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General Trade Report - JETRO

October 2013

In This Issue

Table of Contents

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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

UNITED STATES

GENERAL TRADE POLICY

US General Trade Policy Highlights

US Solar Company Files Antitrust Suit Against Chinese Firms for USD 950 Million in Damages

On October 4, 2013, US solar company Energy Conversion Devices Liquidation Trust ("Plaintiff") filed an antitrust suit in the Southern Division of the Eastern District of Michigan District Court against Chinese solar companies Trina, Yingli, and Suntech ("Defendants"). Plaintiff alleges that the Defendants engaged in price fixing and sold solar panels at unreasonably low and/or predatory prices in violation of US antitrust laws, specifically Section 1 of the Sherman Act and Section 445.772 of the Michigan Antitrust Reform Act.

Plaintiff alleges that Defendants drove it out of business and is consequently seeking damages of USD 950 million to compensate for the loss of the book value of the company and more. Plaintiff claims that Defendants eliminated the entire US solar panel manufacturing industry through a coordinated effort that began in 2008; Defendants allegedly aimed to flood the US market with cheap solar panels and reduce prices by 75 percent over five years. Plaintiff cites co-conspirators who allegedly assisted Defendants "scheme," including Chinese trade associations, China's National Energy Administration on the basis that it issued several commercial directives for the Chinese solar industry, and Chinese polysilicon manufacturers. In support of its complaint, Plaintiff cites the US Department of Commerce's (DOC) 2012 finding that the Defendants dumped solar panels in the US market, and explains that its only option of redress now is through an antitrust action.

This suit is the latest development in the global trade spat between the United States and China over solar energy products. When the United States announced in late 2012 that it would impose antidumping (AD) and countervailing (CVD) duties on imports of solar panel products from China at rates of 23.75 – 35.97 percent for certain identified exporters and 254.66 percent for all other exporters, China responded with its own investigation into imports of US polysilicon, which is an input for solar panel production. The Chinese investigation resulted in preliminary determinations in July and September 2013 that US manufacturers/exporters had dumped polysilicon in the Chinese market and had benefited from subsidies. As a result, Chinese customs would begin imposing AD duties of up to 57 percent and CVD duties at a rate of 6.5 percent on imports into China of US polysilicon as of September 20, 2013.

Following the Chinese determination, US and Chinese government officials have engaged in negotiations to resolve the trade row and remove the high duties on both sides through a compromise agreement. Although details of the negotiations and any proposed agreement are not

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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

yet available, sources note that it will likely set a minimum floor price for Chinese solar panels, limit Chinese exports to a certain share of the US market, and remove the Chinese duties affecting imports of US polysilicon.

China and the EU recently reached a similar compromise agreement in the context of a trade remedy battle regarding imports of Chinese solar panels. The EU announced in June 2013 that it would impose AD duties on Chinese solar panels at a rate of 11.8 percent on a preliminary basis, and 47.6 percent as of August 2013. When China threatened trade remedy investigations of its own into other industries –including wine, automobiles, and steel– certain EU Member States opposed the EU's imposition of the provisional duties. This led to a compromise agreement between China and the EU in July 2013, which consisted of a price undertaking by Chinese exporters to sell solar panels at a minimum price of EUR 0.56 per watt in order to avoid the EU's AD duties.[1] EU Member States must decide by December 5, 2013 whether to back the compromise deal.

The recent shift in solar cell production to Taiwan may incentivize Chinese solar panel producers and the Chinese government to negotiate and settle the dispute with the United States as soon as possible. Nevertheless, the agreement is unlikely to satisfy US solar manufacturing companies, such as the Plaintiff in the most recent antitrust action, who allege that their businesses continue to suffer or have gone bankrupt. US solar companies have also challenged the original DOC determinations in the US Court of International Trade (CIT), on the basis that the scope of the order is too limited and the AD duties were too low.

Click here for a copy of Plaintiff's complaint.

USTR Froman Denies Samsung Request to Veto ITC Import Ban on Certain Smartphone Devices

United States Trade Representative (USTR) Michael Froman rejected on October 8, 2013 Samsung's request for USTR to veto an International Trade Commission (ITC) import ban on certain older model Samsung smart phones, tablet computers, and media devices. The ITC ruled on August 9, 2013 that Samsung's importation of those devices infringed two Apple patents related to the detection of headphone jacks and the operation of touchscreens. USTR Froman's decision marks the end of a mandatory 60-day Presidential review that the President delegates to USTR. As a result, the ITC order will took effect beginning October 9, 2013.

Samsung's veto request stemmed from its concerns that ITC's ruling lacked clarity and may cause issues with Customs and Border Protection's (CBP) interpretation and enforcement. According to an ITC patent expert, ITC does not generally specify model numbers of devices when issuing import bans; it is therefore common for different readings of its coverage to occur. To assuage the concerns of Samsung and members of the patent community, USTR Froman also announced that

[1] The Wall Street Journal, "EU, China, Reach Agreement on Solar-Panel Dispute," (July 27, 2013), available at: http://online.wsj.com/article/SB10001424127887324564704578631323954623876.html.

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USTR, Department of Justice (DOJ), Department of Homeland Security (DHS), and other relevant agencies are working with the Office of the Intellectual Property Enforcement Coordinator (IPEC) to conduct an interagency review to strengthen enforcement procedures of ITC orders. It is not immediately clear when or how these agencies will complete the review.

