



# White & Case LLP General Trade Report - JETRO

February 2013

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## UNITED STATES

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### GENERAL TRADE POLICY

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## The European Union and the United States Progress toward Launch of Transatlantic Trade and Investment Partnership Negotiations

### Summary

On February 13, 2012, the Office of the US Trade Representative (USTR) released the Final Report of the US-European Union (EU) High Level Working Group on Jobs and Growth (HLWG). The Final Report recommends that EU and US leaders initiate the domestic procedures necessary to launch negotiations on a comprehensive trade and investment agreement. In a subsequent statement made by President Obama, European Council President Herman Van Rompuy and European Commission President Jose Manuel Durão Barroso, the leaders announced that, based on the HLWG's recommendations, the United States and the EU have decided to initiate the procedures necessary to launch negotiations towards a Transatlantic Trade and Investment Partnership (TTIP). Despite signs that both sides are eager to negotiate this agreement, longstanding bilateral trade issues have already emerged as likely sticking points within the negotiations.

### Analysis

#### I. BACKGROUND

During the 2011 EU-US Summit, EU and US leaders directed the Transatlantic Economic Council (TEC) to establish the HLWG, which they tasked with identifying policies and measures to increase EU-US trade and investment to support job creation, economic growth and international competitiveness. The EU and US leaders further directed the HLWG to submit an Interim Report by June 2012, and provide its Final Report by the end of 2012. In its June 2012 Interim Report, the HLWG stated that, if its members were able to "satisfactorily" address certain issues on which the United States and the EU would likely disagree in the context of trade agreement negotiations, the Final Report would endorse the pursuit of a comprehensive agreement (please refer to W&C US Trade Alert dated June 25, 2012).

In the Final Report, which is dated February 11, 2013 but was not released until February 13, 2013, the HLWG concludes that, of all the options it has considered, a comprehensive agreement addressing a broad range of trade and investment issues would provide the most significant benefit to both sides. Taking into consideration the HLWG's recommendations, EU and US leaders have announced plans to carry out the necessary domestic procedures necessary for launching negotiations toward a TTIP.

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## II. KEY RECOMMENDATIONS OF THE FINAL REPORT

The HLWG recommends that the TTIP include ambitious commitments in three broad areas: (i) market access; (ii) regulatory issues and non-tariff barriers; and (iii) rules, principles and new modes of cooperation to address shared global trade challenges. The Final Report also recommends that the EU and the United States design the TTIP to “evolve over time,” *i.e.*, not only by allowing parties to make additional commitments after the negotiations towards the agreement are concluded, but also by establishing solid regulatory coherence mechanisms to ensure progressive deepening of transatlantic economic integration. Specific references to this particular structural element are made with regard to sanitary and phytosanitary (SPS) issues as well as technical barriers to trade (TBT). Below we discuss key elements the HLWG recommends the TTIP include in each of the three areas.

### Market Access

The Final Report calls on the parties to negotiate market access outcomes that go beyond what the United States and the EU have agreed to in previous trade agreements. More specifically, HLWG recommends that the EU and the United States seek ambitious commitments on the following market access issues: (i) tariffs; (ii) services; (iii) investment; and (iv) government procurement.

Although tariffs between the EU and the United States are already relatively low and the Final Report sets the goal of eliminating all tariffs on goods between the parties, the Report acknowledges that tariff elimination for the most sensitive products may be difficult to achieve. The Report recommends the elimination of most tariffs taking place immediately upon the agreement’s entry into force and a short phase-out period for “all but the most sensitive” remaining tariff lines. In an EU press conference regarding the Final Report, President Barroso highlighted the existence of sensitive tariff lines when he noted that parties will seek to cut tariffs “whenever it makes sense and is possible.”<sup>1</sup> The Report suggests parties “consider options” for dealing with these most sensitive tariff lines.

Government procurement could also emerge as a contentious area. The Final Report calls for “substantially improved access” to government procurement opportunities; however, observers note that the EU is probably specifically interested in addressing the “Buy America” provisions some US states and local governments maintain with respect to procurement contracts (which is indicated in the Final Report as it calls for improved access “at all levels of government”). The US federal government does not have clear legal authority to bind all individual states and local governments to government procurement commitments under free trade agreements (FTAs) but, rather, only state and local governments that volunteer. At the same time, EU reports confirm that HLWG discussions have focused on ensuring that expected US procurement commitments would include state level as well, as this is one of the key issues to the EU.

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<sup>1</sup> The Barroso speech is available here: [http://europa.eu/rapid/press-release\\_SPEECH-13-121\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-13-121_en.htm?locale=en)

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### Regulatory Issues and Non-Tariff Barriers

The Final Report suggests that the EU and the United States negotiate “SPS-plus” and “TBT-plus” chapters, *i.e.*, chapters that build on commitments contained within the World Trade Organization (WTO) SPS Agreement and the WTO TBT Agreement, respectively. The Report also suggests establishing an “on-going mechanism” to improve efforts made with regard to both issues.

Even though the EU agreed to several US demands on SPS issues ahead of the Final Report’s release, SPS frictions will undoubtedly prove a crucial contentious issue within the TTIP. In a February 12, 2012 letter to USTR Ron Kirk, Senate Finance Committee Chairman Max Baucus (D-MT) and Ranking Member Orrin Hatch (R-UT) acknowledged these actions while noting “there is still much work to be done.” In their letter, the Senators called for the agreement to address the EU SPS measures that: (i) restrict genetically-modified organisms (GMOs); (ii) ban the use of hormones in cattle; (iii) restrict pathogen reduction treatments in poultry, pork and beef; and (iv) restrict the use of ractopamine in beef and pork.

The Final Report acknowledges the contentious and important nature of regulatory issues for both parties. For example, the Report’s recommendation that parties establish an on-going cooperation mechanism within the SPS and TBT chapters indicates that parties acknowledge the likelihood that some SPS and TBT issues will not be resolved before the TTIP is signed. In fact, media sources contend that EU Commission President Barroso suggested basic EU regulations on GMOs are not on the table for negotiation within the TTIP (while EU sources indicate this topic has not yet been subject to an in-depth discussion within the EU institutions so it is too early to tell). In a US press conference regarding the Final Report, USTR Kirk countered this suggestion with the claim that “everything is on the table across all sectors, including all across the agricultural sector. Whether it’s GMOs or other issues, we want to deal with many of these non-tariff barriers that frustrate our trade.” In addition, the Final Report recommends that both sides seek to make “early and continuing progress” on SPS measures. During the US press conference, Deputy National Security Advisor (DNSA) for International Economics Michael Froman noted that “[N]obody should be under any impression that we are not going to be resolving agricultural issues, including SPS issues, both in the negotiation and in parallel to the negotiation.”

