



# White & Case LLP General Trade Report - JETRO

September 2013

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**Contacts:**

Scott Lincicome, Esq.  
701 13th Street NW, Washington, DC 20005  
slincicome@whitecase.com

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
sscoles@whitecase.com

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## UNITED STATES

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### GENERAL TRADE POLICY

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#### *US General Trade Policy Highlights*

### **Undersecretary of Commerce Frank Sanchez Announces Departure for the Private Sector**

United States Undersecretary of Commerce for International Trade, Francisco Sanchez, has announced his resignation from the post, though his departure from Office will not come until later this fall. In an email to colleagues circulated on September 3, 2013, Mr. Sanchez stated that he will delay his departure in order to help ensure a successful consolidation of the International Trade Administration and the first "SelectUSA" Summit, scheduled for October 31-November 1.

The consolidation of the International Trade Administration was confirmed by Mr. Sanchez in June, 2013, and will involve the aggregation of the ITA's current four offices into three. While the various changes involved do not require legislation, they require a so-called "reprogramming" of existing funds, and consequently consent was required from the relevant appropriations committees. The consolidation is anticipated to save \$8 million, which will be reassigned to support export promotion and trade law enforcement, identified by Sanchez as two of the President's core missions.

SelectUSA is an initiative of the President, created by Executive Order in 2011, to attract and retain investment in the United States, particularly in the context of federal-level programs and services related to business investment. The upcoming SelectUSA Investment Summit is the first of its kind, and intends to connect foreign and domestic investors, senior Administration officials, and state and local officials.

It is unclear at this stage who will replace Mr. Sanchez.

### **US DOE Announces Approval of Fourth License Application to Export Liquefied Natural Gas to Non-FTA Countries**

On September 11, 2013, the United States Department of Energy (DOE) announced that it has approved the fourth license application to export domestically produced liquefied natural gas (LNG) to countries with which the United States does not have a free trade agreement (FTA). Subject to an environmental review and final regulatory approval, DOE has conditionally authorized Dominion Cove Point LNG, LP to export as much as 0.77 billion cubic feet of LNG per day for over 20 years, from the Cove Point LNG Terminal in Calvert County, Maryland.

Section 3 of the Natural Gas Act (15 U.S.C. § 717b) requires DOE approval for all exports of LNG, *Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice. No specific action is to be taken on the information provided without prior consultation with White & Case LLP.*

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#### **Contacts:**

Scott Lincicome, Esq.  
701 13th Street NW, Washington, DC 20005  
slincicome@whitecase.com

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
sscoles@whitecase.com

including exports to countries that have an FTA with the United States. However, exports to non-FTA countries are subject to a discretionary "public interest" test, and DOE may refuse to grant permission to export if it finds that the exports "will not be consistent with the public interest."

The "public interest" assessment for exports to non-FTA countries results in long delays in the application process, and this has become an increasing concern for domestic producers. As technological advances, particularly in the area of hydraulic fracturing (*i.e.*, "fracking"), allow producers to extract greater quantities of natural gas at lower cost, they are seeking to take advantage of overseas markets. As a result, domestic producers have filed with DOE an increasing number of export applications, and DOE's lengthy and non-transparent review process has come under scrutiny.

Ranking Member of the US Senate Committee on Energy and Natural Resources Lisa Murkowski, a proponent of US gas exports, welcomed DOE's approval of Dominion Cove Point's application in a September 11, 2013 press release, but also took the opportunity to note that Dominion had filed its application in October 2011. The average wait time for such decisions from DOE has been 22 months to-date. Courtesy of Sen. Murkowski's Office, the following chart summarizes the long delays in the DOE approval process:

**Approved LNG Export Orders to Non-FTA Countries**

	Date of Non-FTA Application	Date of Approval	Days of Delay	Months
Sabine Pass	9/7/2010	5/20/2011	255	8.5
Freeport LNG	12/17/2010	5/17/2013	882	29.4
Lake Charles Exports	5/6/2011	8/7/2013	824	27.5
Dominion Cove Point	10/3/2011	9/11/2013	709	23.6
<b>AVERAGE</b>				<b>22.3</b>

In response to DOE's latest approval for Dominion, Sen. Murkowski also stated that she is "encouraged that DOE seems to have picked up the pace of its reviews. It's important that DOE now move with timely purpose onto the next."

Sen. Murkowski's recent comments form part of a larger effort to put pressure on DOE to increase the rate of decisions regarding export license applications for LNG exports to non-FTA countries. In a white paper released on August 6, 2013, entitled "The Narrowing Window: America's Opportunity to Join the Global Gas Trade," Sen. Murkowski outlines the case for LNG exports and urges swift action by DOE with respect to license approvals. Upon release of the white paper, Sen. Murkowski commented that "[t]he United States has a historic opportunity to generate enormous geopolitical and economic benefits by expanding its role in the global gas trade." She urged the United States "to send a clear and resounding message that the United States is a reliable trading partner and is ready to do business." Based on the latest analysis from academia, think tanks, the private sector, and government agencies, the report warns that "[w]ith additional projects in the planning stages in

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701 Thirteenth Street NW, Washington, DC 20005  
slincicome@whitecase.com

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
sscoles@whitecase.com

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Qatar, Australia, Canada, and elsewhere, the world simply may not need LNG from the [United States] to meet new demand in the future."

An August 2, 2013 joint letter to Energy Secretary Ernest Moniz from Senate Energy and Natural Resources Committee Chairman Ron Wyden and Ranking Member Murkowski, has also taken issue with DOE's approval process. The letter expressed concern and requested more information regarding prior DOE approvals in which DOE "claims the authority to modify or rescind prior approvals." The letter also comments that "greater transparency and certainty in connection with LNG decisions would be beneficial to all parties." The DOE has yet to issue a response.

More than 20 applications to export LNG to non-FTA countries are currently pending before DOE. License approvals are expected to continue on a staggered basis.

Click [here](#) for a copy of DOE's press release, [here](#) for a copy of Sen. Murkowski's comments, and [here](#) for the white paper.

## **OECD Reports Rising Support to Agriculture and Recommends Phasing out Production-Linked Counter-Cyclical Payments; Farm Bill Debate Continues in United States**

On September 19, 2013, the OECD published its annual report on Agricultural Policy Monitoring and Evaluation, highlighting that government support for agriculture rose during 2012, which challenges a long-term downward trend and the historic lows recorded in 2011. The Producer Support Estimate (PSE), which measures support arising from policies targeted to agriculture relative to a situation without such policies, increased to 17 percent of gross farm receipts in 2012, as compared to 15 percent in 2011. The report covered 47 countries that account for almost 80 percent of global farm output. The OECD surmises in the report that declines in commodity prices on international markets are the principal factor in changes to producer support, rather than explicit policy changes.

Based on these findings, the OECD recommends further delinking farm support and production, whereby such production-linked policies as output payments and input subsidies "distort" producer decisions and can lead to "inefficient allocation" of public resources. The report also asserts that, even where a large share of support is now delinked from production, payments tend to reflect past entitlements or on farm area, and thus favor the largest farms. Nevertheless, the OECD observes that the longer-term trend in the OECD countries continues toward support measures delinked from production, but better targeting of such explicit goals as environment sustainability has been slow to develop.

