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General Trade Report - JETRO

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UNITED STATES

GENERAL TRADE POLICY

US General Trade Policy Highlights

Russia Bans Imports of US Agricultural Products

On August 6, 2014, Russian President Vladimir Putin signed *Executive Order No. 506 on Special Economic Measures to Protect Russia's Security* (*Executive Order*), banning importation into Russia of "particular kinds of agricultural produce, raw materials and foodstuffs" originating in countries, including the United States, "that have decided to impose economic sanctions on Russian legal entities and/or physical individuals." The ban, which took effect upon President Putin's signature of the *Executive Order*, will operate for one year.

According to the *Executive Order*, all Russian "state bodies of power, federal authorities, local self-government bodies, legal entities established in accordance with Russian law, and physical individuals" are required to comply with the ban. On August 7, 2014, Russian Prime Minister Dmitry Medvedev announced that he had signed a resolution to enforce the *Executive Order* and stated that "Russia has completely banned the importation of beef, pork, fruits and vegetables, poultry, fish, cheese, milk and dairy products" from the United States. He stated, however, that "these measures will not affect baby food products." Prime Minister Medvedev instructed the Federal Customs Service to "carry out and enforce this directive as quickly as possible," and announced that the Ministry of Agriculture and the Ministry of Industry and Trade would monitor commodity markets and price levels on a daily basis.

Russia's decision to ban US agricultural products occurs in response to recent and ongoing US sanctions against Russia's defense, energy, and financial sectors. The United States imposed the sanctions in response to Russia's annexation of Crimea and alleged continued involvement in Ukrainian affairs. The *Executive Order* follows several smaller-scale announcements by the Russian Federal Service for Veterinary and Phytosanitary Surveillance (*i.e.*, Rosselkhoznadzor) regarding restrictions or potential restrictions of US agricultural products. These announcements include detainment and/or determination of unsafe imports of the following US products: chilled veal (Aug. 4), pet food (Aug. 4), poultry (Aug. 4 and Jul. 31), corn (Jul. 29), and frozen cooked shrimp (Jul. 29).

The economic and geopolitical effects of the *Executive Order* likely will be significant for both Russia and the United States. In particular, the ban implicates the following issues:

- **US-Russia agricultural trade**: Russia traditionally imports a large quantity of food and agricultural products from the United States. In 2013, for example, Russia imported USD 1.3 billion worth of relevant US products, including approximately USD 330 million worth of poultry. To accommodate domestic demand, the Russian government intends to increase

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domestic supply and imports from countries that have not imposed economic or trade-related sanctions against Russia. Rosselkhoznadzor announced on Aug. 6, for example, that its representatives will meet with officials from Argentina, Brazil, Chile, and Ecuador to discuss mechanisms to increase Latin American exports of food products to Russia.[1] The *Executive Order* instructs the Russian government "to take measures to increase supply of domestic goods," and President Putin stated on Aug. 5 that Russia's response to US sanctions "must support domestic producers but not harm consumers."

- **US sanctions**: How, if at all, the *Executive Order* will affect existing US sanctions against Russia's defense, energy, and financial sectors remains uncertain.

- **World Trade Organization**: How, if at all, the *Executive Order* will implicate US-Russia relations at the World Trade Organization (WTO) remains uncertain. On June 20, 2014, Prime Minister Medvedev announced that Russia had requested WTO consultations with the United States regarding certain recently imposed US sanctions, opining that the sanctions "violate WTO rules," particularly as they relate to most-favoured nation treatment and the provision of services. Regarding potential US responses to Russia's ban, Trevor Kincaid, Deputy Assistant United States Trade Representative (USTR) for Public and Media Affairs, stated that USTR "will monitor the situation and take actions as appropriate." Deputy Assistant USTR Kincaid stated that "[t]he sanctions that the United States has imposed comply with our international obligations," while "Russia's move to ban agriculture goods from the United States … appears to have no grounding in the WTO rules governing international trade." Regarding the Russian ban, a WTO official reportedly stated on Aug. 7, 2014 that the organization had not received "any information either from the Russian Federation or the countries that news reports say could be affected."

- **Future US-Russia trade**: The *Executive Order* might affect future US-Russia trade in a variety of ways. Regarding the agricultural ban, Prime Minister Medvedev stated that Russia "would be willing to revise the specific implementation deadlines" should the United States "display a constructive approach toward cooperation issues." However, he also stated that Russia is "considering" a variety of further measures, including "an airspace ban against … US airlines that fly over our airspace to Eastern Asia," a discontinuation of discussions with the United States regarding use of "trans-Siberian routes," and the adoption of "protective measures" for Russia's aircraft, auto, and shipbuilding industries. The United States has not indicated what, if any, trade-related responses it might have to the *Executive Order*.

