# White & Case LLP
# General Trade Report - JETRO

April 2013

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# UNITED STATES

# GENERAL TRADE POLICY

## President Signs Continuing Resolution Restricting Acquisitions of Chinese Information Technology Systems

### Summary

On March 26, 2013 President Obama signed the "Consolidated and Further Continuing Appropriations Act, 2013" (the "CR")[1] into law. Section 516 of the CR[2] places restrictions on the use of funding appropriated under the law to purchase certain Information Technology (IT) systems of enterprises supported by the Chinese government.

### Analysis

Section 516 of the CR includes two important restrictions. First, it prohibits certain US government agencies, namely the Departments of Commerce (DOC) and Justice (DOJ), the National Aeronautics and Space Administration (NASA) or the National Science Foundation (NSF), from using the funds appropriated under the law to acquire an IT system without first investigating the associated risk of cyber-espionage or sabotage. According to the legislation, such an assessment should address any risk associated with a system that was produced, manufactured or assembled by an enterprise owned, directed or subsidized by the Chinese government. Second, and most notably, Section 516 prohibits subject US government agencies from using the appropriated funds to acquire an IT system that is produced, manufactured or assembled by an enterprise owned, directed or subsidized by the Chinese government unless the head of such subject US government agency determines that the acquisition is in the United States' national interest.

**I. BACKGROUND**

The CR comes only months after the House Permanent Select Committee on Intelligence released the October 2012 Investigative Report on the US National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE ("House Report"),[3] which concluded that "the

[1] The CR may be accessed here: http://www.gpo.gov/fdsys/pkg/BILLS-113hr933enr/pdf/BILLS-113hr933enr.pdf

[2] A CR is an appropriations bill meant to fund government agencies at the end of the Congressional fiscal year in the absence of a formal appropriations bill. A CR provides funding for existing federal programs at current, reduced or expanded levels.

[3] The House Report may be accessed here: http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/Huawei-ZTE%20Investigative%20Report%20(FINAL).pdf



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risks associated with [these Chinese companies'] provision of equipment to US critical infrastructure could undermine core US national security interests." The House Report recommended that, *inter alia*, "US government systems, particularly sensitive systems, should not include Huawei or ZTE equipment, including component parts. Similarly, government contractors – particularly those working on contracts for sensitive US programs – should exclude ZTE or Huawei equipment in their systems."

Although not a direct result of the House Report, Section 516 of the CR builds on already heightened concern evident in the House Report over Chinese government-supported companies imperiling US national security through provision of IT systems for US critical infrastructure. Furthermore, the range of companies potentially affected by Section 516 appears far wider than that targeted by the House Report; while the Huawei and ZTE Chinese telecommunications equipment companies were the focus of the House Report, Section 516 holds implications for Chinese and non-Chinese companies both in and beyond the telecommunications equipment sector.

## II. POSSIBLE IMPLICATIONS

In light of the lack of a definition for "IT systems" in the CR, the prohibition for which Section 516 provides could encompass a wide range of IT-related goods, *e.g.*, IT components, made by a Chinese government-supported company and incorporated into larger systems subsequently sold by another company to a subject US government agency. Furthermore, such incorporation of IT-related goods need not occur in China; rather, IT systems of companies located in Japan or even the United States may fall under the scope of Section 516's prohibition if these IT systems incorporate such constituent IT-related goods of a Chinese government-supported company. Also, "IT system", as liberally employed in the CR, suggests that Section 516's prohibition targets IT-related goods beyond those used for telecommunications purposes, *e.g.*, systems used for data gathering and processing, precision measurement, optical image capturing, etc.

Consequently, Section 516 poses significant supply chain-related challenges for companies that: (i) either directly sell IT systems to subject US government agencies; and/or (ii) sell other IT-related goods to companies which, in turn, sell IT systems to subject US government agencies. The complexity of these challenges increases as the international breadth of a supply chain increases, *i.e.*, as the number of countries involved in the relevant supply chain grows.

US and foreign companies supplying IT systems to subject US government agencies are likely to commence audits of their respective upstream suppliers. Such audits could detect a supply chain link involving a Chinese government-supported IT company that could trigger the prohibition contemplated under Section 516. Regardless of whether a company's supply chain encompasses a Chinese government-supported company, companies supplying IT goods eventually consumed by a subject US government agency can expect increased scrutiny of their supply chains, as Section 516 mandates that the head of the subject US government agency, in consultation with the Federal Bureau of Investigation (FBI) or another appropriate agency, assess any risk of cyber-espionage or sabotage associated with the acquisition of IT systems with funds allocated under the CR.



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## Outlook

Chinese Foreign Ministry Spokesperson Hong Lei urged the United States to abandon the CR, or at least certain elements of the same. According to Spokesperson Hong, the law "uses cyber security as an excuse to take discriminatory steps against Chinese companies." However, the enactment into law of the CR effectively avoided an imminent and politically unsavory US federal government shut-down, such that repealing the CR is unlikely. While Congress could theoretically ratify legislation repealing certain portions of the CR, *e.g.*, Section 516, bills sympathetic to Chinese industry and the Chinese state are unlikely to garner much support in a Congress largely skeptical of China, particularly in matters relating to trade and national security.

It remains unclear if subject US government agencies will issue regulation elucidating and providing practical guidance on implementation of Section 516. Also, lawmakers are currently engaged in the process of drafting a budget to continue funding the US federal government for when the CR expires on September 30, 2013 -although another CR is likely if lawmakers fail to craft, ratify and achieve promulgation of a budget- and it remains unclear if such budget or any subsequent CR will contain language similar to that contemplated under Section 516.

# USTR Releases Results of 2013 Section 1377 Review of Telecommunications Trade Agreements

## Summary

On April 3, 2013, the Office of the United States Trade Representative (USTR) released its annual Section 1377 Review of Telecommunications Trade Agreements ("2013 Report").[4] This review focuses on issues contemplated in US trade agreements and relating to: (i) internet-enabled trade in services, including cross-border data flows and Voice over Internet Protocol (VoIP) services, (ii) regulatory independence and efficacy; (iii) foreign investment limitations; (iv) competition regulation; (v) international termination rates; (vi) satellite services; (vii) submarine cable systems; (viii) telecommunications equipment trade; and (ix) local content requirements.

## Analysis

Pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, USTR conducts an annual review of the operation and effectiveness of US telecommunications trade agreements. Such trade agreements include: (i) the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS); (ii) the North American Free Trade Agreement (NAFTA) with Canada and Mexico; (iii) the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and

[4] The full report is available at: http://www.ustr.gov/sites/default/files/04032013%202013%20SECTION%201377%20Review.pdf.



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the Dominican Republic; and (iii) bilateral free trade agreements (FTAs) with Australia, Bahrain, Chile, Colombia, Israel, Jordan, Korea, Morocco, Oman, Panama, Peru and Singapore. The 2013 Report assesses the operation and effectiveness of telecommunications-related provisions under such trade agreements based on public comments filed by interested parties and on information obtained from foreign public officials and private sector representatives.

## I. INTERNET-ENABLED TRADE IN SERVICES

The 2013 Report highlights concerns over the negative effects on global trade and communications due to restrictions on transnational data flows and restrictions on Voice over Internet Protocol ("VoIP") services. We summarize these concerns below:

- **Cross-Border Data Flows.** The 2013 Report asserts that government implementation of policies that block or filter transnational data flows restrict global trade and negatively impact global communication. USTR has called for open access to networks and the free flow of data in the trade of digital goods and services through the Internet. In addition, USTR will: (i) work to identify undue restrictions on cross-border data flows; and (ii) develop trade tools to ensure that such policies do not affect trade.

- **Voice-over Internet Protocol (VoIP).** The 2013 Report notes that government restrictions of VoIP, an internet-based service that transmits voice signals, unnecessarily hinder trade and investment. Government policies force international VoIP providers to partner with domestic suppliers or impose burdening licensing regulations, thus restricting or effectively blocking VoIP services.

## II. INDEPENDENT AND EFFECTIVE REGULATOR

The 2013 Report also discusses issues relating to regulation as a barrier to trade, including:

- **China.** The 2013 Report alleges that China's Ministry of Industry and Information Technology (MIIT) faces a conflict of interest when acting as a "neutral" arbiter in cases involving market participants. The MIIT has effectively shielded and protected state-owned telecommunications operators from domestic and foreign competition. USTR urges China to reenact policies that establish MIIT as an independent regulator by: (i) resolving conflicts between the MIIT and other agencies; and (ii) revising its current draft of the Telecommunications Law.

