



# White & Case LLP General Trade Report - JETRO

September 2012

## In This Issue

United States..... 1

General Trade Policy ..... 1

## Table of Contents

<b>UNITED STATES .....</b>	<b>1</b>
United States Participates in 2012 APEC Summit.....	1
Republican, Democratic Parties Release 2012 Platforms, Provide Positions on Key Trade Issues .....	6
<b>US General Trade Policy Highlights .....</b>	<b>9</b>
TPP Members Conclude 14 <sup>th</sup> Round of Negotiations .....	9
USTR Requests WTO Consultations with China Regarding Export Subsidies for Automobile, Automobile Part Manufacturers .....	11
Meredith Broadbent Sworn In as New ITC Commissioner .....	12
APEC Leaders Agree to List of Environmental Goods .....	13
United States and Cambodia Agree to Commence Exploratory Talks on BIT .....	14
United States Preliminarily Announces Easing of Ban on Import of Burmese Goods.....	15

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## UNITED STATES

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### GENERAL TRADE POLICY

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## United States Participates in 2012 APEC Summit

### Summary

From August 28 – September 9, 2012, Russia hosted in Vladivostok the 2012 Asia-Pacific Economic Cooperation (APEC) Summit. During the Summit, the trade ministers and leaders of APEC member countries made commitments in regard to such trade-related issues as transparency, environmental goods and supply chains. On the sidelines of the Summit, trade ministers of the countries party to the Trans-Pacific Partnership Agreement (TPP) met to assess progress made by TPP negotiators over the past year. Neither President Obama nor US Trade Representative (USTR) Ron Kirk attended the Summit; Secretary of State Hillary Clinton and Deputy USTR Demetrios Marantis attended in their stead. Nonetheless, on September 7, 2012, USTR Kirk issued a press release welcoming the outcomes of the 2012 APEC Summit which he noted “will help export opportunities in the fastest growing region in the world and further demonstrate APEC’s ability to come together to forge consensus on important and challenging issues.”

### Analysis

#### I. 2012 APEC MINISTERIAL STATEMENT AND LEADERS DECLARATION

As the 2012 host of APEC, Russia directed APEC member countries to address a number of issues under the theme “Innovate to Grow, Innovate to Prosper,” including, among others: (i) trade and investment liberalization and regional economic integration; (ii) establishing reliable supply chains; and (iii) intensive cooperation to foster innovative growth. APEC member countries addressed these issues through numerous meetings, including the APEC Ministerial Meeting, held September 5-6, 2012, and the APEC Leaders Meeting, held September 8-9, 2012. Two key sets of documents were released as a result of these meetings, outlining commitments made by APEC member countries in regard to these three issue areas. These documents include the “2012 APEC Ministerial Meeting Joint Statement”<sup>1</sup> (“Ministerial Statement”) and corresponding annexes, as well as the “2012 Leaders’ Declaration”<sup>2</sup> (“Leaders’ Declaration”) and corresponding annexes. Below we highlight commitments cited in these documents.

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<sup>1</sup> The Ministerial Statement is available here:

<http://apec.org/Press/News-Releases/2012/~//link.aspx?id=BDF5AFBEC0884FB1B5344469D7F783AE&z=z>

<sup>2</sup> The Leaders’ Declaration is available here: [http://www.apec.org/Meeting-Papers/Leaders-Declarations/2012/2012\\_aelm.aspx](http://www.apec.org/Meeting-Papers/Leaders-Declarations/2012/2012_aelm.aspx)

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Trade and Investment Liberalization and Regional Economic Integration

- **Model Chapter on Transparency.** In Annex A of the Ministerial Statement,<sup>3</sup> APEC ministers agree upon a model chapter on transparency to be used in free trade agreements (FTAs) or regional trade agreements (RTAs). The Chapter's contents are based on APEC member countries' existing FTA chapters, Article X of the General Agreement on Tariffs and Trade (GATT) and Article III of the General Agreement on Trade in Services (GATS). The Chapter's provisions dictate that parties to FTAs or RTAs, among other things, shall: (i) publish proposed and final measures (including laws, regulations, decisions, judicial decisions and administrative rulings) related to the matters covered in their FTAs or RTAs in an official journal for public circulation; (ii) provide a reasonable period of time between the dates on which a measure is published and implemented; and (iii) provide no less than 30 days for parties to comment on proposed measures;
- **List of Environmental Goods.** In Annex C of the Leaders' Declaration, APEC leaders agree to a list of environmental goods on which they will cut tariffs to five percent or less by 2015 ("List of Environmental Goods") (*please refer to W&C US Trade Alert dated September 12, 2012*). The List of Environmental Goods is widely considered to be the most impressive outcome of the 2012 APEC Summit. The commitment has also been seen as a breakthrough because, among other reasons, World Trade Organization (WTO) members attempted and failed to commit to lowering tariffs on environmental goods within the Doha negotiating round. According to Annex C, APEC countries will provide capacity-building assistance to help members implement this commitment. The List includes several products falling under Harmonized System (HS) chapters 84,<sup>4</sup> 85<sup>5</sup> and 90;<sup>6</sup>
- **Local Content Requirements.** Reports indicate that, in addition to agreeing upon a List of Environmental Goods, another of the United States' top priorities for the 2012 APEC Summit was addressing local content requirements, which the United States views as trade-distorting. Nonetheless, APEC members were unable to make any specific commitments. Instead, in the Ministerial Statement, trade ministers instruct officials to further study in 2013 the impact of local content requirements on regional integration and economic growth; and
- **Energy Security.** In Annex B of the Leaders' Declaration,<sup>7</sup> APEC leaders agree to, *inter alia*: (i) promote steady investment in energy infrastructure; (ii) phase out inefficient fossil-fuel subsidies; and (iii) develop an