USTR Froman's decision further reflects ITC's findings that an import ban will have minimal effect on Samsung products, given that Samsung was able to make technical changes to its subsequent products to avoid infringing Apple's patents at stake in this complaint. ITC also determined that the patents involved are not standard essential patents (SEPs). US regulators and industry generally agree that SEPs are supposed to be licensed broadly and inexpensively and should not trigger import or sales bans. USTR Froman highlighted this important distinction in an August 2013 veto in a separate review of ITC's import ban on certain older-model Apple iPhones and iPads that ITC found infringed Samsung's patents, stating that import bans based on SEPs can give patent owners "undue leverage."

USTR Froman emphasized that "the nationality of the companies involved played no role in the review process." However, technology industry observers still caution that the decision by USTR Froman to issue a veto to Apple and not Samsung might be perceived as favoritism to US companies, despite the different issues at hand.

DOC's International Trade Administration Announces Major Reorganization; Changes Consistent with National Export Initiative Aims

On October 17, 2013, the Department of Commerce (DOC) announced the full implementation of the International Trade Administration's (ITA) "first major organizational change" in 30 years. Under Secretary for International Trade Francisco Sánchez noted in an ITA press release that the ITA reorganization comes in the context of "scarce public funds," and aims to "to reduce inefficiencies and improve communication across the organization."

The reorganization consolidates four ITA units into three "more efficient and functionally aligned" units, namely:

- **Global Markets.** This unit combines ITA's country and regional experts, overseas and domestic field staff, and specific trade promotion programs to provide US companies with country-specific market access advocacy and promote abroad the United States as destination for foreign direct investment (FDI). Its primary deliverable is to provide market contacts, knowledge, opportunities and customized solutions to US companies, particularly small- and medium-sized enterprises;

- **Industry and Analysis.** This unit brings together ITA's industry, trade and economic experts to develop and execute international trade and investment policies. The objective is to advance the competitiveness of US exports by leveraging public-private partnerships with manufacturing and services industries. This unit will also administer the 23 industry advisory committees, which serve as a communications platform for appointed representatives of US companies and organizations who advise US policymakers on trade and other economic policy issues; and

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- **Enforcement and Compliance.** This unit will administer US AD/CVD law and target alleged unfair foreign trade practices under bilateral and multilateral trade agreements. This unit also administers the Foreign Trade Zone (FTZ) program and other import programs that aim to support US job creation.

Notably, ITA appears to have largely merged the functions of the former Market Access and Compliance (MAC) unit with the functions of the former Import Administration (IA) unit. MAC monitored foreign country compliance with trade agreements to which the United States is party and identified compliance problems and foreign market access obstacles. IA enforced such trade remedy laws and agreements as those concerning antidumping (AD) and countervailing (CVD) duties, and crafted policies and programs to address alleged unfair foreign trade practices.

The ITA press release notes that the reorganization supports "ongoing efforts to advance President Obama's goals as set forth in the National Export Initiative [(NEI)]." NEI focuses on export promotion, including through export financing, and the enforcement of trade rules enshrined in US law and trade agreements to which the United States is party, *e.g.*, WTO agreements, free trade agreements (FTAs).

Although the ITA claims that the reorganization aims to reduce inefficiencies and improve communication across the organization, it does not point to any specific inefficiency or case of poor communication that may have led to the reorganization. Consequently, it remains unclear how the reorganization will reduce inefficiencies or improve communication across ITA.

Click here for a copy of the ITA press release, and here for ITA's line-item reorganization proposal.

USTR Froman Requests ITC Review of AGOA's Performance and Future Opportunities

On September 30, 2013, the United States Trade Representative (USTR) Michael Froman requested that the International Trade Commission (ITC) conduct four investigations regarding the African Growth and Opportunity Act (AGOA). USTR is preparing for a "seamless" renewal of AGOA authorization that will expire on September 30, 2015 (*Please see W&C US Trade Alert dated August 12, 2013*). The four ITC reports would aid USTR in assessing the impact of AGOA and, subsequently, how the future trade outlook of sub-Saharan Africa (SSA) may compel certain modifications to the rules of origin (ROOs) and duty free treatment under AGOA.

In the request to ITC, USTR Froman calls for one public-ready report and three others of a confidential nature, each respectively covering the following:

- **AGOA's Impact on Trade and Effect of SSA's Free Trade Agreements (FTAs) with Its Trade Partners on AGOA's Objectives (Public).** This report would assess AGOA's impact on US-SSA bilateral trade and identify resulting changes, if any, to the SSA business and investment climates. This report would also take into account the relationship of current or potential trade agreements between SSA and its trade partners to AGOA's objectives. USTR requests the delivery of this report by March 31, 2014.

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- **Impact of AGOA's Duty-Free Treatment on US Products in Both Direct and Indirect Competition and on US Consumers (Confidential).** This report would assess the effect of SSA exports under AGOA duty-free treatment to US industry and consumers, and subsequently, the probable effect of extending AGOA coverage to all products under US Harmonized Tariff Schedule (HTS) chapters 1 to 97. USTR requests the delivery of this report by March 31, 2014.

- **Potential Changes to AGOA's ROOs to Further Support SSA Regional Integration and Exports to the United States (Confidential).** This report would focus on the leading non-petroleum manufactured or processed goods that may benefit from such change. USTR requests the delivery of this report by April 30, 2014.

- **Impact of EU-South Africa FTA on US Exports to South Africa (Confidential).** This report would specifically identify US export growth potential if South Africa were to reduce its most-favored-nation (MFN) tariffs to those contemplated under the EU-South Africa FTA. USTR requests the delivery of this report by March 31, 2014.

