WHITE & CASE

White & Case LLP
General Trade Report - JETRO

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UNITED STATES

GENERAL TRADE POLICY

USTR Releases 2014 Special 301 Report; US FTAs Developing to Protect IPR and Secure Enforcement

Summary

On April 30, 2014, the Office of the US Trade Representative (USTR) released its 2014 Special 301 Report ("2014 Report").[1] The annual Report details USTR's findings on the state of intellectual property rights (IPR) protection and enforcement in US trading partners around world, and reflects the Obama Administration's efforts to encourage adequate and effective IPR protection and enforcement worldwide.

The 2014 Report identifies a variety of concerns, both emerging and longstanding, including: (i) the deterioration in IPR protection, enforcement, and market access for persons relying on IPR in a number of trading partners; (ii) reported inadequacies in trade secret protection and its increasing misappropriation; (iii) indigenous innovation policies in China; (iv) copyright piracy over the Internet; (v) market access barriers that appear to impede access to healthcare; and (vi) other systemic IPR enforcement issues.

The 2014 Report places the following ten countries on the Priority Watch List: Algeria, Argentina, Chile, China, India, Indonesia, Pakistan, Russia, Thailand, and Venezuela. These countries will be the subject of particularly intense bilateral engagement during the coming year. Meanwhile, the Report places 27 countries on the lower-tier Watch List, which indicates that these countries also present IPR challenges requiring bilateral attention: Barbados, Belarus, Bolivia, Brazil, Bulgaria, Canada, Colombia, Costa Rica, Dominican Republic, Ecuador, Egypt, Finland, Greece, Guatemala, Jamaica, Kuwait, Lebanon, Mexico, Paraguay, Peru, Romania, Tajikistan, Trinidad and Tobago, Turkey, Turkmenistan, Uzbekistan, and Vietnam. USTR has removed Italy and the Philippines from the Watch List in recognition of their IPR-related accomplishments, and as a sign of support for their commitment to continued progress.

Analysis

I. BACKGROUND

Pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and

[1] A copy of the 2014 Report is available here.

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Competitiveness Act of 1988 and the Uruguay Round Agreements Act (19 U.S.C. § 2242), the Report provides an overview of the state of IPR protection and enforcement among US trading partners. USTR reviewed 82 countries and placed 37 of them on the Priority Watch List or Watch List. The Special 301 designations and consequent actions announced in the 2014 Report are the result of deliberations among all relevant agencies within the US government, informed by extensive consultation with affected stakeholders, foreign governments, Congress, and other interested parties.

The Special 301 Report is divided into the two Sections and three Annexes:

- **Section I Developments in IPR Protection and Enforcement** discusses broad global trends and issues in IPR protection and enforcement that the U.S. Government works to address on a daily basis.
- **Section II Country Reports** review issues of concern with respect to particular trading partners.
- **Annex 1** describes the statutory basis of the Special 301 Report.
- **Annex 2** highlights U.S. Government-sponsored technical assistance and capacity building efforts.
- **Annex 3** highlights new ratifications and accessions to the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT), collectively known as the WIPO Internet Treaties.

II. DEVELOPMENTS IN IPR PROTECTION AND ENFORCEMENT

This section provides an overview of USTR's efforts and observations during the implementation of the Obama Administration's priorities in IPR protection and enforcement abroad. This section is summarized as follows:

- **Best Practices by Trading Partners.** In addition to conventional transparency-related practices, USTR underscores the importance of interagency cooperation. USTR highlights recent efforts by the governments of Paraguay, Algeria, and Philippines as exemplary, and encourages other countries to adopt similar interagency arrangements. Moreover, USTR notes its ongoing initiative with Brazil and South Africa as providers in the WIPO *Re: Search* Consortium, a voluntary mechanism for making intellectual property and know-how available on mutually agreed terms and conditions; USTR further expresses hope that other governments and private sector patent holders will consider the use of voluntary licenses.
- **Initiatives to Strengthen IPR Protection and Enforcement.** USTR highlights its efforts through US trade preference programs, free trade agreements (FTAs), and other multilateral trade frameworks to push for effective IPR protection. These efforts include those covered in the Generalized System of Preferences (GSP), Trans-Pacific Partnership (TPP), Transatlantic Trade

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and Investment Partnership (TTIP), and WTO Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council). In addition, USTR notes the potential of the Anti-Counterfeiting Trade Agreement (ACTA) to promote strong international enforcement practices.[2]

- **Trade Secrets and Forced Technology Transfer.** The 2014 Report emphasizes the need to protect and enforce trade secrets, and urges the use of deterrents, including criminal penalties, for trade secret theft. In addition, USTR notes that trade secret theft can take place as a form of forced technology transfer through indigenous innovation policies.

- **Intellectual Property and the Environment.** A noteworthy component to the 2014 Report is USTR's linking of IPR to climate change. Specifically, USTR asserts that IPR provides incentives to invest in green technologies, and can promote economic growth and create jobs in the green technology sector. Without such incentives, businesses are reluctant to invest or enter into technology transfer arrangements in countries that lack effective IPR protection and enforcement.

- **Trends in Trademark Counterfeiting and Copyright Piracy.** USTR remains concerned by the size of the global market for a wide variety of mass-produced fake goods. In particular, the production and distribution of pharmaceutical products bearing counterfeit trademarks is a growing problem that has consequences for consumer health and safety.

- **Digital, Internet, and Broadcast Piracy.** USTR warns that the Internet is an extremely efficient vehicle for disseminating copyright-infringing products. Moreover, the development and sale of devices that allow for the circumvention of technological protection measures (TPM) has exacerbated the problem.

- **Government Use of Software.** Pursuant to Executive Order 13103 issued in September 1998, the US government is working with other governments, particularly in countries that are modernizing their software systems or where concerns have been raised, to stop unauthorized government use of software. USTR notes, however, that further work remains with certain trading partners, such as China, Costa Rica, India, Morocco, Pakistan, Paraguay, Saudi Arabia, Thailand, Ukraine, and Vietnam.

- **Trademark Issues and Domain Name Disputes.** USTR notes that legal and procedural obstacles to securing and enforcing trademark rights exist in several countries, and certain foreign governments fail to provide the full range of internationally recognized trademark protections.

- **Geographical Indications**. USTR is committed to ensuring geographical indications (GIs) do not undercut US industries' market access. Such efforts include ensuring that grants of GI protection do not violate prior rights or deprive interested parties of the ability to use generic or

[2] The legal text of the ACTA is available here. The United States, Australia, Canada, Korea, Japan, New Zealand, Morocco, and Singapore signed the ACTA on October 1, 2011 in Tokyo. The ACTA requires the domestic ratification of six Parties to enter into force. Japan is the only country to date to ratify ACTA.