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<sup>3</sup> Annex A of the Ministerial Statement is available here: [http://apec.org/Meeting-Papers/Ministerial-Statements/Annual/2012/2012\\_amm/annex-a.aspx](http://apec.org/Meeting-Papers/Ministerial-Statements/Annual/2012/2012_amm/annex-a.aspx)

<sup>4</sup> The codes were listed under HS 84: 840290, 840410, 840420, 840490, 840690, 841182, 841199, 841290, 841780, 841790, 841919, 841950, 841989, 841990, 842121, 842129, 842139, 842199, 847420, 847982, 847989, and 847990.

<sup>5</sup> The following codes were listed under HS 85: 850164, 850231, 850239, 850300, 850490, 851410, 851420, 851430, 851490, 854140, and 854390.

<sup>6</sup> The following codes were listed under HS 90: 901380, 901390, 901580, 902610, 902620, 902680, 902690, 902710, 902720, 902730, 902750, 902780, 902790, 903149, 903180, 903190, 903289, 903290, and 903300.

<sup>7</sup> Annex B of the Leaders' Declaration is available here: [http://www.apec.org/Meeting-Papers/Leaders-Declarations/2012/2012\\_aelm/2012\\_aelm\\_annexB.aspx](http://www.apec.org/Meeting-Papers/Leaders-Declarations/2012/2012_aelm/2012_aelm_annexB.aspx)

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WHITE & CASE LLP | 2

Action Plan to achieve the goal of reducing APEC's aggregate energy intensity by 45 percent by 2035.

#### Establishing Reliably Supply Chains

- **Systematic Approach to Supply Chain Improvement.** In their Leaders' Declaration, APEC leaders reaffirmed their commitment to achieving a 10 percent improvement in supply-chain performance across the APEC region by 2015. APEC member countries aim to achieve this reduction in terms of reduction of time, cost and uncertainty of moving goods and services. In Annex B of the Ministerial Statement,<sup>8</sup> trade ministers commit to taking a more systematic approach to improving supply chain performance by: (i) identifying policies to address each chokepoint; (ii) determining whether APEC member countries already have those policies in place; and (iii) providing capacity-building to APEC member countries to help them implement the necessary policies. Trade ministers instruct officials to begin implementation of this approach in 2012 with the goal of providing the capacity-building mentioned in (iii) by 2014.

#### Intensive Cooperation to Foster Innovative Growth

- **Innovation Policies.** In Annex A of the Leaders Declaration,<sup>9</sup> APEC leaders commit to produce innovation policies in 2013 that implement APEC leaders 2011 commitment to implement policies that promote effective, non-discriminatory, and market-driven domestic innovation policies; and
- **Recommendations of the Innovation Technology Dialogue on Nanotechnologies for Energy Efficiency.** In Annex C of the Ministerial Statement,<sup>10</sup> the participants of the Innovation Dialogue on Nanotechnologies for Energy Efficiency explain that nanotechnologies, *i.e.*, technologies that deal with things smaller than 100 nanometers, have the potential to assist APEC member countries in meeting their energy goals. In an effort to promote innovation in the nanotechnology industry, the participants recommend that APEC members, *inter alia*: (i) offer businesses involved in the development and implementation of the energy efficient nanotechnologies with WTO-consistent incentives; (ii) allow for the market-driven development of innovative nanotechnologies; and (iii) promote trade in scientific research equipment and components.

## II. TPP TRADE MINISTERS' REPORT TO LEADERS

On September 6, 2012 the trade ministers of the countries party to the TPP met on the sidelines of the 2012 APEC Summit to discuss progress made with regard to the TPP since the 2011 APEC Summit. At the 2011 APEC Summit, the leaders of countries party to the TPP announced the broad outlines of the TPP and welcomed the interest of Mexico, Japan and Canada in seeking to join the TPP. Although TPP leaders made no public

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<sup>8</sup> Annex B of the Ministerial Statement is available here: <http://apec.org/Press/News-Releases/2012/~link.aspx?id=08D3FA5AB5D8478B86BF1966EB11D79E&z=z>

<sup>9</sup> Annex A of the Leaders' Declaration is available here: [http://www.apec.org/Meeting-Papers/Leaders-Declarations/2012/2012\\_aelm/2012\\_aelm\\_annexA.aspx](http://www.apec.org/Meeting-Papers/Leaders-Declarations/2012/2012_aelm/2012_aelm_annexA.aspx)

<sup>10</sup> Annex C of the Ministerial Statement is available here: [http://apec.org/Meeting-Papers/Ministerial-Statements/Annual/2012/2012\\_amm/annex-c.aspx](http://apec.org/Meeting-Papers/Ministerial-Statements/Annual/2012/2012_amm/annex-c.aspx)

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commitment to do so, US Deputy National Security Advisor Michael Froman stated that TPP leaders also made plans to finalize the TPP in 2012 (*please refer to W&C US Trade Report dated November 18, 2012*). On September 9, 2012 USTR announced the release of the “Trans-Pacific Partnership Leadership Statement”<sup>11</sup> (“TPP Statement”) and the “Trans-Pacific Trade Ministers’ Report to Leaders”<sup>12</sup> (“TPP Report”).

