



White & Case LLP General Trade Report - JETRO

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In This Issue

United States..... 1

General Trade Policy 1

Free Trade Agreements ... 15

Table of Contents

UNITED STATES	1
USTR Releases 2013 Special 301 Report on IPR Protection and Enforcement	1
Congress Holds Hearing on US Energy Exports	6
US General Trade Policy Highlights	10
Deputy USTR Punke Identifies Areas of US Flexibility for Potential Bali Deal	10
President Obama Announces Nominations for Commerce Secretary and USTR	11
House and Senate Agriculture Committees Approve 2013 Farm Bills.....	12
US-Myanmar TIFA Aims to Strengthen Bilateral Trade Ties	13
Free Trade Agreement Highlights.....	15
United States and Mexico Establish Bilateral High-Level Economic Dialogue	15
TPP Member Countries Hold 17th Negotiating Round; IPR, SOEs, Environment and Market Access Remain Sticking Points	15
United States and Caribbean Community Sign TIFA.....	18

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UNITED STATES

GENERAL TRADE POLICY

USTR Releases 2013 Special 301 Report on IPR Protection and Enforcement

Summary

On May 1, 2013, the Office of the US Trade Representative (USTR) released its “2013 Special 301 Report” (“2013 Report”).¹ The annual Report includes a discussion of developments in intellectual property rights (IPR) protection and enforcement as well as a list of countries whose alleged lack of IPR protection and enforcement is of concern to the US government. Specifically, the Report divides countries of concern into four categories: (i) those of greatest concern are designated as “Priority Foreign Countries;” (ii) those of next greatest concern are listed on the “Priority Watch List;” (iii) countries of less concern than those on the Priority Watch List are listed on the “Watch List;” and (iv) those who do not require being placed on a list but are still of concern are designated under the category “Section 306 Monitoring.” While much of the Report’s content remains the same as USTR’s 2012 Special 301 Report, the 2013 Report discusses new developments and makes several changes to the Country Reports section. Below we discuss the Report’s contents, generally, and provide analysis on major substantive changes made to the Report, as compared to the 2012 Report.

Analysis

Section 516 of the CR includes two important restrictions. First, it prohibits certain US government agencies, namely the Departments of Commerce (DOC) and Justice (DOJ), the National Aeronautics and Space Administration (NASA) or the National Science Foundation (NSF), from using the funds appropriated under the law to acquire an IT system without first investigating the associated risk of cyber-espionage or sabotage. According to the legislation, such an assessment should address any risk associated with a system that was produced, manufactured or assembled by an enterprise owned, directed or subsidized by the Chinese government. Second, and most notably, Section 516 prohibits subject US government agencies from using the appropriated funds to acquire an IT system that is produced, manufactured or assembled by an enterprise owned, directed or subsidized by the Chinese government unless the head of such subject US government agency determines that the acquisition is in the United States’ national interest.

I. BACKGROUND

¹ The 2013 Report is available here:
<http://www.ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf>

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Pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act, the Report provides an overview of the state of IPR protection and enforcement among US trading partners. According to the Report, USTR's designation of certain countries within the Country Reports section is necessarily done on a case-by-case basis. Each designation is the result of deliberations among all relevant agencies within the US government, and is informed by consultation with stakeholders, foreign governments, Congress and other interested parties. In the 2013 Report, USTR continued its call to trading partners to develop mutually agreed-upon action plans to improve IPR. In 2012, Russia and the United States agreed to such an action plan.

II. DEVELOPMENTS IN IPR PROTECTION AND ENFORCEMENT

Similar to the 2012 Report, the 2013 Report discusses the following topics in its first of two sections, titled "Developments in IPR Protection and Enforcement": (i) positive developments in IPR protection and enforcement; (ii) initiatives to strengthen IPR protection and enforcement internationally; (iii) trade secrets and forced technology transfer; (iv) best IPR practices by US trading partners; (v) capacity building efforts; (vi) trends in trademark counterfeiting and copyright piracy; (vii) piracy over the internet and digital piracy; (viii) trademarks and domain name disputes; (ix) government use of software; (x) intellectual property and health policy; (xi) supporting pharmaceutical and medical device innovation through market access; (xii) implementation of the World Trade Organization (WTO) Agreement on Trade-Related Aspects of IPR (TRIPS Agreement); and (xiii) WTO dispute settlement. In terms of positive developments, the Report cites steps taken by the Bahamas, Brunei, Canada, China, Israel, Laos, Panama, Philippines, Russia, Taiwan, and Turkey.

Notably, the 2013 Report places an increased emphasis on the issue of trade secrets. The United States is concerned that the number of incidents of trade secret theft has grown in recent years, particularly in China. To address the issue, the US Intellectual Property Enforcement Coordinator issued the "Administration Strategy on Mitigating the Theft of US Trade Secrets" in February 2013. The Strategy outlines the following as action items for the Obama Administration to take: (i) increasing efforts to protect trade secrets outside the United States; (ii) promoting the use of best practices in protecting trade secrets; (iii) bolstering domestic law enforcement efforts; and (iv) improving domestic laws affecting trade secrets.

