White & Case LLP
General Trade Report - JETRO

April 2014

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UNITED STATES

GENERAL TRADE POLICY

USTR Publishes 2014 National Trade Estimate Report

Summary

On April 1, 2014, the Office of the US Trade Representative (USTR) released the 29th National Trade Estimate Report on Foreign Trade Barriers ("2014 NTE"). Pursuant to the Omnibus Trade and Competitiveness Act of 1988, the annual NTE provides a country-by-country inventory of the most important foreign barriers affecting the following: (i) US exports of goods and services; (ii) foreign direct investment by US persons; and (iii) protection of intellectual property rights (IPR).

The stated goal of the NTE is to facilitate negotiations aimed at reducing or eliminating the identified trade barriers and enhance efforts to enforce US trade laws. While much of the 2014 NTE is similar to the 2013 NTE, the resolution of some trade barriers and the emergence of others, as described within each country report, reflects the Obama Administration's successes with respect to its 2012 and 2013 trade policy objectives.

Analysis

I. TRADE BARRIER CATEGORIZATION AND IDENTIFICATION

USTR does not provide a strict definition of "trade barriers", but notes that it includes government laws, regulations, policies, or practices that protect domestic goods and services from foreign competition, artificially stimulate exports of particular domestic goods and services, or fail to provide adequate and effective protection for intellectual property rights.

The trade barriers identified in the 2014 NTE fall into the following nine categories: (i) import policies; (ii) government procurement; (iii) export subsidies; (iv) barriers to services trade; (v) lack of IPR protection; (vi) investment barriers; (vii) anticompetitive practices with trade effects tolerated by foreign governments; (viii) trade restrictions affecting electronic commerce (e-commerce); and (ix) other barriers, including corruption.

Although the report is based on information provided by USTR, the Department of Commerce (DOC), and other relevant US government agencies, the information is supplemented by input provided by: (i) US embassies abroad; (ii) independent persons or entities, in response to a Federal Register request for information; and (iii) private sector trade advisory committees.

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II. COUNTRY REPORTS

The 2014 NTE examines trade barriers in the largest export markets for the United States, including 58 nations, as well as the European Union (EU), Taiwan, Hong Kong, and the Arab League. In addition, USTR has added Iraq and Uzbekistan to the 2014 NTE, reflecting their importance for US exports. USTR also removed Bolivia from the 2014 NTE due to little trade-related activity over the past year, and aligned the section on China more closely with other USTR reports on US-China trade issues.

Noteworthy provisions of country reports are summarized as follows:

- **Argentina.** The 2014 NTE highlights Argentina's increased use of nontariff barriers (NTBs) as a function of the Argentinian government's increasing reliance on a growth strategy based on import substitution. One clear measure is the Advanced Sworn Statement on Imports (DJAI) regime, where companies must wait for government review and approval before importing goods. Conversely, Argentina imposes export taxes on all but a few exports, including significant export taxes on key hydrocarbon and agricultural commodities. In addition, Argentina maintains certain localization measures aimed at stimulating domestic production.

- **Brazil.** The 2014 NTE asserts that federal and state taxes and charges applied to imports effectively double the actual cost of imported products in Brazil. USTR also expresses concerns regarding Brazil's administration of non-automatic import licensing, as US exporters have raised issues regarding additional monitoring, enhanced inspection, and delayed release times for certain goods. Brazil's government procurement regime and increased use of local content requirements for state-controlled oil company Petrobras also reflects a preference for domestic businesses and products.

- **Canada.** The 2014 NTE expresses concern regarding provisions concerning geographical indications (GIs) in the Canada-EU Comprehensive Economic and Trade Agreement (CETA), commenting that it may pose challenges to third parties, including the United States. The CETA final text is not yet publicly available. In addition, USTR highlights the restrictive effects of privacy rules in two Canadian provinces, British Columbia, and Nova Scotia, and its impact on cross-border data flows.

- **Chile.** USTR acknowledges that Chile has virtually no restrictions on imports, as well as trade policies that may constitute trade barriers. The only outstanding issue is Chile's IPR regime, including its listing on the Priority Watch List in the 2013 Special 301 Report. USTR pledges to work with Chile in 2014 to address IPR related concerns.

- **China.** The United States and China have committed to negotiating a bilateral investment treaty (BIT) that will include provisions on non-discrimination and transparency, as well as provide national treatment at all phases of investment, including market access (*i.e.*, the "pre-establishment" phase of investment), and employ a "negative list" approach in identifying exceptions. Nevertheless, the 2014 NTE observes that China's trade barriers remain numerous and widespread.

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- **Costa Rica.** The 2014 NTE draws attention to inconsistent action between institutions within the central government, or between the central government and municipal governments, with respect to issuing investment approvals. Another concern is the frequent recourse to legal challenges before Costa Rica's constitutional court to review whether government authorities have acted illegally or to determine the constitutionality of legislation or regulations. US investors complain that such challenges have been used at times to undermine their investments or draw out disputes.

- **Ecuador.** The 2014 NTE notes that Ecuador's import policies are increasingly restrictive. Specific trade-restrictive resolutions include those related to consumer goods, automotive, and agriculture products. In addition, USTR asserts that Ecuador pursues a strategic policy of selective import substitution through the 2013-2017 national plan developed by the Planning Agency. Subsequently, Ecuador has applied a combination of tariff and nontariff measures, such as non-automatic import licensing, to implement its selective import substitution strategy. On June 12, 2013, Executive Decree 25 created the Ministry of Foreign Trade; the Ministry of Foreign Affairs previously managed trade policy through a vice-ministry.

- **EU.** USTR observes that "chronic barriers" in the EU have prevented successful market access by US businesses. The 2014 NTE highlights many of the same barriers as in previous reports. USTR states that it aims to address these barriers and arrive at a long-term solution through the Transatlantic Trade and Investment Partnership (TTIP). Although four TTIP negotiating rounds have taken place to date, the agreement remains at a preliminary stage due to the complex differences between US and EU trade and regulatory policies.

- **Ghana.** Ghana's barriers relate principally to its politicized business community and the lack of transparency in certain government operations. USTR notes that entrenched local interests can derail or delay new entrants. Corruption also remains a concern.

- **Guatemala.** The 2014 NTE finds that Guatemala's denial of claims for preferential treatment for US products under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) continues to be an occasional source of difficulty in exporting to Guatemala. In addition, stakeholders report that Guatemalan customs authorities frequently challenge declared tariff classifications and try to reclassify products in order to use HS codes subject to a higher tariff.

- **India.** USTR observes that recent patent-related actions in India have heightened IPR concerns. India's Supreme Court appeared to confirm that India's Patent Law creates a special, additional criterion for patentability for certain technologies, such as pharmaceuticals. As a result, India may deny patents to such technologies unless they exhibit "therapeutic efficacy" in addition to the internationally recognized criteria for patentability (novelty, inventive step, and industrial application).

- **Indonesia.** The 2014 NTE highlights Indonesia's two new laws - the Law on Industry and the Law on Trade - that provide the legal framework for trade-restrictive measures. USTR labels these legislative acts as actions to codify protectionism. In addition, Indonesia has begun enforcing a ban on raw mineral exports, while imposing minimum processing thresholds for

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exports of processed minerals.

- **Iraq.** US companies exporting to Iraq face lengthy and burdensome delays and must expend funds and labor to obtain Certificates of Origin (COOs) for their products, which includes clearances from multiple sources of authority. The lack of clear and definitive implementing regulations for the National Investment Law and its amendment also remains a source of delay and confusion in the approval of investment projects.

- **Japan.** USTR takes issue with Japanese import barriers on beef, rice, wheat, and pork. USTR aims to address these concerns through the TPP negotiations.

- **Kazakhstan.** The 2014 NTE notes that the government's continuing support for the increased demand for local content in government procurement poses a challenge to US suppliers. In 2009 and 2010, Kazakhstan amended its Law on Government Procurement to increase the percentage of local content required in government procurement and purchases by state-owned and state-controlled enterprises. As a result, potential suppliers (both domestic and foreign) must receive a certificate from the Ministry of Industry and New Technologies confirming the local content of goods and services.

- **Korea.** In addition to concerns regarding Korea's implementation of its commitments contained in the United States-Korea Free Trade Agreement (KORUS), USTR notes some preliminary concerns with respect to Korea's industrial subsidy policy. Recent statements by Korean policymakers suggest that privatization of the Korean Development Bank (KDB), which provides policy-directed lending to favored industries, is being reevaluated, and draft legislation introduced by the majority party late in 2013 could reverse privatization plans with respect to a wide range of state-owned enterprises.

- **Kuwait.** The 2014 NTE affirms that Kuwait remains on the Watch List in the 2013 Special 301 Report, largely as a result of its failure to draft and pass amendments to its 1999 copyright law in order to provide adequate and effective protection of copyrights.

- **Laos.** The 2014 NTE notes that Laos is transitioning to a value-added tax (VAT) system. The standard VAT rate of 10 percent applies to most domestic and imported goods and services, with some limited exemptions. US companies have also expressed concern with respect to a draft vehicle tax measure that, as proposed, appears to arbitrarily subject US-branded vehicles to higher taxes and charges than other vehicles.

- **Malaysia.** Similar to USTR's comments on Malaysia's WTO Trade Policy Review, the 2014 NTE highlights USTR's concerns with Malaysia's new National Automotive Policy (NAP). While the new NAP seeks to transform the country into a hub for energy efficient vehicles, USTR notes that the policy maintains Malaysia's non-transparent import permit and gazette pricing system, excise duties that disproportionately affect imported vehicles, and special tax reductions for vehicles with Malaysian-manufactured components.

- **Mexico.** The 2014 NTE highlights Mexico's new licensing procedures for the importation of certain steel products, which have effectively rendered the system non-automatic. On January

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27, 2014, new licensing procedures for the importation of certain steel products took effect. However, industry representatives have reported long delays in the review and issuance of licenses.

- **Nigeria.** USTR observes that Nigeria uses nontariff measures in an effort to achieve "self-sufficiency" in certain commodities. In addition, Nigerian port practices continue to present major obstacles to trade. Importers report erratic application of customs regulations, lengthy clearance procedures, and corruption.

- **Paraguay.** Under Paraguayan Law 194 from 1993, foreign companies must demonstrate "just cause" to terminate, modify, or decide not to renew contracts with Paraguayan distributors. USTR notes that this requirement often leads to expensive out-of-court settlements.

- **Philippines.** USTR confirms its negotiations with the Philippines to extend its quantitative restrictions on rice imports, accorded in Annex 5 of the WTO Agreement on Agriculture. However, according to the WTO, NFA's policies have contributed to the sector's non-competitiveness by reducing incentives for farmers to minimize production costs and improve efficiency. In addition, US stakeholders have reported that the Philippine government imposes unwritten "trade balancing" requirements on firms applying for approval of ventures under the ASEAN Industrial Cooperation scheme.

- **Russia.** The United States has suspended trade and investment engagements with Russia pending resolution of Russia's role in the Ukraine crisis.

- **Saudi Arabia.** USTR highlights that Saudi Arabia is in the process of restructuring its IPR regime by creating an IPR Commission to handle copyrights, patents, and trademarks under a single entity. However, the organizational structure and responsibilities of this commission are still unclear.

- **Sri Lanka.** The 2014 NTE finds that Sri Lanka continues to stress the need to promote import substitution policies. Moreover, Sri Lanka's 2013 and 2014 budgets emphasized the importance of agricultural self-sufficiency and import substitution.

- **Switzerland.** Although Switzerland is a signatory to the WTO Agreement on Government Procurement (GPA), USTR notes that the ability of regional cantons to implement GPA commitments independently of the federal government may result in disparities.

- **Taiwan.** The 2014 NTE generally reflects US industry concerns with respect to Taiwan's tariff barriers, including those on large motorcycles, agricultural products, and soda ash. Moreover, the United States remains concerned about Taiwan's import licensing regime and box-by-box inspection with respect to US meat upon importation.

- **Thailand.** USTR generally highlights the lack of transparency and stakeholder consultations with respect to Thai trade and investment policy as the main cause for concern. Specifically, USTR affirms its concerns regarding Thailand's IPR regime, and urges Thailand to take enforcement action against widespread piracy and counterfeiting.

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- **Turkey.** USTR remains concerned regarding the lack of transparency in Turkey's import licensing system. Import licenses are required for products that need after-sales service (e.g., photocopiers, advanced data processing equipment, and diesel generators) and for some agricultural products.

- **Ukraine.** The 2014 NTE draws attention to the high-profile issue of corporate raiding activities. This refers to incidences where "raiders" frequently purchase a small stake in a company, and then take advantage of deficient legislation, corrupt courts, and a weak regulatory system to gain control of the company to the detriment of rightful shareholders.

- **Vietnam.** USTR notes that Decree 72 took effect on September 1, 2013 and has created numerous concerns for cross-border Internet services providers. The decree enumerates stringent licensing requirements and expands the categories of domestic websites subject to those requirements, such as in-house management controls, local server requirements, and the centralization and authentication of user information. USTR has previously highlighted that these requirements would be inconsistent with commitments under discussion in the TPP.

Outlook

The 2014 NTE was released in conjunction with the release of the 2014 Report on Sanitary and Phytosanitary Measures and the 2014 Report on Technical Barriers to Trade. Together with the 2014 Trade Policy Agenda, these four reports provide key insights into the Obama Administration's 2014 trade policy objectives. The information provided in these reports is likely to guide and inform the Administration's trade-related negotiations and enforcement actions in the coming year.

USTR Releases 2014 SPS Report; Identifies SPS Issues of Concern in Nine New Economies

Summary

On April 1, 2014, the Office of the US Trade Representative (USTR) released the fifth Report on Sanitary and Phytosanitary Measures ("2014 SPS Report").[1] The 2014 SPS Report summarizes the Obama Administration's efforts to address barriers and unwarranted SPS measures taken by other countries and economies that impede US food and agricultural exports in 2013. In particular, it highlights certain examples of the Obama administration's successes in eliminating unwarranted SPS measures imposed on US exports resulting in new market access for beef and beef products, swine and pork products, fruits, and horticulture products, among others.