## III. FOREIGN INVESTMENT

The 2013 Report cites foreign investment restrictions, *e.g.*, limits on the shareholding percentage of foreign investors, in Canada, China, and Mexico as a barrier to trade:

- **Canada.** The 2013 Report notes that Canada has recently taken important steps toward eliminating foreign ownership restrictions on the telecommunications sector. Canada currently maintains a "46.7 percent limit on foreign investment in facilities- based telecommunications



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providers operating in Canada," but Canada has recently amended a law, allowing for greater foreign investment in telecommunication providers that control less than 10 percent of Canadian telecommunication services revenue. Although the USTR lauds recent changes in Canadian law in this regard, it still urges Canada to remove any remaining restrictions.

- **China.** USTR suggests that China lift its foreign equity caps in the telecommunications sector by: (i) lowering its capitalization requirement; and (ii) eliminating the requirement that a foreign company must enter into a joint venture with a state-owned company in order to obtain a basic service license. China has recently announced plans to open its market to private sector companies for the resale of mobile services, but the draft rules of this plan suggest that China would not allow foreign companies to participate.

- **Mexico.** Mexico maintains its ceiling on foreign direct investment (FDI) in wire-line carriers that own or operate basic telecommunications facilities. This regulation creates an impediment for foreign carriers concerned with investing in this market. Mexican lawmakers have introduced new legislation to remove these restrictions, and USTR supports such legislation.

## IV. COMPETITION ISSUES

The 2013 Report highlights (i) complaints made by private sector companies in Colombia relating to regulatory parity for trunking services, the effect of market dominance by the dominant telecom operator on the availability of roaming contracts, and spectrum auction regulations that allegedly favor the dominant operator, (ii) Mexican efforts to encourage foreign investment to foster better competition, and (iii) a proposal in China to allow improved market access for mobile communications:

- **Colombia.** The 2013 Report notes that a number of parties including Avantel, DirecTV, America Movil and a number of other Colombian carriers have submitted statements concerning competition issues in Colombia. The Colombian government has also filed responses to these complaints.

  - ***Regulatory Parity.*** Avantel, a mobile operator in Colombia providing trunking[5] services believes that a 2005 modification to its license has caused unfair additional fees and subjects it to a less favorable legal regime. Although USTR claims that maintaining different licensing regimes for different services is not evidence of discrimination, the report suggests that Colombia, in order to provide regulatory parity, should reassess its application of different standards for similar services and allow operators to enjoy a singular legal regime.

  - ***Roaming.*** Avantel and other non-dominant carriers in Colombia have claimed that they are unable to access roaming contracts of reasonable terms and conditions with the dominant operator, Claro. In addition, Avantel believes that the national regulator (*Comisión*

[5] *Trunking:* method of offering shared network access to many clients instead of providing services individually



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*de Regulación de Comunicaciones* (CRC)) is not addressing the dominant status of Claro, nor the lack of roaming agreements between Claro and other carriers within Colombia.

- ***Auctions.*** USTR Report asserts that limiting access to more desirable spectrum bands may be an ineffective way of promoting competition. The National Regulator (CRC) has imposed restrictions on the spectrum in the 1.7 and 2.5 GHz bands for Claro. CRC claims that this new rule will promote competition and prevent Claro from extending dominance from the mobile voice market to the mobile data market. However, this new regulation does not appear to entice new market entrants but, rather, allows other such dominant existing providers as DirecTV to expand. USTR expresses concern that these new regulations are unfairly discriminatory against Claro.

- **Mexico.** The 2013 report notes that Mexico contains a highly concentrated telecommunications and video services market. Such concentration worries the USTR such that it now supports Mexican efforts to draw foreign entities to enter the market. In addition, Mexico has implemented conditions for America Móvil, the largest provider of telecommunications services in Mexico, to meet before it can provide video services and offer bundled services for voice, data and video to consumers. Proponents of these restrictions believe that bundling and cross-subsidizing will lead to artificially low prices which would affect competition. Opponents of these conditions, including the United States Council for International Business (USCIB), assert that requiring America Móvil to meet these conditions will limit competition and lead to low penetration rate for pay television services in Mexico.

- **China.** Early in 2013, the Ministry of Industry and Information Technology (MIIT) suggested a measure to license resellers of mobile services. The measure, titled “Pilot Program for Mobile Communications Resale Business,” encourages private sector involvement in the economy. The proposal is notable because it: (i) may promote market access into the telecommunications sector which currently only has three state-owned integrated operators; (ii) allows wholly-private operators to enter this sector—previously operators were majority state-owned; and (iii) recognizes that operators cannot enter a sector with the existing rule that requires a capitalization rate of USD 100 million.

## V. INTERNATIONAL TERMINATION RATES

The 2013 Report cites (i) instances, principally in regard to Ghana, Pakistan, and Tonga, where direct connections to the United States are not permitted or the rates these countries charge U.S. telecommunications carriers to connect to their respective networks for inbound long-distance calls, *i.e.*, termination rates, are set at distortively- high levels and (ii) issues relating to various service surcharges and taxes in El Salvador, Jamaica, and Panama. We summarize these concerns below:

- **Government-Mandated Termination Rate Increase.**

  - ***Pakistan.*** Some Pakistani long distance international carriers have set rate floors despite previously negotiated rates. This action has artificially increased termination rates of international calls into Pakistan, creating high charges which affect both US companies



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calling Pakistan and Pakistanis living abroad calling home. These actions are tantamount to anti-competitive behavior.

- ***Ghana.*** In 2009, Ghana implemented a mandatory increase in the termination rate for incoming international calls. This action has a resulted in a decrease of 48 percent in the number of minutes of traffic into Ghana. USTR will continue to work with Ghana to remove the mandated rate increase.

- ***Tonga.*** Tonga Communications Corporation (TCC), Tonga's government-owned supplier of telecommunications services, declines to negotiate with US operators over a cost-oriented termination rate for international calls into Tonga. This action has resulted in US operators needing to connect to Tonga through third countries. USTR expresses concern of Tonga's lack of commitment to the GATS Reference Paper and the GATS Annex on Telecommunications, and it is urging the Tongan Government to restore direct circuits with US carriers.

- **Universal Service Surcharges and Taxes.**

  - ***Panama.*** On October 31, 2012, Panama implemented the Panama Trade Promotion Agreement (TPA) which removes the added service fee on international traffic terminated in Panama.

  - ***Jamaica.*** Since 2005, Jamaica has enforced a surcharge on international operators to terminate calls in Jamaica. USTR claims that this surcharge applied solely to international calls places an unnecessary burden on foreign operators and consumers, and it adds to the cost of doing business in Jamaica. USTR recommends that Jamaica remove its universal service charges and taxes to ensure that it does not discriminate between domestic and international suppliers.

  - ***El Salvador.*** Since 2008, El Salvador has implemented a tax on incoming international calls, which has likely led to the decrease in traffic in minutes in El Salvador. The practice of taxing incoming phone calls is a departure from the International Telecommunication Union principle of not applying such tax on incoming traffic.

## VI. SATELLITE SERVICES

The 2013 Report points out limitations in China and India on the ability of U.S. providers to offer satellite-based services to customers, as summarized below:

- **China.** The 2013 Report notes that China Satellite Communications Co. Ltd. ("China Satcom") is the only authorized domestic satellite provider in China. China has granted no other licenses to companies to operate services directly to users.



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- **India.** For C-band VSAT services[6] on a foreign satellite, India requires that VSAT operators route connectivity through ISRO.[7] Also, end-users in India are only allowed to uplink through Indian satellites or Ku-band services. No foreign satellite operator is allowed to provide any Ku-band capacity to an end-user in India unless it does so via Antrix.[8] Finally, India's Ministry of Information and Broadcasting (MIB) guidelines dictate a preference for domestic satellites to provide capacity for delivery of Direct-to-Home (DTH) subscription television services. Authorized DTH licensees have been unable to contract directly with foreign operators, such that foreign satellite capacity must be procured through Antrix.

## VII. SUBMARINE CABLE SYSTEMS

The 2013 Report notes improvements in India to access to cable landing stations as summarized below:

- **India.** USTR lauds the Telecom Regulator Authority of India (TRAI) for taking positive steps in 2012 to decrease "access and collection" charges at India's submarine cable landing stations. USTR recommends that TRAI make such additional changes as eliminating charges for equipment that is not required for access.