Laura Lucas Magnuson, a spokeswoman for the Obama Administration, responded to the Russian ban by stating that "[r]etaliating against Western companies or countries will deepen Russia's international isolation, causing further damage to its own economy." Prime Minister Medvedev stated that "[u]ntil the last moment," Russia hoped that the United States "would realise that

[1] The European Union, which in 2013 exported approximately USD 15 billion worth of food and agricultural products to Russia, imposed sanctions on Russia similar to those imposed by the United States and therefore is subject to the *Executive Order's* agricultural ban.

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sanctions lead to a blind alley, and that no one benefits from them."

Click here for the *Executive Order* and here for Prime Minister Medvedev's statement.

Senators Introduce Bill to Strengthen Domestic Content Requirements for Federal Transportation Projects

On August 5, 2014, Sen. Sherrod Brown (D-OH) announced his introduction of the *Invest in American Jobs Act* (S.2737), legislation to strengthen domestic content requirements for certain public infrastructure projects, including federal transportation projects financed by the US Department of Transportation (DOT). The bill aims "to maximize the use of domestic steel, iron, and manufactured goods" in such projects.

S.2737 would alter government procurement domestic content requirements as follows:

- **Strengthen domestic content requirements**: S.2737 would increase existing domestic content requirements regarding federal highways, public transportation, intercity passenger rail financing, national passenger railroad service (*i.e.*, Amtrak), and the Federal Aviation Administration (FAA). The current 60 percent domestic content requirement for public transportation and FAA projects would increase to 100 percent over five years. Value-based exemptions for Amtrak and passenger rail service projects would be eliminated.

- **Consolidate domestic content requirements**: S.2737 would consolidate domestic content requirements for both federal and sub-federal projects funded by DOT and prevent the federal government from dividing certain projects subject to domestic content requirements into segments, some of which would not be subject to those requirements. Such segmentation, according to Sen. Brown, seeks "to circumvent Buy American standards."

- **Extend domestic content requirements**: S.2737 would apply domestic content requirements to the Drinking Water State Revolving Fund, Economic Development Administration projects, Federal Emergency Management Agency mitigation grants, and bridges over navigable waters funded pursuant to the Truman-Hobbs Act.

- **Increase exemption transparency**: S.2737 would require DOT to announce publicly any planned waivers of domestic content requirements (including information regarding justifications and USD values) and offer an opportunity for public comment. S.2737 also would require DOT to publish an annual report detailing all provided waivers and including information regarding countries of origin and product specifications for any steel, iron, or manufactured goods acquired pursuant to a waiver.

The *Trade Agreements Act* (19 USC §§ 2501–2582) authorizes the President "to waive, in whole or in part," and under certain broad conditions, "the application of any law, regulation, procedure, or practice regarding Government procurement" imposed by the *Buy American Act* (41 USC §§ 8301–8305). However, projects financed by DOT and managed predominantly by states, localities, and other non-federal government entities, by virtue of being sub-federal projects, are not subject to the *Buy American Act*. Rather, a collection of distinct legislative provisions impose domestic content

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requirements on applicable sub-federal DOT projects. This distinction is important because whereas the President is authorized to waive (and regularly does waive) *Buy American Act* requirements to comply with US commitments made pursuant to free trade agreements or the World Trade Organization's plurilateral Agreement on Government Procurement, the legislative provisions applicable to sub-federal DOT projects provide no such authorization. As such, certain aspects of the proposed S.2737 – in particular, those aspects concerning domestic content requirements in sub-federal projects financed by DOT and transparency regarding exemptions – might complicate ongoing Trans-Pacific Partnership and Transatlantic Trade and Investment Partnership negotiations.

S.2737, which is co-sponsored by Sens. Tammy Baldwin (D-WI) and Jeff Merkley (D-OR), has been referred to the Senate Committee on Commerce, Science, and Transportation. Whether the Committee, upon reconvening in September, will forward the legislation to the full Senate for consideration remains uncertain. Rep. Nick Rahall (D-WV) introduced companion legislation, also titled the *Invest in American Jobs Act* (H.R.949), in the House of Representatives on March 5, 2013. H.R.949, which is co-sponsored by 62 Representatives, was referred to the House Committee on Financial Services and the House Committee on Transportation and Infrastructure. Sen. Mark Pryor (D-AR) and John Walsh (D-MT) introduced similar legislation, the *Made in the USA Act* (S.2682), which has been referred to the Senate Committee on Finance, on July 31, 2014.

USTR Requests Comments for Annual Report Detailing Foreign Trade Barriers

On August 15, 2014, the United States Trade Representative (USTR) published a request in the Federal Register for public comments to assist USTR to identify significant foreign barriers to US direct investment, US exports of goods and services, and protection of US intellectual property rights (79 Fed. Reg. 48292). USTR is identifying the barriers in order to publish the 2015 National Trade Estimate Report on Foreign Trade Barriers (NTE), a report published annually pursuant to section 181 of the Trade Act of 1974, as amended (19 U.S.C. 2241).