Compared to last year's report, the 2014 SPS Report identifies nine economies with new SPS measures of concern to the United States, namely Bangladesh, Costa Rica, Hong Kong, Iraq, Namibia, Nigeria, Saudi Arabia, Senegal, and Venezuela. Moreover, last year's report does not list

[1] The 2014 SPS Report is available here: http://www.ustr.gov/sites/default/files/FINAL-2014-SPS-Report-Compiled_0.pdf

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previous SPS measures of concern in Croatia, the Dominican Republic, El Salvador, and New Zealand. Statistically, the successful removal of unwarranted SPS measures helped the United States achieve USD 148 million in food and agricultural exports in 2013 and generated more than 929,000 jobs.

Analysis

This report covers background, trends, and achievements in the past year as well as a summary of SPS barriers taken by US trading partners in key country reports.

I. BACKGROUND, TRENDS AND ACHIEVEMENTS IN 2014

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

Similar to past SPS reports, the 2014 SPS Report identifies the following as major cross-cutting issues: (i) unwarranted export certification requirements; (ii) restrictions on the use of modern biotechnology or genetic engineering (GE) techniques, *i.e.,* techniques used to alter the genetic make-up of plants or animals and, in so doing, achieve such desired characteristics as pest or disease resistance, among others; (iii) Bovine Spongiform Encephalopathy (BSE)-related trade barriers; (iv) avian influenza-related trade barriers; and (v) trade-restrictive maximum residue levels (MRLs) requirements for pesticides.

According to the 2014 SPS Report, the United States counts the following among its SPS-related achievements in 2013: (i) the removal and/or relaxation of SPS barriers affecting the exportation of US beef to the Dominican Republic, the European Union (EU), Indonesia, Mexico, and Panama; (ii) abolition of the EU's ban on the importation of live pigs from the United States, new market access for fresh and chilled pork products to Colombia, and the re-allowance of pork imports into Bahrain and Kyrgyzstan; (iii) abolition of Australia's ban on US grapes and approval of peach and nectarine imports from California, Idaho, Oregon, and Washington; and (iv) resolution of Japan's pest risk concerns resulting in the opening of the Japanese market to US cherries and improved market access for US pears in China.

II. COUNTRY REPORTS

The 2014 SPS Report provides analysis of SPS-related trade barriers facing US exporters in 51

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countries, economies or groups of countries.[2] Unlike last year's report, the 2014 SPS Report does not address SPS issues in (i) Croatia, (ii) Dominican Republic, (iii) El Salvador, and (iv) New Zealand. Moreover, the 2014 SPS Report addresses SPS issues in several countries/economies that were not listed in the country report section of last year's report, namely:

- **Bangladesh.** Bangladesh has imposed double fumigation requirements for cotton products at the port of loading and unloading due to its concerns over the possible presence of boll weevil. According to the United States, double fumigation is unnecessary and should be removed. The United States has raised this issue on several occasions, including at the Bangladesh-United States Partnership Dialogue in May 2013.

- **Costa Rica.** Costa Rica imposed in September 2013 an import ban on US fresh potatoes allegedly due to excess soil in some shipments and the presence of zebra chip. The Report notes that the United States has not received any details of the zebra chip identification and testing methods to date. In addition, the Costa Rican government subsequently rejected a new shipment of potatoes for a pesticide residue violation.

- **Hong Kong.** Hong Kong is in transition to a positive pesticide MRL list, which is scheduled to come into effect on August 1, 2014. The United States identified several US-approved pesticides that were originally not included in the MRL list, but have subsequently been added to the list following several rounds of consultations with Hong Kong authorities. However, the Report highlights that there are several other US-approved pesticides for which MRLs have not yet been established in Hong Kong.

- **Iraq.** Iraq's Advisory Committee for Food Safety imposed on May 5, 2013 an import ban on US beef due to BSE concerns. The United States has requested the Advisory Committee to lift the import ban based on science, the World Organization for Animal Health (OIE) guidelines, and the United States' BSE negligible risk status.

- **Namibia.** Namibia changed its import requirements for poultry and poultry products in February 2013. As a result, US export certificates must be amended to certify that products are derived from chickens hatched and reared in the United States. As the US poultry industry generally imports one day old chicks from Canada, the US Department of Agriculture (USDA) is unable to certify to these requirements.

- **Nigeria.** Nigeria has imposed an import ban on all bovine animal meat and edible offals, pork, sheep, goats, and edible offal of horses, asses, and mules due to BSE concerns. The United States has claimed that the ban is unwarranted because it applies to all countries despite the fact that several countries have no records of BSE cases. In addition, Nigeria requires all food,

[2] The countries and country groups addressed in the country reports section include: Argentina, Australia, Bahrain, Bangladesh, Bolivia, Bosnia and Herzegovina, Brazil, Chile, China, Colombia, Costa Rica, Ecuador, Egypt , Ethiopia, European Union, Hong Kong, India, Indonesia, Iraq, Israel, Jamaica, Japan, Kazakhstan, Kenya, Korea, Kuwait, Kyrgyzstan, Macedonia, Malaysia, Mexico, Morocco, Namibia, Nigeria, Norway, Peru, Philippines, Russia, Saudi Arabia, Senegal, Serbia, Singapore, South Africa, Sri Lanka, Switzerland, Taiwan, Thailand, Turkey, Ukraine, Uruguay, Venezuela, and Vietnam.

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drug, cosmetic, and pesticide imports to be accompanied by certificates from producers and relevant national authorities. However, Nigeria's capacity constraint has delayed inspection and testing process resulting in slow clearance of food imports.

- **Saudi Arabia.** Saudi Arabia imposed an import ban on US beef and beef products due to the detection of a dairy cow with atypical BSE in April 2012. The United States seeks to remove the ban by providing the Saudi Food and Drug Authority (SFDA) with technical information regarding the case.

- **Senegal.** Senegal has maintained an import ban on poultry meat and poultry products from all countries to prevent the introduction of HPAI influenza virus. However, Senegal did not notify the ban nor provide scientific justification for the measure as required by the WTO.

- **Venezuela.** Venezuela imposed an import ban on all US live cattle, beef, and beef products due to the detection of a BSE-positive animal in the United States in 2003. The United States has urged Venezuela to lift the import ban based on science, the OIE guidelines, and the United States' BSE negligible risk status.

Although the remaining countries mentioned in this section have been listed previously, the 2014 SPS Report details issues removed or added to the country report sections:

- **Australia.** The 2014 SPS Report no longer mentions Australia's ban on imports of US stone fruits including peaches, nectarine, plums, and apricots. Meanwhile, it mentions a few new issues including (i) the current ban on imports of US pears due to bacteria disease; and (ii) Australia's excessive testing requirements for viruses associated with tomato and pepper seeds.

- **Chile.** The 2014 Report no longer addresses Chile's provisional phytosanitary requirements for importation of US grapes.

- **China**. The 2014 SPS Report additionally mentions the following: (i) China's new mandatory laboratory testing for the presence of certain phthalates in wines and distilled spirits imposed in January 2013; (ii) import prohibition of avocados; and (iii) restrictive quarantine requirements on US winter wheat. Meanwhile, it no longer mentions China's compliance measure regulating animal feed and feed additives.

- **Colombia.** The 2014 Report no longer mentions the following: (i) Colombia's new national policy for *Salmonella*; and (ii) specific import requirements for pork products to be shipped frozen or tested for trichinosis.

- **Egypt.** The 2014 SPS Report additionally addresses Egypt's import requirements for US beef liver and offals to be sampled and tested for dioxin.

- **European Union.** The 2014 Report no longer mentions the EU's requirement for written proof that imported cherries are free of brown rot. The Report does mention some new issues including (i) the EU's process for setting import tolerances for pesticides; (ii) the EU's re-exportation requirement for seed products; and (iii) the EU's excessive testing requirements for wheat products in certain EU member countries.

- **India.** The 2014 Report additionally addresses India's fumigation requirement for shipments of all pulses at the port of origin.

- **Japan.** The 2014 Report addresses a new issue relating to fumigation treatment required for US cherries for each separate variety.

- **Kazakhstan.** The 2014 Report addresses a new issue relating to an import ban on US beef, pork, turkey, and processed products based on detections of ractopamine residues in beef and pork shipments to Russia. The Report no longer mentions a temporary ban on imports of US cattle.

- **Kenya.** The 2014 Report addresses several new issues including: (i) Kenya's import restriction on live chicks; (ii) imposition of MRL for aflatoxin on corn; (iii) import restriction on US whole peas due to concerns over *pseudomonas pisi* fungus; and (iv) import prohibition of wheat shipped through Washington, Oregon and Idaho.

- **Korea.** The 2014 Report addresses a new issue relating to import prohibition of fresh table-stock potatoes from the Pacific Northwest due to concerns over presence of zebra chips. The Report no longer mentions fumigation requirements for US cherries.

- **Kyrgyzstan.** The 2014 Report newly mentions import restriction on poultry products. It no longer mentions an import ban on pork from several US states due to concerns over the H1N1 virus.

- **Malaysia.** The 2014 SPS Report addresses a new issue relating to GE labeling guidelines for all GE crops.

- **Mexico.** The 2014 Report additionally addresses import restrictions on unpasteurized commercial milk until Mexico completes its risk assessment on the safety of the product.

- **Philippines.** The 2014 Report addresses new issues including (i) the Philippines' excessive two-tiered system requirements on the handling of frozen meat; and (ii) SPS permit requirement prior to shipment for any agricultural products. It no longer mentions concerns over Philippines' lengthy period of time to complete pest risk assessment (PRAs) tests for fresh vegetables.

- **Russia.** The 2014 SPS Report no longer mentions veterinary certificate requirements for imports of US grain and oilseed products for used in animal feed.

- **Taiwan.** The 2014 Report no longer discusses: (i) strict inspection requirements for importation of US apples; and (ii) import restrictions on fresh potatoes originating from Alaska, California, Idaho, Oregon, and Washington.

- **Turkey.** The 2014 SPS Report additionally addresses new issues including (i) Turkey's import requirement of dioxin-free certification for imports and animal feed and pet food products; and (ii) restriction on the use of monosodium glutamate and six other food additives in meat products.

- **Ukraine.** The 2014 Report no longer addresses Ukraine's new law establishing a framework for

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the creation, testing, and use of products of agricultural biotechnology.

Outlook

USTR released the 2014 SPS Report in conjunction with the 2014 NTE and the 2014 TBT Report. Together, these three reports provide an inventory of US government-identified trade barriers. The US government is likely to draw its priority SPS issues from the 2014 SPS Report. These priority issues will undoubtedly be broached in bilateral, regional, and multilateral fora, and some may form the basis for trade disputes brought by the United States.

USTR Releases 2014 TBT Report; United States Continues to Tackle Diversity of TBTs through Multiple Approaches

Summary

On April 1, 2014, the Office of the US Trade Representative (USTR) released its fifth Report on Technical Barriers to Trade ("2014 TBT Report").[3] Progress made on the removal of TBTs and the emergence of new TBTs is evident through a comparison of the 2014 TBT Report and the 2013 TBT Report. These changes reflect the recent achievements as well as the 2014 priorities of the Obama Administration with respect to TBTs.

While some trends listed in the 2014 TBT Report were also listed as trends in the 2013 TBT Report, the 2014 TBT Report further expands and elaborates upon such areas as (i) domestic testing and certification requirements; (ii) domestically developed product and safety standards for telecommunication equipment and electric products; and (iii) domestic standards and requirements in China, the European Union (EU), and Korea, among others.

Apart from bilateral consultations and cooperation through international fora such as the World Trade Organization (WTO) and Asia Pacific Economic Cooperation (APEC), the Obama Administration hopes that the Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP) will become useful pathways to harmonize international standards and procedures and to remove technical barriers to trade between the United States and its trading partners.

Analysis

I. BACKGROUND AND TRENDS IN 2013

Started by the Obama Administration in 2010, USTR's annual TBT Report addresses significant foreign trade barriers faced by US exporters in the following forms: (i) product standards; (ii) technical regulations and testing; (iii) certification; and (iv) other procedures involved in determining

[3] The 2014 TBT report is available here: http://www.ustr.gov/sites/default/files/2014%20TBT%20Report.pdf

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whether products conform to established standards and technical regulations. According to USTR, these standards-related measures become technical barriers to trade (TBTs) if they are non-transparent, outdated, overly burdensome, or discriminatory. The aim of the TBT Report is to describe and advance the US government's efforts to identify and eliminate these barriers.

The 2014 TBT Report includes the following components: (i) an introduction to standards-related measures; (ii) overview of trade commitments with respect to standards related measures; (iii) a description of the US statutory and administrative framework for implementing standards related commitments; (iv) a general description of standards; (v) a general description of conformity assessment procedures; (vi) a description of the US processes used by the US government to identify TBTs and how to address them; (vii) an overview of how the US government engages on standards-related measures through international, regional and bilateral fora; and (viii) an identification and description of TBTs on a country-by-country basis.

Although the 2014 TBT Report largely remains unchanged compared to the 2013 TBT Report, significant changes took place in USTR's country reports in section (viii). The 2014 TBT Report identifies a list of major TBT trends that emerged in 2013 across various US trading partner markets as follows:

- **Domestic Testing and Certification Requirements.** Economies such as Argentina, Brazil, China, India, Indonesia, Korea, and Taiwan require lengthy domestic testing or certification procedures that do not always correspond with international standards and procedures;

- **Domestically Developed Product and Safety Standards for Telecommunication Equipment and Electric Products.** China, the EU, Indonesia, Korea, and Mexico have been adopting and implementing standards for the domestic market that differ from international ones. Compliance with these domestic requirements imposes an undue cost to trade;

- **Standards and Requirements for Trucks.** The United States continues to expresses concern over standards and requirements that Colombia and the EU impose on imported trucks;

- **Alcoholic Beverages Labeling.** The EU, Russia, and Turkey require special labeling and licensing requirements due to intellectual property rights (IPR), and the application of different domestic standards, among others; and

- **Mandatory Labeling of Genetically Engineered (GE) Foods and Nutritional Labeling and Advertising**. The United States expresses concern over GE labeling requirements in Peru and Turkey for genetically modified organisms (GMOs) when GMOs are present in a product, and the potentially negative effect that the labeling might have on consumer preferences**.** Economies such as Ecuador, the EU, Russia, and Taiwan are either considering, or have implemented, mandatory regulations on nutritional labeling and advertising for food products that might be unnecessarily burdensome and require too much information concerning the ingredients used.