III. COUNTRY REPORTS

Priority Foreign Country

The 2013 Report designates Ukraine a Priority Foreign Country (PFC). This marks the first time USTR has made such a designation in seven years. Interestingly, the last country to be designated as such was also Ukraine. The country remained a PFC from 2001 through 2005. According to the Report, the designation of PFC is reserved for those countries with the "most egregious" IPR violations, policies with the most adverse affect on US goods, and that are not making sufficient efforts to improve IPR protection. USTR based its designation on specific IPR concerns in Ukraine including, *inter alia*: (i) an allegedly faulty system for collecting and disbursing music royalties; (ii) use of pirated software, especially by the Ukrainian government; and (iii) online piracy, an issue also discussed in USTR's Notorious Markets list. More generally speaking, the Report contends that

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WHITE & CASE LLP | 2

Ukraine has persistently failed to meet its commitments to improve IPR protection. For example, the United States and Ukraine agreed to an IPR action plan in 2010. However, the Report notes that IPR situation in Ukraine has continued to deteriorate in the years since.

According to section 301 of the Trade Act of 1974, USTR now has 30 days to decide whether it will initiate an investigation on the grounds identified as the basis for its designation of Ukraine as a PFC. If it elects to initiate an investigation, it will consult with the Ukrainian government to resolve the identified IPR issues. The Report claims that when USTR identified Ukraine as a PFC in 2001, the country “failed to address the grounds for its designation during the following investigation.” Consequently, the US government revoked Ukraine’s status as a beneficiary country under the Generalized System of Preferences (GSP) program. The US government restored Ukraine’s GSP status, and upgraded its designation from PFC to Priority Watch List country in early 2006.

Priority Watch List

The 2013 Report lists the following countries on its Priority Watch List (PWL): (i) Algeria; (ii) Argentina; (iii) Chile; (iv) China; (v) India; (vi) Indonesia; (vii) Pakistan; (viii) Russia; (ix) Thailand; and (x) Venezuela. Unlike the 2012 Report, the 2013 Report no longer lists Canada, Israel and Ukraine as PWL countries. While Ukraine was promoted to a PFC, Canada and Israel were downgraded to Watch List countries.

For each country listed on the PWL, the Report discusses positive developments with respect to IPR enforcement and protection that occurred in the country within the last year, and lists IPR-related issues within that country. Below we list those countries on the PWL for which USTR either mentioned new IPR-related issues or did not mention IPR-related issues previously listed in the 2012 Report:

- **China.** Unlike last year’s Report, the 2013 Report does not mention concerns regarding draft legislation on the compulsory licensing of patents. The 2013 Report also places less emphasis on IPR issues relating to indigenous innovation. For example, the Report no longer expresses concern for regulations regarding accreditation for indigenous innovation products. New issues addressed in the 2013 Report include, among others: (i) online infringement through media box piracy; and (ii) China’s system for utility model and design patents. The 2013 Report also puts a stronger emphasis on the theft of trade secrets, citing deficiencies with China’s Anti Unfair Competition Law;
- **India.** The 2013 Report places greater emphasis on patent issues. For example, the Report expresses concern regarding a recent decision by India’s Supreme Court on India’s prohibition on patents for certain chemical forms that do not show increased efficiency, e.g., fewer side effects. Unlike the 2012 Report, the 2013 Report: (i) urges India to enact measures that seek to curtail illegal camcording, online copyright piracy, signal theft and circumvention of technological protection measures; and (ii) expresses concern for India’s Preferential Market Access;
- **Indonesia.** The 2013 Report addresses several new issues, including: (i) Indonesia’s alleged failure to issue a compulsory license decree last year; and (ii) deficiencies with respect to compulsory licenses;

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WHITE & CASE LLP | 3

- **Pakistan.** Unlike the 2012 Report, the 2013 Report no longer calls on Pakistan to improve the system with which it addresses patent issues related to applications to market pharmaceutical products; and
- **Russia.** Additional issues addressed in this year's Report include an apparent decline in promising statistics regarding IPR protection and enforcement. More specifically, the United States alleges that the number of criminal raids on IPR violators and the number of new criminal IPR cases initiated have declined recently.

Watch List

The 2013 Report lists the following countries in its Watch List (WL): (i) Barbados; (ii) Belarus; (iii) Bolivia; (iv) Brazil; (v) Bulgaria; (vi) Canada; (vii) Colombia; (viii) Costa Rica; (ix) Dominican Republic; (x) Ecuador; (xi) Egypt; (xii) Finland; (xiii) Greece; (xiv) Guatemala; (xv) Israel; (xvi) Italy; (xvii) Jamaica; (xviii) Kuwait; (xix) Lebanon; (xx) Mexico; (xxi) Paraguay; (xxii) Peru; (xxiii) Philippines; (xxiv) Romania; (xxv) Tajikistan; (xxvi) Trinidad and Tobago; (xxvii) Turkey; (xxviii) Turkmenistan; (xxix) Uzbekistan; and (xxx) Vietnam.

In contrast to the 2012 Report, the 2013 Report removes Norway and Brunei from the WL; the two countries are no longer listed as countries of concern within the Report. Paraguay, which was designated under Section 306 Monitoring in 2012, was also designated as a WL country in this year's Report. Additionally, the following countries listed in the 2013 Report's WL were not included in last year's WL:

- **Barbados.** The United States is concerned with the following issues: (i) complaints that US composers and songwriters have not received adequate compensation for their performances; (ii) delays within the Barbados Copyright Tribunal; and (iii) the possible existence of a compulsory licensing scheme relating to the unapproved use of US cable programming;
- **Bulgaria.** The 2013 Report addresses the following concerns: (i) online piracy; (ii) issues collecting royalties; (iii) bad faith trademark registrations; and (iv) deficiencies in the judicial system; and
- **Trinidad and Tobago.** The 2013 Report expresses concern regarding a local cable operator's apparent failure to pay music royalties.