Congress authorized AGOA in 2000 as the primary vehicle for US engagement with SSA. AGOA is similar to the Generalized System of Preferences (GSP) in terms of tariff benefits and general eligibility criteria, but differs in regard its broader product coverage and additional eligibility criteria beyond those in GSP. AGOA also includes trade and development provisions beyond its duty-free treatment, which directs the President to provide US government technical assistance and trade capacity building to AGOA beneficiary countries.

President Obama, lawmakers, and AGOA beneficiaries generally agree that AGOA reauthorization is of mutual interest. However, similar to the GSP reauthorization debate (*Please see W&C US Trade Alert dated September 25, 2013*), the pathway to reauthorization provides an opportunity to update AGOA to make it more compatible with the economic trajectory of SSA and investment horizons of such affected US industries as textiles and apparels. Issues include a longer and uniform reauthorization for all AGOA preferences and reciprocal preferential SSA market access for US exports. However, despite this perennial interest, USTR Froman asserted on August 12, 2013 that "it is very possible that [the United States] will conclude that AGOA should just be renewed as is."

Click here for the USTR letter to ITC.

Sen. Kay Hagan (D-NC) Reintroduces Textile Enforcement and Security Act

Sen. Kay Hagan (D-NC) announced On October 24, 2013 the reintroduction of the Textile Enforcement and Security Act (S.1412). The bipartisan bill, co-sponsored by Sen. Lindsey Graham (R-SC), aims to provide US customs enforcement bodies with expanded authority to target textile and apparel imports that circumvent US duties, while giving them additional tools and resources to increase commercial enforcement efforts. Sen. Hagan originally introduced the bill on October 2011 in the 112th Congress, but the Senate Finance Committee never sent such bill to the Senate plenary for floor consideration.

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Specifically, the Textile Enforcement and Security Act (TESA) proposes to:

- establish an electronic verification program that tracks yarn and fabric inputs in free trade agreements;
- increase the number of trained import specialists in textile and apparel verifications at the 15 largest US ports that process textile and apparel imports;
- increase staff at the Textile and Trade Agreements Division of Customs and Border Protection (CBP) that identifies textiles fraud; and
- mandate the publishing of names of companies that intentionally violate the rules of textile and apparel trade agreements.

According to Sen. Hagan, the enforcement of US trade law is critical to the preservation of US employment in the domestic textile and apparel industry. Sen. Hagan further asserts that the illegal trafficking of yarn, misclassification of merchandise, illegal transshipment to circumvent US duties, and other related violations are costing US jobs and government revenue. According to CBP, the risk of such fraud is significant enough to warrant designation as a Priority Trade Issue. CBP enforcement involves a multi-layered approach comprising trade pattern analysis, on-site verification, review of production records, audits, and laboratory analysis. In 2012, CBP textile enforcement resulted in USD 21.92 million in seizures and USD 23.37 million in commercial fraud penalties.

Unsurprisingly, lawmakers from textile and apparel industry-heavy North and South Carolina are responsible for the bill. Due to growing import competition, congressional representatives from these states increasingly pursue stricter rules and enforcement under trade law and free trade agreements (FTAs). The free trade-skeptic National Council of Textile Organizations (NCTO) estimates that the overall textile sector employed 499,000 US workers in 2012, and asserts that enactment of S.1412 would maintain a level playing field for both US workers and manufacturers.

The bill also partly reflects the Obama Administration's efforts to introduce a stricter framework for rules of origin (ROOs) in the Trans-Pacific Partnership (TPP), namely the "yarn forward" rule. Such strict proposed rules on trade may cause certain US TPP negotiating partners to limit their commitments to liberalization, thus undercutting the objectives of the TPP for a high-standard trade agreement. In the context of TPP negotiations, Vietnam negotiators urge their US counterparts to accept more relaxed textiles and apparel ROOs (*e.g.*, cut-and-sew ROO with expanded short supply lists (SSLs)), while Mexico negotiators urge the United States to maintain a strict yarn-forward ROO. This policy position is likely a result of Mexican textile and apparel *maquilas* that have already structured their production platforms around the North American Free Trade Agreement's (NAFTA) strict textile and apparel ROOs.

After the bill's introduction and a reading of the same on the Senate floor, Senate leadership sent the bill to the Committee on Finance. It remains unclear whether the Senate Finance Committee will send the bill back to the Senate plenary for a floor vote. Nonetheless, forthcoming customs reauthorization legislation, *e.g.* the Trade Facilitation and Trade Enforcement Act of 2013 (S. 662),

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sscoles@whitecase.com

will likely include language to address customs enforcement issues, although such language may not specifically target textile-related issues.

Click here for a copy of S. 1412, here for S. 662, and here for the CBP 2012 Textile Enforcement Fact Sheet.

US Senators Raise Concerns about CBP Section 337 Enforcement

Sens. Ron Wyden (D-OR), John Thune (R-SD), Maria Cantwell (D-WA), and Rob Portman (R-OH) sent a letter to US Customs and Border Protection (CBP) Acting Commissioner Thomas Winkowski on October 22, 2013, raising concerns about the enforcement of exclusion orders issued by the US International Trade Commission (ITC) based on Section 337 of the Tariff Act of 1930. The letter asserts that a failure to promptly and fully implement exclusion orders based on Section 337 harms the US economy and fails to protect American companies against intellectual property infringement.

Section 337 investigations conducted by the ITC often involve claims regarding intellectual property (IP) rights, including allegations of patent or trademark infringement by imported goods. A remedy available in 337 investigations is an exclusion order that directs US Customs and Border Protection to stop infringing imports from entering the United States. ITC may also issue cease and desist orders against named importers engaged in an unfair act that violates Section 337.