In addition to SPS and TBT issues, the Report calls for the negotiation of provisions on regulatory coherence and transparency. Where parties can make additional commitments with regard to regulatory coherence in specific goods or services sectors, the Report encourages them to do so.

### Rules Addressing Shared Global Trade Challenges and Opportunities

With the additional aim of contributing to progressive strengthening of the multilateral trading system, the Final Report recommends that the EU and the United States work to address such issues as IPR, labor and environment protection within the TTIP. The United States and the EU have historically experienced tension with regard to IPR issues. As such, it is worth noting that the Final Report recommends parties seek to address a “limited number of significant IPR issues.” This statement suggests that one or both parties are unwilling to address a full range of IPR issues. Although not mentioned in the Report, one of the key IPR issues on which the United States opposes the EU is its use of geographic indications (GIs), *i.e.*, protected names for special products (normally food or beverages) closely associated with a particular place and tradition of production (involving products such as parma ham and champagne). If the parties attempt to address the issue within the

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TTIP negotiations, it is likely to quickly emerge as a key sticking point, as the EU has consistently refused US demands in this area, in large part due to the importance that EU Member States place on these protective mechanisms for local and specialist agricultural production.

The Report also recommends that the parties seek to reach agreement on “globally relevant rules, principles or modes of cooperation” with respect to the following areas: (i) customs and trade facilitation; (ii) competition policy; (iii) disciplines for state-owned enterprises (SOEs); (iv) localization issues; (v) raw materials and energy; (vi) small and medium enterprises (SMEs); and (vii) transparency. In the US press conference, USTR Kirk and DNSA Froman remarked that the agreement will also address the issue of cross-border data flows. Many of these areas do not represent longstanding EU-US trade issues. Instead, many of them represent trade barriers both parties have experienced in third countries, e.g., both parties have expressed concern regarding China’s policies toward its SOEs. By developing rules regarding these areas within the TTIP, the EU and the United States hope to leverage their efforts to overcome such trade barriers in third countries.

### Outlook

In the US press conference, DNSA Froman noted that this is not the first time the EU and the United States have considered pursuing a trade agreement. Nonetheless, DNSA Froman argued that, this time, both sides have found ways to resolve issues that have previously prevented parties from moving forward with the initiative. Key aspects of the potential agreement’s content and structure, as recommended by the Final Report, likely proved crucial to securing leaders’ support for launching the domestic procedures necessary to launch the TTIP. These aspects also set the TTIP apart from a more traditional US FTA. First, according to DNSA Froman, the TTIP will seek to cover a broader range of issues than those covered by a typical US FTA. As mentioned above, the TTIP provides parties with an important opportunity to solidify and strengthen their joint positions on such new trade issues as localization (i.e., measures favoring domestic industries at the expense of imported products) and SOEs. Because the United States and the EU encounter similar obstacles in their efforts to secure market share in major emerging economies, the inclusion of provisions on such issues is likely considered one of the most important goals of the TTIP. The inclusion of mechanisms aimed at securing future commitments is also significant. While US officials have emphasized that all issues and sectors are on the table, the Final Report suggests that the resolution of every bilateral contentious issue is not a prerequisite for signing the TTIP.

Both US and EU officials have set the ambitious goal of completing the agreement by the end of 2014. Whether parties are able to achieve this goal depends on the extent to which they are willing to resolve contentious issues within the negotiations. Government procurement, IPR, and agriculture-related issues, among others, have already emerged as key contentious issues. Looking forward, it remains unlikely that both sides will be in a position to launch negotiations before mid-2013. The European Commission will need to seek a negotiating mandate from EU Member States in the EU Council. While informal EU institutional discussions are already underway, it is estimated that a draft negotiating mandate could be presented for Council approval towards the second half of March. This would enable the Council to formally adopt the mandate later in the Spring or early Summer, with the current target date for this exercise being a Council meeting focusing on trade issues scheduled for mid-June 2013. For its part, USTR is planning to notify Congress of its intent to negotiate the TTIP within the near-term. With the 2007 expiration of Trade Promotion Authority (TPA), a fast-track procedure by which Congress can pass the implementing legislation for trade agreements, USTR is not required to notify

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Congress of its intent to enter trade negotiations. USTR's plan to notify Congress regarding its intention to pursue TTIP underscores USTR's plan to nonetheless follow TPA procedure. Once USTR has sent such notification to Congress, a 90-day consultation period between the Obama Administration and Congress will commence regarding the TTIP negotiations. In addition, USTR will publish a Federal Register notice requesting input on the TTIP negotiations.

## Forecast 2013: More Talk, Few Real Changes

### Summary

The 2012 presidential and legislative elections are over, and President Obama is no longer seeking reelection. However, there are few signs to suggest that US trade policy during the first year of President Obama's second term will be markedly different from US trade policy under his first term. A legislative agenda for several large non-trade items could steal political capital the Obama Administration might have otherwise spent on trade liberalization initiatives, and campaigning for the 2014 midterm legislative elections will commence toward the end of 2013. Consequently, US trade policy is likely to continue at its current pace, and the Obama Administration has little time to make any intended progress on key trade liberalization initiatives. In this report, we discuss the following key areas for 2013:

- **Trans-Pacific Partnership (TPP).** TPP will continue to draw attention as the Obama Administration engages other TPP members on contentious portions of the agreement. Despite the attention, the negotiating members are not expected to conclude the agreement in 2013;
- **Transatlantic Trade and Investment Partnership (TTIP).** European Union (EU) and US leaders have announced their intention to commence the domestic procedures necessary to launch negotiations toward a TTIP. Although parties are likely to launch negotiations this year, longstanding trade issues have already emerged as potential threats to the pace and outcomes of such negotiations;
- **Trade Remedies.** Trade remedy investigations and disputes at both US courts and the WTO Dispute Settlement Body (DSB) are likely to dominate the Obama Administration's trade enforcement agenda in 2013. Such investigations and disputes will frequently involve China. Also, targeted dumping is likely to become a more common allegation in US antidumping proceedings;
- **US-China Trade Relations.** US-China trade relations are expected to continue to play a central role in the Obama Administration's trade policy. In addition to trade remedies, the United States and China are expected to dispute additional matters at the WTO DSB. The Obama Administration is expected to engage China on many of the same bilateral trade issues it focused on in 2012;
- **Energy Exports.** The US government is under pressure to expedite adjudication of several required licenses to export liquefied natural gas (LNG) and crude oil. Also, efforts are underway to overhaul the allegedly antiquated export licensing regime for these goods, although the US government will unlikely undertake and accomplish such overhaul in 2013. However, prospects for the adjudication of pending export license applications appear far better;

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- **WTO.** With the Ninth WTO Ministerial scheduled for December 2013, WTO members will look to make progress where possible within the stalled Doha round negotiations. Negotiations towards an international services agreement (ISA) and an expanded Information Technology Agreement (ITA) will also continue, although key issues related to, among other things, WTO member participation, are likely to limit such progress. The United States will also continue to be an active participant in the WTO DSB; and
- **Congressional Action on Trade Issues.** Although the 113th Congress must consider several large non-trade items in 2013, lawmakers are likely to pass legislation extending several trade preference programs. Other trade-related issues Congress is likely to address include: (i) the renewal of Trade Promotion Authority (TPA); (ii) Customs and Border Protection (CBP or Customs) reauthorization; (iv) the Farm Bill; and (v) a Miscellaneous Tariff Bill (MTB).