II. COUNTRY REPORTS

The 2014 TBT Report identifies and describes significant TBTs faced by US exporters in the

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice. No specific action is to be taken on the information provided without prior consultation with White & Case LLP.

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following 17 economies: (i) Argentina; (ii) Brazil; (iii) China; (iv) Chile; (v) Colombia; (vi) Ecuador; (vii) the EU; (viii) India; (ix) Indonesia; (x) Korea; (xi) Malaysia; (xii) Mexico; (xiii) Peru; (xiv) Russia; (xv) Saudi Arabia; (xvi) Taiwan; and (xvii) Turkey. Compared to the 2013 TBT Report, the 2014 TBT Report excludes examination of TBT measures in Japan, Kenya, South Africa, and Vietnam, and includes instead examination of three new countries, namely:

- **Ecuador.** The 2014 TBT Report addresses:

  (i) Ecuadorian Resolution 116, issued on December 4, 2013 not notified to the WTO. Resolution 116 requires commercial entities to obtain a Certificate of Recognition and sets out requirements for 293 products including certain products[4] covered by HS chapters 72, 73, 84, 85, and 87 to demonstrate compliance with a number of domestic regulations.

  (ii) Ecuadorean technical regulation, RTE INEN 022 "Labeling of Processed, Packed, and Packaged Food Products" which indicates that beginning May 15, 2014, mandatory labeling of "contains transgenics"[5] will be enforced.

  (iii) Executive Decree No. 4522 imposing nutritional labeling requirements on processed foods as set out in Ecuadorean technical regulation, RTE-INEN-022.

- **Peru.** The 2014 TBT Report takes note of:

  (i) Peru's Act to Promote Healthy Eating Among Children and Adolescents that requires a mandatory warning statement for prepackaged foods considered to have high contents of sugars, sodium, saturated fat, and trans fats.

  (ii) The moratorium on planting GE crops from November 14, 2012, for a minimum of ten years, and the implementing regulations that Peru published.

  (iii) Peru's Draft Supreme Decree Approving the Regulations Governing the Labeling of Genetically Modified Foods, mandating that all GE ingredients be included on processed products labels.

- **Saudi Arabia.** The 2014 TBT Report addresses the Saudi conformity assessment program called "Recognition Program on Certificates of Conformity," without notifying the program to the

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[4] Among the 293 products that the Regulation 116 covers are the following HS codes: 7221.00.00.00, 7214.91.90.00, 7214.91.10.00, 7214.91.10.00, 7214.30.90.00, 7214.30.10.00, 7214.10.00.00, 7213.99.00.00, 7213.91.90.00, 7213.20.00.00, 7213.10.00.00, 7209.25.00.00, 7208.53.00.00, 7306.90.00.00, 7306.69.00.00, 7306.61.00.00, 8413.19.00.00, 8413.70.11.00 ,8413.70.19.00, 8428.10.10.00, 8428.10.90.00,8428.40.00.00, 8481.80.70.00, 8481.80.59.00, 8481.80.51.00, 8481.80.40.00, 8481.30.00.00, 8481.10.00.00, 8450.20.00.00, 8450.11.00.00, 8415.10.10.00, 8481.90.90.00, 8544.20.00.00, 8544.42.10.00, 8502.40.00.00, 8502.20.90.00, 8502.20.10.00, 8502.13.90.00, 8502.13.10.00, 8502.12.90.00, 8502.12.10.00, 8502.11.90.00, 8502.11.10.00, 8537.10.90.00, 8537.10.10.00, 8539.31.90.00, 8539.31.20.00, 8539.31.10.00, 8544.60.90.00, 8544.60.10.00, 8544.49.90.00, 8544.49.10.00, 8544.42.90.00, 8544.42.20.00, 8712.00.00.00.

[5] A product labeled "contains transgenics" contains a gene or genes artificially integrated into its genome using recombinant DNA technology. The transgenic sequence may come from unrelated species.

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WTO TBT Committee and providing notice to stakeholders.

For the remaining economies, the 2014 TBT Report provides new TBT issues and an update on the TBT issues mentioned in previous TBT Reports. The following sections summarize additional substantive revisions:

New TBT Barriers in 2014

- **Argentina.** The 2014 TBT Report addresses Argentina's new requirements for conformity assessment for electrical and electronic products, not notified to the WTO, necessary for foreign manufacturers and importers to obtain safety certification.

- **China.** The 2014 TBT Report mentions the following TBTs:

  (i) Inconsistent application of requirements for issuance and use of the China Compulsory Certification (CCC) mark, as required by China's Certification and Accreditation Administration (CNCA).

  (ii) China's 2009 unpublished requirement that its WAPI wireless local area networks (WLAN) standard should be used in mobile handsets, despite the growing commercial success of computer products in China that comply with the internationally recognized Wi-Fi standard.

  (iii) Framework regulations for information security in critical infrastructure known as the Multi-Level Protection Scheme (MLPS), which categorize information systems based on the extent of damage a breach in the system could pose to social order, public interest and national security.

  (iv) Revision (third draft) of Order 276 "Regulation on Supervision and Administration of Medical Devices" mandates country of origin registration, a requirement for prior marketing approval in the country of origin or country of legal manufacture of a product for registration and marketing in China.

  (v) Proposed "Provisional Rules Regarding Administration of the Establishment and Revision of National Standards Involving Patents" raising concerns over responsibilities and potential liabilities of entities that participate in the formulation of revision of national standards.

- **Colombia.** The 2014 TBT Report addresses Colombia's duplicative certification regulations, which require a Certificate of Free Sale for each imported product both at the time of registration and on a shipment- by-shipment basis as imports are received.

- **EU.** The 2014 TBT Report notes the following TBTs:

  (i) The EU's proposed ban on the use of certain hydrofluorocarbons (HFCs) with global warming potential (GWP) in residential refrigerators and freezers from January 1, 2015.

  (ii) Hazard-based categorization of Compounds as Endocrine Disruptors.

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(iii) EU's revised Fuel Quality Directive (FQD) and the lack of transparency in development of methodology for calculating the green house emissions life-cycle emissions for transport fuels.

(iv) Maximum authorized dimensions for trucks in national and international traffic and the maximum authorized weights for trucks in international traffic and the difference in measuring dimensions in the US and the EU.

(v) Wide discretion of the EU member states in the implementation of the EU framework regulation 1169/2011 on the provision of food information to consumers that could potentially result in diverse requirements for importers.

(vi) The EU's "Communication on Agricultural Product Quality Policy" aimed at clarifying and simplifying its product quality policies, marketing standards, and quality schemes and other certification and labeling schemes. The communication contains the "place of farming" requirements that are unclear and difficult to comply with, and lack basis in international standards.

- **India.** The 2014 TBT Report addresses new concerns such as:

(i) India's requirement that all pre-packaged commodities are prohibited, unless they are in a standard quantity and carry all prescribed declarations, especially concerning mandatory container sizes and wholesale food labeling.

(ii) The Indian Department of Electronics and Information Technology's (DEITY) September 2012 Order that mandates compulsory registration for 15 categories of imported electronic and IT goods with laboratories affiliated or certified by the Bureau of Indian Standards.

(iii) The proposed amendment to the hazardous waste setting of rules for managing electronic waste, which will apply to producers, dealers, refurbishes and consumers.

- **Indonesia.** The 2014 TBT Report notes a number of regulations concerning import of cellular and Wi-Fi equipped products, whereby the Government imposes strict testing criteria, burdensome certification, and licensing requirements.

- **Korea.** The 2014 TBT Report addresses:

(i) The Act on the Registration and Evaluation of Chemicals effective from May 22, 2013 that should be fully implemented by January 1, 2015. The Act requires manufacturers and importers of chemical substances to register and submit annual reports.

(ii) UNI-Pass customs system requiring disclosure of the top one to two predominant ingredients used in product's formulas to receive customs clearance.

(iii) A product safety test, deviating from Global Technical Regulation developed by UNECE, for the sunroofs of all motor vehicle manufacturers whose models include sunroofs.

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- **Mexico.** The 2014 TBT Report raises new concerns about lack of transparency in Mexico's decision to consolidate all Mexican standards development organizations (SDOs) into a single Mexican SDO, AMEXNOR, and Mexico's decision to develop between 5,000 and 15,000 standards in the next several years.

- **Russia.** The 2014 TBT Report addresses:

  (i) The lack of transparency and timeliness in the notification of new Russian regulations to the WTO.

  (ii) Ministry of Health Decree 1416 imposing new registration procedures for medical devices, without providing US industry adequate time to adjust.

  (iii) Draft amendments to Russia's Federal Law on Circulation of Medicines that have not been notified yet to the WTO and pose potential problems for US industry due to lack of transparency, proposed mandatory testing of clinical trial samples, and mandatory Russian patent participation in in clinical trials.

- **Taiwan.** The 2014 TBT Report raises concerns over:

  (i) The requirement for all products containing more than five percent of biotechnology soybean or corn ingredients to be labeled as "GMO" or "Containing GMO." Also recent amendments to Taiwan's Act Governing Food Safety and Sanitation could potentially require further labeling requirements following EU biotechnology regulations and guidelines that do not reflect international standards and have lower threshold levels.

  (ii) Amendments to Taiwan's Cosmetic Hygiene Control Act under consideration that might affect protection of proprietary information and trade secrets by requiring a full disclosure of ingredient information in a product information file.

  (iii) Compulsory registration of all chemical substances the importers, exporters and traders deal with under the Labor Safety and Health Law (LSHL), and its amendments that have not been implemented yet. The registration is necessary to sell, produce, and import or export chemical substances.

- **Turkey.** The 2014 TBT Report notes regulation on alcoholic beverage warning statements and lack of Turkish response to US comments submitted during the official WTO three-day comment period while the regulation was at the drafting stage.

Ongoing TBT Barriers in 2014

- **Argentina.** The 2014 TBT Report addresses ongoing issues with Argentine Resolution 453/2010, which requires all inks, lacquers and varnishes used in producing printing materials to undergo testing for lead content at a single laboratory in Argentina.

- **Brazil.** The 2014 TBT Report focuses on:

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(i) Ongoing delays in registering medical devices in Brazil due to a requirement to obtain a Good Manufacturing Practices (GMP) certificate from Brazil's National Health Surveillance Agency (ANVISA).

(ii) Resolution 323 from November 2002 that requires majority of the telecommunication products to undergo testing in Brazil in order to gain access to Brazilian market.

- **China.** The 2014 TBT Report notes the following TBTs:

(i) "Draft Mobile Smart Terminal Administrative Measure" issued on April 10, 2012. The draft measure proposed to establish a new regulatory framework for the mobile device market imposing new obligations, technical mandates, and testing requirements on information technology and telecommunications hardware, operating systems, applications, app stores, and other related services. The scope and mandatory nature of the requirements appears unprecedented among the major global markets for mobile smart devices.

(ii) China's ZUC standard encryption algorithm, for use in 4G Long Term Evolution (LTE) ZUC and a possibility that only domestically developed encryption algorithms, such as ZUC, might be allowed for use in the network equipment and mobile devices comprising 4G TD-LTE networks in China.

(iii) SFDA imposition of requirements on "new ingredients" in cosmetic products and issuance of guidance on the application and evaluation of new cosmetic ingredients in 2011, effectively stalling the approval of cosmetics containing new ingredients.

- **Colombia.** Colombia's proposed Resolution 1111, which specifies that from 2015, all imported trucks must meet the Euro IV emissions standard, continues to be a concern in 2014 TBT Report.

- **EU.** The 2014 TBT Report notes the following TBTs:

(i) The EU regulation for the Registration, Evaluation and Authorization of Chemicals (REACH) and the view that aspects of REACH are discriminatory, lack a legitimate rationale, and pose unnecessary obstacles to trade.

(ii) The EU Renewable Energy Directive RED (2009/28/EC) and its administration and verification requirements having disruptive effect on trade in US products (specifically soybeans used as biofuel feedstock).

(iii) The EU trademarks and IP protection, particularly concerning wines.

(iv) Mandatory aging requirement for distilled spirits.

- **India.** The 2014 TBT Report addresses policies on mandatory transfer of technology and source codes, as well as burdensome testing and certification requirements for telecommunications equipment.

- **Indonesia.** The 2014 TBT Report notes:

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(i) Indonesian horticulture product labeling requirements imposing a broad range of requirements on importation of horticultural products, including labeling in Bahasa Indonesia attached to the packing prior to entering Indonesia.

(ii) Implementation of toy safety standards requiring “redundant and burdensome” testing.

- **Korea.** The 2014 TBT Report addresses:

(i) Korea’s Organic Act effective from January 1, 2014, requiring processed organic exports to Korea to be certified by a certifier accredited by Korea’s Ministry of Agriculture, Food, and Rural Affairs that exports to Korea meet certain standards. The requirement causes prohibitive costs for importers and technical difficulties related to ingredient certifications and certifier readiness.

(ii) Ongoing cooperation between US and Korean agencies on reorganization of safety regulations for information technology equipment.

(iii) Korean requirement for solar panels to be certified by the Korea Management Energy Corporation (KEMCO) before they can be sold in Korea to government supported projects, preventing certain types of thin film solar panels manufactured by US industry from entering the majority of Korean market segments.