As alternative policies to achieve food security, the OECD report suggests a stronger government orientation toward reducing poverty and developing safety nets. In the long-term, the report recommends investments in innovation policy to improve sector profitability, competitiveness and sustainability, which in turn generates such "high social returns" as technology transfers and infrastructure investments.

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701 Thirteenth Street NW, Washington, DC 20005  
[slincicome@whitecase.com](mailto:slincicome@whitecase.com)

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
[sscoles@whitecase.com](mailto:sscoles@whitecase.com)

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In this context, the report suggests that the OECD views the ongoing policy debate over the crafting of a new US Farm Bill as an opportunity to reform US farm support, address disparities in equity across agricultural sectors, and “[enhance US] compliance with multilateral trade obligations.” The US Chamber of Commerce, National Association of Manufacturers and National Foreign Trade Council echo this sentiment in a September 12, 2013 letter to the leaders of the Senate and House Agriculture committees. The letter asserts that “both the Senate Adverse Market Payments and House Price Loss Coverage counter-cyclical programs [could] run the substantial risk of violating obligations the United States has undertaken as a signatory of the [World Trade Organization (WTO)] agreements.” Passage and reconciliation of the House and Senate versions of the Farm Bill has been difficult due to disagreements over the bills’ funding for domestic nutrition support, and it therefore remains unclear when President Obama will be able to enact into law a new Farm Bill.

Click [here](#) for a copy of OECD 2013 Report Agricultural Policy Monitoring and Evaluation, [here](#) for the OECD Producer Support Estimate by country in Excel, and [here](#) for the joint letter by US business groups.

## USTR Requests Public Comments for 2013 Special 301 Out-Of-Cycle Review of Notorious Markets

On September 20, 2013, the Office of the United States Trade Representative (USTR) published a notice in the Federal Register, requesting written submissions from the public identifying potential Internet and physical notorious markets that exist outside the United States for the 2013 Notorious Markets List. In 2010, USTR began publishing the Notorious Markets List as an Out-of-Cycle Review separately from the annual Special 301 report. This review of notorious markets results in the publication of examples of Internet and physical markets that have been the subject of enforcement action or that may merit further investigation for possible intellectual property rights (IPR) infringements. The deadline for interested parties to submit written comments is October 11, 2013.

Click [here](#) for the notice in the Federal Register.

## US and Mexican Officials Hold First High-Level Economic Dialogue

On September 20, 2013, US Vice President Joe Biden, US Trade Representative (USTR) Michael Froman, Secretary of Commerce Penny Pritzker and Assistant Secretary of State for Economic and Business Affairs Jose Fernández met with Mexican Secretary of Finance Luis Videgaray, Secretary of Economy Ildefonso Guajardo and Secretary of Foreign Relations José Antonio Meade for the first US-Mexico High-Level Economic Dialogue (HLED). In parallel, USTR Froman held a meeting with Secretary of Economy Ildefonso Guajardo to discuss prospects for successfully concluding negotiations of the Trans-Pacific Partnership (TPP) before 2014.

HLED comprises three principal pillars:

- **Promoting competitiveness and connectivity**, including in the areas of (i) transportation, and

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Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
sscoles@whitecase.com

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(ii) telecommunications;

- **Fostering economic growth, productivity, entrepreneurship and innovation**, including in the areas of (i) joint investment promotion, (ii) economic development on the border and a comprehensive economic development strategy, (iii) better utilization of the North American Development Bank (NADB), (iv) partnering on advanced manufacturing, (v) entrepreneurship, and (vi) workforce development; and
- **Partnering for regional and global leadership**, including in the areas of (i) partnering to promote development in Central America, (ii) regional trade priorities, and (iii) transparency and anti-corruption.

In regard to trade- and investment-related outcomes of this first HLED, the parties agreed to (i) reform the US-Mexico bilateral air transport relationship, (ii) develop a plan for cooperation on cross-border transportation and freight systems, (iii) involve the NADB and private sector capital in support of modernizing US-Mexico border infrastructure, and (iv) engage in joint investment initiatives. The focus on border-related issues likely stems from the largely terrestrial nature of US-Mexico trade flows; a Mexican Secretary of Economy (SE) press release notes that, in 2012, total bilateral trade reached USD 496 billion, 70 percent of which occurred through land border crossings.

President Obama and President Peña Nieto agreed in May 2013 to establish the HLED as a flexible cabinet-level platform for the advancement of strategic economic and commercial priorities relating to “mutual economic growth, job creation and global competitiveness.” The parties expect to meet annually to take stock of progress on and propose new initiatives surrounding the above-listed HLED pillars.

A central role of HLED is to “facilitate greater alignment and cooperation between the United States and Mexico on issues of shared concern in [such] regional and international for [as] the [TPP], the Asia Pacific Economic Cooperation (APEC) forum [and] the G-20.” Despite several mentions of TPP in press reports covering the HLED, USTR Froman and SE Idefonso Guajardo appear to have limited their discussions in this regard to exchanging views on how best to move the TPP negotiations toward a 2013 finish; however, the number of outstanding, difficult issues still makes such 2013 conclusion unlikely, e.g., market access, state-owned enterprises (SOEs), intellectual property rights (IPR) for pharmaceutical products, labor and environment.

Click [here](#) for a copy of the SE notice (in Spanish), [here](#) for a related USTR press release, and [here](#) for an Obama Administration fact sheet on HLED.

## House Bill Proposes Bolstering GSP Eligibility Requirements

House Energy and Commerce Subcommittee on Commerce, Manufacturing and Trade Chairman Rep. Lee Terry (R-NE) introduced on September 20, 2013 the Playing Fair on Trade and Innovation Act (H.R. 3167) that seeks to bar developing countries that limit access of US exports to their markets from enjoying US Generalized System of Preferences (GSP) program eligibility. Under the Act, countries’ local production requirements or inadequate intellectual property (IP) protections would constitute such limitation of access to US exports, thus making these countries ineligible to

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slincicome@whitecase.com

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8 Marina View, #27-01, Singapore, 018960  
sscoles@whitecase.com

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receive GSP tariff preferences.

Rep. Terry's press release specifically pointed to India's allegedly unfair trade practices; it asserted that India announced rules requiring the local production of information technology and clean energy equipment, and denied or revoked patents for more than a dozen innovative medicines. Rep. Terry emphasized that some GSP beneficiaries "enjoy open access to [US] markets while products made in [the United States] face intellectual theft in their markets," and added that "trade preferences are not a gift."

According to USTR, the US GSP program aims to promote economic growth in the developing world by providing preferential duty-free entry for certain goods originating in beneficiary countries. However, legal authorization of the GSP program expired on July 31, 2013. Rep. Dave Camp (R-MI) in the House and Sen. Max Baucus (D-MT) in the Senate introduced the bills of H.R. 2709 and S. 1331, respectively, to extend GSP authorization until September 30, 2015, but neither bill has received a plenary vote.