In their TPP Statement, the TPP leaders commit to “expeditiously” concluding the TPP negotiations. Based on their assessment of progress made within the past year, TPP leaders state their belief that the goal of finalizing the TPP is “within [...] reach.” To this end, TPP leaders direct negotiators to find solutions to the remaining issues in a timely manner. TPP leaders also welcome Canada and Mexico as new TPP negotiating members. Canada and Mexico were invited to join TPP negotiations in June 2012 and are expected to start participating in TPP negotiations during the December 2012 15<sup>th</sup> round of negotiations in Auckland, New Zealand (*please refer to W&C US Trade Alert dated June 19, 2012*). TPP leaders further direct negotiators to continue discussions with other Asia-Pacific partners that have expressed interest in joining the TPP. This statement undoubtedly refers to countries such as Japan, whose accession to TPP has been delayed by outstanding US-Japan bilateral trade issues and Japanese internal political issues.

In the TPP Report, the TPP trade ministers state that, as a result of the four negotiating rounds and numerous plurilateral meetings held since the 2011 APEC Summit, TPP negotiators have made “encouraging headway” toward completion of the Agreement. The TPP trade ministers commit themselves to finishing as many of the chapters of the TPP as possible by the end of 2012. This statement suggests that TPP is unlikely to be completed by the end of 2012. To date, TPP negotiators have announced the closing of only one chapter within the Agreement – that which addresses issues faced by small- and medium-sized enterprises (SMEs) in the global economy.

Of the 29 chapters in the TPP, negotiators have made “significant” progress on the following 8 texts: (i) customs; (ii) cross-border trade in services; (iii) government procurement; (iv) telecommunications; (v) competition policy; (vi) SMEs; (vii) competitiveness and business facilitation; (viii) cooperation and capacity building. TPP negotiators have also “moved ahead” their negotiations of the following 4 texts: (i) rules of origin (ROOs); (ii) investment; (iii) financial services; and (iv) temporary entry. TPP trade ministers infer that slightly less progress has been made with regard to other texts. Although they do not mention which specific texts TPP members have had difficulty negotiating, experts note they include those that address, among other things: (i) state-owned enterprises (SOEs); (ii) intellectual property rights (IPR); (iii) environmental protection; and (iv) labor rights.

In their Report, TPP trade ministers provide updates on 6 areas, namely:

- **Market Access.** According to the TPP Report, market access negotiations are progressing at varying paces

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<sup>11</sup> The TPP Statement is available here: <http://www.ustr.gov/about-us/press-office/press-releases/2012/september/tpp-leadership-statement>

<sup>12</sup> The TPP Report is available here: <http://www.ustr.gov/about-us/press-office/press-releases/2012/september/tpp-trade-ministers-report-to-leaders>

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for different TPP members. The TPP Report suggests that market access negotiations have not progressed as quickly for those TPP members that have never before negotiated from the “negative list” approach, which presumes comprehensive coverage but allows countries to negotiate specific exceptions to commitments;

- **Regional Agreement.** TPP members have discussed steps towards the creation of a single tariff schedule. TPP members have also made progress towards the establishment of a common ROO that will allow for cumulation across TPP countries. With regard to production and supply chains, TPP members have also made commitments with respect to connectivity, services, customs cooperation and standards;
- **Cross-Cutting Issues.** According to the Report, TPP negotiators have made progress with regard to each of the four cross-cutting issues that the TPP will address, namely: (i) regulatory and other non-tariff barriers (NTBs), an issue that addresses goods, industrial and agricultural standards, regulatory practices, and transparency issues, among other things; (ii) competitiveness and business facilitation, an issue that addresses the development of production and supply chains; (iii) the participation of SMEs in regional trade; and (iv) capacity building, an issue that addresses the need to provide assistance to TPP countries in implementing their TPP-related commitments;
- **New Trade Issues.** The TPP Report states that negotiators have considered how best to address the emerging trade issues related to: (i) the digital economy; (ii) SMEs; (iii) green growth; and (iv) a transparent and pro-competitive business environment, *i.e.*, SOEs; and
- **Living Agreement.** In addition to welcoming Canada and Mexico as new TPP members and acknowledging ongoing discussions with other potential TPP members, the TPP Report notes that negotiators are working to establish a mechanism within the TPP that will allow the agreement to evolve in response future trade issues.

## Outlook

Despite the absence of key US officials, APEC members still achieved several key trade-related outcomes at the 2012 APEC Summit. The most impressive outcome was the agreement on the List of Environmental Goods, although the model chapter on transparency and the commitments made with respect to innovation policies and supply chains are also considered significant. APEC members’ ability to agree on such outcomes is noteworthy, especially in light of WTO Doha round impasse. Nonetheless, it is important to note that APEC is a non-binding organization. As such, APEC does not have a mechanism for enforcing members’ commitments made at the 2012 APEC Summit, *e.g.*, to lower tariffs on environmental goods or to publish measures related to FTAs or RTAs.