USTR requests information regarding the following topics: (i) restrictive import policies; (ii) government procurement restrictions; (iii) export subsidies; (iv) lack of intellectual property protection; (v) services barriers; (vi) investment barriers; (vii) anticompetitive conduct of state-owned or private firms that restrict the sale or purchase of US goods or services; (viii) trade restrictions affecting electronic commerce; (ix) trade restrictions implemented through unwarranted sanitary and phytosanitary measures; (x) trade restrictions implemented through unwarranted standards, conformity assessment procedures, or technical regulations alleged to safeguard national security, the environment, public health, or other objectives; (xi) localization barriers to trade (*i.e.*, measures "designed to protect, favor, or stimulate" domestic goods, services, or intellectual property "at the expense" of foreign goods, services, or intellectual property); and (xii) other barriers. USTR also requests that each submitted comment include (i) an estimate of the potential increase in US exports that might result from removal of the identified foreign trade barrier and (ii) a description of the methodology used to derive that estimate.

According to the USTR request, the NTE "provides a valuable tool in enforcing U.S. trade laws" and

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"facilitates U.S. negotiations aimed at reducing or eliminating" identified foreign trade barriers. Submissions are due to USTR by Oct. 29, 2014.

Click here for the USTR request and here for the 2014 NTE.

Department of Energy Amends Licensing Process to Export LNG to Non-FTA Countries

On August 15, 2014, the US Department of Energy (DOE) published a final rule to revise the licensing process that governs exports of liquefied natural gas (LNG) (79 Fed. Reg. 48132). Pursuant to the rule, DOE will review applications to export LNG from all states (other than Alaska and Hawaii) to countries with which the United States does not have a free trade agreement (FTA) only after the Federal Energy Regulatory Commission (FERC) has completed an environmental impact assessment. The rule, which alters the order but not the legal standard according to which DOE reviews applications, terminates DOE's practice of issuing conditional decisions prior to FERC's completion of an environmental impact assessment. The rule, which is effective immediately and was proposed on May 29, 2014, will not affect "the continued validity of the conditional orders" that DOE previously issued.

Section 3 of the *Natural Gas Act* (15 U.S.C. § 717b) requires DOE approval for all exports of LNG and states that such approval shall be granted "unless…the proposed exportation…will not be consistent with the public interest." The *Natural Gas Act* states further that exports to countries with which the United States has a free trade agreement are "deemed to be consistent with the public interest" and that applications for such exports "shall be granted without modification or delay." Exports to countries with which the United States does not have a free trade agreement receive no such treatment. In addition to acquiring export licensing approval from DOE, companies seeking to export LNG must complete an environmental impact assessment and secure a construction permit from FERC, as required by the *National Environmental Policy Act* (42 U.S.C. § 4321 et seq.).

According to DOE, the rule will "improve the quality of information" that DOE uses to make licensing decisions, contribute to "prompt action" on applications, and "better allocate departmental resources" by reducing the likelihood that DOE will be required to act on applications "with little prospect of proceeding." In addition, DOE stated that conditional authorizations "no longer appear necessary" to motivate FERC or most applicants to commit resources to environmental impact assessments.

Because DOE will consider new and conditionally approved applications according to the order in which FERC completes environmental impact assessments, the rule likely will incentivize LNG project developers to submit FERC applications and undergo environmental impact assessments more rapidly. However, while the rule establishes an order for DOE consideration of applications, potential LNG exporters have complained that DOE still is not required to make a decision on applications within a specified time period. To that end, on June 25, 2014, the House of Representatives passed the *Domestic Prosperity and Global Freedom Act* (H.R.6), which would require DOE to issue a licensing decision within 30 days of the completion of an environmental impact assessment by FERC. If and when the Senate will consider H.R.6 remains

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unclear. However, in light of upcoming mid-term elections and growing support among Senate Democrats to liberalize LNG exports, the Senate might consider H.R.6. (or similar legislation) sooner rather than later. Senate Republicans overwhelmingly support liberalization of LNG exports, as do certain key Senate Democrats, including Sen. Mary Landrieu (D-LA), Chair of the Energy and Natural Resources Committee, and Sen. Mark Udall (D-CO). Senators Landrieu and Udall represent states with abundant natural gas reserves, face difficult reelection battles, and have sponsored or co-sponsored legislation similar to H.R.6. As such, they might attempt to rally Democratic support to consider and pass H.R.6 or similar legislation this fall.