## Analysis

### I. TPP

The TPP negotiations will remain a key focus of the Obama Administration's trade policy in 2013. At the 2012 East Asia Summit, TPP leaders set the goal of reaching a "political conclusion" to the TPP negotiations by the October 2012 Asia Pacific Economic Cooperation (APEC) Summit in Bali, Indonesia. The likelihood that such negotiations will be completed by October 2013 remains doubtful.

#### Progress in 2013

If TPP negotiations fail to make meaningful progress within the near-term, partner countries could start to lose confidence in the agreement. March 2013 will mark the three-year anniversary of the first round of TPP negotiations. Additionally, the goal of achieving a political conclusion to the talks by October 2013 marks the third time TPP countries have aimed to bring negotiations to a close in time for the annual APEC Summit. Some TPP member countries, namely Australia, Brunei, Malaysia, New Zealand, Singapore, and Vietnam, have already decided to simultaneously be parties to the Regional Comprehensive Economic Partnership (RCEP), an Association of Southeast Asian Nations (ASEAN)-driven effort to also form an Asia-Pacific free trade agreement (FTA). Launched in November 2012, RCEP is being negotiated between ASEAN, Australia, China, India, Japan, South Korea, and New Zealand.

The outcomes of the early 2013 TPP negotiating rounds will be especially important in signaling the ability of negotiating members, and the United States in particular, to move the agreement forward. In total, TPP negotiators are expected to hold three formal negotiating rounds in 2013. The 16th round will be held in March, the 17th round is scheduled to take place in May, and the 18th round is likely to be held in September. One key indicator of progress will be whether TPP members table all outstanding and revised texts within the first few months of 2013. TPP partners have posed strong opposition to several US proposals, including, among others, those regarding: (i) access to medicines; (ii) rules of origin (ROOs) for textiles and apparel; and (iii) disciplines for state-owned enterprises (SOEs). If the United States is able to show the flexibility necessary to bring TPP members to agreement on these issues, confidence will likely increase in regard to the countries' ability to complete the agreement.

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## New Members

While other countries are likely to continue to explore the possibility of joining TPP in 2013, the chances that new members will join the negotiations within the near-term remains low. Since 2011, Canada, Mexico, Japan and Thailand have formally expressed interest in joining the TPP. Most recently, Thailand expressed its interest in November 2012. In October 2012, Canada and Mexico became the 10th and 11th TPP members. This development followed the November 2011 announcement by Mexico, Canada and Japan of their interest in seeking to join the TPP negotiations. While Office of the US Trade Representative (USTR) states that the decision to invite additional countries to join TPP is based on the consensus of the current members, the United States' approval appears to be a main obstacle in acceding to the agreement. Such approval appears contingent on several conditions, namely: (i) agreeing to text on which current TPP members have already agreed; and (ii) demonstrating commitment, often through "confidence-building measures" to the agreement.

Japan is unlikely to join the TPP within the near-term for several reasons. First, the United States and Japan have several outstanding bilateral trade issues the United States would like to see resolved before Japan accedes, including Japan's treatment of US goods, particularly beef and autos, its so-called "interventionist" currency policy, and its services policies, particularly with respect to Japan Post. Although US-Japan talks have achieved some progress on these issues, e.g., in January 2013, Japan and the United States agreed to improved terms and conditions for the export of US beef to Japan, the United States will likely push for Japan to make further concessions before it accedes to the agreement. Japan's domestic politics also complicate its consideration of TPP. The country's December 2012 elections brought the Liberal Democratic Party (LDP) to power, which is backed by a rural constituency that strongly opposes Japan's entry into the TPP negotiations. With elections for Japan's Upper House scheduled to take place in July 2013, Prime Minister Shinzo Abe is unlikely to risk his party's support base by pushing for TPP participation in the interim.

## **II. TTIP**

The EU and the United States are likely to launch negotiations towards a TTIP this year. In February 2013, the EU-US High Level Working Group (HLWG) released its Final Report, in which it recommended parties initiate the domestic procedures necessary to launch negotiations toward a comprehensive trade and investment agreement. Shortly thereafter, EU and US leaders announced their intention to commence such procedures. The launch of negotiations is not likely before mid-2013, as the European Commission is expected to need several months to secure a negotiating mandate from EU member states. EU and US leaders have set the goal of completing the agreement by the end of 2014, although both sides acknowledge that such a goal is ambitious.

The Final Report recommends that the parties pursue an agreement that achieves ambitious outcomes in the areas of market access, regulatory issues and non-tariff barriers, and rules, principles and new modes of cooperation to address shared global trade challenges. Although EU and US leaders have expressed optimism with regard to their ability to complete an ambitious deal, the Final Report does not provide parties with a clear pathway for resolving longstanding trade issues through negotiations. Such issues include government procurement, intellectual property rights (IPR) and agriculture-related issues, among others. Instead, the Report recommends that the agreement include mechanisms, especially with regard to SPS and TBT issues, that allow

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parties to deepen their commitments over time. As a result, EU and US stakeholders have already expressed concern regarding the pace and outcome of the negotiations.

### III. TRADE REMEDIES

In 2013, US companies and the US government are expected to be involved in trade remedy investigations as well as disputes regarding trade remedies-related matters. While some trade remedies-related activities from 2012 will carry over into 2013, US entities are likely also to pursue, and be subject to, new trade remedies-related activities in 2013. Below we provide an overview of key trade remedy cases and issues likely to garner attention in 2013.