In the letter, the lawmakers pose several questions to better understand the current enforcement of Section 337 orders, and to explore potential shortcomings in making infringement determinations. In regard to the nature of such potential shortcomings, several rights holders who have obtained Section 337 relief argue that CBP is not adequately enforcing ITC exclusion orders.

The questions in regard to CBP's involvement with exclusion orders are as follow:

- How many exclusion orders are actively in place for calendar year 2012 and how many times did CBP seize or turn away imports subject to a 337 exclusion order?
- What are the processes and circumstances for importers to self-certify that merchandise is not subject to a 337 order? How are self-certifications governed and tracked by CBP?
- Does CBP communicate with the ITC when determining whether products do or do not infringe? What challenges does CBP face in making infringement determinations?

The letter further notes that there is strong bipartisan support for strengthening CBP enforcement efforts against unfair trade, urging CBP to take steps towards creating a stronger and more comprehensive enforcement framework. The Senate lawmakers offer their assistance to work with CBP on possible solutions to ensure a more effective enforcement of 337 exclusion orders.

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8 Marina View, #27-01, Singapore, 018960
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FREE TRADE AGREEMENTS

TPP Leaders Meet on APEC Margins; Considerable Work Remains toward Finished Agreement

Summary

On October 8, 2013, the Trans-Pacific Partnership (TPP) Leaders met in Bali to discuss progress of negotiations and narrow political differences surrounding outstanding issues. The TPP Leaders Statement and the Ministers' report to the Leaders, released after the closed meetings, give neither specific indication of progress made nor a pathway forward for negotiations. The TPP Leaders notably excluded any reference to the expected conclusion date for the negotiations, stating only that they "are on track to complete the [TPP]."

The TPP Leaders Meeting aimed to serve as a political push for advancing the negotiations. However, President Obama's unexpected absence due to the US government shutdown fueled rumors that the Meeting was not as productive as planned. On a separate track, the United States also postponed the 2nd negotiating round of the Transatlantic Trade and Investment Partnership (TTIP), originally scheduled from October 7-11, 2013 in Brussels. Taken together, the negotiating partners of the United States are beginning to factor US lawmakers' repeated political stalemates into the United States' ability to offer strong commitments in the TPP negotiations and ratify the resulting agreement. The absence of a US negotiating mandate and expedited congressional ratification procedure (*i.e.*, Trade Promotion Authority (TPA)) also raises questions about the Obama Administration's ability to move TPP negotiations toward conclusion in any timely manner.

Despite "significant progress" reported in the TPP Leaders Statement, the number of outstanding issues places the 2013 deadline for concluding negotiations in doubt. Malaysia Prime Minister Najib Razak's statement on October 7, 2013 makes clear Malaysia's view that "it may take longer than that time horizon of the end of the year." This perspective stands in contrast to USTR Froman's view expressed a day earlier that "[the] finish line is in sight." Given the Leaders' consensus that expediency should not diminish the TPP's ambition in high standards in trade, it seems more likely that the TPP negotiations will continue into 2014.

Analysis

I. STATUS UPDATES BY ISSUES

- **Market Access**. Market access for such sensitive agriculture products as dairy, beef, sugar, and rice remain contentious, while disagreements on such industrial goods as textiles, footwear and apparel, and autos are increasingly potent among US lawmakers, and between TPP negotiators. Aside from the issue itself, several TPP countries also seek to maintain existing liberalization schedules or carve-outs contemplated under existing FTAs. For example, the US-Australia FTA exempts sugar from liberalization, and US officials are resisting demands to reconsider existing market access commitments in the TPP.

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

As a result, the TPP allows room for a hybrid approach of bilateral and plurilateral negotiations to market access. According to this US-favored approach, existing bilateral FTAs will remain valid, and the United States will only negotiate tariff reductions with non-FTA partners. However, most TPP countries prefer a uniform tariff reduction schedule so that the TPP will assist with the reduction or elimination of the FTA overlapping "noodle bowl" syndrome of different, concurrent commitments and rules of origin.

- **Sanitary and Phytosanitary (SPS) Measures and Technical Barriers to Trade (TBTs)**. TPP member country negotiators and large portions of their respective business communities seek disciplines that are more ambitious than those contemplated under the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures. The aim of this "WTO-plus" approach is to reinforce science-based regulation and prevent introduction of undue compliance burdens on producers, processors and exporters. They also seek "WTO-plus" TBT disciplines in the TPP.

  USTR asserts that US TPP negotiators made progress in SPS and TBT discussions during an early-September TBT intersessional and a late-September 2013 meeting among the TPP countries' chief negotiators; however, the chapter areas remain unfinished as several key issues remain outstanding. Outstanding SPS- and TBT-related issue areas likely relate to: (i) the right of TPP members to implement health measures while in compliance with TPP's SPS and TBT commitments; and (ii) the establishment of a rapid response mechanism (RRM) to resolve issues with perishable and time-sensitive shipments of agricultural products held up as result of SPS measures and TBTs. Although TPP negotiators discussed SPS and TBT matters at the late-September chief negotiators meeting, they did not appear to do so at the October 3-8 meeting in Bali where leaders aimed to reach political-level resolution in a reduced number of areas. In this regard, TPP member countries have likely decided to address these issues during intersessional meetings stretching into 2014.

- **Rules of Origin**. The largest barrier to the rules of origin chapter is the strict "yarn forward" rule included in US FTAs. This rule requires all constituent components in the apparel making process to originate in an FTA country, starting from yarn and going forward.