## VIII. TELECOMMUNICATIONS EQUIPMENT

The 2013 Report highlights various concerns, including government-prescribed encryption standards and concerns regarding the transparency of assessment requirements in China and certain licensing requirements in India but notes the conclusion of a bilateral telecommunications Mutual Recognition Agreement with Israel, as summarized below:

- **China.**
    - ***Multi-Level Protection Scheme.*** The 2013 report notes that USTR is concerned with Chinese framework regulations for information security in critical infrastructure known as the Multi-Level Protection Scheme (MLPS). MLPS contains guidelines to categorize the extent of a breach in terms of its effects on social order, public interest and national security. If China applies these rules broadly to networks and the IT sector, it could adversely affect sales by US information technology suppliers to China. USTR will encourage China to reject these measures.

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[6] "Very-small-aperture terminal" is a satellite service that utilizes a dish antenna of a diameter of 3 meters or less.

[7] Indian Space Research Organization is an Indian government space agency which operates the government-owned Indian National Satellite System (INSAT).

[8] Antrix is a State-owned and -controlled corporation functioning as the commercial and marketing arm of ISRO. ISRO is in direct competition with foreign satellite providers.



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- ***4G Telecommunications ZUC Encryption Algorithm Standard.*** China has released the ZUC standard, which is a Chinese government-developed 4G Long-Term Evolution (LTE) encryption algorithm known. The 2013 report notes US industry concern over Chinese authorities having informally announced in early 2012 that only such domestically-developed encryption algorithms as ZUC would be allowed for the network equipment and mobile devices comprising 4G TD-LTE networks in China. US industry also expresses concern over the potential for future testing procedures that could threaten companies' sensitive intellectual property.

- **ZUC Standard.** In 2012, China released a government developed 4G Long-Term Evolution (LTE) encryption algorithm known as the ZUC standard. The State Encryption Management Bureau (SEMB) announced that only encryption algorithms developed within the state such as ZUC would be permitted for network equipment and mobile devises which make up the 4G TD-LTE networks in China. This new encryption mandate would be precluded by "burdensome and invasive" testing on companies' sensitive material including intellectual property. USTR has insisted that China should not require an encryption standard, and throughout 2012, USTR pressured China into dropping the mandated encryption requirement. At the December 2012 JCCT meeting, China decided that it would no longer mandate a specific encryption standard. The USTR will continue to monitor this issue.

- **India**

  - ***License Amendments Affecting Importation of Telecommunications Equipment.*** The 2013 report indicates that India has amended previous license amendments and requirements affecting the importation of telecommunications equipment, yet concerns remain over: (i) the requirement for telecommunications equipment vendors to test all imported information and communications technology (ICT) equipment in labs in India; (ii) the condition that government agencies have to inspect manufacturing facilities and supply chains for security reasons; and (iii) the prerequisite that vendors assume strict liability and risk possible black-listing without the right to appeal.

    - **General Concerns with Conformity Assessment Requirements.** The 2013 report indicates that USTR will continue to observe developments in this area, and will continue to pursue greater transparency and streamlining of China's telecommunications testing and certification requirements.

    - **Mutual Recognition Agreements (MRA).** In October 2012, the United States and Israel signed bilateral telecommunications equipment MRA, allowing US laboratories to test the conformity of American and Israeli telecommunications equipment.

## IX. LOCAL CONTENT REQUIREMENTS

The 2013 Report cites the adoption or continued application of local-content requirements in Brazil, India, and Indonesia, as summarized below:



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- **Brazil 450 MHz and 2.5 GHz Spectrum Auction.** The 2013 Report indicates that Brazil's National Telecommunications Agency held a spectrum auction in the 450 MHz and 2.5 GHz bands with a stipulation that applicants were required to accept locally produced and locally-developed equipment. USTR expresses concern over Brazil's localization policy, and has engaged Brazilian authorities bilaterally and in the context of the WTO.

- **India Preferential Market Access (PMA).** India issued the Preferential Market Access (PMA) notification in February 2012 which requires government entities to purchase domestically-manufactured ICT equipment.

- **Indonesia Domestic Manufacturing Requirements.** The 2013 report claims that since 2006, Indonesia has been working to implement domestic content requirements for telecommunications service providers. New legislation in Indonesia has reinforced this requirement by stipulating a minimum local content requirement on wireless broadband services.

### Outlook

Considerable progress has been made in the past year on a number of fronts to improve trade in telecommunications through the reduction in certain countries of existing impediments to more open market access and the improvement of in-country access to major supplier networks. However, the emergence or persistence of efforts by countries such as Pakistan, Ghana, Tonga, El Salvador and Jamaica to impose excessive levies on international termination rates or other surcharges as a means of domestic revenue enhancement represents an undesirable recurrence of past practices that USTR hoped had largely been forsaken. Additionally, new and potentially more insidious barriers have started to emerge under the guise of quality control or network security measures, but which in fact represent fairly transparent attempts to insulate domestic manufacturing capabilities from meaningful competition, particularly in some of the world's largest markets such as India and China, and carry with them the potential to significantly harm trade in telecommunications not only in those geographic markets but across the globe as well. Finally, USTR has intensified its focus on market impediments specifically targeted to the vast array of internet enabled services, which can serve to restrict the free flow of information exchanges across borders, thereby resulting in potentially deleterious effects on a broad array of trade activities, including in the telecommunications sector itself. Experts anticipate that these latter two concerns in particular will continue to warrant heightened USTR scrutiny in the coming years.

## USTR Releases 2013 TBT Report

### Summary

On April 1, 2013, the Office of the US Trade Representative (USTR) released its fourth Report on Technical Barriers to Trade ("2013 TBT Report").[9] Progress made on the removal of TBTs and the

[9] The 2013 TBT report is available here: http://www.ustr.gov/sites/default/files/2013%20TBT.pdf



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emergence of new TBTs can be observed through a comparison of the 2013 TBT Report and the 2012 TBT Report. These changes reflect the recent achievements as well as the 2013 priorities of the Obama Administration with respect to TBTs.

## Analysis

### I. BACKGROUND AND TRENDS IN 2012

Started by the Obama Administration in 2010, USTR's annual TBT Report addresses significant foreign trade barriers faced by US exporters in the following forms: (i) product standards; (ii) technical regulations and testing; (iii) certification; and (iv) other procedures involved in determining whether products conform to established standards and technical regulations. According to USTR, these standards-related measures become TBTs if they are non-transparent, outdated, overly burdensome or discriminatory. The aim of the TBT Report is to describe and advance the US government's efforts to identify and eliminate these barriers. Like the National Trade Estimate (NTE) and Report on Sanitary and Phytosanitary (SPS) measures, the TBT Report incorporates information compiled by relevant US government agencies, and stakeholders supplement such information with comments in response to a Federal Register (FR) notice regarding the report.

The 2013 TBT Report includes the following components, *inter alia*: (i) an introduction to standards-related measures; (ii) an overview of standards-related trade obligations; (iii) a description of the US legal framework for implementing its standards-related trade obligations; (iv) a discussion of standards; (v) a discussion of conformity assessment procedures; (vi) a description of the interagency and stakeholder consultations used by the US government to identify TBTs; (vii) an overview of how the US government engages on standards-related measures through international, regional and bilateral fora; (viii) a summary of trends regarding standards-related measures in 2012; and (ix) an identification and description of TBTs on a country-by-country basis.

The 2013 TBT Report lists the following as major TBT-related trends that appeared in 2012 across various US trading partners' markets:

- **Nutritional Labeling and Advertising.** Countries such as Thailand, Chile, El Salvador and Peru are either considering, or have implemented, mandatory regulations on nutritional labeling and advertising;

- **EU Agreements on Conformity Assessment and Acceptance (ACAA).** Under an ACAA, parties agree to adopt EU standards and regulations in covered sectors in exchange for simpler conformity assessment processes in the EU. The United States is concerned that these Agreements "will create additional export barriers";

- **"Voluntary" Measures as Trade Barriers.** Countries such as China and Korea have developed and implemented "voluntary" standards in a manner that renders them required standards in practice; and



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- **Mandatory Labeling of Genetically Engineered (GE) Foods.** The United States expresses concern over a proposed GE labeling requirement in Peru and a European Court of Justice ruling on honey that, according to USTR, would require some types of honey to be approved and labeled according to the EU's laws for genetically modified organisms (GMOs) when sold in the EU.

