US & Multilateral Trade and Policy Developments

Japan External Trade Organization

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Contents

US General Trade Policy

Forecast 2015: A Year of Concrete Progress?

The United States' international trade agenda is likely to accelerate in 2015, with trade initiatives occupying a more prominent position among both Congressional and Executive Branch priorities than in previous years. Domestically, the Republican leadership in Congress has identified trade policy as a primary area of cooperation with the Obama Administration during the 114th Congress, making action on Trade Promotion Authority (TPA) and other trade priorities more likely. Internationally, the United States will pursue the conclusion of the Trans-Pacific Partnership (TPP) negotiations, seek meaningful progress on the Transatlantic Trade and Investment Partnership (TTIP), and play a key role in negotiations at the World Trade Organization (WTO), on both plurilateral agreements and the post-Bali Work Programme. The United States also will maintain an active trade enforcement agenda through US trade remedy laws and as a participant in the WTO's Dispute Settlement Body (DSB).

The United States' 2015 trade policy activities may be summarized as follows:

- **Congressional Action**. Although contentious debate is expected, the 114th Congress likely will enact legislation granting TPA to the Obama Administration. Other trade initiatives also might be addressed through legislation, including (i) renewal of the Generalized System of Preferences (GSP) and the African Growth and Opportunity Act (AGOA); (ii) Customs and Border Protection (CBP) reauthorization; (iii) the Miscellaneous Tariff Bill (MTB); and (iv) reauthorization of the Export-Import Bank.
- **Trans-Pacific Partnership**. The TPP negotiations are nearing conclusion, and an agreement could be finalized and signed quickly in 2015 if Congress grants TPA to President Obama. However, even if an agreement can be signed in 2015, Congressional approval of implementing legislation for the TPP is unlikely to occur before the end of the year.
- **Transatlantic Trade and Investment Partnership**. Top US and EU trade officials have stated that the TTIP negotiations will receive a "fresh start" in 2015 after failing to make significant progress in 2014. However, the TTIP negotiations are expected to focus on non-sensitive issues during the first half of 2015 as the United States works to conclude the TPP.
- **Energy Exports**. The US government is under pressure from multiple domestic constituencies and foreign governments to liberalize exports of liquefied natural gas and crude oil. Although prospects for both initiatives are improved in 2015, significant obstacles to liberalization remain.
- **Trade Remedies**. Trade remedy investigations will continue to be a key component of the Obama Administration's trade enforcement agenda in 2015, and the United States will revisit several previous investigations to comply with adverse WTO rulings.
- **World Trade Organization**. The United States will play an active role in negotiations on the post-Bali Work Programme, which likely will not be finalized by the July 2015 deadline but might be completed by the end of the year. Negotiations towards an Environmental Goods Agreement (EGA), a Government Procurement Agreement (GPA), and an expanded Information Technology Agreement (ITA) also will continue, and the United States will continue to be an active participant in the WTO's DSB.

1. Congressional Action on Trade-Related Issues

Congress likely will consider several significant trade-related initiatives in 2015. Although the legislative agenda is busy due to domestic and foreign policy concerns unrelated to trade, the Republican leadership in Congress has identified trade policy as a high priority and an area of cooperation with President Obama. In early 2015, Congress will focus on enacting TPA, followed by other trade initiatives later in the year.

- **Trade Promotion Authority.** Lawmakers are expected to introduce TPA legislation in March or April of 2015, and Congress likely will enact such legislation unless controversial amendments, such as those requiring free trade agreements (FTAs) to contain enforceable currency provisions, are adopted. However, Congressional Democrats oppose TPA and likely will offer such amendments. The Obama Administration and the Republican leadership in Congress therefore will need to cooperate with Congressional Democrats to limit support for such controversial proposals. Congressional Republicans also have sought assurances that TPA will receive significant bipartisan support, especially in the House of Representatives, where Democratic support remains weak despite ongoing White House advocacy. Ultimately, Congressional debate over TPA will be contentious but likely will result in approval of TPA legislation similar to the *Bipartisan Congressional Trade Priorities Act of 2014*. In a best-case scenario, Congress could enact TPA in the early summer of 2015, as Senate Finance Committee Chairman Orrin Hatch (R-UT) has stated that TPA will not be considered on the Senate floor until at least April.

- **Implementing Legislation for the Trans-Pacific Partnership.** If TPA is enacted and the TPP negotiations are concluded, Congress might consider implementing legislation for the TPP in 2015. However, floor votes on the implementing legislation are unlikely to occur in 2015, even under the expedited legislative procedures established under TPA. Under TPA, Congressional consideration of the implementing legislation for the TPP could last for up to 90 "in-session" days before a final vote on the implementing bill will be required. Thus, even in a best-case scenario in which the Obama Administration would submit TPP implementing legislation to Congress in June, a Senate floor vote on the legislation would not be required until February 2016. Therefore, Congress would need to disregard the TPA timeline and proceed rapidly to floor votes on the implementing legislation to approve the TPP before the end of the year. Many lawmakers will be reluctant to consider the TPP on such an expedited schedule, making Congressional approval of the implementing legislation in 2015 unlikely.

- **Trade Preference Programs.** President Obama and the Republican leadership in Congress have identified prompt reauthorization of the GSP and extension of the AGOA as high priorities for 2015. Strong bipartisan support exists for a fully retroactive reauthorization of the GSP without significant changes to the program. Similar support exists for the extension of the AGOA, and legislation to extend the program reportedly is near completion. Legislation to reauthorize the GSP and the AGOA likely will be approved simultaneously in 2015 as part of a broader legislative package, though the composition and timing of such a package likely will not be clear until debate over TPA has concluded.

- **Customs Reauthorization.** Congress is likely to consider customs reauthorization legislation currently being drafted by Sen. Rob Portman (R-OH) in 2015. The legislation is expected to be based on the *Customs Trade Facilitation and Enforcement Act of 2012*, which was introduced at the end of the 112th Congress by Rep. Kevin Brady (R-TX). However, that legislation stalled in the 112th Congress due to partisan disagreements over provisions intended to counteract evasion of antidumping (AD) and countervailing duty (CVD) orders, as did subsequent legislation introduced by Sen. Hatch and former Sen. Max Baucus (D-MT) in the 113th Congress. The version of these provisions favored by Republicans likely will be included in the 2015 legislation, and, as a result, prospects for Congressional approval of the legislation likely will depend upon whether the Republican caucus is willing to approve the legislation without significant Democratic support.

- **Miscellaneous Tariff Bill.** Congress might consider an MTB in 2015 but likely would need to pass legislation implementing procedural reforms beforehand. As in previous years, efforts to pass MTB legislation in 2015 likely will be impeded by Members of Congress who argue that the process by which the MTB is compiled is inconsistent with Congress' ban on earmarks, *i.e.*, guarantees of federal expenditures to particular recipients in appropriations-related bills. Sens. Claire McCaskill (D-MO) and Rob Portman introduced legislation in 2015 to reform the MTB process, allowing companies to submit proposals for duty suspension directly to the International Trade Commission (ITC) and reserving final approval for Congress. However, the House Ways and Means Committee Chairman Paul Ryan (R-WI) has expressed reservations that this approach would cede Congressional tariff authority to the ITC. Given that these issues remain unresolved, Congressional approval of an MTB in 2015 is unlikely.

- **Export-Import Bank.** Contentious debate will continue in 2015 over Congressional efforts to renew the charter of the Export-Import Bank (Ex-Im), which is set to expire on June 30. Most Congressional Democrats support Ex-Im, while Republicans are more divided, with many conservative House Republicans in particular opposing its reauthorization. Ex-Im is operating under a nine-month extension of its charter approved by Congress in September 2014. However, this approval does not indicate broad Republican support for Ex-Im, as the extension was approved only after being embedded in a continuing resolution necessary to fund the federal government through mid-December 2014. An opportunity to reauthorize Ex-Im under similar circumstances likely will not occur in 2015, as no "must-pass" government funding legislation will be required prior to June 30. Rep. Stephen Fincher (R-TN) introduced legislation in January to renew Ex-Im's charter for five years with minor reforms, gaining 57 Republican co-sponsors. Rep. Maxine Waters (D-CA) introduced competing legislation in February to renew Ex-Im's charter for seven years, gaining 187 Democratic co-sponsors. Sens. Joe Manchin (D-WV) and Mark Kirk (R-IL) are drafting bipartisan Senate legislation to reauthorize Ex-Im.

  However, any stand-alone legislation to renew Ex-Im's charter will face obstacles. First, prospects for reauthorization of Ex-Im will be less favorable generally in the 114th Congress, which is more conservative due to the enlarged Republican majority in the House and the new Republican majority in the Senate. Second, Republican opponents of Ex-Im remain in key leadership positions in the House. These include Majority Leader Kevin McCarthy (R-CA), Majority Whip Steve Scalise (R-LA), and Financial Services Committee Chairman Jeb Hensarling (R-TX). Rep. Hensarling's opposition is of particular significance given the Financial Services Committee's jurisdiction over Ex-Im. In 2014, Rep. Hensarling blocked committee consideration of legislation to reauthorize Ex-Im and might do so again in 2015 to prevent the legislation from being reported to the House floor. Such opposition would present a significant but not insurmountable obstacle to reauthorization of Ex-Im in 2015.

  Congressional approval of legislation to reauthorize Ex-Im is possible despite Rep. Hensarling's objections, but such efforts will require the cooperation of House Speaker John Boehner (R-OH). If the Senate were to approve the bipartisan Ex-Im legislation being drafted by Sens. Manchin and Kirk, Speaker Boehner might face pressure to advance Ex-Im legislation in the House – especially since a majority of Representatives have co-sponsored some form of legislation to reauthorize Ex-Im. Facing such pressure, Speaker Boehner might persuade Rep. Hensarling to allow a committee vote on Ex-Im legislation. Alternately, Speaker Boehner could bypass the Financial Services Committee by attaching Ex-Im legislation to another bill set to receive a floor vote before June 30. Given that Speaker Boehner, a majority of Congress, and many influential business groups support Ex-Im, reauthorization of Ex-Im, perhaps with some reforms, is likely in 2015.

2. Trans-Pacific Partnership

The Obama Administration will aggressively pursue a successful conclusion to the TPP negotiations in 2015. While a number of issues in the TPP negotiations remain unresolved, negotiators have made significant progress in key areas, and, as a result, negotiations are widely expected to conclude in 2015 if Congress

enacts TPA. The United States is pushing to resolve all remaining substantive issues in the TPP by the conclusion of a ministerial meeting expected to be held in mid-April – an achievable but ambitious deadline. In addition to bilateral market access issues, the most notable remaining issues in the TPP include (i) the United States' continued insistence that parties adopt a 12-year data protection period for biologic drugs; (ii) exemptions from the agreement's disciplines on state-owned enterprises (SOEs); and (iii) exemption of certain products, such as tobacco, from the agreement's investor-state dispute settlement (ISDS) rules.

Given that these and other sensitive issues remain unresolved, concluding the TPP negotiations even in principle by the conclusion of the April ministerial meeting is an ambitious goal and likely will be achieved only if TPA legislation has at least been introduced in Congress before the ministerial begins. In fact, the ministerial likely will not occur until TPA has been introduced. In the event that TPA is introduced and the ministerial occurs in April, the remaining substantive issues in the TPP could be resolved in principle during the ministerial. However, unless TPA has been enacted before the ministerial, the Obama Administration effectively will be precluded from announcing a final, signed agreement at that time. This timeline is due largely to the perception that TPP members will withhold their most ambitious market access concessions and agreement on the TPP's most politically-sensitive elements unless TPA is enacted, thereby providing a guarantee that the agreement cannot subsequently be modified by Congress. Congressional Republicans share this view and, for this reason, have stated that they will not support a TPP agreement that has been completed before the enactment of TPA. Therefore, even if an agreement in principle is reached in April, finalization and signing of the TPP text likely would not occur until late spring or early summer – or whenever Congress ultimately enacts TPA.

3. Transatlantic Trade and Investment Partnership

The TTIP negotiations remain in their early stages after making minimal substantive progress in 2014. This state of affairs led United States Trade Representative (USTR) Michael Froman and EU Trade Commissioner Cecilia Malmstrom to announce in December that the parties would seek a "fresh start" to the negotiations in 2015. However, despite these attempts to inject renewed political momentum into the negotiations, any progress made on TTIP in the first half of 2015 likely will be in technical, non-controversial areas, as the United States will be focused on concluding the TPP negotiations during the first half of the year.