Most notably, China and the United States are expected to continue their characteristic “tit-for-tat” application of trade remedies this year. In 2012, this exchange was typified through the trade remedies cases involving solar energy products. Both cases are expected to continue to evolve in 2013. The first case began in late 2011, when SolarWorld Industries of America filed anti-dumping (AD) and countervailing duty (CVD) petitions against imports of crystalline silicon photovoltaic cells (“solar cells”) from China. In its October 2012 final affirmative determination, DOC found dumping margins ranging from approximately 18-250 percent and a subsidization range of approximately 15-16 percent. This case will continue to draw attention in 2013, as the petitioner has challenged the scope of DOC’s determination, and one of the respondents has challenged DOC’s final determination. Following DOC’s initiation of the Chinese solar cells investigations, China’s Ministry of Commerce (MOFCOM) announced the initiation of AD/CVD investigations into imports of solar-grade polysilicon from the United States, among other countries, in July 2012. MOFCOM is expected to issue a definitive determination in this case by July 2013, but could extend the deadline to as late as January 2014.

This “tit-for-tat” exchange of trade remedies between China and the United States is expected to be subject to additional domestic and multilateral litigation in 2013. In particular, issues involving *GPX International Tire Corp. v. United States* (the “GPX case”) are likely to be arbitrated both within US courts and before the WTO DSB. The Court of Appeals for the Federal Circuit’s (CAFC) late 2011 ruling in the case, which found that DOC lacks the legal authority to impose CVDs on imports from non-market economies (NMEs), spurred legal and legislative activity in 2012. In response, President Obama signed Public Law 112-99 (P.L. 112-99 or the “CVD/NME law”), which applied the CVD provisions of the Tariff Act of 1930 to NMEs. P.L. 112-99 contains two sections: (i) Section 1 retroactively required DOC to impose CVDs on identified subsidies from NME countries for investigations that were commenced from November 20, 2006 through the enactment of the law; and (ii) Section 2 prospectively required DOC to address the issue of “double counting,” *i.e.*, the simultaneous application of both AD duties and CVDs on imported merchandise from NMEs. Afterwards, the CAFC remanded the GPX case to the US Court of International Trade (CIT) for a determination of the constitutionality of Section 1 of the law. In early January 2013 the CIT found Section 1 of P.L. 112-99 to be constitutional. The CIT remanded the case to DOC, albeit merely to determine company-specific calculation issues. In 2013, the plaintiffs are likely to appeal the CIT’s ruling on Section 1 of the law.

In 2013, a WTO DSB panel is likely to also address allegations regarding the CVD/NME law. In particular, China has alleged the following, *inter alia*: (i) Section 1 of the law violates the United States’ WTO transparency obligations; (ii) the varying effective dates between Section 1 and Section 2 of the law violate the United States’

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obligation under the WTO to administer its trade remedy laws in a uniform and impartial manner; and (iii) as a result of the varying effective dates, the United States fails to provide DOC with legal authority to identify and avoid double counting, an omission that violates the United States' WTO obligations in regard to administering trade remedies. In addition to the CVD/NME law, the United States and China are involved in three other disputes at the WTO DSB regarding trade remedies matters relating to: (i) China's imposition of AD/CVD duties on imports of US chicken "broiler products" (DS427); (ii) China's imposition of AD/CVD duties on imports of US automobiles (DS440); and (iii) DOC's presumption of China's SOEs as "public bodies" (DS437) (*please see WTO section below for further details on US-China trade remedies disputes before the WTO DSB*).

Another significant trade remedies case likely to progress in 2013 is the CVD case involving frozen warmwater shrimp. In December 2012, the Coalition of Gulf Shrimp Industries filed CVD petitions against imports of these shrimp from China, Ecuador, India, Indonesia, Malaysia, Thailand and Vietnam. The investigations cover the same products as the current AD orders on certain frozen warmwater shrimp from Brazil, China, India, Thailand and Vietnam. DOC and ITC are scheduled to release their final determinations by June and July of 2013, respectively.

There exists a strong possibility of litigation in 2013 of several issues relating to so-called "targeted dumping". A "pattern" of "significant" price differences among purchasers, regions or time periods indicates the occurrence of targeted dumping. Where targeted dumping is found, DOC may depart from the statutorily-preferred methodology of comparing weighted average normal prices to weighted average export prices (*i.e.*, average-to-average methodology) and, instead, employ an average-to-transaction methodology, whereby weighted average normal values are compared to individual export transaction values.

In December 2006, DOC announced the end of so-called "zeroing"<sup>2</sup> as its standard practice in original investigations in response to WTO rulings adverse to the United States; however it reserved the right to continue the practice of zeroing when the average-to-transaction methodology is used, *e.g.*, where targeted dumping is detected. Respondents often allege that zeroing results in overly inflated AD margin rates and, perhaps not coincidentally, since DOC's December 2006 end of zeroing as standard practice, there has been a sharp rise in the incidence of petitioners alleging the existence of targeted dumping.

Likely challenges over the coming years,<sup>3</sup> and possibly in 2013, include those relating to: (i) "pattern of prices", *i.e.*, the matter of what constitute a "pattern" of sales at less than fair market value; (ii) "significant", *i.e.*, the matter of what constitutes a "significant" difference in export prices for distinct purchasers, regions or time periods; (iii) market realities, *i.e.*, the matter of whether DOC's approach on targeted dumping should take into account market realities during certain "time periods" such as Black Friday and other US promotional pricing events; and (iv) scope of targeted dumping remedy, *i.e.*, the matter of whether DOC has the authority to apply average-to-transaction comparison methodology, and thus the zeroing practice, even to non-targeted sales. Additionally,

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<sup>2</sup> "Zeroing" refers to the refusal of DOC to allow non-dumped sales to offset dumped sales when calculating overall AD margin rate

<sup>3</sup> Please see page 17 of:

[http://www.cit.uscourts.gov/Judicial\\_Conferences/17th\\_Judicial\\_Conference/17th\\_Judicial\\_Conference\\_Papers/PorterPaper.pdf](http://www.cit.uscourts.gov/Judicial_Conferences/17th_Judicial_Conference/17th_Judicial_Conference_Papers/PorterPaper.pdf)

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critics of DOC's approach on targeted dumping urge DOC to issue currently inexistent uniform guidelines for AD proceedings in which targeted dumping is alleged in order to provide current and future AD investigation respondents with a greater degree of certainty and guidance.

#### **IV. US-CHINA TRADE RELATIONS**

US-China trade relations are expected to continue to play a central role in the Obama Administration's trade policy in 2013. In particular, trade enforcement efforts will remain a key focus of the bilateral trading relationship. As mentioned in the above section, these trade enforcement efforts are most likely to take the form of: (i) trade remedies investigations; and (ii) disputes regarding trade remedies-related matters. In 2012, DOC initiated AD and/or CVD investigations into imports of five different types of products from China, including utility scale wind towers, drawn stainless steel sinks, xanthan gum and hardwood and decorative plywood. The United States and China are also involved in four WTO disputes regarding trade remedies matters. Both countries are also involved in several other trade enforcement efforts before the WTO DSB regarding issues other than those related to trade remedies, namely: (i) China's use of export restraints on rare earth minerals (DS431); and (ii) China's provision of export-contingent subsidies to auto and auto part producers (DS450) (*please see WTO section below for further details on US-China disputes before the WTO DSB*).