Notably, USTR also identified concerns regarding mandatory GE labeling and "voluntary" measures as two trends in the 2012 TBT Report.

## II. COUNTRY REPORTS

The 2012 TBT Report identifies and describes significant TBTs faced by US exporters in 18 countries and groups of countries, including: (i) Argentina, (ii) Brazil, (iii) China, (iv) Chile, (v) Colombia, (vi) the European Union, (vii) India, (viii) Indonesia, (ix) Japan, (x) Kenya, (xi) Korea, (xii) Malaysia, (xiii) Mexico, (xiv) Russia, (xv) South Africa, (xvi) Taiwan, (xvii) Turkey, and (xviii) Vietnam. Unlike the 2012 TBT Report, the 2013 TBT Report does not examine TBT issues in several countries or groups of countries, including the Central American Customs Union and Thailand.

The 2013 TBT Report updates the TBT issues mentioned for each country also discussed in the 2012 TBT Report. For some countries and country groups, the 2012 TBT Report mentions new TBTs or no longer mentions certain TBTs. Below we summarize these substantive revisions:

- **Argentina.** The 2013 Report no longer expresses concern over testing and compliance requirements associated with Argentine measure No. 583/2008, which limited the amount of phthalates permitted in children's products. The Report also alleges that Argentina's new requirements for conformity assessment for electrical and electronic products have resulted in "repetitive testing and associated delays;"

- **Brazil.** The 2013 Report no longer mentions the following issues: (i) potentially restrictive registration, certification and labeling requirements for certain beverages; (ii) costly certification requirements for imported wines; (iii) registration requirements for medical devices that require the disclosure of proprietary information; and (iv) trade-restrictive registration requirements for food products of animal origin;

- **Chile.** The 2013 Report no longer mentions issues relating to Chile's emission standards, which had the potential to block US exports of diesel trucks to Chile. Unlike the 2012 Report, the 2013 Report expresses the concern that Chile's draft regulations requiring a stop-sign shaped icon on the front of certain food packages may have a negative impact on trade;

- **China.** The Report no longer mentions China's proposed mandatory information security testing and certification requirements for information technology products or proposed voluntary standards relating to information security. The 2013 Report mentions the following additional TBTs: (i) "Draft Mobile Smart Terminal Administrative Measure," the scope and mandatory nature of which the United States finds "unprecedented"; and (ii) a possible requirement that only domestically-developed encryption algorithms, such as ZUC, be allowed for use in China's 4G



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Long-Term Evolution (LTE) network; and (iii) approval procedures and labeling requirements for cosmetics;

- **EU.** The 2013 TBT Report mentions the following additional issues: (i) a requirement that honey containing pollen derived from GE plants must be labeled accordingly; and (ii) framework legislation that protects quality terms. The United States is concerned the legislation subjects commonly used terms to registration requirements;

- **India.** The 2013 Report no longer mentions concerns regarding food, wine and distilled spirit requirements or new rules for managing electronic waste. New issues mentioned in the 2013 Report include a proposed measure that would require that packages containing genetically engineered foods be labeled as such;

- **Indonesia.** The 2013 Report also mentions Indonesia's Regulation 60, which imposes a number of requirements on imported horticultural products. In March 2013 the United States requested the establishment of a World Trade Organization (WTO) panel to address this Regulation, among other issues;

- **Korea.** The 2013 Report no longer mentions the following: (i) cost concerns relating to a requirement that imported whiskey bottles carry a radio frequency identification tag; (ii) restrictions on the use of phthalates in polyvinyl chloride (PVC) flooring and wallpaper; and (iii) concerns regarding an amendment to Korea's Radio Waves Act that may require manufacturers to place labels on devices in such a way that would "adversely affect their performance." New issues addressed in the 2013 Report include the following: (i) Korea's draft administrative guidelines regarding safety standards and self-certification requirements for motor vehicles; and (ii) labeling requirements for absorption of electromagnetic radiation levels for mobile phones that US industry believes may mislead consumers;

- **Mexico.** The 2013 Report does not mention concerns regarding legislation and standards affecting caffeinated and flavored beverages. New issues discussed in the 2013 Report include: (i) delays associated with sanitary registration for certain imported medical devices; and (ii) Good Manufacturing Practices (GMP) compliance requirements for foreign companies selling pharmaceutical and nutritional supplements in Mexico;

- **Russia.** Unlike the 2012 Report, the 2013 Report does not discuss the concern that Russia's amended definition of "beer" precludes many products made by US brewers. The Report also addresses revisions to the Eurasian Economic Commission's (EEC) "Technical Regulations on Food Products Labeling" and "Technical Regulation on Alcoholic Product Safety";

- **Taiwan.** The 2013 Report also discusses a Taiwanese government requirement that all units included in retail multipacks be labeled for individual sale, even if they are sold as multipacks; and

- **Vietnam.** The 2013 Report does not discuss Vietnamese regulations for the raw materials used in processing alcoholic beverages or testing requirements for imported spirits, cosmetics and



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mobile phones. This year's report focuses on Decree 38, the implementing regulation for Vietnam's Food Safety Law, which requires that manufacturers complete numerous forms and certificates to export to Vietnam.

### Outlook

USTR released the 2013 TBT Report in conjunction with the 2013 NTE and the 2013 TBT Report. Together, these three reports provide an inventory of US government-identified trade barriers. Looking forward, many of the TBTs addressed in the 2013 country reports are likely to be discussed in bilateral, regional and multilateral fora, and may be used as the basis for trade disputes brought by the United States.

## USTR Releases 2013 National Trade Estimate

### Summary

On April 1, 2013, the Office of the US Trade Representative (USTR) released the twenty-eighth National Trade Estimate Report on Foreign Trade Barriers ("2013 NTE").[10] While much of the 2013 NTE is similar to the 2012 NTE, the dismantling of several foreign trade barriers and the emergence of others, as described within each country report, reflects changes in the Obama Administration's 2012 and 2013 trade policy objectives.

### Analysis

**I. BACKGROUND**

Pursuant to the Omnibus Trade and Competitiveness Act of 1988, the annual NTE provides a country-by-country inventory of the most important foreign barriers affecting the following: (i) US exports of goods and services; (ii) foreign direct investment by US persons; and (iii) protection of intellectual property rights (IPR). Importantly, the report covers barriers regardless of whether they are consistent or inconsistent with international trading rules. A discussion of some of the actions taken to eliminate foreign trade barriers is also included.

The NTE supports negotiations aimed at reducing and eliminating the identified trade barriers as well as efforts to enforce existing trade law. According to the 2013 NTE, the report is also an important source of information upon which the Interagency Trade and Enforcement Center (ITEC) draws to conduct its research and analysis of trade barriers. The report incorporates information compiled by relevant US government agencies, and stakeholders supplement such information with comments in response to a Federal Register (FR) notice regarding the report.

[10] The 2013 NTE is available here: http://www.ustr.gov/sites/default/files/2013%20NTE.pdf



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## II. COUNTRY REPORTS

The trade barriers identified in the 2013 NTE are categorized as one of the following: (i) import policies; (ii) government procurement; (iii) export subsidies; (iv) services barriers; (v) lack of IPR protection; (vi) investment barriers; (vii) anticompetitive practices; (viii) trade restrictions affecting e-commerce; and (ix) other barriers.