For each country listed on the WL, the Report: (i) discusses positive developments with respect to IPR enforcement and protection that occurred in the country within the last year; and (ii) lists IPR-related issues within that country. Below we list those countries on the WL for which USTR either mentioned new IPR-related issues or did not mention IPR-related issues previously listed in the 2012 Report:

- **Belarus.** The 2013 Report does not call on Belarus to expand the scope of its *ex parte* searches with respect to possible IPR violations;
- **Brazil.** The 2013 Report also calls for increased transparency and predictability with respect to Brazil's patent examination system;

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- **Canada.** The 2013 Report also expresses concern for recent action taken by Canadian courts that requires heightened utility for patents;
- **Costa Rica.** Additional issues listed in the 2013 Report include: (i) Costa Rica's apparent failure to ensure software used by the government is legitimate; (ii) the lack of a specialized IPR enforcement unit; and (iii) the need for customs officials to have *ex officio* authority to investigate potential IPR violations;
- **Ecuador.** The 2013 Report also expresses concern for a recent increase in fees charged for certain patent rights and plant variety protection;
- **Egypt.** Unlike the 2012 Report, the 2013 Report does not call on Egypt to: (i) clarify its protection against the unfair commercial use, as well as unauthorized disclosure, of test or other data generated to obtain marketing approval of pharmaceutical products; (ii) implement a system for resolving patent issues relating to applications to market pharmaceutical products; or (iii) ratify the World Intellectual Property Organization (WIPO) Internet Treaties. The 2013 Report also calls on Egypt to address print piracy and make certain amendments to its copyright law;
- **Guatemala.** The 2013 Report also alleges that "trademark squatting" is on the rise in Guatemala;
- **Israel.** Unlike the 2012 Report, the 2013 Report does not call for the following: (i) approval of legislation regarding patent term extension; and (ii) that cable operators provide adequate compensation to copyright holders. Additional issues addressed in the 2013 Report include: (i) web sites allegedly selling counterfeit pharmaceuticals; and (ii) alleged failure by Israeli enforcement units to exercise *ex officio* authority;
- **Italy.** The 2013 Report no longer makes a specific call for the enforcement of legislation outlawing unauthorized camcording of movies in theaters;
- **Mexico.** Unlike the 2012 Report, the 2013 Report no longer calls on Mexico to: (i) implement a system that protects against the unfair commercial use, as well as unauthorized disclosure, of test or other data generated to obtain marketing approval of pharmaceutical products; or (ii) clarify its system for addressing patent issues relating to pharmaceutical products in a rapid manner. The 2013 Report also expresses concern for the decrease in coordination between Mexico's customs authorities and the Attorney General to find and prosecute shipments of IPR-violating goods;
- **Peru.** The 2013 Report also calls on Peru to step up its efforts to curtail the sale of counterfeit medicines;
- **Philippines.** The 2013 Report no longer expresses concern for import restrictions on pharmaceutical products or urges the Philippines to implement the WIPO Internet Treaties;
- **Tajikistan.** The 2013 Report no longer calls on Tajikistan to provide its customs officials with *ex officio* authority;

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- **Turkey.** The 2013 Report also calls on Turkey to ensure that royalty collecting societies are governed by transparent and fair processes; and
- **Uzbekistan.** Unlike the 2012 Report, the 2013 Report also calls on Uzbekistan to remove its reservation to the *Berne Convention on the Protection of Literary and Artistic Works* and provide adequate IPR protection for sound recordings.

Outlook

A comparison of the 2013 and 2012 Reports highlights the progress, or lack thereof, made on IPR-related issues by US trading partners as well as shifts in the Obama Administration's policy of promoting IPR protection and enforcement. In this regard, there were several key differences between the two Reports. First, USTR designated a country as a PFC for the first time in several years. Although it is currently unclear what actions USTR will now take to put pressure on Ukraine to improve IPR protection and enforcement, the 2013 Report notes that Ukraine's status as a GSP beneficiary country was revoked the last time it was designated a PFC. In addition, USTR removed several countries from this year's Report, including Brunei and Norway. It is particularly significant that USTR removed Brunei from the Report, as Brunei is currently involved in negotiations with the United States and nine other countries toward the Trans-Pacific Partnership Agreement (TPP). The United States is interested in negotiating a stringent IPR chapter within TPP, although the text of the chapter remains a contentious negotiating issue. Other TPP negotiating partners, namely Canada, Mexico, Peru, and Vietnam remain on the 2013 Report's WL, while Chile remains on the Report's PWL.

Congress Holds Hearing on US Energy Exports

Summary

On May 7, 2013 the House Committee on Energy and Commerce Subcommittee on Energy and Power held a hearing titled "US Energy Abundance: Exports and the Changing Global Energy Landscape." During the hearing, lawmakers and witnesses discussed the potential impacts of exporting US energy resources, especially liquefied natural gas (LNG). The hearing reflects the increasingly vocal debate about the exportation of US-origin fossil fuels and current US export restrictions.

Background

The Department of Energy (DOE) is required to grant authorization (via export license) to export LNG to countries with which the United States has free trade agreements (FTAs), pursuant to national treatment language contemplated in these agreements; however, DOE must conduct a "public interest" review before authorizing LNG exports to buyers in countries with which the United States does not have an FTA.² As a result, US law creates a discretionary and discriminatory export

² This policy is pursuant to the Natural Gas Act of 1938, as amended.

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WHITE & CASE LLP | 6

licensing system for exports of natural gas. Exports of US-produced crude oil face a similar licensing requirement; the Department of Commerce's (DOC) discretion to consider most crude oil export license applications against loose criteria relating to "public interest" has caused pending applications to remain unresolved for months.³

In 2012, DOE undertook a public interest review of the current LNG export policy through a two-part study: (i) the first report found that an increase in LNG exports could raise US domestic consumer and industrial LNG prices considerably; and (ii) the second report found that increasing LNG exports would suppose a net economic benefit for the United States. Stakeholder comments on the studies were 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 private sector groups highlighted the economic benefits of authorizing these LNG exports.