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common terms.

- **Intellectual Property and Health Policy.** USTR's position is to ensure provisions of its bilateral and regional trade agreements concerning IPR and health policy do not impede its trading partners from taking measures necessary to protect public health. Consistent with this view, the United States respects its trading partners' rights to grant compulsory licenses in a manner consistent with the provisions of the TRIPS Agreement and the Doha Declaration on the TRIPS Agreement and Public Health.

- **Interagency Trade Enforcement Center.** Established on February 28, 2012, the Interagency Trade Enforcement Center (ITEC) adopts a whole-of-government approach to IPR enforcement and protection. ITEC uses expertise from across the US federal government to assist in asserting US trade rights resulting from various international trade agreements to which the United States is a party.

III. COUNTRY REPORTS

The 2014 Report identifies 10 countries on the Priority Watch List and 27 countries on the Watch List. USTR's assessments of major trading partners are summarized as follows:

Priority Watch List

- **China.** China remains on the Priority Watch List and subject to Section 306 monitoring. This is largely a result of serious obstacles in China to effective protection of IPR in all forms, including patents, copyrights, trademarks trade secrets, as well as protection against unfair commercial use or unauthorized disclosure of test and other data generated to obtain marketing approval for pharmaceutical products. As a result, sales of IPR-intensive goods and services in China remain disproportionately low when compared to sales in similar, or even less developed, markets that provide a stronger environment for IPR protection and market access.

- **India.** India remains on the Priority Watch List in 2014. Nevertheless, in 2013, India made some progress in improving its IPR legal framework and enforcement system. India acceded to and implemented the Madrid Protocol[3]; made progress toward digitization of cable networks to help efforts to combat signal theft by cable operators; and enacted rules to implement amendments to its Copyright Act. USTR will also initiate an Out-of-Cycle Review of India in the third quarter of 2014.

- **Russia.** Russia remains on the Priority Watch List in 2014. Most notably, Russia passed amendments to its Civil Code that substantially weakened protections for industrial designs and introduced confusion into the available scope of copyright exceptions and limitations. USTR also

[3] 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. The Madrid System for the international registration of marks was established in 1891, and comprises the Madrid Agreement (1891) and the Madrid Protocol (1989).

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notes that IPR enforcement appeared to decrease overall in 2013, following a dramatic decline in 2012, and remained plagued by a lack of transparency and effectiveness.

- **Algeria.** According to USTR, Algeria's ban on a number of imported pharmaceutical products and medical devices in favor of local products is a trade matter of paramount concern, and is the reason Algeria remains on the Priority Watch List.

- **Argentina.** Argentina remains on the Priority Watch List in 2014, a position it has occupied since 1996. Significant concerns remain with respect to the high levels of piracy and counterfeiting, including in the digital environment, and the lack of political will to address the situation.

- **Chile.** The United States continues to have serious concerns regarding outstanding IPR issues under the United States-Chile Free Trade Agreement (UCFTA). Such issues include those related to patent applications for pharmaceutical products and circumvention of TPMs.

- **Indonesia.** USTR is principally concerned that Indonesia's IPR enforcement efforts, which have included enforcement raids, have failed to address rampant piracy and counterfeiting. USTR also remains concerned about market access barriers in Indonesia, including measures that appear to condition permissions to import medicines on at least partial local manufacturing or technology transfer requirements.

- **Pakistan.** Although Pakistan has continued its efforts to advance IPR enforcement, through raids, seizures, and arrests by various enforcement authorities, USTR notes that there has not been a significant improvement in its overall IPR protection. USTR highlights that Pakistan has yet to establish specialized IP tribunals and an operational IPO Policy Board as is required by the Intellectual Property Organization of Pakistan Act of 2012.

- **Thailand.** The United States urges Thailand to complete many of the legislative initiatives begun in past years. These include, *inter alia*, legislation to address landlord liability and unauthorized camcording of motion pictures in theaters; to fully implement the provisions of the WIPO Internet Treaties; to restructure the Trade Secret Committee and modify penalty provisions under the Trade Secrets Act; and to accelerate patent examination and registration procedures, and address issues such as partial designs.

- **Venezuela.** Issues of continuing concern include questions about the consistency of domestic laws and international obligations resulting from the 2008 reinstatement of the 1955 Industrial Property Law; the status of trademarks that were registered under the Andean Community law prior to Venezuela's withdrawal from the Andean Community; and the lack of enforcement against counterfeiting and piracy, both physical and online.

Watch List

- **Brazil**. Significant concerns remain regarding the high levels of counterfeiting and piracy, including Internet piracy. Concerns also persist with respect to Brazil's inadequate protection against unfair commercial use of undisclosed test and other data generated to obtain marketing

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approval for pharmaceutical products.

- **Canada.** Despite legislative advances, including the Copyright Modernization Act in June 2012 and Combating Counterfeit Products Act in October 2013, USTR notes that there is a lack of clarity in the law, and notes that Canadian courts have applied heightened utility requirements for patents in recent cases.

- **Mexico.** USTR expresses serious concerns, particularly regarding the widespread availability of pirated and counterfeit goods in Mexico, and increased Internet piracy due in part to higher broadband penetration. The United States urges Mexico to enact legislation to strengthen its copyright regime, including by fully implementing the WIPO Internet Treaties.

- **Vietnam.** The main issue concerns Vietnam's shortcomings in IPR enforcement, due in large part to capacity constraints (lack of resources and IPR expertise), and the lack of coordination among enforcement agencies. The United States aims to address these concerns in the TPP negotiations.

Outlook

USTR will launch several Out-of-Cycle Reviews to enhance engagement with trading partners and encourage progress on IPR issues of concern. USTR will conduct such Reviews on Kuwait, Paraguay, India, and Spain. Notably, successful resolution of specific IPR issues of concern under the Reviews can lead to a change in a trading partner's Special 301 status outside of the conventional period for the annual Special 301 Report. USTR may conduct additional Reviews of other trading partners as circumstances warrant, or if requested by the country in question.

USTR notes in the Report that it will use FTAs to address IPR-related concerns abroad. This reflects the United States' strategy of pursuing binding commitments in FTAs to ensure effective IPR enforcement and protection. Moreover, US FTAs such as the TPP allow the United States and its negotiating partners to go beyond TRIPs protections to higher TRIPs-Plus or TRIPs-Plus-Plus levels. Nevertheless, the state of the TPP negotiations remains unclear and the commitments proposed by the United States have received a mixed response.

