# White & Case LLP
# General Trade Report - JETRO

August 2013

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# UNITED STATES

# GENERAL TRADE POLICY

## Complainants Appeal US District Court Conflict Mineral Disclosures Decision; SEC Yet to Decide on Action against Another Decision by Court Vacating SEC Rules on Resource Extraction Payment Disclosures

### Summary

The appeal by the Complainant-Appellant to the Court of Appeals for the District of Columbia of the decision by the US District Court for the District of Columbia may come after the first annual due date for disclosures on "conflict minerals." The District Court ruled on July 23, 2013 in favor of the US Securities and Exchange Commission ("SEC") in regard to a challenge of the SEC's rules requiring certain disclosures for companies that use "conflict minerals" sourced from the Democratic Republic of the Congo (DRC) and adjoining countries. Although the Court of Appeals set the expedited appeal schedule, it is not yet certain whether its decision will come before the first due date for the disclosures. Earlier that month, on July 2, 2013, the same District Court ruled against the SEC in regard to a challenge of its rules requiring certain disclosures for resource extraction SEC-reporting companies regarding payments made to governments for the purpose of the commercial development of oil, natural gas or minerals. The SEC has not yet published whether it will appeal this decision or modify the rules.

The SEC promulgated the rules at issue in each case pursuant to requirements in the Dodd-Frank Wall Street Reform and Consumer Protection Act (PL 111-203 or "Dodd-Frank Act"). In addition, the United States Government Accountability Office ("GAO") published a report for the US Congress on July 18, 2013 that calls into question the effectiveness of the Dodd-Frank Act's Conflict Minerals disclosure requirements (and corresponding rules promulgated by the SEC) at actually addressing the humanitarian crisis in the DRC that motivated the legislation in the first place.

### Analysis

#### I. BACKGROUND

Dodd-Frank Act Sections 1502 and 1504

Two provisions of the Dodd Frank Act, Sections 1502 and 1504, require SEC-reporting companies (including foreign companies that file Form 20-F) to disclose certain information regarding their use of Conflict Minerals (defined below) originating from the DRC or adjoining countries, and regarding payments to governments for the commercial development of oil, natural gas or minerals.

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- **Section 1502** of the Dodd-Frank Act states that it is the "sense of [the United States] Congress that the exploitation and trade of Conflict Minerals originating in the Democratic Republic of the Congo is helping to finance conflict" in the country, that such conflict is "contributing to an emergency humanitarian situation therein," and that these facts warrant legislation regarding Conflict Minerals.[1] To help "ensure activities involving such minerals [do] not finance or benefit armed groups"[2] in the region, Section 1502 imposes annual disclosure obligations on SEC-reporting companies if Conflict Minerals (as defined below) originating from the DRC or adjoining countries (the "Covered Countries") are necessary to the functionality or production of a product that is either manufactured by the SEC-reporting company or contracted by that company to be manufactured.[3] The term "Conflict Mineral" is defined to include columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives (including tin, tantalum and tungsten) or any other mineral or its derivatives that the United States Secretary of State determines is financing conflict in the DRC or an adjoining country.[4]

- **Section 1504** of the Dodd-Frank Act further requires resource extraction SEC-reporting companies to include information in their annual reports about any payment made by the company, its subsidiary or an entity under the control of the company, to a foreign government or United States government for the purpose of the commercial development of oil, natural gas or minerals.[5]

SEC Adopts Rules to Implement Dodd-Frank Act Sections 1502 and 1504

The Dodd-Frank Act required the SEC to promulgate rules regarding the disclosure requirements in Sections 1502 and 1504. On August 22, 2012, the SEC adopted such final rules, which elaborated upon the mechanisms and triggers for the disclosure requirements pertaining to Conflict Minerals and resource extraction payments.[6] In the final rules, the SEC attempted to reduce the burden of compliance associated with the disclosure requirements. The final rules require affected companies to file their disclosures on a new Form SD by May 31, 2014.[7]

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[1] *See* Dodd-Frank Act, Section 1502(a), *available at*: http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf

[2] 156 Cong. Rec. S3976, May 19, 2010 (statement of Sen. Feingold).

[3] Section 1502 follows a three-step disclosure process: (1) the company must determine if Conflict Minerals necessary to the functionality or production of a product that is contracted to be manufactured or manufactured by the company itself; (2) if such Conflict Minerals are necessary, the company must report the results of a "reasonable country of origin inquiry" to determine whether any of the Conflict Minerals in its products originated from the Covered Countries; (3) if such Conflict Minerals are sourced from Covered Countries, the company must undertake and report the results of due diligence conducted on the source and chain of custody of its Conflict Minerals in order to more clearly determine whether the Conflict Minerals directly or indirectly financed or benefited armed groups in a Covered Country. The outcome of such due diligence will dictate, *inter alia*, whether the issuer is required to file a Conflict Minerals Report which would include an independent private sector audit. *See* Dodd-Frank Act, Section 1502(b), *available at*: http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf

[4] *See* Dodd-Frank Act, Section 1502(e)(4), *available at*: http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf

[5] *See* Dodd-Frank Act, Section 1504, *available at*: http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf

[6] *See* SEC Press Release, "SEC Adopts Rule for Disclosing Use of Conflict Minerals", August 22, 2013, *available at:* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171484002 , *and* SEC Press Release, "SEC Adopts Rules Requiring Payment Disclosures by Resource Extraction Issuers," August 22, 2013, *available at:* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171484028

[7] *Id.*

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Certain aspects of the SEC's final rules regarding Section 1502 and 1504 were challenged in court. Subsequently the US District Court for the District of Columbia ruled on these challenges.