Analysis

Participants addressed the following issues during the May 7 hearing: (i) the geopolitical and international economic implications of increased LNG exports; (ii) the domestic impact of increased LNG exports; and (iii) the history of US government regulation on energy exports. Committee member statements and witness testimonies are summarized below.

Member Statements

- **House Committee on Energy and Commerce Subcommittee on Energy and Power Chairman Ed Whitfield (R-KY)**⁴ noted that advancements in hydraulic fracturing and directional drilling are responsible for the recent increase in the United States' oil and natural gas supply. Chairman Whitfield outlined the advantages to the United States becoming an energy exporter, including improving the US financial situation, strengthening US ties with allies and reducing US dependencies on "troublesome" countries. To advance these goals, he recommended that the Obama Administration allow for energy leasing of federal lands and pipelines, port facilities and other related infrastructure investments; and
- **House Committee on Energy and Commerce Ranking Member Henry Waxman (D-CA)**⁵ argued that the US government should consider the issue of climate change when deciding whether to expand LNG exports. Ranking Member Waxman called climate change "the biggest energy challenge [the United States] faces as a country," noting that several government entities and academic organizations have also called it a serious national security concern. Nonetheless, he claimed to be open to the possibility of expanding LNG exports, given the likelihood that they

³ This policy is pursuant to the Energy Policy and Conservation Act of 1975.

⁴ Chairman Whitfield's statement is available here:

<http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/Hearings/EP/20130507/HHRG-113-IF03-MState-W000413-20130507.pdf>

⁵ Ranking Member Waxman's statement is available here:

<http://democrats.energycommerce.house.gov/sites/default/files/documents/Statement-Waxman-EP-Global-Energy-Landscape-2013-5-7.pdf>

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WHITE & CASE LLP | 7

would: (i) reduce emissions by decreasing nations' dependency on coal; and (ii) reduce US allies' dependency on natural gas imports from Russia and the Middle East.

Witness Testimony

- **Johnston & Associates Chairman Bennett Johnston**⁶ indicated that he supports expanded LNG exports. In his testimony, he expressed skepticism for arguments that unregulated and unrestricted LNG exports would cause demand shock and price volatility. Mr. Johnston used several cases to describe the negative effects of heavy government regulation within the energy sector. For example, he stated that the Natural Gas Policy Act of 1978 was responsible for an increase in the price of gas until full deregulation in January 1985, at which point “the nation experienced lower prices and an adequate supply.” Mr. Johnston argued that market forces, not the US government, should be allowed to govern the LNG sector;
- **Bipartisan Policy Center (BPC) Senior Fellow Byron Dorgan**⁷ expressed support for LNG exports, noting that if the US government is to allow for such exports it must also work to decrease the environmental impact of shale gas production. He argued that restricting trade in fossil fuels “is not an effective policy to reduce global greenhouse gas emissions or to advance domestic interests.” According to BPC, LNG exports are likely to have, at most, a modest impact on domestic natural gas prices;
- **Columbiana, Ohio County Board of Commissioners President Mike Halleck**⁸ expressed support for energy exports. He noted that Columbiana County's unemployment rate dropped significantly as a result of the county's recent transition from a manufacturing-based economy to an economy based on oil and gas production. In light of this development, he opined that lower domestic gas prices are a positive byproduct of the expanding domestic energy sector, however, such prices should not be allowed to decrease to the point at which producers need to lower production. Mr. Halleck believes the United States should export LNG to countries with which it has “open trade.” He noted that LNG exports will likely result in the need for more production and more workers;
- **University of California Davis Energy and Sustainability Institute of Transportation Studies Executive Director Amy Myers Jaffe**⁹ indicated that she supports energy exports. In her testimony, she argued that the US government should take its foreign policy objectives into consideration as it considers its oil and natural gas export policy. For example, enhanced trade in energy goods and services could be used to improve US ties with strategic and economic partners. Ms. Jaffe also argued that energy exports are an important part of the United States'

⁶ Mr. Johnston's testimony is available here: <http://docs.house.gov/meetings/IF/IF03/20130507/100793/HHRG-113-IF03-Wstate-JohnstonJ-20130507.pdf>

⁷ Mr. Dorgan's testimony is available here: <http://docs.house.gov/meetings/IF/IF03/20130507/100793/HHRG-113-IF03-Wstate-DorganB-20130507.pdf>

⁸ Mr. Halleck's testimony is available here: <http://docs.house.gov/meetings/IF/IF03/20130507/100793/HHRG-113-IF03-Wstate-HalleckM-20130507.pdf>

⁹ Ms. Jaffe's testimony is available here: <http://docs.house.gov/meetings/IF/IF03/20130507/100793/HHRG-113-IF03-Wstate-JaffeA-20130507.pdf>

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WHITE & CASE LLP | 8

FTA obligations, noting that the United States already exports natural gas to North American Free Trade Agreement (NAFTA) partners Canada and Mexico. She also called for the US government to consider Japan's expressed interest in importing US natural gas;

