practices, which is a good start because all eleven Members have totally different laws, regulations and institutional procedures.

What Parties intended was to reduce those legal asymmetries by harmonizing them on good practices baseline, a minimum standard for all partners, especially on any process of planning, designing, issuing, implementing and reviewing regulatory measures, all of this to facilitate the achievement of domestic policy objectives, enhance regulatory cooperation; and promote international trade and investment, economic growth and employment.

The regrettable part of this chapter was that it wasn't included into the dispute settlement provisions. This is a pity, because in that way achieving those objectives and facing the very possible inconsistencies is going to be only in political hands. This is what lawyers called a "toothless" regulation.

I can only understand this as a cautious strategy, made more on good faith intentions than to accomplish legal and regulatory objectives. Good faith is the cornerstone of international relations, but in order to achieve good results is indispensable to link those commitments with a strong dispute mechanism with possible economic sanctions.

Dispute Settlement

Every trade agreement contains a dispute mechanism chapter for the purposes of interpretation and application of all the rules. Some include several mechanisms, such as NAFTA which contains three: for investment disputes, for dumping and countervailing measures, and a general one just like the one we are explaining now for the CPTPP, for measures applied by the Parties, inconsistent with the Agreement.

This Chapter is tailored according to WTO standard, and it establishes a fork in the road clause (Art. 28.4), which is a choice of forum clause. Once a Party chooses to go to one forum, "the forum selected shall be used to the exclusion of other fora". This Chapter excludes some other chapters of CPTPP, which have other mechanisms to solve their inconsistencies.

Before any tribunal (or Panel) can solve the dispute, alternative dispute procedures are available such as consultations, good offices, mediation, and conciliation. Once the Parties can't achieve a mutual agreement, a panel of three members can be established to analyze

many measures incompatible with the Agreement, with some matter exceptions contained in several chapters: Investment, Financial Services, Temporary Entry for Businesspersons, Telecommunications, Regulatory Coherence, and Electronic Commerce.

CPTPP Agreement doesn't improve XX Century's FTA's mechanisms. This chapter is usually a safeguard against unilateral illegal measures which doesn't happen on a regular basis, and when violations occur, the dispute usually gets solved on the political grounds, not legal. Even if a Panel finds liability of one Party, the solution is almost always in the governmental good faith. Say for example NAFTA history; in more than 25 years of this treaty there have been only three disputes under Chapter XX, a similar from the one in CPTPP. The reason is that those mechanisms are not useful at all, and CPTPP doesn't go further to improve it. Of course, we have to wait until disputes arise to see the results.

It is urgent to improve the dispute settlement by strengthen the panel mechanisms, make them more attractive as a way to solve problems, and specially that they are not seen as the problem themselves, instead of the solution. Having a totally useless dispute settlement system just because every treaty has it is a bad solution to a very complex situation. This chapter needs more teeth to strengthen the fulfillment of this Agreement.

Intellectual Property

This Chapter contains 11 of the 22 suspended provisions of the CPTPP, which make it one of the most controversial and complicated chapters of the negotiation. At the entry into force of the treaty, this chapter covers and protects all the preexisting IP.

One of the most controversial topics of the IP in this treaty was the pharmaceutical patents and data protection. The CPTPP suspended some of the most important provisions that were negotiated in the former TPP, such as National Treatment (Article 18.8); Patentable Subject Matter (Article 18.37); Patent Term Adjustment for Unreasonable Granting Authority Delays (Article 18.46); Patent Term Adjustment for Unreasonable Curtailment (Article 18.48); Protection of Undisclosed Test or Other Data (Article 18.50); Biologics (Article 18.51); Term of Protection for Copyright and Related Rights (Article 18.63); Technological Protection Measures (TPMs) (Article 18.68), and others.

The suspension of these provisions is due to the fact that they were proposed mainly by the United States, and those rules represent some risks for south economies of the CPTPP for their major interest is providing health instead of protecting investor's IP rights.