The first formal TTIP negotiating round of 2015 yielded minimal progress but set the stage for potential movement later in the year due to new flexibilities offered by the European Union. In particular, the European Union agreed to engage in a detailed discussion of the initial US tariff offer, after having refused to do so since the offer was initially tabled in February 2014. Both parties have expressed a desire to move forward with second tariff offers and might do so before the end of the year. In addition, both parties tabled initial regulatory cooperation proposals in February, marking the first time that proposals from both sides have been tabled in all three horizontal regulatory areas, which include (i) regulatory cooperation, (ii) technical barriers to trade and other standards, and (iii) sanitary and phytosanitary measures.

Two formal TTIP negotiating rounds and several informal negotiations will occur before August of 2015. These efforts are expected to focus on bringing the parties closer to tabling initial market access offers for government procurement and producing consensus on the structure of market access offers for services. The European Commission is also expected to finalize its revised proposal on investor protections in TTIP by the summer of 2015. The revised proposal is expected to account for public concerns related to the potential impact of ISDS on the European Union's ability to regulate in the public interest. The European Union's revised ISDS proposal and subsequent reactions from US negotiators will be a significant milestone that might set the tone for the TTIP negotiations in the latter half of 2015 and beyond.

4. Trade Remedies

2015 likely will be an active year for trade remedies in the United States, continuing the 2014 trend. US companies and the US government are expected to participate in multiple trade remedy investigations and political and economic disputes related to trade remedies. Certain of these investigations and disputes will carry-over from 2014, while others will be initiated in 2015.

The number of US-China trade remedy cases and the tensions arising from such cases have moderated in recent years, although the United States and China are expected to continue their characteristic "tit-for-tat" application of trade remedies to a certain extent in 2015. The WTO's dispute settlement system, WTO disciplines regarding the application of trade remedies, and pro-trade political and economic forces should continue to prevent trade remedy cases from escalating into a "trade war" in 2015. Nevertheless, China will remain the top target of US trade remedy cases this year.

New trade remedies actions not involving China also are expected, and ongoing investigations of allegedly dumped and/or subsidized products will continue into 2015. For example, certain US sugar companies recently challenged a negotiated suspension agreement concerning sugar imported from Mexico, thereby returning the dispute to investigatory phases at the Department of Commerce (DOC) and the International Trade Commission (ITC). The US Court of International Trade is also reviewing the legality of a longstanding suspension agreement concerning tomatoes from Mexico. In addition, certain US producers of polyethylene terephthalate (PET) resin recently filed AD petitions against imported PET resin from Canada, China, India, and Oman and corresponding CVD petitions against China, India, and Oman. These, and other increasingly publicized trade remedies disputes, will continue throughout 2015.

US efforts to comply with adverse WTO rulings also will affect AD/CVD orders in 2015. For example, US compliance with DSB rulings in DS436 – *Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* and DS437 – *Countervailing Duty Measures on Certain Products from China* will require the DOC to revise its determinations in CVD investigations involving carbon steel products from India and multiple goods from China. The United States has announced its intention to implement the DSB's rulings in both disputes and, in the case of DS437, reportedly has agreed with China that the reasonable period of time for implementation will end on July 22, 2015. The reasonable period of time has not been established for DS436 but likely will end in 2015.

Debate over the expiration of China's status as a non-market economy (NME) also will intensify in 2015. China's 2001 WTO Accession Protocol expressly permits the United States and other WTO Members to deviate from the standard dumping calculation methodologies set forth in the WTO Anti-Dumping Agreement (and therefore to use a separate NME methodology) but also arguably establishes an expiration date of December 11, 2016 for this deviation. Some US domestic interests, particularly those affiliated with petitioners, have argued that the United States is not obligated to graduate China from NME status at this time. The US government has not stated its intentions and likely will remain quiet this year.

Finally, the strength of the US dollar in 2015 might cause US manufacturers to face greater import competition and thus become more inclined to file trade remedy petitions. The US dollar is expected to remain relatively strong in 2015, and import-sensitive companies – particularly those producing intermediate goods such as chemicals, steel, and automotive parts – might seek relief through trade remedy laws.

5. Trade in Energy Products

Issues regarding trade in energy products – in particular, the potential liberalization of the regulatory regimes governing exports of crude oil and liquefied natural gas (LNG) – likely will continue to receive significant attention from Congress and the Obama Administration in 2015.

- **Crude Oil Exports**

Members of Congress and interest groups have called for legislation that would eliminate the ban on US crude oil exports established by the *Energy Policy and Conservation Act of 1975*. Although prospects for Congressional passage of legislation to reform or eliminate the ban are improved in the 114th Congress – largely as a result of the Republican Party assuming majority control of the Senate – Congress is unlikely to pass legislation liberalizing crude oil exports this year. Congressional Republicans generally support reforming or eliminating the ban, but key House Republicans have taken a cautious approach towards any potential changes to the ban, indicating that short-term repeal is unlikely. The ban also continues to enjoy strong support among many Members of Congress, particularly within the Democratic Party.

House Energy and Commerce Committee Chairman Fred Upton (R-MI) recently stated that proponents of liberalization "need to build the case" for eliminating the ban and noted that he has not decided whether an energy bill he plans to introduce in 2015 will modify the ban. Rep. Ed Whitfield (R-KY), Chairman of the Subcommittee on Energy and Power, has expressed doubts that Rep. Upton's Legislation will include changes to the ban. During a March 3rd hearing of the Subcommittee on Energy and Power, Reps. Upton and Whitfield reiterated that changes to the ban would be thoroughly deliberated and would not "happen overnight." In the Senate, key Republicans have expressed support for eliminating the ban, but both Republican and Democratic Senators appeared to agree in recent hearings that the issue will not be resolved in the near future.

However, non-legislative mechanisms likely will be employed to alleviate some of the pressure on domestic oil producers caused by the export restrictions. The Obama Administration has given producers tacit approval to "self-classify" ultra-light oil ("condensate") as falling outside the restrictions, and exports of these products are expected to climb in 2015. The administration also is negotiating with Petróleos Mexicanos (Pemex), Mexico's state-owned oil company, a crude oil exchange, under which (i) Mexico would import up to 100,000 barrels of U.S. light crude and condensates per day; and (ii) the United States would import an unspecified quantity of Mexican heavy crude. In February, 23 US Senators expressed support for the exchange in a letter to Secretary of Commerce Penny Pritzker. However, the Obama Administration has given little indication of whether the exchange – which is permitted under current law – will be approved. If the exchange is permitted, it could open the door for other, similar exchanges this year.

- **Liquefied Natural Gas Exports**

In 2014, the Department of Energy (DOE) revised its LNG export licensing procedures such that the DOE will consider export licensing applications only after an applicant has received approval from the Federal Energy Regulatory Commission (FERC) or the Maritime Administration (MARAD).[1] However, potential LNG exporters have complained that the DOE still is not required to make a decision on applications within a specified time period. In response, in early 2015, the House of Representatives passed legislation requiring the DOE to issue a decision on an export licensing application no later than 30 days after the FERC or the MARAD completes all necessary reviews. Similar legislation has been introduced in the Senate.

Prospects for Congressional approval of such legislation are improved in 2015, largely as a result of the Republican Party assuming majority control of the Senate. Senate Republicans, including Senate Energy and Natural Resources Committee Chairman Lisa Murkowski (R-AK), strongly support liberalization of LNG exports, and while many Democrats oppose liberalization, bipartisan support for LNG exports has increased in recent years. Enhanced support is due largely to (i) improved LNG

[1] The *National Environmental Policy Act* requires companies seeking to export LNG to complete an environmental review and secure a construction permit from FERC or, for certain offshore LNG terminals, MARAD.

extraction opportunities; (ii) significant projected economic and commercial benefits from LNG exports; and (iii) rising global political tensions, particularly between the United States and Russia, and the resultant desire by many Members of Congress to increase energy exports to countries that otherwise might purchase energy products from countries with strained relationships with the United States. Despite the fact that several members of Congress fear that increased LNG exports will result in higher US energy costs, LNG reform legislation likely will become law in 2015. However, both the House and Senate versions of the legislation are not expected to accelerate significantly the actual permitting process for LNG exports or facilities. Given the collapse of world market prices, however, the economic impetus for a rapid deployment of US LNG export capabilities has diminished.

6. World Trade Organization

US engagement at the WTO in 2015 will include efforts to conclude negotiations on the post-Bali Work Programme, negotiations on plurilateral agreements, and involvement in various disputes before the DSB.

- **Post-Bali Work Programme**

  After approving the Trade Facilitation Agreement (TFA) on November 28, 2014, WTO members agreed to extend the deadline to produce a "clearly defined work programme" for agreements on the remaining elements of the Doha Development Agenda by July 1, 2015. The United States will continue to be an active participant in each of the WTO's trade negotiating groups as agreements on the Work Programme are pursued in the areas of Agriculture, Non-Agricultural Market Access (NAMA), Services, and Rules. During the negotiations, the United States will continue to insist that emerging market economies such as China and India make significant contributions to the negotiated outcomes, particularly on Agriculture and NAMA.

  - **Agriculture.** The United States will continue to oppose the use of the 2008 Draft Modalities for Agriculture as a starting point for negotiations, instead seeking an approach that would require greater reductions in domestic support programs operated by emerging market economies. US negotiators have argued that the 2008 texts do not reflect the rise of emerging market economies and the increasing levels of domestic agriculture supports put into place by those countries since the 2008 texts were drafted. The 2008 texts contain development flexibilities that would largely permit emerging market economies to maintain their present levels of domestic support – which the United States claims are among the highest in the world – while requiring the United States to cut into its domestic support programs. The United States has stated that such an outcome would be unacceptable and has insisted that emerging market economies make a "meaningful contribution" to the negotiated outcomes on Agriculture. However, India and China have rejected these demands, and progress in resolving this difference has been limited.

  - **Non-Agricultural Market Access.** The United States and other industrialized countries will continue to oppose the use of the 2008 Draft Modalities for NAMA – in particular the use of the "Swiss formula" to reduce tariffs – and instead will seek an outcome requiring more significant tariff concessions from advanced developing countries. Although most developing countries prefer the use of the Swiss formula, the United States and other industrialized countries likely will continue to seek a different tariff-cutting modality that allows for more significant tariff cuts by advanced developing countries. The industrialized countries likely will propose an alternate plan involving the use of the Uruguay Round formula of an across-the-board baseline cut by all Members other than the least-developed countries. This approach would be supplemented by bilateral request-and-offer negotiations, in which greater liberalization and zero-for-zero sectoral tariff cuts would be sought from China and other advanced developing countries.

- **Services.** Rather than emphasize the stalled WTO consultations on services, the United States will continue to focus in the short term on negotiating the plurilateral Trade in Services Agreement (TISA) with 22 other countries. The TISA negotiations are more advanced than the WTO services negotiations, although major differences still must be resolved regarding proposed coverage, market access, and other issues. Many Members are waiting for the results of TISA to be known before engaging on Services in the WTO. In addition, most developing countries have been unwilling to engage in substantive negotiations on services until further progress is made on Agriculture and NAMA.

- **Rules.** As with Services, the Rules negotiations are stalled while members await more significant progress on Agriculture and NAMA. Japan and other member countries of the Friends of Anti-Dumping Negotiations (FANS) are seeking changes to the Anti-Dumping Agreement and have proposed to hold a "brainstorming" session on the subject. However, these efforts have been rejected by the United States and other members, including Canada and Australia. The United States has said that Members must focus on market access issues before moving to more controversial topics such as Rules, and several other Members have indicated that progress on the issue likely will not occur in 2015.

Given the state of the negotiations, and the fact that the United States and other key members will be focused on concluding the TPP, WTO members likely will not reach agreement on the Work Programme by July. Certain WTO members have begun to discuss the possibility of extending the deadline for agreement on the Work Programme until the end of 2015. WTO Director-General Roberto Azevêdo repeatedly has urged Members to focus on realistic, achievable objectives for the Work Programme in the interest of producing a tangible outcome in 2015. However, the United States has signaled that it will focus increasingly on regional initiatives if WTO members continue to demonstrate a lack of ambition in efforts to conclude the Doha Round.