## II. CHALLENGES TO SEC RULES

Unsuccessful Challenge to SEC's Rules on Conflict Mineral Disclosures

On July 23, 2013, the US District Court for the District of Columbia upheld the SEC's Conflict Mineral disclosure rules that require SEC-reporting companies to disclose whether Conflict Minerals sourced from the DRC or adjoining countries are necessary to the functionality or production of products they manufacture or contract to be manufactured.[8] The National Association of Manufacturers, US Chamber of Commerce and the Business Roundtable challenged the SEC's rules on two grounds: (i) that certain aspects of the rules[9] were "arbitrary and capricious"; and (ii) that the mandatory website disclosure violated the First Amendment of the United States Constitution. The Court sided with the SEC on both arguments.

Following the Court's decision, the rules continue to apply without change. The final outcome of this challenge remains uncertain as the plaintiffs appealed the decision on August 12, 2013.[10] Three days later, on August 15, 2013, the US Court of Appeals for the District of Columbia set a briefing schedule for the case, with the first brief due on September 11, 2013, and the reply brief from the SEC due on November 13, 2013.[11] In spite of the expedited briefing schedule, it is uncertain whether the appeal will be decided prior to the initial disclosure deadline of May 31, 2014. Affected companies should therefore prepare themselves for compliance with the rules by compiling the required information and engaging in the related inquiries.

Successful Challenge to SEC's Rules on Resource Extraction Payment Disclosures

In contrast to its ruling regarding the SEC's Conflict Mineral disclosure rules, on July 2, 2013, the US District Court for the District of Columbia vacated the rules adopted by the SEC requiring resource extraction issuers to disclose payments made to governments in connection with the commercial development of oil, natural gas and minerals.[12] The US Chamber of Commerce, American Petroleum Institute, Independent Petroleum Association and National Foreign Trade Council successfully challenged the SEC's rules on two grounds: (i) that the SEC's rules mandating public disclosure of the payment information were more burdensome than the underlying Dodd-Frank Act provision, which only requires a compilation of the payment information to be made public to the extent possible; and (ii) that the SEC had overreached by deciding to deny any disclosure

[8] The full text of the decision may be found at this link: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2013cv0635-37

[9] Including the reasonable country of origin inquiry, coverage of issuers that contract to manufacture products, phase-in periods, and the adequacy of the cost/benefits analysis.

[10] See a copy of the notice to appeal available at this link: http://www.conflictmineralslaw.com/files/2013/08/Notice-of-Appeal1.pdf

[11] The full briefing schedule may be accessed at: http://www.conflictmineralslaw.com/files/2013/08/NAM-Motion-to-Expedite-Appeal-8-15-13.pdf

[12] The full text of the decision may be found at this link: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_ doc?2012cv1668-51

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exemption, especially for companies whose home countries prohibit the disclosure of such payment information by law (*e.g.*, Angola, Cameroon, China and Qatar).[13]

Following the Court's decision in this case, the SEC's rules regarding resource extraction payment disclosures no longer apply. The SEC has not disclosed whether it intends to appeal the ruling, or whether it plans to undertake new rulemaking to address the Court's concerns. The Court's ruling did not invalidate Section 1504 of the Dodd-Frank Act that underlies the SEC's rules, and as a result, the SEC remains obligated to promulgate rules addressing the disclosure of resource extraction payments. Although the rules do not apply until the appeals process is completed and/or new rules are promulgated, companies subject to the SEC's resource extraction rules should continue to collect and document information to be disclosed under Section 1504 of the Dodd-Frank Act. The revised rules may change the disclosure process, but will not change the content of the information required under Section 1504 of the Dodd-Frank Act.

## III. GAO STUDY

In the midst of the US District Court rulings on the challenges to the SEC's Conflict Minerals disclosure rules, the GAO published a report for Congress on July 18, 2013 providing its assessment of whether the Conflict Minerals rules will ultimately achieve the humanitarian goals desired by Congress.[14] The GAO report found that certain factors in the DRC and the surrounding region may hinder the ability for the Conflict Minerals disclosure rules to realize their envisioned intent - reducing the benefits of trade in Conflict Minerals to armed groups in the area. The GAO report identified "constraining factors such as lack of security, lack of infrastructure and lack of capacity in the DRC that could affect the ability to expand on efforts to achieve conflict-free sourcing of minerals from the eastern DRC and thereby potentially contribute to armed groups' benefiting from the Conflict Minerals trade."[15]

The GAO report further noted concerns raised by some industry officials about sourcing Conflict Minerals from the DRC even through in-region sourcing initiatives. These officials noted the potential detrimental impact on brand reputational and the financial risk associated with sourcing from the DRC and arising from the disclosure requirements.[16] Whereas the SEC's rules were intended to minimize the flow of funds to militant groups in the region, the additional risks and costs imposed upon companies that source from conflict-free mines and smelters as a result of the rules adversely affect the conflict-free mines and smelters themselves. This report bolsters concerns about the SEC's rules raised by many companies that the method advanced by the rules to address

[13] The Court found the SEC's decision not be "arbitrary and capricious" in light of the limited explanations provided and the SEC's own assessment indicating that the lack of any exemption "drastically increased the [rules'] burden on competition and cost to investors." Refer to page 30 of the Court's decision, accessible at: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2012cv1668-51

[14] *See*, "SEC Conflict Minerals Rule — Information on Responsible Sourcing and Companies Affected," (hereinafter "GAO Report") available at: http://www.gao.gov/products/GAO-13-689

[15] *See,* Highlights of GAO Report, available at: http://www.gao.gov/products/GAO-13-689

[16] *See*, GAO Report p. 18.