The relationship between the GSP reauthorization bills introduced and H.R. 3167 remains unclear. The GSP program typically enjoys strong bipartisan support, but efforts to reform the program in the past have met significant resistance; instead, lawmakers have usually chosen to simply extend GSP authorization for additional one- or two-year increments, e.g., Congress in 2011 reauthorized a lapsed GSP program until July 31, 2013, extending benefits retroactively. In the present case, Sen. Tom Coburn (R-OK) impeded passage of GSP reauthorization prior to the August 2013 recess over how to offset the import duties foregone as a result of a GSP program authorized through September 30, 2015.

The Alliance of GSP Countries continues to engage Members of Congress to communicate to them information about the benefits of GSP for both US manufacturers and consumers, and for emerging economies, but progress has been slow since Congress' return from August recess. Nonetheless, work continues in Congress to identify other programs from which lawmakers can draw funding to offset foregone import duties under the GSP program. Meanwhile, House leadership has referred H.R. 3167 to the Ways and Means Committee; it remains unclear when or if the Committee will mark up H.R. 3167 and send it back to the House Plenary for a vote, and whether lawmakers will incorporate H.R. 3167 into an eventual GSP reauthorization bill.

Click [here](#) for Rep. Terry's press release.

## Treasury Official Speaks about US-China Investment Issues; CFIUS Highlighted as Central Theme

Assistant Treasury Secretary for International Markets and Development Marisa Lago gave remarks on September 25, 2013 on the US Regulatory and Institutional Environment for Chinese Foreign Direct Investment. She covered in her remarks such areas as the US open investment policy, the Committee on Foreign Investment in the United States (CFIUS) process and the US-China economic relationship.

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701 Thirteenth Street NW, Washington, DC 20005  
slincicome@whitecase.com

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
sscoles@whitecase.com

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In regard to CFIUS, Assistant Secretary Lago noted that “there [exist] misconceptions about the United States’ commitment to open investment, and about the role of [CFIUS] in supporting that commitment.” To address these “misconceptions,” she asserted that four core characteristics define the CFIUS review process, *i.e.*, limited scope, efficiency, non-discriminatory rules, and a clearly and publicly articulated process:

- **On limited scope**, Assistant Secretary Lago noted that “CFIUS reviews focus exclusively on genuine national security concerns.” She also pointed to CFIUS’ transaction-by-transaction approach that allows CFIUS to evaluate “potential national security threats and vulnerabilities [...] posed by the specific transaction under review;”
- **On efficiency**, Assistant Secretary Lago asserted that “CFIUS is committed to being as efficient as possible, and to imposing as little burden as possible on prospective investors,” and noted that CFIUS does “not impede transactions that pose no national security risk.” She also pointed to CFIUS’ voluntary nature, *i.e.*, “there is no mandatory filing requirement,” but noted that “CFIUS does have the authority to review transactions that the parties have not voluntarily notified to CFIUS;”
- **On non-discriminatory rules**, Assistant Secretary Lago noted that “CFIUS applies the same rules to each transaction that it reviews, without regard to the investor’s country of origin [...] or the sector of the investment.” She also asserted that this non-discriminatory treatment applies to CFIUS’ “review of foreign government-controlled transactions, for which CFIUS considers only the facts and circumstances relevant to national security;” and
- **On the clearly and publicly articulated process**, Assistant Secretary Lago asserted that “rules of the [CFIUS] process are fully transparent and [CFIUS]’ determinations are subject to high-level accountability,” although law prohibits “CFIUS [from] publicly [disclosing] information about transactions that it reviews.” She encouraged “investors to consult with [the Treasury Department] in advance about a transaction they may be considering,” and noted that “all information CFIUS receives from parties during such consultations is protected from disclosure by the CFIUS statute’s confidentiality requirements.”

Chaired by the Treasury Department, CFIUS is an interagency committee charged with reviewing certain foreign investments for potential national security concerns.

In regard to China’s trade and investment policy, Assistant Secretary Lago lauded such recent steps China has taken stemming from the Strategic and Economic Dialogue (S&ED) as having (i) agreed to “negotiate a high-standard BIT that covers all phases of investment, including market access and all sectors of the Chinese economy (apart from negotiated exceptions),” and (ii) announced “that it would establish a Shanghai Free Trade Zone, which is expected to have a more open foreign investment regime.” Nonetheless, she expressed concern over China’s “significant restrictions on foreign investment,” and noted that “some [US] politicians have reasonable concerns that US firms face substantial trade and investment barriers in China, and US public and Congressional sentiment towards China and Chinese companies seeking to invest in the United States reflects the view that this is unfair.”

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Click [here](#) for a copy of Assistant Secretary Lago's remarks.

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Scott Lincicome, Esq.  
701 Thirteenth Street NW, Washington, DC 20005  
slincicome@whitecase.com

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
sscoles@whitecase.com

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## FREE TRADE AGREEMENTS

### TPP Member Countries Conclude 19th Negotiating Round; Progress Made on Market Access, Rules of Origin, Pharmaceuticals, Textiles

#### Summary

TPP member country trade officials concluded the nineteenth round of negotiations in Brunei on August 30, 2013. Although information on the actual progress made by negotiators during this round has not been released, official sources report that the round ended in "success."

A joint statement issued on August 30 by the twelve TPP countries<sup>1</sup> states that the negotiators "intensified" their work following guidance given by Ministers at the beginning of the talks in Brunei, which ran August 22-30. Not all negotiating groups met during this round, and the statement describes the technical work on (i) market access, (ii) rules of origin, (iii) investment, (iv) financial services, (v) intellectual property, (vi) competition, and (vii) environment as "advanced." Negotiators also "made progress" on the packages providing access to each other's markets for (i) goods, (ii) services, (iii) investment, (iv) financial services, (v) temporary entry, and (vi) government procurement. Other small-group meetings took place elsewhere or are scheduled for later this month.

#### Progress Made and Future Challenges

- **Market Access.** Sources report that TPP countries were due to submit an offer covering 75 percent of their tariff lines prior to the Brunei round, 90 percent after the Brunei round, 95 percent prior to the APEC meeting, and 100 percent by the end of October. Japan committed to follow the same timeframe. Japan's proposal at Brunei followed the approach of the United States and Peru by discussing tariff reductions only on a bilateral basis. Japan held bilateral talks with all TPP countries other than Chile and Peru, and tabled proposals with six unnamed countries on tariff-free items. Australia and the United States have not yet exchanged tariff offers with other countries for domestic procedural reasons: Australia is currently awaiting a general election and, consequently, a new TPP negotiating mandate, while the United States cannot make any tariff offers until the International Trade Commission (ITC) has completed a confidential assessment on the economic impact of tariff cuts. The ITC's report was due at the end of August. Market access discussions with Japan are forecast to take place later this month.

Agricultural goods, specifically rice, beef, pork, dairy, wheat, and sugar, are likely to be contentious in the context of Japan's market access negotiations. Japan's chief negotiator, Koji

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<sup>1</sup> Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam.

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slincicome@whitecase.com

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
sscoles@whitecase.com

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Tsuruoka, indicated, however, that Japan intends to raise the number of offered duty free items in future negotiations, in accordance with the original expectations. Although Japan has not indicated how many or which tariff lines would be offered for duty-free status, existing Japanese FTAs eliminate tariffs on 84.4 – 88.4 percent of all items over ten years. The Japanese automotive and insurance markets, as well as non-tariff barriers in the auto-sector in Japan, have also been cited by the United States as areas in which Japan must make specific commitments.