(iv) A possible future requirement that some motor vehicle spare parts will have to be self-certified to the relevant Korean Motor Vehicle Safety Standard (KMVSS).

- **Malaysia.** The 2014 TBT Report addresses Malaysian halal MS1500: 2009 food product standard, which establishes general guidelines on halal food production, preparation, handling, and storage, creating standards going well beyond the internationally recognized standards. The food product standard requires audit of all meat production facilities that intend to export to Malaysia. Only one US establishment passed the audit necessary for conditional approval.

- **Mexico.** The 2014 TBT Report addresses:

(i) Mexico’s requirement that manufacturers, importers, distributors and marketers of electrical equipment and appliances label such products with information regarding the product’s energy efficiency and testing compliance.

(ii) Mexico’s certification requirements for corrugated high-density polyethylene (HDPE) pipes that seem to benefit Mexican made pipes at the expense of US made HDPE pipes.

- **Russia.** The 2014 Report addresses:

(i) Food product labeling requirements mandating information on nutritional components, allergens, GE foods, sweeteners, and food coloring.

(ii) The Eurasian Economic Commission (EEC) draft of the Technical Regulation on Alcoholic Product Safety that appears to impose duplicative conformity assessment procedures, administered by at least three different government authorities.

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(iii) Burdensome and non-transparent licensing system for importers of distilled spirits requiring an "activity" license from the Federal Service for the Regulation of the Alcohol Market (FSR), which covers wholesale, purchasing, supply, and storage of distilled spirits.

- **Taiwan.** The 2014 TBT Report address:

(i) Finished interior building materials testing method where Taiwan applies a variation of the ISO 5660 standard for Reaction to Fire Tests, which at the time of adoption by Taiwan was not complete.

(ii) Taiwan requirement to label all consumer goods with the manufacturer's or producer's name, telephone number, and address, imposing extra costs for firms, including the cost of developing unique labeling requirements for the Taiwanese market.

- **Turkey.** The 2014 TBT Report notes:

(i) Turkey's requirement for foreign pharmaceutical producers to secure a GMP certificate based on a manufacturing plant inspection by Turkish Ministry of Health (MOH) to sell products on the Turkish market.

(ii) Mandatory labeling of ingredients derived from biotechnology in all food and feed if the biotechnology content exceeds a certain threshold, a requirement that impedes US food and feed exports to Turkey.

Outlook

The annual publication of the TBT Report signifies both a metric for measuring the Obama Administration's success at eliminating unwarranted standards-related measures during the previous year as well as an agenda for furthering such efforts within the next year. In this regard, the 2014 TBT Report highlights several of the Administration's accomplishments from previous years.

For example, this includes US involvement in APEC in 2013 involving the promotion of good regulatory practices helping to identify and resolve trade concerns before proposed measures are finalized. This also included work to prevent governments from creating new standards-related barriers in several emerging industries, such as energy efficiency, information and communication technologies, commercial green building standards, and development of codes and modeling. Move over, continuous work to negotiate a TBT chapter in the TPP, and push for inclusion of a TBT chapter in the TIPP presents an opportunity to reduce and eliminate burdensome standards related measures and to expand market opportunities for US goods and services exports.

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USTR Releases Results of 2014 Section 1377 Review of Telecommunications Trade Agreements

Summary

On April 4, 2013, the Office of the United States Trade Representative (USTR) released its annual Section 1377 Review of Telecommunications Trade Agreements ("2014 Report").[6] This review focuses on issues contemplated in US trade agreements relating to: (i) internet-enabled trade in services, including cross-border data flows and Voice over Internet Protocol (VoIP) services, (ii) regulatory independence and effectiveness; (iii) foreign investment limitations; (iv) competition regulation; (v) international termination rates; (vi) satellite services; (vii) submarine cable systems; (viii) telecommunications equipment trade; and (ix) local content requirements.

Analysis

Pursuant to Section 1377 of the *Omnibus Trade and Competitiveness Act of 1988*, USTR conducts an annual review of the operation and effectiveness of US free trade agreements (FTAs) with respect to telecommunications products and services. These FTAs include: (i) the World Trade Organization (WTO) General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS); (ii) the North American Free Trade Agreement (NAFTA); (iii) the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR); and (iii) bilateral agreements with Australia, Bahrain, Chile, Colombia, Israel, Jordan, Korea, Morocco, Oman, Panama, Peru and Singapore. The 2014 Report bases its findings on public comments filed by interested parties and on information obtained from foreign government officials and private sector representatives.

I. INTERNET-ENABLED TRADE IN SERVICES

The 2014 Report highlights the negative impact of barriers to **cross-border data flows**, which affects the ability to supply telecommunications services and for covered services needing access and use of telecommunications networks. Specifically, USTR emphasizes developments in Turkey and the EU that underscore this concern.

- **Turkey's New Privacy Law.** Law 5651, amended on February 6, 2014 by the Turkish legislature, grants the Turkish Telecommunications Directorate authority to order websites blocked pending a court order and to penalize Internet service providers for failing to cooperate. According to the UN Office of the High Commissioner for Human Rights, Turkey has closed the operations of approximately 37,000 websites since the law entered into force. In addition, the *Regulation on Processing and Protection of Confidentiality of Personal Data in the Electronic Communication Sector* has introduced an additional layer of restrictions. In effect since January 1, 2014, the Regulation imposes strict prohibitions on transfers of personal data outside of

[6] The report is available here: http://www.ustr.gov/sites/default/files/2013-14%20-1377Report-final.pdf

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Turkey by telecommunications providers in Turkey. USTR notes that it remains unclear how either telephone service (*e.g.* satellite-based services, or mobile roaming services), or other Internet-based services, offered on a cross-border basis in accordance with Turkey's WTO commitments, can be offered in compliance with such strict rules.

- **The EU's Schengen Cloud Proposal.** The 2014 Report cautions that recent proposals by EU member states to create national-only or EU-only (the so-called Schengen cloud) electronic network may discriminate against foreign service suppliers that are directly offering network services, or dependent on them. USTR reasons that requirement to route all traffic involving EU consumers within Europe would decrease efficiency and stifle innovation, given the breadth of services that rely on geographically dispersed data processing and storage.

In addition, the 2014 Report notes that restrictions on **VoIP** services imposed by certain countries have effectively restricted trade and unduly granted preference to local suppliers. According to USTR, VoIP is an important alternative to traditional phone service. However, it is increasingly facing restrictions to growth, namely in China and India. The requirement that a VoIP supplier must first obtain a value-added service (VAS) license, accompanied by China's related licensing requirements, including capitalization levels exceeding one hundred million (USD) and possession of a mandatory telecommunications license in order to interconnect with the public switched network, make it difficult for a VoIP supplier to do business when its operations would not otherwise require investment in or control of transmission facilities. Similarly, India currently only allows VoIP in closed user groups (CUGs), which is a communications network between branches of a single company.

II. INDEPENDENT AND EFFECTIVE REGULATOR

The 2014 Report highlights the lack of an independent and effective telecommunications regulator in China, which limits meaningful market access for companies. USTR finds that the Ministry of Industry and Information Technology (MIIT), China's regulator, has actively worked to consolidate domestic market participants and has often shielded China's state-owned operators from competition, both domestic and foreign. Moreover, the Chinese Government owns and controls the three major basic operators in the telecommunications industry. USTR urges China to implement policies that establish MIIT as an independent regulator by (i) resolving conflicts of interest and (ii) revising its current draft of the Telecommunications Law.

III. FOREIGN INVESTMENT

The 2014 Reports shares evidence of foreign investment limits as a trade distortion, even in instances in which they otherwise reflect the country's commitments under GATS. In particular, USTR highlights developments in two countries that it aims to prioritize in ongoing and future trade negotiations that further telecommunications liberalization.

- **China**. Generally, USTR continues to urge China to lift its foreign equity caps in the telecommunications sector, now 49 percent for basic service licenses, and 50 percent for VAS licenses. In addition, USTR encourages China to eliminate the requirement that a foreign company must enter into a joint venture with a state-owned enterprise (SOE) in order to obtain a basic service license. USTR also raises concerns on specific regulations, namely the *Catalog of*

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Telecommunications Service Categories and *New Types of Telecom Businesses Trial Operation Measures*, which effectively expands coverage of China's licensing regime and operating restrictions.

- **Vietnam**. USTR states that the United States is negotiating with Vietnam to eliminate Decree No. 25 in the context of the Trans-Pacific Partnership (TPP), even though the limits are consistent with Vietnam's WTO commitments. Decree No. 25 limits foreign investment to 49 percent for providing telecommunications network service, and 65 percent for VAS.

IV. COMPETITION REGULATION

In this section, the 2014 Report highlights various instances in which US companies have encountered difficulties in competing on a level playing field. In particular, USTR has provided examples of such competitive impediments in Colombia, Mexico, and Uruguay.

- **Colombia.** The 2014 Report includes a report by Avantel, a US-affiliated operator, concerning its inability to obtain roaming agreements in Columbia with incumbent mobile operators, which it asserts that it needs in order to launch a 4G mobile service based on spectrum it won in an auction om 2013.

- **Mexico.** The 2014 report notes that Mexico contains a highly concentrated telecommunications and video services market. In addition, Mexico has implemented conditions for America Móvil, the largest provider of telecommunications services in Mexico, to meet before it can provide video services and offer bundled services for voice, data, and video to customers. Proponents of these restrictions believe that America Movil, through bundling and cross-subsidization practices, would resort to artificially low prices adversely affecting competition. However, opponents of these conditions, including the United States Council for International Business (USCIB), assert that requiring America Móvil to meet these conditions will itself limit competition and lead to low penetration rate for pay television services in Mexico. In this respect, USTR supports efforts by the Mexican Government to promote greater market entry, where the resulting competition that would benefit US content suppliers.

- **Uruguay.** USTR finds that Decree 775, issued in December 2012, is counterproductive to pay television providers seeking a nation-wide footprint in serving customers. Decree 775 limits providers that offer service on a national basis to serving 25 percent of total households. Moreover, the *Audiovisual Media Services Bill*, contemplated by the Uruguayan Congress, will extend this cap. Specifically, Article 46 of the bill provides that "the total number of pay television subscribers of television companies in the national territory shall not exceed 25 percent of the total households with pay television in the entire country.

V. INTERNATIONAL TERMINATION RATES

Termination rates refer to the cost a foreign telecommunications operator charges a US operator to terminate (*i.e.* route) the call on the foreign operator's network and deliver the call to a local consumer. In this respect, USTR finds that more foreign governments are taking actions that may have the effect of increasing in the termination rates of calls into their countries.

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- **Pakistan**. Thirteen Pakistani carriers, in August 2012, supported the creation of an "International Clearing House" (ICH) agreement, which terminate inbound international calls in Pakistan at a significantly above-cost rate approved by the Pakistani Telecommunications Authority (PTA). The PTA-approved price is USD 0.088 per minute, an increase of approximately 400 percent over the competitive market rate that existed prior to the ICH agreement. In response, the US Federal Communications Commission (FCC) on March 5, 2013 ordered all US carriers not to pay termination rates to Pakistani carriers in excess of the rates that were in effect immediately prior to the rate increase.

- **Tonga**. Although the Tongan Government has removed its former minimum termination rate of USD 0.30 per minute, USTR reports that the government-owned Tonga Communications Corporation (TCC) refuses to negotiate cost-oriented termination rates and continues to block the circuits of US carriers that do not accept its rate demands. USTR cautions that these actions may be inconsistent with Tonga's commitments under the GATS Reference Paper and the GATS Annex on Telecommunications,

- **Fiji**. The Fijian government requires Fiji International (Fintel), the major supplier of telecommunications services, to charge US carriers above-benchmark settlement rates since 2011. However, the International Bureau of the FCC on March 7, 2013 released an order prohibiting US carriers from paying Fintel termination rates in excess of the USD 0.19 per minute.

- **Uganda**. USTR finds that Uganda's tax of USD 0.09 on inbound international calls, legislated in 2013, increases international termination rates without any demonstration of increased costs. In light of this development, USTR is concerned with Uganda's commitment under the GATS Reference Paper and the GATS Annex on Telecommunications.

VI. SATELLITE SERVICES

The 2014 Report highlights the prevailing issues in China and India concerning transparency and restrictive requirements to the detriment of US operators' ability to offer satellite capacity to customers.

- **China.** The 2014 Report notes that China Satellite Communications Co. Ltd. (China Satcom) is the only authorized domestic satellite provider in China. China has granted no other licenses to domestic companies to operate services directly to users. Additionally, the provision of services by international satellite companies is currently limited to two companies, both of which are partially owned by the Chinese government.

- **India.** For C-band VSAT services on a foreign satellite, India requires that VSAT operators route connectivity through the Indian Space Research Organization (ISRO). Moreover, end-users in India may only uplink through Indian satellites for Ku-band services. No foreign satellite operator may provide any Ku-band capacity to an end-user in India unless it does so via Antrix, a state-owned company functioning as the commercial and marketing arm of ISRO. India's Ministry of Information and Broadcasting (MIB) has also established guidelines that dictate a preference for domestic satellites to provide capacity for delivery of Direct-to-Home (DTH) subscription

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television services. Authorized DTH licensees have been unable to contract directly with foreign operators, and must procure foreign satellite capacity through Antrix.

VII. SUBMARINE CABLE SYSTEMS

USTR applauds the Telecom Regulator Authority of India (TRAI) for taking positive steps in 2012 to decrease access and collection charges at India's submarine cable landing stations. However, as a result of judicial challenges in 2013 by Tata Telecommunications and Bharti Airtel, both of which own the majority of cable landing stations in India, the Madras High Court stayed the implementation of the TRAI decision. USTR looks forward to the immediate and expeditious resolution of these legal challenges.