The Obama Administration is expected to continue to bilaterally engage the Chinese government on many of the same issues it focused on in 2012, *e.g.*, industrial policies, particularly in regard to Chinese SOEs and indigenous innovation, IPR protection, and accession to the WTO Government Procurement Agreement (GPA). These issues are likely to be addressed in key bilateral fora, specifically, the Strategic and Economic Dialogue (S&ED), which is likely to be held in spring 2013, and the Joint Commission on Commerce and Trade (JCCT), which is likely to be held in fall 2013. Sources indicate the Obama Administration has plans to participate in numerous rounds of negotiations toward a US-China bilateral investment treaty (BIT) this year; however, disagreement over key areas typically covered by the treaty is likely to seriously impede efforts to complete negotiations within the near- to mid-term. In addition to engagement, the Obama Administration is also expected to employ more confrontational means of addressing US-China trade issues, especially through the initiation of additional WTO disputes against China.

Congress is expected to continue to address in 2013 many of the same US-China trade issues it addressed in 2012, *e.g.*, Chinese investment in the United States, IPR infringement, and market access issues for US businesses. China's alleged currency manipulation is also likely to remain a concern for certain lawmakers; however, the issue is unlikely to enjoy as much attention as it has in the past. According to the Treasury Department, the RMB appreciated on a nominal basis by 9.3 percent against the USD from June 2010 to November 2012, and by 12.6 percent on a real basis (inflation-adjusted). That lawmakers did not seriously consider currency legislation in 2012 is another sign that the issue is no longer a top priority within the bilateral trading relationship.

#### **V. LNG EXPORTS**

The US Department of Energy (DOE) is likely to adjudicate in 2013 several of the 15 currently pending applications for the exportation of LNG to countries with which the United States has not entered a FTA. DOE is required to grant authorization to export LNG to countries with which the United States has FTAs, pursuant to

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national treatment language contemplated in these agreements; however, DOE must conduct a public interest review before granting authorization for LNG exports to a country with which the United States does not have an FTA.

In 2012, DOE undertook this public interest review through a two-part study: (i) the first part released by the US Energy Information Administration (EIA) in January 2012 examined the impact of LNG exports on US domestic energy consumption, production and prices; and (ii) the second part released by Nera Economic Consulting in December 2012 examines the effects on US national income of increased LNG exports and the likely resulting changes to employment and real wages, *i.e.*, wages adjusted for inflation, and capital-, labor- and resource-derived income. The EIA report asserts that increasing LNG exports could raise US domestic consumer and industrial LNG prices considerably, while the Nera report asserted that increasing LNG exports would suppose a net economic benefit for the United States.

Stakeholders submitted a first round of comments on the results of the two-part public interest review. First-round reaction to the two reports was mixed; several citizen interest groups expressed concern over likely increases in US domestic LNG prices as a result of unfettered exportation of LNG to non-FTA partners, while such private sector groups as the US Chamber of Commerce highlighted the economic benefits of authorizing these LNG exports, and many questioned the WTO-consistency of maintaining the current natural gas export license regime, particularly in light of the two cases the United States has brought against China for its export policies.

Recent public opinion surveys show a clear preference among Americans to restrict LNG exports to help US consumers and firms. In light of these opposing industry and consumer forces and the sizeable economic interests at stake, it remains unclear how DOE will adjudicate the current pending LNG export licenses. Nonetheless, the publication of the two-part study and the resulting increased attention to this issue over the latter half of 2012 and early-2013 has intensified the pressure on DOE to address its LNG export licensing regime in the near-term, such that DOE could perform many of such adjudications by mid- to late-2013.

Exports of US-produced crude oil face a similar licensing requirement. Similar to DOE practice in regard to the LNG export licensing regime, DOC has discretion to consider most crude oil export license applications against loose criteria relating to “public interest”, which has caused pending applications to remain unadjudicated for months. Stakeholder efforts are underway to reform the export licensing regimes for US-produced fossil fuel, *e.g.*, LNG and crude oil, but this reform will likely take years such that it is unlikely to come to fruition in 2013.

## VI. WTO

The United States’ engagement at the WTO in 2013 is likely to include efforts to secure deliverables for the Ninth WTO Ministerial, negotiations on WTO plurilateral agreements, and disputes before the WTO DSB. In the first half of 2013, WTO members are also expected to choose a new WTO Director General (DG). Current DG Pascal Lamy’s term of office will expire on August 31, 2013. The deadline for nominating candidates for the position

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ended December 31, 2012. There are nine candidates for the position.<sup>4</sup> The selection process will conclude on May 31, 2013.

### WTO Negotiations

At the December 2011 WTO Eighth Ministerial Conference, WTO members acknowledged that the Doha round is at an impasse. As a result, members decided to explore different negotiating approaches and advance negotiations where progress could be achieved. WTO members were unable to achieve significant progress in any Doha negotiating areas in 2012. With the WTO Ninth Ministerial Conference scheduled to take place in Bali, Indonesia from December 3-6, 2013, WTO members are looking for possible areas in which they can achieve deliverables within the next year. Potential areas in which members may focus their efforts include, but are not limited to:

- **Trade Facilitation.** WTO members are working toward an agreement on trade facilitation. Outstanding issues include those relating to technical assistance and trade capacity building. It also remains unclear whether some developing country members will push for linkage between a trade facilitation agreement and other negotiating areas within the Doha round, a move which could seriously hinder the agreement;
- **Agriculture.** Members are exploring whether they can reach agreement on any part of a broader Doha agenda for agriculture by the 2013 Ministerial. Sources contend that members are currently considering two agriculture proposals put forward by: (i) the Group of 20 developing countries, which, among other things, seeks tighter disciplines for administering tariff rate quotas (TRQs); and (ii) the Group of 33 developing countries, which, among other things, seeks to address domestic support disciplines to enhance food security; and
- **Issues Faced by Least-Developed Countries (LDCs).** WTO members are also likely to focus on agreeing to a deliverable that addresses economic and trade issues faced by LDCs. Because development is one of the key focal points of the Doha round, those WTO members that are LDCs are likely to push for a deliverable in this area by December 2013.