The 2013 NTE examines trade barriers in the largest export markets for the United States, including almost 60 countries, as well as the European Union (EU), Taiwan, Hong Kong and the Arab League.[11] Unlike the 2012 NTE, the 2013 NTE does not address trade barriers in the Democratic Republic of Congo. Below we summarize those newly addressed issues and those no longer mentioned in the 2013 NTE:

- **Australia.** The report no longer expresses concern with the following: (i) local content rules Australia's "Convergence Review Committee" was considering issuing; and (ii) the Australian government's deliberation over whether to list new medicines on its Pharmaceutical Benefits Scheme;

- **Bolivia.** The 2013 NTE also discusses compulsory export licenses for such products as sugar, vegetable oils, soy and sunflower flour, as well as an occasional ban on the export of wheat from Bolivia;

- **Cambodia.** The report no longer mentions restrictions on the provision of foreign legal services;

- **Canada.** The 2013 NTE discusses the following additional issues: (i) Canada's Seeds Act, which reportedly prohibits certain seeds from being sold, advertised for sale or imported into Canada; and (ii) the Canadian government's decision to repeal standardized container size regulations for food products. The report also states that the United States is investigating the nature and extent of Canadian government assistance provided to a paper mill. In addition, the United States will engage Canadian authorities on issues relating to risk management programs for Canadian Pork Producers with Canada;

- **Chile.** The 2013 NTE also expresses concern over Chile's high mobile telephony termination rates and the impact these rates have on small mobile providers;

- **China.** The report also addresses China's restrictions on trade in remanufactured goods and China's framework regulations for information security in critical infrastructure, known as the Multi-Level Protection Scheme (MLPS) which, *inter alia*, reportedly bars integration of foreign

[11] The countries include: Angola, Argentina, Australia, Bahrain, Bolivia, Brazil, Brunei Darussalam, Cambodia, Canada, Chile, China, Colombia, Costa Rica, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Ghana, Guatemala, Honduras, India, Indonesia, Israel, Japan, Jordan, Kazakhstan, Kenya, Korea, Kuwait, Laos, Malaysia, Mexico, Morocco, New Zealand, Nicaragua, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, the Philippines, Qatar, Russia, Singapore, South Africa, Sri Lanka, Switzerland, Thailand, Turkey, Ukraine, United Arab Emirates (UAE), Venezuela, and Vietnam.



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products into information systems graded above a certain level. The 2013 NTE also places a greater emphasis on Chinese policies toward the so-called Strategic Emerging Industries, especially those that may discriminate against US companies and products. Unlike the 2012 NTE, the report does not discuss: (i) allegedly discriminatory criteria for obtaining approval to pursue new wind power projects; and (ii) restrictions on inward investment;

- **Colombia.** Unlike the 2012 NTE, the 2013 NTE does not mention the following issues, *inter alia*: (i) the government issuance of tax rebate certificates that benefit domestic industries; (ii) restrictions on foreign law firms; (iii) restrictions on cross-border transportation services, especially land cargo transportation services; and (iv) delays in obtaining express delivery licenses;

- **Ecuador.** The 2013 NTE no longer mentions Ecuador's limited World Trade Organization (WTO) commitments in the area of telecommunications. Unlike the 2012 NTE, the 2013 NTE expresses concern over a measure restricting the operations of private credit bureaus;

- **Egypt.** The 2013 NTE no longer expresses concerns relating to the United States-Egypt Air Transport Agreement. Unlike the 2012 NTE, the 2013 NTE addresses investment barriers in Egypt, including, *inter alia*: (i) restrictions on capital transfers and daily withdrawals; (ii) labor rules that prevent companies from surpassing a certain national-to-foreigner workforce ratio; and (iii) issues relating to investment disputes;

- **EU.** The 2013 NTE no longer mentions the following: (i) concerns regarding Germany's 2010 drug pricing reform; (ii) restrictions on auditing and accounting services that are "especially burdensome" for foreign firms operating in Greece; (iii) limitations on the purchase of agricultural and forest lands by foreigners in Czech Republic; (iv) the Portuguese government's equity share in partially state-owned enterprises; (v) investment issues in Spain, including compensation concerns relating to the Spanish government's retroactive changes to its renewable energy feed-in tariffs; (v) issues with the government procurement processes in Germany, Spain and Ireland; (vi) Spain's issuance of an interest-free reimbursable loan to an Airbus supplier; and (vii) customs-related barriers affecting distilled spirit shipments to Romania. The 2013 NTE mentions the following additional issues: (i) policies relating to reimbursement for pharmaceuticals in Austria; (ii) issues affecting the Italian pharmaceutical market, including those relating to cost-containment measures, delayed approval for drugs, and limitations on patent rights; and (ii) issues with Malta's criminal code provisions governing IPR;

- **Ghana.** The 2013 NTE does not mention the Ghanaian government's promotion of exports through preferential credits and tax incentives;

- **India.** The 2013 NTE no longer mentions the following: (i) issues resolving commercial disputes, especially those pertaining to the energy sector; and (ii) the implementation of India's Competition Act;

- **Indonesia.** The 2013 NTE alleges that import licensing requirements for agricultural products, as required by Regulation 60, discriminate against US companies. For example, the report



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notes that the Ministry of Agriculture has discretion in regard to whether to issue an Import Recommendation of Horticultural Products, and may make a decision based on national demand analysis. The 2013 NTE also voices concern for recent changes to Indonesia's franchising sector, including, *inter alia*, a new local content requirement;

- **Kenya.** The 2013 NTE no longer addresses the following: (i) Kenya's export subsidies and export promotion programs, including the "Manufacturing under Bond" program and incentives firms operating the Export Processing Zones receive; and (ii) concerns regarding inefficiency and delay with respect to Kenya's judicial system. The 2013 NTE also expresses concern over the independence and effectiveness of the Communications Commission of Kenya;

- **Korea.** The 2013 NTE also discusses issues relating to internet and cloud computing services in Korea, including, *inter alia*, restrictions on the storage of mapping data outside of Korea that allegedly place US firms at a disadvantage in the online map services sector;

- **Kuwait.** The 2013 NTE no longer expresses concern over the allegedly arbitrary nature of tax assessments in Kuwait. Unlike the 2012 NTE, the report mentions concerns relating to Kuwait's National Offset Company's requirement that foreign companies invest a certain percentage of their contract amount in projects that add value to the Kuwaiti economy;

- **Laos.** The 2013 NTE no longer discusses as a trade barrier a Lao government ban on the provision of educational services in Laos by foreign entities;

- **Malaysia.** The 2013 NTE no longer identifies as a trade barrier strict mandatory labeling requirements for food and food ingredients obtained through biotechnology. A new issue addressed in the 2013 NTE relates to halal certification requirements. According to the report, Malaysia's halal standards are stricter than the Codex Alimentarius halal standard;

- **Mexico.** The 2013 NTE also identifies broadcasting as an issue of concern. For example, the report notes that pay television is subject to stricter advertising rules than free-to-air programs. Pay television is the primary outlet for foreign programmers;

- **Nigeria.** The 2013 NTE does not address the following issues: (i) Nigeria's administration of export promotion programs, which include tax concessions, export development funds and capital asset depreciation allowances, among other programs; and (ii) efforts to address financial crimes, including money laundering and advance fee fraud;

- **Panama.** The 2013 NTE acknowledges a recent amendment to Panama's telecommunications law that eliminated a requirement that inbound international traffic make a higher contribution toward Panama's universal service program than do domestic carriers;

- **Peru.** Unlike the 2012 NTE, the 2013 NTE does not address US concerns regarding a Peruvian measure requiring exporters of certain remanufactured products to provide documentation consenting to the remanufacture and exportation of the part;



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- **Russia.** The 2013 NTE no longer mentions: (i) the lifting of restrictions on internet domain registration in Russia; and (ii) Russian subsoil legislation that requires government approval for foreign investment above a certain percentage in companies operating in key subsoil plots. New issues mentioned in the 2013 NTE include the following: (i) a “recycling fee” Russia imposes on importers and manufacturers of certain vehicles; (ii) an import quota on stainless pipes and tubes imported into the Russia-Kazakhstan-Belarus Customs Union; and (iii) Russia’s failure to request observer status to the WTO Government Procurement Agreement (GPA);

- **Singapore.** The 2013 NTE no longer mentions expectations associated with Singapore’s next-generation broadband fiber network. Unlike the 2012 NTE, the 2013 NTE mentions cloud computing, expressing concern over reports that financial institutions in Singapore have been discouraged from using multitenant computer data center architecture;

- **Sri Lanka.** The 2013 NTE also addresses the issue of corruption. The report alleges that public sector corruption, particularly in the form of bribery of public officials, concerns the US government and US businesses;

- **Switzerland.** The 2013 NTE no longer addresses the concern over whether Swisscom, a former government monopoly, has fully complied with Swiss legislation and laws;

- **Taiwan.** The 2013 NTE no longer addresses concerns regarding restrictions on offshore funds established by asset management businesses in Taiwan;

- **Thailand.** The 2013 NTE no longer mentions the Thai government’s efforts to complete a legal framework supporting e-commerce. New issues addressed in the 2013 NTE include the following: (i) concerns regarding price support programs for the domestic rice industry; and (ii) concerns regarding Thailand’s Motion Picture and Video Act which, according to the report, allows for ratios and quotas of foreign films;

- **Turkey.** The 2013 NTE no longer mentions the following, among other issues: (i) difficulty obtaining Turkish work permits for foreign workers; and (ii) areas in which Turkey could improve corporate governance;

- **Ukraine.** The 2013 NTE no longer expresses concern over high excise duties. The 2013 NTE also mentions distribution restrictions on biologically active food supplements;

- **United Arab Emirates.** Unlike the 2012 NTE, the 2013 NTE does not mention restrictions on foreign banks; and

- **Vietnam.** The 2013 NTE also mentions a measure passed in 2012 that has the potential to restrict the operations of foreign law firms in Vietnam.