- **Environmental Goods Agreement**

The United States is seeking a tangible outcome from the EGA negotiations by the end of 2015. However, whether that outcome might be the conclusion of the EGA or a more incremental form of progress, such as an agreement on product coverage, is unclear. Whether the EGA can be concluded in 2015 will depend in part upon when the initial EGA products list can be finalized. The parties have agreed on a target date of March 31 for finalization of the initial products list and, if such an outcome is achieved, to begin negotiations on removing products from the list until parties agree on EGA coverage. However, China has yet to submit its product nominations, which threatens to delay this outcome. China has not tabled proposals because it is undertaking domestic consultations. However, China's participation is considered essential for parties to conclude that a "critical mass" of participants in the agreement exists such that the parties will apply the EGA on a most-favored-nation basis to all WTO Members. Therefore, whether the United States will achieve its objective of a completed EGA in 2015 is uncertain. Instead, the United States might have to settle for more incremental progress, such as an agreement on product coverage.

- **Expansion of the Information Technology Agreement**

The United States and China reached a bilateral agreement on product coverage for the ITA in November 2014. Although the agreement was hailed as a significant breakthrough, certain ITA participants did not endorse the agreement due to China's proposed exclusion of flat-screen monitors from coverage under the ITA. Flat-screen monitors are of major export interest to Korea and Taiwan, but China has refused their inclusion as it attempts to develop its domestic production and export capacity. However, China has signaled some flexibility on product coverage outside of flat-screen monitors, and Director-General Azevêdo recently held consultations to explore whether China might be willing to cover

other products of export interest to Korea and Taiwan under the ITA. The success of these consultations remains to be seen; however, the United States has continued to express optimism that negotiations to expand the ITA can be concluded swiftly.

- **Government Procurement Agreement**

  In early 2015, the United States, the European Union, and other GPA parties expressed dissatisfaction with China's most recent revised offer to accede to the GPA, submitted in December 2014. Although the parties acknowledged that China's latest offer represented an improvement from previous proposals, the parties continued to express dissatisfaction with China's limited proposed coverage of SOEs. The United States and other parties also reiterated their dissatisfaction with the transition periods being sought by China to phase-in reduced procurement thresholds under the GPA and the domestic content requirements that China wishes to continue applying to its procurement contracts. Despite these concerns, China has refused to consider expanding coverage of its SOEs any further and has asked the parties to adopt a "practical attitude" to its latest offer. China did propose to continue negotiating with other Parties on its domestic content requirements but did not state whether it would be prepared to table a sixth revised offer to accede to the GPA. The United States likely will continue to apply pressure to China to expand its coverage of SOEs, but China's public refusal to make further concessions in this area makes additional progress in 2015 uncertain.

- **WTO Dispute Settlement**

  In 2015, the United States will continue its involvement in numerous WTO disputes and might initiate several new disputes. In 2014, WTO members brought 14 disputes before the WTO DSB, compared with 20 disputes in 2013. Of the 14 disputes initiated in 2014, three involved the United States. Major WTO disputes in which the United States will be involved in 2015 include:

  - **Animal Products.** Argentina initiated DS447 against the United States in August 2012. Argentina contends that certain US measures prohibiting the importation of fresh meat from Argentina are inconsistent with numerous provisions of the SPS Agreement and the GATT 1994. The DSB established a panel in January 2013, and the panel is expected to issue its final report to the parties in early 2015.

  - **Avian Influenza.** The United States initiated DS430 against India in March 2012, alleging that India's import prohibitions on various agricultural products from the United States are inconsistent with numerous provisions of the SPS Agreement and the GATT 1994. An Appellate Body decision is expected in 2015.

  - **Coated Paper.** Indonesia initiated DS491 against the United States in March 2015, alleging that the imposition of AD and CVD measures on coated paper imported from Indonesia appears to be inconsistent with the AD and SCM Agreements and the GATT 1994.

  - **Export Subsidies.** The United States initiated DS489 against China in February 2015, alleging that certain Chinese measures provide subsidies contingent upon export performance to enterprises in several industries in China, inconsistent with provisions of the SCM Agreement.

  - **Frozen Warmwater Shrimp.** Vietnam initiated DS429 against the United States in February 2012. At issue are a number of US antidumping measures on certain frozen warmwater shrimp from Vietnam. In January 2015, Vietnam notified the DSB of its decision to appeal certain findings in the panel report.

  - **Large Civil Aircraft.** The European Union initiated DS487 against the United States in December 2014, alleging that conditional tax incentives established by the State of Washington constitute

specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement and are prohibited subsidies inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement. A panel was established In February 2015 but has not been composed.

- **Oil Country Tubular Goods.** South Korea initiated DS488 against the United States in December 2014, alleging that certain antidumping measures on oil country tubular goods from Korea and the investigation methodology underlying such measures are inconsistent with several provisions of the AD Agreement and the GATT 1994. In February 2015, South Korea requested the establishment of a panel.

- **Residential Washers.** South Korea initiated DS464 against the United States in August 2013, alleging that certain antidumping and countervailing duty measures imposed by the United States violate several provisions of the AD and SCM Agreements and the GATT 1994. A panel was established in June 2014 and is expected to hold meetings with the parties during 2015.

- **Solar Local Content.** The United States initiated DS456 against India in February 2013. At issue are certain domestic-content requirements for participation in an Indian solar-power generation program, which the United States alleges to be inconsistent with provisions of the TRIMs and SCM Agreements and the GATT 1994. A panel established in May 2014 is expected to issue a final decision in 2015.

Compliance issues regarding the following WTO disputes also are likely to be a major focus of the United States in 2015:

- **Country of Origin Labeling (COOL).** Canada and Mexico initiated DS384 and DS386, respectively, against the United States in December 2008. Both countries alleged that US COOL rules for meat are inconsistent with various provisions of the SPS Agreement, the Agreement on Rules of Origin, and the GATT 1994. Compliance panels in both disputes circulated final reports in October 2014, both of which were appealed by the United States. Appellate Body reports in both disputes are expected in 2015.

- **Grain Oriented Flat-rolled Electrical Steel.** The United States initiated DS414 against China in September 2010. At issue is China's imposition of AD and CVD measures on imports of grain oriented flat-rolled electrical steel from the United States. A compliance panel was established on February 26, 2014 and is scheduled to issue its report in the second quarter of 2015.

- **Subsidies on Large Civil Aircraft (Airbus).** In 2004, the United States initiated DS316 against the European Union, as well as France, Germany, Spain, and the United Kingdom, alleging that subsidies provided to Airbus violated various provisions of the SCM Agreement and Article XVI:1 of the GATT 1994. A compliance panel was established in April 2012 and is expected to issue a report in 2015.

- **Tuna Labeling.** Mexico initiated DS381 against the United States, alleging that US dolphin-safe labeling provisions for tuna products are inconsistent with the Agreement on Technical Barriers to Trade and the GATT 1994. A compliance panel established in January 2014 is expected to issue its report in early 2015.

Outlook

2015 has the potential to be a productive year for advancement of the US trade agenda, but success will require the US government to make great strides in a short period of time. The new Republican Congress has pledged to cooperate with President Obama on trade initiatives, making enactment of TPA and conclusion of the TPP negotiations likely – but by no means guaranteed – in 2015. TPA passage will require the president and

congressional leadership to spend political capital that heretofore has been lacking. If the TPP is signed, the Obama Administration will have negotiated one of the world's largest free trade agreements with parties comprising approximately 40 percent of global GDP and one-third of global trade. However, even in a best case scenario, Congressional approval of TPP-implementing legislation is unlikely to occur before the end of the year.

The Obama Administration is likely to prioritize efforts to conclude the TPP over other trade initiatives in 2015. An active trade enforcement regime both domestically and at the WTO will continue to be a core component of the United States' trade policy, while other initiatives, such as TTIP and WTO negotiations to conclude the Doha Round, likely will receive less attention. USTR Froman has signaled that the United States is prepared to increase its focus on regional, bilateral, and plurilateral initiatives if efforts at the multilateral level are insufficiently ambitious in early 2015. Given the present state of negotiations on the post-Bali Work Programme, this shift in focus might be underway already. Nevertheless, completion of TPA and the TPP in 2015 alone would count as a resounding success for President Obama and the United States more broadly.

US General Trade Policy Highlights

United States Signs Cooperation Agreement on Trade Facilitation, SPS Measures, and Technical Barriers to Trade with Five African Nations

On February 26, 2015, the United States and the five partner states of the East African Community (EAC) signed a Cooperation Agreement on Trade Facilitation, Sanitary and Phytosanitary Measures (SPS), and Technical Barriers to Trade (TBT). Under the agreement, the United States will provide technical assistance in each area to the five EAC countries of Burundi, Kenya, Rwanda, Tanzania, and Uganda in an effort to facilitate US-EAC trade.

Under the Agreement, the parties made commitments in the following areas:

- **Trade Facilitation:** The United States will provide the EAC Partner States with technical assistance and support for capacity building to implement the provisions of the WTO Trade Facilitation Agreement (TFA). The EAC Partner States also agreed to notify their Category A commitments as prescribed in the TFA to the WTO Preparatory Committee on Trade Facilitation by March 31, 2015.
- **SPS Measures:** Within six months after the Agreement's entry into force, the parties will develop a work plan to enhance the harmonization of SPS measures within the EAC on the basis of international standards, among other initiatives. The United States will provide technical assistance and support for capacity building to facilitate these efforts, with the goal of helping EAC Partner States to fully implement the WTO Agreement on Sanitary and Phytosanitary Measures.
- **Technical Barriers to Trade:** The United States will provide technical assistance and support for capacity building on a number of trade-facilitating initiatives related to technical regulations, with the goal of helping the EAC Partner States to fully implement the WTO Agreement on Technical Barriers to Trade.

USTR Michael Froman signed the Agreement on behalf of the United States and stated that the initiative would serve as an important step to further the US-Africa trade relationship. According to USTR, two-way trade between the United States and the EAC totaled USD 2.8 billion in 2014 and has grown by more than 100 percent in the past five years.

Click **here** for a copy of the Cooperation Agreement and **here** for a copy of the USTR Fact Sheet.

USTR Releases 2014 Special 301 Out-of-Cycle Review of Notorious Markets

On March 5, 2015, the Office of the United States Trade Representative (USTR) released the 2014 Special 301 Out-of-Cycle Review of Notorious Markets ("2014 Review"), which lists physical and online markets around the world that reportedly facilitate and engage in copyright piracy and trademark counterfeiting. The Special 301 Out-of-Cycle

Review of Notorious Markets serves as a complement to the annual Special 301 Report, which is expected to be published on April 30.

Pursuant to Section 182 of the *Trade Act of 1974*, as amended by the *Omnibus Trade and Competitiveness Act of 1988* and the *Uruguay Round Agreements Act of 1994*, USTR publishes a "Special 301 Report" ("Report") in April of each year. The Report reviews the state of intellectual property rights (IPR) protection and enforcement in a number of countries other than the United States. USTR began to publish a Notorious Market List within the Report in 2006. In 2010, USTR announced that it would begin publishing this list in a separate document known as the "Special 301 Out-of-Cycle Review of Notorious Markets."

The 2014 Review is the fifth of such Reviews. USTR published a Federal Register notice on September 26, 2014 requesting submissions from the public identifying potential online and physical notorious markets that exist outside the United States for inclusion in the 2014 Review. According to USTR, the markets listed in the 2014 Review were selected "not only because they exemplify global concerns about counterfeiting and piracy, but also because the scale of infringing activity in such markets can cause economic harm to US IPR holders." However, the 2014 Review "does not purport to reflect findings of legal violations, nor does it reflect the United States Government's analysis of the general IPR protection and enforcement climate in the country concerned."

The 2014 Review specifically names 45 online or physical marketplaces that reportedly engage in and facilitate substantial piracy and counterfeiting. According to the 2014 Review, the 25 online marketplaces identified broadly provide online streaming or download capacity with respect to pirated music, video games, television programs, online books, and software, or otherwise facilitate unauthorized use of protected content. In addition, the 2014 Review highlights for the first time issues associated with certain commercial entities that manage the registration of Internet domain names, several of which reportedly have failed to take action when notified of illicit activity occurring on websites whose domain names they have registered.