- **World Resources Institute Climate and Energy Program Senior Associate James Bradbury**¹⁰ did not indicate his position on LNG exports, and chose instead to focus his testimony on the climate implications of LNG exports. He alleged that US LNG exports are likely to result in increased domestic greenhouse gas (GHG) emissions. Mr. Bradley noted that if natural gas is to become part of the strategy for addressing climate change, policymakers should work to curtail methane leakage from natural gas systems. He described several potential "cost-effective" solutions for addressing fugitive methane emissions, including, *inter alia*: (i) expanding the DOE's applied technology research programs to advance tools for reducing the cost of leak detection and measuring emissions and for developing new emission reduction strategies; and (ii) increasing funding for the States Review of Oil and Natural Gas Environmental Regulations (STRONGER) to help US states develop and study environmental regulations; and
- **Truman National Security Project and Center for National Policy Executive Director Mike Breen**¹¹ did not express an opinion on energy exports, and chose instead to argue that the United States' dependence on oil poses a national security threat. Despite a recent increase in domestic oil production, Mr. Breen argued that the United States remains vulnerable to the vicissitudes of the global oil market. Alternatively, the US military is heavily invested in the development of next-generation energy technologies. Mr. Breen urged lawmakers to support such innovation.

Outlook

Recent media reports indicate that President Obama has signaled his support for an increase in LNG exports. Foreign policy considerations reflect one of the main factors underpinning the Obama Administration's position. With respect to international trade, the Administration is undoubtedly aware of the potentially negative implications of maintaining the current policy. More specifically, a decision to continue restricting exports could be viewed as contradictory in light of the United States' March 2012 allegation that China's use of export restraints on rare earths violates World Trade Organization (WTO) rules. In July 2011, the United States claimed victory in a similar WTO challenge it brought against China's use of export restraints on raw materials.

It remains unclear, however, whether President Obama's support for increased energy exports will translate into a formal, broad-based change to current law and policy. Instead, the Administration may elect to approve LNG exports to non-FTA countries on a case-by-case basis. As evidenced by the issues discussed during the May 7 hearing, little of the current debate surrounding oil and gas exports has focused on the fundamental problems – including possible WTO violations – with the

¹⁰ Mr. Bradbury's testimony is available here: <http://docs.house.gov/meetings/IF/IF03/20130507/100793/HHRG-113-IF03-Wstate-BradburyJ-20130507.pdf>

¹¹ Mr. Breen's testimony is available here: <http://docs.house.gov/meetings/IF/IF03/20130507/100793/HHRG-113-IF03-Wstate-BreenM-20130507.pdf>

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WHITE & CASE LLP | 9

current export licensing systems and instead has addressed only the near-term approval of pending licenses. This myopia, however, might not prove costly for the US government for two reasons. First, it appears that the US industry has little interest in a broad-based reform of systemic US export restrictions as long as pending licenses are approved. Second, if the Administration allows for LNG exports to active WTO Members like the European Union (EU), Japan or China – all of which have expressed an interest in such exports – these Members would likely be reluctant to bring a formal complaint against the United States' current export licensing regimes.

The timeframe within which the US government is likely to act upon the Obama Administration's reported support for an increase in exports remains unclear. At a minimum, no decision is likely to be made before Congress confirms Ernest Moniz, President Obama's nominee for DOE Secretary. Most industry experts expect limited license approvals in the next few months.

US General Trade Policy Highlights

Deputy USTR Punke Identifies Areas of US Flexibility for Potential Bali Deal

In remarks made to an April 30, 2013 meeting of World Trade Organization (WTO) Senior Officials, Deputy US Trade Representative (DUSTR) Michael Punke identified areas where the United States is prepared to demonstrate additional flexibility to move forward negotiations for a package of outcomes for the WTO's Ninth Ministerial Conference (MC9). The MC9 is scheduled to take place December 3-6, 2013 in Bali, Indonesia.

At the 2011 WTO Eighth Ministerial Conference, WTO members acknowledged that the Doha Development Agenda (DDA or "Doha") negotiations were at an impasse. However, with the approach of the MC9, members have engaged in talks to find specific areas within the DDA where they can achieve deliverables. In his speech, Ambassador Punke discussed the following three areas:

- **Trade Facilitation.** WTO members are working toward an agreement on trade facilitation. Ambassador Punke signaled a shift in the US position with respect to provisions regarding advance rulings, *i.e.*, statements by customs authorities that interpret and apply relevant customs laws and regulations to prospective transactions, and penalties for violations of customs laws and regulations. Media sources indicate that, more specifically, the United States: (i) will no longer demand that language be included allowing companies to request advance rulings on whether duty drawback or tariff quotas apply to a good; and (ii) will not call for the inclusion of a provision requiring customs authorities to consider whether a violator of customs laws and regulations has previously violated such rules when determining a penalty. In addition, Ambassador Punke noted that United States is willing to agree to "some" of the proposals put forth by the African, Caribbean and Pacific Group on a so-called "Early Warning System." As proposed, this System would provide developing and least developed countries with a procedure for providing other WTO members with advance notice if they are experiencing difficulty implementing a commitment with an approaching deadline;

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- **Agriculture.** According to Ambassador Punke, the United States is willing to shift its position with respect to food security and tariff rate quotas (TRQs). The Group of 33 (G33) countries have put forward a proposal to loosen disciplines on domestic agricultural support to enhance food security. In his speech, Ambassador Punke committed to a work program on food security, the details of which should be agreed to by MC9. DUSTR Punke also reiterated the United States' "willingness to engage" on the proposal put forth by the Group of 20 (G20) countries, which seeks tighter disciplines for administering TRQs; and
- **Development.** DUSTR Punke expressed support for a monitoring mechanism that would oversee special and differential treatment, *i.e.*, provisions that give developing countries special rights and allow other members to treat them more favorably.