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## Republican, Democratic Parties Release 2012 Platforms, Provide Positions on Key Trade Issues

### Summary

On August 28, 2012 the Republican Party released its 2012 Party Platform.<sup>13</sup> On September 4, 2012 the Democratic Party released its 2012 Party Platform.<sup>14</sup> The Platforms provide each Party's views on a broad range of issues, including those relating to international trade. More specifically, both Platforms describe the Parties' views on such issues as permanent normal trade relations (PNTR) with Russia, the Trans-Pacific Partnership (TPP), and US-China trade relations, among others. The Democratic and Republican Parties release their Platforms once every four years in anticipation of the approaching US Presidential elections, which will take place on November 6, 2012. The Republican Party has nominated Mitt Romney to run against President Barack Obama, a member of the Democratic Party, to become the next US President.

### Analysis

#### I. DEMOCRATIC PARTY PLATFORM

In its Party Platform, the Democratic Party states that “[i]f the playing field is level, [the United States] will be able to compete against every other country on Earth.” According to the Democratic Party, the Obama Administration has achieved key trade-related successes over the past four years, including: (i) the establishment of the Interagency Trade Enforcement Center (ITEC); (ii) “strengthening” and signing into law Free Trade Agreements (FTAs) with Korea, Colombia and Panama, *i.e.*, renegotiating portions of the Agreements and conditioning their Congressional passage on renewal of Trade Adjustment Assistance (TAA); and (iii) bringing World Trade Organization (WTO) disputes against China at twice the rate as the former Bush Administration. The Democratic Platform espouses the Party's views on key trade-related issues, including, among others:

- **Trade Enforcement.** Democrats are committed to addressing the following unfair trading practices: (i) illegal subsidies; (ii) non-tariff barriers; (iii) abuse of workers' rights; and (iv) violation of environmental standards. With regard to intellectual property rights (IPR) protection, the Democratic Platform further states that, under the Obama Administration, Customs and Border Protection (CBP) increased its seizures of IPR-infringed goods and the Department of Justice (DOJ) prosecuted numerous cases regarding trade secrets;
- **Insourcing.** The Democratic Party supports “insourcing,” *i.e.*, offering tax breaks to companies that invest in the United States and cutting tax breaks for US companies that outsource jobs to countries other than the United States;

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<sup>13</sup> The 2012 Republican Party Platform is available here: [http://www.gop.com/2012-republican-platform\\_home/](http://www.gop.com/2012-republican-platform_home/)

<sup>14</sup> The 2012 Democratic Party Platform is available here: <http://www.democrats.org/democratic-national-platform>

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- **Trans-Pacific Partnership Agreement (TPP).** The Democratic Party remains committed to the TPP, which it describes as a high-standard agreement that will, among other things, address new and emerging trade issues, lower barriers to trade and investment, and increase exports. The Democratic Platform further states that TPP negotiating parties are “on track” to finalize the Agreement, although it gives no date by which the Agreement will be finalized;
- **Asia-Pacific Economic Cooperation (APEC).** The Democratic Party is committed to working with APEC member countries to create an integrated regional economy, promote green growth and coordinate regulatory reform;
- **China.** The Democratic Party supports urging the Chinese government to uphold international trade rules regarding currency, export financing, IPR, indigenous innovation and workers’ rights. With regard to China’s alleged currency manipulation, the Democratic Platform states that President Obama has “made it clear” to the Chinese government that its currency must appreciate. Nonetheless, the Democratic Platform does not recommend any specific action be taken to address the issue. Congress has considered numerous pieces of legislation aimed at counteracting currency manipulation. For example, in 2011 the Senate passed - but the House did not consider - the “Currency Exchange Rate Oversight Reform Act” (S 1619).<sup>15</sup> In 2010, the House passed - but the Senate did not consider - the “Currency Reform for Fair Trade Act” (HR 2378);<sup>16</sup>
- **Russia.** According to their Platform, Democrats support establishing PNTR with Russia. Efforts to extend PNTR to Russia are currently stalled over a number of issues, including differing views on a human rights related bill known as the “Sergei Magnitsky Rule of Law Accountability Act of 2012” (“Magnitsky Bill”). While the House version of the Magnitsky Bill combats human rights violations by Russian citizens, the Senate version combats human rights violations by individuals of all nationalities. It remains unclear which version, if any, will be passed by Congress. Although the Democratic Platform does not mention the Magnitsky Bill, it notes that a Democratic Administration would criticize Russian actions it opposes, such as Russian support for the Bashar al-Assad regime in Syria; and
- **North and South America.** The Democratic Platform commits Democrats to pursuing opportunities to expand trade with countries within North and South America. The Democratic Party also supports the negotiation of “open skies” agreements with countries in the region to expand commercial aviation opportunities. According to their Platform, Democrats support continued trade between the United States and Caribbean countries.

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<sup>15</sup> S 1619 proposed: (i) requiring the Department of Commerce (DOC) to investigate whether currency undervaluation by a government provides a countervailable subsidy if a US industry requests investigation and provides the proper documentation; (ii) preventing DOC from refusing to investigate a subsidy allegation based on the single fact that a subsidy is available in circumstances in addition to export; and (iii) repealing the currency provision in current law and replace it with a new framework that requires the US Treasury Department to present a biannual report to Congress that identifies both “fundamentally misaligned currencies” and “fundamentally misaligned currencies for priority action.”