- **Rules of Origin: Cumulation.** A US trade official reported that all TPP countries have agreed that regional cumulation rules of origin will apply to all products, even sensitive items on which some countries may apply varying duty rates for imports from different countries. This would permit having a product from one TPP country further processed or supplemented in a second country, and the final product would be considered to originate from the second country. Similarly, components or inputs from one TPP country which are incorporated into a final good in a second country would still be considered an originating product from the second country. For example, under regional cumulation rules, sugar harvested in Australia could be refined in Canada and then entered into the US under any additional market access for refined sugar that the US has granted only to Canada under the TPP. As such, Australia would have new or additional access to the US market via Canada, which would be greater than the access granted by the US to Australia directly (the US has apparently refused to negotiate additional access for Australian sugar under the TPP).

Agreeing to regional cumulation represents a change to the US position, which originally would not have permitted cumulation for sensitive goods, such as dairy and sugar. As part of its bilateral market access negotiations, the United States has sought to maintain higher tariff rates on certain products from certain TPP countries (e.g., dairy from New Zealand, sugar from Australia). With cumulation rules now applicable to all goods, the United States' bilateral market access negotiations may be hampered, since the rules may result in a system of "tariff arbitrage," where companies are encouraged to base their production in TPP countries that benefit from the lowest tariff rate in the US market (e.g., Australian companies may choose to locate their refining facilities in Canada).

Challenges remain over how parties can ensure that members' market access concessions are not undermined where differing tariff levels are potentially applicable to the same good. One option would be to apply the higher duty to any good with differing tariff levels by TPP member, and another option involves the use of composite tariff rates determined by a formula. Other issues concern whether there should be a *de minimis* level of non-originating inputs that can be used in a good which qualifies for preferential market access, and whether companies should be allowed to self-certify for purposes of the rules of origin requirements.

- **Pharmaceuticals.** Patent protection for pharmaceuticals remains unresolved, pending a revision by the United States to its original proposal on the issue. The original proposal sought to provide stronger protection for brand-name drug companies based on the speed with which they sought marketing approval in a second TPP country, but it was rejected by other countries. A US trade official reported that the US' internal deliberations on the revised proposal are making progress, though no information was given with respect to when the proposal would be

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tabled. Chile, New Zealand, and Australia have put forward alternative approaches to the original US proposal, but it appears unlikely that these will be incorporated into the final US revision. Based on pressure exerted by US business groups, it is likely that the proposal will mirror the patent protection rules contained in the US-Korea free trade agreement, and include data exclusivity protection for 12 years for biologic drugs. A US official has indicated that it believes Japan has similar interests on these issues and will support the United States' bid for strong IP protections.

- **State-Owned Enterprises (SOEs).** The disciplines applicable to SOEs are the only outstanding issue in the competition chapter, but discussions continue to be "basic," as disagreement continues even with respect to the definition of SOEs. Both the US and Australia have put forward proposals on the issue, and these have been combined in bracketed text. A Japanese official commented that Japan remains unable to evaluate how it would be affected by a potential SOE chapter. It is understood that Japan will proceed cautiously with respect to SOE disciplines, given the government's shares in major corporations, as well as the semi-autonomous nature of certain independent administrative agencies in Japan.
- **Environment.** A chief negotiator reported that there has been little progress in the environmental chapter, and 300 square brackets remain in the text. While one bracket was apparently removed during one morning of negotiations, several new brackets were added during the afternoon session. Whether environmental protection would be enforceable through a formal TPP dispute settlement mechanism continues to be an extremely contentious issue.
- **Textiles.** The Brunei meetings on textile rules of origin reportedly produced a consolidated "short supply" list, combining an initial US-proposed list of 170-175 items with additional items requested by other TPP countries. The United States is currently revising the list to eliminate redundancies, which will then serve as the basis for future discussions. The list is divided into two categories of apparel (one permanent, one time-limited) that would be exempt from the US proposal for a "yarn-forward" rule, under which all components of a qualifying apparel item must originate in the TPP region. Vietnam has opposed this rule, given its reliance on textile inputs from non-TPP countries such as China. Although it remains unclear how this issue will be resolved, US officials indicate that discussions between the two sides have been generally positive. A separate meeting was held to discuss a demand from Australia that there be a limited exception from the yarn-forward rule for any apparel cut and sewn in the TPP region using yarns and fabric made in China, as long as that yarn and/or fabric was made using Australian wool.

Special safeguard and customs procedures were also discussed, although the actual progress of such discussions has not been reported.

- **Tobacco.** The US and Malaysia tabled competing proposals relating to tobacco control during the meetings at Brunei. According to USTR, the revised US proposal is intended to preserve the ability of TPP member governments to apply appropriate public health measures in a way that is consistent with trade policy objectives. Sources indicate that the proposal would require TPP members to agree that the public health exception embodied in Article XX(b) of the GATT would include measures "necessary to prevent or reduce tobacco use or its harms." In addition, the US

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proposal would require health authorities from TPP member countries to engage in consultations prior to the launch of any legal challenge to tobacco measures under the TPP. Malaysia's proposal, by contrast, would carve out tobacco control measures entirely from TPP obligations, thereby preventing legal challenges to such measures under the TPP, and exclude tobacco products from tariff reductions.

The Malaysian proposal has, overall, been positively received by other TPP countries, and US public health groups have also expressed support. One source has commented, however, that the exclusion of tobacco products from negotiations on tariff reductions may concern some countries because it could affect the balance of their market access negotiations. The United States did not comment on how the Malaysian proposal would affect its own position on the issue. Negotiators are now consulting internally.

## Future Negotiations

The meetings in Brunei supposedly constituted the last formal round of TPP negotiations. Future negotiations will take place in the form of "intersessional" meetings, involving only one or two working groups. These smaller meetings are intended to advance the negotiations in the lead up to the APEC Leaders meeting in Bali, Indonesia on October 8.

Although no firm schedule for these meetings has been published, the Peruvian government announced intersessional meetings on labor on August 26-29 in Ottawa, technical barriers to trade on September 2-5 in Mexico City, e-commerce on September 3-6 in San Francisco, and legal issues in Washington during the second week of September. Press reports also indicate that an intersessional meeting on intellectual property will be held in Mexico (although the dates have not been disclosed), and Japan has announced that the TPP chief negotiators will next meet in Washington, D.C., from September 18-21. Other sources have commented that there may be an intersessional meeting on a US proposal relating to transparency requirements and procedural disciplines for national drug pricing and reimbursement programs. With respect to these intersessionals, the TPP joint statement released at the close of Brunei noted only that negotiators on labor "continued their work on the outstanding issues in the chapter."