VIII. TELECOMMUNICATIONS EQUIPMENT

In this area of trade, the 2014 Report highlights various concerns, specifically government-prescribed encryption standards and concerns regarding the transparency of assessment requirements in China as well as certain licensing requirements in India, while noting broad developments related to conformity assessments and mutual recognition.

<u>China</u>

- **Multi-Level Protection Scheme**. The 2014 Report notes that USTR remains concerned with Chinese framework regulations for information security in critical infrastructure known as the Multi-Level Protection Scheme (MLPS). MLPS contains guidelines to categorize the extent of a breach in terms of its effects on social order, public interest, and national security. If China applies these rules broadly to networks and the IT sector, it could adversely affect sales by US information technology suppliers to China. USTR will push China to revise these measures through such platforms as the US-China Joint Commission on Commerce and Trade (JCCT).

- **4G Telecommunications ZUC Encryption Algorithm Standard**. China has released the ZUC standard, a Chinese Government developed 4G Long-Term Evolution (LTE) encryption algorithm The 2014 Report notes US industry concern over Chinese authorities having informally announced in early 2012 that only such domestically-developed encryption algorithms as ZUC would be allowed for the network equipment and mobile devices comprising 4G TD-LTE networks in China. US industry also expresses concern over the potential for future testing procedures that could threaten companies' sensitive intellectual property. In 2013, China committed that it will not require applicants to divulge source code or other sensitive business information in order to comply with the ZUC provisions in the MIIT application process for 4G devices.

<u>India</u>

- **License Amendments Affecting Importation of Telecommunications Equipment.** The 2014 Report note that India has amended previous licensing requirements affecting the importation of telecommunications equipment. However, concerns remain over: (i) the requirement for telecommunications equipment vendors to test all imported ICT equipment in Indian labs; (ii) the

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condition that government agencies have to inspect manufacturing facilities and supply chains for security reasons; and (iii) the prerequisite that vendors assume strict liability and risk possible blacklisting without the right to appeal.

General Concerns with Conformity Assessment Requirements

The 2013 Report acknowledges that mandatory certification requirements maintained by China, Costa Rica, India, and Brazil, as well as requirements maintained by Brazil, China, and India that equipment be tested domestically, are areas of concern. According to USTR, requirements of domestic testing on telecommunications and ICT equipment can lead to redundant testing, particularly where a product is required to undergo testing to the same standard in both the exporting and importing country.

Mutual Recognition Agreements (MRA)

In December 2013, the US-Israel telecom MRA entered into force, permitting recognized US labs to test telecommunications products for conformity with Israeli technical requirements, and vice versa. However, the US-Mexico telecom MRA, signed in May 2011, has not entered into force. Although the agreement allowed for an 18-month confidence-building period, Mexico still has gaps remaining with respect to the implementation of necessary systems to accept test results from US labs.

IX. LOCAL CONTENT REQUIREMENTS

The 2014 Report cites the adoption or continued application of local-content requirements, of which governments pursue to boost their respective domestic manufacturing sectors. However, USTR notes that these policies raises serious concerns with respect to its consistency with multilateral and bilateral trade rules, including the GATT, the WTO Agreement on Trade-Related Investment Measures (TRIMs), and FTAs with the United States.

- **Brazil's 450 MHz and 2.5 GHz Spectrum Auction.** The 2014 Report notes that, recalling requirements related to the spectrum auction in the 450 MHz and 2.5 GHz bands, local content requirements by the Brazil's National Telecommunications Agency now loom as increasingly significant in view of the upcoming 2014 700 MHz spectrum auction. USTR expresses concern that Brazil may repeat the imposition of its local content requirements on companies seeking to bid on the 700 MHz spectrum, although there has been no formal announcement on this matter to date.

- **India's Preferential Market Access (PMA).** India issued its Preferential Market Access (PMA) notification in February 2012, which requires government entities to purchase domestically manufactured ICT equipment. In December 2013, India issued a revised PMA policy and continues to require that domestically manufactured goods constitute a certain percentage of the electronic products procured by government entities.

- **Indonesia's Domestic Manufacturing Requirements.** The 2014 Report highlights that since 2006, Indonesia has been working to implement domestic content requirements for telecommunications service providers. New regulations by the Ministry of Communications and

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Information Technology since 2009 have reinforced this requirement by stipulating a minimum local content requirement on wireless broadband services.

Outlook

The United States has made considerable progress in the past year on a number of fronts to improve trade in telecommunications through the reduction in certain countries of existing impediments to more open market access and the improvement of in-country access to major supplier networks. Nevertheless, many barriers presented in the 2012 and 2013 Reports remain ever present.

In addition, new and potentially more insidious barriers have started to emerge under the guise of quality control, privacy protection or network security measures. Particularly, growing localization requirements may pose a challenge to companies and global trade rules. These requirements, particularly those related to cross-border data flows and local content, will likely be a key focus of USTR for 2014.

Finally, it is clear that various competitive barriers in the two largest telecom markets in the world – China and India – remain a major focal point of concern for USTR, as it seeks to promote more open, efficient and competitive telecommunications markets around the world.

US General Trade Policy Highlights

House Ways and Means Committee Chairman Dave Camp Announces Retirement

On March 31, 2014, House Ways and Means Committee Chair Dave Camp (R-MI) announced that he would not seek reelection during the 2014 US midterm elections. Despite Chairman Camp's impending departure from the House committee most responsible for US trade policy, he insisted that he would emphasize "finding new markets for US goods and services" during the remainder of his term. His other policy priorities include reform of the US tax code, healthcare, and social security.

Nevertheless, Chairman Camp's pending retirement could diminish his influence over the US trade agenda and, combined with former Senate Finance Committee Sen. Max Baucus' (D-MT) departure from Congress to serve as US Ambassador to China, leaves congressional trade policy in a state of flux. This uncertainty is particularly important, given several pending US free trade initiatives, such as the Bipartisan Congressional Trade Priorities Act of 2014 that renews Trade Promotion Authority (TPA), which Chairman Camp and Sen. Baucus co-authored, as well as the Trans-Pacific Partnership (TPP), Transatlantic Trade and Investment Partnership (TTIP), and renewal of the Generalized System of Preferences (GSP). Chairman Camp's retirement could diminish his influence over these initiatives.

Rep. Camp's successor to the Ways and Means Chairmanship will not be named until the start of the new Congress in January 2015. Nevertheless, Reps. Paul Ryan (R-WI) and Kevin Brady (R-TX) have expressed an interest in the position, both of whom have historically supported US trade

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liberalization initiatives. Rep. Brady is the more senior lawmaker, but Rep. Ryan's "rising star" status in the Republican Party could propel him to the Chairmanship of the influential tax and budget committee. Although the Obama Administration's free trade initiatives will lose a strong congressional supporter in Camp, Chairman Camp's retirement could encourage the Administration to work more closely with other Members of Congress to bolster support for US trade policy positions.

Click here for Chairman Camp's press release.

GSP Renewal Momentum Receives Boost from Ukraine Aid Considerations

Senate lawmakers and Obama Administration officials have recently indicated that Ukraine would benefit greatly from the Generalized System of Preferences (GSP), providing fresh impetus for renewal efforts since its expiration on July 31, 2013. Given the current gridlock in Congress concerning Trade Promotion Authority (TPA), widely regarded as the principal legislative vehicle for GSP renewal, Ukraine-related bills in the near term may prove to be the platform for supporters of GSP to affix reauthorization provisions. This may also support congressional engagement on GSP issues during an otherwise quiet time for trade, due to preparations for the upcoming 2014 US midterm elections in November 2014.

Prior to GSP's expiration, Ukraine was a beneficiary of the program. Notably, Ukraine had lost its beneficiary status from 2001-2005 due to its lack of enforcement of intellectual property rights (IPR). However, after remedial efforts by the Ukraine government (including its Laser-Readable Disk Law), the United States in 2006 reinstated GSP benefits for Ukraine and lowered Ukraine's designation under Special 301 from Priority Foreign Country to Priority Watch List. Today, Ukrainian exports to the United States that could benefit the most from GSP renewal include manufactured items, such as iron or steel articles, electrical and railway products, snow skis, protein products such as casein, and certain mineral and metal products.

Support for GSP renewal with respect to Congress' Ukraine goals has surfaced at the top level of Senate trade leadership. Speaking on additional US aid efforts for Ukraine, Sen. Sherrod Brown (D-OH) on April 8, 2014 said, "[GSP] might make the most sense, that would be best thing we can do." Moreover, Senate Finance Committee Chairman Ron Wyden (D-OR) has agreed that renewing GSP could be helpful to Ukraine. Both Sens. Brown and Wyden's views echo those of US Trade Representative (USTR) Michael Froman; during a House Ways and Means Committee hearing on April 3, 2014, USTR Froman stressed that GSP renewal "would benefit Ukraine immediately." Nevertheless, House Ways and Means Ranking Member Sander Levin (D-MI) has indicated that Russia's beneficiary status could prove divisive in discussions surrounding GSP renewal.

Although GSP renewal encounters little opposition in Congress, lawmakers to date have not made a decision on the appropriate legislative format. Congress traditionally includes GSP provisions in larger trade bills, rather than passing a standalone GSP measure. Until recently, it appeared likely that GSP renewal provisions would be attached to the TPA Bill, but the latter has encountered

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significant opposition in Congress and will likely remain immobile for the foreseeable. Despite Sens. Brown and Wyden's views, it is not immediately clear which other bills could incorporate GSP renewal provisions in the near future. The most recent Ukraine-related bill is the Support for the Sovereignty, Integrity, Democracy, and Economic Stability of Ukraine Act of 2014, which President Obama signed into law on April 3, 2014.

USTR Requests Confidential ITC Reports on Green Goods Plurilateral

On April 2, 2014, US Trade Representative (USTR) Michael Froman submitted a request to US International Trade Commission (ITC) Chairman Irving Williamson requesting two separate confidential reports concerning plurilateral negotiations at the World Trade Organization (WTO) toward an agreement to liberalize trade in environmental goods and the implications of such an agreement for the United States. Previously, on March 21, 2014, USTR Froman notified Congress of the Obama Administration's intentions to join 13 WTO Members in the negotiations.

The objectives of the two reports are as follows:

- **Report I.** USTR requests that the first report contain ITC's advice with respect to the likely economic effects, on both domestic manufacturers and consumers, of providing duty-free treatment for imports of environmental goods from all US trading partners. For this analysis, USTR requests that the ITC focus on a list of specific items attached to the request letter. The list goes beyond the September 2012 Asia-Pacific Economic Cooperation (APEC) Members' List of 54 Environmental Goods that WTO negotiations will initially focus on, and includes goods listed under HS chapters 73, 84, and 85. USTR requests delivery of this confidential report no later than August 4, 2014.

- **Report II.** The second report requested by USTR concerns information on a different list of environmental goods. Again, the list of goods goes beyond the APEC List. Specifically, USTR requests ITC to provide the following information for each good: (i) US HTS nomenclature; (ii) specific product examples for "ex-outs" that specify an end use; (iii) major US manufacturers; (iv) the estimated value of imports and exports; (v) possible key US export markets; and (vi) permanent normal trade relations and most-favored nation applied and bound tariff rates in key environmental goods markets. USTR requests delivery of this confidential report no later than October 4, 2014.

In accordance with USTR policy on implementing Executive Order 13526, USTR requests ITC to categorize both reports as confidential for a period of ten years. This information will be classified on the basis that it concerns economic matters relating to the national security of the United States.

Negotiations on the new environmental goods agreement will aim to reduce tariffs by 2015. Although negotiations will "build upon" the September 2012 APEC Members' List of 54 Environmental Goods, participating Members intend to extend product coverage beyond the APEC list. In this respect, the USTR list of goods may be indicative of the future scope of goods that may benefit from the agreement's preferential tariff treatment.

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Smart Track Approach Emerges as Alternative to Current TPA Bill

Senate Finance Committee Chairman Ron Wyden (D-OR) has announced his intention to develop new Trade Promotion Authority (TPA) renewal legislation to replace the stalled Baucus-Camp bill.[7] Speaking at the American Apparel and Footwear Association Conference on April 10, 2014, Sen. Wyden sought to distinguish his "smart track" from the conventional "fast track" approach. He stressed that it would hold US trade negotiators more accountable to Congress and its constituents, and result in US free trade agreements (FTAs) that respond to a broader set of public interests. With respect to the drafting and introduction of the bill, Sen. Wyden added that "substance is going to drive the timeline."

According to Sen. Wyden, the smart track bill would differ from the Baucus-Camp fast track bill on the following counts:

- **Accountability and Transparency**. In response to lawmakers' concerns that Congress does not know "what is at stake or how to weigh in," Sen. Wyden aims to introduce more transparency into trade negotiations. It is likely that Sen. Wyden's proposal will exceed the Baucus-Camp requirements on transparency and Congress-Administration consultations. Such an approach would echo a November 15, 2013 letter by 153 House Democrats to President Obama opposing the Baucus-Camp bill over the lack of these provisions.

  Notably, Sen. Wyden previously introduced the "Congressional Oversight over Trade Negotiations Act" on May 23, 2012, which required the Office of the US Trade Representative (USTR) to give all Members of Congress, as well as their staff with appropriate security clearance, access to FTA negotiating texts. Moreover, House Ways and Means Committee Ranking Member Sander Levin (D-MI) on April 9, 2014 called for the creation of a House-Senate TPP Working Group to provide bipartisan input into US negotiations of the Trans-Pacific Partnership (TPP). In light of these other efforts to increase congressional oversight over US FTAs, the new smart track TPA bill would likely include provisions governing Congress' access to FTA negotiating texts and, subsequently, create a more direct channel for congressional input into US FTA negotiations.

- **Safeguard Mechanism**. Stressing the need for "Congress to right the ship if trade negotiators get off course," Sen. Wyden has indicated that his new bill would allow Congress to revoke privileged procedures (such as the up-or-down ratification vote without the possibility for amendment) for trade agreements that fall short of congressional goals. Sen. Wyden may also consider more flexible conditions and power for Congress to revoke TPA during the FTA negotiating process, should USTR contradict its mandate.