<sup>16</sup> If passed, HR 2378 would have, inter alia: (i) amended the Tariff Act of 1930 to include as a “countervailable subsidy” requiring action under a countervailing duty or antidumping duty proceeding the benefit conferred on merchandise imported into the United States from foreign countries with fundamentally undervalued currency; and (ii) declared that the fact that such a subsidy is also provided in circumstances not involving export shall not, for that reason alone, mean it cannot be considered export contingent and actionable under a countervailing duty and antidumping duty proceeding.

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## II. REPUBLICAN PARTY PLATFORM

According to the Republican Platform, “[i]nternational trade is crucial for [the US] economy.” The Republican Platform criticizes the Obama Administration for, among other things: (i) delaying the completion of FTAs begun by the former Bush Administration, *e.g.*, the three FTAs between the United States and Korea, Colombia and Panama, as well as the TPP; (ii) failing to pursue any new trade agreements; and (iii) “surrendering” to China’s violation of international trade rules. Key issues addressed by the Republican Platform include, among others:

- **China.** The Republican Platform calls for parity in the US-China trade relationship. According to the Republican Party, China violates international trade rules through a number of means, including: (i) IPR infringement; (ii) currency manipulation; (iii) exclusion of US companies from the Chinese government procurement market; (iv) subsidies to Chinese companies; and (v) the use of standards and regulations that exclude foreign competitors. In an effort to address China’s alleged currency manipulation, a Republican Administration would be willing to impose countervailing duties (CVD) on Chinese imports. With regard to China’s procurement market, the Republican Party supports suspending procurement of Chinese goods and services until China joins the WTO Government Procurement Agreement (GPA);
- **Trade Enforcement.** In its discussion of US-China trade relations, the Republican Platform also addresses numerous trade enforcement issues. With regard to IPR infringement, the Republican Platform supports punishing foreign firms found to be infringing US IPR, although it fails to state how exactly such firms would be punished. A Republican Administration would also encourage US companies whose international trade-related rights have been violated by foreign countries or companies to raise their claims in both US courts and at the WTO. The Republican Platform further states that discrimination against US companies should “be met in kind,” *i.e.*, retaliated against, although it fails to provide further details on how exactly such a response to commercial discrimination would be carried out;
- **TPP.** The Republican Platform commits a Republican Administration to completing the TPP negotiations as a means of opening Asian markets to US goods;
- **Trade Promotion Authority (TPA).** The Republican Party supports the restoration of TPA, a fast-track procedure by which Congress can pass the implementing legislation for FTAs. TPA expired in 2007 and is considered necessary to achieve Congressional passage of the implementing legislation for the finalized TPP;
- **Reagan Economic Zone.** The Republican Party supports the creation of a “Reagan Economic Zone,” which, according to the Republican Platform, is a multilateral agreement among countries committed to free and fair trade. According to Candidate Romney, the Reagan Economic Zone will open foreign markets to exports of US goods and services and serve as a mechanism for confronting countries that violate international trade rules; and
- **Russia.** The Republican Platform supports the extension of PNTR to Russia. It also states its support for the Magnitsky Bill, but declines to state whether the Republican Party supports the House or Senate version of the Bill.

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## Outlook

In their Platforms, the Democratic and Republican Parties articulate different views for how to address key international trade-related issues. For example, the Republican Platform states that a Republican Administration would be willing to counteract China's alleged currency manipulation with the imposition of CVDs on Chinese imports. The Democratic Platform makes no such commitment. In addition, the Republican Platform makes more specific commitments regarding international trade than the Democratic Platform. For example, the Republican Platform states its support for the negotiation of a Reagan Economic Zone. While the Democratic Platform states its support for opening up new markets for US goods and services, it does not commit a Democratic Administration to negotiating any specific new trade agreements.

Although the Platforms contain differing views on international trade, it is important to note that the Platforms will not necessarily dictate the international trade policy of the next US President. In fact, the next President's trade policies are likely to deviate from the views included in his Party's Platform. For example, in their 2008 Party Platform, the Democratic Party stated that a Democratic Administration would amend the North American Free Trade Agreement (NAFTA) "so that it works better for all three North American countries." Once elected, President Obama did not seek to renegotiate NAFTA.

## *US General Trade Policy Highlights*

### TPP Members Conclude 14<sup>th</sup> Round of Negotiations

On September 15, 2012, the nine members of the Trans-Pacific Partnership Agreement (TPP) completed the 14<sup>th</sup> round of negotiations in Leesburg, Virginia. The 14<sup>th</sup> round of negotiations followed closely behind the 2012 Asia-Pacific Economic Cooperation (APEC) Summit, at which the trade ministers of TPP countries delivered to the leaders of TPP countries the "Trans-Pacific Trade Ministers' Report to Leaders" ("TPP Report"), and TPP leaders released a "TPP Leadership Statement" ("TPP Statement") (*please refer to W&C US Trade Report dated September 21, 2012*). According to a September 15, 2012 press release issued by the Office of the US Trade Representative (USTR), TPP negotiators responded to the TPP Statement by using the 14<sup>th</sup> round to "focus on resolving outstanding issues where possible and narrowing differences on those that still need work."

According to USTR, negotiators made significant progress on the following eight out of a total of 29 chapters in the Agreement: (i) market access; (ii) customs; (iii) rules of origin (ROOs); (iv) technical barriers to trade (TBTs); (v) sanitary and phytosanitary (SPS) measures; (vi) cross-border trade in services; (vii) telecommunications; and (viii) government procurement. USTR also reported that some progress was achieved on specific market access commitments regarding the following: (i) industrial goods; (ii) agriculture; (iii) textiles; (iv) services and investment; and (v) government procurement. In their press release, USTR inferred that less progress was made on the following chapters: (i) intellectual property rights (IPR); (ii) labor rights; and (iii) environmental protection.