The 20 physical markets specifically named in the 2014 Review are located in Argentina, Brazil, China, Ecuador, India, Indonesia, Mexico, Nigeria, Paraguay, Thailand, and Uruguay. As has been the case in previous reviews, China featured prominently in the 2014 Review, which alleges that several Chinese markets have continued to facilitate the distribution of significant quantities of counterfeit merchandise for both domestic consumption and export. USTR acknowledged that Chinese authorities have engaged in routine enforcement actions in certain physical markets but urged that these efforts be expanded. The 2014 Review also noted that public comments submitted to USTR identified China as a primary source of counterfeit products sold around the world, allegedly supplying markets in locations such as Prado, Italy; Lagos, Nigeria; Ciudad del Este, Paraguay; and Bangkok, Thailand.

The 2014 Review also notes that since the release of the 2013 Review, several market owners and operators have made efforts to address the availability of pirated or counterfeit goods in their markets. In addition, certain previously-listed online markets have closed or experienced disruptions resulting from law enforcement efforts. Certain previously-listed markets have been removed from the 2014 Review as a result of these developments; however, USTR notes that it will continue to monitor any such markets and might relist them if circumstances change.

Click **here** for a copy of the 2014 Review.

US Federal Circuit Reaffirms That Retroactive Collection of Duties Is Constitutionally Permissible

On March 13, 2015, the US Federal Circuit upheld US federal law permitting the US Department of Commerce (DOC) to assess countervailing duties retroactively on imports from nonmarket economy (NME) countries. The ruling rejected arguments that the relevant law, in allowing for retroactive imposition of antidumping and countervailing duties, violates the Due Process Clause and the *Ex Post Facto* Clause of the US Constitution.

The Federal Circuit ruling, *GPX International Tire Corp. v. United States* ("*GPX*"), is the latest legal development arising from the US Department of Commerce's (DOC) July 15, 2008 decision to impose both antidumping and countervailing duties on imports of certain tires from China, which is considered a "non-market economy" under the US antidumping law. The *GPX* plaintiffs challenged DOC's decision at the US Court of International Trade (CIT) and, thereafter, the Federal Circuit, each of which held that US law prohibited countervailing duties from being applied to imports from NME countries. In response to these decisions, Congress enacted legislation (Public Law 112-99) on March 13, 2012, amending the *United States Tariff Act of 1930* to permit the imposition of countervailing duties on NME countries. The newly enacted legislation ("CVD/NME Law") (i) authorized DOC to assess countervailing duties retroactively to November 20, 2006 (*i.e.*, when DOC began countervailing duty investigations of Chinese imports); and (ii) required DOC to investigate the existence of double remedies, and to adjust for "double counting" when antidumping and countervailing duties are applied concurrently on the same imports, for all proceedings initiated after March 13, 2012.

On August 17, 2012, the *GPX* plaintiffs filed briefs before the CIT, arguing that the CVD/NME Law was unconstitutional because it violates (i) the Fifth Amendment's Due Process Clause by denying equal protection under the law (*i.e.*, the law does not afford past importers rights and opportunities equal to those afforded to future importers); (ii) the *Ex Post Facto* Clause of Article I of the Constitution by retroactively penalizing past conduct by specific importers that was not punishable at the time it was committed; and (iii) the Fifth Amendment's Due Process Clause by levying taxes on importers without notice and far beyond the limited period of retroactivity typically permitted. The CIT rejected these constitutional challenges on January 7, 2013 (*please see W&C US Trade Alert dated January 7, 2013*), and the plaintiffs appealed the CIT decision to the Federal Circuit.

In its March 13, 2015 ruling, the Federal Circuit held that "we cannot say that the [CVD/NME Law] does not rationally relate to the government's interest in retroactively remedying the damage from unfair foreign trade practices." The court thus reaffirmed its March 18, 2014 ruling in *Guangdong Wireking Housewares & Hardware Co. v. United States* ("*Wireking*") that the CVD/NME Law, despite being retroactive, was not punitive and therefore did not violate the *Ex Post Facto* Clause (*please see W&C US Trade Alert dated March 18, 2014*). The *GPX* plaintiffs attempted to distinguish their position and arguments from those of the *Wireking* plaintiffs by contending that while "*Wireking* found the [CVD/NME Law] to be non-punitive, and not subject to the *Ex Post Facto* Clause… the long period of retroactivity [at issue in *GPX*] makes the retroactive duties especially punitive and thus unconstitutional" under the *Ex Post Facto* Clause. The Federal Circuit disagreed with the plaintiffs, ruling that "the holding in *Wireking* was not fact-specific, and any alleged factual distinctions are irrelevant to the *ex post facto* analysis." As such, the court concluded, the retroactivity period "does not alter the *ex post facto* analysis," and the plaintiffs' "*ex post facto* challenge is forever closed by *Wireking*."

The Federal Circuit now has upheld the CVD/NME Law in two separate challenges, indicating the current legality, for purposes of US domestic law, of DOC's practice of assessing countervailing duties retroactively on imports from NME countries. However, the legality, for purposes of WTO law, of the CVD/NME Law remains unresolved. On July 7, 2014, the WTO issued the Appellate Body Report in *United States – Countervailing and Anti-Dumping measures on Certain Products From China* (DS449). The Appellate Body upheld China's appeal and rejected the Panel's finding that the CVD/NME Law did not violate Article X of the General Agreement on Tariffs and Trade (GATT). However, the Appellate Body did not "complete the analysis" and formally rule that the CVD/NME Law violated Article X because the record lacked sufficient facts (*please see W&C US Trade Alert dated July 7, 2014*). As such, the longstanding dispute between the United States and China regarding the CVD/NME Law could continue, pending the Chinese government's decision to re-litigate the dispute at the WTO.

The *GPX* plaintiffs might elect to appeal the Federal Circuit decision to the US Supreme Court but have not publically indicated an intention to do so. Also, it is far from certain that the Supreme Court would agree to hear the case. A copy of the Federal Circuit *GPX* ruling is available upon request.

Presidential Task Force on Illegal, Unreported, and Unregulated Fishing and Seafood Fraud Issues Action Plan

On March 15, 2015, the Presidential Task Force on Illegal, Unreported, and Unregulated (IUU) Fishing and Seafood Fraud released its action plan for the implementation of recommendations published by the Task Force on December 18, 2014. The plan proposes that various US federal agencies undertake actions to implement 15 Task Force recommendations falling under the four general themes of (i) international agreements and cooperation; (ii) enforcement; (iii) partnerships; and (iv) traceability.

The following proposed actions are of particular interest:

- **Fisheries Subsidies:** The plan proposes that the US Trade Representative (USTR) (i) conclude negotiations on the Trans-Pacific Partnership (TPP) environmental chapter in 2015, obtaining commitments on harmful fisheries subsidies and enhanced transparency and reporting requirements for fisheries subsides; (ii) pursue commitments in the World Trade Organization's rules negotiations in 2015 and 2016 to discipline and provide greater transparency concerning fisheries subsidies; and (iii) complete and release an updated study in 2015 and 2016 on the nature and extent of fisheries subsidies provided by Asia-Pacific Economic Cooperation (APEC) economies; and (iv) pursue regional commitments to reform harmful subsidies.
- **Traceability Program:** The plan proposes several actions necessary to establish the first phase of a risk-based seafood traceability program within 18 months. The traceability program would track seafood from the point of harvest to its entry into US commerce, focusing in its first phase on certain "at-risk" species and subsequently on all seafood entering US commerce. The proposed actions include (i) publication by October 2015 of a list of "at-risk" species commonly subject to IUU fishing or seafood fraud; (ii) issuance by September 2016 of final rules to require the collection of additional information on at-risk species prior to entry into US commerce; and (iii) identification by December 2016 of the requisite next steps to expand the program to all seafood entering US commerce. The Task Force notes that the program will be developed and implemented in a manner "consistent with US international legal obligations" under the relevant WTO agreements.
- **Tariff Codes:** The plan proposes that USTR work with the International Trade Commission (ITC) to adjust codes under the Harmonized Tariff Schedule (HTS) by December 2015, with the goal of increasing the specificity of certain HTS codes to help enforcement officials identify seafood fraud and target shipments likely to contain IUU seafood.
- **Free Trade Agreements (FTAs):** The plan proposes that USTR seek provisions in FTAs to address fisheries subsidies and obtain commitments from parties to the TPP and the Transatlantic Trade and Investment Partnership to enforce labor and environmental laws and to combat IUU fishing and seafood fraud. The plan also proposes that USTR, the Department of Labor, and other relevant agencies prioritize the implementation of FTA commitments pertaining to the conservation and management of marine fisheries resources.
- **Enforcement:** The plan proposes that the US Department of Justice prioritize the investigation and prosecution of cases involving IUU fishing and seafood fraud throughout 2015. In addition, the plan proposes that relevant federal agencies conduct briefings with Members of Congress in 2015 to discuss the need for enhanced agency enforcement authorities, including (i) authority to search, inspect, and seize seafood, both at the point of entry into US commerce and throughout the supply chain; and (ii) authority to pursue judicial enforcement options for trafficking and other violations related to IUU fishing and seafood fraud. However, the plan does not specify the exact authorities that would be requested, and whether Congress would approve legislation granting additional enforcement authorities is uncertain.

The plan does not identify any specifically targeted countries or seafood species that will be the focus of the proposed agency actions. USTR Michael Froman praised the action plan in a March 15 statement and reported that the TPP "is on track to include pioneering commitments to prohibit some of the most harmful fisheries subsidies" and to combat IUU fishing. The White House has indicated that the Obama Administration intends to implement the

action plan; however, whether the President will instruct executive agencies, as applicable, to undertake all of the recommended actions listed in the plan is uncertain.

Click **here** to view a copy of the action plan.

United States Asks WTO Members to Discuss 'Growing Problem' of Duty Evasion

On March 16, 2015, the United States submitted a short paper to the Informal Group on Anti-Circumvention of the WTO's Committee on Anti-Dumping Circumvention, criticizing the private-sector use of professional services to evade the application of antidumping duties. According to the US paper, the alleged use of duty evasion services renders legitimate antidumping measures ineffective, "undermines the effectiveness" of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (*i.e.*, the Anti-dumping Agreement), and erodes confidence in the rules-based multilateral trading system. Furthermore, the US paper states that "[s]ilence or inactivity by the host country may also too easily be construed as tacit approval of, or complicity with, such illicit activities." The paper's objectives are to (i) identify the actions Members are taking to counter and eliminate alleged evasion attempts; (ii) notify other Members about this "growing problem"; and (iii) seek input from other Members on their experiences with similar circumstances. The United States is "interested in getting Member reactions and would like to discuss this problem of antidumping duty evasion in more detail."

The US paper did not specify any countries, industries, or products engaged in the alleged duty evasion activities but likely is targeting China, India and other developing countries that are frequent respondents in US trade remedy investigations. The paper also criticized certain practices or activities, including (i) the shipment of merchandise subject to an antidumping measure to an intermediary third country, where the merchandise is loaded into new containers and provided with new documents showing the third country as the originating export country; (ii) the manipulation or creation of new invoices, packing lists, and other documentation "to disguise the actual country of origin"; and (iii) the proliferation of website marketing of duty evasion services and "aggressive outreach" by duty evasion operators directed at both importers and exporters. The US paper states that these issues also apply to countervailing duty cases.

The alleged duty evasion practices targeted by the United States at the WTO also have drawn Congressional scrutiny. Sen. Ron Wyden (D-OR), now Ranking Member of the Senate Finance Committee, sought to demonstrate the prevalence of such practices in 2010 by publishing a report detailing multiple examples of Chinese exporters advertising duty evasion services to US importers. In 2012, Sen. Wyden and then-Sen. Olympia Snowe (R-ME) requested an investigation by the US Government Accountability Office to evaluate the adequacy of US Customs and Border Protection's (CBP) efforts to counteract duty evasion. (The new US submission to the WTO cites the 2010 Wyden report).

Despite enjoying broad bipartisan support, legislation to prevent duty evasion has eluded Congressional approval. Sen. Wyden introduced the *Enforcing Orders and Reducing Circumvention and Evasion Act* ("Enforce") in 2010 and 2011 to strengthen CBP duty evasion investigations by establishing new procedures and deadlines. The *Enforce Act* received bipartisan support and Senate Finance Committee approval in 2012 but was not passed by the Senate. Subsequently, the *Enforce Act* was included in bipartisan customs reauthorization legislation introduced in the Senate in 2013; however, that legislation did not pass, due mainly to disagreements with House Republicans over certain provisions. Rep. Charles Boustany (R-LA) introduced alternative duty evasion legislation, the *Preventing Recurring Trade Evasion and Circumvention Act* ("Protect"), in 2012 and 2013. However, the *Protect Act*, which would have imposed less stringent requirements on CBP than the *Enforce Act*, failed to advance beyond the House Ways and Means Committee.