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[7] Senate Finance Committee Chairman Max Baucus (D-MT), Ranking Member Orrin Hatch (R-UT), and House Ways and Means Committee Chairman Dave Camp (R-MI) introduced the "Bipartisan Congressional Trade Priorities Act of 2014 on January 9, 2014 to renew TPA and update US negotiating objectives.

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It is important to note that, aside from certain procedural modifications, Sen. Wyden's alternative TPA approach does not oppose or stray from US FTA goals set forth under the Baucus-Camp TPA bill. In that respect, Sen. Wyden has stressed that any US FTA must include five core areas: (i) a strong enforcement mechanism; (ii) digital trade commitments; (iii) rules to address "predatory trade practices" like state-owned enterprises (SOEs) and indigenous innovation policies; (iv) labor and environmental protections; and (v) ambitious market access commitments. These priorities, particularly those related to trade enforcement, were expected of Sen. Wyden after he succeeded his predecessor, Sen. Max Baucus (D-MT), and will continue to be a key feature of his leadership as Senate Finance Committee Chairman.

Nevertheless, House Ways and Means Member Charles Boustany (R-LA) has cautioned that developing a new TPA bill could undermine existing efforts to renew TPA. During his remarks at the Washington International Trade Association on April 10, 2014, Rep. Boustany noted that significant bipartisan, bicameral work went into the Baucus-Camp bill and that Congress needs to act on TPA soon to facilitate the conclusion of the TPP negotiations. This suggests that Congress cannot afford to undergo another round of politicking that would destabilize Congress' already delicate trade consensus.

Regardless of whether Sen. Wyden's efforts result in a new bill or amendments to the Baucus-Camp bill, it is likely Members of Congress will welcome Sen. Wyden's smart track approach. It is clear that the concept of TPA poses problems principally from a public relations perspective, rather than a policy perspective. Compared to the TPA bill of 2002, the Baucus-Camp bill of TPA 2014 already strengthens Congress' oversight by adding consultation and reporting requirements. However, the bill has not succeeded in allaying lawmakers' concerns that certain aspects of TPA, particularly those surrounding the up-or-down ratification vote, continue to reduce the possibility for meaningful review. As a result, giving lawmakers the opportunity to vote for a TPA with even greater congressional oversight may increase support for the bill, although it remains unclear whether this will be sufficient to secure the renewal of TPA before the 2014 midterm elections.

Click here for a transcript of Sen. Wyden's remarks and here for the November 15, 2013 letter.

DOE Authorizes Exports from Kenai LNG Facility to Non-FTA Countries

On April 14, 2014, the Department of Energy (DOE) issued an order granting blanket authorization to export liquefied natural gas (LNG) from the Kenai LNG facility to countries with which the United States has not entered into a free trade agreement (FTA). A blanket authorization refers to the ability to export on a short-term or spot market basis for a period of up to two years. As a result, the Kenai LNG facility, located near Kenai, Alaska, may export as much as 40 billion cubic feet of natural gas extracted from fields in the Cook Inlet region of Southcentral Alaska until April 13, 2016. Notably, since its first authorization in 1967, the facility has supplied LNG mainly to Japan, specifically the Tokyo Electric Power Company and Tokyo Gas Company Limited.

The prior export license for the Kenai facility expired on March 31, 2013 and exports consequently ceased. Previously, DOE had renewed export licenses for the Kenai LNG facility several times since

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its inception in 1967, resulting in no interruptions to export flows. This time, ConocoPhillips, the operator and owner of the facility, decided not to see not seek an extension because of "uncertainties regarding the near-term adequacy of natural gas supplies in the Cook Inlet region for regional needs." ConocoPhillips later determined that circumstances had changed and on December 11, 2013 submitted its request to the DOE for a new two-year blanket authorization.

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."

Sen. Lisa Murkowski (R-AL), a strong supporter of liberalized US export restrictions on oil and natural gas, commented in a press release dated April 14, 2014 that the DOE approval means "ConocoPhillips will be able to add to Alaska's 40-year history of supplying natural gas to Japan." This comment comes just a few days after further lobbying efforts by Sen. Murkowski's to lift the ban on LNG exports. On April 11, 2014, Sen. Murkowski filed a letter with the Energy Information Administration (EIA) requesting that it conduct a "dynamic and ongoing" analysis of issues related to lifting the ban on LNG exports. The request letter, co-signed by Senate Energy and Natural Resources Committee Chairwoman Sen. Mary Landrieu (D-LA), seeks information concerning, *inter alia*, the economic impact of current and alternative US LNG export policies.

Click here for a copy of the DOE order and here for the request letter to EIA.

USTR Requests Public Comments for WTO Dispute with China on Aspects of US Targeted Dumping and NME Methodologies

On April 8, 2014, the Office of the United States Trade Representative (USTR) published a request for comments on the recently established WTO dispute settlement panel concerning *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China* (DS471). Comments to USTR are due by May 2, 2014. USTR has so far received one confidential comment from an undisclosed source.

On February 13, 2014, China requested the World Trade Organization (WTO) Dispute Settlement Body (DSB) to establish a dispute settlement panel to rule on the WTO-consistency of certain aspects of the United States' antidumping (AD) calculation methodology, including the use of "zeroing" by the US Department of Commerce (DOC) in AD investigations involving "targeted dumping." Although the United States blocked China's first panel request at the DSB meeting on February 26, 2014, China's second request triggered an automatic panel establishment on March 26, 2014. 13 WTO members have reserved third party rights: Brazil, Canada, the EU, India, Japan, Korea, Norway, Russia, Saudi Arabia, Ukraine, Taiwan, Turkey, and Vietnam. This is the second WTO dispute involving a challenge to the United States' "targeted dumping" methodology. The first dispute is *United States - Anti-dumping and Countervailing Measures on large residential washers from Korea* (DS464), and a panel was established on January 22, 2014.

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USTR is requesting comments concerning the issues raised by China. In the DS471 dispute, China has advanced claims under the WTO Anti-Dumping Agreement (ADA) related to the United States' application of its (i) targeted dumping methodology; (ii) approach to non-market economies (NMEs); and (iii) use of adverse facts available. In addition, for each DOC measure or practice China challenges, annexes to China's panel request list DOC determinations in various AD investigations where DOC applied the allegedly WTO-inconsistent methodology.

Given the novel and contentious issue of "zeroing" in "targeted dumping" investigations, DS471 and DS464 have garnered significant attention from US companies, foreign exporters, and other WTO Members. A final panel decision in either case, however, will not be issued until the end of 2014 at the earliest, and would likely be appealed by one or both parties to the dispute. In the meantime, it is expected that DOC will continue to apply "zeroing" in "targeted dumping" cases, and that such allegations will therefore continue to be levied by US petitioners.

Click here for USTR's notice, here for the status of DS471 and here for DS464.

ITC Publishes Requested Report on AGOA Trade and Investment Performance

On April 25, 2014, the US International Trade Commission (ITC) published its report titled "AGOA: Trade and Investment Performance Overview." The Office of the US Trade Representative (USTR) requested this public report on September 30, 2013, in order to assess the impact of the African Growth and Opportunity Act (AGOA) on its beneficiary countries of sub-Saharan Africa (SSA). According to the report, although AGOA's impact on exports from SSA has varied, it has largely been positive and consistent with AGOA's objectives.

As requested by USTR, the report describes, reviews, and analyzes the trade and investment performance of beneficiary countries under AGOA from 2000 to 2013. It also examines potential products for export to the United States or for integration into regional and global supply chains and examines changes in the business and investment climate in SSA. Additionally, it examines trade agreements between SSA and non-SSA partners and the relationship between those agreements and the objectives of AGOA. The ITC, in line with standard practice, makes no recommendations on policy or other matters in its report.

Key findings of the report are as follows:

- **Exports entering the United States under AGOA accounted for approximately 70 percent of all imports from beneficiary countries between 2008 and 2013.** Generally, crude petroleum accounted for almost 90 percent of these imports. Excluding crude petroleum, AGOA exports to the United States are concentrated in three sectors: transportation equipment (primarily passenger motor vehicles from South Africa), refined petroleum products, and apparel. These products accounted for 89 percent of non-crude petroleum imports under AGOA in 2013.

- **Some beneficiaries are developing strategies to increase export opportunities under AGOA**. AGOA-related efforts have incorporated regional integration and export diversification initiatives. However, the ITC finds supply-side constraints as the main obstacles to increasing and diversifying AGOA exports.

- **AGOA's trade benefits and eligibility requirements are linked to actions by its beneficiaries that seek to improve their business climates**. Nevertheless, some studies cited in the report suggest that free trade agreements (FTAs) may have certain advantages over trade preference programs such as AGOA, and may have a greater impact on economic development. Whereas unilateral trade preference programs imply a one-way flow of benefits, reciprocal trade agreements generally result in mutual benefits (and obligations) for parties involved. However, certain AGOA beneficiaries have asserted that while FTAs between the United States and SSA remain one of AGOA's objectives, the AGOA reauthorization process does not necessarily provide the appropriate framework to discuss FTA-related concerns.

AGOA was signed into law on May 18, 2000, as part of the Trade and Development Act of 2000, and will expire on September 30, 2015. AGOA is similar to the Generalized System of Preferences (GSP) in terms of tariff benefits and general eligibility criteria, but has broader product coverage and additional eligibility criteria beyond those in GSP. AGOA also includes trade and development provisions beyond duty-free treatment, including the provision of technical assistance and trade capacity building to AGOA beneficiary countries by the US government.

The findings of the report suggest that the impact of AGOA on beneficiary countries is still a work in progress. Nevertheless, there is little question that the ITC report supports the consensus among the Obama Administration, Congress, and AGOA beneficiaries that AGOA should be reauthorized. Likewise, AGOA reauthorization already has the public support of the National Retail Federation, the African Cotton and Textile Industries Federation, the American Apparel and Footwear Association, the Outdoor Industry Association, the Retail Industry Leaders Association, and the United States Association of Importers of Textiles and Apparel.

However, similar to the GSP reauthorization debate, efforts to renew AGOA have led to discussions concerning AGOA's provisions. Lawmakers have expressed in interest in updating AGOA to reflect the economic development goals of SSA and US efforts to encourage greater two-way trade. However, despite this perennial interest, USTR Michael Froman asserted on August 12, 2013, "it is very possible that [the United States] will conclude that AGOA should just be renewed as is."

Click here for a copy of the report and here for more information on AGOA.

ITA Publishes Final Rule Concerning Targeted Dumping in AD Proceedings

On April 22, 2014, the International Trade Administration (ITA) of the Department of Commerce (DOC) published in the Federal Register a final rule (79 FR 22371) in an attempt to clarify the status of previously withdrawn targeted dumping regulations. The DOC's practice regarding targeted dumping has been in flux since December 2008, when DOC withdrew regulations that previously had governed targeted dumping in AD investigations as expressed in its interim final rule (73 FR 74930) on December 10, 2008. The final rule determined that DOC would continue to not apply the

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withdrawn targeted dumping regulations in AD investigations.

Targeted dumping occurs when there is a pattern of export prices that differ significantly among purchasers, regions, or periods of time, and such differences cannot be taken into account using the DOC's normal dumping margin calculation methodologies. Normally, DOC will calculate margins by one of two methods (1) "average-to-average method" - comparing the weighted average of normal values to the weighted average of export prices for comparable merchandise, or (2) "transaction-to-transaction method" – comparing the normal value of individual transactions to the export prices of individual transactions for comparable merchandise. If DOC finds targeted dumping, DOC instead calculates margins using an "average-to-transaction method" that compares the weighted average of the normal values to the export prices of individual transactions of comparable merchandise.

The final rule is DOC's latest attempt to clarify and defend its targeted dumping practice after the Court of International Trade's (CIT) June 2013 decision in *Gold East (Jiangsu) Paper Co. v. United States*, 918 F. Supp. 2d 1317, in which CIT ordered the DOC to reconsider its final determination in that case because the CIT found that DOC had failed to demonstrate that the withdrawn targeted dumping regulations were properly withdrawn in 2008. DOC's previous regulations on targeted dumping provided that when DOC found targeted dumping, the application of the average-to-transaction method could be applied only to the sales that constituted targeted dumping ("limiting rule"). DOC, however, had argued that the targeted dumping regulations had been properly withdrawn in December 2008 and, thus, was no longer required to limits the average-to-transaction method only to the targeted sales, but could apply this method to all sales, including the non-targeted sales. The CIT found that the prior targeted dumping regulations should still be applied in that proceeding because there was a procedural defect in the rulemaking process in which DOC did not provide the requisite notice and opportunity to comment on the proposed withdrawal of the targeted dumping regulations. Although DOC is appealing the CIT's decision regarding the applicability of the withdrawn targeted dumping regulations, DOC determined that this rulemaking was necessary to clarify through proper notice and comment procedures whether the withdrawn targeted dumping regulations should be reinstated or to continue to treat them as withdrawn.

The final rule published on April 22, 2014 noted the DOC had in February 2012 published notice of a rule ("2012 Final Modification") that modified its methodology for calculating dumping margins in certain AD review proceedings and did not include specifically the "limiting rule" in the changes to the applicable regulations.[8] DOC noted that the withdrawn targeted dumping regulations and the revised regulations resulted from the 2012 Final Modification, together with the new final rule, established that the method by which the Department determines whether it is appropriate to use the average-to-average method may continue to evolve as DOC further develops in this area. Although commenters argued that DOC was now making targeted dumping determinations on an *ad hoc*, undefined basis that lacks parameters, principles, transparency, and predictability, DOC found that the withdrawal of the targeted dumping regulations and case-by-case adjudication would allow DOC

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[8] Please see Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification, 77 FR 8101, dated February 14, 2012, available here.

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to exercise the discretion intended by the statute and thereby develop a practice that will allow interested parties to pursue all statutory avenues of relief in this area.