### Expansion of the ITA

Participating countries are expected to make progress toward the conclusion of an expanded ITA, although it remains unclear whether such an expansion can be concluded by the end of 2013. Some proponents of the talks are pushing for a conclusion to the talks by mid- to late-2013 such that an expanded ITA can be counted among the deliverables showcased at the WTO Ninth Ministerial. Efforts to expand the ITA gained traction in July 2012, when approximately 11 participatory countries circulated a consolidated draft of approximately 400 products to be considered under an expanded ITA. By early 2013, approximately 7 additional countries joined the talks, and

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<sup>4</sup> As of January 2013, the nine candidates for the position included (i) Alan John Kwadwo Kyerematen of Ghana; (ii) Anabel González of Costa Rica; (iii) Mari Elka Pangestu of Indonesia; (iv) Tim Groser of New Zealand; (v) Amina Mohamed of Kenya; (vi) Ahmad Thougan Hindawi of Jordan; (vii) Herminion Blanco of Mexico; (viii) Taeho Bark of Korea; and (ix) Roberto Carvalho de Azevedo of Brazil.

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sources contend that numerous products were eliminated from the list in an effort to narrow the product coverage.<sup>5</sup> Nonetheless, several issues currently affecting the ITA expansion talks may impede negotiators' efforts to complete the expansion this year. These issues include, among others:

- **Definition of Information and Communication Technology (ICT) Products.** The lack of a universally accepted definition for ICT will continue to complicate efforts to narrow the current list of products to be considered under an expanded ITA. In a November 2012 report, the US International Trade Commission (ITC) identified numerous products contained within the original list that do not have ICT purposes. These products include, among others, washing machines and ovens. Because participatory countries' positions in regard to whether such disputed products are closely linked to whether these countries are competitive exporters of such products, the debate over whether to include such disputed products is not likely to be easily resolved; and
- **Participating Countries.** The number of ITA signatories participating in the expansion talks has increased since such talks commenced. Nonetheless, the current number of 18 participatory countries falls far short of the total 48 ITA participants. Thus it remains unclear how the rest of the ITA signatories will eventually be included in the expanded ITA. Observers are particularly concerned that China and India have not joined the talks. To date, India has been the most outspoken ITA participant in opposition of the expansion efforts. India's opposition is derived from the negative affects the Indian government reports the ITA has allegedly had on its domestic ICT manufacturing industry.

## ISA

In 2013, participating countries are expected to begin – but not complete – negotiations toward an ISA. More specifically, participatory countries are likely to commence negotiations around March 2013. The United States began exploratory talks with other interested WTO members regarding the negotiation of an ISA in January 2012. These exploratory talks paved the way for USTR's January 2013 notification to Congress of its intent to enter into ISA negotiations.

Several documents provide insight into the issues the ISA negotiations will likely address in 2013. In July 2012, the United States and other interested WTO members released a statement agreeing that an ISA should have the following three characteristics: (i) be comprehensive in scope; (ii) ensure improved market access for services; and (iii) contain new and strengthened rules for trade in services. In its January 2013 notification to Congress, USTR Ron Kirk noted that the United States supports an ISA that, among other things: (i) covers all existing services as well as those that have not yet been conceived; and (ii) requires parties to provide the public with advance notice and an opportunity to comment on proposed regulations while ensuring regulatory authorities preserve the ability to introduce new regulatory policies.

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<sup>5</sup> Media sources contend that, as of January 2013, the countries currently participating in the ITA expansion talks include Australia, Canada, China, Costa Rica, the EU, Hong Kong, Israel, Japan, Malaysia, New Zealand, Norway, the Philippines, Singapore, South Korea, Switzerland, Taiwan, Thailand and the United States.

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Issues likely to impede progress made with regard to the negotiations include, among others:

- **Participating Countries.** As of January 2012, 21 countries are set to negotiate the ISA.<sup>6</sup> Absent from the list of participating countries are several major emerging economies with significant services sectors, including China, India, Brazil, South Africa and Russia. ISA participants continue to engage on the issue of whether and how to multilateralize the ISA. Participants such as the EU are pushing to structure the agreement in such a way that encourages the participation of these countries; and
- **New Issues to Address.** Although the United States has stated its intention to address new issues within an ISA, it remains unclear what issues it will seek to include in the agreement. In the January 2013 notification of intent, USTR Kirk stated that the United States will seek the inclusion of provisions addressing trade in services through electronic channels in an ISA. Media sources contend that the United States is also likely to push for a commitment to allow for the free flow of data across borders. Some lawmakers and US industry groups are also pushing for the United States to address SOEs within the Agreement.

### WTO Dispute Settlement

In 2013, the United States will continue its involvement in numerous WTO disputes and is expected to also initiate several new disputes. In 2012, WTO members brought 27 disputes before the WTO DSB, more than three times the number of disputes initiated in 2011. Moreover, almost half of the 27 disputes initiated in 2012 involved the United States. These numbers underscore the growing importance of the WTO DSB as not only a forum for addressing new and contentious trade issues but, in addition, a cornerstone of the United States' trade enforcement policy. The major WTO disputes in which the United States will be involved in 2013 include, among others:

- **Trade Remedies Disputes.** As noted above, the exchange of trade remedies between China and the United States is likely to be addressed in several disputes in 2013, including:
  - **Chicken Broiler Products.** DS427 was initiated by the United States against China in September 2011. In May 2012, a WTO panel was composed to rule on whether AD/CVD China places on US chicken "broiler products" violate WTO rules. The panel is expected to issue its ruling by June 2013;
  - **Automobiles.** In July 2012 the United States initiated DS440 against China. In October 2012 the DSB established a panel to rule on whether China's imposition of certain AD/CVD on US automobile exports violates WTO rules;
  - **CVD/NME Law.** DS449 was initiated by China against the United States in September 2012. According to its request for consultations, China alleges that numerous aspects of P.L 112-99 violate WTO rules. In December 2012, the DSB established a panel for the dispute;

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<sup>6</sup> The 20 countries negotiating the ISA include Australia, Canada, Chile, Taiwan, Colombia, Costa Rica, the EU, Hong Kong, Iceland, Israel, Japan, Korea, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland, Turkey, and the United States.