In the past three years, DOE has granted conditional approval for eight projects to export LNG to non-FTA countries, totaling 10.52 billion cubic feet per day of natural gas. FERC has completed environmental impact assessments for three of those projects. Only one of those three projects – Cheniere Energy's project in Louisiana – has received final approval from DOE.

Click here for the DOE rule; here for the text of H.R.6; and here for H.Amndt.959, which imposes the 30-day time period requirement.

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FREE TRADE AGREEMENTS

Free Trade Agreement Highlights

USTR States That TPP Will Not Alter US Government Procurement Laws

On July 30, 2014, the Office of the United States Trade Representative (USTR) issued a statement claiming that the Trans-Pacific Partnership (TPP) agreement under negotiation by the United States and 11 other Pacific Rim countries[1] "will make NO CHANGES to our procurement laws on the federal, state, or local level" (emphasis original). Rather, USTR stated, "TPP will only cover a part of federal procurement," and "[n]othing in TPP will in any way impact how state and local governments implement their own procurement policies." USTR further specified that TPP (i) will not impact the ability of states to purchase "in accordance with their environmental policies," (ii) will make "no changes to existing restrictions" regarding federal assistance to state and local transportation projects, and (iii) will ensure that preference programs involving small and minority businesses, distressed areas, transportation services, food assistance, and farm support "are maintained."

USTR's statement attempts to counter claims from lawmakers, organizations, and advocacy groups that TPP will limit the ability of federal, state, and local governments to impose "Buy American" restrictions on government procurement contracts. For example, in a July 30, 2014 letter to President Obama, 119 Democratic and three Republican Members of the House of Representatives urged President Obama "to reconsider" the inclusion of national treatment requirements in TPP's draft procurement chapter, expressing concern that "implementing these 'national treatment' terms would require us to waive our long-standing Buy American policies." Similarly, in a July 31, 2014 letter to President Obama, 14 Republican House Members stated that inclusion of national treatment terms "for U.S. government procurement in the agreement would be completely unacceptable," arguing that any such terms "should not require us to waive long-standing Buy American policies with respect to all firms operating in any TPP signatory nation."

While USTR is correct that TPP likely will not alter existing US government procurement laws, advocates of "Buy American" legislation appear to be more concerned that TPP will increase opportunities for US government entities to procure goods and services from foreign firms. The 1933 *Buy American Act* (41 USC §§ 8301–8305) restricts the acquisition and use by the US government of construction materials and end products not "mined," "produced," or "manufactured" in the United States. However, the Agreement on Government Procurement (GPA), a plurilateral World Trade Organization agreement to which the United States is a signatory, requires GPA parties to provide "treatment no less favourable" to domestic and international providers of most goods and services (so-called "national treatment"). To comply with this obligation, as well as similar obligations contained in certain bilateral free trade agreements (FTAs), the President traditionally waives relevant *Buy American Act* requirements for relevant trading partners. This waiver occurs pursuant to authority granted to the President by the 1979 *Trade Agreements Act* (19 USC §§ 2501–

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2582) to "waive, in whole or in part," and under certain broad conditions, "the application of any law, regulation, procedure, or practice regarding Government procurement."

If an obligation to extend national treatment in government procurement is incorporated into the TPP, the President almost certainly would comply with the obligation by waiving relevant *Buy American Act* requirements. Indeed, the United States already has granted such waivers to over 50 countries in the context of bilateral FTAs or the GPA, including seven of the 11 parties with which the United States is negotiating the TPP (*i.e.*, Australia, Canada, Chile, Japan, Mexico, Peru, and Singapore), and the United States almost certainly will grant a waiver to New Zealand upon completion of its ongoing process to accede to the GPA. USTR alluded to this reality when it stated that "the United States and nearly all other industrialized countries, including 8 of the 11 countries that will be [US] TPP partners" already "have agreed to government procurement rules." A government procurement obligation in the TPP therefore would add Brunei, Malaysia, and Vietnam to the list of countries to which the United States extends – and from which it receives – national treatment in government procurement. Extending non-discrimination in government procurement to these three countries thus is consistent with USTR's statement that "TPP's rules on non-discrimination in government procurement are not new – they reflect 35 years of laws passed by the U.S. Congress." However, because the President would be permitted to waive *Buy American Act* requirements for Brunei, Malaysia, and Vietnam, "Buy American" advocates oppose the inclusion of national treatment for government procurement in the TPP.

Because the United States already extends national treatment to seven of the 11 TPP members (and almost certainly will extend national treatment to New Zealand upon its accession to the GPA), the economic implications, for purposes of US government procurement, of a potential procurement chapter in the TPP might be minimal. This is especially true in the increasingly likely event that the TPP omits procurement commitments at the sub-federal level.

Click here for USTR's statement, here for the *Buy American Act*, here for the Agreement on Government Procurement, and here for the relevant portion of the *Trade Agreements Act*.

