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# White & Case LLP
# General Trade Report - JETRO

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# UNITED STATES

# GENERAL TRADE POLICY

## USTR Announces 2014 Trade Policy Agenda

### Summary

On March 4, 2014, the Office of the US Trade Representative (USTR) released the "2014 Trade Policy Agenda and 2013 Annual Report of the President of the United States on the Trade Agreements Program."[1] Below we provide a brief overview of the 2013 Report as well as details on and analysis of the 2014 Agenda, which identifies the negotiation of certain trade agreements and trade enforcements efforts as Obama Administration trade policy priorities for 2014.

### Analysis

#### I. BACKGROUND

Pursuant to Section 163 of the Trade Act of 1974, as amended, USTR released the 2014 Trade Policy Agenda ("Agenda") and 2013 Annual Report on March 4, 2014. Together, they discuss the Obama Administration's trade policy priorities for 2014 and present a summary of 2013 trade-related activities.

For 2014, the Obama Administration has captured its priorities under one overarching mission statement - Supporting Jobs and Economic Growth through Trade. To that end, USTR will pursue actions to (i) increase trade; (ii) enforce US trading rights; (iii) enhance relations between the United States and its trade and investment partners; (iv) support global economic development through trade; and (v) engage domestic stakeholders on US trade interests.

#### II. 2014 TRADE AGENDA ITEMS

Key trade policy priorities identified in the Agenda include the following:

Trade Promotion Authority

USTR asserts that Trade Promotion Authority (TPA) is a “critical tool” for Congress to assert its goals in US trade policy. In turn, the TPA will help inform USTR on its negotiating positions in current and

[1] A copy of the Agenda is available here: http://www.ustr.gov/sites/default/files/2014%20Trade%20Policy%20Agenda%20and%202013%20Annual%20Report.pdf



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future free trade agreement (FTA) negotiations. However, the Agenda does not detail when and how the Obama Administration will work with Congress to pass TPA legislation.

On March 4, 2014, Ways and Means Committee Chairman Dave Camp (R-MI) and Trade Subcommittee Chairman Devin Nunes (R-CA) responded to the Agenda's TPA component, noting their regret regarding the lack of specifics.[2] Nonetheless, both House lawmakers stressed the importance of TPA to support US FTA negotiations and integrate Congress' role in the process, *e.g.* USTR-Congress consultations.

US Trade Agreement Negotiations

The Agenda emphasizes the Obama Administration's goal of concluding the Trans-Pacific Partnership (TPP) negotiations in 2014. In particular, USTR considers that Japan's entry has expanded the TPP's commercial significance. USTR pledges to negotiate with Japan in parallel to the TPP to address such outstanding issues as automotive trade, insurance, and other nontariff measures. Concurrently, USTR continues to engage aspiring Asian and Latin American entrants into the TPP, with which it stresses the need to meet the TPP's high standards as a basic entry requirement.

Separately, the Agenda notes that USTR expects to make "significant progress" in the Transatlantic Trade and Investment Partnership (TTIP) negotiations. USTR views TTIP as an opportunity to modernize trade rules and achieve regulatory convergence. Moreover, USTR is optimistic that TTIP can offer opportunities to set high standards on global issues beyond the transatlantic area.

At the plurilateral level, the Agenda underscores the Obama Administration's commitment to update global rules of trade to incorporate new growth industries, by way of US participation in the respective negotiations of the Trade in Services Agreement (TiSA) and expansion of the WTO Information Technology Agreement (ITA). Whereas TiSA will comprise "state-of-the-art" rules to open international markets for services, the ITA will expand the scope of product coverage for preferential tariff treatment.

In TiSA, USTR's priority is embedding the notion that service providers should compete based on quality, not nationality. Furthermore, USTR aims to solidify the commercial relevance of TiSA by ensuring the agreement addresses issues affecting digital trade and includes relevant provisions to support such trade. In ITA, USTR aims to push for tariff elimination on "cutting-edge" information technology products not covered by the present ITA. USTR highlights that its targeted outreach efforts has increased the number of ITA negotiating parties, from the initial six in May 2012, to 28 in September 2013. This group reportedly represents 90 percent of global trade in Information and Communication Technology (ICT) goods.

In addition, USTR reaffirms its efforts to negotiate Bilateral Investment Treaties (BITs) with such

[2] A copy of the joint press statement is available here: http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=371683



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partners as China, India, and Mauritius, as well as to explore BIT discussions with Cambodia, Gabon, Ghana, and Russia. USTR will also examine the prospects of a regional investment agreement with the East African countries.

Underlying USTR's commitment to FTA negotiations is the core pursuit of expanding US jobs through increased US trade. USTR cites 2013 data that links every USD 1 billion in US goods exports to an estimated 5,400 American jobs, and every USD 1 billion of US services exports to approximately 5,900 US jobs. Through US FTAs, USTR stresses that such agreements are a means to improve the efficiency of global trade and eliminate barriers to US exports.

Addressing New Disciplines and a Values-Driven Trade Policy

The following are noteworthy components of USTR's 2014 priorities in influencing global trade rules:

- **Green Goods.** USTR Michael Froman announced on the margins of the World Economic Forum in Davos on January 24, 2014 that the United States is joining 13 WTO members to launch negotiations toward liberalizing trade in environmental goods. Negotiations will aim to reduce – by 2015 – most-favored-nation (MFN) tariffs levied on certain environmental goods, based on the September 2012 Asia-Pacific Economic Cooperation (APEC) Members' List of 54 Environmental Goods.

- **State-Owned Enterprises.** USTR vows to level the playing field between state-owned enterprises (SOEs) and private firms through US FTAs. Due to the increasing participation of large SOEs in the international economy, USTR aims to introduce in TPP and TTIP new disciplines on SOEs to prevent trade distortions and unfair competition.

- **Localization.** USTR highlights its efforts to combat localization requirements by foreign governments. USTR stresses that these requirements unduly favor domestic industries at the expense of industries and IP rights holders of other countries. Specifically, USTR will target its energies towards addressing such measures used by governments in Asia.

- **Labor.** USTR affirms its position, as a matter of policy, to negotiate labor provisions in US FTAs. In existing and future US FTAs, USTR insists upon subjecting labor provisions to dispute settlement procedures and enforcement mechanisms as commercial obligations.

- **Environment.** USTR aims to pursue trade policies that blend trade and environmental goals. One aspect of this approach is to ensure US trading partners implement its commitments to Multilateral Environmental Agreements (MEAs), whereby failing to do so will be subject to dispute settlement procedures and enforcement mechanisms under US FTAs.

Enforcement of US Trade Agreements

In 2014, the United States will work to ensure that its FTA partners uphold their obligations and implement their commitments in a timely manner. The Agenda highlights that USTR will strive to uphold commitments related to the following agreements:



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- **US-Korea FTA**. On January 1, 2014, the United States and Korea implemented the third annual tariff reductions, and will shortly convene relevant committees and working groups to continue implementation.

- **US-Colombia FTA.** The Agenda affirms the Obama Administration's goal of coordinating amongst the Departments of Labor and State with the Government of Colombia to advance the implementation of the Colombia Action Plan Related to Labor Rights.

- **US-Panama Trade Promotion Agreement.** On October 22, 2013, the Panamanian National Assembly passed the US-Panama Environmental Cooperation Agreement (ECA), and it entered into force on December 7, 2013. The follow up work program includes the establishment of an independent secretariat to receive public submissions regarding effective enforcement of environmental laws.

- **Dominican Republic-Central America-United States FTA**. Under this FTA, USTR will engage Guatemala on the bilateral comprehensive Labor Enforcement Plan signed in April 2013. Under the Plan, Guatemala agreed to take actions, *inter alia*, to strengthen labor inspections, expedite and streamline the process of sanctioning employers, and increase labor law compliance by exporting companies. The five Central American countries involved in this FTA are Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.

Regional and Bilateral Trade Relations

The Agenda also outlines the Obama Administration's trade policy priorities with respect to certain regional and bilateral trading relationships. For US relations with individual countries, the BRIC nations are of note:

- **Brazil.** USTR remains committed to negotiating a long-term solution to the ongoing US-Brazil WTO dispute on cotton, thus preventing Brazil's need to impose retaliatory measures.

- **Russia.** USTR will focus its attention on Russia's compliance with its WTO obligations. To that end, in 2013, USTR launched two annual reports on WTO Enforcement and on WTO Implementation respectively.

- **India.** Through the US-India Trade Policy Forum, USTR will continue to engage India on such issues as IPR protection and localization policies.

- **China.** In addition to the US-China BIT talks, USTR will engage China with "all available tools" to eliminate market access barriers and increase transparency. Notably, USTR aims to work with China on its Government Procurement Agreement accession negotiations, including on such issues as SOEs and sub-central coverage.

At the regional level, the Agenda discusses USTR's efforts to engage sub-Saharan Africa, the Middle East and North Africa (MENA), and the Asia-Pacific. In 2014, the United States will intensify work to enhance regional trade and investment with partners in the Association of Southeast Asian Nations (ASEAN), including concluding agreements with ASEAN under the Expanded Economic Engagement (E3) Initiative and the US-ASEAN Trade and Investment Framework Arrangement.



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WTO Negotiations

In 2014, the United States will continue to participate in numerous WTO negotiations, most notably:

- **Trade Facilitation Agreement (TFA).** The TFA was adopted by WTO Members at the 9th WTO Ministerial Conference in December, 2013 and the newly-established Preparatory Committee on Trade Facilitation is now tasked with ensuring the implementation of the TFA. The Committee is required to conduct a legal review of the text, accept notifications from developing country Members regarding commitments subject to transition periods, and draft a Protocol of Amendment to insert the Agreement into Annex 1A of the WTO Agreement. The General Council is due to adopt the Protocol by July 31, 2014, at which point the TFA will then be open for acceptance by the Membership until July 31, 2015. The TFA will enter into force if ratified by two-thirds of the Membership by that date.

- **Agreement on Government Procurement (GPA).** In order for the revised GPA to enter into force, two-thirds of the 15 Parties must deposit their instruments of acceptance. During 2013, the GPA Committee held four formal meetings and four informal meetings, focused primarily on the entry into force of the GPA, and seven GPA parties deposited their instruments of acceptance of the revised GPA. At the informal meetings, discussions took place regarding accessions to the GPA of China, Croatia, Montenegro, New Zealand and Ukraine. Croatia became the GPA's 43rd member in July 2013. At the 9th WTO Ministerial Conference in December 2013, GPA Parties committed to bringing the revised GPA into force by March 31, 2014. In 2014, the GPA Committee will continue to advance the accessions of China, Montenegro and New Zealand, and once the revised GPA enters into force the Committee will commence work on the five Work Programs that were adopted as part of the overall package.

- **The Expansion of the Information Technology Products Agreement (ITA).** Participating countries began to negotiate the expansion of this Agreement in 2012. The Agenda states that the United States and 26 other ITA Participants held nine rounds of negotiations in Geneva in 2013 to negotiate a "consolidated list" of products proposed for inclusion in the ITA. The Agenda notes that Participants were unable to secure a deal prior to the 9th WTO Ministerial Conference in December, 2013 because China refused to accept the inclusion of key technology goods in the scope of a final agreement. The ITA Committee also held talks on Non-Tariff Measures and classification divergences on certain ITA products. The Agenda notes that in 2014 the United States will continue to urge China to support the negotiated package, such that the negotiations can be concluded as soon as possible.

The United States will also continue to address issues relating to agriculture, following the achievements on these issues at the 9th WTO Ministerial Conference in December, 2013. The Agenda comments that the United States will resume negotiations on agriculture and continue to look at "fresh approaches to achieve results." In particular, the Agenda notes that it will be important to secure meaningful market access commitments and advanced developing countries will play an important role.

In regard to WTO accessions, the Agenda welcomes the recent accession of Yemen and commends Kazakhstan, Afghanistan, and Seychelles for their progress in market access negotiations and other



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terms of accession. The Agenda laments that the pace of work on accessions slowed in 2013, but notes that Algeria and Belarus resumed previously dormant accession negotiations, Comoros activated its accession process, and Azerbaijan advanced its own accession process through bilateral contracts.

During 2014, the United States will continue to take a leadership role in all aspects of the accession negotiations. The Agenda notes that Kazakhstan and Afghanistan are now potential candidates for approval in 2014 based on their active efforts to resolve outstanding issues. Serbia, and Bosnia and Herzegovina are also noted as being close to completion in 2014.

WTO Disputes

The United States will continue to engage with numerous WTO members at the WTO Dispute Settlement Body (DSB) in disputes that the United States has initiated. These disputes include those that challenge: (i) China's alleged misuse of its trade remedy laws in DS440; (ii) China's export restraints on rare earths in DS431; (iii) China's alleged use of export-contingent subsidies in DS450; (iv) China's compliance with the panel and Appellate Body rulings in DS414; (v) the European Union's (EU) compliance with the WTO DSB's ruling in DS316, which addressed subsidization of the EU aircraft manufacturer Airbus; (vi) India's alleged use of local content requirements in DS456; (vii) India's alleged ban on certain US agricultural imports in DS430; (viii) India's alleged local content requirements on solar cells and modules in DS456; (ix) Argentina's allegedly non-transparent and discretionary import restrictions in DS444; (x) Indonesia's import licensing requirements in DS455; (xi) Indonesia's import measures on certain horticultural products, animals and animal products in DS465.

Trade Preference Programs

The Obama Administration vows to work with Congress to renew authorization of the Generalized System of Preferences (GSP) program in 2014. In addition, the United States will continue work with Bangladesh on its implementation of the GSP Action Plan developed after the President suspended Bangladesh's GSP benefits in June 2013. This Action Plan lists specific actions that Bangladesh should take to provide a basis for reinstatement of GSP benefits, namely those to improve the worker rights environment.

As of January 1, 2014, the Agenda highlights that there were 123 designated GSP beneficiary developing countries (BDCs) and territories, including 43 countries and territories that are "least-developed" beneficiary developing countries (LDBDCs), eligible for a broader range of duty-free benefits. In addition, on April 16, 2013, USTR initiated reviews of Myanmar and Laos for possible designation as GSP beneficiaries. USTR held a public hearing on the eligibility of these two countries on June 4, 2013, and the two countries remain under review.

Separately, USTR stressed that the renewal and reform of the African Growth and Opportunity Act (AGOA) is a key priority of the Obama Administration's global development strategy. USTR is participating in a comprehensive review of AGOA, and the results of the review will inform the Obama Administration's consultations with Congress on renewal options for the AGOA program beyond 2015.



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Increased Transparency in US FTA Negotiations

The Agenda highlights several channels through which USTR aims to engage stakeholders and inform public opinion on the US trade policy priorities. In February 2014, the Administration announced the creation of a new Public Interest Trade Advisory Committee (PITAC). Such stakeholders as NGOs, academics, and other public interest groups are eligible for membership. Moreover, USTR pledges to strengthen relationships with the National Governors Association, the National Conference of State Legislatures, the US Conference of Mayors, as well as state and local officials.