Oral Arguments Held in First-Ever Challenge to CFIUS National Security Review of Foreign Investments in the United States

Summary

On May 5, 2014, the US Court of Appeals for the District of Columbia (DC Circuit) heard oral arguments in *Ralls Corp. v. CFIUS et al*. The case is the first-ever challenge to the review process conducted by the Committee on Foreign Investment in the United States (CFIUS) within the US federal government that reviews investments by foreign persons in the United States on national security grounds. In 2012, after the acquisition was completed, CFIUS halted and US President Barack Obama subsequently ordered Ralls Corporation, owned by two Chinese nationals, to divest

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its acquisition of four wind farm project companies in Oregon due to their proximity to a US Navy weapons testing and training facility. Ralls filed a lawsuit challenging the CFIUS and Presidential orders in the US District Court for the District of Columbia (District Court). The District Court ruled against Ralls, citing, inter alia, its failure to file advance notice of the transaction with CFIUS and the non-reviewable nature of the President's actions. On appeal before the DC Circuit, the oral arguments focused on the issue of transparency in the President's decision-making process.

The case is important because it weighs the due process foreign investors are entitled to during CFIUS review. It also underscores the importance for potential investors in the United States to carefully consider engaging and filing notice with CFIUS and to remain alert to potential national security considerations in their investments—no matter how innocuous the target—such as proximity to military facilities.

Analysis

I. WHAT IS CFIUS?

Pursuant to the Exon-Florio Amendment to the 1950 Defense Production Act, the President, acting through CFIUS, an inter-agency committee in the federal government chaired by the US Department of the Treasury, can suspend, block or otherwise modify investments and acquisitions by *foreign persons* that result in *foreign control* of US entities engaged in inter-state commerce in the United States, if such control threatens US *national security*. This authority may be carried out by conditions or changes prior to the deal's closing or through unwinding or divestment of a transaction that has already been concluded. CFIUS can review transactions upon the filing of a voluntary notice by the parties to a proposed transaction or initiate a review on its own. Upon the filing of a notice with CFIUS, it reviews the transaction over a 30-day period followed by, if need be, a 45-day investigation. At the conclusion, CFIUS may either clear the transaction or refer it to the President, who has 15 days to determine what action to take.

II. WHAT HAPPENED WITH RALLS?

In March 2012, Ralls Corp., a Delaware corporation owned by two Chinese nationals associated with the mega-construction and heavy machinery company, Sany Group, entered into a US$6 million deal to acquire four wind farm project companies in Oregon. Prior to closing the deal, Ralls did not initially file a voluntary notice of the transaction with CFIUS. In June 2012, CFIUS independently learned of the transaction and notified Ralls that if it did not file notice with CFIUS, the Department of Defense, a member of CFIUS, would initiate the review process. On July 25 and August 2, 2012, CFIUS issued orders halting the acquisition; requiring Ralls to cease all construction and remove all items from the relevant properties; and prohibiting Ralls from accessing the properties or selling them until CFIUS was notified and approved of the buyer. On September 28, 2012, President Obama issued a rare and even broader order under Section 721 of the Defense Production Act

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ordering Ralls to divest all interests acquired in the transaction on national security grounds.[4] A subsequent statement by the US Department of the Treasury on the Presidential order noted that the "wind farm sites are all within or in the vicinity of restricted airspace at Naval Weapons Systems Training Facility Boardman in Oregon."[56]

III. THE DISTRICT COURT'S RULING

On September 12, 2012, Ralls filed an unprecedented lawsuit in the District Court against CFIUS and later President Barack Obama, alleging denial of its due process and equal protection rights. On February 26, 2013, the District Court issued a ruling largely upholding the US government's motion to dismiss the case on the grounds that Section 721 barred judicial review of the President's order yet allowing Ralls to proceed with a limited due process claim regarding the process by which the divestment order was issued. On October 9, 2012, the District Court dismissed Ralls's remaining due process claim. It noted that Ralls possessed no constitutionally protected interests because it "voluntarily acquired those state property rights subject to the known risk of a Presidential veto" and "waived the opportunity... to obtain a determination from CFIUS and the President before it entered in the transaction" by failing to file a notice with CFIUS. The District Court additionally cited the President's "absolute, unreviewable discretion to prohibit a covered transaction."

IV. ON APPEAL BEFORE THE DC CIRCUIT

Following the District Court's dismissal, Ralls filed an appeal with the DC Circuit challenging the District Court's decisions on whether the court can review a Presidential decision under the CFIUS regime and whether Ralls was accorded due process. During oral arguments on May 5, Ralls principally argued that it was entitled to know the "basic gravamen" for the Presidential order. The government's contention regarding proximity to military installations was inadequate, in its view, for example, as only one of the four sets of wind farms was in restricted space. While CFIUS flagged "potential issues" in the transaction, Ralls contended that these issues were never made clear. Ralls further argued that it ought to be able to review the unclassified evidence used by the President in reaching his decision. It cited the risk of transactions being blocked based on factual errors without the investor having the chance to correct the record or implement mitigation measures.

The government conversely argued that Ralls "took a gamble" by not filing with CFIUS, knowing the risk that the President might block the transaction, and that it was not entitled to access materials used as part of the President's deliberative process on a national security matter. Notably, the government suggested that the DC Circuit could remand the case to the District Court to determine whether unclassified information—subject to Presidential communications privilege—could be made available to Ralls to shed some light on the decision-making process.

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[4] See http://www.whitehouse.gov/the-press-office/2012/09/28/order-signed-president-regarding-acquisition-four-us-wind-farm-project-c.

[5] See http://www.treasury.gov/press-center/press-releases/Pages/tg1724.aspx.

[6] On at least two prior occasions, Chinese investments in the mining sector in Nevada have similarly failed due to the targets' proximity to US military installations.

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Outlook

Although a degree of transparency in the CFIUS process may emerge from the Ralls litigation, the District Court's decision and the statutory regime reflect the deference accorded to the President and CFIUS. Ralls's experience also shows that the onus is on foreign investors to carefully consider the risks of not seeking CFIUS review prior to closing. While filing a notice is voluntary, in many cases prudence demands that investors do so to obtain clearance and safe harbor from further review and to avoid the risk of a costly divestment process after closing. Moreover, given the absence of clear and objective criteria in the CFIUS legal regime for determining national security concerns, it would behoove foreign investors to take as broad as possible a view of what the US government might deem to be of national security concern.