  There is no indication that the United States is prepared to concede its "yarn forward" rule in TPP, where Vietnam would be a major beneficiary. The Vietnamese apparel industry is the second largest supplier to the United States and is becoming an increasingly cheaper and more viable alternative to China, the largest supplier. Malaysia also favors a liberal regime on rules of origin as a major apparel producer, but Mexico and Peru do not as they already reoriented their production towards meeting existing FTA commitments with the United States.

  According to the TPP Trade Ministers' Report to Leaders published on October 8, 2013, the Ministers made clear that their goal is "to develop trade-facilitating rules of origin that encourage cumulation across the region." It is, therefore, likely that the US-supported "yarn forward" rule will not retain its purest form. Malaysia and Vietnam prefer more liberal, cumulative rules of origin as they would enhance intra-regional trade prospects and mitigate the unintended consequences of trade diversion.

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- **Customs Procedures**. TPP member countries seek ambitious disciplines on customs procedures in order to reduce administrative burdens on exporters/importers and prevent *de facto* trade barriers that often result thereof. Although the chapter on customs procedures has been relatively non-controversial, the United States has lent significant importance to ensuring inclusion in the customs text of enforcement-related provisions, *e.g.*, special customs procedures to ensure the proper enforcement of rules and related commitments concerning textiles origin verification. This is unsurprising as the documentation supporting assertions of goods' origin is likely to be far more complicated than that required under previous US FTAs, simply by virtue of the number and disparate levels of bureaucratic development of the participating TPP members. USTR asserts that US TPP negotiators made progress in customs-related discussions during the late-September 2013 meeting among the TPP countries' chief negotiators; however, TPP negotiators do not appear to have discussed customs at the October 3-8 meeting in Bali. In this regard, TPP member countries have likely decided to address these issues during intersessional meetings stretching into 2014.

- **Investment**. Among the more substantial disagreements between TPP members is the investor-state dispute settlement (ISDS) mechanism. A key barometer for the state of negotiations is to see how Australia responds to the proposals following the installation of the newly elected Liberal National Coalition led by Prime Minister Tony Abbot in September 2013. The previous coalition rejected the ISDS mechanism, but how the Abbot Administration may respond is not immediately clear. The United States is a strong proponent of the inclusion of an ISDS mechanism, such that Australia's opposition to it is a significant challenge to the near-term progress in negotiations for the TPP investment chapter area.

  USTR is also seeking to protect companies from all forms of expropriation. In particular, the disagreements center on the definition of "indirect" expropriations. In the past, "direct" expropriation meant the physical taking of property. Most international investment agreements today also protect foreign companies against "indirect" expropriation, which can mean regulations and other government actions that reduce the value of a foreign investment. TPP negotiating governments are wary that protections against "indirect" expropriation may curtail their ability to introduce new laws and regulations.

- **Services**. One difficult area is the issue of the movement of service providers. While the TPP will not create an easing of immigration rules, the agreement is expected to afford skilled professionals temporary labor mobility. However, there are such corollary issues as the mutual recognition agreements (*e.g.*, for professional certifications) necessary to realize this mobility and the subsequent delivery of the particular service.

  The Obama Administration also finds an ally among consumer watchdog groups, who are

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equally, if not more, concerned that the TPP may weaken the Dodd-Frank Act[2] and other domestic financial regulations. The shared concern stems from the notion that the US financial industry will seek to rollback or weaken domestic regulations by asserting TPP's higher authority. In this regard, the US-Korea FTA (KORUS) is the most recent US FTA in which the United States negotiated provisions on financial services and is likely to serve as a reference for US TPP negotiators. Notably, KORUS does not prevent a party to the agreement from imposing prudential measures to ensure the integrity and stability of the financial system.

- **E-Commerce**. A major disagreement is how companies seeking to provide cross-border services should handle cross-border data flows. Such TPP countries as Australia and New Zealand argue that data should be stored locally in the country of a service provider's operations for security and privacy purposes. However, the United States has proposed that TPP countries commit to not blocking cross-border transfers of data over the Internet and to not requiring that servers be located in the country in order to conduct business in that country. Negotiators continue to exchange alternative texts, where Australia's case entails language consistent with its privacy laws that would give governments greater freedom to regulate personal data protections.

  By extension, US negotiators also seek equal treatment of digitally delivered goods and services, with respect to the TPP's overall goal of eliminating tariff and non-tariff barriers. Industry groups assert that such provisions will allow businesses to leverage access to regional internet-based products and services and cloud computing applications to do business throughout the trans-Pacific region. TPP countries generally agree with the principles, but remain reserved on examining how digital trade may support a government's fiscal goals.

- **Legal and Institutional**. Uncertainties over legal and institutional issues remain, despite the common view that these areas are among the least controversial in the FTA negotiations. First, the United States appears to be in disagreement with several TPP member countries with which it already has FTAs in regard to which agreement will prevail once TPP enters into force. US negotiators have suggested on repeated occasions that the FTA that will prevail in any given area is that which is "stronger," although they have declined to provide greater detail on this differentiation. TPP members, such as Australia, have sought in TPP to modify certain rights and obligations under their bilateral FTAs with the United States, *e.g.*, US-Australia FTA. Consequently, Australia unlikely agrees that the United States should be able to reserve the right to apply one agreement over another depending on which is "stronger" in the subject matter at hand.

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[2] The Dodd-Frank Wall Street Reform and Consumer Protection Act, commonly shortened to Dodd-Frank Act, is a comprehensive legislation detailing an overhaul of the US financial system with up to 400 new regulations and creating new regulatory agencies. In particular, the Act imposes new restrictions on derivatives, limits debit-card fees, and attempts to put an end to the "too big to fail" characteristic of US financial institutions.