As a result of DOC's latest rulemaking, DOC has taken yet another step to try to distance itself from its prior regulations and practice regarding targeted dumping. By confirming that the previous targeted dumping regulations had been withdrawn and no longer in effect, DOC, therefore, has clarified that it will determine on a case-by-case basis whether to apply an alternative comparison method instead of either of the normal average-to-average or transaction-to-transaction methods. Since 2008, DOC's targeted dumping practice has been subject to substantial litigation that is likely to continue and even increase, given that DOC has emphasized it will not issue any bright line rules for when and how it will apply targeted dumping, but rather will continue to evaluate the particular facts of each case and determine whether the alternative comparison methods should be applied.

This final rule takes effect on May 22, 2014, and will apply to all less-than-fair-value investigations initiated thereafter.

Click here for 79 FR 22371 and here for 73 FR 74930.

USTR Removes the Philippines from Special 301 Watch List

The Office of the United States Trade Representative (USTR) has recently removed the Philippines from the Special 301 Watch List. In its announcement dated April 28, 2014, USTR noted that the results of significant reforms and the commitment of Philippine authorities to address unresolved issues have merited the change in status. In effect, the delisting means the Philippines no longer warrants attention at the bilateral level to address intellectual property rights (IPR) issues.

Section 182 of the Trade Act of 1974 ("Trade Act"), under the Special 301 provisions, requires USTR to identify countries that deny adequate and effective protection of IPR or deny fair and equitable market access to US persons who rely on IPR protection. In that respect, a country's placement on the Priority Watch List or Watch List indicates that particular problems exist in that country or economy with respect to IPR protection, enforcement, or market access for persons relying on intellectual property. Since 1994, the Philippines has appeared on the Watch List or Priority Watch List continuously.

Based on USTR's 2013 Special 301 Report, an annual review of the state of IPR protection and enforcement of US trading partners, it indicates that the reforms and commitment of the Philippines motivating USTR's decisions comprises one or more of the following:

- **Updated IPR Laws.** The most significant reform is Republic Act No. 10372, which amended certain provisions of Republic Act No. 8293 on the *Intellectual Property Code of the Philippines*. Signed into law on February 28, 2013, Republic Act No. 10372 comprises provisions, *inter alia*, granting enforcement and visitorial powers to the Intellectual Property Office of the Philippines (IPOPHL), introducing secondary liability in copyright infringement, providing legal remedies for the circumvention of technology protection measures (TPMs) and rights management information (RMI), and establishing the Bureau of Copyright. USTR notes that this particular effort reflects the Philippines' success in meeting its obligations under the World Intellectual Property Organization (WIPO) Internet Treaties.

- **Accession to the Madrid Protocol**. On April 25, 2012, the World Intellectual Property Organization (WIPO) announced the deposit of the Philippines' instrument of accession of the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* ("Madrid Protocol"). The Madrid Protocol, one of two treaties under the Madrid System, allows trademark holders in contracting parties to secure protection for their trademarks in multiple foreign jurisdictions through the completion of a single application.[1] The Madrid Protocol entered into force in the Philippines on July 25, 2012, after which the IPOPHL began accepting applications filed via the Madrid Protocol.

- **IPR Enforcement Efforts.** The United States has welcomed consistent IPR enforcement efforts in the Philippines and, especially, the continuing drop in the incidence of unauthorized camcording of motion pictures in theaters. Moreover, the Philippines Optical Media Board (OMB) under the Office of the President continues to lead local enforcement and consumer education efforts to address optical media piracy.

Despite these successes in the Philippines, USTR remains concerned about (i) from a policy perspective – amendments to the Patent Law that limit the patentability of certain chemical forms unless the applicant demonstrates increased efficacy and (ii) from an enforcement perspective – the need to strengthen criminal enforcement of IPR and to improve predictability with respect to search and seizure orders. There is no restriction preventing USTR from relisting the Philippines on the Watch List, and it has done so with other US trading partners when challenges to IPR reemerge.

The delisting of Philippines also coincides with President Obama's visit to the Philippines on April 28, 2014. Philippines IPR agencies have consulted with its US counterparts for many years on the Special 301 issue, whose efforts appear to have culminated in Philippines' delisting as a deliverable of US-Philippine cooperation. Earlier in 2012, USTR also removed the Philippines from the Special 301 Out-of-Cycle Review of Notorious Markets for 2013, which identified markets, including both physical and Internet markets, as examples of marketplaces that have been the subject of enforcement action or that may merit further investigation for possible IPR infringements.

IPOPHL officials have welcomed the Philippines' removal from the Watch List. The Philippines government also reiterated its commitment to develop a reputation as a "champion for IPR enforcement in the Southeast Asian region" and to increase awareness of IPR protection among its other law enforcement agencies and their officials, prosecutors, members of the judiciary, and academic institutions in the country.

Click here for USTR's announcement, here for USTR's 2013 Special 301 Report, and here for Republic Act No. 10372.

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FREE TRADE AGREEMENTS

Free Trade Agreement Highlights

House Lawmakers Launch Bipartisan TTIP Caucus

On April 3, 2014, Reps. Erik Paulsen (R-MN), Todd Young (R-IN), William Keating (D-MA), and Richard Neal (D-MA) launched a bipartisan caucus in support of the Transatlantic Trade and Investment Partnership (TTIP). The TTIP Caucus aims to serve as a vehicle to engage and educate other House lawmakers on the potential benefits of TTIP, as well as to rally congressional support for the agreement. According to Rep. Paulsen, the TTIP Caucus includes support from approximately a dozen House members in addition to the four co-chairmen. He expects this number to double quickly.

The timing of the TTIP Caucus' launch is noteworthy. Unlike the Friends of the Trans-Pacific Partnership (TPP) Caucus that formed late into the TTP negotiations (after 18 rounds), House lawmakers have established the TTIP Caucus comparatively early in the negotiating process (after 4 rounds). This timing likely reflects the increasing need for strong congressional support for US free trade agreements (FTAs) early on in negotiations in order to avoid last-minute disagreements that could derail domestic ratification, or even prompt undesirable changes to the actual agreement. The call by House and Senate lawmakers for currency manipulation disciplines in the TPP is one clear example. Particularly for US FTAs with profound implications for US trade policy and the domestic economy, the backlash surrounding the ongoing TPP negotiations offers lessons for both the Obama Administration and Congress. Trade issues can be highly divisive and polarizing without a strong foundation of communication and consensus.

The last TTIP negotiating round took place in Brussels from March 10-14, 2014 where negotiators discussed market access, regulations, and rules. The 5th round of negotiations will take place in Washington, DC before the summer.

Senate Foreign Relations Report Recommends Expansion of US FTAs with Asia, Says Economic Statecraft Requires Greater Emphasis and Clarity

On April 17, 2014, Senate Foreign Relations Committee Chairman Robert Menendez (D-NJ) released a report titled "Rebalancing the Rebalance: Resourcing US Diplomatic Strategy in the Asia-Pacific Region." Based on extensive consultations[9] in the United States and abroad, the report

[9] Chairman Menendez traveled to Asia in August of 2013 to engage in discussions in Japan, Korea, Taiwan, and China on US policy in the region, and in 2013 and 2014, the Senate Foreign Relations Committee held a series of hearings through its East Asia and Pacific Affairs Subcommittee, chaired by Sen. Ben Cardin (D-MD), exploring various elements of the rebalance.

examines the progress made, and the challenges that remain, for the Obama Administration's rebalance to Asia. Most importantly, it makes explicit trade recommendations for both Congress and the Obama Administration towards greater emphasis on US economic statecraft as part of the overall effort. The rationale behind these recommendations can be supportive of the US trade policy agenda, and will likely be increasingly prominent in view of President Obama's trip to Asia from April 22-28, 2014.

Specifically, the provisions related to trade fall under the report's economic statecraft narrative, urging greater commercial diplomacy and economic engagement with Asia. Citing Secretary of State John Kerry's assertion[10] that foreign policy is economic policy, the report recommends the United States to:

> Continue to aggressively pursue bilateral trade deals, including a Bilateral Investment Treaty (BIT) with China, alongside larger trade agreements such as the Trans-Pacific Partnership (TPP). In addition, involve the Philippines, Indonesia, and Taiwan in either the TPP or bilateral trade discussions...

Notwithstanding the importance of these recommendations themselves, it reflects a line of thinking in a trade-skeptic Congress that will very likely be indispensable to the Obama Administration's goal of concluding and ratifying free trade agreements (FTAs) with its partners in Asia, principally the TPP. The reason being that, despite the disagreement among US lawmakers concerning the need for and objectives of US FTAs, the consensus that the United States must commit to Asia has remained firm and clear. This tacit agreement among lawmakers that domestic differences should not jeopardize US posture abroad is particularly important considering President Obama's trip to Japan, Korea, Malaysia, and the Philippines, which will largely focus on improving the credibility of US commitment to Asia.

These factors and circumstances will likely have implications for trade. To reassure US allies, the Obama Administration may now find fresh impetus to push for congressional support of the TPP and its enabler, Trade Promotion Authority (TPA), as strategic investments necessary to the US rebalance to Asia. The framing of trade within the broader context of US influence abroad may hold the key for the Obama Administration to garner support in Congress with respect to its trade initiatives.

In fact, the report underscores the key role Congress plays in the Administration's efforts, both with its own activities, as well as in ensuring that the Administration has the necessary resources and mandate in trade to make the rebalance a success. That Chairman Menendez supports this thinking reflects a small but significant recognition that the United States must fundamentally engage Asia in ways that matter to its governments – expanded trade and investment to drive growth.

In this respect, even more notable is the report's conclusion that Asia does not and should not have

[10] Remarks by Senator John Kerry on January 24, 2013 during his opening statement at the Senate Foreign Relations Committee hearing for his nomination as US Secretary of State. Full text is available here.

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to choose between either the TPP or the Regional Comprehensive Economic Partnership (RCEP).[11] This represents a clear break from popular rhetoric by industry representatives, US trade negotiators, and lawmakers in Washington that the TPP is "the only game in town." This message had largely placed unhelpful pressure on non-TPP countries by presenting a growing opportunity cost of non-participation in the TPP. Consequently, governments of Asia will likely welcome this new perspective, which, in some ways, validates their strategic thinking that the TPP and RCEP, by preparing the foundation for Asia's next-generation trade architecture, can and will merge to form the Free Trade Area of the Pacific (FTAAP).

Overall, the report will likely be helpful in reminding Congress on the need to consider US FTAs in the broader context of the US commitment to Asia, and more importantly, Asia's needs around trade. While it is still too early to assess the report's immediate impact on congressional dynamics surrounding TPP and TPA, its overall assessment makes clear that the United States cannot dismiss or discount trade from the greater US rebalancing effort to Asia.

At a minimum, the report will likely help raise greater awareness within Congress concerning the need for a united front in the US rebalance to Asia to allow the Obama Administration to engage credibly, in trade or otherwise. Without this, an uneven or unbalanced implementation can create the risk that the "rebalance may well end up as less than the sum of its parts," an outcome that Chairman Menendez and, arguably, Congress is seeking to avoid. Therefore, this report may give reason for lawmakers to consider US FTAs as vital foreign policy instruments beyond pure trade considerations, thus giving support to such initiatives as the TPP and TPA, although it remains unclear whether this will be sufficient.

Click here for the Senate report.

[11] The RCEP is an economic partnership arrangement involving ASEAN and its FTA partners, namely China, Korea, Japan, India, Australia, and New Zealand. The 16 Parties launched RCEP negotiations on May 9, 2013 in Bandar Seri Begawan, Brunei and last met on April 4, 2014 in Nanning, China for the 4th round of negotiations.

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MULTILATERAL

MULTILATERAL

Multilateral Highlights

WTO Issues Ruling in "GPX" Case, Finds Double Remedies WTO-Inconsistent

On March 27, 2014, the WTO issued the Panel Report in *United States – Countervailing and Anti-Dumping Measures on Certain Products From China* (DS449) ("*US – Countervailing and Anti-Dumping Measures (China)"*). The Panel found that the United States' so-called "GPX" law, which affirms the Department of Commerce's (DOC) authority to impose antidumping duties (ADDs) and countervailing duties (CVDs) on imports from non-market economies (NMEs), is consistent with WTO rules. However, the Panel also ruled that 25 investigations and reviews of Chinese imports that were initiated between 2006 and 2012 were inconsistent with WTO subsidy rules because DOC's concurrent imposition of ADDs (based on the NME methodology) and CVDs on the subject imports resulted in "double remedies" [12] and thus the imposition of CVDs that were not in "appropriate amounts."

Congress passed the GPX law (Public Law 112-99) as an amendment to the United States Tariff Act of 1930 in March 2012, in response to a domestic Federal Circuit judgment in *GPX International Tire Corp. v. US* that ruled that CVDs could not be imposed on NMEs. The Federal Circuit reasoned that "double counting" could occur when both CVDs and ADDs are imposed on goods from NMEs because the NME methodology for AD investigations uses unsubsidized "surrogate values" to calculate dumping and thus theoretically offsets any subsidies received by an investigated exporter, thereby repeating the remedial aspects of any CVDs imposed on that exporter's US sales. Congress effectively overruled this decision with the GPX law, which (i) allowed DOC to assess CVDs retroactively on imports from NMEs but (ii) only prospectively (*i.e.*, after the date of the law) required DOC to investigate the existence of double remedies and make adjustments where concurrent ADDs and CVDs were applied. Although a Chinese exporter challenged the GPX law on constitutional grounds before a US Federal Circuit court, the court's ruling of March 18, 2014 rejected those claims.