### Outlook

The Obama Administration's 2014 Trade Policy Agenda emphasizes many of the same priorities outlined in its trade agendas of prior years. However, the Agenda should be viewed as much an outward expression of the United States' official trade policy as an inward, domestic messaging vehicle which reflects of the precarious political circumstances in which trade has recently found itself in America. The Agenda's annual release coincides with most lawmakers' early preparations and positioning on trade issues *vis-a-vis* the midterm elections that will take place on November 4, 2014. All 435 seats in the House of Representatives and 33 of the 100 seats in the Senate are open to elections. In that regard, the Agenda may come under scrutiny and form the backbone of "guilt by association" campaigns against certain incumbents, focusing on their voting records on trade and potential US job loss as a result.

Given this context, what the Agenda omits might be more important than what it contains. For example, the Agenda does not provide specific timeframes and action plans through which the Obama Administration will work with Congress on TPA, nor does it discuss currency manipulation, despite vocal congressional concerns about this issue. These omissions are likely intentional, reflecting the delicate balance between the Obama Administration's trade negotiating positions and its relationship with Congress. The Obama Administration's goal of obtaining TPA lies solely at the decision of Congress, meaning that the Obama Administration cannot reject outright the Congress-favored notion of currency disciplines in US FTAs. At the same time, the Obama Administration understands that a TPA with strict currency discipline obligations will disrupt, if not undo, progress in the TPP negotiations. Hence, the omission is likely intentional to avoid complications at home and abroad, for now.

## Ukraine and U.S. Energy Export Restrictions: Will Geopolitics Bring Reform?

### Summary

The situation in Ukraine has intensified political and media scrutiny of the United States' restrictions on the export of crude oil and liquefied natural gas (LNG). With supplies of Russian energy to Ukraine and Europe at risk, an increasing number of politicians and commentators – many of whom have not previously opined on the issue – have called for reform of these longstanding restrictions to counter Russia's influence in the region. Although some advocates have argued that the Obama



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Administration has ample discretion to liberalize crude oil or LNG exports, others have proposed congressional legislation to achieve this result.

There are several economic and legal reasons for reforming U.S. energy export policy, but the Ukraine situation has added a geopolitical element to the political debate that was heretofore lacking. Unless the situation escalates, however, there is insufficient political support to loosen export restrictions.

## Analysis

### I. BACKGROUND

Restrictions on the Export of Crude Oil from the United States

The United States federal government regulates the export of crude oil primarily pursuant to Section 103 of the Energy Policy and Conservation Act of 1975 (EPCA),[3] which requires the President to "promulgate a rule prohibiting the export of crude oil and natural gas produced in the United States, except that the President may... exempt from such prohibition such crude oil or natural gas exports which he determines to be consistent with the national interest and the purposes of this chapter."[4] This export restriction has implemented through an export licensing system originally authorized by the Export Administration Act of 1979 (EAA)[5] and implemented under the Export Administration Regulations (EAR)[6] "Short Supply Controls," which are administered by the Bureau of Industry and Security (BIS) within the U.S. Department of Commerce. The EAA expired on March 30, 1984; however, the export controls in effect under that Act have been maintained pursuant to (i) a declaration of national emergency by the President under the International Emergency Economic Powers Act, found in 50 U.S.C. § 1701; and (ii) annual renewals by executive order.

Part 754 of the EAR specifies several narrow categories of exports that qualify for automatic approvals from BIS, most notably exports of crude oil to Canada "for consumption or use therein."[7] For all other exports that do not fall into one of these categories, BIS reviews export applications "on a case-by-case basis and... generally will approve such applications if BIS determines that the proposed export is consistent with the national interest and the purposes of the [EPCA]."[8] BIS must

[3] 42 U.S.C. § 6212 (2013).

[4] 42 U.S.C. § 6212(b)(1). This chapter lists the EPCA's purposes: (1) "to grant specific authority to the President to fulfill obligations of the United States under the international energy program;" (2) "to provide for the creation of a Strategic Petroleum Reserve capable of reducing the impact of severe energy supply interruptions;" (3) "to conserve energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy uses;" (4) "to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products;" (5) "to provide a means for verification of energy data to assure the reliability of energy data;" and (6) "to conserve water by improving the water efficiency of certain plumbing products and appliances." 42 U.S.C. § 6201.

[5] 50 U.S.C. § 2406. http://www.gpo.gov/fdsys/pkg/USCODE-2009-title50/pdf/USCODE-2009-title50-app-exportreg-sec2406.pdf

[6] *See* http://www.bis.doc.gov/policiesandregulations/ear/754.pdf

[7] 15 C.F.R. § 754.2(b)(1)(ii) (2013).

[8] 15 C.F.R. § 754.2(b)(2).



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deem certain narrowly-defined transactions to be in the "national interest" and will reject all others unless the President issues a formal finding that the transaction at issue is in the "national interest."

The result of this system, as confirmed by monthly export data, is an effective ban on all crude oil exports destined for anywhere other than Canada.

Restrictions on the Export of Natural Gas from the United States

The export of natural gas is primarily governed by the Natural Gas Act of 1938 (the "Act").[9] The law states that gas exports must be authorized by DOE and that authorization shall be granted unless exportation "will not be consistent with the public interest."[10] The system provides for automatic licensing for exports to any U.S. FTA partner (*i.e.*, exports destined for FTA partners are deemed to be consistent with the "public interest"). For exports to all other countries, the system creates a rebuttable presumption that a proposed export is in the "public interest."[11] The term "public interest" is not defined by law, and there are no objective criteria that would bind DOE's determination of whether the "public interest" standard has been met. Thus, the agency has the discretion to reject an export license based on a subjective determination under the "public interest" standard.

DOE approval of a license to export natural gas to non-FTA countries does not automatically lead to such exports because the gas must be condensed and liquefied at special LNG export terminals, the construction of which is regulated by the Federal Energy Regulatory Commission (FERC) within DOE. Section 3 of the Act grants FERC the "exclusive authority to approve or deny" an LNG export terminal prior to construction (along with siting and expansion).[12] This process has proven difficult and lengthy: FERC has approved only one LNG export terminal – the January 31, 2011 Sabine Pass application was approved on April 16, 2012.[13] Thirteen other LNG export terminal authorization requests remain pending.[14]

## II. POLICY CONCERNS WITH THE U.S. ENERGY EXPORT REGIME

An increasing number of critics across the political spectrum are concerned that the regimes governing exports of U.S. oil and gas are inconsistent with international trade law; geopolitical interests of the United States and its allies; and other U.S. economic and trade objectives.

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[9] 15 U.S.C. § 717 (2013).

[10] 15 U.S.C. § 717b(a).

[11] *See,* ConocoPhillips Alaska Natural Gas Corporation and Marathon Oil Company: Order Granting Authorization to Export Liquefied Natural Gas From Alaska, DOE Opinion and Order No. 2500, at 43 (June 3, 2008); *see also* Phillips Alaska Natural Gas Corporation and Marathon Oil Company: Order Extending Authorization to Export Liquefied Natural Gas from Alaska, DOE/FE Opinion and Order No. 1473, at 13 (April 2, 1999).

[12] 15 U.S.C. § 717b(e)(1).

[13] *See* http://www.ferc.gov/CalendarFiles/20120416164846-CP11-72-000.pdf

[14] *See* https://www.ferc.gov/industries/gas/indus-act/lng/lng-proposed-potential-export.pdf



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International Trade Law Concerns

The U.S. crude oil and natural gas export systems could be inconsistent with the United States' legal obligations under the World Trade Organization (WTO) Agreements. These concerns relate to international trade in both upstream and downstream products.

Upstream Issues

Restrictions on crude oil and natural gas raise several concerns under the country's WTO obligations. The primary issue is that they appear to be inconsistent with the general prohibition on quantitative export (and import) restrictions under Article XI of the WTO *General Agreement on Tariffs and Trade* (GATT). WTO jurisprudence has established that discretionary export licensing systems, as well as those in which license approvals are delayed for long periods, violate Article XI.[15] The legal standards for exports of both crude oil (the "national interest") and natural gas (the "public interest") leave the executive branch with almost unlimited discretion to approve or deny a license to export such products. Many applications for the export of natural gas to non-FTA countries have been delayed for unreasonable periods of up to several years.

The permitting process for LNG export terminals also may be susceptible to challenge as a violation of Article XI, which prohibits "quotas, import or export licenses or *other measures*" that restrict imports or exports. WTO jurisprudence has interpreted this last category broadly, noting that it is "meant to encompass a 'broad residual category'" of trade restrictions.[16] A WTO Panel has found that an analogous measure – Colombia's express limitation on port access for certain transactions – was an impermissible import restriction under Article XI.[17] The limitation in U.S. law on LNG export terminal construction, as enforced by FERC and demonstrated by the lack of approved facilities, could be deemed to constitute a similar type of restriction (in this case on LNG exports).[18]

In the event of a WTO challenge under Article XI or another WTO provision, the United States could find it difficult to rely on any of the exceptions to WTO rules under GATT Article XX or XXI. Article XX provides ten general exceptions from GATT obligations, but only paragraphs (b) (allowing

[15] Panel Report, *India – Quantitative Restrictions*, paras. 5.129 (citing and adopting a GATT panel's decision that "export licensing practices… leading to delays of up to three months… had been non-automatic and constituted restrictions on the exportation of such products inconsistent with Article XI.").

[16] Panel Report, *Colombia – Ports of Entry*, para. 7.227 (citing Panel Report, *Argentina – Hides and Leather*, para. 11.17.).

[17] *Colombia – Ports of Entry*, paras. 7.274 – 7.275. The fact that this case addressed import, rather than export, restrictions would be immaterial to any Panel analysis of LNG export terminals under GATT Article XI.

[18] A secondary challenge to the crude oil licensing system could come under the most-favored nation (MFN) obligation of GATT Article I, which requires a WTO Member to treat all other Members equally in respect of cross-border trade in goods. The presumption of license approval for crude oil exports to Canada might violate the United States' MFN obligation because exports to all other WTO Members are granted no such preference. The United States could argue that this discrimination is permitted under GATT Article XXIV because Canada is an FTA partner, but its position would be difficult to reconcile with the fact that (i) the North American Free Trade Agreement (NAFTA) does not contain a provision explicitly permitting U.S. crude oil exports to Canada while restricting them to Mexico; and (ii) unlike natural gas, no other U.S. FTA partners are granted preferential access to U.S. crude oil exports. In any event, conformance of a U.S. FTA with GATT Article XXIV would not excuse the presumptive violation of GATT Article XI.



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measures "necessary to protect… health") and (g) (allowing measures "relating to the conservation of exhaustible natural resources") appear applicable. A defense of the U.S. crude oil and natural gas export restrictions based on one of these exceptions, however, may prove unsuccessful. Given that environmental or health protection is not a core tenet of the EPCA or the Natural Gas Act, an Article XX(b) defense would likely be tenuous. Moreover, the successful invocation of Article XX(g) requires commensurate "restrictions on domestic production or consumption," but there are no such restrictions for natural gas or crude oil in the United States.

A GATT Article XXI "national security" defense would also be problematic. This provision permits a WTO Member to take "any action it considers necessary for protection of its essential security interests", but the only provision which would apply to U.S. energy export restrictions is that governing actions "taken in time of war or other emergency in international relations[.]"[19] This standard is subjective and Article XXI has never been interpreted in WTO jurisprudence. Although Members are deferential to security concerns, on the merits it would be difficult to maintain an argument that, in this time of American energy abundance, decades-old export restrictions fit within the criteria of Article XXI,. Moreover, the United States would probably be hesitant to invoke Article XXI to justify these particular measures out of concern for the precedent it would set.

Downstream Issues

U.S. export restrictions on crude oil and natural gas also raise legal concerns with respect to trade in downstream or energy-intensive goods like refined products, petrochemicals, fertilizer or aluminum. These concerns stem from a heightened risk of (i) trade remedy (anti-dumping or countervailing duty (CVD)) actions against U.S. exports of downstream products in key foreign markets, or (ii) a WTO challenge alleging that the export restrictions constitute "prohibited" export subsidies to these goods. Such actions could lead to remedial duties on downstream exports from the United States, thereby offsetting any alleged competitive advantage that U.S. exporters currently gain from the upstream export restrictions.

First, export restrictions on upstream inputs could be deemed to constitute actionable or even prohibited subsidies under the WTO *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") or national CVD laws. If an export restriction reduces the domestic cost of an industrial input, overall production costs for goods using that input would in turn be reduced.[20] Thus, domestic downstream products made from U.S. crude oil or natural gas could benefit from the upstream export restrictions, thus leading to claims by other WTO Members that the restrictions act as unfair subsidies. If such subsidies provide an incentive for downstream producers "to skew anticipated sales towards exports," then they could be found to be prohibited "export-contingent"

[19] GATT, art. XXI(b)(iii). The other two security interests relate to "fissionable materials or the materials from which they are derived" and "traffic in arms" and other weapons. GATT, arts. XXI(b)(i), XXI(b)(ii).

[20] United States International Trade Commission, *Export Controls: An Overview of Their Use, Economic Effects, and Treatment in the Global Trading System*, Aug. 2009, pp. 3-4, *available at* http://www.usitc.gov/publications/332/working_papers/ID-23.pdf



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subsidies under Article 3.1(a) of the SCM Agreement.[21]

A WTO Panel has ruled that the export restraint at issue in that dispute did *not* constitute a subsidy,[22] but this remains a live issue in both WTO dispute settlement and CVD proceedings. Indeed, the United States regularly uses such logic to find that export restrictions constitute countervailable subsidies on downstream products.[23] China is currently challenging this view in a WTO dispute, where it argues that the U.S. Department of Commerce incorrectly deemed export restraints (quotas, taxes and licensing arrangements) to constitute countervailable subsidies.[24] That case remains pending.

Second, the export restrictions could raise concerns for U.S. exporters of downstream products that are targeted in national anti-dumping investigations. In calculating dumping, certain WTO Members, including the European Union, have cited export restrictions as grounds to reject investigated exporters' home market sales prices and record input costs on the view that export restrictions render these values unusable. Instead, the Members' investigating authorities have calculated dumping using adjusted values based on "undistorted," higher international market prices, thereby leading to higher anti-dumping duties on the downstream products under investigation (or duties that would not otherwise exist at all).

If an anti-dumping investigation were initiated against imports of refined products, petrochemicals or other downstream goods from the United States, a national authority following this policy could find that upstream export restrictions on gas or oil render downstream U.S. exporters' sales and cost records unusable for calculating dumping. Such an approach would likely increase the margin of dumping and lead to higher duties on the subject merchandise than would have been levied using the exporters' actual records. Although this methodology is controversial (it is the subject of two pending WTO disputes[25]), it will be effective unless WTO rulings disapprove it.

Geopolitical Concerns

The current restrictions on crude oil and natural gas exports also have raised geopolitical concerns, as U.S. allies in Asia and Europe endure high and erratic energy prices and remain dependent on a limited number of regional suppliers. Although the immediate geopolitical impact of systemic reform

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[21] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1047.

[22] Panel Report, *US – Export Restraints*, para. 8.75.

[23] *See*, *e.g.*, United States Department of Commerce, *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Ecuador*, Investigation No. C-331-803, Aug. 12, 2013, p. 28, *available at* http://enforcement.trade.gov/frn/summary/ecuador/2013-20169-1.pdf

[24] World Trade Organization, Request for the Establishment of a Panel by China, *United States – Countervailing Duty Measures on Certain Products from China*, Aug. 20, 2012, WT/DS437/2.