US General Trade Policy Highlights

President Obama Announces Intent to Withdraw GSP Benefits for Russia

On May 7, 2014, President Obama notified Congress of his intentions to withdraw Russia's eligibility for the Generalized System of Preferences (GSP) program. The reason for doing so is that Russia is "sufficiently advanced economically" that it no longer warrants preferential tariff treatment for its exports to the United States under GSP. As a result, imports of GSP-eligible goods from Russia will be subject to non-preferential rates of duty.

Section 502(c) of the Trade Act of 1974 (19 U.S.C. 2462(c)) provides that, in determining whether to designate any country as a beneficiary developing country for purposes of the GSP, the President shall take into account various factors, including (i) the country's level of economic development, (ii) the country's GDP per capita, (iii) the living standards of its inhabitants, and (iv) any other economic factors deemed appropriate. As a result, President Obama has determined that Russia is sufficiently advanced with respect to economic development and trade competitiveness such that it no longer warrants continued preferential treatment under the GSP. President Obama may issue a presidential proclamation after 60 days (*i.e.* July 6, 2014) to formalize this decision, consistent with termination procedures under 502(f)(2) of the Trade Act.

The withdrawal of Russia's GSP eligibility likely benefits efforts to renew GSP. Earlier in April 2014, House Ways and Means Ranking Member Sander Levin (D-MI) indicated that Russia's beneficiary status could prove divisive in discussions surrounding GSP renewal, which some Members of Congress and Obama Administration officials linked to US efforts to provide aid to Ukraine. Consequently, the pathway to GSP renewal now has one less impediment, although whether this is sufficient remains unclear.

Until recently, it appeared likely that GSP renewal provisions would be attached to the Trade Promotion Authority (TPA) legislation, but the latter has encountered significant opposition in Congress and will likely remain immobile for the foreseeable future. It is not immediately clear which bills related to aid for Ukraine could incorporate GSP renewal provisions in the near future. Congress traditionally includes GSP provisions in larger trade bills, rather than passing a

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standalone GSP renewal measure.

Click here for a copy of President Obama's statement and here for the Trade Act of 1974.

CBP Launches Revised Application for Online Renewal of Trademarks and Copyright Recordation

On May 8, 2014, US Customs and Border Protection (CBP) launched its revised online application for owners of federally registered trademarks and copyrights to renew their recordation electronically. The Intellectual Property Rights e-Recordation (IPRR) tool can also be used to update ownership information, request extensions of time for submitting renewals, and to check on the status of pending applications.

Before using IPRR, CBP advises applicants to have the following information in hand:

- Patent and Trademark Office Registration Number or Copyright Office Registration Number;
- Digital images up to 2MB of the protected mark/work in a ".jpg," ".gif" or ".pdf" format that accurately depict the right to be protected; and
- Documents specified in 19 CFR 133.3 for trademarks and 19 CFR 133.33 for copyrights.

The recordation fee for a single copyright is USD 190, whereas the recordation fee for trademarks is USD 190 per international class of goods. The renewal fee for an existing recordation is USD 80 per copyright and USD 80 per trademark. The estimated average time to complete the IPRR application is two hours per respondent.

CBP estimates that the online tool will enable nearly 32,000 trademark and copyright owners to renew their recordation electronically rather than through paper filings. Moreover, CBP notes that online filing of trademark and copyright recordation applications will greatly decrease the amount of time and paperwork normally required, thus providing more timely enforcement of intellectual property rights.

The IPRR portal is available for access at https://iprr.cbp.gov/

Click here for a copy of CBP's announcement and here for 19 CFR 133.3 and 19 CFR 133.33.

Department of Commerce Announces Next Phase of National Export Initiative

On May 13, 2014, Department of Commerce (DOC) Secretary Penny Pritzker announced the launch of the next phase of the National Export Initiative (NEI) – "NEI/NEXT" – to facilitate more exports from US businesses to additional markets abroad. The Export Promotion Cabinet and Trade Promotion Coordinating Committee (TPCC), which consists of representatives from 20 federal departments and agencies with export-related programs, will lead implementation of NEI/NEXT.

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The expanded facilities and programs under NEI/NEXT are summarized as follows:

- **Tailored industry support programs**. DOC will develop interagency tools, trade events and training on an industry-specific and market-specific basis to help US companies become exporters or expand exports. Such efforts would specifically cover new market access afforded by current and future US free trade agreements (FTAs), including the Trans-Pacific Partnership (TPP), Transatlantic Trade and Investment Partnership (TTIP), and Trade in Services Agreement (TiSA).

- **Streamlined export procedures**. The US government pledges to complete and achieve government-wide use of the International Trade Data System (ITDS) by December 2016 as well as raise awareness of the Executive Order on Streamlining the Export/Import Process for America's Businesses, published on February 19, 2014. Complementary efforts to accelerate delivery of goods also include a commitment to improve the performance of the US freight network to reduce inefficiencies in US supply chains.

- **Increased access to financing**. DOC will establish a Global Finance Team within the International Trade Administration (ITA) to initiate, coordinate and support global programs that focus on finance issues including trade finance and access to capital. In addition, the NEI/NEXT work program makes clear of the need for congressional reauthorization of the Ex-Im Bank in 2014.

- **Enhanced focus on metropolitan areas**. DOC affirms the equal importance of exports and inbound foreign direct investment (FDI) to the growth of US communities. Under NEI/NEXT, DOC aims to set up new or support existing export pipelines that would integrate into the economic development strategies of US states.

- **Expand market access and trade facilitation**. US agencies with trade-related responsibilities will continue and enhance efforts to negotiate, implement and enforce US rights and opportunities under US FTAs and other trade-related agreements. In particular, DOC will focus on developing programs in developing countries to implement the specific provisions of the WTO Trade Facilitation Agreement.

NEI/NEXT represents a necessary, complementary effort to the Obama Administration's objective of expanding market access for US businesses through trade agreements to which the United States is a party. While the US government establishes more market access, NEI/NEXT affirms the importance of the awareness and capability of US businesses to utilize these agreements. The success of NEI/NEXT will be measured by the dollar value of US exports, number of US companies exporting, and exports to emerging markets and trade agreement markets.

Click here for a copy of the NEI/NEXT Strategic Framework.

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United States Indicts Chinese Military Hackers for Cyber Espionage; Puts Further Pressure on Bilateral Trade Relations

On May 19, 2014, the US Department of Justice (DOJ) indicted five Chinese military hackers (jointly "defendants") for cyber espionage against a US labor organization and five US corporations operating in the nuclear power, metals and solar products industries. The indictment alleges that the defendants conspired to (i) hack US entities; (ii) maintain unauthorized access to their computers; and (iii) steal information from those entities that would be useful to their competitors in China, including state-owned enterprises (SOEs). According to the DOJ, this indictment represents the first ever charges against a state actor for this type of hacking.