The TPP Report made clear that progress towards finalizing the TPP is varied not only in terms of issue area, but also in terms of member country. For example, trade ministers noted that market access negotiations have not progressed as quickly for those TPP members that have never before negotiated from a negative list approach. As evidence of the need to hold additional talks with some TPP members in an effort to keep negotiations on

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WHITE & CASE LLP | 9

track, USTR officials traveled to Brunei and Malaysia in August 2012 to discuss the US IPR proposal. Moreover, USTR Ron Kirk visited Vietnam in the same month to address bilateral trade-related issues, including market access for US beef, as well as TPP-related issues.

In their Report, TPP trade ministers agree to close as many of the 29 chapters of the Agreement as possible by the end of the year. To date, TPP negotiators have announced the closing of only one chapter within the Agreement – that which addresses issues faced by small- and medium-sized enterprises (SMEs) in the global economy. Nonetheless, TPP members did not announce the closing of any additional chapters at the 14<sup>th</sup> round. Instead, Assistant USTR (AUSTR) for Southeast Asia and the Pacific Barbara Weisel stated that TPP members have agreed not to announce chapter closings until the entire Agreement is complete. According to AUSTR Weisel, this reflects TPP negotiators' treatment of the Agreement as a "single undertaking," *i.e.*, virtually every item of the Agreement is part of a whole and indivisible package that cannot be agreed to separately.

As TPP members have already tabled initial proposals for most aspects of the Agreement, they are now working to revise a number of tabled proposals based on member feedback. For example, news sources report that, during this latest round, USTR tabled a revised proposal on transparency rules for national drug pricing and reimbursement programs. Other sources indicate that USTR may be considering revisions of other key texts it has tabled, *e.g.*, cross-border data flows and access to medicines.

The United States continues to sense pushback on a number of its proposals, including, among others, that which proposes disciplines for state-owned enterprises (SOEs). During the closing press conference of the 14<sup>th</sup> round, officials from Malaysia, Singapore and Vietnam spoke about their countries' concerns with the SOE text. The officials' comments can be summarized as follows:

- **Vietnam.** The Vietnamese official noted that Vietnam is currently reforming its SOEs to ensure they operate on the basis of commercial considerations. The official further asserted that TPP members' discussion of SOEs should follow three guiding principles, namely: (i) there must be a demonstrated need for SOE disciplines; (ii) SOEs' allegedly unfair trading practices must not be remedied by creating another situation in which new, unfair trading practices are used against SOEs; and (iii) the specific circumstances of each TPP member must be taken into consideration, *i.e.*, whether the country's economy is still developing;
- **Malaysia.** The Malaysian official noted that Malaysia's SOEs have the following characteristics: (i) they are highly integrated into Malaysia's economy; (ii) many of them perform a public service; (iii) many of them operate on the basis of commercial considerations. As a result of these characteristics, the Malaysian official noted that Malaysia would have to make a number of changes to its SOEs to come into compliance with the US proposal; and
- **Singapore.** The Singaporean official stated that many of Singapore's SOEs also operate on the basis of commercial considerations. The official urged TPP members to use the SOEs text as a means of targeting anti-competitive behavior in general, not specific entities.

The 14<sup>th</sup> round was the last round of TPP negotiations at which Canada and Mexico did not participate in negotiations. The United States is scheduled to complete its 90-day consultation period in October 2012. As

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WHITE & CASE LLP | 10

such, both countries will begin negotiating at the 15<sup>th</sup> round, which is scheduled to take place December 3-12, 2012 in Auckland, New Zealand. News sources allege that TPP members' based their support for Canada and Mexico's entry into the TPP on several conditions, including, *inter alia*, that neither country would have the ability to reopen for negotiation any text already agreed to by the nine current partners. Despite AUSTR Weisel's comments about TPP members' decision not to announce the closing of chapters, experts opine that the majority of TPP chapters have not been closed. As a result, Mexico and Canada will be in a position to influence many different aspects of the Agreement. At the same time, the speed at which negotiators make progress toward a finalized Agreement may decrease as Canada and Mexico seek to achieve their negotiating priorities in each of the chapters still open.

Click [here](#) for a copy of USTR's September 15 press release.

## USTR Requests WTO Consultations with China Regarding Export Subsidies for Automobile, Automobile Part Manufacturers

On September 17, 2012, US Trade Representative (USTR) Ron Kirk issued a press release announcing that the United States had requested World Trade Organization (WTO) consultations with China regarding certain export-contingent subsidies provided to Chinese producers of automobiles and automobile parts (DS450). According to the press release, the value of these allegedly WTO-inconsistent subsidies amounted to at least USD 1 billion between 2009 and 2011.

Pursuant to the WTO Dispute Settlement Understanding (DSU), the United States and China have 60 days to settle the dispute through consultations. If the parties fail to settle the dispute through consultations within the designated timeframe, the United States may request the WTO Dispute Settlement Body (DSB) to establish a panel to consider whether the contested measure is WTO-inconsistent.