In response to ongoing Congressional pressure, including through public hearings, CBP began to publish periodic "AD/CVD Updates" in December 2014. The updates publicly document the CBP's activities to collect antidumping and countervailing duties from US importers that allegedly have attempted to evade duty payments. Also in December 2014, CBP distributed an "AD/CVD Scam Alert" to US importers, which warned of the legal ramifications

of duty evasion. These CBP efforts likely are intended to dissuade Congress from imposing new reporting and procedural requirements on CBP.

Congress nonetheless might pass legislation to counteract duty evasion in 2015. Sen. Rob Portman (R-OH), an influential member of the Senate Finance Committee, is a proponent of the *Enforce Act* and likely will include certain *Enforce Act* provisions in customs reauthorization legislation that he intends to introduce in 2015. That customs reauthorization legislation is rumored to be a "compromise bill" that will be acceptable to House Republicans who have continued to indicate a preference for the *Protect Act*. Prospects for passage of legislation to prevent duty evasion thus are improved, but by no means guaranteed, in 2015.

Whether other WTO Members will follow the United States' lead on the duty evasion issue, or whether the US Congress will approve related legislation, is uncertain. However, past US efforts on duty evasion have encountered pushback. First, the United States has failed to distinguish among customs fraud, circumvention, and legal activities, like offshoring, that are a natural commercial response to new duties. Second, several WTO Members have opposed US duty evasion initiatives during the Doha Round, arguing that the United States was seeking to punish exporters, through higher regulatory costs or punitive sanctions, for engaging in perfectly lawful activities.

Click **here** for a copy of the US paper.

Former Secretaries of Commerce Endorse TPA; Discourage Congressional Action on Currency Manipulation

In an open letter published on March 25, 2015, ten former US Secretaries of Commerce expressed support for Trade Promotion Authority (TPA) and discouraged the adoption of legislation designed to counteract alleged currency manipulation by US trading partners. The former Secretaries specifically noted their opposition to legislation that would address currency manipulation "by providing the Commerce Department additional authority under Anti-Dumping and Countervailing Duty law." The statement refers to legislation introduced in Congress on February 10 that would direct the US Department of Commerce (DOC) to consider undervalued currency as a prohibited export subsidy for purposes of US countervailing duty investigations.

Echoing the stated position of the Obama Administration, the bipartisan group of former Secretaries argued that any undervaluation of foreign currency would be addressed more effectively by the Department of the Treasury through bilateral engagement rather than by amending US trade remedy laws or including currency-related obligations in free trade agreements (FTAs). Another bipartisan letter, sent to Congressional leaders on March 5 by fourteen former Chairmen of the White House Council of Economic Advisors, expressed similar views. However, the former Chairmen only noted their opposition to the inclusion of currency provisions in FTAs and did not specifically address the pending legislation to amend US trade remedy laws.

The letters likely were coordinated with the assistance of the Obama Administration to limit Congressional support for currency legislation that could complicate efforts to enact TPA. Although TPA legislation is not expected to be introduced before mid-April, Sen. Charles Schumer (D-NY), with the support of Senate Finance Committee Ranking Member Ron Wyden (D-OR), reportedly has begun to draft language for an amendment that would require FTAs negotiated under TPA to contain enforceable currency obligations. If adopted, such an amendment would "make it very, very difficult" for TPA to be approved by Congress, according to Senate Finance Committee Chairman Orrin Hatch (R-UT). As a result, efforts by the Obama Administration to limit Congressional support for currency legislation are likely to continue; however, the effectiveness of such efforts remains to be seen.

Click **here** for a copy of the March 25 letter.

Free Trade Agreement Highlights

Chinese Commerce Minister Says Text of US-China Bilateral Investment Treaty 'Basically' Complete; USTR Says Negative List Expected Soon

On March 7, 2015, Chinese Commerce Minister Gao Hucheng stated during a press conference in Beijing that the core text of the US-China Bilateral Investment Treaty (BIT) is 'basically' complete, signaling that the parties might soon move to the next phase of the negotiations, during which negative lists will be exchanged. Although a spokesperson for the US Trade Representative (USTR) clarified on March 9 that challenges remain in finalizing the core text, USTR officials have confirmed that they expect China to propose an initial negative list in the near future, signaling that the BIT negotiations might advance this year. The parties had aimed to agree to a core text by the end of 2014 and to begin discussing negative list offers in early 2015, but failed to achieve that goal.

USTR did not elaborate on the nature or extent of any remaining differences over the core text, but informed sources have speculated that such issues might involve provisions of the 2012 US model BIT which pertain to the following: (i) transparency rules, particularly those requiring notice-and-comment procedures for public rulemaking; (ii) capital transfer obligations; and (iii) performance requirements, particularly those relating to technology transfers and domestic content.

One of the most sensitive outstanding disagreements reportedly relates to Article 7 of the model BIT, which contains provisions related to capital transfers. Article 7 requires parties to "permit all transfers relating to a covered investment to be made freely and without delay" and "in a freely usable currency at the market rate of exchange." Such provisions are believed to have complicated the negotiations for China due to its current exchange rate regime, which critics contend is not market-based. However, USTR officials have not confirmed publicly the specific status or details of the BIT negotiations as they relate to exchange rate provisions.

Despite the potential challenges that might exist in finalizing the core BIT text, officials from USTR and the State Department, which serves as a co-chair of the BIT negotiations, have stated that China is expected to propose its initial negative list in March. The negative list will contain the group of industries or economic sectors that China wishes to exclude from coverage under the BIT. USTR officials and US business groups have urged China to keep its negative list as narrow as possible. However, it is expected that China will seek to exclude a number of sectors; as a result, future negotiations over the contents of the negative list are likely to be challenging.

United States and European Union Signal Progress Towards Revised TTIP Services Offers; Issue Joint Statement on Public Services

On March 20, 2015, US Trade Representative (USTR) Michael Froman and EU Trade Commissioner Cecilia Malmstrom signaled that the parties to the Transatlantic Trade and Investment Partnership (TTIP) intend to exchange new market access offers for services before the tenth TTIP negotiating round in July 2015. The United States and the European Union tabled initial market access offers for services in May and July 2014, respectively; however, disagreements over both the structure and the scope of those offers have inhibited progress in the negotiations.

Following a meeting with USTR Froman in Brussels on March 20, Commissioner Malmstrom reported that the two officials made "considerable progress" on "how to move further in our negotiations in the field of services, and how to move towards new offers before the tenth round." However, neither official specified how the revised market access offers would seek to resolve disagreements that have persisted since the initial offers were exchanged in 2014. The United States has criticized the European Union for (i) structuring its initial offer in a hybrid format, rather than as a full "negative list" proposal (the latter of which would open all services to liberalization except for those specified in the offer); and (ii) excluding commitments in the financial services sector from the scope of the offer.

EU negotiators previously signaled a willingness to adopt the negative list structure if the United States revises its own offer to include an inventory of US sub-federal restrictions on market access for services. However, new pressure from the European Parliament may dissuade the European Commission from adopting a negative list

structure. In February, a draft European Parliament resolution establishing the Parliament's recommendations for TTIP explicitly called for services market access to be negotiated on the basis of a positive list, "whereby services that are made open for foreign companies are explicitly mentioned and new services are excluded." The draft resolution also called for financial services market access to be negotiated only in tandem with "financial regulation on the highest level," which the United States thus far has refused to include in the TTIP. The draft resolution, authored by International Trade Committee Chairman Bernd Lange, is expected to be considered by the Parliament in May. If approved in its current form, the resolution could complicate efforts to advance the TTIP market access negotiations for services in 2015. Further complicating those efforts is the fact that the United States will remain more focused in the short term on concluding the Trans-Pacific Partnership negotiations than on advancing the TTIP.

The draft resolution also urged US and EU negotiators to issue a joint declaration reflecting a clear commitment to exclude public services and public utilities from the TTIP services commitments. USTR Froman and Commissioner Malmstrom issued such a joint statement on March 20, clarifying that "[n]o EU or US trade agreement requires governments to privatize any service, or prevents governments from expanding the range of services they supply to the public," among other issues. The joint statement likely was requested to ease public concerns in the European Union that such services might be privatized under the TTIP.

Click **here** for a copy of the EU-US Joint Statement on Public Services.

Alleged Draft of TPP Investment Chapter Leaked

On March 25, 2015, the non-profit organization Wikileaks published an alleged draft of the investment chapter of the Trans-Pacific Partnership (TPP) agreement. The alleged draft chapter is dated January 20, 2015 and therefore likely reflects the state of the negotiations following the December 7 – 12, 2014 informal TPP negotiating round held in Washington, DC. Subsequent negotiations on the investment chapter have occurred during informal negotiating rounds held in New York City from January 26 to February 1 and Hawaii from March 9 – 15. Thus, the alleged draft chapter might not reflect the present state of the negotiations.

The alleged draft chapter suggests that prior to the New York City round, the Parties had reached agreement on most of the chapter's provisions but were still negotiating limitations on the scope of investor-state dispute settlement (ISDS), as well as broader exemptions that would permit countries to restrict capital flows under certain circumstances.

According to the draft chapter, the Parties have agreed to language closely resembling Sections A and B of the 2012 US model bilateral investment treaty ("Model BIT"), which pertain to investment protections and investor-state dispute settlement (ISDS), respectively. The alleged draft chapter thus is similar to an earlier alleged draft chapter leaked in July 2012. However, the January 2015 draft chapter contains far fewer instances of "bracketing," whereby texts still under negotiation highlight outstanding provisions and establish figurative outer boundaries based on certain Parties' proposals.

The draft chapter indicates that the following substantive differences remain unresolved:

- **Australian exemption from ISDS provisions:** Australia, in a provisional footnote, seeks the right to exempt itself from the ISDS provisions contained in the chapter. However, the footnote states that Australia will withdraw this request if certain conditions are met. Australian Trade Minister Andrew Robb has signaled that Australia would subject itself to ISDS in exchange for concessions on agricultural market access from certain Parties. The footnote in the alleged draft chapter suggests that such market access concessions were still under negotiation as of mid-January.
- **Sector-specific ISDS exemptions:** The Parties seek to exempt sector-specific measures from being challenged under ISDS, as follows: (i) Malaysia seeks an exemption for measures related to government procurement; (ii) Canada seeks an exemption for measures pertaining to "cultural industries," such as music, film, and literature; and (iii) Australia seeks an exemption for measures related to its Pharmaceutical Benefits

Scheme, Therapeutic Goods Administration, and Office of the Gene Technology Regulator (presuming that Australia ultimately agrees to be bound under the chapter's ISDS provisions).

- **Chilean exemption for capital controls:** Chile (i) proposes that the Central Bank of Chile be permitted to reserve the right to establish capital controls pursuant to its domestic laws, including restrictions on current payments and transfers to or from Chile; and (ii) proposes that the obligations and commitments contained in the chapter shall not apply to actions taken pursuant to its Foreign Investment Statute and Foreign Capital Investment Fund Law.
- **Temporary safeguard measures:** The Chapter contains two competing proposals for an article pertaining to temporary safeguard measures. Each proposal would permit the Parties to impose capital controls to prevent or mitigate the effects of serious financial crises. However, the second proposed article – reportedly the version supported by the United States and Canada – would be more limiting regarding the universe of permissible capital controls.
- **Investment agreements and authorizations:** The United States is seeking for ISDS to apply to (i) investment agreements (*i.e.,* certain contracts between governments and private investors), and (ii) investment authorizations (*i.e.,* licenses granted by governments authorizing certain activities by private investors). According to the alleged draft chapter, certain Parties seek to exempt such agreements and authorizations from ISDS.

The alleged draft chapter also contains certain ISDS exemptions that purportedly have been agreed to by the Parties. The draft chapter suggests that (i) Australia, Canada, Mexico, and New Zealand have secured an exemption for existing measures that permit their national governments to disallow certain foreign investments and acquisitions; and (ii) Chile, Mexico, Peru, and Vietnam have secured a provision that prohibits investors from initiating an ISDS dispute if said investors already have pursued the dispute in the applicable national court.