The defendants' alleged conduct with respect to its US corporate targets are summarized as follows:

- **Westinghouse**. The DOJ alleges that, while Westinghouse was building four AP1000 power plants in China and negotiating other terms of the construction with a Chinese SOE ("SOE-1"), one defendant stole proprietary technical and design specifications for pipes, pipe supports, and pipe routing within those plants. Moreover, the defendant stole sensitive emails belonging to senior Westinghouse executives responsible for its broader relationship with the Chinese SOE. Westinghouse is one of the world's leading commercial nuclear power developers.

- **SolarWorld**. The DOJ alleges that, in 2012 when the Department of Commerce (DOC) determined dumping of Chinese solar products in the US market, one defendant and at least one co-conspirator stole business information of the petitioner, SolarWorld, sensitive to the trade litigation process. The DOJ notes that the information includes SolarWorld's cash flow, manufacturing metrics, production line information, costs, and privileged attorney-client communications. SolarWorld is a US subsidiary of German solar products manufacturer, SolarWorld AG.

- **US Steel**. The DOJ alleges that two defendants stole emails from US Steel employees in 2010 relating to the company's role as lead petitioners in certain US trade remedy investigations, which involved a certain Chinese SOE ("SOE-2). Those investigations involved Chinese imports of oil country tubular goods and seamless standard line pipes, respectively. The DOJ charges that the two defendants employed spearphishing emails, malware and server exploits to acquire business sensitive information. US Steel is the largest steel company in the United States.

- **Allegheny Technologies Inc. (ATI)**. The DOJ alleges that, in 2012, one defendant stole network credentials for at least 7,000 ATI employees during a period in which ATI had partnered with, competed against, and participated in a trade dispute involving SOE-2. ATI is a large specialty metals company.

- **Alcoa**. The DOJ alleges that one defendant and other identified individuals stole at least 2,907 emails concerning Alcoa's relationship and transactions with a certain Chinese SOE ("SOE-3"). Alcoa is the largest aluminum company in the United States.

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The Chinese Ministry of Foreign Affairs (MOFA) has rejected the allegations and called for the DOJ's withdrawal of the indictment. In a press release dated May 19, 2014, the Chinese government claimed that the indictment against Chinese personnel is "ungrounded with ulterior motives." The Chinese government alleges that China is "a victim of severe US cyber theft, wiretapping and surveillance activities" and that the US government has long been involved in such activities in a large-scale and organized manner. As an initial response, the Chinese government has decided to suspend activities of the China-US Cyber Working Group and pledged to retaliate further as the situation develops.

The indictment represents an escalation of trade-related friction between the United States and China. The issue of industrial and economic espionage, however, is not new and has reportedly grown in recent years. In the 2013 Special 301 Report published by the Office of the US Trade Representative (USTR), officials cite reports by the Office of the National Counterintelligence Executive (ONCIX) that "Chinese actors are the world's most active and persistent perpetrators of economic espionage." USTR also finds that theft of trade secrets are likely occurring inside and outside of China for the competitive advantage of Chinese SOEs and private companies.

A noteworthy consideration is that neither the United States nor China has decided to postpone the bilateral Strategic & Economic Dialogue (S&ED), currently scheduled for July 2014 in Beijing. Should the S&ED take place, the indictment will likely become a top issue and may impose negative pressure on areas of cooperation vital to bilateral trade. Such work programs include the initiatives of the US-China Climate Change Working Group (CCWG) covering energy efficiency, smart grids, greenhouse gas data collection and management, carbon capture utilization and storage (CCUS), and heavy duty and other vehicles.

Click here for a copy of the indictment and here for the China MOFA press release.

Ukraine, Moldova, and Georgia Urge Congressional Trade Leaders to Renew GSP; Underscore Importance to Economic Security

On May 22, 2014, the Ambassadors of Ukraine, Moldova, and Georgia issued a letter to leaders of the Senate Finance Committee, Chairman Ron Wyden (D-OR) and Ranking Member Orrin Hatch (R-UT), and House Ways and Means Committee, Chairman Dave Camp (R-MI) and Ranking Member Sandy Levin (D-MI), urging both groups to make renewal of the Generalized System of Preferences (GSP) a priority. The countries assert that GSP renewal is critical to restore demand for its exports and, in the case of Ukraine, mitigate the economic uncertainty caused by Russia's actions in Crimea.

The letter provides clear examples of the cost for exports of Ukraine, Moldova, and Georgia due to the lapse of GSP. Significant examples include the decrease of Georgian exports of ferrosilicon manganese to the United States. According to the letter, the reinstated 3.9 percent duty rate has led to a 15 percent decrease of imports in 2013 compared to 2012 and a 57 percent year-on-year decrease in the first two months of 2014. Similarly, imports of Moldovan wines have experienced a 28 percent decrease since the expiration of GSP. The letter asserts that, without GSP, Moldovan

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wines cannot maintain its newly established share of the US market, thereby eliminating a key lifeline for its wine industry and rural communities.

Notably, the narrative on Ukraine reflects many of the same assertions made by Sen. Sherrod Brown (D-OH) on April 8, 2014 and United States Trade Representative Michael Froman on April 3, 2014, such that GSP renewal is critical to Ukraine's economic stability. Until Russia's recent actions in Crimea, Russia imports approximately a quarter of Ukraine's overall exports, amounting to USD 17.6 billion in 2012. However, Russia's ongoing actions have disrupted its bilateral trade with Ukraine and it is likely to continue to do so in the near future. In that respect, the Ambassador of Ukraine asserts that GSP renewal would allow the United States to play a surrogate role by reestablishing a stable demand for Ukrainian exports. Such exports would help maintain employment in Ukraine, thus ensuring its economic security in the midst of political uncertainty in the region. Moreover, Ukraine hopes increased trade under GSP could facilitate a more long-term alignment with the United States "as a stronger and more reliable partner."

The letter's arguments will likely resonate with lawmakers arguing that GSP is a necessary element of US assistance for Ukraine. However, its immediate impact on congressional dynamics with respect to GSP renewal is not immediately clear. Congress has thus far not indicated which bill could serve as the legislative vehicle on which to affix renewal provisions. Similar to President Obama's decision on May 7, 2014 to withdraw GSP benefits for Russia, while the letter provides an additional impetus to renew GSP, whether it is sufficient also remains unclear.