[25] *See* World Trade Organization, Request for Consultations by the Russian Federation, *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia*, Jan. 9, 2014, WT/DS474/1; World Trade Organization, Request for Consultations by Argentina, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, Jan. 8, 2014, WT/DS473/1.



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should not be overstated, there is general agreement that the export of U.S. energy resources would, by providing a new, significant supply source, help stabilize global energy markets in times of global turmoil and provide Asian and European consumers with an alternative to less predictable suppliers, including those in Russia. U.S. exports, in turn, would limit allies' concerns about the potential impact of their foreign policy decisions on domestic energy availability and prices. The White House has recently noted its own efforts to promote energy exports for these very reasons.[26]

Many experts have argued that the liberalization of U.S. crude oil and natural gas exports also would demonstrate U.S. flexibility to tackle security challenges through diverse measures—beyond, or in conjunction with, more forceful action such as economic sanctions or military action. Given the instability in many energy exporting countries and regions and current U.S. reluctance with respect to expansive foreign commitments,[27] these experts assert that geopolitical benefits of a liberalized U.S. energy export regime are clear.

Other Concerns

Critics of U.S. export restrictions also claim that the restrictions undermine U.S. economic and trade policy. First, by depressing domestic prices and subjecting export approval to non-market forces, the restrictions are said to retard domestic energy production and discourage investment in the oil and gas sectors.[28] Artificially low prices prevent producers from achieving a sustainable rate of return on the large up-front costs required to drill and extract oil and gas, and investors lack any assurances under the discretionary licensing systems that domestic prices will not collapse when output increases. Domestic supply gluts in natural gas have caused U.S. producers to divest from the sector, and analysts expect similar problems for crude oil in the near future.[29] These economic concerns led the International Energy Agency to warn that U.S. export restrictions put the entire "American oil boom" at risk.[30]

Moreover, independent reports show that the exportation of oil and gas would not cause a traumatic spike in oil and gas prices for U.S. industrial and individual consumers. According to these reports, U.S. natural gas prices would remain well below prices in other markets, and several economic

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[26] *See* Carol Davenport and Steven Erlanger, *U.S. Hopes Boom in Natural Gas Can Curb Putin*, N.Y. TIMES, Mar. 5, 2014 (quoting Carlos Pascual, head of the U.S. State Department Bureau of Energy Resources as stating "that although the prospective American exports would not immediately solve the problems in Europe, 'it sends a clear signal that the global gas market is changing, that there is the prospect of much greater supply coming from other parts of the world.'").

[27] *See* Stephen Sestanovich, *Obama's Focus Is On Nation-Building at Home*, N.Y. TIMES, Mar. 11, 2014, *available at* http://www.nytimes.com/roomfordebate/2014/03/11/weakness-or-realism-in-foreign-policy/obamas-focus-is-on-nation-building-at-home

[28] Sarah O. Ladislaw & Michelle Melton, Center for Strategic & International Studies, *The Molecule Laws: History and Future of the Crude Export Ban*, Jan. 2, 2014, http://csis.org/publication/molecule-laws-history-and-future-crude-export-ban

[29] Christi Stark, "Light Sweet Crude and Refineries: An Overload in the Making ," PB Oil & Gas, Jan. 1, 2014, *available at* http://pbog.zacpubs.com/light-sweet-crude-and-refineries-an-overload-in-the-making/

[30] Gregory Meyer & Ajay Makan, *US shale boom at risk, watchdog warns*, FIN. TIMES, Feb. 6, 2013, *available at* http://www.ft.com/intl/cms/s/0/2217180a-70aa-11e2-85d0-00144feab49a.html?siteedition=intl#axzz2wPVMtfSn



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analyses predict that crude oil export reform would likely *lower* U.S. gasoline prices[31] – thus answering U.S. lawmakers' most prevalent liberalization concern. In fact, studies indicate that the primary beneficiaries from the crude oil restrictions are certain U.S. refiners who buy domestic crude at a discount and freely export refined products at global prices. One such study found that, from 2010 to 2013, refiners in the Rocky Mountain and Midwest regions paid between 16 to 21 percent less per barrel for crude oil than those on the East Coast, but wholesale gasoline prices were essentially unchanged.[32]

Second, current policy might undermine several other Obama administration trade priorities. Restricting oil and gas exports is difficult to reconcile with President Obama's National Export Initiative[33] or his support for other energy exports, particularly renewables. Moreover, the use of export restrictions that benefit domestic downstream industries is inconsistent in principle with longstanding U.S. policy of applying anti-subsidy (countervailing) duties on foreign imports that are found to benefit from export restrictions on upstream inputs. Finally, the U.S. government has long opposed restrictive and opaque export licensing systems in WTO negotiations and dispute settlement.[34] It is difficult to square the current U.S. export restrictions on crude oil and natural gas with these positions.

## III. UKRAINE: BRINGING U.S. ENERGY EXPORTS TO THE FORE

The situation in Ukraine has moved U.S. energy export liberalization from a niche issue to the forefront of American political discourse. Before the crisis, a steady-but-small group of public figures advocated reforming the U.S. crude oil and natural gas export regimes. In addition to several advocacy and policy groups,[35] Senators Mary Landrieu (D-LA) and Lisa Murkowski (R-AK), the Chair and Ranking Member, respectively, of the Senate Committee on Energy and Natural Resources, advocated liberalizing the export of both crude oil and LNG.[36] These Senators were joined by Rep.

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[31] *See*, *e.g.*, Neil Hume, "Bringing shale benefits to the US driver," Financial Times, Dec. 11, 2013, *available at* http://www.ft.com/intl/cms/s/0/6506397a-61b3-11e3-aa02-00144feabdc0.html?siteedition=intl#axzz2n6SNOlGv; *and* Stephen P.A. Brown, Charles Mason, Alan J. Krupnick, Jan Mares, "Crude Behavior: How Lifting the Export Ban Reduces Gasoline Prices in the United States," Issue Brief 14-03-REV, March 2014, *available at* http://rff.org/Publications/Pages/PublicationDetails.aspx?PublicationID=22346. The U.S. Energy Information Administration and the private American Petroleum Institute reportedly are preparing similar studies.

[32] Trevor Houser & Shashank Mohan, Rhodium Group Note, *Kicking Off the Crude Export Debate*, Jan. 7, 2014, http://rhg.com/notes/kicking-off-the-crude-export-debate

[33] The White House, Press Release, *President Obama Details Administration Efforts to Support Two Million New Jobs by Promoting New Exports*, Mar. 11, 2010, *available at* http://www.whitehouse.gov/the-press-office/president-obama-details-administration-efforts-support-two-million-new-jobs-promoti

[34] *See generally*, *e.g.*, Appellate Body Report, *China – Raw Materials*; World Trade Organization, Request for the Establishment of a Panel by the United States, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, Jun. 29, 2012, WT/DS431/6.

[35] Such groups include industry associations, such as the American Petroleum Institute and National Association of Manufacturers, as well as think-tanks, including the American Enterprise Institute, Brookings Institution, CATO Institute and Council on Foreign Relations.

[36] Laura Litvan, *Drillers Seen Gaining From Oil-State Senators Atop Crucial Committee*, BNA INTL. TRADE REP., Feb. 11, 2014, *available at:* http://news.bna.com/tdln/TDLNWB/split_display.adp?fedfid=41579477&vname=itdbulallissues&wsn=499137000&searchid=22287596&doctypeid=1&type=date&mode=doc&split=0&scm=TDLNWB&pg=0



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Fred Upton (R-MI),[37] Chair of the House Committee on Energy and Commerce, leading GOP 2016 Presidential contenders Senators Ted Cruz (R-TX) and Rand Paul (R-KY)[38] and a few other lawmakers, but overall congressional support remained limited.

Since the situation in Crimea, however, the ranks of reform advocates have blossomed, as has related congressional legislation. Because of Europe's reliance on Russian energy resources, many people now have advocated liberalizing U.S. energy exports as a check on Russia's regional ambitions. Editorials in the *New York Times*, *Washington Post*, and *Wall Street Journal* all called on the Administration to liberalize U.S. energy exports.[39] In the course of two days, three bills were introduced in the House and Senate concerning LNG exports.[40] House Majority Leader John Boehner (R-OH) has championed reform, noting that the Ambassadors of four Central and Eastern European States (Hungary, Poland, Slovakia and the Czech Republic) have asked him and Senate Majority Leader Harry Reid (D-NV) for the "presence of U.S. natural gas" in the region in order to counter Russia's influence.[41] Another leading contender for the 2016 Republican presidential nomination—Senator Marco Rubio (R-FL)—also has called for crude oil and LNG export reform,[42] as have several Democratic lawmakers.[43]

## IV. OBSTACLES TO REFORM REMAIN

Despite the heightened scrutiny of U.S. energy export regimes and the added sense of geopolitical urgency, near-term systemic reform remains unlikely. The Obama Administration has, to date, indicated that it does not intend to alter these longstanding policies because market and infrastructure limitations prevent reform from immediately affecting the Russian government's

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[37] Amy Harder, *House Republicans Add Pressure for Gas Exports*, NAT'L J., Feb. 4, 2014, *available at* http://www.nationaljournal.com/energy/house-republicans-add-pressure-for-gas-exports-20140204

[38] Nick Juliano & Elana Schor, *GOP's 2016 right flank goes all in for crude exports*, Env. & Energy Daily, Feb. 11, 2014, *available at* http://www.eenews.net/stories/1059994364

[39] Editorial, *Natural Gas as a Diplomatic Tool*, N.Y. TIMES, Mar. 7, 2014, *available at* http://www.nytimes.com/2014/03/07/opinion/natural-gas-as-a-diplomatic-tool.html?ref=editorials&_r=0&gwh=D21A421848010697A617AED0880CD127&gwt=regi; Editorial, *America's Oil and Gas Leverage*, WALL ST. J., Mar. 6, 2014, *available at* http://online.wsj.com/news/articles/SB10001424052702303630904579417542357989608; Editorial, *Europe needs an alternative to Russian natural gas*, WASH. POST, Mar. 6, 2014, *available at* http://www.washingtonpost.com/opinions/europe-needs-an-alternative-to-russian-natural-gas/2014/03/05/31f30ac2-a321-11e3-a5fa-55f0c77bf39c_story.html

[40] Brian Wingfield, *Years Needed Before U.S. Gas Exports Could Counter Russian Energy Leverage*, BNA INTL. TRADE REP., Mar. 7, 2014, *available at* http://news.bna.com/tdln/TDLNWB/split_display.adp?fedfid=42726358&vname=itdbulallissues&wsn=498999500&searchid=22287343&doctypeid=1&type=date&mode=doc&split=0&scm=TDLNWB&pg=0

[41] The Office of Speaker of the House John Boehner, Press Release, *In Response to Russian Aggression, Key Central European Nations Plead for U.S. Natural Gas Exports*, Mar. 8, 2014, *available at* http://www.speaker.gov/press-release/response-russian-aggression-key-central-european-nations-plead-us-natural-gas-exports#

[42] Laura Barron-Lopez, *Rubio calls for end to crude oil export ban*, THE HILL, Mar. 10, 2014, *available at* http://thehill.com/blogs/e2-wire/e2-wire/200342-rubio-calls-for-end-to-crude-oil-export-ban

[43] Zack Colman, *Ukraine crisis brings urgency to Senate Democrats' push on natural gas exports*, WASH. EXAMINER, Mar. 12, 2014, *available at* http://washingtonexaminer.com/support-for-natural-gas-exports-growing-among-senate-democrats/article/2545569



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behavior.[44] Analysts further speculate that the President's resistance to reform also stems from base political concerns: Democrats face a difficult 2014 mid-term election cycle, and reform could upset environmental and other groups that oppose any policies that might increase domestic fossil fuel production.[45] Indeed, prominent environmental groups have just begun a concerted effort to persuade President Obama to oppose LNG export reform, while also noting that their push is "not in response to what's happening in Crimea[.]"[46] Regardless of the accuracy or strategic value of the President's current position, his role in any reform process – as head of the executive branch and *de facto* leader of the Democratic Party – makes White House support critical to any such initiatives.

Moreover, significant political opposition to energy export liberalization remains. Aside from the aforementioned environmental groups, certain downstream industries have organized lobbying efforts to oppose export liberalization.[47] Moreover, many U.S. lawmakers remain steadfastly opposed to reform. For example, just a day after Senator John Barrasso (R-WY) introduced an amendment to a bill on aid to Ukraine that called for expediting LNG exports, the amendment was ruled procedurally "out of order" and Foreign Relations Committee Chairman Robert Menendez (D-NJ) concluded that "this may be a debate for another time."[48] Other lawmakers, such as Senator Ed Markey (D-MA) also have criticized reformers' position as geopolitically impotent or harmful for U.S. energy consumers. As such, liberalization initiatives still face an uphill climb despite recent geopolitical developments.

## V. CONCLUSION

The situation in Ukraine has not altered the policy rationales for reforming U.S. oil and gas export restrictions, but it has provided significant new political momentum for liberalization. Political support for loosening exports is still too diffuse to overcome the Obama Administration's inertia, but if the situation in Ukraine intensifies or spreads to other parts of Eastern Europe,[49] the current political opposition or indifference to reform efforts may disintegrate. The White House could then view the political cost of inaction as higher than that of any possible retribution from domestic political supporters or consuming industry groups in 2014. At that point, congressional Democrats and the

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[44] Brian Wingfield, *Years Needed Before U.S. Gas Exports Could Counter Russian Energy Leverage*, BNA INTL. TRADE REP., Mar. 7, 2014, *available at* http://news.bna.com/tdln/TDLNWB/split_display.adp?fedfid=42726358&vname=itdbulallissues&wsn=498999500&searchid=22287343&doctypeid=1&type=date&mode=doc&split=0&scm=TDLNWB&pg=0

[45] *See* Barney Jopson, Obama urged to 'send a message' to Putin with US energy exports, FIN. TIMES, Mar. 9, 2014, *available at* http://www.ft.com/intl/cms/s/0/927a5390-a741-11e3-a9fe-00144feab7de.html#axzz2wPVMtfSn

[46] Amy Harder, *Are Natural-Gas Exports the Next Keystone?* Washington Wire (blog), WALL ST. J., http://blogs.wsj.com/washwire/2014/03/18/are-natural-gas-exports-next-keystone/

[47] *See* http://www.americasenergyadvantage.org/blog/entry/aea-letter-to-us-senate-committee-on-foreign-relations-on-ukraine; *and* Lachlan Markay, "Refinery Fight," Washington Free Beacon, March 12. 2014, *available at* http://freebeacon.com/refinery-fight/

[48] Ari Natter, *Senate Panel Blocks Amendment to Expand LNG Export Approval in Ukraine Aid Plan*, BNA INTL. TRADE REP., Mar. 13, 2014, *available at* http://news.bna.com/tdln/TDLNWB/split_display.adp?fedfid=42855096&vname=itdbulallissues&fn=42855096&jd=42855096

[49] Associated Press, *Market Drops on Fears Over China and Ukraine*, N.Y. TIMES, Mar. 13, 2014, *available at* http://www.nytimes.com/2014/03/14/business/daily-stock-market-activity.html



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President could be forced to accept and embrace energy export reform, regardless of their political, environmental and geopolitical views. Ukraine thus warrants continued monitoring, as it, not actual policy concerns, could dictate the pace of any reforms to U.S. natural gas or crude oil export systems.