## Outlook

The 2013 NTE accompanies the 2013 Trade Policy Agenda (*please refer to W&C US Trade Report*



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*from March 7, 2013*). USTR released the NTE report in conjunction with the Report on Sanitary and Phytosanitary Measures ("SPS Report") and the Report on Technical Barriers to Trade ("TBT Report"). Together, these three reports provide an inventory of US government-identified trade barriers.

The 2013 NTE highlights the Obama Administration's 2013 trade policy priorities. Notably, the report's preface highlights the Obama Administration's prioritization of trade enforcement efforts, especially in regard to protecting labor rights and the environment. According to the report, the Obama Administration has "implemented interagency processes for systematic information gathering and review of labor rights practices and environmental enforcement measures in FTA countries." The preface also addresses the Obama Administration's increasing awareness of localization-based barriers to trade. To address this type of issue, the Obama Administration recently requested WTO consultations with India regarding local content requirements for solar energy products *(please refer to W&C US Trade Alert dated February 22, 2013).*

# USTR Releases 2013 SPS Report

## Summary

On April 1, 2013, the Office of the US Trade Representative (USTR) released the fourth Report on Sanitary and Phytosanitary Measures ("2013 SPS Report").[12] While much of the 2013 SPS Report is similar to the 2012 SPS Report, the resolution of some SPS issues and the emergence of others, as described in the country reports, reflects the Obama Administration's 2013 policy objectives with respect to the removal of SPS-related trade barriers.

## Analysis

### I. BACKGROUND, TRENDS AND ACHIEVEMENTS IN 2012

Started by the Obama Administration in 2010, the annual SPS report provides, *inter alia*: (i) an overview of SPS measures, the agencies that impose and monitor them, and the international trade agreements that govern their application; (ii) a summary of major cross-cutting SPS issues; and (iii) analysis of SPS-related trade barriers facing US exporters in a number of key countries. The aim of the Report is to describe and advance the US government's efforts in removing these barriers. Like the National Trade Estimate (NTE) and the Report on Technical Barriers to Trade (TBT Report), the SPS Report incorporates information compiled by relevant US government agencies, and stakeholders supplement such information with comments in response to a Federal Register (FR) notice regarding the report.

Similar to the 2012 SPS Report, the 2013 SPS Report identifies the following as major cross-cutting

[12] The 2013 SPS Report is available here: http://www.ustr.gov/sites/default/files/2013%20SPS.pdf



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issues: (i) "overly burdensome" export certification requirements; (ii) restrictions on the use of modern biotechnology or genetic engineering (GE) techniques, *i.e.,* techniques used to alter the genetic make-up of plants or animals and, in so doing, achieve such desired characteristics as pest or disease resistance, among others; (iii) Bovine Spongiform Encephalopathy (BSE)-related trade barriers; (iv) avian influenza-related trade barriers; and (v) trade-restrictive maximum residue levels (MRLs) requirements for pesticides. According to the Report, the United States counts the following among its SPS-related achievements in 2012: (i) the removal of SPS barriers affecting the exportation of US beef to El Salvador, Hong Kong, Japan and Mexico; (ii) Taiwan's implementation of an MRL for beef containing ractopamine; (iii) the elimination in Colombia of SPS barriers for exports of US paddy rice; (iv) streamlined import procedures for US cherries entering Korea; and (v) improved market access for US pears in China.

## II. COUNTRY REPORTS

The 2013 SPS Report provides analysis on SPS-related trade barriers facing US exporters in almost 50 countries or groups of countries.[13] Unlike the 2012 SPS Report, the 2013 SPS Report does not address SPS issues in (i) Costa Rica, (ii) Guatemala, (iii) Gulf Cooperation Council, (iv) Honduras, (v) Hong Kong, (vi) Nicaragua, or (vii) Venezuela. The 2013 SPS Report addresses SPS issues in several countries that were not listed in the country reports section of last year's report, namely:

- **Bahrain.** Bahrain has instituted a ban on US pork products due to concerns regarding the H1N1 virus. According to the Report, there is no evidence that indicates the virus can be conveyed to humans through the consumption of pork;

- **Bosnia and Herzegovina.** The Report notes that although Bosnia and Herzegovina passed legislation in 2009 allowing for the importation of licensed GE products, the government has been slow to establish procedures for such approval;

- **Kenya.** In November 2012, the Kenyan government instituted a ban on agricultural biotechnology food and feed imports;

- **Macedonia.** According to the Report, Macedonia has stopped accepting the US Food Safety and Inspection Service (FSIS) meat inspection system as equivalent, and has started requiring additional attestations in addition to the FSIS export certificate. In light of these developments, Macedonia has also stopped accepting US exports of pork; and

- **Serbia.** Serbia does not currently allow for the importation of food products with trace amounts of modern agricultural biotechnology. However, the 2013 SPS Report notes that Serbia has

[13] The countries and country groups addressed in the country reports section include: Argentina, Australia, Bahrain, Bolivia, Bosnia and Herzegovina, Brazil, Chile, China, Colombia, Croatia, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, European Union, India, Indonesia, Israel, Jamaica, Japan, Kazakhstan, Kenya, Korea, Kuwait, Kyrgyzstan, Macedonia, Malaysia, Mexico, Morocco, New Zealand, Norway, Peru, Philippines, Russia, Serbia, Singapore, South Africa, South African Development Community, Sri Lanka, Switzerland, Taiwan, Thailand, Turkey, Ukraine, Uruguay, and Vietnam.



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suggested it may amend its laws to facilitate its World Trade Organization (WTO) accession process.

Although the remaining countries mentioned in this section have been listed previously, the 2013 SPS Report mentioned some new issues that the 2012 SPS Report did not mention. Likewise, the 2013 SPS Report no longer mentions some SPS issues the 2012 SPS Report mentioned. Below we highlight major issues removed or added to the country reports section of the 2013 SPS Report:

- **Chile.** The 2013 Report also addresses the following: (i) Chile's ban on imports of US live cattle; and (ii) Chile's restrictions on the importation of salmonid eggs;

- **China**. The 2013 SPS Report no longer mentions the following: (i) US-China efforts to develop an export certificate for US dairy exports; and (ii) restrictions imposed on imports of pears from certain US states. The 2013 SPS Report also mentions several new issues, including the detention of imports of US processed meat at Chinese customs;

- **Colombia.** The 2013 Report no longer mentions the following: (i) avian influenza-related bans on US poultry and poultry products from some US states; and (ii) restrictions on US paddy rice exports due to claims regarding the existence of smut fungus;

- **Egypt.** The 2013 SPS Report also addresses trade-restrictive measures affecting US exports of cotton to Egypt;

- **El Salvador.** The 2013 Report no longer mentions BSE-related trade barriers for US beef or a zero tolerance rule for Salmonella on poultry meat. The 2013 Report discusses a regulation calling for additional declarations to accompany US rice imports;

- **European Union.** The 2013 Report no longer mentions labeling requirements for food products with synthetic colors. The Report does mention a new issue relating to a ban on bisphenol A (BPA);

- **Indonesia.** The 2013 Report no longer mentions the Indonesian government's plans to close the Port of Jakarta to fruit and vegetable imports. The Report mentions the following new issues: (i) Indonesia does not recognize the equivalence of the US inspection system for beef and pork; and (ii) restrictions on imports of US beef due to BSE concerns;

- **Japan.** The 2013 Report no longer alleges that Japan's testing requirements for imports of US rice are "excessive." The Report also does not mention restrictions on imports of US pears;

- **Kazakhstan.** The 2013 Report mentions a temporary ban placed on imports of US cattle due to the detection of bluetongue, a "non-contagious, insect-borne viral disease rarely found in cattle." The Report notes that Kazakhstan announced in March 2013 that it would re-open its market to US cattle;

- **Mexico.** The 2013 Report no longer mentions concerns regarding Mexico's inspection regime



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for exports of fresh chilled meat in "combo bins;"

- **Philippines.** The 2013 Report no longer mentions the following: (i) the Philippines' SPS policies affecting US exports of frozen and chilled meat and meat products; and (ii) allegedly "duplicative" certification requirements for processed plant products;

- **Russia.** The 2013 SPS Report also mentions Russia's 2012 imposition of a zero tolerance standard for residues of ractopamine in pork and beef;

- **Thailand.** The 2013 SPS Report no longer discusses restrictions on US pork and pork products due to H1N1 concerns or a ban on the use of magnesium silicate as a filtering agent to prolong the life of frying oil. The Report places a stronger emphasis on issues relating to MRLs for ractopamine in pork. Additional issues mentioned include, among others, food safety inspection fees on imports of uncooked meat that are significantly higher than similar domestic fees; and

- **Vietnam.** The 2013 Report no longer mentions a zero tolerance standard for Salmonella on raw poultry meat.