DOC Announces First 12 Manufacturing Communities Under IMCP Initiative

On May 28, 2014, Department of Commerce (DOC) Secretary Penny Pritzker announced the first 12 Manufacturing Communities under the Investing in Manufacturing Communities Partnership (IMCP) initiative. As a result, the 12 Manufacturing Communities will receive coordinated support for economic development strategies focused on manufacturing growth from 11 federal agencies with USD 1.3 billion available in financial assistance. As part of Phase II of the IMCP, an interagency panel selected these 12 of 70 applicants based on the strength of their economic development plans, the potential for impact in their communities, and the depths of their partnerships across the public and private sector.

The Obama Administration first launched the IMCP in September 2013 as an initiative to accelerate the resurgence of manufacturing in the United States. The IMCP provides funding and technical assistance to select US communities in order to strengthen their competitive edge in attracting manufacturing investments and in their supply chain capabilities. Under Phase I of the IMCP, DOC awarded USD 7 million to 44 communities to undertake the strategic planning necessary to apply for Manufacturing Community status under Phase II, although eligibility for Phase II is not contingent on winning Phase I.

The IMCP constitutes a critical component of the Obama Administration's pro-manufacturing agenda. In a corresponding press release, President Obama makes clear that the "[US] middle class was built on the strength of [the US] manufacturing sector." This indicates that an underlying

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purpose of the IMCP is to attract and retain inward investment, in order to address criticisms that the Obama Administration's current trade and industrial policies disincentivize both US and global businesses to invest, produce, or hire in the United States. Later in 2014, DOC will launch a second IMCP competition to designate the next cohort of Manufacturing Communities.

Click here for the DOC press release, here for Obama Administration press release, and here for more information on the IMCP.

House of Representatives Passes Bill on Venezuela Sanctions

On May 28, 2014, the House of Representatives approved the *Venezuelan Human Rights and Democracy Protection Act* (H.R.4587), imposing sanctions on officials of the Venezuelan regime led by President Nicolas Maduro. The Act directs the President to deny US visas, to, freeze assets of, and prohibit financial transactions with Venezuelan officials (and representatives thereof) allegedly responsible for human rights abuses. Rep. Ileana Ros-Lehtinen (R-FL) is the sponsor of the bill, supported by 22 other lawmakers as cosponsors (12 represent Florida).

The Act represents a response by Congress, largely driven by lawmakers from Florida, to hold Venezuelan authorities accountable for the violent treatment of protesters that has been ongoing since February 12, 2014. Florida is home to one of the largest Venezuelan immigrant populations in the United States, which played a key role in catalyzing support for the sanctions legislation. While the Obama Administration has thus far opposed any sanctions legislation, it is yet to issue a response to the Act. In the past, Administration officials have asserted that lawmakers have mischaracterized developments in Venezuela as a US-Venezuela issue. They argued that unilateral sanctions are an inappropriate response to the situation in Venezuela, as they undermine mediation efforts between the Venezuelan government and the opposition, and strain relations between the US and Latin American partners.

As expected, foreign ministers from the 12-member Union of South American Nations (UNASUR) issued a statement on May 23, 2014, asserting that any sanctions adopted would violate the principles of non-intervention and adversely affect efforts to find a political solution in Venezuela. Rep. Gregory Meeks (D-NY) has also advised against the Act, arguing that it indicates that the United States "does not care about what [its Latin American partners] think."

In addition to sanctions, the Act directs the Administration to submit comprehensive strategies to Congress in order to (i) promote internet and information access freedom in Venezuela, and (ii) identify US support for Venezuelan citizens seeking free elections and the development of an independent civil society. The Act also states that, as a matter of policy, the United States will (i) support efforts to identify prisoners of conscience and cases of human rights abuses in Venezuela, and (ii) offer refugee status or political asylum in the United States to political dissidents in Venezuela or assist in their relocation to other countries. The Act's sunset clause notes that the Act will expire two years after the date of its enactment.

Despite overwhelming support in the House, it is not immediately clear when the full Senate will

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consider the bill. The Senate Foreign Relations Committee on May 22, 2014 passed by a 13-2 vote a Senate version of sanctions legislation, known as *the Venezuela Defense of Human Rights and Civil Society Act* (S.2142). Both the House and Senate bills do not identify specific individuals for sanction actions, but instead delegate this task to the President. Sen. Marco Rubio (R-FL) has already proposed 23 Venezuelan individuals that should face sanctions.

Click here for the text of H.R.4587, here for the text of S.2142, here for the UNASUR statement, and here for Sen. Rubio's proposed individuals.

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FREE TRADE AGREEMENTS

Free Trade Agreement Highlights

IPR Letter by Seven Lawmakers Shifts Focus of Trade Lobbying from TPP to TPA

On May 6, 2014, Reps. Jared Polis (D-CO) and Darrell Issa (R-CA) issued a letter with five other House lawmakers[7] to Chairmen and Ranking Members of the House Committee on Ways and Means and the Senate Finance Committee urging prioritization of the internet economy in Trade Promotion Authority (TPA). Specifically, the letter calls for the inclusion of specific language in the TPA bill directing US negotiators to "export copyright limitations, exceptions, and safe harbors." The decision to target TPA provisions represents a departure from other congressional efforts to date that have targeted almost exclusively the Trans-Pacific Partnership (TPP) negotiations.

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 TPA legislation on January 9, 2014. The *Bipartisan Congressional Trade Priorities Act of 2014* provides for, *inter alia,* procedures for expedited congressional consideration of US free trade agreements (FTAs) negotiated, whereby lawmakers vote up-or-down on such agreements but may not provide any amendments. This "fast-track" is available to the President if US FTAs presented to Congress meet the desired negotiating outcomes established in the TPA bill. Although TPA is not necessary to begin or conclude FTA negotiations, it is widely considered key in order to define congressional authority over US trade priorities, and ensure the passage of FTA implementing legislation.

As a result, because TPA is a fundamental element of the Obama Administration's FTA strategy and US ratification of the TPP, some observers consider that the best way for Congress to influence FTA negotiations is through the TPA's requirements on US negotiating objectives. Until now, however, Members of Congress have focused their efforts on the TPP negotiations alone, based on an understanding that that Congress would not take action on, much less approve, TPA, thus leaving it ineffectual as a way to exercise their trade goals.

The latest letter led by Reps. Polis and Issa suggest that congressional dynamics may be shifting *vis-a-vis* TPA. That some lawmakers have realized the potential of TPA to exercise congressional authority over US FTAs may have positive implications for the TPA bill. The Polis-Issa letter reflects a strategic recognition that TPA is the most direct way to influence the outcomes of the TPP, hence the consequent need for Congress to revise (if necessary) and approve the TPA bill while TPP negotiations are still underway. Nevertheless, whether this is adequate remains unclear. Congress remains unlikely to pass TPA before the 2014 mid-term elections, and congressional efforts to

[7] The other five signatories to the letter are Reps. Zoe Lofgren (D-CA), Michael McCaul (R-TX), Anna Eshoo (D-CA), Blake Farenthold (R-TX), and Mike Honda (D-CA).