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the humanitarian issues arising from conflict in the DRC and surrounding areas may be counterproductive.

# *US General Trade Policy Highlights*

## Senate Finance and House Ways and Means Leaders Address India's Allegedly Unfair Trade Practices

Senate Finance Committee Chairman Max Baucus (D-MT) and Ranking Member Orrin Hatch (R-UT) and House Ways and Means Committee Chairman Dave Camp (R-MI) and Ranking Member Sander Levin (D-MI) sent a letter to the US International Trade Commission (ITC) on August 2, 2013, requesting an investigation into India's trade practices that these lawmakers allege discriminate against US exports to and foreign direct investment (FDI) in India. The letter asserts that Indian officials limit market access for US goods and FDI, while promoting Indian domestic industries. The lawmaker's further note that India has not taken necessary steps to protect US intellectual property rights (IPR).

The letter requests that ITC provide a report covering (i) trends and policies in India affecting trade and FDI, including examples of measures to facilitate or restrict the flow of trade, (ii) descriptions of any significantly restrictive trade or FDI policies, the US sectors affected, and the general competiveness of sectors in India's economy that may benefit from such policies, (iii) case studies with quantitative analysis examining the economic effects of India's measures on the US economy, US trade and investment, and select sectors of the US economy, and (iv) a survey of US firms' perceptions of India's trade and investment policies and the effect they have had on US firms' strategies towards India.

The lawmakers' letter comes shortly after Vice President Biden's July 2013 trip to Mumbai where he discussed with Indian officials deepening bilateral economic integration, and pointed to the yet unconcluded US-India Bilateral Investment Treaty (BIT) as a means to achieve such integration. However, VP Biden also pointed to several US concerns in regard to the bilateral trade and investment relationship, namely (i) allegedly inadequate protection of US IPR, (ii) Indian local content requirements, (iii) limits on FDI into India, (iv) inconsistent tax treatment on the part of Indian tax authorities toward US persons, and (v) reported persistent barriers to Indian market access.

Click here for a copy of the lawmakers' letter.

## CRS Publishes Report on US-Japan Trade and Economic Relations; Salient US-Japan Issues for TPP Addressed

The Congressional Research Service (CRS) issued a report on August 2, 2013 titled "Japan-US Relations: Issues for Congress", providing a detailed analysis of US-Japan political and economic relations. Within the section on US-Japan economic issues, the report provides an overview of the bilateral economic relationship, and details salient bilateral trade issues.

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The report notes that Japan was the United States' fourth-largest source of US merchandise imports at the beginning of 2013, but that this figure undervalues the importance of US-Japan trade given that Japan exports intermediate goods to China for further processing and subsequent export to the United States. The report further notes that, at the same time, The United States was Japan's second-largest export market.

Economic Relationship

Despite tensions over trade issues characterizing the bilateral economic relationship during the three decades prior to 2000, such tensions have eased due to, *inter alia*, (i) Japan's slow economic growth having "changed the general US perception of Japan from one as an economic competitor to one as a 'humbled' economic power," (ii) the rise of China as an economic power and trade partner having caused US policymakers to shift attention from Japanese trade practices to those of China as a source of concern, (iii) the increased use of the World Trade Organization (WTO) as a forum for resolving trade disputes having "de-politicized [US-Japan] disputes and helped to reduce [bilateral] friction," and (iv) shifts in US and Japanese trade strategies toward bilateral and regional trade areas with third countries having lessened the focus on US-Japan bilateral economic tensions. Additionally, the report notes that China's emerging military might and the continued threat of North Korea have forced US and Japanese leaders to lend greater attention to security issues within the US-Japan relationship, which has drawn policymakers' attention away from the bilateral economic relationship.

Bilateral Trade Issues

The report then discusses specific bilateral trade issues, including:

- **Japanese Market Access for US Beef Exports.** The report notes that, on February 1, 2013, the Japanese government loosened its import restrictions on US beef exports to allow beef from cattle 30 months or younger for the first time since December 2003. The Office of the United States Trade Representative (USTR) continues to seek Japanese market access for US beef exports from cattle of any age;

- **Trans-Pacific Partnership (TPP).** The report notes US concerns over (i) Japanese non-tariff measures (NTMs) applied to US automotive exports, (ii) the alleged lack of a level playing field between Japan Post and private insurers, (iii) alleged Japanese NTMs applied in regard to insurance, government procurement, competition policy, express delivery and sanitary and phytosanitary (SPS) measures, (iv) potential defensive positions to protect Japanese sugar, beef and pork, dairy, rice, and wheat and barley industries, and (v) potential efforts on the part of Japan to nullify so-called Buy American provisions in US government procurement laws and regulations. The United States and Japan will hold negotiations parallel to those toward the TPP to address several of these outstanding issues, although talks the parties have already held have yielded an agreement whereby Japan accepted the establishment of (i) a special "safeguard" provision to handle injurious surges in automotive imports, (ii) a mechanism allowing for a so-called "snap-back" of US automotive tariffs if Japan fails to fulfill certain automotive trade commitments, (iii) phase-out periods for automotive tariffs equaling the longest phase-out period contemplated under TPP, and (iv) an increase from 2,000 to 5,000 the number of US-made