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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

Another area of concern is the issue of when TPP would enter into force for each member; the United States historically has only entered an FTA into force when the partner country certifies in writing that it has complied with all commitments contemplated in the agreement. TPP members, such as Chile, assert that this unilateral ability not to apply the TPP that the United States likely seeks to wield is tantamount to an encroachment on national sovereignty.

Finally, there remain disagreements among TPP members over the scope of general exceptions to the TPP. Like most FTAs, TPP will likely have language toward the end of the agreement detailing the circumstances under which a party may take exception to the commitments it undertook, *e.g.*, measures necessary to protect human, animal or plant life or health. Malaysia and the United States have competing proposals on the rights of parties to implement tobacco control measures, and these competing proposals constitute a troublesome disagreement over the scope of related exceptions.

- **Government Procurement**. The debate over government procurement centers on protecting the right of governments to stimulate economic growth through public spending on domestically-produced goods against allowing foreign companies access to public procurement contracts. It remains unclear how TPP countries will tackle this challenge. While TPP countries acknowledge the need for liberalization in government procurement to a certain degree, governments are not prepared to fully concede the market, and they insist on carve-outs to maintain a policy space to exercise public spending as a policy tool. For example, Japan seeks a reversal of Buy American government procurement policies, much to the heavy opposition of US state governments and many federal-level lawmakers.

- **Competition**. Issues surrounding state-owned enterprise (SOE) disciplines largely fall under the competition chapter. On SOEs, a troublesome issue is the impact the proposed disciplines on the role of SOEs could have in regard to the provision of public goods and services, the development of strategic industries and the implementation of socio-development programs. Such developing countries as Malaysia argue that, while a level playing field is necessary for local and foreign companies to grow in the country, Malaysia's government-linked corporations (GLCs) are unique in the sense that they are oriented toward augmenting social welfare and providing opportunities to the "unserved" or "underserved" where market forces cannot reach them. The United States is the most vociferous proponent of including strong SOE language in TPP, and its proposal reportedly seeks commercial neutrality for SOEs and puts forth a so-called "harm test" to determine any injury an SOE may cause to commercial competitors. The United States continues to engage other TPP countries in order to convince them of the virtues of its proposal.

- **Intellectual Property**. Issues surrounding public health access and copyright protection in trade of digital goods hamper negotiations on intellectual property rights (IPRs). Several TPP member countries prefer to maintain current Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) provisions as the baseline TPP IPR framework, while others intend to seize the opportunity to advocate for TRIPs-plus or TRIPS-plus-plus provisions (*e.g.*, the United States). The former group argues that the heavy-handed regulation of intellectual property creates diminishing returns and may create the opposite

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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

effect of deterring innovation, and it may prevent access to such IPR-centric goods as breakthrough medicines.

An emerging issue on copyright protection and enforcement is how –or if– the TPP would curtail internet freedom and "fair use." As awareness of the TPP negotiations grows, many so-called "netizens" argue that TPP would place a chilling effect on the internet as a distribution and knowledge-sharing platform. These netizens in the United States and other TPP countries urge elected representatives to scrutinize the TPP's rules and regulations on internet use, and observe the increasingly global expectation that the access to the internet is a fundamental right and freedom. The United States general takes the position that no law or government policy should impinge on internet freedom.

- **Labor and Environment**. The primary disagreement in these two chapters lies between the preference for more consultation-oriented dispute settlement mechanisms and the preference for punitive measures-driven mechanisms. The former preference by such developing countries as Malaysia aims for a conversation towards identifying common goals to build confidence based on such consensus, largely reflecting a cultural preference toward such business conduct. In contrast, countries with strong legal frameworks and industries, including the United States, prefer a clear proclamation of legal procedures and repercussions.

  On the employee side of the labor chapter, US labor unions continue to push for freedom of association and collective bargaining in the TPP reflected in the 1998 Declaration on Fundamental Principles and Rights at Work of the International Labor Organization (ILO). The goal is to prevent TPP signatories from lowering labor standards to attract investment, and, conversely, use labor standards as protectionist policies. However, stakeholders note that meeting these commitments is difficult for Vietnam, which reportedly does not allow organized labor beyond existing state-run unions.

  Issues surrounding potential conflicts between national- and subnational-level jurisdictions hamper progress in the environment chapter. For countries like Malaysia, authority over environment and national resources are a state-level power. It is not immediately clear how these issues will be resolved, as it has more to do with domestic politics than trade policy.

- **Horizontal Issues**. According to the TPP Trade Ministers' Report to the Leaders, TPP negotiators seek to leverage the agreement to make advancements in APEC work. These issues include (i) regulatory and other non-tariff barriers; (ii) competitiveness and business facilitation; (iii) small- and medium-sized enterprises; and (iv) capacity building, cooperation and development. The issue of non-tariff barriers is one of the more significant offensive interests of the United States in the TPP negotiations. The goals of the effort include to "improve regulatory practices, promote transparency, and conduct regulatory processes in a more trade-facilitative manner, as well as to coordinate approaches in specific sectors." However, the difficulty lies in distinguishing non-tariff measures with legitimate public policy objectives from trade-diverting non-tariff barriers.

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II. BILATERAL ENGAGEMENTS TO SUPPORT TPP NEGOTIATIONS

- **US-Japan Hold Bilateral Talks to Support Trans-Pacific Partnership Negotiations**. From September 30-October 1, 2013, the United States and Japan held a 2nd round of negotiations parallel to the TPP negotiations to address bilateral concerns. Japanese Ambassador for Economic Diplomacy Takeo Mori set the tone by requesting "utmost and maximum" flexibility from the US delegation. The talks covered automotive goods and non-tariff barriers relating to insurance, transparency, investment, IPR, standards, government procurement, competition policy, express delivery, and SPS measures. The parallel negotiations aim to achieve tangible results by the completion of the main TPP negotiations and will be legally binding at the time a TPP agreement enters into force.