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MULTILATERAL

MULTILATERAL

WTO Update: Honourable Draw Versus Stalemate

I. INTRODUCTION

WTO Members face a very challenging situation when they start work again in Geneva in early September. As soon as possible they must complete the Protocol for the new Trade Facilitation Agreement (TFA) which they failed to agree on before the summer recess, and by year-end they have to deliver a convincing work programme to conclude the Doha Round.

Last December's successful Ministerial Conference in Bali raised hopes of new political will to reinvigorate multilateral trade cooperation and finally bring to closure the Doha Round, which is now in its 13th year. Yet by mid-year the WTO was back in crisis. India blocked finalization of the TFA, the centrepiece of Bali, and no real progress has been made on other parts of the Doha Round, particularly the core market access negotiations. North-South divisions seemed to widen again after Bali, and some important bilateral relationships have deteriorated, notably those of the United States and the EU with India and Russia.

The credibility of the WTO is at stake. Progress is being made in regional and plurilateral negotiations, particularly the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), and the Trade in Services Agreement (TISA). All of these cover a large share of world trade and, if completed, will offer participating countries an attractive alternative trading environment that could persuade them to side-line the WTO if it fails to deliver results.

That need not be the case. The WTO's dispute settlement system and its surveillance and consultation mechanisms work well, and WTO rules remain crucial for managing key trade relationships among the major countries. Its negotiating arm needs a radical overhaul, but that cannot be done until the Doha Round is out of the way.

The price for finishing the Round quickly, by end-2015, will be a low level of ambition in market access and rulemaking. That will be disappointing, but it is a price worth paying to allow WTO Members to turn the page on Doha and start to figure out how to make multilateral trade negotiations work in the 21st century.

II. TRADE FACILITATION

Initially, technical work to finalize the new Trade Facilitation Agreement (TFA) proceeded well after Bali. The legal scrub of the TFA was completed in May, and the text of the Protocol of Amendment to incorporate the TFA into the WTO as a "covered agreement" was ready by early July. The only element that lagged was the notification by developing countries of Category A commitments (commitments to implement parts of the TFA upon its entry into force), but this is less critical.

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Despite joining the consensus at the technical level, at the final hour India blocked formal adoption of the Protocol by the WTO General Council that would have opened the way for ratification of the new TFA by mid-2015. India's opposition came as a surprise and was viewed by many other WTO Members as bad faith. The Indian Minister of Commerce and Industry stated that her objection had nothing to do with the TFA per se. Rather, it was that not enough progress had been made on the other Bali issues, notably on India's aim of securing permanent acceptance of the agricultural subsidies that it uses to underwrite its food security programme; in Bali India had won agreement that its subsidies would not be challenged in dispute settlement before 2017, during which time a permanent solution would be sought. In last minute negotiations conducted by WTO Director-General Roberto Azevêdo, India was offered an accelerated work programme on food security and other Bali development-related issues, but India remained insistent on having a permanent solution on food security now. That, Azevêdo stated, would be tantamount to rewriting the Bali decisions and was unacceptable to other delegations.

Azevêdo expressed "very, very serious concern" at the situation at end-July. This cannot be downplayed as just another example of the WTO missing a deadline; blockage of the TFA will destroy any prospect of concluding the rest of the Doha negotiations until it is sorted out. Even if a solution on the TFA can be found quickly, the mistrust that has been created among delegations and shortage of time will make it exceedingly difficult to arrive at agreement by the end of the year on a work programme to complete the Doha negotiations. Without an early solution on the TFA, the WTO's future as a serious negotiating forum will look very bleak.

There have been various reactions to the breakdown in the TFA negotiations. A large number of Members condemned India's stance in terms such as "flabbergasted", "astonished", and "dismayed". The United States stated that this failure placed the future of the WTO on very uncertain grounds.

India is confident that a solution can be found in early September. That seems optimistic. The Indian Government has not yet resolved the domestic political difficulties that have driven it to take such an extreme position in the WTO. Nor will its negotiating partners, in particular the United States, readily make further concessions to appease India on food security. President Obama hopes to have a positive summit meeting with Indian Prime Minister Modi in mid-September on key strategic issues such as energy and defence; he will not want differences over WTO issues souring that meeting. However, members of the US Congress have expressed deep frustration with India's actions in the WTO, and this will limit the extent to which USTR Michael Froman can offer new concessions to appease India on food security, even if he wishes to do so.

Japan and Australia have proposed turning the TFA into a plurilateral agreement without India. That is an option, although it would need India's consent for it to be brought under the WTO umbrella, and this seems unlikely. Other Members have rejected the idea of leaving aside a country as systemically important as India and pointed to the danger of fragmentation of the WTO.