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vehicles that the United States can export to Japan under Japan's Preferential Handling Procedure (PHP); and

- **Insurance.** The report notes that US-based insurance providers face market access difficulties, particularly in regard to the provision of life and annuity insurance. Specifically, the report cites (i) alleged subsidies afforded to the insurance operations from revenues of other Japan Post operations, (ii) allegedly more stringent regulations governing privately-owned insurance providers, both domestic and foreign-owned.

CRS regularly issues plain-language, explanatory reports for the purpose of informing lawmakers in regard to issues on which they could eventually vote, *e.g.*, a future possible vote to ratify the bill implementing TPP. Such vote is unlikely in 2013.

Click here for a link to the CRS report.

## CRS Publishes Report on Trade Promotion Authority; Addresses Major Issues and Options for Congress

The Congressional Research Service (CRS) issued a report on August 2, 2013 titled "Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy", providing background on and analysis of past TPA laws. The report also discusses major issues lawmakers must resolve before renewing TPA, the 2002 version of which expired in 2007.

TPA partially delegates to the President Congress' constitutionally-afforded authority to regulate foreign commerce, *e.g.*, it allows the Office of the United States Trade Representative (USTR) to negotiate trade agreements for subsequent consideration in Congress under expedited legislative procedures, granted the President observes (i) certain negotiating objectives, and (ii) executive-congressional notification and consultation requirements. USTR negotiators typically have greater credibility when engaged in free trade agreement (FTA) negotiations if TPA is in force as negotiating partners have greater certainty that the positions these USTR negotiators propose reflect the desired outcomes of most lawmakers who must subsequently vote on any concluded FTA.

The report notes that the United States is currently negotiating four trade agreements, including (i) the Trans-Pacific Partnership (TPP), (ii) the World Trade Organization (WTO) Doha Development Agenda (DDA), (iii) the WTO Trade in Services Agreement (TISA), and (iv) the Transatlantic Trade and Investment Partnership (TTIP). USTR is negotiating these agreements without TPA, and the report asserts that renewing TPA could signal to relevant trading partners "congressional support for moving ahead with [these] trade negotiations."

Current debate over TPA renewal centers on (i) what US trade negotiation objectives should be, (ii) to what extent Congress should oversee trade negotiations, and (iii) how and in which areas the United States should enforce FTA commitments. In light of this debate, the report provides four possible future scenarios for TPA:

- **Failure to Renew TPA.** This scenario could delay negotiation and entry into force of FTAs. However, a failure to renew TPA would unlikely affect US trade policy relating to (i) executive

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and largely non-binding Trade and Investment Framework Agreements (TIFAs), (ii) unilateral preference programs (*e.g.*, Generalized System of Preferences (GSP)), and (iii) trade enforcement measures (*e.g.*, those relating to labor or environmental commitments under existing FTAs or trade remedies);

- **Ratification of a Targeted TPA.** Under this scenario, Congress would extend the TPA that expired in 2007 with few or no revisions, but such TPA renewal would only cover certain agreement(s) under negotiation (*e.g.*, the Trans-Pacific Partnership (TPP) and/or the Transatlantic Trade and Investment Partnership (TTIP));

- **Modification of TPA.** This scenario envisages Congress extending an updated TPA for a certain period of time into the future, but not exclusively for specific FTAs. Possible updates include modified negotiating objectives in regard to (i) state-owned enterprises (SOEs), (ii) intellectual property rights (IPR), labor and environment, *i.e.*, so-called "May 10 issues," and (iii) regulatory coherence; or

- **Permanent TPA Extension.** Among several the iterations of this scenario is one whereby lawmakers would (i) make permanent the procedures for congressional consideration of concluded FTAs, but (ii) require the House and Senate to approve the FTA negotiations into which USTR intends to enter, and to provide USTR negotiation objectives for such negotiations.

CRS regularly issues plain-language, explanatory reports for the purpose of informing lawmakers in regard to issues on which they could eventually vote, *e.g.*, a future possible vote to renew TPA. President Obama requested in a July 30 speech that Congress provide this TPA, but he linked TPA renewal to a reauthorization of Trade Adjustment Assistance (TAA), scheduled to expire on December 31, 2013. TAA is a program that aims to aid US workers whom international trade adversely affects, although congressional Republicans often question the purpose and effectiveness of TAA.

Click here for a link to the CRS report.

## DOE Announces Additional LNG Export Authorization

The Department of Energy (DOE) announced on August 7, 2013 that it has conditionally authorized Lake Charles Exports LLC to export from Louisiana domestically-produced liquefied natural gas (LNG) to countries with which the United States has not entered a free trade agreement (FTA). The Department first granted authorization to Sabine Pass LNG Terminal export from Louisiana LNG to non-FTA countries in May 2011, and subsequently granted similar authorization to the Freeport LNG Terminal in Texas. In this regard, DOE's August 7 announcement marks the third authorization to export LNG to non-FTA countries.