  The US-Japan bilateral negotiations are a parallel initiative to the TPP negotiations to address long-standing concerns about Japanese market access as US companies aim to leverage TPP to play offense in the 2nd largest economy in Asia. Japan's membership in TPP with the United States would constitute a *de facto* US-Japan FTA. Failure to address these concerns could suggest the existence of issues too difficult or contentious to overcome and could indicate that TPP's growth opportunities are not convincing enough to push through necessary reforms in Japan.

  Japan's entry into the TPP negotiations comes at a precarious moment for the Japanese Prime Minister Shinzo Abe's Liberal Democratic Party (LDP). Peterson Institute for International Economics scholar Jeffrey Schott and Brookings Center for Northeast Asian Policy Studies scholar Mireya Solís elaborated on the political sensitivities in a September 2013 National Bureau of Asian Research roundtable. Mr. Schott and Ms. Solis cautioned that the LDP remains deeply divided on the TPP, and many members will be reluctant to compromise on tariffs over five categories of products: rice, wheat, beef and pork, sugar, and dairy, for which the United States seeks greater market access for US exports. Mr. Schott added that Japan would likely agree to substantially reduce, but not eliminate, restrictions protecting most of these sensitive products.

III. MEMBERSHIP ISSUES

- **Taiwan and Korea as Potential Participants**. Both Taiwan and Korea have expressed interest in joining TPP, but have not made a concrete decision to formally seek accession. According to New Zealand Trade Minister Tim Groser at an October 16, 2013 speech, "it is deeply improbable that any country will now join the TPP-12" as negotiations reach their final stage. Thus, it seems likely any expansion in TPP membership will take place after negotiators conclude the agreement.

- **Malaysia Hands Final TPP Membership Decision to Parliament**. On October 13, 2013, Malaysian Prime Minister Najib Razak stated in an interview that "if the people of Malaysia decide that they still do not want TPP, so be it." Prime Minister Najib's comment comes on the heels of affirming his intention to present the final TPP agreement to Parliament for discussion.

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Given Malaysia's derived framework of the United Kingdom's law-making practice, the Malaysian Cabinet can enter into international agreements and treaties without parliamentary approval. While there is no formal requirement that Parliament give its consent for Malaysia to enter into international agreements, questions of integrating international legal obligations into domestic law are debated in parliament. A Malaysian trade official confirms that only trade agreements that require amendments to existing legislation or introduction of new legislation will need parliamentary approval.

Outlook

While the TPP Leaders report "significant progress," the lack of a deadline for concluding negotiations suggests that several issues remain too fundamentally divisive for a near-term conclusion of the Agreement. Several include longstanding issues over market access and non-tariff barriers, while others cover new approaches to rulemaking. Taken together, these disagreements reveal the gap that lies between developed and developing countries, where the latter group asserts that its governments should not and cannot afford to sacrifice policy instruments. Unless TPP governments achieve a faster pace of negotiations and frequent instances of success resulting thereof, TPP negotiations are likely to carry into 2014.

Free Trade Agreement Highlights

Business Roundtable Economic Data Detail Benefits by US State of Trans-Pacific Partnership

On October 1, 2013, the Business Roundtable (BRT), an association of chief executive officers of leading US companies, released economic data detailing national and state-by-state impact of the Trans-Pacific Partnership (TPP). BRT asserts that "every state stands to benefit from increasing [US] commercial engagement with [TPP] countries, as does the overall [US] economy."

The state-level fact sheets provide details on the following:

- **Jobs.** Estimated number of US jobs supported by trade with and foreign investment from the TPP countries;
- **Exports Volumes.** Estimated value of US goods and services exports to TPP countries;
- **Export Industries.** Key export industries for each state; and
- **Exemplary Beneficiary Companies.** Examples of US companies with existing trade and investment ties to TPP countries, among other data.

BRT's data aim to demonstrate that the TPP countries are critical growth markets for US goods and services exports, which received 45 percent of US goods exports in 2012, thus "[underscoring] the benefits of trade with these dynamic economies," according to Caterpillar Inc. Chairman & CEO and BRT's International Engagement Committee Chairman Doug Oberhelman. Also, the BRT data show that non-US companies headquartered in TPP countries invested approximately USD 600 billion in the United States and employ more than 1.5 million US citizens.

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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

The BRT state-by-state data come in the context of rising opposition on the part of several US lawmakers, certain private sector actors, organized labor and various other civil society stakeholders to all of or certain aspects of TPP, particularly in regard to the perceived direction of negotiations in such areas as state-owned enterprises (SOEs) or to the apparent lack of discussion on the inclusion of provisions to address certain TPP members' alleged unfair currency practices. With the release of these data, BRT appears to be attempting to reignite interest for TPP among US citizens, policymakers and businesses, many of whom are weary of years-long negotiations and a possible deterioration of the negotiating members' original ambition for the Agreement.

Click here for the press release, and here for the economic data.