# Chinese Participation in the Trade in Services Agreement

On March 11, 2014, the US-China Economic Security Review Commission (USCC) issued a report on the risks and benefits of China's participation in the negotiations for the Trade in Services Agreement (TISA). The overall conclusions of the report tend to emphasize the risks, rather than the potential benefits, of Chinese membership in TISA.

China applied to join the TISA negotiations in October 2013, having previously opposed them as being a threat to multilateralism and the Doha Round. The United States has been considering its response to China's application; all other TISA participants except Canada are believed to favor Chinese participation in TISA.

The USCC is a body created by Congress to report on the national security implications of the bilateral trade and economic relationship between the United States and China. Although a member of the USCC's staff authored the report, it does not necessarily represent the views of the USCC itself. It betrays some misunderstanding of the status of the TISA negotiations, as in the title: "Should China join the WTO Services Agreement?" China is already, of course, a member of the WTO General Agreement on Trade in Services (GATS), and TISA is not an attempt to update the GATS or a potential "early harvest" product of the Doha Round, like the Trade Facilitation Agreement (TFA), which the report implies. However, the report is likely to be influential, especially with those in Congress and elsewhere who are skeptical about the desirability of Chinese participation. This report will not facilitate the task of those in Washington who are arguing the case for China's inclusion.

## I. BENEFITS OF CHINESE PARTICIPATION

The obvious benefit of China's membership of TISA, from the viewpoint of its partners, would be improved access to China's services market, which though already vast, is relatively underdeveloped, accounting for only about one-third of employment and 40 percent of GDP – far below comparable figures in the advanced economies. Moreover, many service sectors in China are inefficient by world standards – over-regulated, with limited access for foreign suppliers and heavy participation by state-owned enterprises. This imposes heavy costs on the rest of the economy. Therefore, the scope for liberalization and increased imports is very large, and the Chinese Government has shown, for example in the establishment of the Shanghai Free Trade Zone (SFTZ) and in the ongoing talks for a US-China Bilateral Investment Treaty (BIT), that it recognizes the need for reform of services markets and for foreign investment in services. China's application to join TISA could be seen as part of the same market reform effort. The TISA partners of the United States are very aware of the potential benefits of improved access to the Chinese market. Consequently, they are showing frustration with the United States' hesitation.



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## II. FOUR POTENTIAL RISKS OF CHINA'S PARTICIPATION

The report identifies four potential downsides of China's participation, which combine to create fear that including China would water down the level of ambition in TISA and increase the difficulty of achieving and implementing an eventual agreement.

1. Past Negotiating Behavior. Concerning the breakdown of negotiations for extension of the coverage of the Information Technology Agreement (ITA) in July 2013 and again in December, USTR Froman has cited China's insistence on wide exclusions from coverage as a discouraging precedent for ambitious negotiations with China on services. Slow progress on liberalization of services in the SFTZ is also discouraging.

2. Potential Resistance by Chinese Service Suppliers. It is suggested that Chinese services companies in sectors formerly dominated by state monopolies, such as financial services, telecommunications, oil and gas, and aerospace, would resist liberalization because they know they are internationally uncompetitive, and that State agencies responsible for these sectors would back them. State ownership of many services at the local level is another potential barrier to liberalization. On the other hand, internationally competitive sectors, such as civil engineering and shipping, might favor liberalization.

3. Sensitive Regulatory Issues. Some of the most important US objectives in TISA are new disciplines on regulatory issues such as government procurement of services, state-owned enterprises (SOEs), and the free flow of data across borders. The report suggests that all of these are likely to raise particular difficulties with China.

4. Doubts about China's Commitment to TISA. The report suggests that China's application may be a bid by the Government to demonstrate responsibility in trade diplomacy and establish a precedent for participation in other agreements, such as the Trans-Pacific Partnership (TPP). On the other hand, it is suggested that the application may not be made in good faith – China might wish to join the negotiations in order to water down TISA or even block it. More seriously, it suggests that even after negotiating the deal in good faith, China may fail to comply with its obligations under TISA; In this regard, the report has cited China's failure to respect certain WTO commitments since its accession.

## III. CONCLUSIONS

The USCC report draws no clear conclusions, but the balance of the arguments put forward is on the side of caution. Fears that China's involvement would delay or even block the negotiations, and would in any case cause the eventual TISA to fall below the hoped-for level of ambition, outweigh the potential benefits of improved access to the Chinese market. In particular, this may be because the United States hopes to achieve the most important of these benefits through the BIT with China that is under discussion.

All of these arguments are clear to partners of the United States in TISA. Nevertheless, all of them, except Canada, are believed to favor China's inclusion.



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Meanwhile China has been waiting for six months for the US response to its application, even though the proponents of TISA have always maintained that participation is open to any country willing to accept the target levels of ambition. It is likely that China decided to join the negotiations in part because it realized that important regulatory issues would be negotiated, and it did not want to be faced, should it later consider joining TISA, with a set of disciplines it had no part in drafting.

Another factor, not mentioned in this report, is that it is thought, for example in the WTO Secretariat, that China's participation in the negotiations may incite applications to join in from other developing countries, such as Egypt, South Africa or even Brazil. This would be consistent with the TISA proponents' stated aim of openness, but the United States and some TISA Parties, may well think it desirable to establish the level of ambition in TISA more firmly, in terms of market access commitments and regulatory disciplines, before opening the negotiations too widely. They do not wish to re-create the impasse of the services negotiations in the Doha Round.

# WTO Consultations on the Future of the Doha Round

The first formal meeting of the World Trade Organization's (WTO) General Council following the successful Ministerial Conference at Bali in December indicates that agreement by the end of this year on a comprehensive work program to restart the Doha Round will be difficult to achieve. The divergences between Members that have stalled the Round for several years are still apparent.

## I. BACKGROUND

The General Council met on March 11, 2014 to consider reports by the Chairs of Doha Round negotiating groups on possible next steps on the future of the Round after Bali. Ministers agreed at Bali that by the end of 2014 the WTO should draw up a "clearly defined work program" for conclusion of the Doha Round; the Chairs' consultations with Member governments, undertaken at the request of WTO Director-General Roberto Azevêdo, are the first step in that process. They represent a first assessment of the views of Member governments on the feasibility of reviving the Doha Round and how this might be done.

## II. CHAIR REPORTS AND DG ASSESSMENT

Reports were made by the Chairs of the negotiating groups on Agriculture, Non-agricultural market access (NAMA), Services, Rules, Environment, Development, and Intellectual Property. As Chairman of the Trade Negotiations Committee (TNC), DG Azevêdo made an opening statement summarizing progress in each area.

Although DG Azevêdo described the consultations as an "excellent start" in which "there is much which we can build on constructively," the Chair reports generally do not contain new ideas or proposals from Members as to how to move the work forward. At this early stage, just after Bali, this reality should not come as a surprise; delegations have not yet had sufficient time to develop new thinking on the Doha Round. The basic divergences that have blocked the Doha negotiations for the last five years therefore persist, and there is no consensus on whether the Round should or can be re-launched based on the original mandate. The relevance of the original mandate will be the fundamental issue for debate in the coming months.



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A common theme in the reports is the central role of agriculture, NAMA, and services as the three "pillars" of the Round, progress in which will dictate the appropriate level of ambition in other areas. However, there is disagreement on basic approaches. In NAMA, some Members want to resume work based on the draft "modalities" last revised in 2011, while others favor a request-offer approach or negotiations on a sectoral basis. In Agriculture, there is similar disagreement about the value of the draft modalities as the basis for further work. Export competition (subsidies) is a high priority for many Members. The reports stress the need for "balance" between and within these three negotiating areas; for example, the report on Services records the view that there must be balance across agriculture, NAMA, and services. Nevertheless, there is a major problem here; it is widely recognized that as long as the negotiations for a Trade in Services Agreement (TiSA) outside the WTO are progressing, serious parallel negotiations on services in the Doha Round will not occur. The statement issued by the US Chamber of Commerce on 6 March on its priorities in the WTO said bluntly that countries interested in services liberalization would not be looking for it in the Doha Round. Thus, one of the three pillars of the Doha Round could be undermined.

The need for realism and a focus on what is "doable" is another common theme of the reports. It is normally stressed by developed countries who believe that it is unrealistic to expect that the Doha agenda can be delivered in full, and that negotiation on discrete issues that are ripe for agreement (on the model of the Trade Facilitation Agreement agreed at Bali) would be more rewarding This implies further departure from the single undertaking principle. In a speech to African delegations on March 18, 2014, DG Azevêdo cautioned against "getting bogged down" in debate about the status of the draft modalities dating from 2008 and 2011. He said that without adjustments they could not work as the main basis for renewed talks on Agriculture and NAMA.

Some reports indicate skepticism as to whether particular negotiations can or should continue. The report on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is frankly doubtful as to whether there is any appetite among Members for further negotiations on the subject. The consultations on Rules (trade remedies) were based on the Chairman's question "how *if at all* the delegations see Rules issues fitting into the overall post-Bali context." The Rules report makes clear that for most delegations it is an open question whether Rules should form part of the new work program; others thought the chances of any progress were limited, while a few considered Rules to be a core subject on which outcomes on at least certain issues were essential.

## III. CONCLUSIONS

The discussion in the General Council after the submission of these reports was largely a repetition of familiar arguments. There were two main currents of opinion about the future of the Doha Round. Many developing countries, led by India with strong support from African countries, insisted on retention of the entire Doha agenda, on the "single undertaking" principle, and on the centrality of development objectives. On the other side were Members, mainly developed countries, who argued for "realism," for updating the agenda by addressing such "21st century" issues as investment and the digital economy, and for negotiating "early harvest" agreements like the Trade Facilitation Agreement on issues that become ripe for such an approach.

These two opposed positions will dominate the debate on the future of the Round throughout the year. It is likely to become clear that consultation at the level of negotiating groups will not resolve



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this fundamental divide, and later in the year DG Azevêdo, as Chairman of the TNC, may be obliged to unify the process of drafting the Doha work program under his own aegis, as he did before Bali. DG Azevêdo has scheduled a meeting of the TNC on April 7, 2014.

Finally, there is a larger question underlying the whole debate at this stage: whether WTO Members seriously want to pursue the Doha Round at all. For several years, the prevailing view among Members and observers has been that the Round cannot be restored to life, and negotiating energies have been devoted to regional or preferential initiatives such as the Trans-Pacific Partnership (TPP), TiSA, and bilateral free trade agreements. There are certainly countries that would be prepared to forget the Doha Round in its present form and move on to a new agenda. That sentiment, however, is not shared by other Members who still value Doha for its promise of development benefits or who fear the introduction of new issues into WTO negotiations. The strong support and regard for the DG Azevêdo following his triumph at Bali may be the best hope of squaring this circle.

## *US General Trade Policy Highlights*

## USTR Announces Suspension of Trade and Investment Talks with Russia, Threatens Further Action

On March 3, 2014, United States Trade Representative (USTR) Michael Froman announced the suspension of upcoming bilateral trade and investment talks with the Russian government. The announcement took place the same day President Obama warned that the United States is considering a "whole series" of economic and diplomatic punitive measures to penalize Russia in response to Russia's military intervention in Ukraine's Crimea region. These announcements put a halt to recent progress made in US-Russia trade relations.

In 2012, shortly after Russia's accession to the World Trade Organization (WTO), the United States granted Permanent Normal Trade Relations (PNTR) status to Russia. As a result, US companies are entitled to full rights and market access in the Russian market, in accordance with Russia's WTO accession commitments. Trade between the two countries has grown slowly, however, and remains relatively insignificant. Trade exchanged between the two countries was no more than $40 billion in 2013.[50] In contrast, trade between United States and Canada, the United States' largest trading partner, was worth $632.4 billion in 2013, while Russia's trade relationship with Europe is worth approximately $460 billion per year.

The United States and Russia recently began to take more steps towards expanding their economic relationship. Russia's Economy Minister, Alexei Ulyukayev, visited Washington, DC, on February 24-26, 2014, to engage in talks over bilateral trade and investment. Russia's overall goals in the talks were reportedly less ambitious than its concurrent exchanges with China, the European Union,

[50] According to the US Census Bureau, the United States imported Russian goods, mostly fuel oil, worth $27 billion, and exported just $11.2 billion, led by aircraft, cars and parts.



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and Asia-Pacific countries. Nonetheless, the US and Russian delegations agreed to a draft plan for developing trade and investment cooperation, and began drafting an agreement on investment protection.

Due to recent events in Ukraine, the United States has suspended these discussions, with no clarity when they will resume. In addition to suspending bilateral trade talks, the United States withdrew an invitation for Russian veterinary officials to attend multilateral talks at the WTO, concerning sanitary and phytosanitary (SPS) measures in connection with Kazakhstan's WTO accession negotiations, scheduled from March 3-6, 2014. Moreover, the United States also announced on March 3, 2014 that it has cut military ties to Russia, including exercises, port visits and planning meetings.

US officials stated that these actions are part of a broader set of sanctions President Obama is considering in order to "isolate" Russia and generate "a negative impact on Russia's economy and its status in the world." The Obama Administration is also threatening to ban visas, freeze assets of select Russian officials in the chain of command, and target state-run financial institutions. US Secretary of State John Kerry has also stated that US allies are willing to respond with similar measures and that, along with other G-8 countries, the United States was willing to boycott the next G-8 summit, scheduled to take place this June in Sochi, Russia.[51]

## Implementation of WTO Trade Facilitation Agreement Faces Challenges, Linked to Agreement over WTO's Future Work Programme

On February 6, 2014, in a statement to the Trade Negotiations Committee (TNC) of the World Trade Organization (WTO), WTO Director General Roberto Azevedo commended Members for their achievements at the 9th WTO Ministerial Conference in Bali and emphasized the need for Members to implement successfully the adopted texts. DG Azevedo also urged Members to maintain the momentum achieved at Bali and, in particular, to develop by the end of 2014 a work programme to address the remaining Doha issues, as instructed by Ministers.

The so-called "Bali package," adopted by WTO Members at the 9th Ministerial Conference, includes (i) a Ministerial Decision and related Agreement on Trade Facilitation (TFA), (ii) a set of Ministerial Decisions on agriculture, (iii) a Ministerial Decision on cotton, and (iv) a set of Ministerial Decisions on development and least-developed country (LDC) issues. It also includes a set of Ministerial Decisions pertaining to the regular work under the General Council. Although these decisions address only a small number of items on the Doha Development Agenda, they represent a major achievement for the WTO and a personal triumph for DG Azevedo, considering the previous long-standing impasse.

Whereas most of the Bali Decisions are not subject to implementation deadlines or special procedures to bring them into force, the TFA has an agreed procedure and timetable for

[51] The G-8 countries include Canada, France, Germany, Italy, Japan, the United Kingdom., the United States, and Russia.



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implementation. The Ministerial Declaration containing the TFA created a Preparatory Committee on Trade Facilitation with three functions: (i) to conduct a legal scrub of the Agreement; (ii) to receive notifications from developing countries of those TFA commitments that they will implement as from the date of entry into force of the Agreement (Category A commitments); and (iii) to draft the Protocol which will add the TFA to the multilateral agreements on trade in goods in Annex 1A to the WTO Agreement.