In regard to these non-FTA countries, federal law generally directs DOE to grant export authorization pending a determination that such exports would be consistent with public interest. DOE's August 7 announcement stems from a public interest review that took into account, *inter alia*, the economic, energy security, and environmental impacts of granting LNG export authorization to Lake Charles LLC.

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DOE's August 7 decision comes in the context of Senate Energy and Natural Resources Committee Ranking Member Lisa Murkowski (R-AK) having released on August 6 a white paper titled "The Narrowing Window: America's Opportunity to Join the Global Gas Trade" that argues in favor of expanding US LNG exports. In a related press release, Sen. Murkowski asserts that the "United States has a historic opportunity to generate enormous geopolitical and economic benefit by expanding its role in the global gas trade." The white paper provides in-depth analysis of the domestic and global gas markets, and includes a series of policy recommendations urging the timely approval of export applications and the development of US natural gas resources.

DOE asserts that it will continue to process currently pending LNG export applications on a case-by-case basis. Sen. Murkowski's white paper notes that DOE has received more than 20 of such applications.

Click here for a copy of DOE's August 7 decision, and here for a copy of Sen. Murkowski's white paper.

## USTR Froman Provides Outlook on Future of AGOA

On August 12, 2013, United States Trade Representative (USTR) Michael Froman spoke before the 12th African Growth and Opportunity Act (AGOA) Forum in Addis Ababa. In his remarks to senior Obama Administration officials, Ministers of African governments, and US and African business and civil society stakeholders, he detailed progress made since the United States first established AGOA in 2000, provided possible next steps for the AGOA program, and reinforced the Obama Administration's commitment to US-Africa trade and economic cooperation. AGOA enables 39 eligible sub-Saharan African countries to export most products duty-free to the United States.

Detailing potential areas for review in preparation for a "seamless" renewal before AGOA lapses on October 1, 2015, USTR Froman focused on the following areas:

- **Taking Inventory.** USTR Froman urged policymakers to take inventory of (i) which non-commodity African exports have the greatest potential for growth and integration into dynamic global value chains, (ii) how AGOA can promote regional integration and spur diversification, and (iii) how to better use such tools as the Partnership for Growth, the Millennium Challenge Corporation compacts, Power Africa and Trade Africa to increase AGOA utilization and to address the issues beyond AGOA which damage Africa's competitiveness;

- **Discussing Specifics AGOA Reforms.** USTR Froman urged policymakers to (i) examine thousands of duty-free tariff lines under AGOA to determine eligibility of exporters in light of certain US sensitivities, (ii) consider whether there should be graduation out of AGOA for sectors or countries, and (iii) brainstorm solutions for problems relating to rules of origin (ROOs) and science-based regulatory measures, and consider trade facilitation, customs harmonization, infrastructure development as means of lowering the costs of getting goods to market in Africa;

- **Looking at Reciprocal Preferential Trade.** USTR urged policymakers to (i) examine African trade and investment relationships with, *inter alia*, China and the European Union (EU), and (ii) consider how to move forward with AGOA renewal in light of Africa's growing number of two-

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way, reciprocal trade agreements which could put US firms at a "competitive disadvantage in the rapidly growing and dynamic African market;"

- **Targeting Specific AGOA Member Country Trade Policies.** USTR Froman urged policymakers to consider how to combat "bad policies and common pitfalls, like rigid localization requirements that serve as barriers to trade and hinder the development of competitive industries."

Although AGOA will not expire until September 30, 2015, there is always at least baseline congressional interest in seeking reform of US trade preference programs, *e.g.*, AGOA and the Generalized System of Preferences (GSP), whenever the opportunity emerges to renew them. However, despite this baseline perennial interest, USTR Froman asserted in his remarks that "it is very possible that [the United States] will conclude that AGOA should just be renewed as is."

Click here for a copy of USTR Froman's remarks.

## 18 House Lawmakers Urge USTR Froman to Prioritize E-Commerce Issues in Trade Agreement Negotiations

Representative Jared Polis (D-CO) and 17 other House Lawmakers, all but two of whom are Democrats, sent a letter to United States Trade Representative (USTR) Michael Froman on August 5, 2013, requesting that he prioritize issues relating to electronic commerce ("e-commerce") in all trade agreements the United States negotiates or into which the United States enters. The letter also noted the importance that any bill to renew Trade Promotion Authority (TPA) "set forth modern trade negotiating objectives that reflect the Internet's broad impact on job growth and the US economy and not merely repeat objectives from past bills."

Rep. Polis asserts that key to entrepreneurship and e-commerce are (i) unrestricted cross-border data flows, (ii) the elimination of localization and other "protectionist" measures, (iii) the establishment of liability protections for the platforms on which Internet users communicate (*e.g.*, limitations on liability of internet service providers for intellectual property rights violations of their users), and (iv) a balanced intellectual property (IP) framework. The letter particularly focuses heavily on IP, asserting that US trade agreements should balance the interests of such Internet actors as content providers, Internet cloud providers, online marketplaces, social networks, access providers, discussion forums, search engines, creative artists and users in order to "[enable] new technologies and transformative ways to deliver content."

The letter's focus on targeting foreign localization requirements in regard to e-commerce is consistent with increased interest in the subject matter among Obama Administration officials, particularly in the context of the ongoing negotiations toward the Trans-Pacific Partnership (TPP). US TPP negotiators are aggressively seeking to prevent fellow TPP member countries from maintaining or establishing measures that block cross-border data flows or require Foreign Service providers to place computer servers in-country.