China and Brazil expressed their frustration with the situation and, in China's case, its concern about collateral damage to the multilateral trading system. Both have big stakes in keeping the rest of the Doha negotiations and, more broadly, the WTO on track. They and others have stated that they are willing to resume consultations with India again in September.

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Brazil has suggested amalgamating the negotiations on the TFA Protocol, the remaining Bali decisions (including food security), and the work programme on the completion of the Doha negotiations with a view to finding trade-offs and reaching agreement on all three by the end of the year. The problem is that this would drive everything back to the Single Undertaking and the difficulties associated with it that have confounded the Doha Round negotiators for years.

Nonetheless, this may be the only route open to the WTO. It seems unlikely that India can back down on the TFA without achieving something significant on food security; domestic political considerations will prevent that. It seems equally unlikely that other Members will bow readily to India's demands on food security. The willingness of the United States, the European Union, and others to agree eventually to a permanent waiver is not in doubt; they already conceded in Bali a peace clause until 2017 preventing challenges to subsidies for food stockpiling by developing countries. However, they will attach conditions and expect counterpart concessions before agreeing to make that arrangement permanent, and this can be negotiated only as part of the Doha agricultural package.

III. COMPLETING DOHA

WTO Ministers agreed in Bali to prepare a "clearly defined work programme" by the end of this year to conclude the Doha Round. This means reaching agreement on the key political parameters that will allow technical level negotiations to proceed next year and to conclude in time for the WTO's 10th Ministerial Conference in December 2015. It requires agreement in particular on the level of ambition to liberalize markets that Members will aim for in the negotiations on Agriculture and Non-Agricultural Market Access (NAMA) and on what development flexibilities will be offered to the major emerging market economies.

Achieving the end-of-year target to agree on the work programme was never expected to be easy. With only four months left, it looks very challenging given how little progress has been made in Geneva so far this year and the failure to conclude Trade Facilitation.

In his report to the Trade Negotiations Committee at the end of July, Director-General Azevêdo spoke of a "very good level of engagement" on the work programme. The reports from the individual Negotiating Groups were less sanguine. The core issues are agriculture, NAMA and services. They will determine how far Members can go on the other areas of rules, intellectual property, environment and development.

On services, key Members have so far adopted a wait-and-see attitude as the separate TISA negotiations proceed outside the WTO. TISA will not be finished this year, but in anticipation of its successful conclusion the WTO work programme could contain agreement on the tabling of revised market access offers. The existing offers are 9 years old and no longer reflect current priorities or patterns of trade, for example electronic commerce and digital trade.

The work programme on agriculture must settle on the modalities that will be used to cut import restrictions and domestic support programmes and on the flexibilities that will be available to developing countries, in particular to the large emerging economies, to protect their farmers. The

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agreement reached in 2005 to eliminate all forms of export subsidies seems still to be intact, but it will not be conceded finally until the market access and domestic support pillars are agreed on.

NAMA cannot move without agriculture. The NAMA work programme needs to include the modalities for cutting import restrictions and the flexibilities that will be available to developing countries. It needs also to give direction for negotiations on specific sectors where there are expectations of deeper liberalization, in particular on environmental goods, an expanded and updated Information Technology Agreement, and sectors such as chemicals and electrical goods where the United States and others are hoping to bring tariffs down to zero.

The level of ambition that WTO Members choose to aim for in agriculture and NAMA will be critical. The United States seems prepared to work on any level – high or low – but it insists that the same level must be applied consistently to all areas of negotiation. Other OECD members, such as the European Union and Japan, are more ambivalent. They want high ambition in some areas, such as anti-dumping rules in the case of Japan and environment and geographical indications in the case of the European Union, but they have longstanding sensitivities in areas such as agriculture. China wants to preserve its flexibility in agriculture to provide high levels of domestic support and maintain state trading activities. China probably will settle in NAMA for cutting bound tariffs without touching applied rates. Brazil and other agriculture-exporting countries will press for high ambition in agriculture, but they are defensive on NAMA. India is defensive on both NAMA and agriculture and would welcome a low-ambition result, although it will fight for a permanent waiver for its food security programme.

The level of ambition on market access is tied to flexibilities for developing countries (so-called "special and differential treatment" or SDT). The higher the level of ambition, the more flexibility will be expected by developing countries to protect their domestic industries and farmers. Developed countries are not prepared to offer the same flexibility to the large emerging economies as to other developing countries. They want them to graduate out of full SDT and accept a high degree of reciprocity in the negotiations if there is to be a deal. For the time being, the emerging economies have not accepted that, and this is not a debate that Members can resolve before the end of this year.

Given the differences in the positions of the major players, the vexing question of developing country flexibilities and the very limited time remaining to reach a deal on the work programme, it seems inevitable that the level of ambition to aim for can only be low. That will help avoid a confrontation over SDT flexibilities for emerging market economies, and limit the political difficulties for Members in getting a deal through their domestic legislatures.