The Protocol is to be adopted by July 31, 2014 and will remain open for acceptance by Members until July 31, 2015. The United States, the EU, and other developed countries have strongly emphasized that the implementation of the TFA is currently their first priority in the WTO. The Agreement will enter into force, for those Members which have accepted it, only after it is accepted by two-thirds of the Membership. Multilateral agreements under Annex 1A of the WTO Agreement normally require that the benefits are extended to all WTO Members (most-favored nation or "MFN" treatment), whether or not they are signatories, and this is the current expectation for the TFA. Although there has been some discussion of the possibility of denial of benefits to non-signatories, it will probably have to be accepted that some Members may never accept the Agreement: unless such "free riders" included very significant trading countries, this should not prevent the TFA's entry into force.

In addition, WTO Members agreed at Bali that by December 2014 the TNC shall prepare a "clearly defined work program" on the remaining issues in the Doha Agenda, addressing "all other issues under the Doha Mandate that are central to concluding the Round". It is already clear that the critical issue in this debate will be whether the Doha Round can or should be resumed based on the current agenda and the single undertaking approach, essentially at the point where negotiations stalled in 2008. Certain developed countries are calling for the inclusion of new "21st century" issues, to update the WTO agenda. Canada, for example, has suggested that investment, competition policy, the digital economy, the environment and energy should be part of the negotiations. Several Members have also suggested departing from the single undertaking approach and allowing negotiations on specific issues to proceed independently of one another, as was the case with the "early harvest" of the Decisions at Bali. The Ministerial Conference at Hong Kong legitimized this approach in 2011. Many developing countries, however, including India, resist further pursuit of this approach, arguing that the single undertaking model must be maintained and new issues should not be added, as this would divert attention away from Doha's development objectives.

It is, therefore, clear that the negotiations over the future work programme of the WTO will pose many challenges, and a delicate balance will have to be struck between the ambitions of developed countries and the interests of the majority of developing countries. Although DG Azevedo has suggested that the future viability of the early harvest model should be carefully evaluated, he has also stressed the importance of what is "doable" or realistic, while maintaining the centrality of the development agenda. He has said that any future multilateral agreement would be likely to require outcomes in agriculture, and that this would no doubt entail negotiations on industrial goods and services as well. He has directed the Chairs of the Doha Round negotiating groups to undertake consultations with Members to identify issues that could move forward, and to report on their findings to the General Council in March. At that point, it will become clearer whether Members remain committed to reinvigorating the WTO's negotiating function, or if their attention will again turn away from the WTO, as in the years before Bali.



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# 42 House Democrats Support New TAA Renewal Bill

On March 6, 2014, 42 House Democrats offered support for the introduction of a standalone bill to extend all Trade Adjustment Assistance (TAA) programs that were in effect as of December 31, 2013 through the end of 2020, and to restore certain benefits that Congress previously enacted in 2009. The "TAA Act of 2014"[52] includes support from such key lawmakers on trade issues as House Ways And Means Committee Ranking Member Sander Levin (D-MI), Trade Subcommittee Ranking Member Charles Rangel (D-NY), and Friends of the Trans-Pacific Partnership (TPP) Caucus Co-Chair Gregory Meeks (D-NY).

TAA is a federal program established under the Trade Act of 1974 that provides aid to US workers displaced by increased imports from, or shifts in production to, foreign countries. TAA programs include, *inter alia*, training assistance, income support while in training, and job search and relocation assistance. If Congress does not renew TAA, the program will expire in its entirety on December 31, 2014. In addition to TAA's renewal, the following provisions in the bill are of note[53]:

- **Eligibility for workers in relation to non-FTA partner countries**. Currently, only adverse impacts linked to US FTA-partners or preference program beneficiaries qualify for TAA purposes. The bill would expand eligibility for workers whose job losses are due to increased imports from, or shifts in production to, any trading partner;

- **Broad sectoral coverage of workers.** The Act would cover workers and firms in the services and manufacturing sectors, as well as suppliers of component parts, public sector workers, farmers, and fishermen; and

- **Increased TAA financial support to 2009 levels**. The bill restores funding for TAA programs to 2009 levels. Congress had expanded TAA in the American Recovery and Reinvestment Act (ARRA) of 2009 from an earlier version in the Trade Act of 2002, in response to the deep US economic recession following the 2008-09 global financial crises.

The impact of the bill on congressional dynamics regarding Trade Promotion Authority (TPA) is not immediately clear. On one hand, Congress traditionally combines TAA with TPA so that lawmakers supported by labor unions feel politically covered to support TPA, since TAA addresses the potential short-term adjustment cost of trade liberalization, *e.g.* loss of US jobs. However, some lawmakers have also taken the position that a TPA that includes, or is proposed alongside with, TAA renewal is counter-productive to the goals of free trade.

On March 6, 2014, AFL-CIO President Richard Trumka urged support for the TAA bill, dismissing the need to link it with the "undemocratic Baucus-Camp Fast Track legislation." Notwithstanding the current political circumstances, a Congressional Research Service (CRS) timeline demonstrates that,

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[52] See http://beta.congress.gov/bill/113th-congress/house-bill/4163/text

[53] See http://adamsmith.house.gov/uploadedfiles/one_pager.pdf



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on a few occasions, Congress has reauthorized expiring TAA programs independent of TPA legislation, where there has been either a long period where TPA is active and does not require reauthorization (1979-1988), or no renewal of TPA for an extended period of time (1993-2002).

## President Obama Signs Executive Order Authorizing Ukraine-Related Sanctions; Individuals and Entities Yet to be Designated

On March 6, 2014, President Obama signed an Executive Order (EO)[54] authorizing the United States to impose sanctions on certain persons and entities if they are found to have contributed to the situation in Ukraine. According to President Obama, the EO, issued in direct response to ongoing unrest in the Crimean region of Ukraine, aims to "impose a cost on Russia and those responsible for the situation in Crimea."

The EO represents the first step in a "whole series" of economic and diplomatic punitive measures that the Obama Administration is currently considering. The sanctions authorized by the EO include asset freezes as well as a prohibition on US persons from doing business with entities or individuals designated under the EO. Specifically, the EO authorizes blocking the property and interests in property of any person found to be responsible for, complicit in, or to have engaged in, directly or indirectly:

- Actions or policies that undermine Ukrainian democratic processes or institutions;
- Actions or policies that threaten Ukraine's peace, security, stability, sovereignty, or territorial integrity; or
- Misappropriation of Ukraine's state assets or of an economically significant Ukrainian entity.

The EO also authorizes sanctions against the leaders of any entities that the United States has found to be engaged in any of these activities, as well as any person found to be materially assisting or providing financial, material or technological support for, or goods or services to or in support of, these activities or any blocked person under the EO. The EO further authorizes the imposition of sanctions on persons found to have asserted governmental authority over any part of Ukraine without the authorization of the Government of Ukraine.

The EO also expands a pre-existing visa ban that the State Department had imposed on individuals complicit in human rights abuses and political oppression in Ukraine in recent months. Under the new ban, the State Department will now deny visas to those responsible for or complicit in threatening the sovereignty and territorial integrity of Ukraine. The State Department also may revoke visas that it has issued.

[54] See http://news.whitecase.com/35/3481/downloads/ukraine-eo-(march-6--2014).pdf



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While the EO puts the legal framework for sanctions in place, the United States has not yet designated specific individuals and entities subject to the EO. Congress is also separately considering legislative action that could involve additional sanctions. Presently, the Treasury Department's Office of Foreign Assets Control (OFAC) administers 24 different sanctions programs, including the new Ukraine-related sanctions.[55]

The issuance of the EO occurs on the same day that the European Union announced that it has imposed sanctions[56] against 18 Ukrainian individuals deemed responsible for the misappropriation of Ukrainian state funds and human rights violations.

## US Issues Second Executive Order, Designates Ukrainian and Russian Officials

On March 17, 2014, President Obama signed a new Executive Order ("March 17 EO"), expanding on the Executive Order issued on March 6, 2014 ("March 6 EO") relating to the unrest in Ukraine. The March 17 EO authorizes the United States to impose sanctions on senior officials of the Government of the Russian Federation, as well as on individuals or entities operating in the arms or related materiel sector in the Russian Federation. The March 17 EO also provides the authority for designation of any individual or entity that is owned or controlled by, or provides material or other specified support to any senior official of the Government of the Russian Federation or any person designated pursuant to this order. The March 17 EO was issued in direct response to the referendum held on Sunday, March 16 in Crimea regarding secession from Ukraine.

The March 17 EO authorizes blocking the property and interests in property located in the United States or in the possession or control of a US Person of any person (including individuals and entities) found to be:

- An official of the Government of the Russian Federation, defined to include the Government of the Russian Federation, any political subdivision, agency, or instrumentality thereof, including the Central Bank of the Government of the Russian Federation, and any person owned or controlled by, or acting for or on behalf of, the Government of the Russian Federation
- Operating in the arms or related materiel sector in the Russian Federation
- Owned or controlled by or acting on behalf of a person or entity acting on behalf of:
    - A senior official of the Government of the Russian Federation
    - A person blocked under this EO

[55] See http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx

[56] See http://www.whitecase.com/files/Publication/18371619-8af4-48d3-ae04-4a9dceb5cd31/Presentation/PublicationAttachment/57f2a396-d994-4d17-813d-fcf5092eb8cc/client-alert-eu-sanctions-on-ukraine-6-march-2014.pdf



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- A person or entity that has materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to:
    - A senior official of the Government of Russia
    - A person blocked under this EO

The March 17 EO also prohibits transactions that evade or avoid, have the purpose of evading or avoiding, cause a violation of, or attempt to violate any of the prohibitions set forth in the March 17 EO, including any conspiracy to violate any of the prohibitions.

Note that the March 17 EO has been issued in addition to the March 6 EO, which continues to provide for blocking of individuals and entities engaged in activities that are considered to undermine the democratic processes and territorial integrity of Ukraine. The March 6 EO[57] provided the foundation for designations of individuals and entities relating to the unrest in Ukraine, but was not accompanied by corresponding designations at that time

The sanctions authorized by the Executive Orders include asset freezes as well as a prohibition on US persons from doing business with entities or individuals designated under the EO or that are owned or controlled by a designated entity or individual.

The March 17 EO is accompanied by a first wave of designations made under both the March 6 and March 17 Executive Orders. Eleven individuals from both Russia and Ukraine have been designated. OFAC has provided the following listing:

- AKSYONOV, Sergey Valeryevich (a.k.a. AKSENOV, Sergei; a.k.a. AKSYONOV, Sergei; a.k.a. AKSYONOV, Sergey; a.k.a. AKSYONOV, Sergiy; a.k.a. AKSYONOV, Serhiy Valeryevich); DOB 26 Nov 1972; POB Balti, Moldova (individual) [UKRAINE].
- GLAZYEV, Sergey (a.k.a. GLAZYEV, Sergei); DOB 01 Jan 1961; POB Zaporozhye, Ukraine; Presidential Advisor (individual) [UKRAINE2].
- KLISHAS, Andrei (a.k.a. KLISHAS, Andrey); DOB 09 Nov 1972; POB Yekaterinburg, Sverdlovsk, Russia; Chairman of the Russian Federation Council Committee on Constitutional Law, Judicial and Legal Affairs and the Development of Civil Society (individual) [UKRAINE2].
- KONSTANTINOV, Vladimir Andreyevich, Crimea, Ukraine; DOB 19 Nov 1956 (individual) [UKRAINE].
- MATVIYENKO, Valentina Ivanovna; DOB 07 Apr 1949; POB Shepetovka, Khmelnitsky, Ukraine; Federation Council Speaker; Chairman of the Russian Federation Council (individual)

[57] See http://www.whitecase.com/files/Publication/13c45693-45c0-458a-abea-427f172536ef/Presentation/PublicationAttachment/85d1b247-7e61-4092-a31d-7ffcc3a5f81c/alert-US-Issues-New-Executive-Order-Ukraine.pdf



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[UKRAINE2].

- MEDVEDCHUK, Viktor; DOB 07 Aug 1954; POB Pochyot, Krasnoyarsk Krai, Russia (individual) [UKRAINE].

- MIZULINA, Yelena (a.k.a. MIZULINA, Elena; a.k.a. MIZULINA, Elena Borisovna; a.k.a. MIZULINA, Yelena Borisovna); DOB 09 Dec 1954; POB Bui, Kostroma, Russia; State Duma Deputy; Chairman of the State Duma Committee on Family, Women and Children (individual) [UKRAINE2].

- ROGOZIN, Dmitry Olegovich (a.k.a. ROGOZIN, Dmitriy; a.k.a. ROGOZIN, Dmitry); DOB 21 Dec 1963; POB Moscow, Russia; Deputy Prime Minister of the Russian Federation (individual) [UKRAINE2].

- SLUTSKY, Leonid (a.k.a. SLUTSKIY, Leonid; a.k.a. SLUTSKY, Leonid E.; a.k.a. SLUTSKY, Leonid Eduardovich); DOB 04 Jan 1968; State Duma Deputy; Chairman of the Committee on Affairs of the Commonwealth of Independent States (CIS); First Deputy Chairman of the Committee on International Affairs; Chairman of the Russian World Fund Administration (individual) [UKRAINE2].

- SURKOV, Vladislav Yurievich; DOB 21 Sep 1964; POB Solntsevo, Lipetsk, Russia; Presidential Aide (individual) [UKRAINE2].

- YANUKOVYCH, Viktor Fedorovych; DOB 09 Jul 1950; POB Yenakiyeve, Donetsk Region, Ukraine; alt. POB Makiivka, Donbas, Ukraine; Former President of Ukraine (individual) [UKRAINE].

In addition, the Executive Orders expand a pre-existing visa ban that had been imposed on individuals complicit in human rights abuses and political oppression in Ukraine in recent months. Under the expanded visa ban, the US State Department will now deny visas to those responsible for or complicit in threatening the sovereignty and territorial integrity of Ukraine. The US State Department also may revoke visas that already have been issued. The State Department is keeping lists of individuals subject to the visa ban confidential, and does not have any plans to make them publicly available at this time.

The EU today also announced sanctions[58] against 21 individuals involved in the Crimean region in Ukraine and Russia.

Under the US Executive Orders stemming from the Ukraine crisis, the United States has made clear that the measures taken could target not only those directly involved in the Ukraine situation, but also any person or entity providing support broadly to Russian government officials or the arms and

[58] See http://events.whitecase.com/pdfs/alert-EU-imposes-sanctions-on-21-politicians-and-military-officers-from-Russia-and-Crimea.pdf



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materiel sector of Russia.

According to the White House, the intent of these Executive Orders is "to hold accountable individuals who use their resources or influence to support or act on behalf of senior Russian government officials." The potential scope of future designations consequently is extremely broad. In commentary today, however, the White House indicated that the designated government officials are targeted in their individual capacities and that companies they manage on behalf of the Russian state are not currently targeted. Companies doing business in Russia and Ukraine should monitor closely any measures imposed pursuant to these Executive Orders and congressional action to ensure compliance. It is particularly important for financial institutions as well as other entities to understand their obligations under US law in the event that they might hold assets of designated persons, either directly or indirectly. Penalties for noncompliance are severe. We will continue to track and report on these sanctions developments.