For investors, on the contrary, the moderation of IP rules represents risks for their investments because it gives chance to generics to take control of the market without the research and development, which can cost billions of dollars of losses for investors. If we take into account that governments are unable to invest that amount of money, and they can't protect investments either, what would be the motivation for investors to continue researching and innovating?

Trade agreements can be useful tools for companies that invest millions to develop cures for many diseases, but they need protection of their investments to achieve their goals. In any case, CPTPP at least seeks to establish a minimum floor of protection, a harmonized set of rules that can be a good start in the matter of international standards of protection, but it would be better if the US come back again to the negotiations.

Suspended Measures

CPTPP was essentially a Plan B for the negotiating partners, since the retirement of the US Delegation in 2017. The original TPP was built with the all-new structure of the so-called new generation of trade agreements, but it included several very polemical provisions that southern countries rejected in the first place.

The decision for suspending, instead of eliminating those provisions, according to White and Case, was because of Japan and Australia's negotiating tactic "aimed at leaving the door open for the eventual return to the agreement by the United States" (Corr *et al.*, 2019, p. 5). There's logic in this argument, because Trump's decisions have proven inconsistent, what now is right, tomorrow may not be and vice versa.

All 22 suspended measures involve themes such as Intellectual Property and Investment, both of the most complex chapters in almost every actual FTA Agreement, especially because of the pharmaceutical patents and the ISDS mechanisms. But all the suspended provisions are as follows

1. Express Shipments – Article 5.7.1(f) - suspend second sentence

2. Investment Agreement and Investment Authorization (ISDS applies to these)

3. Express Delivery Services – Annex 10-B - suspend paragraph 5 and 6

4. Minimum Standard of Treatment in Article 11.2 – suspend sub-paragraph 2(b); footnote 3 and Annex 11-E

5. Resolution of Telecommunications Disputes - Article 13.21.1(d)

6. Conditions for Participation - Article 15.8.5 - Commitments relating to labor rights in conditions for participation

7. Further Negotiations - Article 15.24.2 - suspend "No later than three years after the date of entry into force of this Agreement"

8. National Treatment - Article 18.8 footnote 4 – suspend last two sentences

9. Patentable Subject Matter - Article 18.37.2 and 18.37.4 (Second Sentence)

10. Patent Term Adjustment for Unreasonable Granting Authority Delays - Article 18.46

11. Patent Term Adjustment for Unreasonable Curtailment – Article 18.48

12. Protection of Undisclosed Test or Other Data- Article 18.50 13.

13. Biologics - Article 18.51

14. Term of Protection for Copyright and Related Rights – Article 18.63

15. Technological Protection Measures (TPMs) - Article 18.68

16. Rights Management Information (RMI) - Article 18.69

17. Protection of Encrypted Program-Carrying Satellite and Cable Signals - Article 18.79

18. Legal Remedies and Safe Harbors - Article 18.82 and Annexes 18-E and 18-F

19. Conservation and Trade (measures 'to combat' trade) - Article 20. 17.5 – suspend "or another applicable law" and footnote 26

20. Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices - suspend Annex 26A – Article 3 on Procedural Fairness

21. Annex II Schedule of Brunei Darussalam – 14 – paragraph 3: the phrase "after the signature of this Agreement" suspended

22. Annex IV Schedule of Malaysia – 3 and 4 – Scope of Non-Conforming Activities: all references to the phrase "after signature of this Agreement" suspended

The rationale suspension of these provisions means that countries are going to continue making efforts to reach a progressive agreement, just as the title of the Agreement says, which is possible considering other negotiations that are taking place at the same time. Take for example, the Mexican negotiations with the European Union, a trade agreement which involves most of the previous IP provisions of the TPP Agreement, and the creation of a permanent court of arbitration for the ISDS disputes, which was not included in the 2016 version of the TPP Agreement and it is considered as one real innovation for trade and investment agreements in the world.

But it is predictable that those efforts will be modest while the US continues to be out of the negotiations. On the other side, there is a risk that if the US gets back as part of the Agreement and tries to revive the suspended measures, some of the country Members won't agree on it, and that could start another economic and political crisis in the zone. But somehow it seems that we all depend upon the next US presidential elections to see the real upcoming possibilities.