78 House Lawmakers Highlight Economic Value of Japanese Automotive Investments to US Innovation and Job Creation

On October 16, 2013, Reps. Alan Nunnelee (R-MS) and Pete Gallego (D-TX) led 76 Congressmen in a bipartisan letter to President Obama highlighting the importance to creating jobs and stimulating innovation of foreign direct investment (FDI) in the United States. Specifically, the House lawmakers drew attention to the presence of Japanese automakers in the United States; the letter asserts that these companies invested a total of USD 47.1 billion across 29 plants and major facilities over 50 years, resulting in "the creation of over 76,000 [US] jobs." Given the resulting combination of "state-of-the-art production facilities, cutting edge manufacturing processes, and a [US] workforce that is second to none," the letter urges both Congress and the Obama Administration to pursue a business climate conducive to and compelling for FDI in the United States.

According to Rep. Nunnelee, the 78 signatories "[did not] want the positive message of [FDI] to get lost in the debate" in the negotiations of such free trade agreements (FTAs) as the Trans-Pacific Partnership (TPP). This message contrasts with the tone of two recent endeavors by many House and Senate lawmakers that warning against Japan's allegedly unfair trade practices. First, a March 14, 2013 letter by 48 Congressmen and 9 Senators asserts that "the very structure of Japan's industry depends on protection at home and exploitation of foreign auto markets." Second, a June 6, 2013 letter by 230 Congressmen and another on September 24, 2013 by 60 Senators urged USTR to seek inclusion in TPP and other future US free trade agreements (FTAs) of foreign currency "manipulation" disciplines. Notably, no representative from automotive industry-intensive Michigan signed the October 16 letter.

The unique nature of the October 16 letter lies in the focus on attracting FDI and enhancing the value of foreign companies operating in the United States. This perspective runs contrary to the common vilification among US lawmakers of the Japanese automotive industry and the impact of its practices on the US economy. Put one way, this approach means the signatory House lawmakers appreciate the importance to US economic and job growth not only of pursuing foreign market access for US goods but, also, of dismantling domestic trade barriers to foreign goods, *i.e.*, FTAs should result in reciprocal opportunities.

The relatively small number of signatories -78 of 435 House members- reflects an aversion among these House lawmakers toward appearing as free trade-friendly in the run-up to the 2014 US

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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

midterm elections; being a champion of free trade rarely helps US electoral campaigns. For comparison purposes, 230 of 435 House lawmakers signed the June 6, 2013 letter targeting Japan's allegedly unfair currency practices. However, 78 is not an insignificant number; this letter demonstrates that a sizeable force in Congress believes Japan's participation TPP creates jobs in the United States, not eliminates them. Nonetheless, efforts to question the value of Japan's inclusion in TPP will likely continue with great frequency and considerable force, particularly among lawmakers enjoying support from US organized labor or those with major automotive industry players residing within their respective constituencies.

Click here for a copy of the October 16 letter, here for the September 24 letter, here for June 6 letter, and here for the March 14 letter.

3rd US-Japan TPP Parallel Negotiations Acknowledge Gaps Remain on Autos

US and Japanese officials met in Washington, DC on October 23, 2013 for the 3rd round of bilateral negotiations running parallel to the Trans-Pacific Partnership (TPP) negotiations to address concerns over certain non-tariff barriers (NTBs). According to Acting Deputy USTR Wendy Cutler, who leads the US side in these parallel negotiations, "important work remains – particularly in the area of motor vehicles." The parallel negotiations cover automotive goods and NTBs relating to insurance, transparency, investment, intellectual property rights (IPR), standards, government procurement, competition policy, express delivery, and sanitary and phytosanitary (SPS) measures. No publicly available information was immediately available to assess if negotiators made progress in the other listed NTBs.

As a result of the US-Japan consultations held prior to Japan becoming a TPP member in July 2013, the parallel negotiations on the automotive sector cover, *inter alia*, the establishment of a special "safeguard" provision to address surges in automotive imports and of a special tariff "snapback" mechanism to address a partner's failure to fulfill certain commitments on automotive trade. The results of the parallel negotiations will result in enforceable commitments in the final bilateral TPP market access package between the United States and Japan. To guide the parallel talks, the United States and Japan detailed the full range of issues for negotiations in a Terms of Reference on Motor Vehicle Trade.

According to USTR's National Trade Estimate Reports on Foreign Trade Barriers from 2011-2013, access to the Japanese automotive market is traditionally difficult for all foreign automakers due to NTBs relating to Japan's unique standards and certification. According to a July 23, 2013 proposal by Rep. Sandy Levin (D-MI) titled "US-Japan Automotive Trade: Proposal To Level The Playing Field," Japan's import penetration rate in 2012 for autos was 5.9 percent, compared to the OECD average of 58 percent and a US import penetration rate of 47.9 percent. The aggressive position toward Japan's alleged automotive barriers taken by US lawmakers and the automotive industry remains resolute; a March 14, 2013 letter by 48 Congressmen and 9 Senators asserts that "the very structure of Japan's industry depends on protection at home and exploitation of foreign auto markets" (*please refer to the W&C US Trade Alert dated October 17, 2013).* Similarly, the position paper of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of

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

America (UAW) published on April 12, 2013 notes concern that Japan's inclusion in TPP may impede US progress toward autos industry recovery.

Notably, the US-Japan parallel negotiations did not indicate a discussion on currency manipulation disciplines despite calls to do so by the House and Senate in June 2013 and September 2013, respectively (*please refer to the W&C US Trade Alert dated September 25, 2013*). It remains unclear whether such disciplines will be open for bilateral negotiations, but other TPP member countries are likely to exclude it from the common schedule of commitments. Canadian Trade Minister Ed Fast commented during a visit to Washington on September 27, 2013 that "a macroeconomic issue like currency issues should be dealt with outside a specific trade negotiation."

Click here for a copy of the USTR press release, here for the Terms of Reference, here for Rep. Levin's proposal, and here for the UAW position paper.

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