The prospect is that very little, if any, real liberalisation of trade will be achieved. That will be disappointing, but not as damaging to the credibility of the WTO as failing to grasp this opportunity to conclude the Doha Round. If there is no agreement on the work programme by year-end, many of the major players are likely to turn their backs on Doha and concentrate on their regional and plurilateral negotiations that look far more promising.

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IV. CONCLUSION

The sole thought in negotiators' minds when they return to Geneva in September must be to bring the Doha Round to closure at the 10th WTO Ministerial Conference in December 2015. Continuing to skirmish over unfinished Bali business will only waste time. The benefits of reforming trade facilitation practices are obvious; sensible governments will go ahead and implement them anyway without waiting for legal formalities to be completed in the WTO, as APEC countries have recently announced they will do. Food security for India and others is well-protected by the Bali peace clause until 2017; a permanent solution should be sought through the Doha negotiations.

Members should decide by December on a low-ambition baseline scenario to complete Doha. In the case of market access this could be no more than consolidating bound levels of tariffs, domestic support, and services regulations at or close to current applied rates. Real liberalization could still come from supplementary critical-mass agreements in areas such as the ITA or environmental goods or through importing the results of the TISA. Modifying WTO rules, particularly on contingency measures, is important to some delegations, but it seems to be a step too far in a low-ambition scenario. Results that all Members agreed to previously at the Hong Kong Ministerial Conference in 2005 should be honoured, particularly the elimination of agricultural export subsidies and concessions for low-income countries on cotton and duty-free-quota-free market access.

A package such as that would fall well short of expectations when the Doha Round was launched. But the reality is that time has run out. The risk to the credibility of the WTO of further delays without any guarantee of a better result is now too high to ignore. "Just get it done" is the message that G20 leaders have given to Director-General Roberto Azevêdo since he took office. He demonstrated in Bali that he has the negotiation skills that are needed to close the deal. He will need the support of all WTO Members over the next eighteen months to bring Doha to closure once and for all. It may not be a glorious result. But settling for an honourable draw now would seem to be infinitely better than continuing the Doha stalemate and watching the WTO steadily disintegrate.

Multilateral Highlights

WTO Members Fail to Adopt Trade Facilitation Agreement Protocol

On July 31, 2014, Members of the World Trade Organization (WTO) failed to meet a deadline to adopt the Protocol of Amendment required to incorporate the Trade Facilitation Agreement (TFA) into Annex 1A of the WTO Agreement and render the TFA binding on all Members. The TFA, which was concluded at the 9th WTO Ministerial Conference held in Bali in December, 2013, contains provisions for more efficient, transparent, and internationally uniform customs procedures. According to the United States Trade Representative (USTR), the agreement – which constituted not only the centerpiece of the "Bali Package" but also the first multilateral trade agreement in the WTO's nearly 20-year history – was anticipated to generate "hundreds of billions of dollars in much needed economic activity."

Adoption of the Protocol of Amendment, which required consensus among Members, became

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increasingly unlikely upon repeated demands by India to postpone the July 31 deadline until Members addressed Indian concerns regarding the legality of domestic food security stockholding programs. At the Bali Ministerial, Members adopted the Decision on Public Stockholding for Food Security Purposes, which provided that WTO Members "shall refrain" from challenging via WTO dispute settlement developing Members' support programs for traditional food crops as part of food stockholding programs, so long as they are maintained in accordance with this Decision and certain provisions of the WTO Agreement on Agriculture. However, that Decision will expire in 2017, at which point India's food security programs will become more vulnerable to challenge. The vast majority of Members, including several Members sympathetic to India's food security concerns, have opposed India's efforts to delay implementation of the TFA.

In announcing the failure of the Protocol, WTO Director-General Roberto Azevêdo informed Members that "unbridgeable" gaps existed between Members who believe that the Bali Package "cannot be changed or amended in any way" and Members who believe that the Bali Package "leave[s] unresolved concerns that need to be addressed in ways that…change the balance of what was agreed in Bali." Director-General Azevêdo instructed Members to "reflect long and hard on the ramifications of this setback" during the WTO's August recess.

The failure of Members to implement the TFA protocol implicates the general effectiveness and credibility of the WTO. Amidst the background of an unsuccessful and languished Doha Round, the Bali Package offered fresh but minor optimism that the TFA might reignite multilateral trade negotiations. Non-adoption of the Protocol of Amendment, however, combined with ongoing progress in plurilateral and bilateral negotiations (*e.g.*, the Trade in Services Agreement and the Transatlantic Trade and Investment Partnership, respectively) has significantly tempered any enthusiasm surrounding the WTO as a successful multilateral negotiating forum. Several Members even have begun speaking informally about using the TFA as a template to advance trade facilitation objectives at a plurilateral level without India.