TPA details for trade agreement negotiators in the Executive Branch (*i.e.*, within the Obama Administration) congressional trade negotiating objectives and notification procedures, and provides

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for expedited legislative consideration of concluded trade agreements. It remains unclear to what extent Rep. Polis' letter will have an impact on the e-commerce-related language in the forthcoming TPA renewal bill. While there is great interest among lawmakers in updating the now-expired 2002 TPA with language addressing such 21st century issues as e-commerce, and cross-border data flows and server location are priority areas for US service providers, finding a balanced approach of IP issues will likely be a more difficult endeavor, particularly given the strong show of resistance against Stop Online Piracy Act (SOPA) in 2011 and 2012. Additionally, only two of the letter's co-signers, *i.e.*, Reps. Thompson (D-CA) and Doggett (D-TX), sit on the House Ways and Means Committee, which is the principal House committee of jurisdiction for international trade issues.

Click here for a press release announcing the letter.

## President Obama Issues Executive Order Easing Ban on Imports from Burma

The Burmese Freedom and Democracy Act (BFDA) expired on July 28, 2013. In light of BFDA's expiration, President Obama issued an Executive Order on August 7, 2013 repealing the provisions of Executive Order 13310, issued July 28, 2003, which implemented a broad BFDA import ban on Burmese products. Shortly after issuing the August 7 Executive Order, President Obama sent a letter to House Speaker John Boehner (R-OH) explaining its purpose and provisions. Deputy National Security Advisor (DNSA) for Strategic Communications Ben Rhodes issued a concurrent statement providing plain-language insight into the Obama Administration's evolving policy towards Burma, which led to the issuance of the Executive Order.

The August 7 Executive Order does prohibit the importation into the United States of any jadeite or rubies mined or extracted from Burma and extends such ban to any articles of jewelry containing jadeite or rubies mined or extracted from the country. However, it waives certain financial sanctions prescribed under the Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008 against certain members of the Burmese State Peace and Development Council (SPDC), the Union Solidarity Development Association (USDA) and the Burmese military. The lifting of certain JADE sanctions notwithstanding, due to concerns over alleged persistent human rights abuses, the August 7 Executive Order notes the continued prohibition under the International Emergency Economic Powers Act (IEEPA) on transactions with persons included on the Department of the Treasury's List of Specially Designated Nationals and Blocked Persons (SDN List).

The issuance of the August 7 Executive Order comes in the context of the Obama Administration's recent moves to ease trade sanctions on Burma in response to apparent political and economic reform efforts underway in the country. In addition to the easing of economic sanctions, the United States and Burma have largely normalized diplomatic relations in light of such reform efforts. For instance, in May 2012 President Obama nominated Ambassador Derek Mitchell to be the first US ambassador to the country in over two decades *(please refer to the W&C US Trade Alert dated May 25, 2012)*.

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Click here for a copy of the August 7 Executive Order, here for a copy of the letter to Rep. Boehner, here for DNSA Rhode's statement, here for a copy of Executive Order 13310, here for a copy of the Tom Lantos Block Burmese JADE Act of 2008, and here for a copy of the IEEPA.

## ITC Releases Report Exploring Digital Trade Issues

The International Trade Commission (USITC) released part one of a report titled "Digital Trade in the US and Global Economies" in July 2013. The report, requested by the US Senate Committee on Finance, provides information on the role of digital trade in both US domestic commerce and international trade, describes significant barriers and impediments to digital trade, and presents potential approaches for further assessing digital trade and its contributions to the US economy.

The report describes digital trade in the context of the US economy through (i) digitally delivered content, (ii) social media, (iii) search engines, (iv) digital services, and (v) uses of internet technology in the broader US economy. In detailing the role digital trade-related industries play in international trade and investment, the report examines:

- **Cross-Border Services Trade.** The report summarizes the value and growth of different categories of digitally-enabled services, including (i) business, professional and technical services, (ii) services deriving in royalties and license fees, and (iii) financial and insurance services.

- **Foreign Investment.** The report provides data on sales by US majority-owned foreign affiliates (MOFAs) and on US outward foreign direct investment (FDI) to illustrate interest and investment in digital products and services.

- **Global Services**. Using figures collected by the Organisation for Economic Co-operation and Development (OECD), the report presents US digital trade in the context of global trade. The report references US Census data on US exports and imports relating to e-commerce in order to calculate an approximate quantification of cross-border data flows.

- **Non-Tariff Measures**. The report provides analysis on non-tariff measures (NTMs) identified by industry participants and experts as potential barriers or impediments to digital trade, such as (i) localization measures, (ii) data privacy and protection measures, (iii) intellectual property rights (IPR)-related measures, (iv) censorship measures, and (v) border measures and limits on immigration.

The report identifies several affirmative policies and principles considered necessary to foster the growth of digital industries and the further development of the Internet.

Such USITC fact-finding investigations are generally in response to requests from the US Trade Representative, the House Committee on Ways and Means, or the Senate Committee on Finance. The resulting reports aim to contain objective findings and independent analyses, making no recommendations on policy or other matters found in the reports.

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On August 20, 2013, USITC published a Federal Register notice announcing a public hearing scheduled for September 25, 2013 concerning the second part of this report.

Click here for a copy of the report.