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advance the Baucus-Camp TPA bill are likely to be impeded further by the rise of the alternative "smart-track" approach envisioned by Senate Finance Committee Chairman Ron Wyden (D-OR).

Click here for a copy of the letter and here for a copy of the TPA bill.

TPP Ministers Conclude Singapore Meeting; Commit to Intensify Talks on Market Access and Rules

From May 19-20, 2014, Trade Ministers of Parties to the Trans-Pacific Partnership (TPP) gathered in Singapore for a "check-in" meeting to review the status of the negotiations, including those occurring at the bilateral level. In the Joint Statement that followed, the TPP Ministers asserted that the group "cemented [its] shared views" on differences that remained and steps to eliminate them. The TPP Ministers have instructed their Chief Negotiators to meet in July and committed to undertake intensified engagement, bilaterally and in other configurations. These talks in the near future will aim to address outstanding issues in the areas of market access and rules, in light of newfound consensus.

In the TPP Ministers' review, deliberations during the US-Japan talks in April 2014 and Chief Negotiators meeting in Ho Chi Minh City from May 12-15, 2014 received specific attention. Outcomes noteworthy in the context of the overall negotiations are as follows:

- **Japan commits to increase agriculture market access**. Reports indicate that although Japan will not eliminate tariffs on its sensitive agricultural products (rice, diary, sugar, beef, and pork), it will provide additional market access for them by either further reducing tariffs or introducing a tariff-rate quota (TRQ), at least for the United States. This commitment has reportedly facilitated Japan's engagement with other TPP Parties on market access packages. Japan previously hesitated to do so due to the unclear ambition on market access at the US-Japan level. Moreover, as United States Trade Representative Michael Froman acknowledges in a conference call, "As countries see where their market access opportunities are likely to land, it makes them more comfortable in addressing the outstanding rules issues as well." Other TPP Parties have purportedly also begun to accept that Japan is unlikely to eliminate all tariffs for its agriculture products, but remain concerned that Japan may not extend its concessions for the United States to them.

- **Progress towards the short supply list (SSL)**. Mexican Economy Secretary Ildefonso Guajardo in a press interview noted that the United States, Vietnam, and Mexico are nearing an agreement on the SSL, in terms of what items constitute the SSL on a temporary or permanent basis. Notably, items on the SSL would be exempt from the yarn-forward rule of origin, although Vietnam reportedly continues to press for the more liberal cut-and-sew rule for some items.

- **Phase-in approach for intellectual property protection for pharmaceuticals.** The Parties reportedly have been exploring an approach that would establish a single set of obligations for all participants, but allow them to be phased in over time for low-income, developing countries (*e.g.*, for Malaysia, Mexico, Peru, and Vietnam). Nevertheless, the Parties remain in disagreement over the obligations themselves, namely those concerning data exclusivity, patent

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term extension, and patent linkage.

- **Korea holds TPP entry consultations with Parties**. The Korean government reportedly dispatched trade officials to Ho Chi Minh City to hold bilateral consultations with the TPP Parties. Korea has not formally requested entry into the TPP.

- **Parties establish a public relations committee**. According to Malaysian Minister of International Trade and Industry Mustapa Mohamed, the Parties have agreed to establish a committee to coordinate messaging and public relations concerning the TPP. This development likely reflects the overdue need for consistent and credible messaging to allay public concerns of the TPP, an issue of growing importance to countries requiring legislative approval for domestic ratification.

Developments in Singapore and Ho Chi Minh City, principally the breakthrough between the United States and Japan, will likely catalyze discussions in other areas to conclude the TPP negotiations. As all issues are linked to each other, progress, even incrementally, can help give shape to a notional package of market access and rules that Parties find meaningful and balanced. However, the fact that negotiations now intensely focus on numerous specific disagreements (and presumably resulting in a compromise below the original high ambition) may also accumulatively create the risk of weakening the overall agreement.

Click here for the TPP Ministers' Joint Statement.

Fifth TTIP Negotiating Round Concludes with Draft Legal Texts; Technical Work Remains Key Focus in View of Political Uncertainty

From May 19-23, 2014, US and EU trade representatives met in Arlington for the fifth negotiating round of the Transatlantic Trade and Investment Partnership (TTIP). According to United States Trade Representative (USTR) Michael Froman, the Parties have advanced from "discussing a conceptual framework" to "defining specific ideas," which reflects the fact that negotiators have started to deliberate draft texts in most areas under negotiation. Notably, US and EU negotiators agreed that "[they] are where [they] should be after 11 months."

Areas contemplated during the fifth round are summarized as follows:

- **Market Access**. The talks covered tariff commitments, trade in services, investment, and government procurement. With respect to tariffs, EU Chief Negotiator Ignacio Garcia Bercero noted that discussions were of "a technical nature to clarify some elements of [the US' and EU's] respective offers," while US Chief Negotiator Dan Mullaney shared that both Parties are moving towards second tariff offers, albeit with no specific timeframe. The EU is also reportedly taking an offensive approach to secure market access commitments at the US state level, specifically those related to government procurement with the aim of provisions beyond the WTO Government Procurement Agreement (GPA).

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In terms of rules of origin, reports indicate that US negotiators have offered ideas for a potential separate chapter on textiles, which would provide specific treatment for covered products. However, as a rule of thumb, the EU does not negotiate free trade agreements (FTAs) with a specific chapter on textiles, unlike the United States that has a textile chapter or annex in recent FTAs to which it is a party (*e.g.* bilateral FTAs with Korea, Colombia, and Panama respectively).

- **Regulatory Compatibility**. Negotiators discussed a range of sectors, including medical devices, pharmaceuticals, cosmetics, information communication technologies, automobiles, pesticides, and chemicals. The European Commission published on May 14, 2014 its negotiating positions with respect to regulatory compatibility in five sectors, including for motor vehicles.

  In the case of motor vehicles, Bercero noted that both negotiators and regulators focused on comparing the US' and EU's respective technical regulations on safety, while identifying and discussing the type of data needed to find compatible levels of safety, and means to compile such data. More broadly, Bercero stressed that TTIP negotiators will address regulatory compatibility on a sector-specific basis, due to fundamental differences in each sector.