Investment

Some measures established in the TPP are now suspended in the CPTPP, just as it was mentioned before. Investment chapters are actually the most polemical in many FTA's. Some say those treaties are no longer for opening markets (because there are few tariffs to protect in the majority of actual negotiations). The most important topic of a FTA now is the protection of investments, or what is called ISDS mechanisms.[3]

[3] Investor-State Dispute Settlement, the arbitration designed to protect investors from governmental actions against them, and to promote investments abroad.

Investment protection is the core of this new generation of trade agreements, and there is a great amount of legal literature available on this topic, almost in every language. That is why CPTPP goes a step further in this matter in comparison with the 1990's FTAs. This chapter is extensive so we're just underlying some of the most important highlights.

Chapter 9 covers the full cycle of an investment, from establishment or acquisition, management, operation, expansion and disposition (Corr *et al*, 2019, p. 3). It contains, as well as many actual investment treaties, the national treatment, most-favored nation (MFN) treatment, minimum standard of treatment, expropriation and compensation, performance requirements and transfers. This is considered the minimum floor in harmonized investment treaties.

Arbitration is still the way to protect investments from government's violations, but in the recent version of CPTPP this protection is weak in terms of initiating a dispute when it derives from a contract with the government. And ISDS tribunals are never able to overturn a Party's domestic measures; they can only seek compensation for damages.

This Chapter diminishes (in my opinion) investor's rights because only some violations can be sought to ISDS, with the clear exception of legal measures against tobacco; the consent to arbitration is now a national matter of the State (i.e. Mexican Hydrocarbons Law, arts. 20-21).

According to UNCTAD, "In the CPTPP, signatories have adopted an ISDS mechanism with procedural improvements. Some CPTPP signatory's created side letters signed by several countries on a bilateral basis related to ISDS procedures. The bilateral side letters (1) removed or modified ISDS provisions between specific countries or (2) terminated pre-existing IIAs (replacing overlapping ISDS commitments). Overall, this created asymmetric ISDS arrangements under CPTPP, with ISDS opt-outs done in parallel to the creation of many new treaty relationships offering ISDS" (UNCTAD).This Treaty contains policy flexibility to regulate in the public interest through reservations known as "non-conforming measures". Example: Canada maintains policy flexibility on Indigenous and minority affairs, culture, social services (including health and public education), which means that any national law or regulation made to protect any of those legitimate objectives is going to be armored against arbitration (ISDS).

In terms of consent of arbitration some measures are suspended, for example the provisions related to "investment agreements" and "investment authorizations", the Agreement prevents foreign investors from bringing forward a case, unless the State agrees on it.

But maybe the most dangerous provision of the treaty is related to tobacco, one multinational and legal industry unfairly punished by a chapter on a treaty. Let's say this clear, tobacco consumption is dangerous for human health and proven mortally. That is a fact, but even so, tobacco is legal in every part of the world and it provides many jobs, promote agricultural industry, which strengthens jobs as well.

CPTPP provides (Article 29.5) that a "Party may elect to deny the benefits of Section B of Chapter 9 (Investment arbitration) with respect to claims challenging a tobacco control measure of the Party (…)." A treaty that denies benefits concerning defense against illegal governmental measures, leaving the investors the national courts as the one and only way to challenge those measures, is not the proper way to promote investments.

Besides, the condemnation to a legal investment in an international treaty is against the principles of law itself such as due process of law, a clear discrimination of an industry with respect to others, and creates a dangerous precedent which can be used latter after to condemn other industries such as soft drinks, chips, alcohol and any other product that a government considers "dangerous" as health policy.

Environment

The Environment Chapter was included in NAFTA since 1994 but on a minimum level of protection, especially on a non-binding base. CPTPP goes further and establishes both binding and non-binding commitments. The starting point is that every country should have a minimum set of rules to protect the environment and in doing so they comply with multilateral compromises.