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- **Public Bodies.** China initiated DS437 against the United States in May 2012. In September 2012, the DSB established a panel to address, among other things, China's allegations that, in the context of CVD investigations, DOC's presumption of Chinese SOEs as "public bodies" is inconsistent with WTO rules;
- **Rare Earths.** DS431 was initiated by the United States against China in March 2012. At issue is China's imposition of export restraints on rare earth minerals. The United States won an earlier WTO dispute against China's imposition of similar export restraints on certain raw materials (DS394), and many opined that it was the test case for purposes of the present challenge to rare earths. A WTO panel was composed in September 2012 to address the issue;
- **Auto Export Subsidies.** The United States initiated DS450 against China in September 2012. According to USTR, the export-contingent subsidies China provides to producers of automobiles and automobile parts violate WTO rules;
- **Import Licensing.** The United States initiated DS455 against Indonesia in January 2013. The United States alleges that Indonesia's non-automatic import licensing regime for horticultural products, animals, and animal products is WTO-inconsistent;
- **Import Restrictions.** The United States initiated DS444 against Argentina in August 2012. The United States alleges that Argentina maintains numerous WTO-inconsistent import measures, including non-automatic import licenses, pre-registration requirements for imports, and *de facto* trade restrictive practices such as domestic content requirements, trade balancing requirements and capital controls. Shortly after the United States initiated DS444, Argentina requested WTO consultations with the United States regarding two issues, namely: (i) trade restrictive measures on imports of lemons (DS448); and (ii) trade restrictive measures on animals, meat and other animal products (DS447);
- **Avian Influenza.** The United States initiated DS430 against India in March 2012. In January 2012 a panel was established to consider whether India's prohibitions on imports of certain US agricultural products, including, *inter alia*, poultry products and eggs, are WTO-inconsistent. According to USTR, India imposed the import ban in an alleged effort to prevent the spread of avian influenza. India and the United States are expected to compose a panel for this dispute within the near future; and
- **Solar Panel Products.** The United States initiated DS456 against India in February 2013. According to USTR, certain domestic content requirements in India's national solar program are WTO-inconsistent.

Compliance in regard to WTO disputes is also likely to be a main focus of the United States in 2013. Most notably, the United States will participate in two compliance panels with the EU in the ongoing Boeing-Airbus dispute. The dispute centers on the following two cases: (i) DS316, which the United States brought against the EU in October 2004 for its alleged subsidization of the European aircraft manufacturer Airbus; and (ii) DS353, which the EU brought against the United States in June 2005 for its alleged subsidization of the US aircraft manufacturer Boeing. With regard to DS316, the compliance panel is expected, but not guaranteed, to rule by the end of 2013 on whether the EU complied with the DSB's ruling. In contrast, the compliance panel for DS353 is not expected to rule on whether the United States complied with the DSB's ruling until the first half of 2014. Compliance issues in regard to several other WTO disputes are also likely to garner attention in 2013, including:

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(i) DS285, in which Antigua challenged the United States in regard to measures affecting the cross-border supply of gambling and betting services; and (ii) DS267, in which Brazil challenged the United States in regard to its provision of cotton subsidies.

## VII. CONGRESSIONAL ACTION ON TRADE-RELATED ISSUES

Congressional trade-related action in 2013 is likely to be limited in nature. There are only a few pieces of trade-related legislation on which Congress must act. The broader legislative agenda is also relatively full due to pressing domestic concerns, thus likely leaving little time for consideration of trade-related legislation. In early 2013, the Senate is expected to focus on several trade-related nominations, including those for USTR, Treasury Secretary and Commerce Secretary. Later in the year, Congress is expected to address – and in some cases consider legislation regarding– the following trade-related issues:

- **TPA.** Although lawmakers are expected to address the renewal of Trade Promotion Authority (TPA) in 2013, they are unlikely to pass legislation enacting it until the Obama Administration expresses its full support. The Obama Administration will most likely withhold its support for TPA renewal until TPP is close to completion. Nonetheless, key Republican and Democratic lawmakers have expressed support for addressing the issue in 2013. Issues to discuss include, among other things, the extent to which the “May 10 Agreement” will form the foundation for a renewed TPA.<sup>7</sup> Although it is unlikely to seek TPA in the near-term, the Obama Administration is expected to, nonetheless, follow TPA procedure in regard to trade agreement negotiations;
- **Extension of Preference Programs.** In 2013, the 113th Congress is expected to pass legislation extending the Generalized System of Preferences (GSP) and the Andean Trade Preference Act (ATPA). Such extension is likely, although not guaranteed, to be passed prior to the expiration of both programs. GSP and ATPA are scheduled to expire on July 31, 2013. As in previous years, numerous lawmakers have suggested reforming GSP as part of the legislative effort to extend it. Although lawmakers may discuss such proposals for reform, it remains unlikely that lawmakers will pass any GSP extension legislation that includes reforms;
- **Customs Reauthorization.** Lawmakers may consider legislation reauthorizing CBP in 2013. Two Customs bills introduced at the end of the 112th Congress are likely to provide a starting point for the consideration of such legislation within the 113th Congress. Former House Ways and Means Trade Subcommittee Chairman Kevin Brady (R-TX) introduced the first bill, known as the “Customs Trade Facilitation and Enforcement Act of 2012” (HR 6642). Ways and Means Ranking Member Sander Levin (D-MI) and former Trade Subcommittee Ranking Member Jim McDermott (D-WA) introduced the second bill, known as the “Customs Enhanced Enforcement and Trade Facilitation Act” (HR 6656). The two bills differ in numerous ways, including in regard to provisions aimed at counteracting duty evasion;

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<sup>7</sup> The May 10 Agreement, a compromise deal reached by then President Bush with House Democrats to break a partisan stalemate on the US-Peru and US-Panama Free Trade Agreements (FTAs) and allow for their consideration in Congress, provided for the inclusion in pending and future FTAs of core international labor and environmental protection standards and loosened intellectual property rights (IPR) provisions.

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- **Farm Bill.** Lawmakers are likely to work toward passage of a new five-year Farm Bill in 2013. The 2008 Farm Bill, for which Congress provided with a short-term extension in January 2013, is set to expire on September 30, 2013. Five-year Farm Bill legislation composed during the 112th Congress will likely provide a starting point for lawmakers' efforts to consider such legislation in 2013. In June 2012, the Senate plenary passed the "Agriculture Reform, Food and Jobs Act of 2012" (S 3240). In July 2012, the House Agriculture Committee passed their version of the Farm Bill, known as the "Federal Agriculture Reform and Risk Management Act" (HR 6083). The bills contain numerous differences, the most notable of which pertains to the commodity support programs contained within each bill. Due to upcoming federal spending and budget deadlines, e.g., those related to the "debt ceiling" (i.e., the limit on federal borrowing), "sequestration" (i.e., automatic spending cuts), and federal government funding, lawmakers are unlikely to make progress toward passing a new Farm Bill until mid-2013. The outcomes of these fiscal debates are also likely to affect the content of the Farm Bill, as additional spending cuts will likely limit lawmakers' ability to fund Farm Bill programs; and
- **MTB.** Congress may consider MTB legislation in 2013. The House Ways and Means Committee Leadership introduced, but Congress did not consider, the "US Job Creation and Manufacturing Competitiveness Act of 2013" (HR 6727), at the end of the 112th Congress. HR 6727 was derived from more than 2000 MTBs, which were vetted through a process begun by the House Ways and Means Committee and Senate Finance Committee in March 2012. Efforts to pass MTB legislation in 2013 may be impeded by, inter alia, those who argue that the process by which the MTB is compiled is inconsistent with the ban on earmarks, i.e., guarantees of federal expenditures to particular recipients in appropriations-related bills and related documents. Several senators, including Claire McCaskill (D-MO), Jim DeMint (R-SC) and Rob Portman (R-OH), among others, support legislation that would reform the MTB process by allowing companies to submit their proposals for duty suspension directly to the ITC, and reserving final approval for Congress.