## US Designates Additional Individuals and Russian Bank under Ukraine-Related Sanctions and Issues Third Executive Order Targeting Sectors of Russian Economy

On March 20, 2014, the United States issued a second wave of designations under Executive Order 13661 published on March 17, 2014 ("EO 13661"), which authorized sanctions on officials of the Government of the Russian Federation, persons operating in the arms or related materiel sector in the Russian Federation, and persons providing specified support to any senior official of the Government of the Russian Federation or any person designated pursuant to EO 13661.1

Today's designations include 20 individuals and one bank, Bank Rossiya. According to the United States, the 20 individuals are either Russian government officials or persons who are providing support to senior Russian government officials. Bank Rossiya is the first entity (as opposed to individual) designated under this set of sanctions.

The March 20 OFAC designations are:

- BUSHMIN, Evgeni Viktorovich (a.k.a. BUSHMIN, Evgeny; a.k.a. BUSHMIN, Yevgeny); DOB 10 Oct 1958; POB Lopatino, Sergachiisky Region, Russia; Deputy Speaker of the Federation Council of the Russian Federation; Chairman of the Council of the Federation Budget and Financial Markets Committee (individual) [UKRAINE2].

- DZHABAROV, Vladimir Michailovich; DOB 29 Sep 1952; First Deputy Chairman of the International Affairs Committee of the Federation Council of the Russian Federation (individual) [UKRAINE2].

- FURSENKO, Andrei Alexandrovich (a.k.a. FURSENKO, Andrei; a.k.a. FURSENKO, Andrey); DOB 17 Jul 1949; POB St. Petersburg, Russia; Aide to the President of the Russian Federation (individual) [UKRAINE2].

- GROMOV, Alexei; DOB 1960; POB Zagorsk (Sergiev, Posad), Moscow Region, Russia; First



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Deputy Chief of Staff of the Presidential Executive Office; First Deputy Head of Presidential Administration; First Deputy Presidential Chief of Staff (individual) [UKRAINE2].

- IVANOV, Sergei (a.k.a. IVANOV, Sergey); DOB 31 Jan 1953; POB St. Petersburg, Russia; Chief of Staff of the Presidential Executive Office (individual) [UKRAINE2].
- IVANOV, Victor Petrovich (a.k.a. IVANOV, Viktor); DOB 12 May 1950; alt. DOB 1952; POB Novgorod, Russia (individual) [UKRAINE2].
- KOZHIN, Vladimir Igorevich; DOB 28 Feb 1959; POB Troitsk, Chelyabinsk Oblast, Russia (individual) [UKRAINE2].
- KOVALCHUK, Yuri Valentinovich (a.k.a. KOVALCHUK, Yury Valentinovich); DOB 25 Jul 1951; POB Saint Petersburg, Russia (individual) [UKRAINE2].
- MIRONOV, Sergei Mikhailovich (a.k.a. MIRONOV, Sergei); DOB 14 Feb 1953; POB Pushkin, Saint Petersburg, Russia; Member of the Council of the State Duma; Leader of A Just Russia Party; Member of the State Duma Committee on Housing Policy and Housing and Communal Services (individual) [UKRAINE2].
- NARYSHKIN, Sergey Yevgenyevich (a.k.a. NARYSHKIN, Sergei); DOB 27 Oct 1954; POB Saint Petersburg, Russia (individual) [UKRAINE2].
- OZEROV, Viktor Alekseevich (a.k.a. OZEROV, Viktor Alexeyevich); DOB 05 Jan 1958; POB Abakan, Khakassia, Russia; Chairman of the Security and Defense Federation Council of the Russian Federation (individual) [UKRAINE2].
- PANTELEEV, Oleg Evgenevich (a.k.a. PANTELEEV, Oleg); DOB 21 Jul 1952; POB Zhitnikovskoe, Kurgan Region, Russia; First Deputy Chairman of the Committee on Parliamentary Issues (individual) [UKRAINE2].
- ROTENBERG, Arkady; DOB 15 Dec 1951; POB St. Petersburg, Russia (individual) [UKRAINE2].
- ROTENBERG, Boris; DOB 03 Jan 1957; POB St. Petersburg, Russia (individual) [UKRAINE2].
- RYZHKOV, Nikolai Ivanovich (a.k.a. RYZHKOV, Nikolai); DOB 28 Sep 1929; POB Duleevka, Donetsk Region, Ukraine; Senator in the Russian Upper House of Parliament; Member of the Committee for Federal Issues, Regional Politics and the North of the Federation Council of the Russian Federation (individual) [UKRAINE2].
- SERGUN, Igor Dmitrievich; DOB 28 Mar 1957; Lieutenant General; Chief of the Main Directorate of the General Staff (GRU); Deputy Chief of the General Staff (individual) [UKRAINE2].
- TIMCHENKO, Gennady (a.k.a. TIMCHENKO, Gennadiy Nikolayevich; a.k.a. TIMCHENKO, Gennady Nikolayevich; a.k.a. TIMTCHENKO, Guennadi), Geneva, Switzerland; DOB 09 Nov 1952; POB Leninakan, Armenia; alt. POB Gyumri, Armenia; nationality Finland; alt. nationality Russia; alt. nationality Armenia (individual) [UKRAINE2].



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- TOTOONOV, Aleksandr Borisovich (a.k.a. TOTOONOV, Alexander; a.k.a. TOTOONOV, Alexander B.); DOB 03 Mar 1957; POB Ordzhonikidze, North Ossetia, Russia; alt. POB Vladikavkaz, North Ossetia, Russia; Member of the Committee on Culture, Science, and Information, Federation Council of the Russian Federation (individual) [UKRAINE2].

- YAKUNIN, Vladimir; DOB 30 Jun 1948; POB Vladimir Oblast, Russia (individual) [UKRAINE2].

- ZHELEZNYAK, Sergei Vladimirovich (a.k.a. ZHELEZNYAK, Sergei; a.k.a. ZHELEZNYAK, Sergey); DOB 30 Jul 1970; POB Saint Petersburg, Russia; Deputy Speaker of the State Duma of the Russian Federation (individual) [UKRAINE2].

- BANK ROSSIYA (f.k.a. AKTSIONERNY BANK RUSSIAN FEDERATION), 2 Liter A Pl. Rastrelli, Saint Petersburg 191124, Russia; SWIFT/BIC ROSY RU 2P; Website www.abr.ru; Email Address bank@abr.ru [UKRAINE2].

This brings the total designations to date to 31 individuals and one entity. Eleven designations, comprising Ukrainian and Russian individuals, were made on March 17, 2014, under Executive Orders 13660 and 13661.2

Also on March 20, 2014, President Obama signed a third Executive Order ("March 20 EO"), expanding on EO 13660 and EO 13661. The March 20 EO authorizes the United States to impose sanctions on persons operating in particular economic sectors in Russia and those providing specified support or assistance to persons who may be designated under this order.

Specifically, the March 20 EO authorizes blocking the property and interests in property located in the United States or in the possession or control of a US Person of any person (including individuals and entities) found to be:

- operating in the financial services, energy, metals and mining, engineering, and defense and related materiel sectors of the economy of the Russian Federation

- a person or entity that has materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to a person blocked under this Executive Order

- owned or controlled by or acting on behalf of, directly or indirectly, a person or entity blocked under this Executive Order.

The March 20 EO, like the other Executive Orders, also prohibits transactions that evade or avoid, have the purpose of evading or avoiding, cause a violation of, or attempt to violate any of the prohibitions set forth in the Executive Order, including any conspiracy to violate any of the prohibitions. The sanctions authorized by this and the other Executive Orders include asset freezes as well as a prohibition on US persons from doing business with designated entities or individuals. The practice of the United States is to treat as designated not only the entities and individuals specifically named, but also entities that are owned 50% or more by a designated entity or individual.

While the Executive Orders together create broad sanctions authority across several Russian economic sectors, the United States has thus far only designated individuals related to the unrest in



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Crimea, Russian officials and persons considered to be members of Vladimir Putin's "inner circle," as well as individuals and an entity considered to support the designated parties. To date, the United States has not issued designations under the March 20 EO.

The White House previously has stated that designated government officials are targeted in their individual capacities and that companies they manage on behalf of the Russian state are not currently targeted. Entities that are owned 50% or more by any designated party, however, normally are treated as designated themselves. Accordingly, assets of such entities in the United States or within the possession or control of a US Person also are blocked. US Persons may not engage in transactions with such entities. Any entity controlled by a designated party or in which a designated party holds less than 50% ownership *may* be targeted in the future for designation, but is not automatically blocked. Companies doing business with any such entity are advised by the United States to exercise caution.

The EU, working in coordination with the United States, announced late Thursday that it will as a next step expand the list of designated individuals and entities by 12 names. In addition, further EU sanctions measures might follow depending on Russia-related developments in the coming days. We will provide a report once the additional designations, and any further sanctions measures, are formally published. To date, the EU has announced designations of 39 individuals related to the ongoing unrest in Crimea.

Finally, also on March 20, the Ministry of Foreign Affairs of the Russian Federation announced reciprocal visa bans for the following US officials:

- Caroline Atkinson (Deputy National Security Assistant to US President)
- Daniel Pfeiffer (Assistant to US President)
- Benjamin Rhodes (Assistant to US President)
- Harry Reid (US Congress Senate Majority Leader)
- John Boehner (Speaker of the House of Representatives of US Congress)
- Robert Menendez (Chairman of Senate Committee on Foreign Relations)
- Mary Landrieu (Senator)
- John McCain (Senator)
- Daniel Coats (Senator)

Companies should monitor closely any measures imposed pursuant to these Executive Orders and any congressional action to ensure compliance. It is particularly important for financial institutions as well as other entities to understand their obligations under US law in the event that they might hold assets of designated persons, either directly or indirectly. Penalties for noncompliance are severe. We will continue to track and report on these sanctions developments.



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# Lawmakers Propose Bills to Loosen Restrictions on LNG Exports in Response to Situation in Ukraine

The impact of the Ukraine crisis on the global gas market has triggered a number of legislative proposals in both the Senate and the House of Representatives to loosen restrictions on exports of liquefied natural gas (LNG). Lawmakers introduced three bills from March 5-6, 2014, reflecting the heightened nature of congressional debate on the issue of global energy security and the role of the United States in the global energy market.

On March 5, 2014, Sen. Mark Udall (D-CO), introduced a bill[59] in the Senate that would remove limitations placed upon US LNG exports to countries that are Members of the World Trade Organization (WTO), but with which the United States does not have a free trade agreement (FTA). Currently, in accordance with Section 3 of the Natural Gas Act (15 U.S.C. § 717b), exporters must secure approval from the Department of Energy (DOE) for all exports of LNG, including exports to countries that have an FTA with the United States. However, exports to non-FTA countries, such as Japan, India, and Ukraine, are subject to a discretionary "public interest" test, whereby DOE may refuse to grant permission if exports "will not be consistent with the public interest." Sen. Udall's bill would allow for an expedited approval process for LNG exports to FTA and non-FTA countries alike.

In a similar vein, Rep. Corey Gardner (R-CO) on March 6, 2014 introduced a bill[60] in the House of Representatives that would approve all currently pending LNG export applications, and exempt from DOE's review process LNG exports to non-FTA countries that are WTO Members. 24 applications are currently pending DOE review. House Energy and Commerce Committee Chairman Fred Upton (R-MI), a co-sponsor of Rep. Gardner's bill, indicated in a statement that expanding US LNG exports would mean that nations dependent on Russian natural gas, such as the EU (which receives about 30 percent of its natural gas from Russia), would have more options.[61] [1] Rep. Gardner has commented, "this is an incredible opportunity for the United States to highlight its position as an energy superpower."

Standing in opposition to the expansion of LNG exports, Foreign Relations Subcommittee Chairman Sen. Edward Markey (D-MA) on March 6, 2014 introduced a bill[62] in the Senate that would potentially slow down the approval process and rein in DOE Secretary Ernest Moniz, who has approved four non-FTA export applications in less than a year in the position. Although Sen. Markey's bill proposes reducing the discretion embodied in the "public interest" test currently used to assess applications involving non-FTA countries, it requires DOE to weigh the impact of proposed

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[59] See http://beta.congress.gov/bill/113th-congress/senate-bill/2083

[60] See http://beta.congress.gov/bill/113th-congress/house-bill/6

[61] Other cosponsors include Reps. Joe Barton (R-TX), Charles Boustany (R-LA), Michael Burgess (R-TX), Bill Cassidy (R-LA), Renee Ellmers (R-NC), Phil Gingrey (R-GA), Morgan Griffith (R-VA), Ralph Hall (R-TX), Bill Johnson (R-OH), Leonard Lance (R-NJ), Robert Latta (R-OH), Cathy McMorris Rodgers (R-WA), Pete Olson (R-TX), Joseph Pitts (R-PA), Tim Ryan (D-OH), Steve Scalise (R-LA), John Shimkus (R-IL), Michael Turner (R-OH), Ed Whitfield (R-KY) and Steve Womack (R-AR).

[62] See http://beta.congress.gov/bill/113th-congress/senate-bill/2088



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exports on, *inter alia*, US consumers, the US economy and manufacturing sectors, national security, and foreign policy. Sen. Markey has commented that the Ukraine crisis should not be used by the United States as an "excuse" to expand US LNG exports,[63] as this would reduce US jobs, raise costs for consumers, increase carbon emissions, and damage efforts to develop the renewable energy sector. He further added that the LNG exports already approved have nearly reached a level that DOE found could lead to a price increase of almost USD 2.50 per thousand cubic feet of gas for US consumers.

This latest escalation in the US LNG export debate stems from demands that the United States use LNG exports as a foreign policy tool to address the situation in Ukraine. For instance, on March 4, 2014 House Speaker John Boehner (R-OH), called upon the Obama Administration to expedite approvals of exports, arguing that the United States should not "force [its] allies to remain dependent on [Russia] for their energy needs." It remains unclear whether US efforts with respect to the Ukrainian situation will translate into any changes to US law on LNG exports. However, the recent escalation of the debate will likely appeal to non-FTA partners with persistent and growing energy needs.[64] Any prospective changes to US law will depend on how Congress and the Obama Administration weigh US energy policy in the broader matrix of domestic and global energy security, as well as US diplomatic and economic policy tools.

## APEC and EU Publish Industry Checklist to Streamline Cross-Border Data Protection Measures

APEC and EU data protection authorities have published an informal checklist for organizations seeking to design and adopt personal data protection policies consistent with requirements in both regions. APEC Senior Officials (SOM) endorsed the checklist[65] as referential 2014/SOM1/034 at their meeting from February 27-28, 2014, while the EU's Article 29 Working Party adopted the checklist in the form of Opinion 02/2014 at its plenary meeting from February 26-27, 2014.[1] Although the checklist does not aim to achieve mutual recognition, it is significant with respect to organizations engaged in cross-border data flows, and represents one of the first systematic attempts towards bridging inter-regional divergences at the legal and political levels.