The leak of the alleged draft chapter follows a series of critical statements made by certain influential US lawmakers regarding ISDS. On December 17, 2014, Sen. Elizabeth Warren (D-MA) argued in a letter to US Trade Representative (USTR) Michael Froman that the TPP should not include an ISDS process. On the same day, certain Democratic members of the House Ways and Means Committee argued in a separate letter for the exclusion of ISDS from the Transatlantic Trade and Investment Partnership. In the letters, the lawmakers expressed concerns that ISDS would expose the United States government to financial liabilities for maintaining regulations designed to protect, *inter alia*, the environment, public health, and the stability of the US financial system. However, the letters gained only three and five signatories, respectively. The Obama Administration has defended ISDS against such criticisms, both privately (*e.g.*, consultations with individual Members) and publicly (*e.g.*, a fact sheet issued by USTR).

Certain critics of ISDS have speculated that the leak of the alleged draft chapter will weaken Congressional support for the TPP. For example, Sen. Charles Schumer (D-NY), referring to the leaked document, stated, "I think people on both sides of the aisle will have trouble with this." However, because the alleged draft chapter is based on the US Model BIT, the leaked document is unlikely to contain information with which Members of Congress were not previously familiar. Furthermore, according to USTR, Members of Congress are permitted to view the full negotiating texts of FTAs such as the TPP. As a result, the leak of the alleged draft chapter is unlikely to have a significant impact on Congressional attitudes towards the TPP.

Multilateral

Internet Neutrality and WTO Rules

On February 27, 2015, the U.S. Federal Communications Commission (FCC) adopted new rules regarding the provision of access to the internet, commonly known as "net neutrality" rules. The main effect of these changes, which have not yet been implemented, would be to bring network owners that provide primary access to the internet within the scope of Title II of the Telecommunications Act of 1934, thus making them subject to regulation as telecommunications companies providing a public good. The decision of the FCC to regulate network access provision under Title II raises the possibility that the United States would now accept that these services are covered by the World Trade Organization's General Agreement on Trade in Services (GATS) Annex on Telecommunications and the GATS Reference Paper on Basic Telecommunications. From the viewpoint of the WTO this is a significant change.

1. Status of Internet Services under the GATS

The GATS contains two instruments which govern the regulation of basic telecommunications services. First, the GATS Annex on Telecommunications requires, *inter alia*, that:

> *Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule.*[2]

The purpose of this provision is to ensure that foreign suppliers of any service on which a GATS commitment is made should have full and non-discriminatory access to public telecommunication services; it is obvious that discriminatory or impaired access to these essential services would handicap any business. In 2004, the United States won a WTO dispute against Mexico in which the Panel found that Mexico had violated its GATS commitments by (i) failing "to ensure interconnection at cost-oriented rates;" (ii) failing to "prevent anti-competitive practices by firms that are major telecoms suppliers;" and (iii) failing "to ensure reasonable and non-discriminatory access to and use of telecommunications networks."

Secondly, the GATS Reference Paper on Basic Telecommunications, which binds those Members that have accepted it, including the United States, requires *inter alia* that:

> *Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided*
>
> (a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates.[3]

The purpose of the Reference Paper is to ensure that major suppliers of basic telecommunications services (i) do not engage in anti-competitive practices, and (ii) provide non-discriminatory interconnection with their networks, even to competitors.

[2] Paragraph 5(a), *GATS Annex on Telecommunications.*

[3] Paragraph 2.2(a), *Reference Paper on regulatory framework for basic telecommunications*.

Both the Annex and the Reference Paper apply explicitly to basic telecommunications services. The United States has consistently maintained that internet access provision is a "value-added" and not a "basic" service and, therefore, is not subject to these disciplines. In 2002, the FCC referred to internet access providers as "information providers". Some other Members have not shared this view. Australia, for example, has argued that internet access is an essential service akin to a public utility and should be regulated accordingly. The borderline between basic and value-added services has never been defined and has never been subject to WTO dispute settlement.

Title II of the 1934 Telecommunications Act deals with the regulation of "common carriers". Its original purpose was to regulate public telephone monopolies and it is still used to regulate dominant suppliers. The classification of internet access providers under Title II means that they would fall under the definition of "public telecommunication transport services" in the GATS Annex on Telecommunications as "any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally".[4] This implies that the United States would no longer argue that these services are not covered by the Annex or the Reference Paper, which defines a major supplier as

> *"a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:*
>
> *(a) control over essential facilities; or*
>
> *(b) use of its position in the market."*[5]

The US government has not yet stated how it views the potential GATS implications of the FCC's reclassification of internet access provision under Title II.

2. Net Neutrality and Discrimination under the GATS

Proponents of strong internet neutrality rules have argued that the rules which were in contemplation by the FCC before the recent decision, which would have permitted differentiated treatment of service providers, including "fast lane" access to those paying a premium, would have been inconsistent with the GATS non-discrimination disciplines. It is suggested that differentiated treatment is by definition discriminatory, and that service suppliers of developing countries, in particular, would be disadvantaged or excluded from certain services by premium charges.

It is not clear, however, that differentiated charging would in itself breach the non-discrimination obligation. The GATS is not in general concerned with the prices at which services are supplied, and the normal presumption would be that to charge a higher price for a higher quality of service is not discriminatory, if the service is available to all those willing and able to pay for it. On the other hand, to charge higher prices to some clients than to others for the same service would appear to be discriminatory. A complete discrimination analysis therefore would depend on the manner in which the differentiation was effected and justified.

Other forms of discrimination, for example to restrict or refuse access to certain suppliers or applications for non-technical reasons, could breach the Reference Paper's provision on competitive safeguards. This provides as follows:

> *1.1 Prevention of anti-competitive practices in telecommunications:*
>
> *Appropriate measures shall be maintained for the purpose of preventing suppliers who,*

[4] Paragraph 3(b), *GATS Annex on Telecommunications.*

[5] *Reference Paper on regulation of basic telecommunications:* Definitions

alone or together, are a major supplier from engaging in or continuing anti-competitive practices.[6]

The establishment of internet neutrality should in principle obviate the danger of inconsistency with these WTO obligations. This would provide a useful degree of additional security and predictability for foreign suppliers of internet services in the US market. However, until details of the proposed new rules are made known it is impossible to assess the implications for U.S. obligations under the GATS. Indeed, some original proponents of net neutrality have recently reversed course and opposed the new FCC rules because they believe that the extensive new regulations go far beyond a basic non-discrimination rule and instead provide the FCC with open-ended discretion to regulate internet service and potentially even content. If such views are correct, the new rules could raise discrimination concerns with respect to services that may be said to constitute "basic telecommunications services" under the GATS.

The WTO Work Programme on Electronic Commerce

At the 9th Ministerial Conference of the WTO in December 2013, Ministers adopted a Decision that the Work Programme on Electronic Commerce should be "substantially invigorated." The Work Programme merits significant attention in light of the recent decision by the US Federal Communications Commission (FCC) to reclassify Internet access provision as a telecommunications service under Title II of the Telecommunications Act of 1934. Ministers stated that the Work Programme should continue to examine the trade-related aspects of enhancing Internet connectivity and access to information and telecommunications technologies and public Internet sites, the growth of mobile telephony, electronically delivered software, cloud computing, and the protection of confidential data, privacy and consumer protection. Special consideration should be given to the situation in developing countries, particularly in least-developed country Members and least-connected countries. Ministers also agreed to maintain until December 2015 the current practice of not imposing customs duties on electronic transmissions (the "moratorium").

The Work Programme was launched in 1998, in recognition of the rapid growth of global electronic commerce and the legal issues to which it could give rise in the WTO. The term "electronic commerce" was understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means. It can be defined as comprising three different types of transaction:

- the provision of Internet access services themselves – meaning the provision of access to the net for businesses and consumers;
- the electronic delivery of services, meaning transactions in which services products are delivered to the customer in the form of digitised information flows; and
- the use of the Internet as a channel for distribution services, by which goods and services are purchased over the Internet but delivered to the consumer subsequently in non-electronic form.

The question whether existing rules and obligations under the WTO Agreements would apply to e-commerce, or whether new rules should be developed, was a critical underlying issue. In particular, the General Council was instructed to examine all issues relating to the imposition of customs duties on electronic transmissions.

Under the aegis of the General Council, this work has been carried out by the Council for Trade in Goods, the Council for Trade in Services, the Council for TRIPS, and the Committee on Trade and Development. After 2001, the

[6] Paragraph 1.1, *Reference Paper on regulatory framework for basic telecommunications.*

General Council's continuous review of the Work Programme was delegated to "Dedicated Discussions" focused on horizontal issues cutting across more than one of the WTO Agreements.

1. The Moratorium on Customs Duties

The moratorium on customs duties is a political undertaking by all Members not to impose tariffs on "electronic transmissions." It has never been made permanent and legally binding but has been renewed six times at Ministerial Conferences, until the date of the succeeding Conference. The current moratorium will expire in December 2015 unless renewed at the 10th Ministerial Conference at Nairobi in that month.

In this context, the term "electronic transmissions" has never been precisely defined; moreover, debate on their classification has never reached a conclusion. It is generally understood, however, that a customs duty in the sense of the moratorium would apply to the transmission itself – not to the value of its content. This is sometimes referred to as a "bit tax." No country has yet sought to impose such a charge, and it has never been clear how sucha charge would be levied. This fact has certainly made it easier to agree to the successive renewals of the moratorium; conversely, the possibility or hope of a tax with such revenue-raising potential underlies the reluctance of many developing countries to make the moratorium permanent. The United States and other developed countries have argued for a permanent and binding moratorium, fearing that electronic commerce could be stunted by tariffs.

It must be understood that the moratorium does not apply to tariffs on goods purchased on the nternet and imported in physical form; ordinary tariff bindings apply to those. The same would be true of a tariff applied to the import of a service. There are currently very few, if any, tariffs on services, but the possibility exists. (However, when a Member has scheduled a commitment on a given service, it may not impose a tariff on the import of that service, whether done electronically or otherwise, if doing so would impair the level of access guaranteed in its GATS schedule of commitments).

2. Nature of the Work Programme

The Work Programme essentially has been a process of discussion, analysis, and classification. It has produced no binding decisions or new rules, but it has usefully clarified the general understanding of the application of existing rules to e-commerce, particularly on trade in services. Increasing the participation of developing countries in e-commerce and improving their access to the necessary technology have been constant concerns and the main focus of the work of the Council for Trade and Development. A very wide range of technical and legal issues have been proposed for discussion and analysis, and such proposals are still being made; however, in the past ten years the work on substantive issues has flagged, despite periodic instructions from Ministers that it should be reinvigorated.

3. Electronic Commerce and Services

The greater part of the WTO's work on electronic commerce has been done in the Council for Trade in Services (CTS), for two reasons. First, the vast bulk of international trade and commerce done over the Internet is the sale of services; for instance, currency and securities trading, and most other financial services, are overwhelmingly done electronically. Second, telecommunications and Internet access provision are themselves vitally important services, underpinning the entire fabric of electronic commerce. Intensive work in the GATS Council in 1998-99 resulted in the adoption of a Progress Report which recorded the common understanding of Members on all the issues which had been assigned to the Council for consideration. Though they are not legally binding, these understandings have survived intact and in some important cases have been confirmed by the findings of dispute settlement Panels.

The most important clarification concerns the scope of the GATS. It was the general view that the electronic delivery of services falls within the scope of the GATS, since the Agreement applies to all services regardless of the means by which they are delivered. The GATS is technologically neutral in the sense that it makes no

distinction between the various means by which services can be delivered, under any of the four modes of supply. All measures affecting the electronic delivery of services are therefore covered by GATS obligations.

This understanding on the scope of the GATS has been confirmed by Panel reports. In *US — Gambling*, for example, the Panel found that supply of a service through mode 1 (cross-border supply) includes all means of delivery, including online delivery, and in *China — Publications and Audiovisual Products*, the Panel found that the scope of China's commitment in its GATS Schedule on "Sound recording distribution services" extends to sound recordings distributed in non-physical form, through technologies such as the Internet. These are important findings. In 1998, some were arguing that electronic commerce was *sui generis*, neither trade in goods nor trade in services, and that new rules might be needed to regulate it. This suggestion that GATS commitments and existing rules did not adequately cover the electronic supply of services would of course have voided of substance the recently concluded agreement on financial services and many other GATS commitments; virtually all financial services and many others are supplied electronically. Most GATS-related dispute settlement cases have involved online or networked services. Jurisprudence under the GATS has obviated that danger.