According to the United States' Request for Consultations (WTO/DS450/1), China provides subsidies to Chinese producers of automobiles and automobile parts located in designated "export bases" that meet export performance requirements. The Request alleges that China has created automobile and automobile part "export bases" in 12 municipalities throughout China. In its Request, the United States also cites 73 legal instruments, e.g., policy directives, through which China provides these export subsidies.

The Request states that China's provision of the above-mentioned export subsidies violates Article 3 of the WTO Subsidies and Countervailing Measures Agreement (SCM Agreement), which prohibits the provision of subsidies contingent, in law or in fact, upon export performance. Under the SCM Agreement, there are two categories of subsidies: actionable and prohibited subsidies. Actionable subsidies are not prohibited unless the complainant can demonstrate "adverse effects" to the interests of other WTO Members. Prohibited subsidies, including export subsidies, are considered illegal *per se* because they are designed to distort trade.

The United States further alleges that, in providing the above-mentioned export subsidies, China violated certain WTO commitments it undertook regarding transparency. More specifically, the Request states that China: (i) did not notify the WTO that it provided the subsidies, as required in Articles XVI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Articles 25.1, 25.2, 25.3, and 25.4 of the SCM Agreement; (ii) did not

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WHITE & CASE LLP | 11

publish the measures relating to the subsidies as required under Part I, Paragraph 2(C)(1) and (2) of China's WTO Accession Protocol and; (iii) did not provide a translation of the measures into one of the official languages of the WTO, *i.e.*, English, French and Spanish, as required under Part I, Paragraph 1.2 of China's WTO Accession Protocol.

The United States urged China on several occasions to promptly provide detailed information on its subsidy programs to the WTO. In an effort to encourage such disclosure, the United States submitted to the WTO in October 2011 information identifying almost 200 subsidy programs that China failed to notify to the WTO.

On the same day that the United States requested WTO consultations with China, China also requested WTO consultations with the United States regarding US Public Law 112-99, as well as several antidumping (AD) and countervailing duty (CVD) measures carried out by the United States (*please refer to China Trade Alert dated September 27, 2012*). The United States' September 17 request for WTO consultations with China comes in the context of increased efforts on the part of both President Obama and Candidate Mitt Romney to prove to voters their respective abilities to counteract China's allegedly unfair trade practices in advance of the November 2012 Presidential elections. DS450 is the second consecutive WTO challenge that the United States has brought against China regarding automobiles; on July 5, 2012, the United States challenged China's imposition of AD/CVD measures on certain automobiles from the United States (*please refer to W&C US Trade Alert dated July 10, 2012*). Although the Obama Administration denies that DS450 has political underpinnings, President Obama announced that the United States had made the request for consultations during a campaign speech in Cincinnati, Ohio. Ohio is not only one of the top five states in automobile and automobile parts manufacturing employment, it is also one of the "battleground" states, *i.e.*, states where it remains unclear whether the majority of voters will vote for President Obama or Candidate Romney.

Click [here](#) to access a copy of the United States Request for Consultations (WTO/DS450/1).

Click [here](#) for a copy of USTR's press release.

Click [here](#) for a copy of USTR's fact sheet.

## Meredith Broadbent Sworn In as New ITC Commissioner

On September 11, 2012 the US International Trade Commission (ITC) issued a press release announcing that Meredith Broadbent, a Republican from Virginia, has been sworn in as an ITC Commissioner. President Obama nominated Ms. Broadbent to serve as ITC Commissioner on November 8, 2011. The US Senate confirmed Ms. Broadbent's nomination on August 2, 2012. Her term as ITC Commissioner will expire on June 16, 2017.

The ITC is an independent, nonpartisan agency responsible for: (i) providing trade expertise to both the US legislative and executive branches of government; (ii) determining the impact of imports on US industries; and (iii) directing actions against certain unfair trade practices, such as intellectual property right (IPR) infringement. The

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WHITE & CASE LLP | 12

ITC is headed by 6 Commissioners, each of whom is nominated by the President and confirmed by the Senate.<sup>17</sup> According to the ITC, no more than 3 Commissioners may be of any one political party. Including Ms. Broadbent, there are currently 3 Republicans and 3 Democrats serving as ITC Commissioners. Each Commissioner's term lasts 9 years; a new Commissioner is brought on once every 18 months. Ms. Broadbent will replace Commissioner Deanna Tanner Okun.

In a statement she provided at her May 8, 2012 Senate confirmation hearing, Ms. Broadbent stated that she believes her broad experience in international trade has prepared her to assume the position of ITC Commissioner. Ms. Broadbent was previously Assistant US Trade Representative (AUSTR) for Industry, Market Access, and Telecommunications. During her time as AUSTR, Ms. Broadbent directed an initiative to reform the Generalized System of Preferences (GSP) and participated in World Trade Organization (WTO) Doha round negotiations to reduce tariff and non-tariff barriers on industrial goods. Earlier in her career, Ms. Broadbent served as a professional staff member on the House Ways and Means Committee and the Committee's Subcommittee on Trade, where she worked on numerous trade-related pieces of legislation, including, among others, the Trade and Development Act of 2000, the Trade Act of 2002, legislation to extend permanent normal trade relations (PNTR) to China, and the implementing bills for the North American Free Trade Agreement (NAFTA) and the Uruguay Round Agreements.