### Outlook

USTR released the 2013 SPS Report in conjunction with the 2013 NTE and the 2013 TBT Report. Together, these three reports provide an inventory of US government-identified trade barriers. Within the next year, the US government is likely to draw its priority SPS issues from the 2013 SPS Report. These priority issues will undoubtedly be broached in bilateral, regional and multilateral fora, and some may form the basis for trade disputes brought by the United States.

# *US General Trade Policy Highlights*

## Senate Finance Committee Chairman to Retire in 2014

On April 23, 2013, Sen. Max Baucus (D-MT) confirmed his decision to retire at the end of 2014. Sen. Baucus has been the top Democrat on the Senate Finance Committee, one of the two main congressional committees of jurisdiction for international trade issues, since 2001 and currently serves as its Chairman. His exit from Congress will leave open the position of Senate Finance Committee Chairman.

First elected in 1978, Sen. Baucus is known for, among other things, his efforts to promote market access for US beef exports and his support for Trade Adjustment Assistance (TAA), a federal program meant to assist US workers adversely affected by international trade. Sen. Baucus is one of several Democratic senators to announce plans to retire, including the next most senior Democrat on the Senate Finance Committee, Sen. John Rockefeller (D-WV).

Typically, although not always, the majority party member with the greatest seniority on a particular congressional committee serves as its chairman. The next most senior Democrat that has not



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announced plans to retire is Sen. Ron Wyden (D-OR). A review of Sen. Wyden's position on various international trade issues provides an indication of what his priorities would likely be were he to serve as Senate Finance Committee Chairman. Sen. Wyden gained attention in 2011 when he raised the issues of transparency and congressional approval with respect to the Anti-Counterfeiting Trade Agreement (ACTA). More recently, Sen. Wyden has participated in several debates regarding trade in environmental goods. For example, he published a report in 2012 titled "Losing the Environmental Goods Economy to China," which, among other things, expressed support for the US government's trade remedy investigations into imports of solar cells and wind towers from China.

Despite Sen. Wyden's position as a senior Democrat on the Senate Finance Committee, his chances of becoming the next Chairman are far from certain. Other senior Democrats sitting on the Committee include Sens. Chuck Schumer (D-NY) and Debbie Stabenow (D-MI). In addition, the outcomes of the 2014 Senate races remain unclear. If the Republicans gain control of the Senate, Senate Finance Ranking Member Orrin Hatch (R-UT) is likely to become Chairman of the Committee. Other top Republicans on the Committee include Sens. Mike Crapo (R-ID) and Pat Roberts (R-KS).

Click here for a copy of the Senate Finance Committee's April 23 press release regarding Sen. Baucus' retirement.

## USTR Initiates Review of Burma and Laos for Possible Designation as Beneficiary Countries under GSP

On April 16, 2013, the US Trade Representative (USTR) issued a Federal Register (FR) notice announcing the initiation of a review of Burma and Laos for possible designation as beneficiary developing countries under the Generalized System of Preferences (GSP) program. The review will also address whether each country, if so designated, should also be designated as a least-developed country under the program. The FR notice provides the schedule for public comment and a public hearing on whether Burma and/or Laos should be designated as beneficiary countries under GSP.

Title V of the Trade Act of 1974, as amended, authorizes the GSP program. The Act provides for duty-free treatment of certain articles imported into the United States from countries the President designates as either "beneficiary developing countries" or "least-developed beneficiary developing countries." Additional designated articles are subject to preferential treatment if they are imported from least-developed beneficiary countries. Congress most recently reauthorized the GSP program in October 2011, but it is scheduled to expire July 31, 2013 unless Congress passes legislation to avoid such expiration.

In determining whether to designate a country as a beneficiary country, the Act requires that the President consider a number of factors, including but not limited to: (i) an expression by such country as to whether it wishes to be so designated; (ii) such country's level of economic development; (iii) whether other major developed countries are extending generalized preferential tariff treatment to such country; (iv) whether such country has given the United States assurances that it will provide "equitable and reasonable" access to its markets and refrain from using "unreasonable" export policies; (v) whether such country provides sufficient intellectual property rights (IPR) protection; (vi) whether such country has acted to reduce barriers affecting investment and trade in services; and (vii) whether such country provides internationally recognized worker rights. According to the FR notice, the governments of Burma and Laos have each informed USTR of their respective desires to be considered for designation under the United States' GSP program.

From April 24-27, 2013, Acting USTR Demetrios Marantis visited Burma to demonstrate the United States' support for deeper bilateral economic engagement. According to a USTR press release regarding the visit, Ambassador Marantis explored with senior Burmese government officials the possibility of establishing a bilateral Trade and Investment Framework Agreement (TIFA), which would formalize dialogue between the two countries regarding trade and investment topics, in addition to the possibility of designating Burma a beneficiary country under the GSP program. The press release notes that Burma had previously been a GSP beneficiary country; however, its eligibility was revoked in 1989 due to concerns over alleged violation of workers' rights. USTR has never considered Laos for GSP eligibility.

## Treasury Declines to Name Any Major Trading Partner a Currency Manipulator

On April 12, 2013, the Department of the Treasury ("Treasury") released its semi-annual Report to Congress on International Economic and Exchange Rate Policies. The Report finds none of the United States' major trading partners, including China, to be manipulating its currency for the purposes of preventing effective balance of payments adjustment or gaining unfair competitive advantage in international trade. The Report addresses international economic and exchange rate policies during the last half of 2012 and, where appropriate, the first few months of 2013. Nonetheless, the Report addresses concerns with the policies of China and, to a lesser extent, Korea and Japan.

The Report finds that China's exchange rate has appreciated in recent years. From June 2010 to April 2013, the RMB appreciated 10 percent against the USD in nominal terms. In real terms, the Report notes that the RMB appreciated 16.2 percent over a similar time period. In addition, China's current account balance declined from 10.1 percent of gross domestic product (GDP) in 2007 to 2.3 percent in 2012.

Despite this appreciation, the Report suggests that Chinese authorities continue to tightly manage the RMB, and states that the RMB shows signs of "significant undervaluation." For example, the Report voices concern over a recent increase in China's foreign reserve accumulation. Although China's reserve accumulation slowed for much of 2012, Chinese financial institutions purchased a record USD 110 billion in foreign exchange in January 2013. Reserve accumulation provides some indication of intervention in currency markets. The Report highlights policies China could undertake to deepen its exchange rate reform, including widening the RMB's daily trading band and disclosing details regarding foreign exchange market intervention shortly after it occurs.



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In March 2013, House Ways and Means Ranking Member Sander Levin (D-MI) introduced the "Currency Reform for Fair Trade Act" (HR 1276), which, *inter alia,* seeks to include as a countervailable subsidy the benefit conferred on merchandise imported into the United States by virtue of the corresponding exporting country fundamentally undervaluing its currency. Although lawmakers introduced similar pieces of legislation in the last Congress, none of them achieved passage in both chambers. Several factors, including the recent change in focus to other US-China issues, *e.g.,* cyber security, as well as the acknowledgement by some policymakers and analysts of the appreciation of the RMB, indicate Congress is similarly unlikely to pass this legislation in the near term. Nonetheless, US authorities are likely to raise currency issues with their Chinese counterparts during the upcoming US-China Strategic and Economic Dialogue, scheduled for July 2013.