DUSTR Punke's April 30 comments contrast with his previous, more skeptical comments regarding certain elements of a prospective Bali deal. For example, at an April 11, 2013 meeting of the WTO Trade Negotiations Committee, DUSTR Punke expressed concern with the G33 proposal, alleging that it "represents a step back from existing Uruguay Round [of WTO negotiations] disciplines." Media sources indicate that as many as 10 other WTO members, including Japan, Mexico, the European Union, Brazil, New Zealand and Colombia, came forward at the April 30 meeting to indicate areas in which they would also be willing to show additional flexibility.

Despite the optimism produced by the April 30 meeting, more recent developments underscore just how difficult it will be for WTO members to agree on a package of deliverables by December. During an informal May 1, 2013 "Green Room" meeting of essentially the same countries, under the chairmanship of the WTO Director General, several countries played down DUSTR Punke's statements. India and Indonesia indicated that the United States' proposal for a work program may not be enough to satisfy the G33 countries. Likewise, South Africa noted that the United States' prior demands on penalties and advance rulings were likely to have been rejected anyway.

WTO members are nonetheless well aware of the importance of solidifying a deal for MC9. As Ambassador Punke warned, "if Bali fails, it is hard to imagine how Doha can succeed." Members are expected to further discuss trade facilitation, agriculture, development – and possibly other issues – at the May 29-30, 2013 Organization for Economic Cooperation and Development (OECD) ministerial meeting.

Click [here](#) for a copy of DUSTR Punke's speech.

President Obama Announces Nominations for Commerce Secretary and USTR

President Obama announced on May 2, 2013 the nomination of Penny Pritzker for Secretary of Commerce and of Deputy National Security Advisor (DNSA) for International Economic Affairs Michael Froman for United States Trade Representative (USTR). President Obama made the announcement before departing for fellow Trans-Pacific Partnership (TPP) negotiating partner Mexico, where he and Mexican President Enrique Peña Nieto will discuss trade, among other issues.

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WHITE & CASE LLP | 11

In his remarks, President Obama pointed to Penny Pritzker's extensive management experience in the real estate, finance and hospitality industries. He also noted that "[s]he knows from experience that no government program alone can take the place of a great entrepreneur [and] she knows that what [government] can do is to give every business and every worker the best possible chance to succeed by making America a magnet for good jobs."

Of DNSA Froman, President Obama remarked that "[h]e's been a key negotiator alongside [former USTR] Ron Kirk [and] won a reputation as being an extraordinarily tough negotiator while doing it." President Obama further noted that DNSA Froman "does not rest until he's delivered the best possible deal for American businesses and American workers [and] [h]e's fought to make sure that countries that break the rules are held accountable."

Penny Pritzker will replace Acting Commerce Secretary Rebecca Blank, who assumed the post following the June 2012 departure of then Commerce Secretary John Bryson. Her nomination as Commerce Secretary is unlikely to translate into substantive policy changes in the trade-related bodies within the Department of Commerce (DOC), as policy is largely formulated and executed at the bureaucrat-level.

DNSA Froman will replace Acting USTR Demetrios Marantis, who assumed the post after the March 2013 departure of then USTR Ron Kirk. It remains unclear how DNSA Froman's nomination will impact USTR; DNSA Froman is known as a shrewd negotiator at the strategy-level but he is not an expert at the technical-level. DNSA Froman is also not a known consensus builder among lawmakers, a particularly important skill in light of the Obama Administration's expressed commitment to renewing its trade agreement negotiating mandate under the now expired Trade Promotion Authority (TPA) legislation. Both Penny Pritzker and DNSA Froman will need to achieve Senate confirmation before assuming their respective roles as Commerce Secretary and USTR.

Click [here](#) for a copy of the White House press release.

House and Senate Agriculture Committees Approve 2013 Farm Bills

On May 16, 2013, the House Agriculture Committee approved the "Federal Agriculture Reform and Risk Management Act of 2013" (HR 1947 or "2013 House Farm Bill"). The Senate Agriculture Committee approved its version of the 2013 Farm Bill on May 14 (S. 954 or "Senate Farm Bill"). The last Farm Bill passed Congress in 2008 and will expire on September 30, 2013.

According to a House Agriculture Committee press release, the 2013 House Farm Bill saves approximately USD 40 billion (i) reforming or eliminating over 100 programs; (ii) suppressing direct payments granted to farmers independent of market conditions; and (iii) streamlining and reforming commodity risk management policy. House Agriculture Committee Chairman Frank Lucas (R-OK) stated that the House Farm Bill would likely continue through regular order and be brought to the House plenary in June 2013.

The Senate Farm Bill, according to a Senate Agriculture Committee press release, requires conservation compliance for crop insurance, *i.e.*, links conservation compliance to crop insurance
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WHITE & CASE LLP | 12

premium assistance. Additionally, the Senate Farm Bill avoids (i) means testing, whereby larger farmers would have paid higher premiums for crop insurance; and (ii) payment limitations, whereby the US government would have limited the amount of support any one farm could have received.

A significant portion of US agricultural trade policy is set by the Farm Bill. Specifically, the Farm Bill contains provisions that not only promote the export of US agricultural products, but also support the US agricultural industry and facilitate the distribution of food aid in foreign countries. Domestic farm support is addressed within the World Trade Organization (WTO) Agriculture Agreement (to which the United States is party), is a negotiating sticking point in the context of the WTO Doha round, and has been the subject of numerous disputes before the WTO, e.g., Brazil against the United States on Subsidies for Upland Cotton – DS 267.

According to Chairman Lucas, the House could reconcile its farm bill with that of the Senate in July 2013. Thereafter, President Obama could possibly enact into law a five-year farm bill before the August 2013 congressional recess.