In September 2012, the Chinese Government requested WTO dispute settlement consultations with the United States over the GPX law. China requested the Panel to find (i) that the GPX law violates several publication and administration obligations of GATT Article X; and (ii) that the United States violated various provisions of the *Agreement on Subsidies and Countervailing Measures* ("SCM

[12] "Double remedies" refers to the double counting of overlapping CVD and ADD rates that DOC applies to NME-origin goods where both ADD and CVD orders are in place

Agreement") because DOC failed to investigate and avoid double remedies in certain investigations and reviews of Chinese imports that were initiated between 2006 and 2012. The Panel's findings may be summarized as follows:

- **The GPX Law.** China argued that Section 1 of the law violated: (i) Article X:1 because it was not published promptly; (ii) Article X:2 because it was enforced before it was officially published and effected an advance in a duty rate; and (iii) Article X:3(b) because the law overruled the judgment of the Federal Circuit and thereby thwarted the obligation that administrative agencies such as DOC are governed by domestic tribunals. The Panel rejected all of China's claims. With respect to GATT Article X:1, the Panel found that the law was "made effective" upon adoption in 2012, not on any earlier date, and therefore was published promptly. With respect to Article X:2, the Panel found that, although the law was enforced before it was officially published, it did not affect an advance in a duty rate or impose a new or more burdensome requirement. One Panelist dissented on this issue, finding instead that the law did in fact result in an advance in a duty rate. With respect to Article X:3(b), the Panel found that the obligation to ensure that administrative agencies implement and be governed by decisions of domestic tribunals does not prohibit a Member from taking legislative action to amend US law in respect of pending and future cases, as well as DOC proceedings.

- **Double Remedies.** China argued that the United States' failure to investigate and avoid double remedies in certain investigations and reviews initiated between 2006 and 2012 violated Article 19.3 and, consequentially, Articles 10 and 32.1 of the SCM Agreement. Article 19.3 requires that CVDs are collected in "appropriate amounts" (*i.e.*, a CVD will not be appropriate where it represents the full amount of the subsidy, if ADDs calculated on the basis of the same subsidization are concurrently imposed) and has been interpreted by the Appellate Body to create an affirmative obligation on investigating agencies to investigate the existence of double remedies. The Panel found that 25 of the 26 investigations and reviews at issue violated Article 19.3 because in each case DOC had imposed concurrent ADDs and CVDs, without investigating whether the use of the NME methodology in the antidumping action, when combined with the CVDs, resulted in double remedies that exceed the actual level of dumping and subsidization found to occur. The 26th investigation was initiated after the enactment of the GPX law and therefore was outside of the scope of the dispute.

The Parties now have 60 days to appeal the dispute. China will likely appeal the report to the WTO Appellate Body, given the general ferocity with which the Chinese government has opposed the GPX law and the United States' application of CVDs to imports from NME countries.

Click here for a copy of the Panel Report and here for the USTR press release.

WTO Trade Facilitation Agreement: Progress towards Implementation

The WTO Ministerial Agreement on Trade Facilitation reached last December in Bali set out three next steps to be completed by July this year in preparation for entry into force of the Agreement (the aim is July 2015) and its subsequent implementation. Reaching agreement on definitive application

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of the Agreement outside the Single Undertaking of the Doha Round could prove contentious: low-income developing countries may demand concessions on issues of interest to them elsewhere in the negotiations. Potentially much more problematic will be getting Category A commitments by July from some major developing countries, such as Egypt, India and South Africa.

- The first step is a legal scrub of the text. This is proceeding slowly but without any serious difficulties.

- Second, once the legal scrub is complete, drafting a Protocol of Amendment to incorporate the Agreement into the WTO legal framework. This should be a straightforward technical exercise that can easily be completed on schedule, but it will require Members to agree that Trade Facilitation can go forward on a definitive basis outside the Single Undertaking of the Doha Round and that, for the time being, is not agreed by some developing countries.

- Third, receiving notifications from Members of their Category A commitments, meaning those measures they will implement directly upon Entry into Force of the Agreement. Getting Category A commitments from some major developing countries, such as Egypt, India and South Africa, could be problematic since these countries have no legal obligation to notify their commitments before Entry into Force of the Agreement and they may see in this an opportunity to negotiate an advantage elsewhere in exchange for their cooperation here.

The need for a **legal scrub of the text** is an acknowledgment that pressure to conclude the negotiations before Bali left insufficient time to review the final draft for possible inconsistencies internally or with other WTO rules. There may be some text, for example provisions on the protection and confidentiality of information in the Customs Cooperation section of the Trade Facilitation Agreement (Article 12), that could be at odds with Article 10 of the Customs Valuation Agreement and Article 3(i) of the Rules of Origin Agreement.

The new Preparatory Committee on Trade Facilitation, chaired by Philippines Ambassador Esteban Conejos, has taken up the legal scrub of the text as its priority and is aiming to complete it by early May. So far, this is proceeding more slowly than expected but without any serious difficulties. 18 Members (including Japan, the United States, EU, China, Singapore and India) presented written proposals for changes to the text, almost all involving clerical corrections to formatting, punctuation and grammar but also some of a more substantive nature (e.g., proposals by the United States to clarify, and in doing so raise, the level of commitment for some provisions). The Committee's working hypothesis that no change will be made to the Bali text without consensus has meant that those proposals for substantive changes have been left aside so far, without any real opposition from the proponents, and this is likely to continue throughout the whole exercise including on previously contentious issues such as transit. The Committee will meet next from 28 April, with the aim of completing the legal scrub by 2 May.

The second step is to **draft a Protocol of Amendment** that will incorporate the Trade Facilitation Agreement into Annex 1A of the WTO Agreement and integrate it with all other WTO provisions, including dispute settlement. The deadline for completing this is 31 July 2014, when the WTO General Council will meet to adopt the Protocol and open it for acceptance within twelve

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months. There is no working draft of the Protocol for the time being, although Norway has tabled a detailed written proposal that seems to have found favor with many OECD Members.

There are two potentially controversial issues relating to the Protocol that the Preparatory Committee will need to address. One is how to prevent free-riding by Members that fail to accept the Agreement. The Bali Ministerial Decision stipulates that the Protocol will enter into force in accordance with Article X:3 of the WTO Agreement. Article X:3 foresees the possibility of a Member that fails to accept the Trade Facilitation Agreement being invited to withdraw from the WTO altogether. This language was included deliberately before Bali by a number of developed countries as a threat against free-riding by developing countries. However, it seems unlikely that there would ever be the political will (and the necessary three-quarters majority of WTO Members) to carry out that threat, which to many appears completely disproportionate. More likely is pressure from developed countries to include MFN-minus language in the Protocol that will deny the benefits of the Agreement to Members that choose not to accept it. Nonetheless, it has not gone unremarked in light of recent developments in Ukraine that maintaining the reference to Article X:3 in the Protocol could provide eventually a legal platform for a heavy sanction against a WTO Member, such as Russia, that failed to accept the Trade Facilitation Agreement.

A second possible controversy over the Protocol may come from some low and middle-income developing countries who are voicing the view that definitive implementation of the Trade Facilitation Agreement should happen only in the context of the successful conclusion of the whole of the Doha Round, as a Single Undertaking. They fear that allowing Trade Facilitation to go ahead on its own would deprive them of leverage to push through some of the Doha topics they are most interested in, for example LDC issues such as duty-free quota-free access to OECD markets. Paragraph 47 of the Doha Declaration foresees the possibility of provisional or definitive implementation of parts of the Doha Round as and when they are agreed. The presumption in Bali was that Ministers were approving definitive application of the Trade Facilitation Agreement: certainly there is no mention to the contrary in the Bali Decision. Applying the Agreement on a provisional basis only would seriously undermine its value, both legally and in terms of practical customs and other border management reforms and, crucially for developing countries, in terms of the likely support for capacity-building that they are counting on – without a commitment to implement the Agreement, there is not likely to be a commitment from the donors to provide resources. .

The final task of the Preparatory Committee before July is **to receive notifications from developing countries of their Category A commitments** – that is to say, the provisions of the Agreement that they will implement immediately upon its Entry into Force. For the developed countries, all of the provisions are in Category A. For developing countries, the Agreement foresees them being able to put some of the Agreement's provisions in Category B (more time needed to implement) or Category C (more time and resources from donors for capacity-building needed to implement), neither of which they are expected to notify before Entry into Force. There is no real controversy about this for low-income developing countries – it is accepted they will have full flexibility to allocate their commitments between categories A, B and C as they see fit. The same is not true for high-income developing countries, notably Brazil, China and India, who are expected by the developed countries to put the bulk of the provisions into Category A and announce that fact by July. Politically, it is crucial for developed countries to be able to inform their parliaments and

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congresses during their own ratification processes what is expected from their major trading partners in terms of commensurate commitments to implement fully and fast.

China has already made it known informally that it will put the majority of the provisions in Category A, and that it will not have any recourse to Category C. Brazil is in a similar position, although it is playing its cards more closely for the time being. The big question mark is India. Note that the Bali Decision mandates the Trade Facilitation Preparatory Committee to receive Category A commitments before July but it does not mandate individual Members such as India to present them. Formally, India has no obligation to announce its Category A measures until Entry into Force of the Agreement. Behind India, there could be a number of other developing countries (e.g. Egypt and South Africa) who will take a reserved position on the announcement of their Category A commitments by July.

This could turn out to be the most difficult part of the Preparatory Committee's mandate. It has no power to require developing country Members to announce their Category A commitments by July, but if any major developing country fails to make such an announcement, or falls short of the high level of commitment to Category A that the United States or EU is expecting from it, things will stall and the General Council decision opening the Trade Facilitation Agreement for acceptance will have to be delayed beyond July. That will have ramifications that go well beyond Trade Facilitation, pushing back any likelihood of substantive progress on the rest of the Doha topics well into the fall.

Post-Bali Prospects for the Doha Development Agenda

There is a great deal at stake in meeting the end-of-year objectives set by the WTO Ministerial Conference in December 2013 in Bali. Behind the Bali language lies the belief that if Doha cannot be wrapped up relatively quickly, say by the next WTO Ministerial Conference at the end of 2015, some major WTO Members may turn their backs on it for good.

The WTO Ministerial Conference set two objectives for 2014:

- to implement the Decisions and Agreements reached in Bali; and
- to prepare a clearly defined work program by the end of 2014 on how to conclude the Doha Round.

Many WTO Members have made it clear that their priority in the first half of 2014 is implementation of the Bali results. If implementation were to stall, notably on the Trade Facilitation, it would have very negative consequences for restarting Doha on a broad front.

Expecting Members to reach agreement by the end of this year on how to conclude the Doha Round seems ambitious. The success of the Bali Conference and the outstanding personal contribution to it of the WTO Director-General Roberto Azevêdo, have restored a degree of optimism and renewed commitment to the Round among Members, but it is fragile. Members will need to focus on the key political parameters that will allow the technical level negotiations to resume, in particular what modalities to use for the market access negotiations, how Special and Differential Treatment for developing countries will apply, and what level of ambition to aim for across-the-board. These are

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not easy issues. They have been at the heart of the blockage on the negotiations for several years now, most recently in 2011.

The Negotiating Group Chairs were sent off to begin consulting on how to unblock the situation in each of their areas of the negotiations. Their consultations are underway. The Chairs have already reported back once this year to the Trade Negotiations Committee, signaling no progress. They are due to report again in early May.

The key lies in the negotiations on Agriculture, NAMA, and Services, and in finding agreement among six delegations: the EU, Japan, the United States, Brazil, China, and India. Nothing else will move until an agreement is reached on how to complete the negotiations on those three topics; they will set the level of ambition across-the-board. If agreement can be found among those six delegations then other Members will most probably fall into line.

Two key political difficulties that cut across all areas of the negotiations have to be resolved before December. They are: (i) persuading emerging economies, in particular Brazil, China, and India, to graduate out of full developing country status in the negotiations; and (ii) setting a level of ambition, on market access in particular, that is, on the one hand, meaningful and, on the other hand, is realistic given the skepticism that prevails domestically in many WTO Members about further trade liberalization.

Members must reach an understanding on how flexibilities for developing countries are going to apply in the end-phase of the Doha Round (the so-called "special and differential treatment," or S&DT). Developed countries are not prepared to offer the same flexibility to the emerging economies as to other developing countries. They demand that emerging economies graduate out of full S&DT and offer a high degree of reciprocity in the negotiations if there is to be a deal. For the time being, the emerging economies, particularly India, have not accepted graduation, and if so by how much and to whom. In the negotiation of new rules, Members will likely to explore an approach that allows for higher levels of commitment from some developing countries than from others. The Trade Facilitation Agreement reached in Bali shows a possible precedent.

Accepting a low level of ambition is probably the only way that WTO Members will be able to wrap up the Doha negotiations quickly. Agriculture, NAMA, and Services are where defensive interests are strongest for most Members. The prospect is that very little, if any, real liberalization of trade will be produced. Members will probably have to settle for not much more than reducing bindings on tariffs and agricultural subsidies. Whether that would be enough to satisfy the major players, the United States in particular, is not clear. It might be seen as the lesser evil, since failing to get any result at all out of Doha would have serious negative ramifications for the WTO, including its highly respected dispute settlement system.

Formally, the Doha negotiations are a Single Undertaking, meaning that they must be concluded as a package. Nothing can be finally agreed until everything is agreed. This was used successfully as a negotiating tool to conclude the Uruguay Round. However, the Single Undertaking can also work in the opposite direction, by blocking everything if even only one issue cannot be resolved.

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In Bali, WTO Ministers set aside the Single Undertaking and agreed on a small sub-set of Doha topics, notably the new Trade Facilitation Agreement. This raised controversy at the time and continues to do so. It seems improbable that it will be allowed to happen again. Taking the easier topics out of the negotiations reduces leverage for the proponents of the more difficult topics to push them through.

Finally, the attention of Trade Ministers from most of the major WTO Members lies outside the Doha Round. With only disappointing results in prospect now from the Doha negotiations, they have been eclipsed politically and for private sector support by regional and plurilateral agreements. Mega-regional agreements such as the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) offer opportunities for deep liberalization and stronger trade rules beyond anything that can be envisaged out of the Doha Round. If these succeed while Doha languishes, they will create serious doubts about the further value of multilateral trade negotiations.

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