## Prospects

The official joint statement reiterates the intention of the 12 TPP member countries to conclude the agreement by the end of the year and cites the October APEC meeting in Bali as an important milestone in that effort. However, reports from Brunei indicate that the negotiations were not productive enough to secure a conclusion of the agreement by the end of 2013. Japanese TPP minister Akira Amari stated that, to achieve this, a full agreement "in principal" is needed in all areas by the October APEC meeting, although a conclusion on market access would not be necessary at this time. However, Chile's Director of international economic relations, Alvaro Jana, has stated that only six of more than two dozen chapters in the draft agreement are closed (regulatory coherence, competitiveness, development, temporary entry of business persons, cooperation, and small- and medium-enterprises). The closed chapters were relatively non-controversial throughout the negotiations. Mr. Jana further commented that two other chapters are almost closed (administration of the agreement and telecommunications), and that seven other un-named chapters are "parked,"

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### Contacts

Scott Lincicome, Esq.  
701 Thirteenth Street NW, Washington, DC 20005  
slincicome@whitecase.com

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
sscoles@whitecase.com

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pending resolution of high level issues. A Malaysian official commented that conclusion of the agreement by the year end was not "realistic."

Click [here](#) for a copy of the joint statement.

## ***Free Trade Agreement Highlights***

### **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 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

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#### **Contacts**

Scott Lincicome, Esq.  
701 Thirteenth Street NW, Washington, DC 20005  
[slincicome@whitecase.com](mailto:slincicome@whitecase.com)

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
[sscoles@whitecase.com](mailto:sscoles@whitecase.com)

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11:59pm, September 25, 2013.

Click [here](#) for a copy of the USTR notice, and [here](#) for a copy of the interim review.

## US Commerce Department Defends Safe Harbor Framework in US-EU Trade Relations

US Commerce Department General Counsel Cameron F. Kerry spoke out this week in defense of the US-EU Safe Harbor Agreement and the maintenance of US-EU commitments to facilitate cross-border data transfers. General Counsel Kerry's comments were made during a keynote address delivered at the German Marshall Fund of the United States on Wednesday, August 28, 2013.

The US-EU Safe Harbor Framework was approved by the EU in 2000, and allows for an organization located in the US to self-certify that it adheres to data protection principles analogous to those obligations found under the EU's 1995 Data Protection Directive. The EU Directive prohibits the transfer of personal data to non-European Union countries that do not meet the EU's "adequacy" standard for privacy protection. Since US privacy protection would not meet this standard, the Safe Harbor Framework enables US companies that transfer personal data of EU citizens to servers in the US to certify their adherence to privacy practices the EU considers adequate. Such certifications are enforced by the Federal Trade Commission or the Department of Transportation as appropriate. In this way, a company which is Safe Harbor certified will be treated as though it is located in a country that is deemed by the EU to have adequate data protection law. Without the Framework, US companies would be significantly hampered in their ability to engage in a range of trans-Atlantic transactions.

According to General Counsel Kerry, more than 4000 companies have subscribed to the US-EU Safe Harbor Framework, many of which are US subsidiaries of EU companies that also rely on the Framework. Kerry calls it a "fundamental building block" of the US-EU trade relationship. Quoting a joint US-EU statement issued in March 2012, he further stated that Safe Harbor "is a useful starting point for further interoperability" in the context of privacy protection, and emphasized that "any step back from Safe Harbor" in TTIP could send the US-EU trading relationship "backward."

The US has consistently taken a strong position in favor of including cross-border data transfer issues within TTIP negotiations, in order to lock in the Safe Harbor mechanism and provide greater certainty for US companies. Mr. Kerry commented that while data issues are challenging, they are an important part of the economic equation, and US business groups continue to emphasize that interoperability between the EU and US regimes should be enhanced through concrete commitments in TTIP and inclusion of the Safe Harbor Framework. Other groups believe that TTIP offers an opportunity for the United States to convince the EU that the US privacy regime is "adequate," and include language to this effect in the final agreement.

By contrast, EU Trade Commissioner Karel De Gucht has said that data privacy issues should be handled separately from TTIP. Member of the European Parliament (EP) Jan Philipp Albrecht, charged in the EP with leading the EU's data protection reform package (proposed by the European Commission in early 2012), has taken a similar position, arguing that it would not be appropriate to

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### Contacts

Scott Lincicome, Esq.  
701 Thirteenth Street NW, Washington, DC 20005  
slincicome@whitecase.com

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
sscoles@whitecase.com

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address the multitude of complicated issues surrounding data privacy in the context of TTIP. Instead, Albrecht favors negotiation of a separate agreement on common data privacy standards and the discontinuation of the Safe Harbor Framework – and other existing EU decisions on adequacy of data protection in third countries – two years after the enactment of the reform package.

Notwithstanding this general disagreement regarding the appropriateness of including data privacy issues in a trade agreement, press reports have interpreted General Counsel Kerry's comments this week as a separate response to warnings by EU officials that Safe Harbor must be reviewed in light of recent revelations regarding the US National Security Agency's (NSA's) surveillance programs, some of which targeted Europe. The European Parliament has expressed particular concern in a recent resolution that all of the companies involved in NSA's PRISM surveillance program are Safe Harbor participants. European Commission Vice-President and EU Justice Commissioner Viviane Reding commented that Safe Harbor "may not be so safe after all," and "it could be a loophole" that allowed companies to shift data to the US where "data protection standards are lower than our European ones." She announced in July that the Commission is undertaking a review of the framework to determine whether it provides sufficient protection for EU citizens, and is expected to issue a report by the end of the year.

It thus remains unclear how the issues of cross border data transfers and privacy protection will be resolved, and whether TTIP or a new agreement will be chosen as the means to do so. Either way, the Safe Harbor Agreement itself does appear to be at risk. Pre-existing EU concerns regarding data protection under Safe Harbor have been compounded by the recent NSA revelations, and it may consequently be very difficult for the two countries to come to a mutually satisfactory arrangement.

Click [here](#) for a transcript of General Counsel Kerry's Address.

## **AFL-CIO Unanimously Approves Resolution Threatening to Oppose TPP**

On September 10, 2013, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) unanimously approved "Resolution 12: America and the World Need a New Approach to Trade and Globalization." The Resolution warns of a "national campaign" to oppose the adoption and implementation of the Trans-Pacific Partnership (TPP) if it embodies a deal favoring corporate interests at the expense of US workers.

AFL-CIO, founded in 1955, is a voluntary federation of 57 national and international labor organizations representing more than 12 million workers, e.g., collective bargaining for wages and benefits, and conditions and treatment, and political action campaigns targeting state- and federal-level labor-related policy. AFL-CIO policies and goals are set every four years at a convention attended by elected delegates from each of the unions. The most recent convention took place in Los Angeles, September 8-11, 2013, and Resolution 12 was one of 54 resolutions adopted.

AFL-CIO Trade Policy Specialist Celeste Drake emphasized during the convention that, as governments are still negotiating TPP, Resolution 12 is "not a statement of opposition, yet," and

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AFL-CIO is still trying to push issues with the Obama Administration that are beneficial to workers. However, Resolution 12 does indicate that AFL-CIO has begun to officially mobilize opposition to TPP. AFL-CIO President Richard Trumka also commented during a press conference on September 8 that AFL-CIO has been activating its state and local labor councils, partnered with state and community organizations, to conduct state, local and national campaigns against TPP.