The checklist identifies requirements, overlapping and diverging, in both the APEC Cross Border Privacy Rules (CBPR) system[66] and the Binding Corporate Rules (BCRs)[67] authorized by EU

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[63] See http://energy.gov/sites/prod/files/2014/03/f8/Summary%20of%20LNG%20Export%20Applications.pdf

[64] On March 7, 2014, Visegrád Group Ambassadors to the United States, comprising representatives of the Czech Republic, Hungary, Poland, and Slovakia, issued a letter to Rep. Boehner highlighting the importance of US LNG exports to Central and Eastern Europe. A copy of the letter is available at: http://www.speaker.gov/press-release/response-russian-aggression-key-central-european-nations-plead-us-natural-gas-exports

[65] See http://www.apec.org/~/media/Files/Groups/ECSG/20140307_Referential-BCR-CBPR-reqs.pdf

[66] See http://www.apec.org/Groups/Committee-on-Trade-and-Investment/~/media/Files/Groups/ECSG/CBPR/CBPR-PoliciesRulesGuidelines.ashx

[67] See http://ec.europa.eu/justice/data-protection/document/international-transfers/binding-corporate-rules/index_en.htm



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member state data protection authorities. It is clear from a review of the checklist that not only are there significant differences between the US and European regimes, certain requirements are not fully compatible. Consequently, companies should tailor their data protection policy to both regimes, regardless of the similarities that exist.

The CBPR and BCRs frameworks aim to create accountability with respect to organizations handling personal data, and to facilitate consumer confidence in electronic commerce. Specifically, CBPR is an APEC self-regulatory initiative that seeks to protect the privacy of consumer data moving between APEC economies through a voluntary but enforceable code of conduct implemented by participating businesses. By contrast, BCRs are legally binding internal corporate privacy rules approved by EU data protection authorities, allowing multinational companies to transfer personal data from the European Economic Area (EEA) to their affiliates located outside of the EEA. By consulting the checklist, which provides a side-by-side comparison of the two frameworks, APEC and EU officials argue that companies should find it easier to design and implement privacy policies that achieve concurrent compliance or "double certification" under both frameworks.

APEC meetings have made clear that data protection in a global environment depends on cross-border or cross-region co-operation. Nevertheless, APEC notes, "there is a fine line between protecting privacy and creating unnecessary barriers to the flow of information." Although governments have noted the need for effective enforcement and co-operation for many years, this new checklist demonstrates the concerted effort now taking place at the international level to reduce fragmentation across regimes. As demonstrated by the ongoing revelations relating to NSA surveillance activities and the subsequent global reaction, the relationship between privacy protection and cross-border data flows is complex, and has become inherently linked with other global issues such as trade, human rights, and national security.

## Revised WTO Government Procurement Agreement Enters Into Force on April 6, 2014

On March 11, 2014, Bruce Christie, the Chairman of the World Trade Organization (WTO) Committee on Government Procurement, confirmed that the revised WTO Agreement on Government Procurement (GPA) would enter into force on April 6, 2014. In order to enter into force, two-thirds of the GPA Parties had to accept formally the revised text;[68] this occurred on March 7, 2014 when Israel formally notified the WTO of its acceptance.

Ministers of GPA Parties concluded negotiations and agreed upon on a revised GPA text at the WTO's 8th Ministerial Conference on December 15, 2011 in Geneva. GPA Parties formally adopted a Protocol to amend the GPA on March 30, 2012, which replaced the original GPA with the revised text. However, in accordance with the original GPA text, the revised GPA would only enter into force 30 days after two-thirds of the Parties formally accepted the text. The 11 Parties that have, to date, accepted the Protocol to amend the Agreement are, in the order in which they have accepted it:

[68] See http://docsonline.wto.org/Dol2FE/Pages/FormerScriptedSearch/directdoc.aspx?DDFDocuments/t/PLURI/GPA/113.DOC



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Liechtenstein; Norway; Canada; Taiwan; the United States; Hong Kong, China; the European Union; Iceland; Singapore; and Israel.

The revised GPA does not alter the essential obligations placed upon GPA Parties, and the value thresholds at which procurement contracts are subject to GPA disciplines remain largely the same. However, the majority of the revisions to the GPA render the Agreement more user friendly, and provide greater flexibility for all Parties, particularly developing countries, both in negotiating entry to the GPA and in implementing it. For developing countries, Special and Differential (S&D) treatment provisions are more explicit and more flexible than in the original GPA. Various other provisions modernize the application of procurement disciplines, namely by facilitating the use of electronic tools (as opposed to paper) in the procurement and tendering process. Correspondingly, timeframes for turnover under the revised GPA are now shorter, largely to reflect efficiencies that are now possible using the Internet. The revised GPA also creates additional transparency obligations, as well as specific rules on the conditions that governments can set in order for entities to participate in procurement.

GPA Parties will now likely shift their attention to other WTO Members negotiating to join the revised GPA. According to the WTO, Members currently engaged in accession negotiations include China, Moldova, Montenegro, New Zealand, and Ukraine. In the case of China, the Office of the United States Trade Representative (USTR), along with other GPA Parties, has made clear that its offers are so far unacceptable.[69] The GPA Parties continue to press China to improve offers by including coverage of certain state-owned enterprises, lowering the thresholds above which the GPA's non-discrimination disciplines apply, removing several broad exclusions to coverage, and expanding coverage of sub-central entities. According to USTR's 2014 Trade Policy Agenda, the United States is prioritizing working with China to facilitate GPA accession in the near future.

## US Chamber of Commerce Emphasizes Importance of WTO to US Business Community, Continues to Express Skepticism Regarding Doha Round

On March 6, 2014, the US Chamber of Commerce published a position paper[70] outlining its priorities with respect to major issues currently under consideration at the World Trade Organization (WTO). The paper addresses substantive issues of importance, for example the Trade Facilitation Agreement (TFA), the proposed Trade in Services Agreement (TiSA), and Trade in Environmental Goods, but it is most notable for its skepticism about the feasibility and value of completing the Doha Round. The paper also emphasizes efforts of the United States in plurilateral trade negotiations like TiSA over those at the multilateral level. The Chamber is the world's largest national business organization representing more than 3 million US businesses, and the US Government listens to it attentively.

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[69] China submitted its latest offer on December 31, 2013.

[70] See https://www.uschamber.com/sites/default/files/documents/files/021340_INTL_WTOPriorities_final.pdf



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The following components of the Chamber's narrative are of note:

- **WTO TFA.** The Chamber "warmly welcomed" the TFA, noting that it is an opportunity for participating WTO Members to demonstrate their commitment to a "cost-cutting, competition-enhancing, anti-corruption agreement," and attract more trade and investment. However, the Chamber cautions that "the true value of a trade agreement lies in its effective implementation." The Chamber is undertaking outreach efforts to encourage developing countries to adopt the TFA and submit strong "Category A" commitments.

- **WTO Information Technology Agreement (ITA).** The Chamber criticizes China for triggering the suspension of ITA negotiations in July and November 2013. Stressing the commercial benefits of an expanded ITA, the Chamber emphasizes that it will continue to urge China to adopt a "more pragmatic stance," likely by reducing the product lines it seeks to exclude from an expanded ITA.

- **Green Goods and Services.** The Chamber strongly approves of the new initiative by the United States and other Members to eliminate tariffs on environmental goods. Moreover, the Chamber considers that the Trade in Environmental Goods initiative will complement the concurrent Trade in Services Agreement (TiSA) negotiations, to remove barriers to trade in environmental services such as air pollution monitoring, and solid and hazardous waste treatments.

- **Doha Development Agenda (DDA).** Importantly, the Chamber notes that WTO Members with a strong interest in services liberalization no longer look to the DDA, but rather the ongoing plurilateral negotiations of the TiSA. Furthermore, the Chamber questions whether WTO Members will be "sufficiently motivated" to negotiate on agriculture and non-agriculture market access (NAMA) through the DDA. Although the Chamber does not explicitly take a position on the future of DDA with respect to TiSA and other breakout plurilateral negotiations, it appears to express a preference for plurilateral over multilateral negotiations in order to deliver results. Nonetheless, this position stands in contrast to the overarching message of the issue paper that US businesses need the WTO "today as much as ever."

- **21st Century Issues.** Despite its detailed recommendations, the Chamber laments that WTO Members remain unclear on means to address, at the multilateral level, "21st century" issues such as digital trade, regulatory coherence and cooperation, investment, and state-owned enterprises (SOEs). Either in principle or in practice, the Chamber notes that WTO Members are largely far from consensus as to whether the Doha Round negotiations should include these new issues.

The release of the paper is also notable for its timing. It coincides with the March 10, 2014 visit to Washington, DC of WTO Director-General Roberto Azevêdo, who delivered a major speech to the Chamber on the vital need for continuing US leadership in the WTO, for the benefit both of the multilateral trade system and of the United States itself.[71] In his speech, DG Azevêdo identified two

[71] See http://www.wto.org/english/news_e/spra_e/spra9_e.htm



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major tasks now confronting the WTO. The first is the implementation of the Decisions taken at the Bali Ministerial Conference, above all that of the TFA. The second is the conclusion, "once and for all" and as quickly as possible, of the Doha Round. This was DG Azevêdo's main theme, and he showed great openness regarding possible new negotiating approaches and the need to address "emerging issues." However, he indicated that a multilateral agreement would require meaningful outcomes in the three "pillars" of the Round, agriculture, NAMA, and services, and that development issues must remain "front and center."

In this context, it seems most likely that the multilateral and plurilateral processes will continue to coexist and, hopefully, progress, in a complementary fashion. The reason for this is two-fold: (i) DG Azevêdo has clearly stated that Members must aim for what is "doable," indicating his support for all efforts that deliver results, even those outside the multilateral setting; and (ii) plurilateral endeavors, such as TiSA, have the potential to unblock Doha Round impasses by allowing a core group of Members to achieve consensus outside of the multilateral system and then channel this consensus back into the negotiations. Nevertheless, the skepticism of US businesses towards the multilateral process, which many other Members also feel, makes it clear that agreement by the end of 2014 on a "clearly defined work program" for the conclusion of the Doha Round will be very difficult.

## USTR Notifies Congress of Intentions to Launch Green Goods Talks

On March 21, 2014, United States Trade Representative (USTR) Michael Froman notified Congress regarding the Obama Administration's intentions of joining 13 fellow World Trade Organization (WTO) Members to launch negotiations toward liberalizing trade in environmental goods.[72] According to USTR Froman, the United States intends to wait at least 90 days from the date of the notice before beginning negotiations at the WTO.

According to the USTR notification, an environmental goods agreement can contribute to the domestic and international environmental protection agenda by (i) making environmental technologies cheaper and more accessible and (ii) supporting "green jobs" in the United States. USTR values global trade in environmental goods at nearly USD 1 trillion dollars annually, and notes that some WTO Members charge tariffs as high as 35 percent on environmental goods. US exports of environmental goods reportedly accounted for USD 106 billion in 2013, and grew 5 percent faster than US exports of industrial goods in general from 2008-2012.

Negotiations on a new agreement will aim to reduce – by 2015 – tariffs levied on certain environmental goods. Although negotiations will "build upon" the September 2012 Asia-Pacific Economic Cooperation (APEC) Members' List of 54 Environmental Goods, participating Members intend to extend product coverage of any WTO agreement beyond the APEC list. Furthermore, participants do not intend for the list to be static; according to an EU press release on the topic, WTO Members behind the initiative hope to create a "living agreement" that will grow and evolve

[72] See http://www.ustr.gov/sites/default/files/03212014-Letter-to-Congress.pdf



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according to future needs. This may result in the addition of new environmental goods based on future technological advancements, as well as the inclusion of rules relating to environmental services and non-tariff barriers in the agreement.

WTO Members responsible for 86 percent of global trade in environmental goods have expressed an interest in participating in the negotiations: Australia, Canada, China, Costa Rica, the European Union, Jong Kong, Japan, Korea, New Zealand, Norway, Singapore, Switzerland, Taiwan, and the United States. USTR's notification to Congress confirms that the new agreement would almost certainly apply on a most-favored-nation (MFN) basis, which means that tariff concessions agreed to by participants would have to be accorded to all WTO Members equally, including non-participants ("free-riders"). To minimize the free-rider problem, however, the agreement would only enter into force if it accounted for a "critical mass" of trade in covered products, which in the past has been understood to mean that an agreement should cover around 90 percent of trade.

In the case of an environmental goods agreement, the 90 percent threshold may not be difficult to obtain, particularly since many APEC members may still be persuaded to join the negotiations. However, even if that threshold is met, it is questionable that any agreement would be implemented if India and Brazil continue to remain outside of the agreement.

## WTO Rules Against China in Rare Earths Dispute, China Likely to Appeal

On March 26, 2014, the World Trade Organization (WTO) released the Panel Report[73] in *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (DS431/DS432/DS433) ("*China – Rare Earths*"). The Panel found that China's various export restrictions on rare earths, tungsten, and molybdenum are inconsistent with WTO rules and cannot be justified on environmental protection or conservation grounds. The United States, one of the three complainants in the WTO dispute, has welcomed the findings; United States Trade Representative (USTR) Michael Froman hopes that it will "discourage further breaches of WTO rules" that negatively affect US manufacturers.[74]

China is currently responsible for around 90 percent of the world's production of rare earth elements, which refers to 17 chemical elements, including 15 lanthanides as well as scandium and yttrium. Rare earths are used in a variety of products, including hybrid car batteries, mobile phones, flat-panel display screens, medical imaging equipment, wind turbines, and energy efficient lighting. Downstream companies in the United States using rare earths reportedly account for more than USD 300 billion of economic output. The steel industry's heavy dependence on tungsten and molybdenum is also noteworthy; the US steel industry accounts for USD 75 billion in annual sales. China's imposition of export restrictions in 2009 caused world prices to soar in 2011, with some prices allegedly increasing by as much as 500 percent due to fears of global

[73] See http://www.wto.org/english/tratop_e/dispu_e/431_432_433r_e.pdf

[74] See http://www.ustr.gov/about-us/press-office/press-releases/2014/March/US-wins-victory-in-rare-earths-dispute-with-China



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shortages. Although this trend led to increased investment in rare earths mines elsewhere, such as the United States and Australia, and to discoveries of new rare earth deposits, global prices have remained high due to restricted supply in the global market.

The United States, the European Union, and Japan launched the dispute challenging China's rare earth export restrictions in March 2012, shortly after a favorable ruling in the so-called "test-case" against similar Chinese export restrictions on different raw materials and minerals in *China — Measures Related to the Exportation of Various Raw Materials* (DS435/DS437/DS438). In *China – Rare Earths*, the complainants argued that the Chinese measures restrict supply to the global market in order to lower prices for Chinese companies that produce downstream products and give them an unfair advantage over foreign competitors. The Panel sided with the complainants and rejected China's environmental and conservation defenses, following essentially the same reasoning as in *China – Raw Materials*.

The Panel's findings can be summarized as follows:

- **Export Duties.** The Panel found that the export duties at issue violate China's Accession Protocol, which contains a specific prohibition against the imposition of export duties. China unsuccessfully attempted to justify the duties by invoking GATT Article XX(b), arguing that the duties were part of a broad environmental protection policy framework and were "necessary" to achieve those goals. The Panel rejected China's defense both on procedural grounds and on the merits. One panelist dissented on the procedural issue, finding that Article XX was available to defend GATT-related violations of China's Accession Protocol unless a contrary intention was expressed.