Click [here](#) for a copy of the House Agriculture Committee press release, [here](#) for a copy of the Senate Agriculture Committee press release, [here](#) for a copy of the Senate Farm Bill, and [here](#) for a copy of the House Farm Bill.

US-Myanmar TIFA Aims to Strengthen Bilateral Trade Ties

On May 21, 2013, Acting United States Trade Representative (USTR) Demetrios Marantis and Deputy Burmese Commerce Minister Pwint San signed a bilateral Trade and Investment Framework Agreement (TIFA). In regard to the aim of the Agreement, Ambassador Marantis noted that “[e]conomic reforms and trade are mutually supportive. Stronger institutions, transparency, and rule of law create stronger foundations for commercial transactions, trade and investment.” The TIFA signing occurred during the visit to the United States of President Thein Sein, the first such visit by a sitting Burmese leader nearly five decades.

TIFAs are mechanisms for ongoing dialogue and cooperation on trade and investment issues between two governments. However, US TIFAs generally contain mostly non-binding language, detailing broad goals, expressing goodwill, and establishing a schedule for regular contact among the Parties’ trade and investment authorities. In this regard, the US-Myanmar TIFA is a positive step forward in terms of bilateral economic ties, but it bears less weight than a bilateral investment treaty (BIT) or a free trade agreement (FTA), both of which typically contain specific and binding commitments in such areas as trade in goods and services, investment, intellectual property rights (IPR), customs procedures, etc.

The TIFA signing comes in the context of the Obama Administration having begun in 2012 to ease trade sanctions on Myanmar in response to apparent Burmese political and economic reform efforts underway. In this regard, a USTR press release asserts that the TIFA provides a vehicle for the United States and Myanmar to identify initiatives in support of the ongoing reform program and promote economic development. However, the USTR press release stresses concern over labor rights in Myanmar, which is consistent with the Obama Administration trade policy’s focus on labor-related enforcement.

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Total bilateral trade between the United States and Myanmar reached USD 90 million over the first three months of 2013, USD 89 million of which corresponds to US exports to Myanmar.

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

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FREE TRADE AGREEMENTS

Free Trade Agreement Highlights

United States and Mexico Establish Bilateral High-Level Economic Dialogue

President Obama and Mexican President Enrique Peña Nieto met in Mexico City from May 2-3, 2013 to discuss bilateral, regional and global issues that affect the United States and Mexico. With an aim to increase both countries' competitiveness as well as open trade and investment opportunities, Presidents Obama and Peña Nieto established a High Level Economic Dialogue (HLED).

A Joint US-Mexico Statement asserts notes that the purpose of HLED is to promote competitiveness, productivity and connectivity, foster economic growth and innovation, and partner for global leadership. The first HLED meeting will take place in Fall 2013 and meet annually thereafter. It will be chaired at the cabinet-level and involve representatives from relevant US and Mexican agencies and departments, and engage with relevant stakeholders, particularly from the private sector. A Fact Sheet notes that HLED will complement but not replace existing bilateral dialogues and working groups, e.g., those prescribed under the North American Free Trade Agreement.

Although Canadian Prime Minister Stephen Harper was not present, Presidents Obama and Peña Nieto discussed the importance of all three countries working to increase the dynamism of the North American production platform formed over the past two decades since the entry into force of NAFTA. In light of NAFTA parties having joined negotiations toward the Trans-Pacific Partnership (TPP), Presidents Obama and Peña Nieto agreed to ensure that TPP effectively strengthens the economic integration stemming from NAFTA.

Presidents Obama and Peña Nieto also agreed to seek conclusion of TPP negotiations in 2013. However, due to the number, complexity and difficulty of outstanding issues (e.g., market access, state-owned enterprises (SOEs) and IPR), TPP members are unlikely to conclude negotiations before 2014.

Click [here](#) for a copy of the Joint Statement, and [here](#) for a copy of the Fact Sheet.

TPP Member Countries Hold 17th Negotiating Round; IPR, SOEs, Environment and Market Access Remain Sticking Points

TPP member country trade officials concluded in Lima on May 24, 2013 the seventeenth negotiating round. An Office of the United States Trade Representative (USTR) press release points to areas in which negotiators made progress but also to areas for which difficulties lie ahead. The USTR press

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release also discusses Japan's forthcoming participation as a full TPP negotiating member alongside the United States, Australia, Brunei Darussalam, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

Progress Made and Future Challenges

According to USTR, negotiators progressed "significantly" in the following areas: (i) cross-border trade in services; (ii) government procurement; (iii) sanitary and phytosanitary (SPS) measures; (iv) trade remedies; (v) labor; and (vi) dispute settlement.

- **On (iii)**, the United States tabled a proposal that fell short of allowing for full dispute settlement proceedings in cases of alleged SPS-related violations, but Peru also reportedly tabled a proposal effectively allowing for full dispute settlement proceeding in such cases. However, the US proposal reportedly does envisage a consultative mechanism for SPS-related disagreements among members and a rapid response mechanism (RRM) to resolve SPS issues blocking shipments of perishable goods in a timely manner; and
- **On (v)**, Canada tabled a proposal on labor rights enforcement, but it is reportedly less stringent than that the United States is pushing; unlike the US proposal, the Canadian labor proposal does not allow for the suspension of trade concessions in labor-related disputes but, rather, Parties would develop an action plan to address the violating labor practice.