- **Rules**. Parties have advanced discussion based on draft legal texts in the areas of technical barriers to trade (TBT), competition, state-to-state dispute settlement, and small and medium enterprises (SMEs). The talks reportedly also involved non-text based discussions on sustainable development, labor, and environment. Notably, the discussion on energy and raw materials, a key offensive area for the EU, focused on determining whether to have a separate energy chapter that addresses specific issues and identifying the extent to which other parts of the Agreement already reflect commitments that affect the energy trade.

Progress made by TTIP Parties during the fifth round is more comprehensive than expected, particularly in light of the May 25, 2014 European Parliament elections, which had engendered fear that they would compromise the EU's ability to establish a clear negotiating position. Nevertheless, the outcomes of the fifth round suggest that the Parties have exercised the maximum negotiating space possible in advance of greater political instruction. In this respect, it has become increasingly clear that the concluding the TTIP will face political obstacles on both sides of the Atlantic: a US Congress in gridlock over trade and TPA, and a generally pro-trade but fragmented European Parliament.

Click here for a copy of USTR Froman's statement, here for the transcript of the Closing Press Conference, and here for the EU position papers published on May 14, 2014.

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MULTILATERAL

MULTILATERAL

Multilateral Highlights

WTO Panel Issues Ruling in "China – Autos (US)" Case, Finds Chinese AD and CVD Duties WTO-Inconsistent

On May 23, 2014, the WTO issued the Panel Report in *China — Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States* (DS440) ("*China – Autos (US)*"). The Panel found that China's anti-dumping (AD) and countervailing duties (CVD) on certain US automobiles violated WTO rules on, broadly, procedural transparency, the determination of injury, and the use of facts available when determining an "all others" duty rate. Although China removed the duties on December 13, 2013 in advance of the WTO Panel's final ruling, the United States has stated that it will continue to monitor compliance.

China imposed the challenged AD and CVD duties in 2011, and collected duties ranging from 2 percent to 21.5 percent. Of particular note, China imposed CVD duties on autos benefiting from the US Troubled Asset Relieve Program (TARP), which provided loans to General Motors (GM) and Chrysler.[8] As a result, both US cars as well as SUVs with an engine capacity of 2.5 liters or larger were affected by the Chinese duties and, according to the Office of the United States Trade Representative (USTR), the value of affected US auto exports amounted to USD 5.1 billion. USTR has further noted that nine companies (BMW, Chrysler, Daimler, Ford, GM, Honda, Nissan, Tesla, and Toyota) in ten US States (Alabama, California, Illinois, Indiana, Kentucky, Michigan, Ohio, South Carolina, Tennessee, and Texas) produce autos that are exported to China. At a USTR press conference announcing the ruling, House Ways and Means Ranking Member Sander Levin (D-MI) asserted that China had imposed the duties in retaliation for the US safeguard measure on certain off-road tires from China.

In July 2012, the US Government requested WTO dispute settlement consultations with China over the relevant duties. The United States requested the Panel to find that (i) the duties violate various procedural obligations of the Agreement on Implementation of Article VI of the *General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"); (ii) the determination of injury for both the AD and CVD duties was also inconsistent with these agreements because it was based on an incorrect definition of the domestic industry and wrongly analyzed price effects and causation; and (iii) the use

[8] Congress authorized TARP through the Emergency Economic Stabilization Act of 2008 to implement programs to stabilize the financial system during the financial crisis of 2008. Under TARP, the Automotive Industry Financing Program (AIFP) was created to prevent the uncontrolled liquidation of Chrysler and GM, as well as the collapse of the US auto industry.

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of "facts available" to determine the "all others" duty rate for unknown exporters was WTO-inconsistent. In its report published on May 23, 2014, the Panel broadly upheld all of the US claims.

The Panel's findings may be summarized as follows:

- **Procedural Obligations:**
  - **Disclosure of "essential facts":** The Panel found that MOFCOM failed to disclose to US respondents the essential facts that formed the basis of its decision to impose definitive AD duties, as required under Article 6.9 of the Anti-Dumping Agreement. However, the Panel rejected the US claim with respect to MOFCOM's disclosure of essential facts for purposes of the "all others" AD and CVD duty rates, finding that MOFCOM had disclosed the essential facts of its determinations in each instance.
  - **Public notice:** The Panel rejected US claims that MOFCOM's public notices failed to disclose the essential facts and findings as well as conclusions reached on all issues of fact and law considered material by MOFCOM for the determination of certain duty rates (Articles 6.9, 12.2, 12.2.2 of the Anti-Dumping Agreement and Articles 12.8, 22.3 and 22.5 of the SCM Agreement).
- **Injury:**
  - **Definition of domestic industry:** The Panel rejected the US claim that MOFCOM's definition of the domestic industry was inconsistent with Article 4.1 Anti-Dumping Agreement and Article 16.1 of the SCM Agreement. The Panel reasoned that the fact that producers may choose to request and take part in an investigation by coordinating their actions through a trade association did not render the definition of domestic industry WTO-inconsistent. Moreover, the fact that the domestic industry as defined did not include a particular proportion of producers opposing the complaint was also not problematic.
  - **Price effects and causation:** The Panel found that several aspects of MOFCOM's price effects and causation determinations were inconsistent with Articles 3.1, 3.2 and 3.5 of the Anti-Dumping Agreement and Articles 15.1, 15.2 and 15.5 of the SCM Agreement. The Panel determined that MOFCOM failed to make its determination based on an objective examination of positive evidence.
- **Facts available:** The Panel found that MOFCOM's determination of AD and CVD rates assigned to unknown exporters was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement. This is because MOFCOM determined the rate based on facts available but had not notified exporters of the information required of them, and those exporters had not refused to provided necessary information or otherwise impeded the investigation.

The Parties now have 60 days to appeal the dispute. It is not clear whether China will choose to file an appeal, given that it removed the challenged duties at the end of last year prior to the Panel's final ruling.

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The ruling represents a major victory for US trade enforcement. Although the ruling itself is unlikely to cause friction in the broader scope of US-China trade relations, it is significant to domestic political dynamics in the United States, *e.g.* the Obama Administration's ability to demonstrate to Congress dedicated enforcement of US rights and obligations under international Agreements. This is particularly important given the current tensions between Congress and the Administration on general trade issues, and even more so as Congress contemplates the reauthorization of and modifications to Trade Promotion Authority (TPA). As such, the ruling could prove valuable as the Obama Administration (re)engages Congress on its trade agenda, demonstrating, in addition to opening markets, the Administration's equal if not greater commitment to enforcing a level playing field for US industry.

Click here for a copy of the Panel Report and here for the USTR fact sheet.

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