AFL-CIO opposition to TPP centers around disciplines on state-owned enterprises, rules of origin, trade enforcement, reciprocal market access, currency, labor rights, services and financial services rules, public procurement, and investment rules. Specific concerns relate to the labor disciplines and market access rules that will apply to Vietnam and Japan. Although the United States has been pushing for a commitment from all TPP members to uphold international labor standards as set out in the International Labor Organization's 1998 Declaration on the Fundamental Rights and Principles at Work, AFL-CIO argues that Vietnam cannot meet this commitment since it does not permit independent unions.

AFL-CIO is also challenging the possibility that TPP will be "fast tracked" using trade promotion authority (TPA), which would involve submitting the final TPP Agreement to Congress for a straight up-or-down vote, thus bypassing the possibility for amendments. AFL-CIO argues that this process is undemocratic and wholly inadequate to provide the transparency, accountability and oversight necessary.

Federal law providing for "fast track" authority or TPA expired on June 30, 2007. As such, in order for the Obama Administration to fast track TPP, it would first have to pass new TPA legislation. Former US Trade Representative Ron Kirk in a February 2012 statement said "[w]e've got to have it," and President Obama's published 2013 Trade Policy Agenda also referenced the need to pass TPA legislation. Six business and agriculture organizations argued in a September 9, 2013 letter to the four leaders of the Senate Finance and House Ways and Means Committees that new TPA legislation would actually allow Congress better oversight, as Congress could use the legislation to specify negotiating objectives that the Obama Administration, through the Office of the United States Trade Representative (USTR), must pursue. Lawmakers are currently crafting a draft TPA renewal bill, although the Obama Administration is unlikely to apply pressure on lawmakers to finalize the draft until TPP members near a concluded agreement. USTR Froman has asserted that TPP members aim to conclude the agreement before 2014, although this self-imposed deadline appears unlikely given the number of outstanding, difficult issues.

Click [here](#) for a copy of the AFL-CIO resolution, and [here](#) for the September 9 letter.

## TPP Chief Negotiators Pave Way for Bali Checkpoint between Leaders and Ministers

On September 21, 2013, the Trans-Pacific Partnership (TPP) chief negotiators concluded four days of meetings in Washington, during which they made progress in several TPP chapters and provided the groundwork for a TPP summit on the sidelines of the October 2013 APEC meetings in Bali. The TPP Leader's meeting on October 8, 2013 and the Minister's meeting that precedes it will discuss pathways forward on remaining issues and a timetable for concluding the negotiations by the end of

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### Contacts

Scott Lincicome, Esq.  
701 Thirteenth Street NW, Washington, DC 20005  
slincicome@whitecase.com

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
sscoles@whitecase.com

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2013. Japanese Chief Negotiator Koji Tsuruoka stated in a press conference after the TPP chief negotiators meeting that “[negotiators] have succeeded in laying the groundwork before upgrading future negotiations to the political-level.”

According to the Office of the United States Trade Representative (USTR), negotiators made progress in such chapters as customs, telecommunications, sanitary and phytosanitary (SPS) issues, technical barriers to trade (TBTs), cross-border services and labor. Chief negotiators also discussed approaches for resolving challenges on e-commerce and legal and institutional issues. Separately, the chief negotiators met with working groups covering market access for goods and government procurement, which also convened this week in order to advance packages on goods, including industrial goods, agricultural products and textiles.

Ahead of the TPP Leaders’ and Ministers’ meeting, the negotiating groups on financial services and the environment will meet in Washington from September 23-28 and from September 27-30, respectively. In addition, the rules of origin (ROOs) group will meet from September 23-27 in Ottawa, while the intellectual property rights (IPR) group will meet from September 23-October 2 in Mexico City. The Government of Peru disclosed the dates and locations of these meetings through its *Official Gazette*.

Concurrent with the TPP chief negotiators meeting, US government and industry developments continue to offer both challenges and opportunities for US negotiators:

- **Currency Rules.** Sens. Debbie Stabenow (D-MI) and Lindsey Graham (R-SC) lead 57 Senators in a yet-to-be published letter to Treasury Secretary Lew and USTR Michael Froman, urging them to include strong and enforceable foreign currency manipulation disciplines in TPP. Sources report that it is similar to a June 6, 2013 letter from 230 House members to President Obama on this matter;
- **Greater Ambition.** On September 19, 2013, the Emergency Committee for American Trade (ECAT), together with eight other business associations, published an open letter to the TPP chief negotiators, expressing concern that TPP, as negotiated to date, has yet to achieve the level of ambition pledged by the governments; and
- **Trade Promotion Authority.** On September 19, 2013, President Obama declared in his remarks at the Meeting of the Export Council that he needs Trade Promotion Authority (TPA) in order to move trade agreements through Congress, and signaled that he believes the bill could garner bipartisan support. TPA is the authority Congress grants to the President to enter into certain reciprocal trade agreements and to have their implementing bills considered under expedited legislative procedures. Provided the President observes certain statutory obligations under TPA, Congress agrees to consider implementing those trade pacts without amending them.

It remains unclear if the TPP negotiations will fully conclude before 2014. Some optimism may be due as the TPP chief negotiators reportedly agreed to table by October 17, 2013 all tariff lines for elimination within the first year; however, these offers may not satisfy the high ambition of the TPP due to certain member-sought carve-outs or long phase-out periods. To that point, New Zealand’s

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Trade Minister Groser declared on September 23, 2013 that “the crucial element [...] is that [...] principle export items are not excluded from comprehensive liberalization. That’s the real red line.” In that context, these market access offers, often the crux of any trade negotiation, will likely be a baseline success factor for TPP Leaders’ and Ministers’ meeting.

Other remaining issues include Malaysia’s September 2013 proposal to carve-out tobacco products and its control measures from the TPP negotiations due to its unique impact on public health. IPR issues wrapped around access to medicine and healthcare, increase in pharmaceutical prices, and longer copyright protection terms also continue to hamper progress. Negotiators also seek to end the deadlock around state-owned enterprises (SOEs) by reconciling the differences between developed and developing members. Negotiators must fully address all disagreements as the TPP follows the single undertaking approach. Any issues unresolved by the Bali meetings will likely necessitate further discussion which would thus push the TPP negotiations into 2014.

Click [here](#) for a copy of the USTR press release, [here](#) for a copy of the House letter, [here](#) for a copy of the business groups’ letter, and [here](#) for a copy of President Obama’s speech.

## 60 US Senators Seek Foreign Currency Manipulation Disciplines for the Trans-Pacific Partnership

On September 24, 2013, US Senate Manufacturing Caucus Co-Chairs Debbie Stabenow (D-MI) and Lindsey Graham (R-SC) and 58 other Senators issued a letter to Treasury Secretary Lew and USTR Froman urging them to include foreign currency “manipulation” disciplines in the Trans-Pacific Partnership (TPP) and other future US free trade agreements (FTAs). The letter cites a study issued by the Peterson Institute for International Economics (PIIE) that found that foreign currency manipulation has cost between one and five million US jobs.