USTR notes that negotiators also progressed, although not "significantly", in the following areas: (i) technical barriers to trade (TBTs); (ii) e-commerce; (iii) rules of origin (ROOs); (iv) investment; (v) financial services; (vi) intellectual property rights (IPR); (vii) transparency; (viii) competition; and (ix) environment. USTR identifies from among these areas (vi), (viii) and (ix) as those which pose the greatest challenges in future negotiating rounds. We provide below several highlights of these discussions:

- **On (iii)**, the United States reportedly tabled a proposal for a short supply list (SSL) of items that would be subject to a cut-and-sew ROO, *i.e.*, an exception to the US-pushed yarn-forward ROO whereby items on the SSL originating from third countries and used to make apparel could still qualify for preferential duty treatment under TPP. US negotiators also appear willing to consider accepting exclusions to cumulation in the case of sensitive products;
- **On (iv)**, certain developing TPP members object to the US position that parties not block inbound or outbound capital transfers, noting that certain capital controls help to stem financial crises;
- **On (vi)**, several developing TPP members reportedly object to the US position on copyrights, asserting that it would limit access to content, and to the US position on pharmaceutical patent protections, asserting that it would have negative public health implications by limiting access to drugs; and
- **On (viii)**, there is reportedly strong push-back within the US business community to Australia's approach on state-owned enterprises (SOEs), which competes with a US SOE proposal. While

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both the US and Australian approaches are based on the concept of competitive neutrality for SOEs, the Australian approach reportedly seeks such competitive neutrality by requiring SOEs to pay into the coffers of the country where it is an amount offsetting the benefits it receives, which US firms believe would be ineffective at stemming the actual anti-competitive behavior.

In regard to market access, the USTR press release simply states that “negotiators made further progress on building the comprehensive [tariff] packages that will provide access to their respective markets for industrial, agricultural and textile and apparel products.” Although this language suggests nothing to its effect, TPP members remain deeply divided in regard to the US position on market access; US negotiators are continuing to pursue the negotiation of a new market access schedule only with countries with which the United States does not already have FTAs in effect. Such TPP members as Australia, which has an FTA in effect with the United States, object to this approach, arguing that the United States closing the door to renegotiating existing market access schedules provides little incentive for current US FTA partners to make concessions in other areas. US officials assert that a future partial renegotiation of existing market access schedules should not be ruled out but that USTR’s near-term focus for market access is on engaging those TPP members without an FTA with the United States. However, Assistant US Trade Representative (AUSTR) Barbara Weisel noted during the 17th round that the United States seeks to minimize the negative effect of having several bilateral market access schedules by maximizing the number tariff lines that go to zero upon TPP’s entry into force.

Japan and Next Steps

According to USTR, members also discussed how to smoothly integrate Japan into the negotiations following the completion of members’ respective internal procedures allowing for such integration, e.g., the 90-day period for the Obama Administration to consult with lawmakers on new trade agreement negotiations as prescribed by the now-expired 2002 Trade Promotion Authority (TPA) which the Obama Administration continues to observe nonetheless. Although this 90-day consultation period will not have expired by the beginning of the mid-July 2013 18th round, Japan will reportedly be able to participate in the tail end of the round, and TPP members have expressed a willingness to allow Japan to unofficially express its views and put forth proposals from the beginning of the round. However, Japan will technically be unable to view confidential negotiating documents until the Obama Administration-Congress consultation period expires.

The USTR notice asserts that President Obama and the leaders of the other ten TPP member countries still aim to conclude negotiations by the self-imposed October 2013 deadline, but the number of complex and contentious issues that remain outstanding makes this goal very difficult to achieve, and the forthcoming inclusion of Japan will likely further slow the current pace of negotiations. However, AUSTR Weisel noted during the 17th round that US officials are currently in the process of deciding on priority issues in order to be able to conclude negotiations before 2014, which suggests that USTR might show increasing flexibility on such difficult issues as IPR, environment, SOEs and market access as the self-imposed deadline nears.

TPP members will hold the 18th round of negotiations from July 15-25. Meanwhile, USTR reports that negotiators will continue intercessional work.

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WHITE & CASE LLP | 17

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

United States and Caribbean Community Sign TIFA

Vice President Joe Biden and Haitian President and Caribbean Community (CARICOM) Heads of Government Conference Chairman Michel Martelly signed on May 28, 2013 in Port of Spain the US-CARICOM Trade and Investment Framework Agreement (TIFA). Acting US Trade Representative Miriam Sapiro noted that the TIFA will provide a “valuable framework to discuss [bilateral] trade and investment issues” between the United States and CARICOM countries, *i.e.*, Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

The US-CARICOM TIFA will replace the June 1991 Agreement which established a Council on Trade and Investment (“1991 CTI”). Supplanting the 1991 CTI, the US-CARICOM Council on Trade and Investment contemplated under the TIFA (“TIFA CTI”) will address such issues as: (i) trade and investment facilitation; (ii) multilateral cooperation; (iii) intellectual property rights (IPR); (iv) labor rights enforcement; (v) environmental protection; and (vi) other trade barrier-related items. Parties aim to hold the first TIFA CTI meeting by late-2013.

TIFAs are mechanisms for ongoing dialogue and cooperation on trade and investment issues between two governments. However, US TIFAs do not require US congressional ratification and generally contain mostly non-binding language, detailing broad goals, expressing goodwill, and establishing a schedule for regular contact among the Parties’ trade and investment authorities. In this regard, the US-CARICOM TIFA is a positive step forward in terms of bilateral economic ties, but it bears less weight than a bilateral investment treaty (BIT) or a free trade agreement (FTA), both of which typically contain specific and binding commitments in such areas as trade in goods and services, investment, intellectual property rights (IPR), customs procedures, etc.

Click [here](#) for a PDF copy of the TIFA.

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