- **Export Quotas.** The Panel found that the export quotas at issue are inconsistent with GATT Article XI:1 and various provisions of China's Accession Protocol and Working Party Report, and could not be justified on conservation grounds pursuant to GATT Article XX(g). The Panel recognized that, pursuant to the principle of permanent sovereignty over natural resources, it is entirely within a Member's discretion to decide how to preserve and exploit its natural resources in accordance with its own development and conservation objectives. However, the right to adopt conservation programs and regulate a natural resource market did not involve boundless discretion; once natural resources have been extracted and have entered the market, they are subject to GATT disciplines like any other product. The Panel emphasized that the right to adopt conservation programs was not a right to "control the international markets in which extracted products are bought and sold."

- **Trading Rights.** The Panel found that certain aspects (export performance, minimum capital, and prior export experience requirements) of China's administration of the export quota systems breach obligations in China's Accession Protocol and Working Party Report. Although in principle Article XX(g) was available to China to defend its measures, based on the specific language of the accession commitments involved, the Panel rejected China's defense on evidentiary grounds.

The Parties now have 60 days to appeal the case, and it is widely expected that China will appeal at least some of the Panel's findings to the Appellate Body. News reports state that while the head of



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China's treaty and law department welcomed the Panel's general recognition that China had put in place comprehensive conservation and environmental protection policies, they expressed disappointment with the remainder of the Panel findings. An official from the Ministry of Commerce stated, "China believes that these regulatory measures are perfectly consistent with the objective of sustainable development promoted by the WTO," and commented that China will follow WTO dispute settlement procedures to resolve the dispute.



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# FREE TRADE AGREEMENTS

## *Free Trade Agreement Highlights*

### TTIP Negotiators Conclude 4th Round of Negotiations in Brussels, Disagreement Continues Regarding Tariff Elimination Goals

From March 10-14, 2014, US and EU negotiators met in Brussels for the 4th negotiating round of the Transatlantic Trade and Investment Partnership (TTIP). According to United States Trade Representative (USTR) Michael Froman, although substantial work remains, both Parties have established an understanding on key issues left to be resolved.[75] In that respect, the delegations largely conducted talks in Brussels on a conceptual basis, with a few exceptions where certain working groups tabled proposals to move towards text-based negotiations.

During the round, the Parties discussed the following areas:

- **Market Access**. The Parties discussed the existing offers on tariffs, and examined agreeable approaches to tabling offers on services and government procurement. Notably, the issue of tariff elimination on all goods has become visibly divisive. The United States made clear in a March 11, 2014 USTR fact sheet[76] that the bilateral free trade agreement (FTA) should comprise zero-tariff treatment on all trade in goods. However, during a press conference, the EU's lead negotiator, Garcia Bercero, reiterated that TTIP should consider differential treatment for the most sensitive products, as reflected in the February 2013 report[77] of the US-EU High Level Working Group on Jobs and Growth.

- **Regulation.** The Parties discussed regulatory coherence and ways to increase regulatory compatibility in specific sectors, including pharmaceuticals, cosmetics, medical devices, automotives, and chemicals. In addition, the Parties discussed written proposals on technical barriers to trade (TBT) and preparations for future proposals on sanitary and phytosanitary (SPS) measures. The United States affirmed in the USTR fact sheet that commitments on SPS measures should eliminate restrictions that are not based on science, as well as other behind-the-border barriers, such as tariff-rate quotas (TRQs), and permit and licensing barriers.

- **Rules.** The Parties took stock of respective commitments in the context of sustainable

[75] See http://www.ustr.gov/about-us/press-office/press-releases/2014/March/Statement-by-USTR-Froman-at-close-of-fourth-round-TTIP-negotiations

[76] See http://www.ustr.gov/about-us/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View

[77] See http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf



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development, labor, and environment, as already covered by existing US and EU FTAs with other trade partners. The Parties also discussed TTIP's coverage of trade in energy and raw materials, an area of particular importance to the EU given the differential treatment accorded to US FTA and non-FTA partners in the US export control regime for liquefied natural gas (LNG.

Press reports indicate that informal talks on investment also took place despite the ongoing suspension of official talks on this issue while the EU holds public consultations.[78] Although the Parties did not discuss or table specific texts, they reportedly exchanged perspectives on the US model bilateral investment treaty (BIT).[79]

The 5th round of negotiations will take place in Washington, DC before the summer. In the interim, USTR Froman confirmed that President Obama would discuss TTIP with European Council President Van Rompuy and European Commission President Barroso during the US-EU Summit on March 26, 2014 in Brussels.

## United States Launches Consultations with the Philippines on Joining TPP

On March 20, 2014, the Office of the United States Trade Representative (USTR) announced that the United States has begun a series of technical consultations with the Philippines to discuss issues relating to the Philippines' potential participation in the Trans-Pacific Partnership (TPP). The consultations are taking place under the auspices of the US-Philippines Trade and Investment Framework Agreement (TIFA), held from March 19-20, 2014 in Washington, DC. Assistant USTR for Southeast Asia and the Pacific Barbara Weisel, concurrently the US chief negotiator for the TPP, and Philippine Undersecretary of Trade Adrian Cristobal chaired the TIFA meetings, which also included the participation of Philippine Agriculture Department Undersecretary Segfredo Serrano and Philippine Tariff Commission Chairman Edgardo Albon. Although these preliminary consultations by no means guarantee that the Philippines will eventually join the TPP, sources indicate that the Philippine government recognizes the growing opportunity cost of non-membership, and has begun to evaluate more seriously the considerably complex steps involved in joining.

Notably, USTR's press release[80] on the TIFA meetings is one of the first public statements to acknowledge the Philippines' ongoing deliberations regarding participation in TPP. Although certain Philippine government officials have long acknowledged the value of the TPP, there are clear domestic legal difficulties that have constrained the Philippines from joining the TPP

[78] EU Trade Commissioner Karel De Gucht announced on January 21, 2014 that the EU has put on hold further negotiations on the TTIP's investment chapter until the completion of a public consultation. The EU will publish in March 2014 the proposed EU text for the investment chapter, including provision on investment protection and investor-state dispute settlement (ISDS), after which any EU stakeholder will have three months to comment. A copy of Commissioner De Gucht's announcement is available at: http://europa.eu/rapid/press-release_IP-14-56_en.htm

[79] See http://www.state.gov/e/eb/ifd/bit/index.htm

[80] See http://www.ustr.gov/about-us/press-office/press-releases/2014/March/US-and-Philippines-commit-to-intensified-engagement-on-trade



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negotiations. The fact that the Philippines is now prepared to engage TPP Parties formally may indicate its willingness to overcome these difficulties and the development of a strategy to do so.

The most cited example of the aforementioned difficulties is the Philippines' Foreign Investment Negative List (FINL),[81] which identifies areas of investment reserved for Filipinos and stems from the Philippine Constitution. How the Philippines will address this issue is not immediately clear, particularly considering that Philippine President Benigno Aquino has stated publicly that there is no need for constitutional amendment to attract foreign investment. Trade Secretary Gregory Domingo, however, has said that the Philippines will try to seek flexibility on this matter in the TPP.

In addition, Undersecretary Serrano's participation in the TIFA meetings is notable. The issue of the Philippines' quantitative restriction (QR) on rice imports, one of the most politically sensitive topics domestically, will likely be a key issue in the TPP negotiations. Under the QR regime, the Philippines government can limit the volume of rice imports through the National Food Authority (NFA), a government-owned entity given an import monopoly by law. The QR on rice is a legacy from the Philippines' WTO accession in 1994, where it negotiated special treatment for rice under the WTO General Agreement on Tariffs and Trade (GATT). However, this flexibility expired in June 30, 2012. Although the Philippines has reiterated its ongoing negotiations with WTO Members to extend this special treatment to 2017 and that it has gained some support, the preservation of the QR regime under the TPP will likely be very difficult, particularly considering that the United States is seeking comprehensive market access for rice in Japan.

Notwithstanding the difficulties surrounding the Philippines' potential participation in TPP, its intentions to join the agreement comes as little surprise. The United States is among the Philippines' top trading partners, and has traditionally been the Philippines' largest foreign investor, despite the absence of a bilateral free trade agreement. In that regard, bilateral goods and services trade between the United States and the Philippines totaled USD 22 billion in 2011. Moreover, the US-Philippine Trade Facilitation Protocol (signed on November 13, 2010) and Partnership for Growth (signed on November 16, 2011), were widely viewed as confidence and capacity building exercises to support the Philippines' potential participation in the TPP. Nevertheless, it is not immediately clear if the Philippines can join the TPP before negotiations conclude, or whether TPP Parties will be willing to incorporate the Philippines' sought-after flexibilities and carve-outs.

## DOE Authorizes Jordan Cove to Export LNG to Non-FTA Countries

On March 24, 2014, the Department of Energy (DOE)[82] conditionally authorized Jordan Cove Energy Project ("Jordan Cove") to export domestically produced liquefied natural gas (LNG) to countries with which the United States has not entered into a free trade agreement (FTA). The Jordan Cove LNG Terminal, located in Coos Bay, Oregon, may export up to a rate equivalent to 0.8 billion standard

[81] See http://dti.gov.ph/dti/index.php?p=433

[82] See http://energy.gov/articles/energy-department-authorizes-jordan-cove-export-liquefied-natural-gas



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cubic feet per day (Bcf/d), for a period of 20 years. This is the seventh LNG terminal approved for exports to non-FTA countries.

Section 3 of the Natural Gas Act (15 U.S.C. § 717b) requires DOE approval for all exports of LNG, including exports to countries that have an FTA with the United States. However, exports to non-FTA countries are subject to a discretionary "public interest" test, and DOE may refuse to grant permission to export if it finds that the exports "will not be consistent with the public interest."

DOE has not provided any indication as to what – if any – role the situation in Crimea played in the decision to grant the Jordan Cove approval.[83] Although the situation in Ukraine has not altered domestic US policy considerations in the context of the debate on liberalizing US oil and gas export restrictions, it has provided significant new political momentum in favor of broad liberalization. In that respect, Senate Finance Committee Chairman Ron Wyden (D-OR) and Senate Energy Committee Ranking Member Lisa Murkowski (R-AK) have publicly supported the Jordan Cove approval, noting its importance to US job creation and global gas markets. The project must now receive approval from the Federal Energy Regulatory Commission (FERC) before construction can begin.

[83] See http://energy.gov/fe/downloads/order-no-3413-jordan-cove-lng



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# CUSTOMS

## *Customs Highlights*

### US Court Rules Retroactive Collection of Duties Permissible, Rejects Constitutional Challenge

On March 18, 2014, the Federal Circuit upheld US federal law permitting the US Department of Commerce (DOC) to assess countervailing (CV) duties retroactively on imports from nonmarket economies (NMEs). The ruling rejected arguments that the relevant law, in allowing for the retroactive imposition of both anti-dumping (AD) and CV duties, is punitive and in violation of the US Constitution's *ex post facto* clause.

The federal court ruling reaffirms a March 12, 2013 decision of the US Court of International Trade (CIT) in the same dispute. Chinese exporter Guangdong Wireking Housewares & Hardware Co. Ltd.'s [84] initiated CIT proceedings in November 2009 challenging a September 2009 DOC countervailing duty (CVD) order on certain kitchen appliance shelving and racks. Guangdong Wireking argued that the CVD order, as well as its legal basis, violated, *inter alia*, the US Constitution's *ex post facto* clause because it did not require DOC to adjust for any double counting that could result from the retroactive imposition of both CV and AD duties. A law will violate the *ex post facto* clause if it is found to have a retroactive effect and impose a punishment for an act that was not punishable at the time it was committed, or increases the punishment for an act that was committed before the new law was enacted.

Proceedings in the Guangdong Wireking case had been stayed while the Federal Circuit considered a similar case in *GPX International Tire Corp. v. US* ("GPX").[85] The court in GPX eventually ruled in December 2011 that CV duties could not be imposed on NMEs like China because double counting could occur when both countervailing and anti-dumping duties are imposed on goods from NEMS. However, in March 2012, Congress effectively overruled this GPX decision by passing an amendment to the United States Tariff Act of 1930, which specifically provided that DOC could assess CV duties retroactively on imports from NMEs, and did not require DOC to make adjustments for any double counting that may result from the imposition of both AD and CV duties.

When the Guangdong Wireking proceedings resumed, the United States argued that the March 2012 amendment "simply reaffirms the state of the law that existed prior to its passage" and did not either unconstitutionally or retroactively broaden the Tariff Act of 1930's scope. In its March 2013 ruling, the CIT found against Guangdong Wireking, concluding that the amendment and, therefore, the CVD order, did not violate the Constitution's *ex post facto* clause. Guangdong Wireking

[84] See http://www.cafc.uscourts.gov/images/stories/opinions-orders/13-1404.Opinion.3-13-2014.1.PDF

[85] See http://www.cafc.uscourts.gov/images/stories/opinions-orders/11-1107.pdf



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appealed the CIT decision to the Federal Circuit in May 2013.

The three-judge panel charged with hearing Guangdong Wireking's appeal affirmed the earlier CIT decision and upheld the constitutionality of the relevant law. The panel concluded that there is "no serious question" that Congress intended to create a civil remedy with the March 2012 amendment rather than impose punishment, despite the fact that the amendment directs DOC to adjust for double-counting prospectively but not retrospectively. Despite this finding, however, the panel expressed reservations with respect to the legal effects of the March 2012 amendment. The panel ruled that the government's argument that the amendment did not change the law was "unpersuasive," and rejected the government's assertions that the amendment nullified the Federal Circuit's GPX ruling and rendered it of no legal effect. The panel stated that the GPX ruling "still stands as a statement of the law at the time of its decision." Counsel for Guangdong Wireking commented that, although Guangdong Wireking was disappointed with the overall ruling, it welcomed such statements by the court.

## US Suspends Dual-Use Export Licensing for Exports and Re-Exports to Russia

On March 25, 2014, the Bureau of Industry and Security (BIS) announced that effective March 1, 2014, it has placed a hold on the issuance of any export licenses authorizing the export or re-export of items to Russia. BIS has stated that this practice will continue until further notice. This action evidently is another sanctions measure against Russia stemming from the Ukraine situation.

BIS is the agency responsible for administering export controls on dual-use items that are subject to the Export Administration Regulations (EAR). This includes most goods, software and technology originating from the United States, and also some items made outside the United States that incorporate specified levels of US-origin content. If an item subject to the EAR is controlled for export or re-export to a certain country, end-use, or end-user, an export license is required absent a license exception.

Not all items require export licenses for Russia. Exports and re-exports of such items to Russia should not be affected. Exports to Russia require a license for items controlled for Short Supply (SS), Chemical and Biological Weapons (CB), National Security (NS), Missile Technology (MT) and certain Crime Control (CC) purposes, absent a license exception. Whether an item is controlled for these reasons depends on its Export Control Classification Number (ECCN).

As a result of this policy, license applications submitted or pending after March 1, 2014 for exports or re-exports to Russia will not be processed until further notice. This policy will not affect licenses previously issued by BIS for exports or re-exports to Russia.

This policy impacts not only US businesses engaged in exports to Russia, but also non-US companies engaged in exports to Russia from third countries of products that are of US-origin and that require BIS licenses. This can include products with US-origin content or made as the direct product of US origin technology. Penalties for noncompliance are severe.



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