It is also the general view that the GATS Annex on Telecommunications applies to access to and use of the Internet network when it is defined in a Member's regulatory system as a public telecommunications transport service or network in terms of that Annex. In light of this view, the recent decision of the FCC to regulate network access provision under Title II of the *Telecommunications Act of 1934* is significant, as it implies that the United States would now accept that these services are covered by the Annex and by the GATS Reference Paper on Basic Telecommunications. From the viewpoint of the WTO, this would be a significant change; the United States has hitherto maintained that these are "value-added" and not basic telecoms services, and therefore not subject to the Annex and the Refeence Paper. However, the US government has not yet stated how it views the potential GATS implications of the FCC's reclassification of Internet access provision under Title II.

Many subjects have been proposed by delegations for further work in the CTS. They include electronically delivered software; classification issues; the protection of confidential data and privacy; consumer protection; consumer awareness; electronic signatures; unsolicited bulk electronic communications (*i.e.*, "spam"); private standards; the availability of infrastructure for developing countries; Internet access; payment issues; non-discrimination; electronic authentification and trust services; and unequal access to information and communication technology.

Meanwhile, trade in ICT and ICT-enabled services continues to grow faster than overall economic growth. Global exports of computer and information services achieved annual growth between 2005 and 2013 of 14 percent, and exports of other business services totalled USD 1.2 trillion with growth averaging 9 percent annually between 2005 and 2013. Electronic commerce serving ordinary consumers (business-to-consumer sales) also is growing rapidly, achieving roughly 20 percent growth over each of the past three years, and is predicted to reach nearly USD 2.4 trillion by 2017.

4. Other WTO Agreements

There has been no suggestion that the GATT and the Agreement on Trade-related Aspects of Intellectual Property Rights do not apply to electronic commerce. Questions deserving further consideration have been identified in both cases, however.

5. Current State of Work

Despite the Decision by Ministers at Bali that the Work Programme should be substantially invigorated, there has been no significant progress since then. The Ambassador of Panama, Mr. Alfredo Suescum, was appointed to chair the Dedicated Discussions which address issues cutting across different WTO Agreements, and having invited proposals from delegations, in the 10th Dedicated Discussion on February 17

he tried to animate discussion of future work and objectives. A submission had been made by the United States to the GATS Council on Cross-Border Information Flows, Localization Requirements and Privacy Protection, and on the coverage of Cloud Computing under Computer and Related Services. The WTO Secretariat also produced a comprehensive paper on the history of the Work Programme. However, these initiatives were not well received, particularly by some developing countries who questioned the authority for production of the Secretariat paper and suggested that substantive work would be premature given the state of work in agriculture and other issues in the Doha Round negotiations. No progress was made.

This is not very surprising, given the lack of response to earlier decisions by Ministers that the work should be reinvigorated. There is a great deal of important and relevant subject-matter that could usefully be discussed in the Work Programme, but other elements of the Doha negotiations do not depend on this. It could be said that the essential point – to establish that the WTO Agreements apply fully to electronic commerce – has already been achieved. Further progress may well be made more easily in regional and bilateral trade agreements.

World Trade Organization Rules and Exchange Rates

In the last twelve months, the trade-weighted Dollar index has risen by more than 20 percent against the Euro and 15 percent against the Yen. This is not surprising, given the health of the US economy and expectations of tighter monetary policy this year. But these developments are starting to harm American farmers and manufacturers and have amplified US lawmakers' claims that some US trading partners are deliberately weakening their currencies to make their exports artificially competitive. The main target of such criticism is China, as it has been for several years, notwithstanding the fact that, according to the US Treasury Department, China has adhered to an agreement reached in 2014 that it would not intervene to undervalue its currency. Moreover, the Yuan has appreciated by over 50 percent in real trade-weighted terms since 2004. As the end of the Trans-Pacific Partnership (TPP) negotiations comes into focus, other countries in Asia, such as Japan and South Korea, will become vulnerable to allegations of having undervalued currencies that are boosting their exports.

On February 10, 2015, bipartisan groups of US lawmakers introduced bills in the Senate and the House of Representatives that would direct the US Department of Commerce to consider that an undervalued currency is an export subsidy for purposes of US countervailing duty investigations. Similar bills were introduced, but not enacted, in 2010 and 2011. Proponents of the current bills are seeking to have their proposals incorporated into Trade Promotion Authority (TPA) legislation. As of March 16, the House and Senate currency bills have garnered 4 and 10 co-sponsors, respectively, but many key US government officials oppose the bills. Most, if not all, Members of the congressional Republican leadership, which controls both chambers of Congress, also do not support the bills.

US lawmakers also have been discussing the possibility of adding clauses banning currency manipulation to the TPP agreement and other future trade agreements. However, the congressional Republican leadership and key US government officials oppose these efforts. Chairman of the US Federal Reserve, Janet Yellen, opposed such an idea in testimony to the Senate Committee on Banking, Housing and Urban Affairs on February 24, 2015: "I would really be concerned about a regime that would introduce sanctions for currency manipulation into trade agreements." USTR Michael Froman, echoing the entire Obama administration's view, has indicated that currency manipulation should not be addressed through free trade agreements, but rather by the U.S. Treasury Department through bilateral mechanisms, and through international forums such as the G-7, the G-20, and the International Monetary Fund (IMF).

Exchange rate proposals of this kind have never been enacted in the United States, and the fate of the current bills is uncertain. Nonetheless, the strong desire among both the Obama administration and Republican leadership to conclude both TPA and TPP in 2015 gives the currency bills' supporters unique – and unpredictable – leverage.

Thus, it is worthwhile to consider how the US currency legislation might play out under World Trade Organization (WTO) rules.

1. Members' Views in the WTO

Concerns about the trade effects of exchange rate changes have surfaced numerous times in the WTO and, before it, the GATT, often at times when there was a perception that the US dollar was undervalued. The breakdown of the post-World War II fixed exchange rate system became an issue during the launch of the Tokyo Round (1974-79). Exchange rate instability in the 1980s was a concern in the run-up to the Uruguay Round (1986-1994), when the European Union (EU) announced that it would reject the results of the negotiations if, when the time came, it was not satisfied with prevailing exchange rate parities. The EU demanded a study by the IMF and a debate in the GATT Council to express its concerns. In the late 1990s, a number of WTO Members raised similar concerns in the wake of the Asian financial crisis as currencies in the region tumbled and another IMF study was commissioned. The IMF's view has been that exchange rate volatility and misalignment can, in principle, affect trade (by pricing traded goods incorrectly and causing more resources to move into their production) and trade policy (by undercutting levels of protection against foreign competition and causing bilateral current account imbalances that provoke a protectionist response). However, the studies that the IMF produced for the WTO found little evidence that these effects were significant in practice. No action was taken in the WTO on any of these occasions, and as currency markets normalised the concerns seemed to fade away.

The issue resurfaced in the WTO in 2011, when Brazil complained about the trade effects of exchange rate changes that resulted from expansionary monetary policy to tackle the financial crisis of 2008-09, notably the programme of quantitative easing in the United States. The weaker dollar favoured exports from the United States to its main trading partners, including Brazil, several of whom were concerned that their Uruguay Round tariff bindings would cease to support their domestic industries, particularly at a time of global recession. In 2012-2013, WTO Members debated the issue once again, this time on the basis of a "Conceptual Note" tabled by Brazil on the relationship between exchange rates and international trade.

Brazil claimed that "WTO provisions do not seem to be adequate to provide solutions to compensate for or otherwise redress those currency fluctuations that may impair commitments undertaken by Members in successive rounds of negotiations." Brazil proposed that Members consider whether there is "a need to craft trade remedies that specifically address currency misalignments," and, anticipating a positive response, suggested the following elements to be factored into the design of new corrective measures:

- How currency misalignment should be measured;
- Whether measures should be applicable only to a specific product or sector in the country affected, or to its entire economy;
- Whether measures should be applied on a most favoured nation (MFN) basis or specifically for currencies against which the misalignment is found;
- Whether measures should be triggered automatically or subject to a finding of injury; and
- How long measures should be in place, and what investigative procedures should be followed.

Like its predecessors, the debate that followed among WTO Members was inconclusive. No consensus emerged regarding the definition of currency misalignment or its effects on trade, and Members were not inclined to change WTO rules. Some Members rejected the use of trade policies – and trade remedies in particular – to address allegedly currency misalignments. All Members agreed that exchange rate issues belonged to the jurisdiction of the IMF, rather than the WTO, and many Members felt that if necessary

actions should be channeled into closer institutional cooperation with the IMF. The positions of various Members are worth noting:

- **China** sympathized with Brazil's concerns that current exchange rate instability was rooted in the quantitative easing of monetary policy by some governments but stated that the right way to resolve the issue was through monetary policy coordination in the IMF. China rejected the use of trade policies to address currency issues, as this would be contrary to WTO rules and damaging to the multilateral trading system.
- **The United States** stated that persistent misalignment of exchange rates could create serious difficulties for international trade, but felt that the cause of the problem was often policies aimed at preventing the adjustment of exchange rates to macroeconomic conditions, and that appropriate remedies needed to be found through the IMF, not the WTO.
- **The European Union** agreed with Brazil that existing WTO rules were not designed to deal with a world of flexible exchange rates but requested more analysis before addressing the question of the need for new rules.
- **Japan, India and Switzerland** emphasized the supremacy of the IMF on exchange rate matters and saw no benefit from trying to tackle the issue in the WTO.
- **Australia, Chile, and Singapore** felt that using trade policies to try to resolve exchange rate problems would be ineffective and could spiral into protectionism.

As on earlier occasions, currency market developments – this time the appreciation of the US dollar – defused the issue in the WTO and the discussion lapsed.

2. WTO Rules and Exchange Rates

The United States has never requested a discussion of trade and exchange rate issues in the WTO, but US lawmakers have tabled bills on the matter on several occasions in recent years, prompted mainly by their concern about China's export competitiveness and their view that such competitiveness is due in part to China's manipulation of the Yuan to keep it undervalued. However, US lawmakers have not found WTO rules helpful to devising a trade policy response.

WTO rules on exchange rates have remained largely unchanged since the GATT was drafted in 1947.[7] None of the rules addresses the impact of currency misalignment on trade directly or comprehensively. Those rules that might be invoked by Members to address such a problem were designed to operate in a fixed exchange rate system and their scope is limited.

- **GATT Article XV** aims to prevent Members from substituting exchange restrictions for trade restrictions and, *vice versa,* manipulating their trade or their currencies. It requires, in part, that Members "shall not, by exchange action, frustrate the intent of the provisions of the [GATT]." This provision has never been tested through dispute settlement and seems to set a high burden of proof for any Member challenging another Member's exchange restrictions. The term to "frustrate the intent" of GATT provisions has not been formally interpreted, but it has been agreed that an "appreciable departure" from the intent of the GATT provisions must exist if there is to be any basis for a challenge. Article XV:9 exempts exchange restrictions from challenge in the WTO if they are being applied in accordance with the IMF Articles of Agreement. This provision weakens the discipline considerably in the case of China, for example, whose currency policies and exchange restrictions were reviewed repeatedly and critically in the IMF over the past decade but, because of lack of consensus, were never

[7] A full listing of the rules is contained in a WTO Secretariat note, WT/WGTDF/W/3, available on the WTO website.

found in breach of its Articles. In the case of other countries with fully floating exchange rates, Article XV does not address the manipulation of currencies through means other than exchange restrictions, for example monetary policy, which was the basis of Brazil's concerns in 2012.

- **GATT Article II:6** could, in principle, offer a more direct way of dealing with currency manipulation, but its scope is very narrow. The provision allows a Member to renegotiate its *specific* duties and charges if a currency devaluation of 20 percent or more by another Member lowers their protective effect. However, the provision does not cover changes in *ad valorem* duties, and in any case the time needed to renegotiate a concession seems to preclude immediate relief from the disruptive impact of currency misalignment.
- **GATT Article XXIII:1(b)** does not apply specifically to exchange rate issues, but it might support a challenge that the currency practices of a Member nullify or impair the benefits accruing to another Member. Although in principle a challenge under this provision would not require a showing that the challenged exchange rate practices violate a specific WTO rule, jurisprudence suggests that the burden of proof for this kind of non-violation complaint would be high, and the time taken for full dispute settlement proceedings to produce a result would, again, seem to preclude immediate relief.