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# FREE TRADE AGREEMENTS

## *Free Trade Agreement Highlights*

### CRS Publishes Report on Major Issues and Challenges in Proposed Transatlantic Trade and Investment Partnership

The Congressional Research Service (CRS) issued a report on July 23, 2013, providing an overview of major issues and challenges facing Congress in regard to the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the European Union (EU) and the United States. CRS regularly issues plain-language, explanatory reports for the purpose of informing lawmakers in regard to issues on which they might eventually vote, *e.g.*, a future possible vote to ratify the bill implementing TTIP.

The report notes that Congress' constitutionally-afforded authority to "regulate commerce with foreign nations" lends Congress "an important legislative, oversight, and advisory role when" the Office of the United States Trade Representative (USTR) negotiates trade agreements on its behalf. In light of Congress' purview over international trade, the report includes explanations of major issues and challenges in such TTIP areas as (i) market access, including discussion on tariffs and cultural exceptions, (ii) regulatory issues, including discussion on technical barriers to trade (TBTs) and sanitary and phytosanitary (SPS) measures, and whether TTIP should cover financial sector regulations, and (iii) TTIP rules, including discussion on those relating to investment, intellectual property rights (IPR), labor and environment, trade facilitation, small- and medium-sized enterprises (SMEs), cross-border data flows and data privacy, and state-owned enterprises (SOEs).

The report also explains the purpose and content of Trade Promotion Authority (TPA), which details congressional trade negotiating objectives and notification procedures, and provides for expedited legislative consideration of concluded trade agreements. The 2002 TPA expired in 2007, and lawmakers are currently engaged in crafting a renewal TPA. In addition, the report provides possible implications of TTIP for future US trade policy, and gives an outlook on the prospects for a successful conclusion of TTIP negotiations.

Click here for a copy of the CRS report.

### GAO Issues Report Identifying Factors behind Successful International Regulatory Cooperation; Implications for TTIP Addressed

The Government Accountability Office (GAO) released a report on August 1, 2013, examining the activities in which US government agencies regularly engage in regard to international regulatory cooperation. The report explains existing international regulatory cooperation as enshrined in such agreements as the World Trade Organization (WTO) Technical Barriers to Trade (TBT) Agreement, WTO Sanitary and Phytosanitary (SPS) Measures Agreement and US free trade agreements (FTAs)

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already in force. Additionally, the report provides several possible implications of such international regulatory cooperation activities for ongoing negotiations toward the Transatlantic Trade and Investment Partnership (TTIP).

The report asserts that US companies face difficulties competing in foreign markets when countries apply different regulatory requirements to address similar health, safety or other issues. In this regard, the report:

- **provides an overview of US regulatory agencies' international cooperation activities,** *i.e.*, (i) information sharing and scientific collaboration, (ii) development and use of international standards, (iii) observance of equivalency agreements, (iv) strengthening capacity of developing countries, (v) work sharing with foreign counterparts, and (vi) coordination on voluntary programs;

- **examines ways that US agencies incorporate outcomes from international regulatory cooperation activities and consider competitiveness during rulemaking,** *e.g.*, whether to (i) conduct a separate analysis when developing regulations on the competitiveness impacts on US businesses, and (ii) employ international standards for the purpose of lowering costs for US businesses and reducing barriers to trade; and

- **examines factors identified by US agencies and stakeholders that act as facilitators or barriers to international regulatory cooperation,** *e.g.*, whether cooperation activities (i) have dedicated resources, (ii) follow established processes, (iii) operate under high-level leadership, (iv) receive input from scientific and technical exchanges, (v) encourage stakeholder involvement, (vi) occur due to statutory authority, and (vii) enjoy early and ongoing coordination.

The report recognizes the relevance of international regulatory cooperation for the TTIP negotiations, and notes that one of USTR's principal aims in such negotiations is to "[reduce] the cost of differences in regulation and standards by promoting greater compatibility, transparency, and cooperation." As tariffs levied on imports into the United States and the European Union are generally low, greater economic benefit of TTIP will likely derive from EU-US regulatory cooperation than from mutual tariff reduction/elimination. Consequently, the report's discussion of US procedural issues relating to international regulatory cooperation provides insight into how the US TTIP negotiators will likely engage their EU counterparts, and how both parties' regulators will inform these negotiators' positions.

Click here for a copy of the GAO report.

## United States Seeks Public Input on Interim Environmental Review of TPP

The United States Trade Representative (USTR) published a notice on August 28, 2013, announcing a request for public comments on the USTR interim environmental review of the Trans-Pacific Partnership (TPP). USTR's practice of conducting written environmental reviews seeks to provide information to policymakers and the public concerning the potentially significant positive and negative environmental implications of free trade agreements, to identify complementarities between

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trade and environmental objectives, and to help formulate appropriate responses to identified environmental impacts.

Reviews provide support for trade negotiations, and the United States has carried out such reviews in the context of all major trade agreements since 1992, when the first review was performed for the purposes of the then forthcoming entry into force of NAFTA. The Trade Act of 2002 created a formal obligation for USTR to perform environmental reviews of certain international trade agreements, consistent with Executive Order 13141, titled "Environmental Review of Trade Agreements" (64 FR 63169, 1999) and its implementing guidelines (65 FR 79442, 2000), and to provide reports to the House and Senate. The focus of environmental reviews is predominantly on the domestic environmental effects of the FTA concerned, though reviews will also consider transboundary and international environmental concerns, where appropriate.