In her May 8 statement, Ms. Broadbent also noted that she believes it is an exciting time to be an ITC Commissioner because Congress is currently developing a new template for the next general of trade agreements. To this end, Ms. Broadbent noted that the ITC can provide Congress with data and analytical support to inform lawmakers' policy deliberations. With regard to her role within the ITC, Ms. Broadbent emphasized that she "understand[s] the importance of objectivity in rendering injury determinations and legislative intent behind the countervailing duty and anti-dumping laws."

Click [here](#) for a copy of the ITC's September 11 press release.

Click [here](#) for a copy of Ms. Broadbent's May 8 Senate confirmation statement.

## APEC Leaders Agree to List of Environmental Goods

On September 11, 2012 the Office of the US Trade Representative (USTR) issued a press release announcing that Asia-Pacific Economic Cooperation (APEC) member countries have agreed to a list of environmental goods on which they will cut tariffs to five percent or less by 2015 ("APEC List of Environmental Goods"). This agreement was one of numerous commitments made during the September 2-9, 2012 APEC Leaders' Summit and follows APEC leaders' 2011 commitment to develop such a list.

APEC leaders' commitment to cut tariffs to five percent or less by 2015 applies to a specific list of 54 products. The list of 54 goods includes, among other things: (i) renewable and clean energy technologies; (ii) wastewater

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<sup>17</sup> The other ITC Commissioners include Irving Williamson, Daniel Pearson, Shara Aranoff, Dean Pinkert and David Johanson.

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treatment technologies; (iii) air pollution control technologies; (iv) solid and hazardous waste treatment technologies; and (v) environmental monitoring and assessment equipment. The tariff reductions will be made on a most-favored nation (MFN) basis, *i.e.*, non-APEC members will also benefit from the tariff reductions.

In 2011, the United States exported USD 27 billion worth of these goods to APEC countries. Approximately USD 1 billion of these US exports incurred tariffs of more than five percent. According to USTR, tariffs on the APEC List of Environmental Goods are currently as high as 20-35 percent.

Response to the APEC List of Environmental Goods has been overwhelmingly positive. According to USTR's press release, the List represents a "historic outcome" that is likely to significantly contribute to increased US exports and green growth.

Click [here](#) for a copy of USTR's press release.

Click [here](#) for a copy of the APEC List of Environmental Goods.

## United States and Cambodia Agree to Commence Exploratory Talks on BIT

On August 31, 2012, US Trade Representative (USTR) Ron Kirk and Cambodian Commerce Minister Cham Prasidh met on the sidelines of the 44<sup>th</sup> Association of Southeast Asian Nations (ASEAN) Economic Ministers (AEM) meeting held in Siem Reap, Cambodia from August 27-31, 2012. During the meeting, both sides discussed ways to enhance bilateral trade and investment relations between the two countries. Following the meeting, USTR Kirk and Minister Prasidh jointly announced that the United States and Cambodia have agreed to commence exploratory discussions on a potential bilateral investment treaty (BIT).

To date, the United States has implemented BITs with more than 40 countries. The US BIT provides investors with improved market access and protections in regard to, among other things, discriminatory or otherwise harmful government treatment such as expropriation. The BIT also establishes an international arbitration mechanism for addressing breaches of the treaty. In April 2012, USTR and the US State Department (DOS) announced the release of an updated US model BIT, which includes new language regarding state-owned enterprises (SOEs), labor and environment, transparency and performance requirements (*please refer to the W&C US Trade Alert dated April 23, 2012*).

According to an August 31, 2012 USTR press release, the next step is for US and Cambodian officials to discuss their respective investment regimes and highlight key similarities and differences. Officials will conduct their discussions based on the US model BIT. USTR Kirk further stated that the decision to explore a BIT comes as a result of Cambodia's efforts to treat private investment in an open, transparent and non-discriminatory way. USTR Kirk expects that a completed US-Cambodia BIT would promote an improved investment climate, enhanced market-based economic reforms, and strengthened rule of law in Cambodia.

Both sides have not yet set a date for launching exploratory discussions.

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WHITE & CASE LLP | 14

Click [here](#) for a copy of the August 31 USTR press release.

## United States Preliminarily Announces Easing of Ban on Import of Burmese Goods

During a September 26, 2012 meeting with Burmese President Thein Sein, Secretary of State Hillary Clinton announced that the United States will “begin the process of easing restrictions on imports of Burmese goods into the United States.” This announcement comes in the context of recent actions taken by the Obama Administration to ease other sanctions against Myanmar by allowing for US investments in and exports of US financial services to Myanmar (*please refer to the W&C US Trade Alert dated May 24, 2012*).

On August 10, 2012, President Obama enacted legislation to, among other unrelated objectives, renew sanctions on imports of Myanmar-origin goods. The law reauthorized for three years a so-called “fast-track” process for Congress to approve annual renewal of such sanctions but also left intact the President’s authority to waive or terminate these import sanctions (*please refer to W&C US Trade Alert dated August 7, 2012*).

Secretary Clinton further noted in her September 26 remarks that the Obama Administration will continue consulting with Congress on “additional steps” although she did not provide any greater detail in this regard. Her remarks suggested, however, that further US easing of sanctions is contingent upon continued progress toward democratic and economic reform in Myanmar.

It remains unclear when the Obama Administration will officially order and issue guidelines on the easing of sanctions. We will provide further updates and greater analysis when the Obama Administration takes such action.

Click [here](#) for a copy of the meeting’s transcript.

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WHITE & CASE LLP | 15