An alternative approach that US lawmakers have explored is to address currency manipulation through trade remedy measures. The argument is that an undervalued currency boosts a country's exports and, in economic terms, acts as an export subsidy if it is maintained deliberately below its equilibrium exchange rate. However, the WTO Agreement on Subsidies and Countervailing Measures (ASCM) makes no explicit mention of currency undervaluation; nor is it on the Illustrative List of Export Subsidies in Annex I of the ASCM.

Could currency undervaluation be challenged as being prohibited or actionable, nonetheless, through the ASCM? A judgement on that depends first on whether a nation's currency policy would fall within the Agreement's definition of a "subsidy" (*i.e.*, a "financial contribution" by a government or public body that confers a "benefit" on the recipient). Most experts in this field view such a determination as unlikely. It is not clear how currency undervaluation could be considered to involve a financial contribution of some form from the government.

Second, currency undervaluation would appear to fail the test of being "specific" to an enterprise or an industry – a necessary determination prior to the imposition of countermeasures on actionable subsidies. A currency policy applies to everyone in a country, not just certain enterprises or industries therein, and in that sense can be likened to "the setting or change of generally applicable tax rates," which is deemed not to be a specific subsidy for the purposes of the ASCM.

Third, whether currency undervaluation may constitute a prohibited export subsidy (which is *per se* specific) is questionable. Such subsidies are "contingent… upon export performance," but currency policies lack such contingency. Also, as noted above, currency undervaluation is absent from the illustrative list of export subsidies found in Annex I of the ASCM.

The coverage of currency undervaluation by the ASCM therefore is ambiguous at best. Brazil effectively reached that conclusion when spearheading the debate in the WTO on this issue in 2012, leading Brazil to suggest that other Members consider whether there is a need to write new WTO trade remedy rules that specifically address currency misalignments. However, this suggestion was not taken up by other Members. The bills tabled earlier this year by US lawmakers would cut through the ambiguity of the ASCM at the US Department of Commerce by directing it to consider an undervalued currency as an export subsidy for purposes of US countervailing duty investigations. But without fixing things also in the WTO, a countervailing duty imposed by the United States in this context would remain open to challenge through dispute settlement as a breach of the ASCM.

Conclusion

Frustration about the trade effects of currency manipulation is understandable when it is believed that undervaluation is achieved deliberately to generate a competitive export advantage or higher barriers to imports. However, WTO rules offer very limited possibilities to challenge a Member's currency practices. That is partly because WTO rules were written for a world of fixed exchange rates and have not been changed to reflect today's far more complex financial system. *Mainly, however, it is because WTO Members, seemingly without exception, believe that international surveillance and management of exchange rate issues belongs to the IMF, not the WTO, and Members have no appetite to broaden the WTO rules to accommodate the use of trade restrictions for this purpose.* A radical overhaul of the WTO's ASCM likely would be needed before countervailing duties could be used reliably to remedy currency undervaluation, and there is serious concern that doing so could open the door to significant new barriers to trade without having any effect on underlying exchange rate disequilibriums.

Multilateral Highlights

WTO Members Discuss Treatment of Recently Acceded Members During Doha Round Negotiations on Agriculture and NAMA

In recent weeks, issues at the WTO pertaining to the treatment of Recently Acceded Members (RAMs) have arisen during informal negotiations on the Doha Round, particularly in the context of negotiations on Agriculture and Non-Agricultural Market Access (NAMA). In the Agriculture negotiations, the United States and China voiced differences over the flexibilities offered to RAMs regarding domestic support policies. In addition, Paraguay and Argentina recently submitted proposals pertaining to Agriculture and NAMA that address, *inter alia*, the treatment of RAMs.

Throughout the negotiations, the United States has urged China and other large developing countries to forego certain development flexibilities in order to make a more significant contribution to the market access component of the Doha Round. In the case of the Agriculture negotiations, these discussions continued during the week of March 9-13, addressing the section of the 2008 draft modalities for agriculture that provides flexibilities to developing countries regarding their obligations to reduce overall trade-distorting domestic support policies. One such flexibility offered to the RAMs is a *de minimis* entitlement, specified in Paragraph 12 of the text, which exempts their domestic support from reduction for up to 17 percent of the value of their agricultural production. During the recent discussions, the United States proposed that the RAMs should forego at least part of that exemption. However, China reacted negatively to this proposal, stating that it "would make no contribution towards new disciplines on domestic support." Other developing countries have *de minimis* exemptions for up to 10 percent of the value of their production, and India reacted equally negatively when the United States proposed that this exemption also should be reduced. The implications of these exchanges might extend beyond agriculture if the United States seeks to undercut, on a broader negotiating front, the more favorable treatment offered thus far to the RAMs.

Recent proposals submitted by Paraguay and Argentina also addressed treatment of the RAMs. Both proposals offer new approaches to reducing tariffs and domestic supports, which the two countries suggest should replace the currently accepted 'Swiss formula' in the case of Agriculture and NAMA. Paraguay proposed a combination of an overall average cut and a minimum tariff line cut, whereby developed and developing countries would target an overall average cut of 54 percent, but the RAMs would continue to enjoy more favorable treatment with an average cut of 24 percent. Argentina proposed a simple request-offer approach which, it noted, would eliminate the need for detailed flexibilities and exemptions for different categories of developing countries. Under the Argentinian proposal, the RAMs would not receive special 'up-front' treatment but instead would have to argue the case for their RAM status with each of their negotiating partners in the bilateral request-offer process.

Neither proposal has advanced beyond the stage of general discussion. However, the status of the RAMs, which until now has appeared to be relatively non-controversial, could play a more significant role as Members struggle to reach agreement on how the Doha Round should be concluded.

Slow Progress on Market Access Negotiations Delays Movement on Doha Round

In recent weeks, informal negotiations on the key issues of Agriculture and Non-Agricultural Market Access (NAMA) have continued at the World Trade Organization (WTO) as Members seek a common basis for constructing the core market access package for the remainder of the Doha Round. The market access package likely will need to include 'zero-for-zero' tariff cuts in certain sectors and incorporate the results of separate negotiations on the Environmental Goods and Information Technology Agreements to be considered acceptable by the United States. However, the negotiations are at an impasse over the more fundamental issue of identifying an acceptable formula – or an alternative approach – for determining across-the-board tariff cuts. Progress has been slow in this area; as a result, no progress has occurred in other areas of the Doha Round negotiations, such as Rules.

At a Heads-of-Delegation meeting on March 18, WTO Director-General Roberto Azevêdo assessed the current status of the negotiations, stating that "[w]hile we are making progress, this does not yet mean we are converging," and adding that "[t]here remain many challenges to overcome before we can find solutions." In particular, finding common ground to agree on cuts to domestic agricultural subsidies is widely viewed as a "gateway" to progress on the other market access issues; however, progress towards identifying such common ground has been slow. Some delegations have begun to openly predict that Members likely will miss the end-July deadline for finalizing the Bali Work Programme, which, when completed, will contain the political decisions required for technical-level negotiations on the detailed texts of agreements to begin.

On March 5, EU Trade Commissioner Cecilia Malmstrom appeared to pre-empt a decision by the entire WTO Membership on the issue of timing, by stating the goal of reaching a political agreement on the Doha Round at the WTO's next Ministerial Conference in Kenya in December 2015. Other Members reportedly have agreed privately that December is a more realistic target date than the end of July for reaching agreement on the Bali Work Programme. Meanwhile, movement on the other Doha Round issues, such as Rules, has not occurred. In addition, some key WTO Members are focused on finalizing the Trans-Pacific Partnership (TPP) and, in the case of the United States, passing Trade Promotion Authority (TPA), leaving little room for senior political-level attention to the Doha Round.

On Agriculture and NAMA, delegations are struggling to identify an acceptable alternative to the Swiss formula for reducing tariffs and domestic farm subsidies. Ambassador Remigi Winzap of Switzerland, the current NAMA Chairman, stated on March 11 that "pursuing a Swiss formula, even if favoured by many Members, seems to be extremely difficult for some other Members today." The reference to "other members" includes the United States and the European Union, which effectively rules out the Swiss formula as a basis for cutting industrial tariffs despite the fact that many developing countries are refusing to abandon it formally. The Agriculture negotiations are more complicated, as negotiators must resolve the approaches to be used for cutting both tariffs and domestic subsidies. Most developing countries and emerging economies continue to insist on retaining the extensive development flexibilities contained in the 2008 draft modalities texts. In addition, a permanent solution must be found for developing countries' food security programs, which India has insisted on maintaining with support from the rest of the G-33 group of developing country food importers.

Two alternatives to the Swiss formula for reducing tariffs have been tabled in recent weeks:

- **Paraguay** proposed using a combination of overall average cuts coupled with minimum cuts per tariff line that would allow Members to tailor their offers to achieve the overall average cut. Many emerging and developing countries consider that an average tariff cut formula would be less favourable to them than the Swiss formula and have not supported Paraguay's proposal. However, the European Union has recommended an average tariff cut approach in the past and reportedly still believes that it might provide a solution to the formula problem. NAMA Chairman Winzap also offered support for the proposal, stating, "I sense an openness by most Members to look more closely at an approach for cutting tariffs with a formula based on an average cut," complemented "by other features like possibly minimum cuts."

- **Argentina** proposed a simple request-offer approach with no target for overall average cuts and "no other parameters or benchmarks." Since the negotiations would be conducted on the basis of less-than-full-reciprocity for developing countries, there would be no need to negotiate separate development flexibilities or other exceptional provisions. The approach could encompass non-tariff barriers as well as tariffs, and Argentina proposed that it should apply also to Services to maximize the possibility of trade-offs among each of the market access issues. One concern expressed by some Members about Argentina's approach is that bilateral and plurilateral request-offer negotiations could be too time-consuming at this late stage. Also, such an approach could lead to a minimalist result which falls below widely-shared expectations of an acceptable outcome. NAMA Chairman Winzap reported that he had heard "many sceptical voices" claim that Argentina's proposal would be less predictable than the Swiss formula. Nonetheless, it will continue to be discussed along with other proposals.

For the time being, the approach most likely to be taken for industrial tariffs appears to be a combination of an average formula cut coupled with deeper cuts by key countries, including the emerging economies. Such deeper cuts would be arrived at through accelerated request-offer negotiations on particular products and in sectors where plurilateral negotiations already are underway, such as Information Technology products and Environmental Goods.

WTO Members Complete Initial Product List for Environmental Goods Agreement; Aim to Finalize List by August

At a negotiating round held during the week of March 14, 2015, the sixteen WTO Members participating in negotiations on the Environmental Goods Agreement (EGA) completed an initial list of approximately 600 products that have been proposed for zero-tariff treatment under the EGA. Notable developments during the round included (i) China's submission of a relatively short list of approximately 70 products that it is proposing for zero-tariff treatment under the EGA, including products related to water and air pollution, bamboo products, and high-efficiency electrical goods; and (ii) the formal inclusion of Iceland and Turkey in the negotiations for the first time.

The initial EGA products list covers a wider range of products than the Asia-Pacific Economic Cooperation (APEC) List of Environmental Goods, which consists of 54 tariff lines on which APEC members have agreed to lower tariffs to 5 percent or less by the end of 2015. This is because the initial EGA products list covers many products that do not necessarily have independent environmental credentials but that can be used for environmental purposes or by environmental contractors (*e.g.,* electrical measuring machinery). Participants have not agreed on a minimum standard of environmental credentials that will be required for products to be covered under the EGA; however, some participants, such as the United States, are seeking liberalization for the largest number of tariff lines possible. Other participants, particularly in Europe, are under pressure from environmental groups to apply strict environmental credentials before allowing products to be included on the final list. In addition, some EGA participants have continued to press for the EGA to address non-tariff barriers and include environmental services. Although this is unlikely to occur before the December deadline, the EGA could be expanded in these directions in the future.

The Parties will now seek to narrow down the initial products list and produce a final consensus list by August, with the goal of completing the EGA in advance of the United Nations Climate Change Conference in Paris in December 2015. However, despite this recent progress, the number of participants in the EGA negotiations remains small. As a result, it may be difficult for EGA participants to attain the "critical mass" criterion of product coverage that they have said will be necessary if the results of the EGA are to be extended to all WTO Members on a most-favored-nation basis once the agreement is concluded.

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