Complying with national law, then, is the first step. In that sense, according to CPTPP Parties shouldn't (i) fail to effectively enforce its environmental laws in a manner affecting trade or investment between the Parties; (ii) waive or otherwise derogate from its environmental laws in order to encourage trade or investment between the Parties; or (iii) provide certain types of fisheries subsidies that negatively impact overfished stocks.

All other non-binding commitments fall in the field of strengthen cooperation, promote above the minimum floor the governmental activities to efficiently fight against climate change, improve mechanisms for the companies and investors, so they include more green technologies in their process.

Labor Rights

The Labor Chapter was another innovation in the NAFTA Agreement and the reason, accordingly with the environmental chapter, was to avoid that countries seek to strengthen their trade and investment by reducing labor rights. Countries such as Mexico had at that time poor laws and few labor regulations. The so-called "labor dumping" was a real concern for Canada and the US, so the new treaty did seek to level the rights and obligations of the three members.

Now this topic in the CPTPP intends to include binding commitments that every country has to include in their own local laws, and consisted in those promoted by the International Labor Organization (ILO) Declaration, such as: (i) freedom of association and collective bargaining; (ii) elimination of forced labor; (iii) abolition of child labor; and (iv) elimination of employment discrimination.

Mexico had the advantage of having the lowest salaries and labor rights in the NAFTA region, but now in the CPTPP Agreement is not the same because some country members have similar advantages as Mexico, and if the Mexican advantage has been for long time the proximity with the United States, for our partners in CPTPP been close to a big market as China is attractive as well.

In the actual trade agreements what should be more important for governments is to enhance labor capabilities of their workers, make them more competitive instead of making them cheap. Competing with Asia and Oceania will be a big challenge. Mexico will have to improve its trade skills if its goal is to actively participate in the global trade.

Conclusion

The CPTPP's new chapters constitute the actual trade agenda and establish a minimum floor of protection on topics not specially linked to trade, but indispensable now to talk about a new configuration of trade agreements. The standardization of laws and regulations in many areas is the key to continue making trade agreements a good alternative to promote development.

CPTPP partners are very different from each other, but the international trade creates a common language for the international community and a very effective way to approach problems that the entire world is facing. Legitimate objectives, such as environment, human rights, health, labor rights and others are now part of the trade agenda and national policies have to be made with some similar characteristics in order not to become barriers to trade.

CPTPP Agreement establishes chapters with some new topics for the trade agenda, but it does it on a minimum standard of protection. Partners should be careful in making this commitments in a serious way, otherwise trade agreements can be seen as "politically correct", not a real alternative in facing global problems On the other side, the Regulatory Coherence Chapter can be the most important part of this change, a real start to uniform as much as we can, our laws and regulations to give a step forward in making this agreements real tools to make our world a little better.

The Regulatory Coherence Chapter could be the most important effort to eliminate the national legal and regulatory differences between all Parties. That could be a good starting point to uniform eleven countries' measures.

Dispute Settlement Chapter should be more enforceable, it needs more teeth to dissuade countries not to comply with their commitments. Maintaining the disputes mechanisms in the political arena doesn't guarantee the solution of conflicts.

Investment protection is indispensable if countries really want to attract and maintain FDI. Both objectives are sine qua non. Investors need to feel safe in a country where the government complies with due process of law, and governments want to attract more FDI. By setting an effective ISDS mechanism investors can be safe against illegal and unfair governmental measures, but CPTPP got some of the important rights of this chapter suspended. That is not a very good sign to promote FDI in a safety manner.

Finally, the CPTPP Agreement looks incomplete without US involvement. This text seems to be made that way in the meantime, waiting for the US to decide to come back to the table, and suspended measures send that message.

CPTPP Partners are making great efforts to make this treaty feasible and attractive. Japan is playing a leading role in the zone and there are good signs that this agreement can be an interesting counterweight in the world economy, but many think that the US is the missing part in this puzzle and they are waiting to find it again, once Trump's administration comes to an end.

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