This interim environmental review considers the TPP's environmental impact at a high level, rather than the environmental impact of actual provisions agreed to thus far. Overall, the review concludes that the changes in the pattern and magnitude of trade flows estimated to result from the TPP – both in goods and services – are not likely to result in significant adverse environmental impacts in the United States. The TPP may lead to improved maintenance and enforcement of US environmental regulations as a result of greater access to environmental technologies, which can support environmental and natural resource stewardship goals both in the United States and in other TPP countries. Moreover, TPP could have positive environmental impacts in TPP partner countries by reinforcing conservation efforts and legal environmental initiatives, both domestic and regional.

Although the review considers that the likelihood and magnitude of any increased risks appear to be small, it identifies certain issues for further analysis, including: (i) localized environmental impacts at selected US maritime ports, predominantly on the West Coast; (ii) increased risk of introduction of invasive species; and (iii) potential environmental impacts caused by increased domestic liquefied natural gas production, including non-conventional extraction techniques (*i.e.*, hydraulic fracturing) and reduced investment in renewables. The review invites the public to comment on each of these issues, as well as the conclusions on the environmental impact of TPP more generally, no later than 11:59pm, September 25, 2013.

Click here for a copy of the USTR notice, and here for a copy of the interim review.

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# CUSTOMS

## *Customs Highlights*

### DOC Tightens Rule on Use of Market-Economy Input Prices in Non-Market Economy AD Margin Calculations

The Department of Commerce (DOC) published a final rule in the Federal Register on August 2, 2013, modifying its long-standing regulation concerning the use of market-economy input prices to assign costs to non-market economy (NME) respondents' consumption of raw materials, packing inputs, and other "factors of production." The Department's normal NME practice is to use publicly available "surrogate values" from a surrogate country outside the NME to assign costs to the NME respondent's factors of production.

The only exception to this rule has been to apply an NME respondent's actual purchase prices for individual inputs if at least one-third of the input was purchased from a market-economy supplier and paid for in a market-economy currency. Under DOC's new rule, DOC will not use a market-economy purchase price in lieu of a surrogate value unless "substantially all," *i.e.*, 85 percent, of the input is sourced from a market-economy supplier and paid for in a market-economy currency.

The significant change in this rule will make it difficult for NME respondents to avoid the application of often unfavorable surrogate values to their factors of production, which will also make it more difficult for NME respondents to predict the outcome of AD proceedings and avoid dumping. DOC changed its rule on the premise "that a market economy input price is not the best available information for valuing all purchases of that input in cases in which market economy purchases of an input do not account for substantially all purchases of such input."

DOC issued the final rule as part of a package of trade law enforcement initiatives announced in 2010 under President Obama's National Export Initiative (NEI).

Click here for a copy of the FR notice.

### CITA Adds Corduroy to Annex of Items Not Immediately Available in DR-CAFTA Countries

The Committee for the Implementation of Textile Agreements (CITA) published a notice in the Federal Register (FR) on August 27, 2013, announcing that certain polyester/nylon cut corduroy fabric is not available in commercial quantities in a timely manner in Parties to the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA). CITA has added the fabric to the Textile and Apparel Commercial Availability Provision (Annex 3.25) of DR-CAFTA in unrestricted quantities.

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Articles that contain products on the Annex 3.25 list will remain eligible for preferential treatment provided they otherwise meet the rules of origin (ROOs). Under the DR-CAFTA Implementation Act, CITA is the authority for modifying the Annex 3.25 list. CITA is responsible for matters affecting US textile trade policy and supervising the implementation of all textile trade agreements to which the United States is party. The Department of Commerce chairs the committee, which includes the Departments of State, Labor and Treasury and the Office of the US Trade Representative.

Click here for a copy of the notice.

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# MULTILATERAL

MULTILATERAL

## *Multilateral Highlights*

### UNCTAD Publishes Report on Non-Tariff Measures for Developing Countries

On August 12, 2013, The United Nations Conference on Trade and Development (UNCTAD) published a report providing an overview of topics relating to non-tariff measures (NTM) with an emphasis on information mostly relevant to developing countries. The report, titled "Non-Tariff Measures to Trade: Economic and Policy Issues for Developing Countries," aims to educate developing countries on the use and implications of such non-tariff trade policy instruments.

The report provides an extensive overview of NTMs, including: (i) the classifications of NTMs and their utilization in traditional trade policy, (ii) frameworks and methodologies for a quantitative analysis of the effects of NTMs on trade and welfare, (iii) evidence and findings from case studies on several technical and non-technical NTMs, (iv) regulatory transparency in NTMs and possible improvements through notification systems, reporting and monitoring, and (v) existing regulatory frameworks of NTMs provided by the World Trade Organization (WTO) and regional and bilateral agreements. The report also includes a series of recommendations on reforming NTMs, including case studies of regulatory reform, and a practical step-by-step approach to streamlining NTMs.

UNCTAD states that it is crucial for developing countries to be fully aware of the effects of NTMs, as their market access increasingly depends on compliance with trade regulatory measures that are beyond the scope of traditional tariffs and preferential schemes. Furthermore, the report suggests that a better understanding of NTMs will contribute to more balanced international trade agreements and will improve multilateral dialogue on trade policy issues.

Click here for a copy of the UNCTAD report.

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