## Outlook

At best, 2013 will likely do little more than set the stage for important trade-related outcomes in 2014. For example, if TPP negotiators are able to come to agreement on sensitive issues in 2013, the Obama Administration could be prepared to complete the agreement in 2014. But at its worst, 2013 could result in continued stagnation, or even regression, in regard to the US trade agenda. For example, if major emerging economies such as China and India decide not to join such WTO negotiations as those toward an ISA and an expanded ITA, those agreements are likely to lose momentum.

2013 has been heralded as a golden opportunity to revive the US trade agenda, and members of the US business community and several US think tanks have called 2013 a crucial year for achieving trade-related results. With the 2012 elections over and President Obama embarking on his second term, there is some political space for trade-related items to progress. Furthermore, the slight improvement of the US economy over the past few years could also prove beneficial for trade liberalization initiatives, as advancing a free trade agenda has historically been easier in the United States when the economic outlook is positive. However, the chances that the Obama Administration achieves significant trade-liberalizing outcomes this year remain slim.

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The Obama Administration enters its second term with legislative wishlist that covers such hefty items as: (i) large fiscal adjustments to address the deficit and debt; (ii) immigration reform; and (iii) gun control. While it is quite possible that President Obama had intended to pursue a more free trade-friendly agenda than that of his first term, his Administration probably understands that this non-trade related legislative agenda will likely require a significant amount of political capital. President Obama was unwilling to expend significant political capital on trade during his first term and, instead, focused on advancing health care and financial reform legislation.

That President Obama is no longer seeking reelection could mean a greater willingness to expend political capital on advancing trade liberalization, but it cannot be ruled out that his hefty legislative agenda takes precedence in this regard. Also, campaigning for the 2014 mid-term elections will begin toward the end of 2013 such that the Obama Administration would need to make significant progress on trade items subject to congressional approval in the first three quarters of the year as support for free trade initiatives from Congress typically wains during elections.

If the Obama Administration decides to prioritize free trade, *e.g.*, in a manner similar to that of the former Clinton Administration, concrete results on trade agenda items can be expected in the next four years. On the other hand, continued stagnation should be expected if the Obama Administration uses the trade agenda as a tool for building the support of its political base, *e.g.*, placing a greater focus on trade enforcement than on trade liberalization as was the case during President Obama's first term.

## ***US General Trade Policy Highlights***

### **USTR Requests WTO Consultations with India Regarding Local Content Requirements for Solar Energy Products**

On February 6, 2013, US Trade Representative (USTR) Ron Kirk issued a press release announcing that the United States had requested consultations before the World Trade Organization (WTO) with India in regard to domestic content requirements under India's national solar program (DS456). According to USTR Kirk, "the United States strongly supports the rapid deployment of solar energy around the world, including with India. Unfortunately, India's discriminatory policies in its national solar program detract from that successful cooperation, raise the cost of clean energy, and undermine progress toward our shared objective."

Pursuant to the WTO Dispute Settlement Understanding (DSU), the United States and India 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.

India launched its national solar policy, the Jawaharlal Nehru National Solar Mission (JNNSM), in January 2010. According to USTR's press release, the first phase of this policy requires developers of solar photovoltaic projects employing crystalline silicone technology to use solar modules and crystalline silicon solar cells manufactured in India. India is considering the expansion of the domestic content requirements to include solar thin film technologies, which the press release notes currently comprise the majority of US solar exports to India. In addition, the Indian government guarantees that it will purchase, at a subsidized tariff rate, a certain amount of

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the solar energy produced by solar energy developers that buy and use solar cells and solar modules of domestic origin.

According to its Request for Consultations (WT/DS456/1), the United States believes that the above-mentioned policies are inconsistent with India's WTO obligations. More specifically, the United States alleges that the domestic content requirements under JNNSM and the provision of subsidies through JNNSM contingent on the fulfillment of the domestic requirements contravene, *inter alia*: (i) Article III of the General Agreement on Tariffs and Trade 1994 (GATT 1994), which generally prohibits measures that discriminate in favor of domestically produced goods versus imports; (ii) Article 2 of the WTO Agreement on Trade-Related Investment Measures (TRIMS Agreement), which prohibits trade-related investment measures that are inconsistent with GATT Article III; (iii) Article 3 of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), which prohibits conditioning a subsidy on the use of domestic over imported goods; and (iv) Article 5 of the SCM Agreement, which prohibits causing adverse effects on other WTO Members through certain subsidies.

The United States' request for consultations with India comes in the context of the Obama Administration's heightened focus on localization barriers to trade. In mid-2012 USTR created the Trade Policy Staff Committee Task Force on Localization Barriers to Trade to "develop and execute a more strategic and coordinated approach to address localization barriers." According to USTR, localization barriers come in the form of: (i) local content requirements; (ii) subsidies or other preferences provided to companies that use products of domestic origin; (iii) requirements to provide services through a local facility; (iv) legal instruments that require the transfer of technology or intellectual property; (v) requirements to comply with standards that are specific to a certain area or design; and (vi) conformity assessment requirements that create unnecessary obstacles to trade.

The dispute is also the latest in a series of green-energy related trade disputes around the world. In December 2010, the United States requested WTO consultations with China regarding subsidies provided to Chinese wind power equipment manufacturers. In addition, a WTO panel ruled in December 2012 on the European Union and Japan's allegations regarding the domestic content requirements contained in Canada's feed-in tariff program ("FIT program"). The FIT program aims to increase the share of electricity from renewable sources in overall electricity generation. In November 2011, the US Department of Commerce (DOC) initiated antidumping (AD) and countervailing duty (CVD) investigations into Chinese imports of solar cells, while the Chinese Ministry of Commerce (MOFCOM) initiated a trade barrier investigation into certain US subsidy policies applied to its clean energy industry. In July 2012, MOFCOM also initiated AD/CVD investigations into imports of solar-grade polysilicon from Korea and the United States.

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

Click [here](#) to access a copy of the United States' Request for Consultations (WT/DS456/1).

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

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