The letter does not specifically discuss the Senate lawmakers’ model framework for “strong and enforceable” foreign currency manipulation disciplines, but asserts that it is one of the “21st century’s most serious trade problems.” The charge largely reflects the message of a June 6, 2013 letter 230 House lawmakers, led by Reps. Mike Michaud (D-ME), John Dingell (D-MI), Sam Graves (R-MO), and Rick Crawford (R-AR), sent to President Obama. Secretary Lew and USTR Froman held a closed-door discussion on September 11, 2013 with House Ways and Means Committee members in response to the June 6 letter; however, reports indicate Secretary Lew and USTR Froman offered no commitments in this regard.

The Senate lawmakers’ letter comes at an important juncture in the lead-up to the November 2014 US mid-term elections, in which roughly a third of Senate seats are open to contest. Senate incumbents and candidates are likely to increase their visibility on trade policies perceived by their respective bases as root drivers of the US trade deficit and lingering high unemployment; alleged unfair currency practices on the part of US trading partners fall in this category for many US voters.

The House and Senate letters could hold certain implications for the crafting of a renewal Trade Promotion Authority (TPA) bill; however, it remains unclear if any new TPA will require TPP and other future FTAs to include “strong and enforceable” language on so-called “unfair” currency

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practices. US trade officials have refrained from engaging on currency issues in such other contexts as the World Trade Organization (WTO) likely due to the lack of consensus among countries surrounding a singular definition of “unfair currency practices” (e.g., several economists have pointed to successive rounds of quantitative easing (QE) on the part of the US Federal Reserve as also potentially having an effect on the price of the US dollar (USD) relative to other currencies). Given this lack of clarity in regard to what constitutes an unfair currency practice, the Obama Administration may resist calls to include language in TPA requiring “strong and enforceable” currency-related commitments in TPP and other FTAs, particularly because the United States would then run the risk of US FTA partners targeting expansionary US monetary policies that place downward pressure on the USD.

Click [here](#) for the full text of the Senate letter, [here](#) for the House letter, and [here](#) for the Peterson Institute study.

## House Lawmaker Pushes USTR on TPP SOE Disciplines

On September 25, 2013, Chairman of the House Trade Working Group Rep. Mike Michaud (D-ME) issued a letter to USTR Froman, detailing specific requests for inclusion in the final Trans-Pacific Partnership (TPP) agreement disciplines relating to state-owned enterprises (SOEs). Rep. Michaud expressed concern in the letter that TPP “will not in practice level the playing field” for US companies competing with SOEs in foreign markets.

The letter calls for inclusion in TPP of five SOE-related disciplines:

- **Transparency Requirements.** Rep. Michaud urges TPP governments to create a publicly available SOE registry, detailing such government support these entities receive as subsidies;
- **Broader Definition.** Rep. Michaud calls on TPP countries to establish a definition of an SOE to include companies “involved in commercial trade activities” operating as *de facto* SOEs, *i.e.*, when a country advertises a transition away from SOEs, but “the state continues to control and support the entities;”
- **Dispute Settlement Mechanism.** Rep. Michaud urges TPP countries to subject SOEs to the dispute settlement mechanism under well-defined and expeditious timelines;
- **Injury Test.** Rep. Michaud asks that TPP countries base a so-called “injury standard” on that found under US trade law and to ensure that the threat of injury is actionable;
- **Public Complaint Portal.** Rep. Michaud urges USTR to create a docket in which parties adversely affected by an SOE in another TPP country could file petitions for administrative action with respect to such foreign SOE.

Rep. Michaud is a frequent and vocal critic of free trade initiatives the United States undertakes. Additionally, his congressional voting record shows that he has rarely voted to dismantle trade barriers or trade-distorting subsidies. In this regard, his September 25 letter targeting SOEs in TPP is consistent with his well-known opposition to trade liberalization and his long-standing advocacy on

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behalf of certain trade-skeptic actors within US domestic industry, particularly due to the perception in the United States that foreign SOEs negatively impact US job creation and the US trade deficit.

The issue of SOE disciplines continues to hamper the TPP negotiations, primarily due to differences between developed and developing countries' positions. Nonetheless, reports indicate that the United States, Japan, Australia, Canada and Mexico plan to table a joint proposal before the TPP summit on October 8, 2013 in Bali to facilitate SOE reforms in such countries as Vietnam and Malaysia. The proposal is unlikely to require an immediate privatization of SOEs or the elimination of government support in order to meet TPP commitments; however, it remains unclear whether TPP negotiators will be able to reach consensus before the Bali meeting, and whether developing TPP countries will continue to press for carve-outs on SOE disciplines.

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

## Japanese Auto Parts Price-Fixing Further Fuels US Industry Opposition to Japan's Participation in Trans-Pacific Partnership

On September 26, 2013, Attorney General Eric Holder announced that nine Japan-based auto part companies and two executives pled guilty in relation to fixing the prices of over 30 products sold to US car manufacturers and installed in cars sold in the United States and elsewhere. The Justice Department's (DOJ) investigations are a part of an international probe, involving 20 companies, 21 executives and authorities from Japan, the European Union, Canada, Korea, Mexico and Australia, into the price fixing of a broad range of car parts, including seat belts, radiators, windshield wipers, air-conditioning systems, power window motors and power steering components.

DOJ reported that these international price-fixing "conspiracies" affected more than USD 5 billion in automobile parts sold to such US car manufacturers as Chrysler, Ford and General Motors, as well as US subsidiaries of Honda, Mazda, Mitsubishi, Nissan, Subaru and Toyota. As a result, DOJ determined that the price-fixing affected more than 25 million cars purchased by US consumers. Deputy Assistant Attorney General Scott Hammond asserted that "the breadth of the conspiracies brought to light [...] are as egregious as they are pervasive," and that "they involve more than a dozen separate conspiracies operating independently but all sharing in common that they targeted [US] automotive manufacturers."

United Steelworkers (USW) International President Leo Gerard immediately released a statement celebrating the DOJ's results as a victory for US manufacturing, and asserted that Japan "cheats" and needs to "earn the right to be a preferred trade partner" of the United States in the Trans-Pacific Partnership (TPP). Mr. Gerard's statement further warned that the outcome of this case is insufficient to build confidence in US enforcement against its trading partners, and instead called for tough action on Japan's currency manipulation and other "predatory and illegal trade practices." This development applies further pressure on US and Japanese TPP negotiators to address in TPP such other alleged unfair trade practices on the part of Japan as currency manipulation, which is an issue that is gaining traction among House and Senate lawmakers.

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### Contacts

Scott Lincicome, Esq.  
701 Thirteenth Street NW, Washington, DC 20005  
[slincicome@whitecase.com](mailto:slincicome@whitecase.com)

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
[sscoles@whitecase.com](mailto:sscoles@whitecase.com)

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Click [here](#) for a copy Eric Holder's remarks, and [here](#) for a copy of the USW's press release.