Treasury's Report also draws attention to the exchange rate policies of Korea and Japan, among other countries. With respect to Korea, the Report finds that the won appreciated 8 percent in nominal terms against the USD in 2012. However, the Report estimates that authorities intervened in currency markets to limit this appreciation. As a result, the Report calls on Korea to limit foreign exchange intervention, disclose such intervention, and pursue policies that reduce financial sector risk.

In nominal terms, the Japanese yen depreciated against the dollar by 8.7 percent in the second half of 2012 and by 12.5 percent in early 2013. According to the Report, Japan has not intervened in foreign exchange markets in over a year. The United States claims that, shortly after Japanese Prime Minister Shinzo Abe was elected in late 2012, Japanese authorities made comments indicating a desire to "correct" the strength of the yen. However, the Report notes that, in February 2013, Japan joined the Group of Seven (G-7) countries in affirming that its "fiscal and monetary policies have been and will remain oriented towards meeting [its] domestic objectives using domestic instruments, and that [it] will not target exchange rates." The Report notes that the United States will nonetheless closely monitor Japan's policies. Some US lawmakers have raised the issue of Japan's currency policies in light of the April 20, 2013 decision by Trans-Pacific Partnership (TPP) members to invite Japan to join negotiations. For example, Ranking Member Levin recently noted that "Japan has used currency intervention to give Japanese auto companies one of their most significant unfair competitive advantages."

Click here for a copy of the Report.



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# FREE TRADE AGREEMENTS

## *Free Trade Agreement Highlights*

## United States Welcomes Japan's Participation in TPP Negotiations

On April 12, 2013, following the exchange of letters between US and Japanese trade authorities, Acting US Trade Representative (USTR) Demetrios Marantis announced that the two countries had completed consultations on the inclusion of Japan in the Trans-Pacific Partnership (TPP). With this exchange of letters, USTR formally welcomed Japan's participation in the TPP negotiations pending a consensus agreement among the current TPP members and the completion of members' respective domestic processes.

USTR noted in its April 12 statement that, as confirmed previously in the February 22, 2013 US-Japan Joint Statement, Japan has agreed to the goal of the November 12, 2011 Outlines of the TPP Agreement of "achieving a comprehensive, high-standard agreement" under which "all goods would be subject to negotiation." However, the Joint Statement did not call for the "unilateral elimination of all tariffs" upon Japan's accession to the ongoing TPP negotiations.

USTR emphasized that "a robust package of actions and agreements with Japan" allowed for the conclusion of the bilateral consultations, in particular those relating to the automotive and insurance sectors. Japan and the United States also agreed to further negotiations to address Japanese non-tariff measures affecting US exports, including those relating to regulatory transparency, investment, intellectual property rights, standards, government procurement, competition policy, express delivery, and sanitary and phytosanitary (SPS) measures.

For the automobile sector, Japan and the United States agreed, among other specific commitments, that (i) the United States would phase out tariffs levied on imports of Japanese motor vehicles in accordance with the longest staging period for any other product under the eventual TPP agreement and would "back load" such tariff liberalization to the end of the phase-out period; (ii) the TPP agreement would include a "special motor vehicle safeguard" mechanism to protect against rapid surges in automobile imports; and (iii) the agreement would provide for an accelerated dispute settlement procedure allowing for the re-imposition of the current MFN tariffs applicable to the sector under a so-called "snap-back" procedure. These commitments are in addition to Japan's April 11, 2013 unilateral decision to more than double to 5,000 the current annual threshold of 2,000 vehicles per vehicle type covered under Japan's Preferential Handling Procedure (PHP) certification system.

In the insurance sector, both governments agreed to engage in negotiations to "address level playing field issues" in Japan's insurance market. Also, Japan unilaterally committed to refrain from approving certain new insurance products from Japan Post Insurance "until it determines that



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equivalent conditions of competition with private sector insurance suppliers have been established" in addition to certain other conditions.

In his opening address to his "Meeting Amongst Main Ministers on the TPP," Prime Minister (PM) Shinzo Abe emphasized Japan's broader national interests in participating in TPP: "In addition to the economic merit of incorporating growth in the Japanese economy and in the Asia-Pacific region, I believe that the creation of rules in the TPP with other countries […] who share the universal values of freedom, democracy, and the rule of law, will be greatly significant for security." PM Abe also urged US Secretary of State John Kerry at an April 14 joint press conference to promote the inclusion of Japan in TPP among other TPP members; TPP members could jointly welcome Japan to TPP during an April 20-21 Asia-Pacific Economic Cooperation (APEC) Trade Ministers' meeting in Indonesia.

Once all members formally welcome Japan to TPP, USTR would need to notify Congress of its intention to enter into TPP negotiations with Japan 90 days before doing so. Consequently, Japan would be unable to participate in the mid-May 2013 17th round of negotiations but, were TPP members to extend their invitation to Japan during the April 2013 APEC Trade Ministers' meeting, Japan could possibly join TPP negotiations by late-July 2013.

Congressional reaction to USTR's announcement welcoming Japan to join TPP was mixed; Senate Finance Committee Chairman Max Baucus (D-MT) and Ranking Member Orrin Hatch lauded USTR's decision in this regard, while House Ways and Means Committee Chairman Dave Camp (R-MI) and Ranking Member Sander Levin express continued concerns with lingering Japanese tariff and non-tariff barriers to US exports, particularly automotive goods, insurance and agriculture. Private sector reaction is similarly mixed; trade coalitions are generally supportive of USTR's welcoming of Japan while organized labor is universally skeptical of Japan's participation in TPP.

Click here and here for the letters exchanged.

Click here for a copy of the February 22, 2013 joint statement.

Click here for a copy of USTR's fact sheet on the US-Japan consultations.

Click here for a copy of the US-Japan Motor Vehicle Trade Terms of Reference.

Click here for a copy of Prime Minister Abe's remarks.

## United States and Guatemala Agree on Plan to Resolve DR-CAFTA Labor Dispute; Case Reflects Obama Administration's Focus on Trade Agreement Enforcement

Acting United States Trade Representative (USTR) Demetrios Marantis and Acting Secretary of Labor Seth Harris announced on April 11, 2013 an agreement between the United States and Guatemala to resolve a labor-related dispute the United States brought against Guatemala in the context of the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA). Acting USTR Marantis asserted that the agreement "reflects Guatemala's commitment to constructive engagement to meet its labor obligations under our trade agreement and the United States' commitment to working with [its] trade agreement partners to help ensure respect for labor rights."

The agreement comprises an 18-point plan detailing specific steps the Guatemalan government must take, and specific timeframes within which it must take them, to better enforce its labor code. The 18-point enforcement plan requires Guatemala to: (i) strengthen labor inspections; (ii) expedite and streamline the sanctioning of employers and the ordering of labor violation remediation; (iii) increase exporting companies' compliance with the labor code; (iv) improve labor court order monitoring and enforcement; (v) publish information on labor law enforcement; and (iv) establish mechanisms to ensure that factories pay workers when such factories close.

USTR requested consultations with Guatemala in July 2010 following April 2008 allegations on the part of US and Guatemalan labor unions that the Guatemalan government had failed to effectively enforce its labor laws. A subsequent Labor Department (DOL) report largely supported such allegations. In August 2011, USTR requested the establishment of a DR-CAFTA arbitral panel (*please see W&C US Trade Alert dated August 10, 2011*) after failing to arrive at a mutually satisfactory solution with Guatemala through consultations within DR-CAFTA's Free Trade Commission (FTC). Agreement on the 18-point labor enforcement plan allowed US and Guatemalan trade officials to suspend the arbitral panel proceedings; however, such proceedings may resume if Guatemala fails to satisfactorily implement the enforcement plan.

These Guatemala-United States dispute settlement proceedings constitute the first labor-related case that the United States has brought under an FTA. However, this case is one of many efforts the Obama Administration has made to seek enforcement of labor- and environment-related provisions under US FTAs. For example, USTR could soon seek consultations with Bahrain under the bilateral FTA over alleged labor violations in that country. Similarly, USTR sought and secured from Peru a 5-point plan to bring Peru into compliance with the US-Peru FTA Forestry Annex.

The Obama Administration's heightened focus on enforcement of labor and environmental FTA provisions holds implications for ongoing Trans-Pacific Partnership (TPP) negotiations. Several TPP members appear reluctant to accept bolstered US proposals on labor and environment, including those relating to dispute settlement, particularly given the Obama Administration's penchant for seeking enforcement of these provisions.

Click here for a USTR fact sheet on the US-Guatemala labor enforcement plan.



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