US trade policy officials responded to the failure of the TFA protocol with criticism and regret. House Ways & Means Committee Chairman Dave Camp (R-MI) stated that India's actions "put into doubt its credibility as a responsible trading partner" and suggested that the United States should "salvage the Trade Facilitation Agreement, either with or without India." Senate Finance Committee Ranking Member Orrin Hatch (R-UT) charged that India "put the broader international trading system at risk" and "once again blocked significant progress towards greater trade liberalization." USTR Michael Froman responded more cautiously, reminding foreign trade partners that the WTO "relies on its Members to implement the commitments to which they have agreed" and stating that the United States "will consult with our trading partners on potential paths forward."

Click here for Director-General Azevêdo's speech, here for Chairman Camp's response, and here for Ranking Member Hatch's response.

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Failure by WTO Members to Adopt the TFA Protocol Produces Negative Consequences for the WTO, the Doha Round, and the TFA

This report follows the announcement that Members of the World Trade Organization (WTO) failed to meet the July 31, 2014 deadline to adopt the Trade Facilitation Agreement (TFA) Protocol of Amendment. There have been several significant developments regarding the future prospects of the TFA and the implications for the WTO more broadly. As reported, India refused to support adoption of the Protocol of Amendment on the grounds that insufficient progress had been made on other issues – notably, the creation of a permanent derogation for developing country agricultural subsidies that underwrite food security programmes – agreed to at the 9th WTO Ministerial Conference held in Bali in December, 2013. India rejected the offer of an accelerated work programme on food security and other Bali issues related to development, insisting on a permanent "peace clause" to prevent challenges to India's agricultural subsidies for food stockpiling beyond the 2017 deadline agreed to in Bali.

The WTO's failure to meet the TFA Protocol of Amendment deadline has generated strong negative responses from key WTO parties, which suggest serious consequences for the future of the Doha Round and the operation of the WTO:

- **Response by WTO Director-General**: WTO Director-General Roberto Azevêdo convened Members in a closed meeting late in the evening of July 31 to announce that a bridge between India's position and that of other Members, notably the United States, could not be reached. Azevêdo stated that adopting India's proposal for a permanent "peace clause" would be unacceptable to other delegations, as it was tantamount to rewriting the Bali decisions.

- **Responses by Members**: Many Members condemned India's position, using terms such as "flabbergasted", astonished" and "dismayed." Japan and Australia proposed transforming the TFA into a plurilateral agreement without India. However, bringing such an agreement under the WTO umbrella would require India's consent. Other delegations, including New Zealand, rejected the idea of leaving aside a country as systemically important as India, fearing fragmentation of the WTO. China and Brazil, while frustrated with India, expressed a willingness to resume consultations with India in September. Brazil suggested that it might be possible to amalgamate negotiations regarding the TFA Protocol, remaining Bali decisions (including food security), and a work programme to complete the Doha negotiations – with a view toward finding trade-offs between these elements – by the end of the year. This approach, however, would return negotiations to the same problems with the Single Undertaking that have confounded Doha Round negotiators for years.

- **Implications for the TFA**: India stated that it remained confident that a solution could be found in early September. However, that seems to be a remarkably short period for the Indian Government to resolve the domestic political difficulties that have driven India to take such an extreme position in the WTO. Determining a solution in early September also presumes that India's negotiating partners, particularly the United States, will make further concessions on the food security issue, which is far from certain. President Obama is scheduled to meet with Indian

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Prime Minister Modi in mid-September regarding energy, defense, and other strategic issues, and the President will not want differences over the TFA souring that meeting. However, members of the US Congress have expressed deep frustration with India's WTO obstructiveness, limiting the extent to which United States Trade Representative Michael Froman will be able offer new food security concessions to appease India, even if he wished to do so.

- **Consequences to the Doha Round and the WTO**: The WTO's failure to meet the TFA Protocol of Amendment deadline poses a serious threat to a productive conclusion of the Doha Round and to the effective operation of the WTO as a trade negotiating body. Director-General Azevêdo expressed "very, very serious concern" and said that failure to adopt the draft Protocol of Amendment could not be downplayed as just another example of the WTO missing a deadline; rather, the failure would have significant, negative consequences for the rest of the Doha negotiations. Indeed, even if a solution for TFA enshrinement is reached shortly, the mistrust that has been created among Members will make arriving at an agreement by the end of 2014 on a work programme to complete the Doha negotiations extremely difficult. Without a TFA solution in September, the WTO's future as a negotiating forum will be cast into very serious doubt.

Interested parties are now waiting to learn if positions change by early September, when the WTO reconvenes in Geneva following its August summer recess.

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