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---

**Contacts**

Scott Lincicome, Esq.  
701 Thirteenth Street NW, Washington, DC 20005  
slincicome@whitecase.com

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
sscoles@whitecase.com

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## MULTILATERAL

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### MULTILATERAL

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#### *Multilateral Highlights*

### Korea Challenges The United States' Use of Zeroing in Targeted Dumping Before the WTO

On August 29, 2013, Korea requested World Trade Organization (WTO) consultations with the United States regarding the US Department of Commerce's (DOC's) use of "zeroing"<sup>1</sup> to calculate dumping rates based on an affirmative finding of targeted dumping in an anti-dumping (AD) investigation of imports of large washing machines from Korea (DS464). Korea is also challenging DOC's imposition of countervailing duty (CVD) measures in a parallel CVD investigation based on a finding that Korean producers received subsidies in the form of tax credits and other measures. Korean producers Samsung Electronics Co. and LG have already brought similar complaints before the U.S. Court of International Trade (CIT), the proceedings of which are ongoing.

WTO panels and the Appellate Body have consistently found the practice of zeroing to be illegal under WTO rules, whether in original AD investigations, administrative reviews, new shipper reviews, or sunset reviews. These cases have found zeroing to be illegal under either the *average-to-average* or *average-to-transaction* methodology. Previous WTO disputes have not yet addressed, however, whether zeroing is WTO-inconsistent in "targeted dumping" cases, which involve patterns of export prices that differ significantly among purchasers, regions, or periods of time and utilize an *average-to-transaction* methodology (*i.e.*, average normal values are compared to the export prices of individual sales of comparable merchandise).

In response to the WTO rulings, DOC abandoned zeroing as its standard practice in AD investigations and reviews of AD orders. DOC's current practice in AD investigations and reviews is to compare an average normal value (*i.e.*, home-market price) to an average export price (an *average-to-average* methodology) – **without** setting negative margins to zero when aggregating all the comparisons for comparable merchandise to calculate the respondent's overall dumping margin. DOC has continued, however, to apply zeroing in cases of "targeted dumping." As such, DOC zeroes any comparisons in which individual export prices exceed average normal values, thereby leading to higher overall dumping margins. For this reason, targeted dumping investigations, which were rarely initiated before DOC modified its practice to comply with the adverse WTO rulings concerning zeroing, are quite common today.

Korea's WTO challenge will require a ruling on whether zeroing is permissible in cases involving targeted dumping.

DOC initiated the AD and CVD investigations of washers from Korea in response to a complaint filed by US manufacturer Whirlpool Corporation in January 2012. DOC found in December 2012 that

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#### Contacts

Scott Lincicome, Esq.  
701 Thirteenth Street NW, Washington, DC 20005  
slincicome@whitecase.com

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
sscoles@whitecase.com

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washing machines were being dumped by South Korean companies, and that the Korean companies had received subsidies from the government. DOC issued the final AD and CVD orders on February 15, 2013. The AD order imposed a cash deposit rate of 9.29 percent on Samsung Electronics Co., 13.02 percent on LG Electronics, 82.41 percent on Daewoo Electronics Co., and 11.86 percent for all other Korean producers. The final CVD order imposed a cash deposit rate of 1.85 percent on Samsung and 72.3 percent on Daewoo.

Korea and the United States will have 60 days to settle the dispute through consultations before Korea can request the establishment of a panel. The magnitude of the duties imposed, as well as Samsung and LG's involvement, make it likely that this dispute will progress to the formal panel stage. If so, this will be the first case in which the WTO will be asked to rule on the circumstances in which an analysis of targeted dumping is permitted, and whether the practice of zeroing violates WTO rules in this context.

## **G20 Signals Support for Bali Ministerial; Potential Deal Remains Unclear**

Leaders of the Group of 20 (G20) nations publicly committed to completing a multilateral trade package in the World Trade Organization (WTO) by the end of 2013, but any such deal remains far from certain. The G20 Leaders' Declaration, released September 6, 2013, extends until 2016 the standstill commitment on protectionist measures, and confirms the G20 commitment to the WTO's upcoming Ninth Ministerial Conference, to be held in Bali, Indonesia, from 3-6 December 2013. The G20 Leaders' Summit was held in St. Petersburg, Russia, September 5-6, 2013.

The G20 standstill commitment was made at the fourth meeting of the G20 leaders, held in Toronto in 2010, and involves a commitment to guard against the further adoption of protectionist measures and to remove existing measures that could act as barriers and impediments to global trade and investment. The standstill commitment is aimed at boosting the world economy on the back of freer cross-border trade. In extending the commitment to 2016, Leaders also stressed the importance of curbing existing protectionism through the WTO.

The Declaration emphasizes the importance of a successful multilateral trading system and states that the Bali Ministerial Conference of WTO Members will be an important step towards freer trade and progress in the Doha Development Agenda negotiations. It further states that G20 leaders will endeavor to make the Conference "an impetus for negotiations on a roadmap to reach this goal." The three key areas of trade facilitation, some elements of agriculture, and development issues are identified as being those in which progress can be made. G20 Leaders further comment that success at Bali would demonstrate the credibility of the WTO negotiating function and provide "new confidence" for successful post-Bali Doha negotiations.

Although the Leaders' Declaration calls on WTO members to "show the necessary flexibilities in order to bridge existing gaps and deliver positive and balanced results" at Bali, it is far from clear that negotiators will be able to finalize any agreement, regardless of its scope. Doha negotiations were officially declared to be at an impasse in 2011, and motivation to continue discussions, even in a few limited areas, has been typically lacking.

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### **Contacts**

Scott Lincicome, Esq.  
701 Thirteenth Street NW, Washington, DC 20005  
slincicome@whitecase.com

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
sscoles@whitecase.com

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Stressing the importance of a successful Ministerial Conference at Bali this year, the new Director General Roberto Azevedo stated in his inaugural speech to the WTO General Council on September 9 that success at Bali is now his "full priority." Mr. Azevedo acknowledged that "other solutions" outside of the WTO were being considered by some members, but reiterated the importance of the WTO and his belief in its mission. He announced that he will be holding intensive consultations with Members, starting this week, on the package of results needed to ensure success in Bali. Consultations and negotiations on trade facilitation, agriculture and development issues will occur on a rolling basis until the end of September. Meetings of senior officials from capitals and of the Trade negotiations Committee will be held in mid-September and at the end of the month.

The Azevedo process was welcomed by US Ambassador to the WTO Michael Punke, who commented that the plan was "ambitious but workable," even though it does not promise a result. He agreed that it would be clear by October whether a "meaningful" deal at Bali is possible or whether it is "slipping over the brink of failure." As part of a "meaningful deal, the United States has long demanded binding rules on trade facilitation, but many developing countries have taken the position that this must go hand in hand with binding disciplines on development, including the provision of technical assistance to developing countries. Several Members, including India, have stated repeatedly that a deal will be secured at Bali only if Members move to a "horizontal process" where tradeoffs are made between the three different areas of the deal. Although Ambassador Punke stated that the United States is open to providing special and differential treatment to developing countries, and indeed has already shown willingness to compromise, the United States' current approach might not be sufficient to strike an acceptable compromise with other major players in time for the Bali Ministerial.

Mr. Azevedo's speech can be found [here](#). The G20 Leaders Declaration can be found [here](#).

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**Contacts**

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701 Thirteenth Street NW, Washington, DC 20005  
[slincicome@whitecase.com](mailto:slincicome@whitecase.com)

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
[sscoles@whitecase.com](mailto:sscoles@whitecase.com)

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